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PAST PRESIDENTS

*Edward F. Seitzinger, 1964 – 1965
*Frank W. Davis, 1965 – 1966
*D.J. Goode, 1966 – 1967
*Harry Druker, 1967 – 1968
*Philip H. Cless, 1968 – 1969
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*Dudley J. Weible, 1970 – 1971
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*Craig H. Mosier, 1973 – 1974
*Ralph W. Gearhart, 1974 – 1975
*Robert V.P. Waterman, 1975 – 1976
*Stewart H.M. Lund, 1976 – 1977
*Edward J. Kelly, 1977 – 1978
*Don N. Kersten, 1978 – 1979
Marvin F. Heidman, 1979 – 1980
*Herbert S. Selby, 1980 – 1981
L.R. Voigts, 1981 – 1982
Alanson K. Elgar (Hon.), 1982 – 1983
*Albert D. Vasey (Hon.), 1983
*Harold R. Grigg, 1983 – 1984
Raymond R. Stefani, 1984 – 1985
Claire F. Carlson, 1985 – 1986
David L. Phipps, 1986 – 1987
Thomas D. Hanson, 1987 – 1988
Patrick M. Roby, 1988 – 1989
*Craig D. Warner, 1989 – 1990
Alan E. Fredregill, 1990 – 1991
David L. Hammer, 1991 – 1992
John B. Grier, 1992 – 1993
Richard J. Sapp, 1993 – 1994
Gregory M. Lederer, 1994 – 1995
Charles E. Miller, 1995 – 1996
Robert A. Engberg, 1996 – 1997
Jaki K. Samuelson, 1997 – 1998
Mark L. Tripp, 1998 – 1999
Robert D. Houghton, 1999– 2000
Marion L. Beatty, 2000 – 2001
Michael W. Ellwanger, 2001 – 2002
J. Michael Weston, 2002 – 2003
Richard G. Santi, 2003 – 2004
Sharon Greer, 2004 – 2005
Michael W. Thrall, 2005 – 2006
Mark S. Brownlee, 2006– 2007
Martha L. Shaff, 2007 – 2008
Megan M. Antenucci, 2008 – 2009
James A. Pugh, 2009 – 2010

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

* Edward F. Seitzinger, President

* D.J. Fairgrave, Vice President

*Frank W. Davis, Secretary

Mike McCrary, Treasurer

William J. Hancock

* Edward J. Kelly

*Paul D. Wilson

* Deceased

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	2000	Sharon Soorholtz Greer
1990	Richard J. Sapp	2001	James Pugh
1991	Eugene B. Marlett	2002	Michael Thrall
1992	Herbert S. Selby	2003	Brent Ruther
*1992	Edward F. Seitzinger	2004	Michael Thrall
1993	DeWayne E. Stroud	2005	Christine Conover
1994	Marion L. Beatty	2006	Megan M. Antenucci
1995	Robert D. Houghton	2007	Michael Thrall
1996	Mark. L. Tripp	2008	Noel K. McKibben
1997	David L. Phipps	2009	Martha L. Shaff
1998	Gregory M. Lederer	2010	Gerald D. Goddard
1999	J. Michael Weston		

*First Special Edition "Eddie" Award

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association
September 2010 – August 2011

Megan R. Dimitt
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2010 – 2011 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
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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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mellwanger@rawlingsnieland.com

Co-Chairs: Stacey Hall, Noel McKibben, Kevin Reynolds, Tom Read, Ed Rose, Brent Ruther, Bruce Walker

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

Chair: Gregory G. Barntsen
Smith Peterson Law Firm
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Phone: (712) 328-1833
ggbarntsen@smithpeterson.com

Commercial Litigation
Monitor current developments in the area of commercial litigation and act as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.

Chair: Daniel B. Shuck
Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P.
701 Pierce Street, Suite 200
Sioux City, IA 51102
Phone: (712) 255-8838
Dan.Shuck@heidmanlaw.com

E-Discovery
The E-Discovery committee will monitor the new rules on e-discovery, provide our members with education on the new rules including rulings on the issue and practice pointers.

Chair: David H. Luginbill
Ahlers & Cooney, P.C.
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dluginbill@ahlerslaw.com

2010 – 2011 STANDING COMMITTEES

Employment Law
Monitor current developments in the area of employment law; act as a resource for the Board of Directors and membership on employment law issues. Advise and assist in newsletter and in amicus curiae participation on employment law issues.

Chair: Deborah M. Tharnish
Davis Brown Koehn Shors & Roberts PC
The Financial Center, Suite 2500 666 Walnut Street
Des Moines, IA 50309-3993
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dmt@lawiowa.com

Fair & Impartial Courts
This committee will work with the ISBA and the Supreme Court regarding judges who come under attach at the time of re-appointment.

Chair: Open

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, L.L.P.
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E-mail: mjacobs@rawlingsnieland.com

Law School Program/Trial Academy
Liaison with law school trial advocacy programs and young lawyer training programs.

Chair: Christine L. Conover
Simmons, Perrine, Albright & Ellwood, P.L.C.
115 Third Street S.E., Suite 1200
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cconover@simmonsperrine.com

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
Patterson Law Firm, L.L.P.
505 Fifth Avenue, Suite 729
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gwitke@pattersonfirm.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: Megan M. Antenucci
Whitfield & Eddy, PLC
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2010 – 2011 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
Whitfield & Eddy PLC
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.
Lane & Waterman
220 North Main Street, Suite 600
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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
Leff Haupert Traw & Willman LLP
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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.

Chair: Catherine Drexler
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cdrexler@fbfs.com

Tort and Insurance Law
Monitor current developments in the area of tort and insurance law; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on tort and insurance law issues.

Chair: Gale E. Juhl
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2010 – 2011 STANDING COMMITTEES

Worker's Compensation Committee

Monitor current developments in the area of Worker's Compensation; act as a resource for Board of Directors and Membership on comp issues. Advise and assist in newsletter and amicus curiae issues.

Chair: Peter Sand
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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: Benjamin M. Weston
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SPEAKER BIOGRAPHIES

Megan M. Antenucci, Whitfield & Eddy, PLC, Des Moines, IA
Megan is a member of Whitfield & Eddy in Des Moines where she has been trying civil cases for more than 25 years. She is co-chair of the firm's litigation practice group. She is a past president of this organization, a member of the Iowa Academy of Trial Lawyers, the Iowa State Representative for DRI, and is a founding member of the DRI Women In The Law Committee. She graduated from Drake University Law School with honors, was awarded Order of the Coif and Order of the Barristers, and was executive editor of the Drake Law Review. Megan is a speaker at seminars held around the country on insurance coverage issues, defending insurance bad faith claims, and civil trial skills and practice.

Justice David Baker, Cedar Rapids, IA
Justice Baker attended undergraduate and law school at the University of Iowa, receiving his bachelor's degree in 1975 with Honors in Sociology and his law degree in 1979 with high honors, Order of the Coif.

Following graduation from law school, Justice Baker worked in the private practice of law for 25 years where he practiced in various areas including tax and corporate to bankruptcy to litigation. His initial areas of practice were a general practice with an emphasis in tax, estate planning and corporate. He evolved away from a business practice to a litigation practice, initially bankruptcy and later insurance defense. In 1989, Justice Baker began a new firm with John Riccolo under the name of Riccolo & Baker, P.C. practicing almost exclusively in the area of litigation.

Justice Baker has handled cases involving personal injury, professional negligence, construction, real estate, commercial questions, employment issues, and workers' compensation. He has been involved in numerous trials as well as administrative and bankruptcy hearings. He had an extensive appellate practice.

He was appointed as a district court judge for the Sixth Judicial District in the State of Iowa beginning January 3, 2005.He was appointed to the Iowa Court of Appeals in 2006. He was appointed to the Iowa Supreme Court in 2008 where he served until December 31, 2010. As a district court judge, he heard cases ranging from divorces to medical malpractice cases to land disputes. As an appellate judge, he has heard hundreds of cases covering almost every aspect of the law.

Justice Baker has been involved in many professional activities. As a member of the Iowa State Bar Association, he was involved in Jury Instructions Committee, Bench/Bar Committee, and the Appellate Practice Committee where he participated in the writing of the Appellate Practice Manual. He is currently the co-chairman of the Bench/Bar Committee. Justice Baker also served as a temporary bar examiner for 10 years and has been a lecturer for the Iowa Bar Review School. In the Linn County Bar Association, he served as a member of the Ethics and Grievance Committee. He was also a member of the Merit Selection Panel involved in the selection of the U.S. Magistrate for the Northern District of Iowa. He was the chairman of Amicus Curiae Committee for the Iowa Trial Lawyers Association. Based upon the recommendations of his peers and judges, he was inducted into the Iowa Academy of Trial Lawyers, whose membership is limited to 250 attorneys who have displayed exceptional skills and the highest integrity. He is currently a member of Mason Ladd Inn of Court.

Both as a judge and an attorney, Justice Baker has been a frequent lecturer at continuing legal education programs. He has also been a participant at educational activities for law students at both the University of Iowa and Drake law schools. He is currently an adjunct instructor at the University of Iowa College of Law teaching Trial Advocacy.

Justice Baker is a member of the Linn County, Iowa State and American Bar Associations.

Dr. Richard Baratta, Rimkus Consulting Group, Inc., Houston, Texas
Dr. Baratta is a 1989 graduate in Biomedical Engineering from Tulane University in New Orleans. Dr. Baratta's primary areas of consulting expertise include injury causation biomechanics, accident reconstruction, medical device failures and intellectual property. Dr. Baratta performs biomechanical analysis on cases involving low-speed accidents, driver determination, falling objects, slip and falls, and amusement rides. He has reconstructed accidents involving low-speed accidents, high-speed fatality collisions, pedestrian accidents, vehicle rollovers and other types of accidents. Dr. Baratta also provides expertise in relation to modified, high performance and racing automobiles. Dr. Baratta is fluent in English and Spanish and has testified in both depositions and trials in the United States and Mexico. Dr. Baratta's prior experience has included multiple aspects of orthopedic, facial and spinal biomechanics and rehabilitative engineering and research. He has an extensive publication record addressing basic, applied, and clinical orthopedic topics and has performed collaborative research with other intramural departments and outside academic and industrial institutions. He has experience in the development, clinical implementation and writing of FDA submissions for a paraplegic ambulation device. Dr. Baratta continues to be involved with teaching biomechanics to orthopedic surgeons seeking recertification.

SPEAKER BIOGRAPHIES

Thomas M. Braddy, Locher, Pavelka, Dostal, Braddy & Hammes, LLC, Council Bluffs, IA
Thomas M. Braddy is a Principal and Shareholder with the law firm Locher Pavelka Dostal Braddy & Hammes, LLC. He graduated from Coe College (B.A. 1991) and Creighton University (J.D. 1994, cum laude). He was admitted to the Nebraska bar in 1994; to the U.S. District Court for the District of Nebraska in 1994; to the U.S. Court of Appeals, Eighth Circuit in 2000; to the Iowa bar in 2002; and to the U.S. District Court for the Northern and Southern Districts of Iowa in 2002. He is a member of the Nebraska State Bar Association, Omaha Bar Association, Defense Research Institute, Nebraska Defense Counsel Association, Nebraska Association of Trial Attorneys, Iowa State Bar Association, Iowa Association for Justice, Iowa Defense Counsel Association, and Pottawattamie County Bar Association.

Chief Justice Mark, S. Cady, Iowa Supreme Court
Justice Cady, Ft. Dodge, was appointed to the Supreme Court in 1998 and was named Chief Justice in 2011. He was born in Rapid City, South Dakota. Chief Justice Cady earned both his undergraduate and law degrees from Drake University. After graduating from law school in 1978, he served as a judicial law clerk for the Second Judicial District for one year. He was then appointed as an assistant Webster County attorney and practiced with a law firm in Fort Dodge. Cady was appointed a district associate judge in 1983 and a district court judge in 1986. In 1994, he was appointed to the Iowa Court of Appeals. He was elected chief judge of the Court of Appeals in 1997.

Chief Justice Cady is a member of the Order of Coif (honorary), Iowa State Bar Association, Iowa Judges Association, and Iowa Academy of Trial Lawyers (honorary). He is the Iowa chair of iCivics Inc. He also served as chair of the Iowa Supreme Court Task Force on the Court's and Communities' Response to Domestic Abuse and the Drake Law School Board of Counselors. Chief Justice Cady is the coauthor of *Iowa Practice: Lawyer and Judicial Ethics* (Thomson-West 2007). He is also the coauthor of *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 16 Cornell J.L. & Pub. Pol'y 101 (2008), and the author of *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 481 (1987).

Chief Justice Cady is an adjunct faculty member at Buena Vista University and serves on the President's Advisory Council. His current term expires December 31, 2016.

Megan R. Dimitt, Lederer Weston Craig PLC, Cedar Rapids, IA
Originally from Johnson City, Kansas, Megan attended Grinnell College in Grinnell, Iowa graduating in 2006 with a B.A. in Psychology. She received her J.D. from the University of Iowa College of Law in 2010. Megan joined the Lederer Weston Craig law firm in Cedar Rapids in 2010. She is a member of the Linn County Bar Association, the Iowa State Bar Association, the Defense Research Institute, and the Iowa Defense Counsel Association.

Jason T. Farley, Whitfield & Eddy, P.L.C., West Des Moines, IA
Jay is an associate with the Whitfield and Eddy law firm in West Des Moines. He practices in the firm's Construction and Surety Practice Group, focusing on construction litigation. Prior to joining Whitfield and Eddy, Jay worked three years with Huber, Book, Cortese, Happe and Lanz in West Des Moines, where his primary area of practice was civil litigation. Most of his work was devoted to construction defect litigation, representing design professionals, contractors, and product manufacturers. His work also involved products liability, premises liability, road assessment litigation, discrimination, personal injury, and worker's compensation. He received his undergraduate degree from the University of Kansas, and his law degree from Washburn University.

Sharon S. Greer, Cartwright Druker & Ryden, Marshalltown, IA
Sharon Greer has been at Cartwright, Druker & Ryden since 1986 and became partner in 1993. She is a graduate of the University of Iowa and has served in the following organizations: American Bar Association; Iowa State Bar Association; Iowa Defense Counsel Association, serving on IDCA's board of directors; Supreme Court Law Library Advisory Committee; Supreme Court Commission on Continuing Legal Education; Supreme Court Sesquicentennial Celebration Committee; District 2B Judicial Nominating Commission; Marshall County Bar Association; and the Iowa Academy of Trial Lawyers.

Thomas J. Hurney, Jr., Jackson Kelly PLLC, Charleston, WV
Thomas J. Hurney, Jr., is a member of Jackson Kelly PLLC in Charleston and leader of its Industrial, Environmental & Complex Litigation practice group. He defends serious personal injury and wrongful death actions, and has trial experience ranging from medical negligence and products liability to environmental litigation. He is a Fellow of the American College of Trial Lawyers and a member of American Board of Trial Advocates. He is active in the ADTA as a member of its Executive Council, a member of DRI and IADC, and is a past President of the Defense Trial Counsel of West Virginia. Tom has been recognized in West Virginia as a leading defense litigator in various publications, and is a frequent speaker and author on a variety of health care and litigation topics. He graduated with honors from the University of Dayton School of Law in 1983.

SPEAKER BIOGRAPHIES

Michael P. Jacobs, Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, IA
Mike attended The University of South Dakota where he earned a Bachelor of Science Degree in 1976. He attended Drake Law School in 1976 and 1977, and returned to The University of South Dakota where he received his Juris Doctorate Degree in 1979. Mike moved to Sioux City in 1979 to begin practicing law with this firm which was then known as Kindig, Bebee, Rawlings, Nieland, and Killinger. Mike became a partner in 1982 and has been here ever since. He served as a president of the Sioux City Young Lawyers Club and on the Woodbury County Bar Association Grievance and Courts Committees. He is a member of the Iowa Association of Workers' Compensation Lawyers, Inc. He is currently serving on the Iowa Bar Association Jury Instruction Committee and on the Board of Directors of the Iowa Defense Counsel Association. Mike has served on the Sioux City Civil Service Commission. Mike is currently serving on the Iowa Supreme Court Civil Justice Reform Task Force Steering Committee. Mike is a Fellow in the Iowa Academy of Trial Lawyers.

Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA
Carol J. Kirkley is an attorney with the Crawford, Sullivan, Read & Roemerman, P.C. law firm in Cedar Rapids, Iowa, where she practices in the areas of general civil litigation and family law. Ms. Kirkley received her B.A. degree, with distinction, from the University of Iowa in 1984 and her J.D. degree from the Drake University Law School in 1987. Ms. Kirkley is a member of the American Bar Association, the Defense Research Institute, the Iowa Defense Counsel Association, the Iowa State Bar Association, and the Linn County Bar Association.

Jaki K. Samuelson, Whitfield & Eddy, PLC, Des Moines, IA
Jaki Samuelson graduated from Bradley University, BA, summa cum laude, and from University of Iowa Law School, with highest honors, Order of the Coif. Prior to Whitfield and Eddy, PLC, she has been the clerk to the Honorable Ronald Longstaff in US District Court for the Southern District of Iowa. Samuelson is a past president of IDCA, Fellow and Member of the Board, Iowa Academy of Trial Lawyers Best Lawyer, Super Lawyer and Chambers' Leading Lawyer in the area of employment law.

Darrell Schapmire, X-RTS, Hopedale, Ill.
Darrell Schapmire has a graduate degree in exercise physiology. Prior to making a mid-life career change at the age of 40, he worked in a variety of fields. Mr. Schapmire has worked as a construction laborer, laying sidewalks and repairing and constructing agricultural structures. He was also a journeyman in the Signal Department for the Illinois Central Railroad. As a signalman, he worked on projects that involved the construction, maintenance and repair of wayside signals and crossing protection. These experiences gave him firsthand knowledge regarding work practices, the use of tools and machinery and the dangers inherent in the work that is performed in "the real world." Mr. Schapmire also worked in maximum security prisons in Illinois for more than seven years. This experience gave him considerable insight into human behavior, specifically manipulative and/or deceptive behavior. In 1987, Mr. Schapmire returned to university studies on a part time basis, taking classes to prepare for a career change. He then qualified for entry in 1989 in the graduate program for exercise physiology at Illinois Benedictine College (now Benedictine University) in Lisle, Illinois. Since graduating in 1991, Mr. Schapmire has worked in the field of industrial rehabilitation as an employee, as the director and partner in a clinic and as the owner of X-RTS, a product development company. In addition to continued research on functional assessment methods, he does FCEs in Illinois and provides legal consultation services. He and James D. St. James have co-authored *Forensic Dissection of a Functional Capacity Evaluation: Or How to Successfully Challenge a "Standard" FCE*. Mr. Schapmire has organized a series of studies which have resulted in a total of eight articles published in peer-reviewed journals.

Jill Schroeder, Baylor, Evnen, Curtiss, Grimit & Wilt, LLP, Lincoln, NE
Ms. Schroeder focuses her practice in workers' compensation law and coordination of benefits with Medicare. Her litigation and appellate experience as a former Assistant Attorney General for the State of Nebraska serves as valuable background for effective representation of our clients. She advises private businesses and governmental entities on claims arising under the Nebraska Workers' Compensation Act and the Medicare Secondary Payer Act. She has a special interest in evaluating and responding to potential obligations of employers, insurers, and injured parties when Medicare may have an interest in the claim. She also is closely monitoring developments with the new Mandatory Insurer Reporting requirements. Juris Doctor, University of Nebraska College of Law, 1984 Bachelor of Business Administration, Texas A & M University, 1981 Admitted to practice in: State of Nebraska; United States District Court, District of Nebraska; United States Court of Appeals, Eighth Circuit; United States Supreme Court. Professional Affiliations include: American Bar Association, Workers' Compensation Committee; Defense Research Institute ; Lincoln Bar Association ; International Association of Defense Counsel ; Nebraska Defense Counsel Association, Executive Board, 1995-Present; Nebraska State Bar Association: Workers' Compensation Section, Executive Board 1993-1999; National Alliance of Medicare Set Aside Professionals, Legislation Committee 2010 to present, Board of Directors 2005 to 2010.

SPEAKER BIOGRAPHIES

Todd Scott, Minnesota Lawyers Mutual Insurance Co., Minneapolis, MN
Todd Scott is the Vice President of Risk Management for Minnesota Lawyers Mutual Insurance Company. He is a frequent author and guest lecturer on the topics of malpractice, ethics, and practice management systems. Much of his duties include helping lawyers select and implement software systems appropriate to their particular practice. Mr. Scott had previously served as Attorney/Claims Representative for MLM, and was the head of their technology subsidiary, Mutual Software. Todd is also an adjunct professor in the Legal Studies Department at Hamline University in St. Paul, Minnesota. He is a graduate of Hamline University School of Law and is a member of the American Bar Association, the Nebraska State Bar Association, and the Minnesota State Bar Association, where he has served as past Chair of the Practice Management & Marketing Section.

Martha L. Shaff, Betty Neuman & McMahon PLC, Davenport, IA
Martha L. Shaff is a partner at Betty, Neuman & McMahon PLC, in Davenport, IA. She received her B.A. from St. Olaf College and graduated with a JD with honors from Drake University Law School. Shaff is a past president of IDCA, Fellow, Iowa Academy of Trial Lawyers (Board of Directors 2011 -), Fellow, American College of Trial Lawyers Member, International Defense Counsel Member, DRI Supreme Court Subcommittee on Civil Procedure and Supreme Court Task Force member on Civil Justice Reform.

Chief Magistrate Judge Tom Shields, United States District Court Southern District of Iowa
Thomas J. Shields was appointed a part-time United States Magistrate Judge for the Southern District of Iowa on January 14, 1997, and in June, 2000 was appointed to full-time status. Magistrate Judge Shields received his B.A. from the College of William & Mary in Virginia, and his J.D. from Indiana University. After completing law school, Magistrate Judge Shields worked as a law clerk for the Honorable W. C. Stuart, United States District Judge for the Southern District of Iowa. He was in private practice at Lane & Waterman, Davenport, Iowa from 1974 until 2000. Magistrate Judge Shields is a fellow of the American College of Trial Lawyers and a fellow of the Iowa Academy of Trial Lawyers. He is also a member of Working Group 1 of the Sedona Conference.

Deborah M. Tharnish, Davis, Brown, Koehn, Shors & Roberts, PC, Des Moines, IA
Deb is a senior shareholder of the Davis Brown Law Firm. Deb has a general practice in but not limited to Business Litigation and Employment Law. She was a member of the Firm's Board of Directors from 1996 through 1999, serving as President in 1998 and 1999. Professional achievements include: AV rated by Martindale-Hubbell, Arabella Mansfield Award Recipient (2005), *The Best Lawyers in America* 2011, Bet-the-Company Litigation, Commercial Litigation, *Chambers USA*, Litigation: General Commercial, Iowa Ranked Band 2; Labor and Employment Law, Iowa Ranked Band 2, 2010, and *Iowa Super Lawyers* 2009.

Bruce L. Walker, Phelan Tucker Mullen Walker Tucker & Gelman LLP, Iowa City, IA
Bruce L. Walker is a partner in the Iowa City law firm of Phelan, Tucker, Mullen, Walker, Tucker & Gelman, L.L.P. His practice involves both plaintiff and defense civil litigation from 1972 to present. Walker's educational background includes: William Penn College 1964-65, University of Iowa BA 1965-68, University of Iowa College of Law JD 1968-72, with distinction. Professional organizations include: Johnson County Bar Association, Iowa State Bar Association:, Board of Governors 2010- ; Jury Instructions Committee 1988-1994 and 2000; Advertising Task Force 1997-1999; Lawyer Specialization Committee 1994-1998, Chairman in 1997; Litigation Section Chairman 2002; CLE Committee 1991-1995; Professional Liability Insurance Committee 1992-1994; Alternative Dispute Resolution Committee 1992-93; Fair and Impartial Courts 2011- ; American Bar Association Trial Evidence Committee 1982-90; Contributor, Evidence in America 1987; Iowa State Bar Association Young Lawyers Sect; Bridge the Gap Committee 1982-1983, Law-Related Education Committee 1980; Trial by Jury Committee 1976, Small Claims Manual Contributor and Education Committee; Participant Study of No-Fault Insurance; Iowa Academy of Trial Lawyers 1980-present; Iowa Defense Counsel Association Executive Counsel member and Secretary 2010-11; Association of Trial Lawyers of Iowa; Defense Research Institute; American Board of Trial Advocates; Executive Counsel and State Chair of the Association of Defense Trial Attorneys, Volunteer Lawyers Program; American College of Trial Lawyers.

SPEAKER BIOGRAPHIES

Anna Soo Wildermuth, Personal Images, Inc., Elmhurst, Ill.
Anna Wildermuth is the founder of Personal Images Inc., a recognized leader in the image industry. Her professional credentials include being past President of the Association of Image Consultants International, the largest image consulting organization in the world; one of only seven Certified Image Masters in the world; a Toastmaster ATB; a member of the American Society of Training and Development (ASTD) and certified Platinum Rule® trainer and coach. Anna's professionalism and that of her company have been recognized with numerous awards. Personal Images, Inc. received the CMBDC 2009 Supplier of the Year and in 2008 Association of Image Consultants International Award of Excellence. In 2004, Personal Images was named Professional Service Firm of the Year by the U.S. Department of Commerce Minority Business Development Agency (MBDA) and the Chicago Minority Enterprise Development Council. The company also was recognized with the 2004 Outstanding Minority Success Award from the China Star Media Corporation.

A seasoned image and communication specialist, trainer, and coach since 1983, Anna regularly conducts workshops, seminars, and presentations for corporations, including HSBC, Bank of Montreal, Northern Trust Company, Allstate Insurance Company, Humana, J.C. Anderson Company and General Electric Company; and not-for-profit organizations. She helps corporate executives and management teams enhance their credibility and relationship building skills by strategizing their professional image, and sensitizing them to the nuances of business/social etiquette and the issues prompted by diversity.

Anna has been highlighted in the Chicago Tribune, New York Times and Wall Street Journal; quoted as an image expert in Success, Star and Crain's Chicago Magazines and featured on television's ABC7 Chicago, CNN Financial and Fox News. She also has written articles for numerous local and national publications. Anna's book CHANGE ONE THING: Discover What is Holding You Back Fix it with the Secrets of a Top Executive Image Consultant -McGraw-Hill August 2009.

2011 Legislative Report

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LEGISLATIVE REPORT
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ATTORNEYS & COUNSELORS AT LAW

I. OVERVIEW OF THE 2011 IOWA LEGISLATIVE SESSION

The first session of the 84th Iowa General Assembly convened on January 10, 2011 (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). The legislature adjourned sine die on June 30, 2010, for a total of 172 days, which was 62 days after legislators' per diem expired. This made the 2011 session the third longest in Iowa history. The length of this session was especially striking given that the 2010 session lasted just 79 days, which was the shortest legislative session in decades.

In 2011 we monitored the following legislative activity for the Iowa Defense Counsel Association ("IDCA"):

- 1,708 bills and study bills (study bills are prospective committee bills)
- 136 resolutions
- 1,135 amendments (amendments can be as simple as changing a single word or number or can be the equivalent of lengthy complicated bills in themselves)

This year we registered on 148 bills, study bills and resolutions on behalf of the IDCA.

The 2010 elections brought significant changes to the legislature. Mirroring national trends, Republicans made big gains. Republican Terry Branstad defeated incumbent Chet Culver in the gubernatorial contest. Republicans picked up a net 16 seats and took control of the House by a 60 to 40 margin. Republicans also made big gains in the Senate, picking up a net 6 seats, but fell just shy of taking control, as Democrats maintained a slim 26 to 24 majority.

The governor had 30 days after the legislature adjourned sine die (i.e., July 30, 2011) to approve or veto legislation sent to him in the last three days before adjournment or sent to him after the legislature adjourns. If the Governor does not approve or disapprove a bill within the 30-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. As of the time of this writing, the Governor has acted upon all legislation. Budget bills are subject to item vetoes, meaning the Governor may veto only parts of those bills. This report will state whether each bill included in it has been enacted. Unless otherwise noted, enacted bills took effect on July 1, 2011.

Bills that were not finally acted upon during the 2011 session carry over and are eligible for consideration during the 2012 session The second session of the 84th Iowa General Assembly will convene on January 9, 2012.

With the split in control of the two chambers, very little partisan legislation was enacted this year. The impact of divided control was amply demonstrated in the areas we monitored for the IDCA. Plaintiff-friendly legislation generally received more favorable attention in the Senate, but little interest in the House. Conversely, while the House passed some bills more favorable to the defendants, the Senate did not take up such measures.

Despite this general rule, some legislation of interest to IDCA members was enacted in 2011. This report will first discuss bills that were enacted and then conclude with a discussion of significant legislation that was considered, but not enacted this year.

II. LEGISLATION OF INTEREST ENACTED IN 2011

The following legislation was enacted in 2011.

Scope of Duty of Insurance Agents. In late 2010, an Iowa Supreme Court decision significantly expanded the potential scope of duties insurance agents owe to their clients. The 2010 case, *Langwith v. American National General Insurance Company*, overruled a 1984 case, *Sandbulte v. Farm Bureau Mutual Insurance Co.*, that had set forth more limited duties of agents. The Independent Insurance Agents of Iowa led the fight to overturn *Langwith*. They initially began the fight with a stand-alone bill, but eventually secured an amendment to the Insurance Division's omnibus bill, SF 406, to restore Iowa law to what is was prior to the *Langwith* decision. This provision was very controversial, with the Iowa Association for Justice vigorously opposing the provision. The IDCA supported restoring prior Iowa law and was ultimately successful in gaining passage of language abrogating the *Langwith* decision in section 45 of SF 406.

As enacted, section 45 of SF 406 adds a new subsection 7 to Iowa Code section 522B.11 in the insurance producer licensing chapter. The new subsection states the following:

NEW SUBSECTION. 7.

a. Unless an insurance producer holds oneself out as an insurance specialist, consultant, or counselor and receives compensation for consultation and advice apart from commissions paid by an insurer, the duties and responsibilities of an insurance producer are limited to those duties and responsibilities set forth in Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984).

b. The general assembly declares that the holding of Langwith v. Am. Nat'l Gen. Ins. Co., (No. 08-0778) (Iowa 2010) is abrogated to the extent that it overrules Sandbulte and imposes higher or greater duties and responsibilities on insurance producers than those set forth in Sandbulte.

This will not be the last on this issue, however. The plaintiffs' lawyers are actively seeking legislation in 2012 to delete the phrase "apart from commissions paid by an insurer" from paragraph a. The goal is to weaken the second prong of the two-part test. If successful, deletion of those seven words could result in broader duties being imposed on Iowa insurance agents.

Indemnification Agreements in Construction Contracts. Championed by the Master Builders of Iowa, Senate File 396 was enacted to restrict the use of indemnification agreements in construction contracts. The concern was broad indemnity provisions that require a party to a construction contract to indemnify the other party for any claim, regardless of which party was at fault. Subject to narrow exemptions (principally involving obligations of insurance companies to insureds), the bill bans "a provision in a construction contract that requires one party to the construction contract to indemnify, hold harmless, or defend any other party to the construction contract, including the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, against liability, claims, damages, losses, or expenses, including attorney fees, to the extent caused by or resulting from the negligent act or omission of the indemnitee or of the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible."

Iowa False Claims Act. In 2010, Iowa adopted a state False Claims Act (Iowa Code chapter 385) modeled very closely on the federal False Claims Act, 31 U.S.C. sections 3729-3733. The Iowa law was amended this year in Division XI of House File 649, the health and human services appropriations bill. All of the changes made to the Iowa law were to conform to changes made in the federal law in the last year and were not controversial. The Iowa Attorney General sought an additional change that was NOT included in the final version of HF 649: language stating that defendants in Iowa false claims actions are jointly and severally liable. While the federal law has been interpreted to impose joint and several liability, the federal law does not explicitly state that defendants are jointly and severally liable. Business interests expressed some concern with putting that language in the Iowa law, and the conference committee that ultimately wrote the final version of HF 649 agreed to leave the joint and several liability language out of the bill.

Recovery of Medicaid Payments in Medical Malpractice Suits. Section 85 of the health and humans services appropriations bill, HF 649, amends Iowa Code section 147.136. That section generally prohibits recovery of economic losses suffered by a medical malpractice claimant if such losses were paid for by insurance, governmental programs, or any other source other than the assets of the claimant or the claimant's immediate family. Section 85 of HF 649 adds another exception and allows recovery of amounts paid by the medical assistance program (i.e., Medicaid).

Release and Satisfaction of Judgments. Senate File 244, an Iowa Bar Association initiative, makes some changes to the process for the release and satisfaction of judgments. The bill provides that the court may order that, in lieu of posting a bond with the clerk of court to gain immediate release of a judgment lien against a homestead, the bond may be deposited in either an attorney's trust account or in a federally insured depository institution. The bill amends the law requiring a judgment creditor to acknowledge satisfaction of a judgment by allowing a judgment creditor to instead have the instrument acknowledging satisfaction of the debt notarized in the manner prescribed in Iowa Code chapter 9E. The bill increases the penalty for failing to acknowledge the satisfaction of the debt to from $100 to $400 but eliminates the recovery of attorney fees. The bill provides that the penalty may be recovered by a motion filed in the court that rendered the original judgment requesting that the payor of the judgment, if different from the judgment debtor, be subrogated to the rights of the judgment creditor, that the court determine the amount currently owed on the judgment, or any other relief as may be

necessary to accomplish payment and satisfaction of the judgment. If the motion relates to a lien of judgment as to specific property, the motion may be filed by a person with an interest in the property. The bill also provides that upon the filing of an affidavit that a judgment creditor cannot be located or is unresponsive to requests to accept payment, and upon court order, payment upon a judgment may be made to the treasurer of state as provided in Iowa Code chapter 556 and the treasurer's receipt for the funds is conclusive proof of payment on the judgment.he bill provides that the district court sitting in small claims has concurrent jurisdiction of motions and orders relating to releases of judgments where the amount owing on the judgment, including interests and costs, is $5,000 or less.

Appointment of Judges. Senate File 326 makes a number of changes to the judicial appointment process. Among the changes are the following:

- For district court judicial nominating commissioners, the bill prohibits having more than one appointed commissioner from a county within a judicial election district unless each county within the judicial election district has an appointed or elected commissioner or the number of appointed commissioners exceeds the number of counties within the judicial election district. Currently sitting commissioners are not affected by the change.

- The Chief Justice may, for budgetary reasons, order delays in appointing new judges for up to one year for up to eight judicial openings.

- The Chief Justice may apportion a vacant judicial office to another judicial district if the Chief Justice finds, and a majority of the judicial council approves, that there is a substantial disparity in the allocation of judgeships and judicial workload between judicial election districts.

- District associate judges must be residents of the judicial election district (rather than the county) where they serve.

- Magistrates may be residents of a contiguous county to the one where they serve.

III. LEGISATION OF INTEREST THAT WAS NOT ENACTED

The following legislation received some consideration during the 2011 session, but was not enacted. Bills from the 2011 session remain eligible for consideration in 2012, so we may see some of the bills discussed below receive attention next year.

Workers' Compensation. The House considered several pro-employer workers' compensation bills this session. Two of them (House File 401, which would have clarified that injuries that occur after hours on an employer's premises that do not arise out of the employment relationship are not compensable and House file 523, which would have allowed employers a credit for overpayment) passed the House but died a swift death in the Senate. The Senate did not pass any workers' compensation legislation this session.

Wage Collection Payment Act. The Senate passed Senate File 311, which would have made substantial changes to the Wage Payment Collection Act. Among other provisions, the bill

would have created a rebuttable presumption of illegal retaliation if a worker was the subject of an adverse work action within 90 days of making a wage payment claim. The bill also would have allowed liquidated damages in all wage payment cases, even where an employer did not intentionally violate the law. The bill received no consideration in the House.

Health Care Professional Lien Act. Legislation championed by the chiropractors, House File 540, would have created a lien in favor of licensed health care professionals for the unpaid amount of health care services the providers rendered to uninsured patients under certain circumstances. We had concerns that such a lien would significantly complicate the settlement of personal injury claims and opposed the bill. The bill was modeled on existing Iowa law (Iowa Code chapter 582) creating a lien in favor of hospitals for unpaid medical bills by patients. The bill passed the House, but did not receive committee approval in the Senate.

Certificate of Merit. For many years, the Iowa Medical Society has sought legislation to require a certificate of merit in medical malpractice suits. These bills have evolved over time. The version offered in 2011, House File 490, provided for enhanced expert witness disclosure requirements applicable to plaintiffs in medical malpractice cases. These disclosures would have been in addition to those required by Iowa Code section 668.11. The bill stated that within 180 days of a defendant's answer, the plaintiff would have been required to submit affidavits from each plaintiff expert who was expected to testify with respect to the issues of breach of standard of care or causation. The affidavits would need to state that the expert was familiar with the applicable standard of care, the expert's statement that the standard of care was breached by the health care provider named in the petition, the expert's statement of the actions that the health care provider should have taken or failed to take to have complied with the standard of care, and the expert's statement of the manner by which the breach of the standard of care was the cause of the injury alleged in the petition. Failure to provide the affidavit would be grounds for dismissal of the case. The bill passed the House, but was not considered in the Senate due to strong opposition from the plaintiffs' bar.

Trespassing on Agricultural Operations. A major initiative of the agricultural lobby this year was House File 589. The bill was meant to target animal rights groups that gain access to agricultural facilities to film farm or livestock operations for the purpose of showing animal abuse. The bill would have created new criminal penalties and a civil right of action for "animal facility tampering" and "animal facility interference." The bill was extremely broad and quite likely violated the First Amendment by putting severe restrictions on the ability of persons to disseminate images of animal abuse. The bill passed the House but was never brought up for debate in the Senate despite attempts by advocates for the legislation to pare down the scope of the bill substantially.

Retention of Private Attorneys by State Agencies. House File 563 would have put limits on the ability of executive branch agencies to retain private attorneys in lieu of (or in addition to) the state Attorney General's office. The bill was a somewhat belated reaction to the tobacco litigation that occurred in the 1990s where state Attorneys General retained private plaintiffs' counsel whol received huge fees as part of the settlement of that litigation. The bill passed the House unanimously, but was not taken up by the Senate.

Appointment of Iowa Supreme Court Justices. In light of the controversy over Iowa's Supreme Court justices, the 2010 retention vote, and the *Varnum* same-sex marriage decision, a number of bills and resolutions were filed to makes changes to the judicial nominating system in Iowa either through statutory changes or amendments to the Iowa Constitution (see, e.g., House File 343, Senate Joint Resolutions 6, 7, 11, and 13). None of these bills or resolutions received significant consideration. However, the issue was brought up during debate in the House on Senate File 326. As described above, SF 326, which makes relatively minor changes to the judicial nominating system, was enacted. While that bill was not particularly controversial, it did serve as the vehicle for an attempt by a group of conservative House members to change the judicial nominating process much more substantially. Because none of the stand-alone bills proposing significant changes to the judicial nominating system were debated, the group of legislators attempted to hang an amendment on SF 326 that would have scrapped the judicial nominating commission process and allowed the governor to appoint justices, subject to confirmation by the Senate. That amendment was ruled non germane to the bill and thus was not included in the final version of the bill.

IV. CONCLUSION

The discussions of bills in this legislative report are general summaries only. For those bills which were enacted, the enrolled bills themselves should be referred to for specifics. Enrolled bills can be found the General Assembly's website: www.legis.iowa.gov

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2011 which were of particular interest to the IDCA's members. Please

Case Update II: Negligence and Torts

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Iowa Case Law Update II
Negligence and Torts
2010 – 2011

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* See also the Civil Procedure, Juries & Trial, Insurance, Judgment & Limitation of Actions by Megan R. Dimitt with Lederer Weston Craig, PLC.

** See also Employment, Government, Damages, Contract, Commercial Constitutional by Amy Licht.

I. Breach of Duty

Brokaw v. Winfield-Mt. Union Community School Dist, 788 N.W.2d 386 (Iowa 2010) (Baker)

FACTS: During the varsity basketball game, Andrew McSorley, a guard for WMU struck Jeremy Brokaw in the head. A technical foul was called on McSorley, and he was ejected from the game.

PROCEDURAL HISTORY: The district court awarded the Plaintiffs $13,000.00 for past medical expenses and $10,000.00 for loss of mind and body and past pain and suffering. The district court dismissed the action against WMU. In addition, the district court did not award any punitive damages. The Court of Appeals affirmed the district court's ruling.

ISSUES: The case involves a number of issues. The first issue presented is whether the district court correctly calculated the compensatory damage award. The second issue presented is whether the school district knew, or in the exercise of reasonable care should have known, that McSorley was likely to commit a battery against an opposing player. Thirdly, whether an award of punitive damages is mandatory upon a finding of battery.

RATIONALE: **Compensatory Damages:** Compensatory damages or actual damages are intended to compensate the victim for the injury sustained by another party's wrongful acts. Ryan v. Arneson, 422 N.W.2d 491, 496 (Iowa 1988). In this case, the Plaintiff had two significant incidents subsequent the injury sustained in the basketball game: 1) he fell on the ice and 2) he was hit by a pitch during a baseball game. The trial court found that medical evidence presented during the trial showed that the symptoms were not consistent and that the medical evidence did not conclusively tie the Plaintiff's symptoms to the incident that was the subject of the action. The treating physician could not state with any degree of medical certainty that the two symptoms from the two events (basketball game and the fall on the ice) were in any way related. In addition, there was no testimony linking the symptoms from the basketball game to the symptoms from being hit by the pitch.

Breach of Duty: The court began its analysis by noting that the district court had factored foreseeability into its analysis of breach of duty. The court then proceeded into analysis of the issue under the Restatement (Third) of Torts and Thompson v. Kaczinski. The court focused its attention on the Restatement (Third) of Torts §19. "The conduct of a defendant can lack reasonable care insofar as it foreseeability combines with or permits the improper conduct of the plaintiff or a third party." Id at 215. "This section imposes liability where the actions of the defendant 'increase the likelihood that the plaintiff will be injured on account of the misconduct of a third party.'" Id §19 cmt. e at 218.

The court discussed the convergence of defendant negligence and scope of liability. Additionally, the court cited to the three factors identified in §19, cmt. d at 217: 1) one factor is the foreseeable likelihood of improper conduct on the part of the plaintiff or a third party, 2) a second factor is the severity of the injury that

can result if a harmful episode occurs, and 3) the third factor concerns the burden of precaution available to the defendant that would protect against the prospect of improper conduct by the plaintiff or a third party. The court also touched on the policy considerations of negligence set forth in the Restatement noting that cautioning against excessive precautions. In analyzing the evidence presented at the trial, the court found that there was no evidence supporting the fact that McSorley was likely to commit battery on other players. Therefore, the court found that there was no breach of duty in this instance.

Punitive Damages: The court focused on the fact that punitive damages are always discretionary, and are not a matter of right. Berryhill v. Hatt, 428 N.W.2d 647, 656 (Iowa 1988). In addition the court focused on §668A.1 of the Code of Iowa which provides the conduct at issue must be a "willful and wanton disregard for the rights or safety of another". The court found that the conduct here was the result of a spilt second decision and although it was intentional, it did not justify an award of punitive damages.

HOLDING: The court held that substantial evidence supported the trial court's award of compensatory damages and the finding that WMU could not reasonably foresee that McSorley would intentionally attack another player. In addition, the court held that the trial court did not abuse its discretion in refusing to award punitive damages. The court affirmed the Court of Appeals and the District Court's Ruling.

II. Comparative Fault

Mulhern v. Catholic Health Initiatives, 799 N.W. 104 (Iowa 2011) (Waterman)

FACTS: Elizabeth Von Linden was in charge of consumer marketing at a large media company. Her position involved substantial travel and stress. She had a history of depression. She and her husband purchased a larger home on the same street. They were having a lot of difficultly selling their home. The financial situation coupled with her job stress created a situation wherein she attempted suicide. Her husband found her and she was taken to Mercy Medical Center's emergency room. She was admitted to the Mercy Franklin Center and stayed there for a couple of days. Once admitted there, she improved a great deal. She was discharged and was given instructions for follow up care as well as instructions to follow if things deteriorated. Upon being discharged, she returned to work where she performed well. She had a follow up appointment with her psychiatrist, who discussed follow up recommendations with her and reviewed emergency services with her. The Plaintiff's expert and her treating psychiatrist both testified that on the last occasion that he saw her that she could not have been involuntarily committed. She took her own life six days after she last saw her psychiatrist.

PROCEDURAL HISTORY: The district court entered judgment in favor of the Defendant pursuant to Chapter 668 because the jury allocated the fault 90% to Von Linden and 5% each to Mercy and Dr. Jennisch.

ISSUE: The primary issue presented by this case is whether Chapter 668 permits a jury to compare the fault of a non-custodial suicide victim with the negligence of the mental health professionals treating her. This is an issue of first impression.

The court also examined whether it was error for the district court to instruct the jury to decide whether the conduct of Von Linden in taking her own life was the sole proximate cause of the estate's damages. In addition, the court examined the issue of whether the estate was entitled to a result of treatment instruction.

RATIONALE: The majority opinion examines three arguments posed by the Plaintiff in support of the proposition that the jury should have not been instructed to compare the Plaintiff's fault in deciding this issue. The first argument was whether the estate established that Von Linden lacked the mental capacity to be found negligent. The court stated that whether a person suffering from a mental disease lacks the capacity to be found negligent is a question of fact. Borchard v. Anderson, 542 N.W.2d 247, 249 (Iowa 1996). The court found that the estate had not established that she lacked the mental capacity to be found negligent based upon the fact that she could not have been involuntarily committed, she was being treated on an outpatient basis, and she was working. The estate also argued that Chapter 668 does not allow a comparative fault defense based upon an act of suicide. In examining this question, the court noted that the fighting issue is whether Von Linden's suicide can be considered as fault under Chapter 668. The estate argued that Von Linden's suicide cannot be considered negligent because it is an intentional act. The court stated that this argument rests on a false premise –that negligent conduct cannot include intentional self-

harm. The court relied on the Restatement (Third) of Torts: Apportionment of Liability §3, cmt. a, at 29 (2000) for the proposition that "Plaintiff's negligence can include conduct that is reckless, grossly negligent, or intentional." The court went onto state that "the concept of negligence contemplates that every person must act as a reasonable person would have acted under the same or similar circumstances." Id. "If a person acts with intent to cause harm, the person necessarily breaches a duty to act as a reasonable person." Id. Accordingly, "within the context of a claim for damages based on negligence, conduct by the plaintiff that was intended to cause self-harm constitutes an action that is "in any measure negligent … toward the . . . actor" because a person who intentionally causes harm also fails to act as a reasonable person. Iowa Code 668.1 (2003). See Mulhern at 114. In addition, the court found that suicide falls within the term "unreasonable assumption of risk." See Mulhern at p. 115.

The court entered into an examination as to how this issue has been addressed in other jurisdictions as well as a discussion of the policy arguments. In so doing, the court indicated that there are policy arguments which would support the legislature creating an exception stating that mental health providers should be denied a comparative fault defense.

The court also address whether the Tratchel decision entitles the Plaintiff to a new trial. The court found that it does not because Tratchel stands for the proposition that an intentional tortfeasor cannot reduce this liability by raising a defense of the victim's comparative fault.

The court examined the statute's legislative history as well as the uniform act to find that supports the proposition that drafters intended the omission of intentional torts to allow a plaintiff a full recovery for her own intentional harm.

The court addressed this issue of whether the treater's duty to prevent suicide preclude a comparative fault defense. The court found that it did not because Von Linden could not have been involuntarily hospitalized and we recognize a comparative fault in medical malpractice actions. Further, the court stated that such a rule would make for poor public policy.

The court also addressed the issue of sole proximate cause. The court found that the estate was not prejudiced by this instruction because the jury found that Von Linden's conduct was not the sole proximate cause of the estate's damages.

The court in addressing the estate's request for a result of treatment instruction found that the requested instruction violated the principles set forth in Smith v. Koslow, 757 N.W. 2d 677 (Iowa 2008).

HOLDING: The court affirmed the district court entering judgment in favor the Defendant.

Justice Wiggins authored a dissent which was joined by Justice Hecht.

Justice Wiggins takes the position that the majority opinion reviewed the case on a theory different from than the one on which the case was tried. His dissent goes on to examine the case from the perspective that the first question we need to answer is whether chapter 668 covers the defendant's specification of

negligence. The Justice relies on the Tratchel and Carson opinions for the viewpoint that intentional acts are not included in the definition of fault set forth in §668.1(1). In addition, his viewpoint is that the statute does permit the jury to compare an intentional act to a negligent act when determining fault. Further, the Justice takes the position that the parties never tried the issue of Von Linden's negligence in failing to call the suicide hotline or the doctor before committing suicide to the jury. In essence, the Justice is taking the position that the majority of the court decided this case on a theory that was not tried to the district court. In view of the aforementioned, Justice Wiggins would have reversed the judgment of the district court.

Justice Appel also authored a dissent which was joined by Justice Hecht.

Justice Appel takes the viewpoint that the definition of fault under §668.1 does not include intentional misconduct or any broad phrase that might reasonably be construed to include it. In so doing, he examines the Tratchel case among others. He also examines the public policy aspects of whether the use of comparative fault is appropriate when the "acts which the plaintiff's mental illness allegedly caused him to commit, were the very acts which the defendants had a duty to prevent, and these same acts, cannot as a matter of law, constitute contributory negligence."

Justice Appel also takes the position of negligence was not joined in this trial. Therefore, he takes issue with the court deciding a case on an issue that was not raised below.

Finally, Justice Appel addresses the issue of intentional misconduct at common law. His view is that the parties tried this case under Chapter 668; therefore, the case should be decided under the construct of comparative fault. Therefore, he would reverse the judgment of the district court.

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010) (Hecht)

FACTS: Plaintiff operated a dairy farm. Dalarna was experiencing a lot of difficulty with its herd in the context of low milk production and a high death rate. Dalarna concluded that the herd was being affected by stray voltage originating from the utility system of Access Energy Cooperative.

Plaintiff sued on nuisance theory on two counts seeking the following relief: 1) money damages for past and present harm and 2) injunctive relief seeking to abate and enjoin Access Energy from causing stray voltage.

PROCEDURAL HISTORY: The district court entered an order determining that Iowa Code §657.1(2) authorizes Access Energy to assert a comparative fault defense only against Dalarna's claim for future damages, if any, awarded in lieu of injunctive relief. This is an interlocutory appeal to the court.

ISSUE: Whether Iowa Code §657.1(2) provides a potential comparative fault defense in any action for nuisance against an electric utility.

RATIONALE: The court began its analysis of the issue with an examination of the history of the statute and the language of it. The court found that the language of the statute concerning the use of the defense of comparative fault was ambiguous. Therefore, the court applied its well established principles of statutory construction. The court then engaged in an effort to discern the legislature's intent focusing on the statute's subject matter, the object to be accomplished, the purpose to be served, the underlying policies, remedies provided, and the consequences of the various interpretations. See Dalarna at 660. The court determined that the amendment to 657.1 was a legislative response to the Martins decision. See, Martins v. Interstate Power Co., 652 N.W.2d 657 (Iowa 2002).

The court found that §657.1 was intended to authorize a comparative fault defense in any nuisance action if the utility demonstrates compliance with the standards. See Dalarna at 661. In addition, the court pointed to the referred to the references in §657.1(2) to §668.3 to support its decision.

As an aside, the court also considered the constitutionality of its interpretation of § 657.1(2) and found that it does pass constitutional muster.

HOLDING: The district court's ruling was reversed and the case was remanded on the basis that Iowa Code §657.1(2) provides a potential comparative fault defense in any action for nuisance against an electric utility.

III. Contact Sports Exception

Feld v. Borkowski, 790 N.W.2d 72 (Iowa 2010) (Cady)

FACTS: Feld and Borkowski were teammates on an intramural slow pitch softball team. During batting practice, Feld was playing first base while Borkowski batted. Borkowski hit a fly ball into foul territory on the third base side of the field. Shortly after Borkowski's bat made contact with the ball, it left his hands and went down the first base side of the field. The bat struck Feld in the forehead. Borkowski claimed that letting go of the bat was an accident, and members of the team described it as a freak accident.

PROCEDURAL HISTORY: The district court granted summary judgment to the Defendant finding that the contact sports exception applied and that Defendant's conduct was not reckless. The Court of Appeals affirmed the district court finding that physical contact is generally inherent in the game of softball and that there was no conclusive evidence of recklessness sufficient to present an issue of material fact for a fact finder. The Iowa Supreme Court granted further review.

ISSUE: The primary issue addressed is whether softball is an activity or game covered by the contact-sports exception. The secondary issue identified by the court is whether the plaintiff presented facts sufficient to support a jury question on the issue of whether the defendant's actions in releasing the bat during the swing were reckless.

RATIONALE: Importantly, the majority opinion noted that neither party challenged the viability of the contact-sports exception and noted in a footnote the policy that the court is to construe the law in resolving the issues presented to it and not to go beyond that.

The opinion addressed the historical foundations of the contact supports exception. The court cited the Leonard case for the contact sports exception and discussed its application of the doctrine under the Restatement (Third) of Torts §7. The court also noted that the Restatement (Third) primarily sought to eliminate specific arguments that no duty of care exists under a particular set of circumstances. See Restatement (Third) of Torts §7 cmt. A at 77. The court discussed the risks associated with playing softball and determined that softball is a contact sport. The majority opinion found the affidavit executed by the plaintiff's expert indicating that he had never seen a bat go down the first base line when the ball went down the third base line sufficient to support a jury question on the issue of recklessness.

Justice Wiggins concurring specially. Justice Wiggins urges the court to address the continued viability of the contact sports exception in the present action rather than defer it. Moreover, he clearly indicates that he does not feel that it is a viable part of our negligence jurisprudence under the Restatement (Third) of Torts.

Justice Appel concurring in part and dissenting in part. Justice Wiggins joins in concurring with Divisions I and III(A) of this special concurrence.

Justice Hecht joins this special concurrence in its entirety. Justice Appel identifies two issues: 1) whether there is a special limited duty rule for contact sports under Iowa law that applies to the game of softball and 2) whether the contact-sports exception should prevent liability based on negligence under the facts and circumstances of this case. The opinion addresses the matters before the court. It notes the tension between the roles of deciding cases and developing the law. In so doing, the Justice discusses the historical policy considerations of these two roles. Justice Appel would have preferred that the court reach the issue of the viability of the contact sports exception in the current opinion rather than defer the issue to another day. Justice Appel proceeds to outline the historical development of the contact sports exception from a national perspective. Further, he engages in a discussion of the scope and development of the contact sports exception in Iowa. He then goes into a discussion of the adoption of the Restatement and the concept of duty. In so doing, he cites the Restatement (Third) of Torts §7(a) for the proposition "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Further, he addresses the philosophy of the Restatement that being that "the duty of care owed by one to another in matters involving personal safety is ordinarily the generally-applicable negligence standard and that the question of whether the generally –applicable standard has been breached is a factual question for the jury." His view is that special judge-made rules that apply in narrow situations as incoherent and inconsistent with modern tort law. However, he does recognize that the Restatement does reserve special duty rules for "exceptional cases." Justice Appel then goes onto question the ongoing viability of the contact-sports exception for a number of policy reasons: 1) contact-sports cases generally do not adequately take into consideration the flexibility of negligence as a cause of action, 2) the contact-sports exception does not adequately take into consideration our comparative-fault framework, 3) the sky is falling approach to contact-sports cases, and 4) the avalanche of lawsuits theory. Justice Appel does not feel that if the contact-sports exception is still viable in Iowa that it should be expanded beyond the limited context of the Behrens case. He notes that "in my view, under the better-reasoned contact-sports cases, a person who commits acts or omissions that create risks that are outside the ordinary risks inherent in a game are subject to liability sounding in negligence." See Feld at 94.

HOLDING: The court held that the district court erred in granting summary judgment. The court vacated the decision of the court of appeals, reversed the judgment of the district court, and remanded the case for further proceedings.

IV. Doctrine of Ostensible Agency

Rettenmaier v. Finley Hosp., 2011 WL 1584582 (Iowa Ct. App. 2011) (Eisenhauer) (Unpublished Opinion)

FACTS: Craig Rettenmaier sought treatment at Finley Hospital in the emergency room. Dr. Manternach ordered a series tests including a CT scan. Dr. Gortz, a radiologist employed by Dubuque Radiological Associates interpreted the CT scan and discussed the results with Dr. Manternach. There is a factual dispute as to whether Dr. Gortz relayed the information concerning white matter ischemic changes to Dr. Manternach.

Three weeks before scheduled trial, the Plaintiffs' filed a trial brief arguing for a jury instruction stating that Dr. Gortz was a agent of Finley Hospital under the doctrine of ostensible agency. The Plaintiffs' had not claimed that Dr. Gortz was negligent until the submission of the trial brief.

PROCEDURAL HISTORY: The district court denied the Plaintiffs' request for the jury instruction, and the Plaintiffs' filed a Motion for a New Trial following a jury verdict in favor of Defendant, Finley Hospital. The district court also denied the Plaintiffs' Motion for a New Trial.

ISSUE: Whether the hospital could be vicariously liable for the negligence of the independent contractor physician.

RATIONALE: The court began its analysis of the issue by articulating the doctrine of ostensible agency. The doctrine of ostensible agency provides that a hospital has an absolute duty to its emergency-room patients to provide competent medical care, a duty which cannot be delegated. Thus, a hospital may be vicariously liable for the negligence of its emergency-room caregivers, even if they are designated as independent contractors. This liability arises from an ostensible agency, in that an emergency –room patient looks to the hospital for care, and not to the individual physician –the patient goes to the emergency room for services, and accepts those services from whichever physician is assigned his or her case.

Wolbers v. The Finley Hospital, 673 N.W.2d 728, 734 (Iowa 2003).

In light of the fact that the Plaintiffs' had not alleged negligence by Dr. Gortz's in their answers to discovery despite their knowledge that Dr. Manternach alleged that Dr. Gortz had not conveyed the findings pertaining to the ischemic changes to him that Plaintiffs' were not entitled to the jury instruction.

HOLDING: The court affirmed the district court's ruling denying the Plaintiffs' a new trial.

V. Duty of Care

McCormick v. Nikkel & Associations, Inc, 2011 WL 2419751 (Iowa Ct. App. 2011) (Danilson) (Unpublished Opinion) (Application for Further Review Pending)

FACTS: Troy McCormick was a maintenance employee at Little Sioux Corn Processors (Sioux). Sioux operates an ethanol plant and was involved in an expansion project. A portion of that expansion project involved electrical upgrades and changes. Sioux entered into contracts with a number of different entities as part of the electrical upgrade. Sioux purchased numerous switchgears, a piece of electrical equipment that is wired to receive high voltage electricity and controls the flow of electricity within the distribution system from Graybar Electric. Sioux hired Schoon to bore-in and pull the electrical cables that connected the components of the new electrical loop and to place and install the switchgears on their mounting basements. Schoon entered into a contract with Nikkel to do "terminations" which involved hooking up electrical cables to terminals on the switchgears. Sioux also purchased fault indicators which were to be mounted inside the switchgear cabinets. The installation of the fault indicators required the installation of mounting brackets inside the switchgear cabinets.

On November 7, 2006, Peterson, an employee of Nikkel, offered to mount the fault indicators. Konwinski, an employee of Sioux, told Peterson that Nikkel should not install the mounting brackets and that he would have Sioux employees modify the mounting brackets and install them in the switchgear cabinets.

Peterson energized the electrical circuit from the main panel to the switchgear on November 7, 2006. Sioux contends that Konwinski instructed Peterson to alert him when the electricity to the new power loop was turned on. There is a factual dispute as to whether Peterson informed Konwinski that the circuit was live. It was Sioux's policy that all employees were to assume all electrical equipment was energized until the contrary was proven. It was also Sioux's policy that no work was to be commenced on the electrical equipment until the equipment was de-energized, locked out, tagged, and the absence of energy verified.

On November 13, 2006, McCormick and another employee, Sangwin, were working on the installation of a mounting bracket inside a switchgear cabinet and McCormick inserted a tool and was electrocuted.

PORCEDURAL HISTORY: The district court entered summary judgment in favor of Nikkel on the basis that Nikkel owed no duty of care to McCormick as a matter of law.

ISSUE PRESENTED: Whether a subcontractor owes the contractor's employee a duty of care.

RATIONALE: The Court began its analysis with a discussion of duty as articulated in the Restatement (Third) of Torts §7(a), at 90 as adopted in Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009) which states that "an actor owes a general duty to exercise reasonable care, when the actor's conduct creates a risk of physical harm." The Court then applied this standard to the context of the employer-independent contractor relationship and the application of the retained control

standard as set forth in Van Fossen v. MidAm Energy Co., 777 N.W.2d 696 (Iowa 2010). The Court also examined the Restatement (Second) of Torts §384 in the application of the foregoing principles which provides that one who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of land, for physical harm caused to others upon and outside the land by the dangerous character of the structure or other conditions while the work in is his charge.

The Court determined that the test to determine liability is based upon control at the time of the negligent act, not at the time of injury. In applying this test the Court found that a genuine issue of material fact existed as to whether Nikkels's conduct of energizing the electrical system created a risk of physical harm of a dangerous character predicated upon the factual dispute as to whether Peterson (Nikkel) informed Konwinski (Sioux) that the electrical line was charged.

HOLDING: The district court's granting of summary judgment to Nikkel was not appropriate given the factual dispute pertaining to the charging of the electrical line.

Patterson v. Rank, 2010 WL 539463 (Iowa Ct. App. 2010) (Potterfield) (Unpublished Opinion)

FACTS: Micah and Rebecca Bartlett rented a single-family home to Mariah Rank and Joshua Rauhauser. Rank and Rauhauser owned a pit bull named Chopper at the time they entered into the lease agreement with the Bartletts. Pursuant to the terms of the lease agreement, the Bartletts did not retain any control over the premises. The dog did not have any history of vicious behavior.

Patterson crossed the street to speak to Rank who was sitting on the steps in front of the home. Patterson approached Chopper on the sidewalk leading up to the front door and reached down towards the dog. Chopper bit him.

PROCEDURAL HISTORY: The district court entered summary judgment in favor of the Bartletts on the basis that the Bartletts did not owe a duty of care to Patterson.

ISSUE: Whether the landlord owed a duty of care to a third party when the landlord did not retain any control of the premises as a term of the rental agreement.

RATIONALE: The court focused on the issue of control of the premises in its analysis of this issue. In so doing, the court discussed the traditional elements of negligence: duty, breach of duty, proximate cause, and damages. Further, the court examined duty in the framework of the Restatement (Third) of Torts §7 which states that "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." The court went onto discuss the policy considerations involved in making a determination that the general duty to exercise reasonable care is appropriately displaced.

In examining this issue, the court found that for all practical purposes that the lessee "becomes for the time being the owner and occupier subject to all of the liabilities of one in possession". See Restatement (Second) of Torts §356 cmt. a at 240. Further, the court looked at the policy that the law does not require the

landlord as the owner of the building to be an insurer for the acts of his tenant as well as our current statutory framework, Iowa Code §351.28 (2009) which imposes liability on the owner to find that the landlord did not have a duty to the third party.

HOLDING: The district court granting of summary judgment to the Bartlett's was appropriate.

VI. Economic Loss Rule

Annett Holdings, Inc. v. Kum & Go, L.C., 2011 WL 2652324 (Iowa 2011) (Mansfield) (Rehearing Pending – Supreme Court)

FACTS: Annett Holdings, Inc. is an Iowa holding company. One of its subsidiaries is TMC Transportation which is a trucking company. Annett entered into a contract with Comdata pursuant to which Comdata provided credit cards that could be used by Annett employees to purchase fuel and obtain cash advances at Comdata authorized service centers. In part the contractual agreement between Annett and Comdata provided that Annett agreed to be fully responsible for the unauthorized or fraudulent use of the cards and included a provision whereby Annett was to hold Comdata harmless from any and all liability resulting from the acts of employees or agents of Annett.

Comdata entered into a contractual relationship with Kum & Go., L.C. that enabled a particular Kum & Go., store in Oskaloosa to handle Comdata transactions. This contract included detailed procedures which governed how Kum & Go was to process the Comdata transactions.

TMC employed Michael Vititoe from November, 2002 until April, 2006. During the course of his employment, Vititoe engaged in fraudulent transactions using his company issued credit card which totaled $298,524.79. Vititoe was charged with first degree theft and was subsequently convicted of theft and ordered to pay restitution in the amount of $298,524.79.

PROCEDURAL HISTORY: The district court entered summary judgment in favor of the Defendant ruling that the economic loss rule bars the negligence claim and that the trucking company's parent was not a third-party beneficiary of the contract between the card issuer and the truck stop.

ISSUE: Whether the Plaintiff's negligence claim is barred by economic loss rule.

RATIONALE: The court's analysis of this focused on the fact that no one was injured and the fact that no property was destroyed, but rather the nature of the loss was purely economic. Moreover, the majority's opinion focused on the contractual relationship between Annett and Comdata and Comdata and Kum & Go, L.C. In so doing, they focused on the fact that Annett had contracted to assume certain risks of financial loss and had the ability to minimize those risks.

The majority's opinion focuses as well on the policy implications of the economic loss rule. The court states that "as a general proposition, the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss" citing Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 126 (Iowa 1984). Further, "[t]he well-established general rule is that a plaintiff who has suffered only a economic loss due to another's negligence has not been insured in a manner which is legally cognizable or compensable." Id.

Much of the majority's opinion is focused upon the "boundary-line function" of the economic loss rule which states, in essence, when parties have sustained economic loss pursuant to contract that they should not be allowed recovery under a tort. The court notes that the doctrine of economic loss that has not been limited to situations where the plaintiff and defendant are in direct contractual privity.

In this opinion, the majority appears to be broadening the scope of the economic loss doctrine; however, the court declines to "delineate the precise contours of the economic loss rule" Id at _____. The court specifically notes that there are exceptions to the economic loss rule such as professional negligence against attorneys and accountants.

In the course of its analysis, the court noted its historical use of the following factors to be considered in applying the economic loss rule: 1) the nature of the defect, 2) the type of risk, 3) the manner in which the injury arose, and 4) the type of damages sought by the plaintiff. The court went onto to say "[i]t is not clear to us that the Determan/Nelson factors are relevant when the claim is for negligence resulting only in financial harm." Id at _____.

The court found that there were a number of characteristics that brought Annett's cause of action within the scope of economic loss rule such as the fact that there was no risk of physical harm, there was no defect, the ability to prevent the loss, and the hold harmless provision in the contract.

HOLDING: The court affirmed the grant of summary judgment to Kum & Go, L.C. on Annett's negligence claim.

Dissenting Opinion Authored by Justice Wiggins and joined in by Justice Hecht.

The dissent engages in a lengthy discussion of the history of the economic loss doctrine in Iowa. There are number of key points made in the dissent. Firstly, that the policy reasons for the use of economic loss doctrine do not apply here because there was no contract relationship between Annett and Kum & Go. Secondly, the dissent's view is that the economic loss rule should remain, with exceptions based on the nature of action. Finally, the dissent makes an argument that the facts of this case are akin to a legal or accounting malpractice case.

Umthun v. IMT Ins. Co., 2011 WL 222514 (Iowa Ct. App. 2011) (Vogel) (Unpublished Opinion)

FACTS: Umthuns sold a commercial building to Quality Communications (Quality) pursuant to a real estate contract. The real estate contract contained a provision requiring Quality to insure the premises and provide proof of the same to the Umthuns. Quality purchased the required insurance from IMT Insurance Company.

The commercial building was damaged by fire. Quality failed to comply with document requests as part of IMT's fire investigation which resulted in IMT's denial of Quality's claim for damages.

PROCEDURAL HISTORY: The district court entered summary judgment in favor of IMT Insurance Company finding that the economic loss doctrine barred the Umthuns' negligence claims against IMT.

ISSUE: Whether an insurance company owes a professional duty to either its own named insured or to someone named in an endorsement and given a "loss payable" designation.

RATIONALE: The court's analysis of this issue begins with a discussion of the economic loss doctrine. The court notes that "a negligence claim may be prohibited by the economic loss doctrine." Van Sickle Construction Co. v. Wachovia Commerical Mortg., Inc., 783 N.W.2d 684, 692-93 (Iowa 2010).

> The economic loss doctrine has been characterized as a generally recognized principle of law that plaintiffs cannot recover in tort when They have suffered only economic harm. The rationale for this limitation on recovery is that purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions. Accordingly, we ultimately look to the policies behind tort law and contract to determine whether a loss is compensable in tort or in contract.
>
> Id.

The court noted that the district court found no Iowa case that would uphold a professional negligence claim against an insurance company. The court noted that the Umthuns were not participants in the negotiations between the insurance company and Quality. Further, the language contained in the real estate contract did not provide that the Umthuns were entitled to a certain type of loss payee coverage or that the contract required the Umthuns to name them the "Lender's Loss Payable Designation." Importantly, the Umthuns were not IMT'S insured. Finally, the court noted that Iowa case law has not been extended to hold an insurance company owes a professional duty to either its own insured or to someone named in an endorsement and given a "loss payable" designation.

HOLDING: An insurance company does not owe a professional duty to either its own named insured or to someone named in an endorsement and given a "loss payable" designation. Therefore, the district court properly entered judgment in favor of IMT Insurance Company.

VII. Iowa Tort Claims Act

McGill v. Fish, 790 N.W.2d 113 (Iowa 2010) (Cady)

FACTS: Casey McGill was employed by the water works department of the University of Iowa in 2006. He filed an action for personal injuries allegedly suffered while performing maintenance at the physical plant on August 31, 2006. He asserted a negligence claim against the manufacturer of the treatment system at the plant. In addition, he asserted a gross negligence claim against five co-employees of the University of Iowa. He claimed the co-employees were supervisors who failed to properly train him on working with hazardous materials and to provide him with protective clothing and equipment.

PROCEDURAL HISTORY: The State of Iowa filed a Motion to Dismiss on the basis that the district court was without subject matter jurisdiction because the Plaintiff had not exhausted his administrative remedies under the Iowa Tort Claims Act. The district court denied the motion to dismiss. The district found that the action for gross negligence against the five state employees constituted a claim under Iowa Code §85.20 and was not subject to the provisions of ITCA. The State sought interlocutory review.

ISSUE: Whether the legislature intended to exclude state employee claims based on gross negligence of co-employees from the ITCA by excepting claims by state employees "covered by the Iowa workers' compensation law."

RATIONALE: The court began its analysis with a historical overview of the ITCA. In so doing, the court noted that the ITCA provides numerous exceptions from its rules. One particular exception to ITCA are claims by state employees which are covered under the workers' compensation law. The court then engaged in a discussion of statutory interpretation and statutory construction. The court then narrowed its analysis to the meaning of the word "covered" as ITCA excepts claims that are "covered by the Iowa workers' compensation law." Iowa Code §669.14(5). The court found that "the plain meaning of the word "covered" under §669.14(5) means the claim excluded from ITCA must be one that is included in and dealt with by the workers' compensation laws." See McGill at 119. The court went onto note that the workers compensation statute clearly exempts claims for gross negligence.

As an aside, the court also examined the issue on an constitutional basis and determined that their finding was consistent with the Equal Protection Clause of the state and federal constitutions.

HOLDING: The court held that the legislature did not intend to exclude state employee claims based on gross negligence of co-employees from the ITCA. Therefore, the court reversed the decision of the district court and remanded the case back to the district court for further proceedings.

****Schneider v. State of Iowa, 789 N.W.2d 138 (Iowa 2010) (Hecht)**

FACTS: The case arises out of a road project by which Highway 63 was re-routed to bypass Denver, Iowa. This project involved a floodway and the construction of a bridge in the floodway. The bridge that was constructed in 1994 met the Q50 standard. In May of 1999, Denver experienced an extraordinary rain event and resulting flood which damaged a number of homes and local businesses. There was evidence which showed that the bypass project including the construction of the bridge increased the amount of flooding . After the flood, the State of Iowa redesigned and extended the bridge such that it was Q100 compliant.

Plaintiffs filed an action allegedly that the State breached a common law duty by designing and constructing the bridge in a manner that obstructed the floodway and increased the depth of the water. In addition, the petition alleging that the State breached a duty under Iowa Code §314.7 proscribing disruption of the natural drainage of surface water.

PROCEDURAL HISTORY: The State of Iowa filed a motion for summary judgment based on lack of subject matter jurisdiction and statutory immunity. The district court granted the motion for summary judgment reasoning the State is immune under Iowa Code §669.14(1). The district court also granted summary judgment on the basis that the State was entitled to summary judgment on the claim for damages for permanent devaluation of their properties under §669.14(8) predicated upon the state of the art defense. The district court also rejected the plaintiffs claims under Iowa Code §314.7. The court of appeals affirmed the district court.

ISSUE: Whether those plaintiffs who thereafter declined the board's request for additional documentation failed to exhaust the available administrative remedy and thereby deprived the district court of subject matter jurisdiction. Whether the State of Iowa is entitled to immunity from suit pursuant to Iowa Code §669.14(1). Whether the State is entitled to assert the state-of-the-art defense. Whether the plaintiffs have to show that the water runoff was from the roadway in order to pursue their claims under §314.7.

RATIONALE: **Subject Matter Jurisdiction:** All of the plaintiffs have completed and filed the necessary forms. The court noted that the board had a remedy available to it to compel production of additional information that it did not avail itself of. Therefore, the court held that the invocation of the exhaustion doctrine is not required to avoid interference with the administrative process.

Discretionary Function Immunity: The court set forth a two-part test to determine whether §669.14(1) shields the State from liability. First, the State must show there was an element of judgment or discretion involved in the design or construction of the bypass project. Secondly, if judgment or discretion was involved in the design or construction of the project, the State must show the judgment or discretion was of the type the legislature intended to shield from liability. The court found that given the statutory and regulatory prohibitions against the creation of floodway encroachments causing increased risk of loss to upstream properties in the event of a 100 year flood that the discretionary function defense has no application in this case. See Schneider at 147.

Design and Construction Immunity: The court examined the issue under Iowa Code §669.14(8). The State supported its motion for summary judgment with an

affidavit from an expert witness who testified that bridge and floodway elevations after the 1999 flood eliminated the risk of future flooding from a flood having a magnitude not greater than a 100 year flood and that the design was state of the art. Given the fact that the plaintiff's claims arise out of the construction of a highway, the court held that this defense applies and affirmed the district court on the issue of permanent devaluation.

Liability Under §314.7: The court found that "the clear language of §314.7 imposes on those who undertake highway improvements a duty to use strict diligence in draining surface water from the road to its natural channel in conformity with general riparian principles." See Schneider at 150. Therefore, the court found that the statue is broader in its scope that water draining from the roadway; thus, plaintiffs were allowed to proceed with that claim. However, the court noted the design and construction immunity defense is applicable.

HOLDING: The court ruled that the district court erred in granting summary judgment based upon the defense of discretionary immunity under §669.14(1) and on the action under §314.7. The court affirmed the balance of the district court's rulings. The court vacated the court of appeals decision and affirmed the district court in part and reversed the district court in part. The case was remanded for further proceedings.

VIII. Releases

Peak v. Adams, 2011 WL 2582834 (Iowa 2011) (Waterman)

FACTS: Mark Peak was helping Ellis and Rachel Adams move into their new home. Mark went with Ellis and Rachel to pick up the U-Haul rental truck. Mark waited in the car while Ellis and Rachel went into the office.

The U-Haul got stuck in the Adams' driveway and in the process of trying to free the truck, Mark Peak's leg was badly broken.

Peak then hired counsel who began negotiating with Country Mutual Insurance Company which had premises liability coverage on the Adams' home. Counsel was also negotiating with Republic Western Insurance Company which was U-Haul's insurance carrier.

The claim against Republic was settled for policy limits. Peak executed a release without reading it which specifically released Ellis Adams, U-Haul in addition to various other classes of persons. The attorney did not disclose to Republic that he planned on proceeding against the Ellis and Rachel Adams individually.

Country Mutual Insurance Company obtained a copy of the release and denied coverage on the basis that the release discharged the liability of Ellis and Rachel.

PROCEDURAL HISTORY: The district court granted summary judgment to the Defendants on the negligence claim ruling that the terms of the release relinquished all of the Plaintiff's claims against both of the Defendants. The Court of Appeals reversed.

ISSUE: Whether the parties intended to grant Ellis and Rachel Adams a complete release of all claims under the terms set forth in the release.

RATIONALE: The court for purposes of its analysis examined the issue for each defendant separately utilizing established the principles of contract law. The court determined that based upon the fact that Ellis was specifically named in the release, the fact that it was never disclosed to Republic that Peak intended to proceed against the Adams individually, and the fact that the policy limits were paid despite the fact that liability was an issue determined that the parties did intend to grant Ellis a complete release. With regard to Rachael, the court determined that because she was not specifically named in the release, that agency is a question of fact, and that the release language pertaining to various classes of persons that a genuine issue of material fact exists pertaining to whether the parties intended to release Rachel.

HOLDING: The court vacated the Court of Appeals decision and affirmed the district court's grant of summary judgment in favor of Ellis and reversed the district court's grant of summary judgment in favor of Rachel.

IX. Scope of Liability (Insurance Agent vis-à-vis Insured)

***Langwith v. American Nat. General Ins. Co., 793 N.W.2d 215 (Iowa 2010) (Ternus)**

FACTS: The Langwiths had a longstanding relationship with Janet Fitzgerald who was an independent insurance agent with American National General Insurance Company. During the course of the relationship, the Langwiths had consistently carried an umbrella insurance policy with $3,000,000.00 limits in addition to an automobile liability insurance policy. They had a son named Ben. Ben's driver's license was suspended, and American General canceled Ben's coverage. After Ben's driver's license was restored, his mother contacted Fitzgerald about obtaining coverage. Fitzgerald procured a high risk policy for Ben. However, the driver exclusion for Ben remained on their umbrella policy. Ben had an accident subsequent to the restoration of his driver's license. American General denied liability under the umbrella policy, but provided coverage under the high risk policy.

PROCEDURAL HISTORY: Both parties filed motions for summary judgment. Fitzgerald filed a motion for summary judgment requesting that the court rule as a matter of law that informing Langwiths that the driver exclusion continued on the umbrella policy and advising them that title to the suburban should be transferred to Ben so Dennis could avoid legal liability for Ben's negligent driving "are outside of the scope of Fitzgerald's duty as an insurance agent." The district court granted Fitzgerald's motion for summary judgment and denied the plaintiff's motion for partial summary judgment.

ISSUE: The scope of liability owed by an insurance agent to her clients.

RATIONALE: The opinion contains an extensive historical discussion of our jurisprudence pertaining to insurance agent's duties to their clients. The court summarized the *Collegiate Manufacturing Co and Sandbute* decisions as discussing the "circumstances under which an insurance agent owes a more expansive duty to a client than the general duty to procure the requested insurance." See Langwith at 220. The *Humiston Grain Co.* decision was noted as defining "the standard of care that applies to the agent's exercise of his or her duty and how a breach of that standard must be proved." Id. The court cities the Restatement (Third) of Agency §8.07 and §8.08 extensively in its analysis of the duties between principal and agent. The court sets out a number of factors for examination to determine the extent of the duty between an insured and his/her agent such as whether: 1) the agent received consideration beyond a mere payment of the premium, 2) the insured made a clear request for advise, or 3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advise is being sought and relied upon. The court stated that the client bears the burden of proving an agreement to render services beyond the general duty to obtain the coverage requested. See Langwith at 223. In addition, "in the absence of circumstances indicating the insurance agent has assumed a duty beyond the procurement of the coverage requested by the client, the insurance agent has no obligation to advise a client regarding additional coverage or risk management." Citing Sintros v. Hamon, 810

A.2d 553, 555 (N.H. 2002). The court went on to overrule Sandbute to the "extent it limits an expanded duty those cases in which the agent holds himself out as an insurance specialist, consultant, or counselor and receives compensation for additional or specialized services." Id.

The court found that the record showed a longstanding relationship between the Langwiths with Fitzgerald coupled with the nature of relationship that a genuine issue of material fact with respect to the negligence claim pertaining to the umbrella coverage existed.

HOLDING: The court reversed the district court's ruling on summary judgment as to Fitzgerald's duty to advise them that coverage for Ben was excluded from the umbrella liability policy after Ben's license was reinstated. The district court's rulings as to the balance of the summary judgment issues were affirmed. The district court judgment was affirmed in part and reversed in part. The case was remanded back to district court for further proceedings.

***Legislative Action:** The legislature amended Iowa Code §522B.11(7)(b) in response to this case. "The general assembly declares that the holding of Langwith v. Am. Nat'l Gen. Ins. Co. (No. 08-0778) (Iowa 2010) is abrogated to the extent that it overrules Sandbute and imposes higher or greater duties and responsibilities on insurance producers than those set forth in Sandbute."

Secondary Sources: There is an article in the Winter 2011 Iowa Defense Counsel Association Newsletter authored by Benjamin J. Patterson, Lane & Waterman, L.L.P. on this case to which I direct your attention.

***Merriam v. Farm Bureau Ins., 523 N.W.2d 520 (Iowa 2011) (Cady)**

FACTS: The Plaintiff is a self-employed truck driver. The Defendant insurance agent, Stonehocker, met with the Plaintiff to discuss coverage for a home he was purchasing for his mother. During the course of the meeting, Stonehocker offered to obtain quotes for Plaintiff on other kinds of insurance coverages, vehicles, guns, and property insurance coverages. Stonehocker knew that Plaintiff was a self-employed truck driver. Stonehocker and the Plaintiff never discussed workers' compensation coverage for coverage for the Plaintiff if he was injured on the job. Subsequent to the meeting, Plaintiff was seriously injured and his left arm was crushed. The Plaintiff did not have workers' compensation coverage.

PROCEDURAL HISTORY: The district court granted the defendants' motion for summary judgment, holding that evidence established Stonehocker used reasonable care, diligence, and judgment in procuring the insurance requested by the Merriams and that, as a matter of law, there was no genuine issue of material fact for trial.

ISSUE: The primary issue presented is whether Stonehocker had an affirmative duty to inquire or advise the Merriams on Timothy's need for self-employed workers' compensation insurance coverage.

RATIONALE: The court relied on its holdings in Langwith in its analysis of the issue. Specifically, the court noted that "[t] the general principles governing agency relations [require] a more flexible method of determining [whether] the

undertaking of an insurance agent is appropriate." See Merriam at 523 citing Langwith at 793 N.W.2d 215, 221. In addition, " '[a] n agent has duty to act in accordance with the express and implied terms of any contract between the agent and the principal.' " Id. The court focused on the short duration of the relationship of the parties and the fact that Stonehocker was never asked about workers' compensation coverage for the plaintiff to determine that he did not have a duty to so inquire.

HOLDING: The court affirmed the district court's granting of summary judgment to the defendants'.

***Legislative Action:** Please see the recent amendment to Iowa Code §522B.11(7)(b).

***Amling v. State Farm Ins. Co., 2011 WL 1584215 (Iowa Ct. App. 2011) (Mahan) (Unpublished Opinion)**

FACTS: Amlings purchased a home for $34,000.00 in 1988. Over the course of the next ten years, they spent $40,000.00 renovating the home. The Plaintiff is a contractor, and he performed the labor himself. In 1998, the Amlings obtained a farm/ranch policy from State Farm Insurance with $90,000.00 in coverage for the home and $53,000.00 in coverage for personal property.

In 2004, a sunroom was added to the home. The Amlings did not increase their coverage amounts aside from inflation protection.

In March of 2006, the home burned down and was considered a total loss. The Amlings were paid their policy limits by State Farm in addition to debris removal. State Farm also paid additional living expenses for the Amlings.

PROCEDURAL HISTORY: The district court entered summary judgment in favor of State Farm on the Plaintiff's claims of negligence, negligent misrepresentation, bad faith, and punitive damages.

ISSUES: Whether State Farm agent agreed to render services to Amlings beyond the general duty to obtain the coverage requested. Whether State Farm had a reasonable basis for denying the Amling's claims. Whether State Farm willfully and wantonly disregarded the Amling's rights.

RATIONALE: With regard to the negligence issues, the court relied on holding in the Langwith v. Am. Nat'l Gen.Ins. Co., 793 N.W.2d 215, 222 (Iowa 2010):

Therefore, we hold that is for the fact finder to determine, based on a consideration of all of the circumstances, the agreement of the parties with respect to the service to be rendered by the insurance agent and whether that service was performed with the skill and knowledge normally possessed by insurance agents under like circumstances. Some of the circumstances that may be considered by the fact finder in determining the undertaking of the insurance agent include the nature and content of the discussions between the agent and the client; the prior dealings of the parties, if any; the knowledge and sophistication of the client; whether the agent holds himself out as an insurance

specialist, consultant, or counselor; and whether the agent receives compensation for additional or specialized services.

The Langwith court also stated" The client bears the burden of proving an agreement to render services beyond the general duty to obtain the coverage requested." Id. at 223. "In the absence of circumstances indicating the insurance agent has assumed a duty beyond the procurement of the coverage requested by the client, the insurance agent has no obligation to advise a client regarding additional coverage or risk management." Id.

The court found that the agent did not receive compensation for additional or specialized services from the Amlings. In addition, there was no evidence that Amling ever asked the agent how much coverage he should have on the home, or whether the existing coverage was adequate. Additionally, there was no evidence showing what square footage for the house was used when the coverage was obtained in 1998.

With regard to the bad faith claim, the court stated that to establish a first-party bad faith claim that the plaintiff must show (1) the insurer had no reasonable basis for denying benefits under the policy and (2) the insurer knew, or had reason to know, that its denial was without basis. Rodda v. Vermmer Mfg., 734 N.W.2d 480, 483 (Iowa 2007).

In this case, the court found that State Farm denied some of the claims because the items claimed were not covered under the terms of the policy and denied others because the Amlings did not provide receipts.

With regard to the punitive damage claim, the court relied on the principle that punitive damages may be awarded where there is clear, convincing, and satisfactory evidence supporting a finding that the defendants willfully and wantonly disregarded the rights of the plaintiff. See, Van Sickle Constr. Co. v. Wachovia Commerical Mtg., Inc., 783 N.W.2d 684, 689 (Iowa 2010). The court found that in this case that no such evidence was presented.

HOLDING: The court affirmed the grant of summary judgment to the Defendants.

***Legislative Action:** Please note the recent amendment to Iowa Code §522B.11(7)(b).

Rule 1.413(1) Sanctions: A Cure or a Curse?

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RULE 1.413(1) SANCTIONS: A CURE OR CURSE?

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I. Introduction

This paper will examine the evolution of civil litigation sanctions in Iowa. The sanctions that are the subject of this paper are those assessed against parties (and attorneys) who file motions and pleadings that are not merited in either fact or law or filed for an improper purpose. Sanctions imposed as a result of discovery violations are outside the scope of this paper.

This paper can be characterized as Iowa-specific. Much discussion will concern the relevant Iowa statutes[1], rules[2] and case law governing litigation sanctions. However, because much of the Iowa jurisprudence has been influenced by the evolution of the Federal law[3], reference will also be made to the Federal case law concerning Rule 11 of the Federal Rules of Civil Procedure. The question we pose, but cannot answer, is whether the application of the Rules corrected a problem or only made litigation more contentious and the relationship between opposing attorneys more testy.

[1] Iowa Code § 619.19 (2011). While not discussed in this paper, the Iowa Code contains a provision that allows a trial court to order a party to pay court costs and an opponent's reasonable attorney fees at the outset of an action if said party has, in the past five years, unsuccessfully prosecuted three or more actions and the Court deems these actions frivolous. Iowa Code § 617.16 (2011).
[2] Iowa R. Civ. P. 1.413(1)
[3] See Barnhill v. Iowa Dist. Ct., 765 N.W.2d 267, 274 (Iowa 2009) (stating that the relevant Iowa Rule was modeled after Fed. R. Civ. P. 11 and that the Court looks to Federal precedent for guidance).

II. Litigation Sanctions in General

Litigation sanctions arose as a means of deterring the filing of pleadings that were harassing and/or frivolous.[4] The common law courts have been faced with the problem of frivolous lawsuits "since the court system became mature and, indeed, prior to that time."[5] Frivolous lawsuits are obviously harmful to the Defendants: he or she is "subject to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his [or her] business or profession, and, in some cases, harm to reputation and even physical damage to person or property."[6] The Court system is also harmed by these lawsuits, in that court employees are subjected to clogged dockets, distractions and delays.[7] The public is also harmed: those with valid claims must face delay and limited attention from the court staff; and, of course, the public must foot the bill for this increased workload among court staff.[8]

While most can agree on the problematic nature of frivolous lawsuits, the question of whether a lawsuit is frivolous is the subject of some disagreement.[9] Commentators have expressed concern that the threat of sanctions has prevented litigants from pursuing "legitimate and colorable arguments" thereby depriving said litigants of their day in court.[10] Other concerns have included the creation of satellite litigation, unpredictable application and disproportionate harm to particular plaintiffs.[11]

Attorneys also have an ethical obligation to abstain from filing frivolous pleadings. Under the ABA's Model Rules of Professional Responsibility, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for

[4] John W. Wade, On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions, 14 HOFSTRA L. REV. 433, 433 (1986); Carol C. Knoepfler, Note, Divining an Approach to Attorney Sanctions and Iowa Rule 80(A) Through an Analysis of Federal and State Civil Procedure Rules, 72 IOWA L. REV. 701, 701-702 (1987); Byron C. Keeling, Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions, 21 PEPP. L. REV. 1067, 1068 (1994).
[5] Wade, 14 HOFSTRA L. REV. at 433.
[6] Id.
[7] Id.
[8] Id.
[9] See Keeling, 21 PEPP. L. REV. at 1070 (discussing how states differ in their definition of "frivolous").
[10] Id.
[11] 5A Wright & Miller, Federal Practice & Procedure: Civil 3d § 1332, at 480-95 (2004).

doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[12] The Iowa Supreme Court has adopted this Rule.[13] Attorneys who have violated Rule 32:3.1 have been subject to suspension[14] and even license revocation.[15]

III. Litigation Sanctions in Iowa

There are two sources of litigation sanctions in Iowa. Rule 1.413(1) of the Iowa Rules of Civil Procedure is the State law counterpart to Federal Rule 11.[16] Additionally, the Iowa Code allows for sanctions through a provision containing language identical to Rule 1.413(1).[17] Rule 1.413 states:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party.[18]

[12] AMRPR 3.1.
[13] Iowa Ct. R. 32:3.1.
[14] Iowa Supreme Ct. Bd. of Professional Ethics & Conduct v. Hohnbaum, 554 N.W.2d 550, 552 (Iowa 1996) (Attorney's license suspended for three months after he amended his Answer in a car accident case to deny that his client rear-ended the Plaintiff's vehicle, even though conversations with the client and the insurance company revealed that she had, in fact, rear-ended the vehicle).
[15] Iowa Supreme Ct. Bd. of Professional Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 519-20 (Iowa 1996) (Attorney's license revoked after Court found he initiated frivolous lawsuits).
[16] Rule 1.413 is the counterpart to Fed. R. Civ. P. 11 insofar as the former is modeled after the latter. However, the two are different as written. Differences between the two rules will be discussed infra.
[17] Iowa Code § 619.19.
[18] Iowa R. Civ. P. 1.413(1).

The policy aims of Rule 1.413(1) are to encourage professionalism in the practice of law, deter the filing of frivolous lawsuits, and to "deter misuse of pleadings, motions, or other papers."[19] Note that under Rule 1.413, like Rule 11, ***all*** pleadings and motions are subject to sanctions—not just the petition.[20]

Rule 1.413(1) imposes three separate and independent duties on an attorney: first, the attorney has a duty to read the pleading; second, a duty to conduct a reasonable inquiry; and third, a duty to abstain from filing motions for an improper purpose.[21] A violation of one of the duties constitutes a violation of the Rule. Unlike its Federal counterpart, the Iowa Rule *requires* a Court to impose a sanction if it finds a violation. Compliance with Rule 1.413 is governed by an objective standard at the time the challenged pleading is filed.[22] "'The test is 'reasonableness under the circumstances,' and the standard to be used is that of a reasonably competent attorney admitted to practice before the district court.'"[23]

IV. **What Constitutes a Reasonable Inquiry?**

A reasonable inquiry must be made with respect to both fact and law.[24] The Iowa Supreme Court has adopted the standards set forth by the American Bar Association's Section on Litigation.[25] Under these standards, the following factors are considered in determining whether a reasonable inquiry into both fact and law has been made:

1. The amount of time available to the signer to investigate the facts and research and analyze the relevant legal issues;
2. The complexity of the factual and legal issues in question;

[19] Barnhill, 765 N.W.2d at 273.
[20] Iowa R. Civ. P. 1.413; Fed. R. Civ. P. 11.
[21] Barnhill, 765 N.W.2d at 272; see also Mark S. Cady, Curbing Litigation Abuse and Misuse, 36 DRAKE L. REV. 483, 490-501 (1986-87).
[22] Barnhill, 765 N.W.2d at 273.
[23] Id. (quoting Weigel v. Weigel, 467 N.W.2d 277, 281 (Iowa 1991) (quoting Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986))).
[24] Cady, 36 DRAKE L. REV. at 492.
[25] Mathias v. Glandon, 448 N.W.2d 443, 446-47 (Iowa 1989). The ABA standards are reprinted at 121 F.R.D. 101, 114 (1988).

3. The extent to which the pre-signing investigation was feasible;
4. The extent to which pertinent facts were in the possession of the opponent or third parties or otherwise not readily available to the signer;
5. The clarity and ambiguity of existing law;
6. The plausibility of the legal positions asserted;
7. The knowledge of the signer;
8. Whether the signer is an attorney or pro se litigant[26];
9. The extent to which counsel relied upon his or her client for the facts underlying the pleading, motion, or other paper; and
10. The resources available to devote to the inquiries.[27]

Factual inquiry presents such issues as sources of information (whether from client or third party), the information available[28] and the time in which an attorney can conduct an investigation. With respect to reliance upon a client, the general rule is that "blind reliance on the client is seldom a sufficient inquiry."[29] Legal inquiry presents such issues as the state of the law at the time of filing[30], the ability of the lawyer to research the law[31], the amount of time

[26] Pro se status does not shield a party from compliance with the requirements of or sanctions under Rule 1.413. Buhr v. Howard County Equity, 2011 WL 1584348 (Iowa Ct. App., April 27, 2011).
[27] 121 F.R.D. at 114-16.
[28] See Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990) (quoting Frantz v. United States Powerlifting Federation, 836 F.2d 1063, 1068 (7th Cir. 1987)) ("'Rule 11 must not bar the courthouse door to people who have some support for a complaint but need discovery to prove their case'"); see also Brooks Web Services, Inc. v. Criterion 508 Solutions, Inc., 780 N.W.2d 248 (Table), 2010 WL 446553 (Iowa Ct. App.) (citing Schettler v. Iowa Dist. Ct., 765 N.W.2d 459, 466 (Iowa 1993) ("[O]ur civil procedure system does not expect parties to have their entire case established at the time the petition is filed, and acknowledges that unforeseeable mistakes in strategy occur at trial, and witnesses may change their testimony when cross-examined").
[29] Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (abrogated on other grounds by Childs v. State Farmu Mut. Auto Ins. Co., 29 F.3d 1018, 1024, n. 18 (5th Cir. 1994); see also Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 669-70 (W.D. Mo. 1990); Fleming Sales Co., Inc. v. Bailey, 611 F. Supp. 511, 519 (C.D. Ill. 1985); Coburn Optical Industries, Inc. v. Cilco, Inc., 611 F.Supp. 656, 659 (C.D. N.C. 1985).
[30] Does an attorney have a duty to reevaluate his or her client's position as the case proceeds? Until 1988, the Fifth Circuit held that an attorney had an obligation to review and reevaluate his or her client's position as the case developed. Childs, 29 F.3d at 1024, n. 18 (citations omitted). The Court reversed this precedent in Thomas v. Capital Security Services, Inc., 836 F.2d 866, 870 (5th Cir. 1988) (en banc). In Childs the Court stated that, rather than constantly reevaluate the client's position, an attorney has a duty to refrain from filing a motion or other pleading advancing a position after facts are discovered that

needed to research the law and the line between making a good faith effort to extend or restrict existing law and making a frivolous claim.[32]

V. The Improper Purpose Prong

Rule 1.413 prohibits an attorney from filing a pleading for an improper purpose "such as to harass or cause unnecessary delay or needless increase in the cost of litigation."[33] Whether a pleading constitutes harassment is determined, not by the effect of the pleading on the opposing party, but rather, on the "improper purpose of the person signing the document, tested objectively…"[34] In ascertaining the signer's improper motive, the Court must view the surrounding facts and make a determination of the signer's subjective intent.[35] The Fourth Circuit has indicated that the following factors are relevant in making this determination: Repeated filings; outrageous nature of the claims made; and a signer's experience in a particular area of law.[36]

reveal a lack of factual support for said position. Id.; see also Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987) (Rule 11 does not require counsel to continuously review pleadings and amend pleadings after discovering new information). The Iowa Supreme Court addressed this issue in Everly v. Knoxville Cmty. Sch. Dist., 774 N.W.2d 488 (Iowa 2009). This case will be discussed infra.

[31] In Continental Airlines, Inc. v. Group Systems Intern. Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986), the Court found that Defense Attorney failed to conduct a reasonable legal inquiry when he failed to address Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), in a Motion to Dismiss for lack of personal jurisdiction. Continental Airlines, 109 F.R.D. at 597. In arriving at this ruling, the Court rejected counsel's argument that he did not have Westlaw or Lexis, writing "These tools may be helpful in discovering the more obscure or the very recent cases not yet generally reported. Their aid seems unnecessary in reaching U.S. Supreme Court cases from the prior term." Id. at n. 3.

[32] See Barnhill, 765 N.W.2d at 279 ("Our law is constantly evolving and hopefully improving because talented attorneys are willing to fight uphill battles … However, we will not allow an attorney to act incompetently or stubbornly persistent, contrary to the law or facts, and then later attempt to avoid sanctions by arguing he or she was merely trying to expand or reverse existing case law").

[33] Iowa R. Civ. P. 1.413(1).

[34] Cady, 36 DRAKE L. REV. at 499; see also In re Kunstler, 765 F.2d 505, 518-19 (4th Cir. 1990) ("it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit").

[35] Kunstler, 765 F.2d at 519.

[36] Id.

Can an attorney or party, who files a claim or motion that is grounded in fact and in law, be sanctioned if that same paper is filed for an improper purpose? The answer appears to be yes, though in very rare circumstances. Then-Judge Cady observed:

> Thus, it is difficult to imagine that a complaint which passes the first prong of the rule as supported by fact and law could fail under the improper purpose test. Filing successive complaints based on rejected legal propositions could, however, translate into harassment. Moreover, filing successive motions or actions, supported by facts and law, could constitute an improper purpose where there is an identity of parties and a clear indication that the proposition of the second claim was resolved in the first claim.[37]

Harassment is not the only improper purpose proscribed by Rule 1.413. "If a complaint is not filed to vindicate rights in court, its purpose must be improper."[38] Courts have sanctioned parties for filing motions to for the purposes of delaying trials.[39] Other courts have sanctioned parties for filing pleadings to delay a client's obligation to pay a debt or prevent a collection action from proceeding.[40]

It is important to note that the party in violation of Rule 1.413 need not act with malice or bad faith.[41] "The Rule 'was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, professional incompetence.'"[42] However, whether the violation was willful is relevant for determining the sanction to be imposed.[43]

[37] Cady, 36 DRAKE L. REV. at 499.
[38] Kunstler, 765 F.2d at 518.
[39] Cady, 36 DRAKE L. REV. at 499 (citing a case where Court sanctioned attorney for removing a case from state court to federal court on the eve of trial, simply to delay trial).
[40] MHC Inv. Co. v. Racom Corp., 209 F.R.D. 431, 437 (S.D. Iowa 2002), aff'd at 323 F.3d 620 (8th Cir. 2003) (Federal Court sanctioned Iowa law firm after finding that it filed answers for the purpose of delaying client's obligation on a debt); see also In re Weiss, 111 F.3d 1159, 1171 (4th Cir. 1997) (Pleading filed for central purpose of delaying or avoiding a collateral foreclosure proceeding).
[41] However, the existence of bad faith is a factor in determining the amount of the sanction. Barnhill, 765 N.W.2d at 276-77 (citing 121 F.R.D. 125-26).
[42] Id. 273 (quoting Perkins v. Gen. Motors Corp., 129 F.R.D. 655, 658 (W.D. Mo. 1990) (quoting Gaiardo, 835 F.2d at 482).
[43] Gaiardo, 835 F.2d at 482.

RECENT IOWA CASE LAW ON SANCTIONS

When then-Judge Cady wrote his Drake Law Review article in the mid-1980s, little case law on Rule 1.413 existed. Nearly 25 years later, Iowa Courts have had several opportunities to develop this body of law. In 2009, the Iowa Supreme Court addressed two cases involving sanctions. One year later, the Iowa Court of Appeals took up a sanctions case. These cases will now be reviewed.

1. **Barnhill v. Iowa Dist. Ct., 765 N.W.2d 267 (Iowa 2009).**

The facts of the Barnhill case are complex and span nearly a decade.[44] In 1998, attorney Kathryn Barnhill, on behalf of Jerry's Homes, Inc., filed several commercial law claims against Tamko Roofing Products, Inc.[45] The suit was filed in state court, but was later removed to federal court.[46] The purpose of the suit was to compel Tamko to repair roofs on houses built by Jerry's Homes or for money damages in the amount needed to repair the roofs.[47] A jury returned a verdict of $1.6 million on the promissory estoppel claim, which was later vacated on a post-trial motion.[48] The trial court's ruling was affirmed by the Eighth Circuit Court of Appeals.[49]

Three years after filing the initial lawsuit, Barnhill commenced a class-action lawsuit in state court against Tamko and its President and CEO, David Humphreys.[50] Jerry's Homes was a representative plaintiff.[51] The Petition alleged the following causes of action against Tamko and Humphreys:

- Breach of express warranty;
- Breach of implied warranty;
- Fraudulent misrepresentation;

[44] Barnhill, 765 N.W.2d at 270-72.
[45] Id. at 270.
[46] Id.
[47] Id.
[48] Id.
[49] Id. (citing Jerry's Homes, Inc. v. Tamko Roofing Prods., Inc., 40 Fed. App'x 326 (8th Cir. 2002)).
[50] Id.
[51] Id.

- Negligent misrepresentation;
- Rescission due to permissible liquidated damages;
- Rescission due to unconscionability of express warranty; and
- Violation of Missouri fair business practices act, based upon Tamko's status as a Missouri corporation.[52]

Tamko and Humphreys moved for summary judgment and prevailed on many claims.[53] Summary judgment was granted in favor of Humphreys on all causes of action except fraudulent misrepresentation.[54] The grants of summary judgment were affirmed on all six counts; additionally, the Court of Appeals reversed the denial of summary judgment on the fraudulent misrepresentation, resulting in dismissal of all claims against Humphreys.[55] Following the Court of Appeals rulings in favor of Humphreys, the District Court granted summary judgment in favor of Tamko on the remaining issues and the Court of Appeals affirmed.[56]

During the appeals process, Humphreys (but not Tamko) sought sanctions against the plaintiffs and against Barnhill.[57] According to Humphreys, "None of the claims pursued by plaintiffs … were well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[58] The trial court awarded sanctions against Barnhill in the amount of $25,000.[59] In sanctioning Barnhill, the District Court described her pleadings as "confusing, convoluted, self-contradictory and elusively vague."[60] The District

[52] Id. at 270-71.
[53] Id. at 271.
[54] Id.
[55] Id. (citing Sharp v. Tamko Roofing Prods., Inc., 695 N.W.2d 43 (Table), 2004 WL 2579638 (Iowa Ct. App.)).
[56] Id. (citing Sharp v. Tamko Roofing Prods., Inc., 2006 WL 2873062 (Iowa Ct. App., October 11, 2006)).
[57] Id.
[58] Id.
[59] Id.
[60] Id.

Court wrote "[i]t is as though Barnhill said whatever needed to be said at each step to just get past the moment, whether there was a legitimate basis for saying it or not."[61]

Barnhill filed a petition for a writ of certiorari. The Court of Appeals annulled the writ and the Supreme Court granted further review.[62] The issue on appeal was whether the district court abused its discretion in sanctioning Barnhill.[63]

The Supreme Court, in an opinion by Justice Streit, annulled the writ.[64] The Court first reviewed each claim to determine whether "a reasonably competent Iowa attorney" would not have pursued these claims.[65] The Court concluded that a reasonably competent Iowa attorney would not have pursued the warranty claims because a corporate officer is not generally liable for the corporation's contracts.[66] The Court rejected Barnhill's argument that the warranty claim was grounded in tort law (where an officer could be liable) and not contract law.[67] "No reasonably competent attorney would conclude, based on [a passage in Tomka v. Hoechst Celanese Corp.[68], discussing warranty claims and products liability claims] that a breach of warranty can be based on a tort theory."[69] Therefore, the District Court did not err in finding a violation of R. 1.413 on the warranty claims.

With respect to the fraudulent misrepresentation claim, the trial court found a violation of R. 1.413 because Barnhill "pled facts that were literally untrue."[70] However, a sanction was not imposed because the district court did not grant summary judgment on the issue and therefore, Humphreys would have had to defend against this claim in any event.[71] The Court did impose

[61] Id. at 271-72.
[62] Id. at 272.
[63] Id. at 273 ("We must determine whether the district court abused its discretion in concluding a reasonably competent Iowa attorney would not have brought these claims and that $25,000 is an appropriate sanction").
[64] Id. at 272.
[65] Id. at 273-76.
[66] Id. at 273.
[67] Id. at 274.
[68] 528 N.W.2d 103 (Iowa 1995)
[69] 765 N.W.2d at 274.
[70] Id.
[71] Id.

sanctions on the negligent misrepresentation claim.[72] The Court found that Barnhill was advised by Humphreys' attorney that negligent misrepresentation claims are cognizable only against those in the business of supplying information.[73] Despite this letter, she refused to dismiss the claim. Barnhill alleged that the case of Burbach v. Radon Analytical Laboratories, Inc.,[74] supported her claim against Humphreys and Tamko.[75] The Court held that the Burbach case "had nothing to do" with the issues in this case.[76] Therefore, the Court affirmed the District Court's award of sanctions.

Finally, the Court determined whether sanctions were proper for the alleged violation of the Missouri statute.[77] Although the statute imposed liability on a company's CEO, the statute required the cause of action be brought in a Missouri Circuit Court. The Court rejected Barnhill's argument that the statute was not pled against Humphreys, finding that there were references to Humphreys in the petition. Therefore, the sanctions against Barnhill were upheld.

The Court determined that Barnhill violated Rule 1.413. The next question was whether the trial court abused its discretion in imposing a sanction of $25,000.[78] Until Barnhill, the Iowa Supreme Court had not established criteria to aid a district court in determining an appropriate sanction. The Court adopted the following factors from the Fourth Circuit's decision in Kunstler to aid lower courts in determining the amount of a monetary sanction: "'the reasonableness of the opposing party's attorney fees; the minimum to deter; the ability to pay; and factors related to the severity of the violation.'"[79] However, the Court also recognized the following factors set

[72] Id.
[73] Id.
[74] 652 N.W.2d 135 (Iowa 2002).
[75] 765 N.W.2d at 274.
[76] Id.
[77] Id.
[78] Under Rule 1.413, a Court must impose a sanction on an attorney and/or party if that attorney and/or party violates the Rule. This mandatory requirement is contrary to Federal Rule 11, in which a sanction is not mandatory, even if a violation occurred.
[79] Barnhill, 765 N.W.2d at 277 (citing Kunstler, 914 F.2d at 523).

forth by the American Bar Association and encouraged District Courts to consider these factors as they relate to the Kunstler factors:

- "The good faith or bad faith of the offender;"
- "The degree of willfulness, vindictiveness, negligence or frivolousness involved in the offense;"
- "The knowledge, experience and expertise of the offender;"
- "Any prior history of sanctionable conduct on the part of the offender;"
- "The reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;"
- "The nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;"
- "The relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;"
- "The risk of chilling the specific type of litigation involved;"
- "The impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;"
- "The impact of the sanction on the offended party, including the offended person's need for compensation;"
- "The relative magnitude of sanction necessary to achieve the goal or goals of the sanction;"
- "Burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;"
- "The degree to which the offended person attempted to mitigate the prejudice suffered by him or her;"

- "The degree to which the offended person's own behavior caused the expenses for which recovery is sought;"
- "The extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and"
- "the time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion or other paper."[80]

Applying the Kunstler factors, the Court found that the district court did not abuse its discretion in arriving at a sanction of $25,000. In arriving at its decision, the Court considered Humphreys' attorney fees of nearly $150,000 and the amount of work required of Humphreys' attorney in defending the claims. The Court wrote,

> The $25,000 sanction is reasonable given the legal and factual issues involved and the sheer number of pleadings, motions, discovery, and hearings. In total there were six sanctionable counts asserted against Humphreys, five petitions, more than a dozen individually-named plaintiffs, eight motions for summary judgment against nine individually-named plaintiffs, a class certification appeal, limited remand procedures, and a summary judgment appeal.[81]

The Court also considered Barnhill's trial tactics and lack of candor.[82] The Court cited the district court's observation that Barnhill "said whatever needed to be said at each step just to get past the moment" regardless of the legitimacy of her statements.[83] The Court also cited many instances in which Barnhill made false representations to the trial court.[84] In discussing Barnhill's candor to the tribunal, the Court addressed the balance between an attorney's role as a zealous advocate for a client and her "'special responsibility for candor and fairness in all of his [or her] dealings with a court.'"[85] The Court found that the only reason Barnhill kept

[80] Id. at 276-77 (quoting 121 F.R.D. 125-26).
[81] Id. at 277-78.
[82] Id. at 278.
[83] Id.
[84] Id.
[85] Id. (quoting Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217-18 (Iowa 1996)).

Humphreys in the suit was to "force or coerce a settlement of the litigation so Humphreys would avoid personal liability."[86] The Court wrote that it "is an abuse to drag corporate officers into corporate litigation with hopes to affect their attitude and professional judgment involving corporate responsibility and obligations."[87]

The Court ultimately held that the $25,000 sanctions was sufficient to deter Barnhill from similar conduct in the future. The Court also held that sanction was also sufficient to "partly compensate" Humphreys for his expenses.[88]

Justice Wiggins authored a dissenting opinion, which Justice Hecht joined. He contended that compensation is not a purpose of monetary sanctions under either Rule 1.413 or Rule 11.[89] He also wrote that both the district court and the majority failed to apply the Kunstler factors appropriately. With respect to the first factor—reasonableness of the opposing party's attorney fees incurred by defending the action—he wrote that the Court failed to separate the fees Humphreys expended on the fraudulent misrepresentation claim (which the court did not sanction) and the meritless claims, which the court did sanction.[90] Citing then-Judge Cady's Law Review article, he noted that "'only those expense incurred in defending the frivolous claims'" should be considered.[91] Justice Wiggins took the majority to task for not applying the second and third factors—ascertaining the minimum amount necessary to deter the sanctionable conduct and ability of the sanctioned party to pay—at all.[92] Justice Wiggins concluded that "the majority's failure to apply the four-step test and scrutinize the district court's award of the sanction gives the district court unlimited power to craft a sanction without giving any explanation as to how it arrived at the amount."[93] Finally, Justice Wiggins wrote,

[86] Id. at 279.
[87] Id.
[88] Id.
[89] Id. at 280.
[90] Id.
[91] Id. at 281 (quoting Cady, 36 DRAKE L. REV. at 506).
[92] Id. at 282.
[93] Id.

> It is standard practice for defendants to raise a myriad of defenses in their answers to petitions. These defenses include failure to state a cause of action, statute of limitations defenses, laches, estoppel, comparative fault, assumption of risk, failure to mitigate damages, unreasonable failure to avoid injury, or misuse. Many times defendants raise these defenses without factual support. If we abide by the majority's analysis in its review of the district court, the attorneys that raise these defenses without support should be sanctioned, and that sanction would be unreviewable.[94]

Justice Wiggins concluded his dissent by stating that the district court abused its discretion as follows: 1) not determining the time spent by the defendant to defend against the sanctioned activity; 2) not determining the minimum amount needed to deter the conduct; 3) not determining the ability of the sanctioned party to pay; and 4) not considering other factors as set forth in the ABA standards.[95]

The Barnhill case provides insights into how attorneys view sanctions. At least with respect to the negligent misrepresentation claim, Humphreys' attorney demonstrated a willingness to resolve the dispute without resorting to litigation. He did so by sending a letter to Barnhill and informing her of his position on the current, unambiguous state of the law of negligent misrepresentation. The fact that the Court recognized this effort is evidence that it was considered in determining whether Barnhill's conduct violated Rule 1.413.

By contrast, the threat of sanctions did not stop Barnhill from pursuing her case. Even if the letter from Humphreys' attorney did not explicitly mention sanctions, the thought should have crossed her mind: Federal Rule 11 has been in place since 1937 and the Rule's relevance has increased since its amendments in the 1980s and 1990s.[96] It is easy to accuse Barnhill of ignoring the letter, and continuing in a crusade to shake down Mr. Humphreys for money. However, many other facts might explain Barnhill's actions. Perhaps Iowa trial courts had been

[94] Id. at 283.
[95] Id.
[96] See 5A Wright & Miller at § 1332.

hesitant to impose sanctions on attorneys. Perhaps the negligent misrepresentation claim was one of her weaker claims, but she felt differently about the other claims.[97]

The Barnhill case supports the notion that sanctions are used to deter egregious conduct by attorneys. Critics of sanctions have alleged that they deter attorneys from merely advancing a novel cause on behalf of a client and disproportionately punish plaintiffs' attorneys who zealously advocate for clients.[98] Barnhill was not sanctioned for any such conduct; rather, her conduct included displaying a lack of candor to the Court. Evidence of this lack of candor included her telling the Court that she did not plead the Missouri statute against Humphreys, when the Court found references to Humphreys in that pleading.[99] Critics would likely agree that lack of candor to the tribunal is reprehensible at most, and unethical at the very least.[100]

Finally, much of Justice Wiggins' dissent is devoted to the assertion that compensation is not a function of sanctions under Rule 1.413.[101] This is a curious position in light of the language in the rule itself that that allows a Court to impose "an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee."[102] Justice Wiggins notes that "although Rule 11 allows an award of attorney fees to the opposing party, the rule's mention of attorney fees does not create an entitlement to full compensation when an opposing party files a frivolous pleading."[103] In this case, Humphreys certainly did not receive full compensation of his attorney fees: the Court's sanction of $25,000 pales in comparison with the $148,596.37 Humphreys spent defending this lengthy litigation.[104]

[97] The Iowa Court of Appeals discussed the relationship between Rule 1.413 and pleading in the alternative in Brooks Web Services, Inc., 780 N.W.2d 248 (Table), 2010 WL at *6, which will be discussed *infra.*
[98] 5A Wright & Miller at § 1332.
[99] 765 N.W.2d at 274.
[100] See Iowa Ct. R. 32:8.4(c) ("It is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").
[101] 765 N.W.2d at 280.
[102] Iowa R. Civ. P. 1.413(1) (emphasis added).
[103] 765 N.W.2d at 280 (citing White v. Gen. Motors Corp., 908 F.2d 675, 683-84 (10th Cir. 1990).
[104] Id. at 277.

Everly v. Knoxville Cmty. Sch. Dist., 774 N.W.2d 488 (Iowa 2009).

This lawsuit was prompted by the Knoxville School District's decision to award ABC Construction a contract to replace lights in its football stadium. Plaintiff Everly was a citizen taxpayer in Knoxville, Iowa.[105] Everly, through his attorney, Kathryn Barnhill, brought suit for temporary injunction and writ of certiorari against the Knoxville Community School District and Superintendent Randy Flack. Also joined in this suit was Musco Sports Lighting, L.L.C., a supplier of ABC.

Everly alleged that the Defendants violated Iowa Code § 394.99 (award of a contract due to bid specifications discriminating in favor of a single bidder). Everly also alleged fraud against all defendants. Everly asked that the commencement of the construction project be stayed, that the act be annulled and declared void and that the project be rebid.[106]

Following the denial of a temporary injunction, Musco filed a Motion to Dismiss the action. Specifically, Musco argued that it had no contractual relationship with the school district, since it was a supplier of a bidder; that a writ of certiorari was not applicable; and that Everly failed to state a claim for fraud, since he did not allege detrimental reliance.[107] Everly resisted Musco's Motion to Dismiss.

In addition to resisting Musco's Motion to Dismiss, Everly filed for leave to amend his petition.[108] Everly was seeking to commence a class action on behalf of all the taxpayers of the Knoxville School District against Musco.[109] Everly relied upon a fraudulent inducement theory, contending that Musco and Flack, the superintendent, colluded to have the bid awarded to Musco, even though both parties knew that Musco's product was nonresponsive to the bid

[105] Everly, 774 N.W.2d at 489.
[106] Id. at 490.
[107] Id.
[108] Id. at 491.
[109] Id. The Petition in included Dennis Fee as an additional Plaintiff.

specifications.[110] Finally, Everly alleged that the school board relied upon the Musco's misrepresentations in awarding the bid and had no means of discovering the product's deficiencies.[111]

Everly dismissed his certiorari claims against the School District and the Superintendent on the day of the hearing on the Motion to Dismiss. The reason for this dismissal is unclear, at least from the reported decision. The Court dismissed the remaining claims against Musco on the grounds that a taxpayer cannot sue a private entity when that entity was not a party to a supposedly illegal contract. The Court never ruled on Everly's motion to amend his petition; however, the dismissal of the underlying claim against Musco rendered the application moot.[112]

Following the dismissal of these claims, Musco filed an application for attorney fees and costs under Rule 1.413(1). Musco alleged that it was entitled to sanctions since it was not a proper party to the action. Musco submitted an affidavit, showing attorney fees of $45,030 in connection with this action and $612 in court costs. Everly responded that Musco was a proper party to the fraud case since it was a third-party beneficiary of the Knoxville-ABC contract. Everly also claimed that Musco should have been joined in the certiorari action because its rights were affected.[113] Finding that Everly's lawsuit was "riddled with deficiencies … that should have been apparent … from the start," the trial court imposed sanctions in the amount of $47,403.87.[114]

Everly appealed the ruling on the Motion to Dismiss and the award of sanctions. The Iowa Court of Appeals affirmed this ruling. The Iowa Supreme Court granted further review and, in an opinion by Justice Wiggins, affirmed in part and reversed in part.

The Court broke the appeal into two separate issues: first, was the naming of Musco in the original certiorari petition sanctionable? Second, did Everly's attorney engage in

[110] Id.
[111] Id.
[112] Id.
[113] Id. at 491-92.
[114] Id. at 492.

sanctionable conduct in continuing to pursue the certiorari claim against Musco, after dismissing that same claim against the Knoxville School District?

With respect to the first question, the Court noted that Musco was a private entity and a supplier to a successful bidder.[115] The Court also noted that the Iowa Rules of Civil Procedure allow a writ of certiorari to be granted "'only when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally.'"[116]

Everly argued that adding Musco was warranted by existing law or a good faith argument for the extension thereof.[117] According to Everly, while tribunals or boards exercising judicial functions are necessary parties in certiorari actions, other parties must also be brought into the action "if their rights are to be adjudicated."[118]

The Court found that case law from Iowa and from other jurisdictions supported Everly's claim.[119] The Iowa case lending credence to Everly's argument was Sear v. Clayton County Zoning Bd. of Adjustment.[120] The Court held that Sear stood for the proposition that the rules of joinder apply to certiorari actions.[121] "Although Sear is not factually identical to [the Everly] case, it indicates that our rules of civil procedure may allow the joinder of a party to a certiorari action whose rights may be affected by adjudication of the action."[122]

After discussing the policy reasons for allowing a private entity to be joined in a certiorari action, the Court wrote "up to the time when Everly dismissed the school district and its superintendent from his suit, a reasonably competent attorney could argue under existing law, or make a good faith argument for the extension of existing law, that such a party may be joined

[115] Id. at 493.
[116] Id. (quoting Iowa R. Civ. P. 1.1401).
[117] Id.
[118] Id.
[119] Id. at 494.
[120] 590 N.W.2d at 512 (Iowa 1999).
[121] Everly, 774 N.W.2d at 494.
[122] Id.

in a certiorari action."[123] The Court held that naming Musco as a party in a certiorari action, along with the school district and its superintendent, was not sanctionable conduct at the time the pleading was filed.[124] Thus, the District Court abused its discretion in sanctioning Everly's attorney.

The second question was whether Everly's decision to pursue the certiorari action after the dismissal of the school district and the superintendent constituted sanctionable conduct. The Court found that, following the dismissal of the two public entities, "the landscape materially changed" and that Everly would not be entitled to recover against Musco, even if he proved the contract was illegal.[125] The Court wrote "we know of no authority for the proposition that a disappointed taxpayer can bring a certiorari action solely against a supplier to a successful bidder who allegedly improperly procured a government contract without naming a government entity."[126] The Court concluded that the trial court did not abuse its discretion in sanctioning her for continuing to pursue the certiorari action after the dismissal of the public entities.[127] The Court further remanded the case and ordered the lower court to consider a sanction for the conduct. In doing so, the Court held that the lower court should make specific findings as to the reasonableness of Musco's attorney fees; the minimum amount necessary to deter; Barnhill's ability to pay; and other factors related to the severity of the violation.[128]

As stated in Note 28 *infra*, the Everly case presented the larger issue of whether an attorney must reevaluate his or her client's position when the landscape materially changes and reveals a lack of factual or legal support therefor. In Everly, the Court answered this question by affirming the District Court's sanctions against counsel for her "actions after the dismissal of

[123] Id.
[124] Id. at 495.
[125] Id.
[126] Id.
[127] Id. But it is not clear from the opinion what pleading(s) beyond the application for leave to amend were filed to continue pursuing the claim. Further, the proposed amended petition appears to be a class action fraud case, not a certiorari case.
[128] Id. (quoting Barnhill, 765 N.W.2d at 277 (quoting In re Kunstler, 914 F.2d 505, 523 (4th Cir. 1990))).

the government entity and official."[129] It is not clear, however, from the reported decision what conduct, other than the appeal, plaintiff's counsel engaged in that subjected her to sanctions under Rule 1.413.

Often times, attorneys take positions in cases that they later discover are not supported by the law or the facts. A plaintiff's attorney might ask for an item of damages that he or she later learns cannot be recovered; a defense attorney may assert an affirmative defense of comparative fault or failure to mitigate damages, only to later learn that such defenses are not merited. Yet, Iowa Courts have, for some time, held that attorneys have no duty to dismiss a lawsuit or amend a pleading after the filing of such paper.[130]

The Everly Court's holding (that the attorney was appropriately sanctioned for continuing her client's certiorari action against Musco) and prior rulings that attorneys do not have a continuing obligation to dismiss lawsuits or other pleadings in light of new information calls into question the requirement that the reasonableness of the pleading be determined at the time of filing. The Court in Matthias wrote

> We find the plain meaning of the language of [Rule 1.413] and [Section 619.19] clearly expresses an intent that the court evaluate the signer's conduct at the time of signing the pleading, motion, or other paper. The purpose of the rule and statute was to eliminate abuses in the signing of pleadings, motions, and other papers filed in court proceedings … Although the rule and statute focus upon the event of signing, we recognize that in most cases there will be a series of filings. They may indicate a pattern of conduct. The provisions of our rule and statute would apply to each paper signed and would require that each filing reflect a reasonable inquiry.[131]

In other words, even though an attorney is not obligated to dismiss a lawsuit or withdraw a pleading after discovering a lack of support therefor, he or she is not entitled to continue filing pleadings that advance that meritless claim or defense. The Fifth Circuit decision in Childs stated the rule as follows:

[129] Id.
[130] Matthias, 448 N.W.2d at 447; Schettler, 509 N.W.2d at 465.
[131] 448 N.W.2d at 447.

> [L]iability for signing a document [is] similar to a snapshot. Courts would focus on the instant the picture was taken-when the signature was placed on the document. Liability under Rule 11 would only be assessed if at that instant in time the attorney or litigant was in violation of the rule. [Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc)]. … Virtually all suits will require a series of filings and Rule 11 applies to each and every paper signed during the course of the proceedings. *Id.* at 875. Accordingly, if facts are discovered that show that there is no longer a good faith basis for a position taken by a party, a pleading, motion, or other paper signed after those facts come to light reaffirming that position can be the basis of a violation of the rule.[132]

The Everly case leaves open the question of whether an attorney has an affirmative duty to dismiss its pleading one the landscape changes. The Court upheld a sanction on an attorney for not dismissing her case against Musco after she dismissed her case against the two public entities. Perhaps the Court intended to sanction the attorney for continuing to resist Musco's Motion to Dismiss at the hearing after "the landscape materially changed."[133] But continuing to orally resist a Motion to Dismiss (even if frivolous) is not conduct with which Rule 1.413 is concerned.[134]

3. **Brooks Web Services, Inc. v. Criterion 508 Solutions, Inc., 780 N.W.2d 248 (Table), 2010 WL 446553 (Iowa Ct. App.).**

In 2010, after the Supreme Court handed down its decisions in Barnhill and Everly, the Court of Appeals adjudicated the above-referenced case. In this case, the parties entered into a written contract for services.[135] Under the contract, the Plaintiff was required to provide the Defendant a weekly summary of services provided.[136] The Plaintiff was also required to submit invoices to the Defendant within ten days of completion of a project. The Defendant was required to make payments on those invoices within thirty days of receipt.[137] The Defendant terminated the contract in writing on May 18, 2005.[138]

[132] 29 F.3d at 1024, n. 18.
[133] Everly, 775 N.W.`12d at 495.
[134] Iowa R. Civ. P. 1.413 (Only written pleadings are governed by this Rule).
[135] Brooks Web Services, 780 N.W.2d 248 (Table), 2010 WL at *1.
[136] Id.
[137] Id.
[138] Id.

More than one year after the termination of the contract, the Plaintiff sued the Defendant for monies owed. The Plaintiff advanced three theories: the breach of an express contract; open account; and quantum meruit.[139] The Defendant denied all allegations and submitted various counterclaims.

At trial, Angy Brooks, the Plaintiff's owner, testified that the parties had not followed the written contract. For instance, she testified that she rarely submitted weekly reports; she rarely, if ever, submitted invoices within ten days of completion of a project; she was often paid, even though her invoice was submitted late; and the contractual relationship between the parties deteriorated, resulting in renegotiations of the payments allegedly owed to her.[140] The Court also found that several of the invoices had incorrect dates on them, reflecting the date the documents were last opened on her computer and not the date of creation or the date of submission to the Defendants.[141]

The District Court granted judgment as a matter of law in favor of the Defendant. The Court found that a written contract did exist between the parties, that the Plaintiff did provide services to the Defendant, but that the Plaintiff failed to comply with various conditions which were conditions precedent to payment.[142] The District Court also ruled in favor of the Defendant on the open account and quantum meruit theories.[143]

At the conclusion of the trial, the Defendant moved for sanctions.[144] The Defendant argued that the Plaintiff's attorney failed to adequately investigate the facts of the case, prior to filing the lawsuit. The District Court granted Defendant's motioned and awarded sanctions in the amount of $25,326.64.[145] This figure represented Defendant's attorney fees.

[139] Id.
[140] Id.
[141] Id. at *2.
[142] Id.
[143] Id.
[144] Id. at *3.
[145] Id.

The District Court found that Plaintiff did not conduct an adequate investigation of the facts of the case.[146] As evidence, the Court noted that the Plaintiff's attorney attached the wrong contract to the Petition and never filed an amended petition. The Court also noted that the Plaintiff's attorney appeared to be seeing the evidence for the first time at trial. Finally, the Court noted the Plaintiff's admissions of re-creating the invoices and not submitting the invoices within 10 days were evidence of an inadequate investigation.[147]

The Iowa Court of Appeals, in an opinion by Chief Judge Sackett, reversed the trial court's ruling. First, the Court was troubled that the District Court viewed the Plaintiff's attorney's actions "in terms of what was known at trial."[148] The Court wrote that sanctions will not be imposed based upon hindsight.

The Court also found that the District Court did not consider the merit in the Plaintiff's alternative theories. The Court found that quantum meruit and open account, both quasi-contractual claims, were acceptable alternatives to the claim on the written contract.[149] The Court also held that, as a matter of policy, imposing a sanction for asserting alternative theories of recovery would reduce the likelihood that defendants receive notice of claims as a case progresses.[150]

Finally, the Court took the opportunity to distinguish the Barnhill case.[151] The Court noted that the attorney in Barnhill protracted the litigation by her "persistence in maintaining claims against a specific defendant, even without legal or factual support, in order to coerce a settlement."[152] By contrast, the Court in Brooks held that the record did not contain evidence

[146] Id. at *5.
[147] Id.
[148] Id. at *6.
[149] Id.
[150] Id.
[151] Id. at *7.
[152] Id. (citing Barnhill, 765 N.W.2d at 278-79).

that the attorney ignored facts, persisted in pursuing alternative theories out of stubbornness or was untruthful with the District Court.[153]

CONCLUSION

It was not our intent, nor do we have the ability, to answer the question posed at the outset. It does appear, however, that the frequency with which Rule 1.413 is implemented can be reduced significantly if all practitioners follow a few basic rules:

1. Investigate the facts of your case—do not blindly rely upon what your clients tell you and, to the extent possible, obtain documents and any other evidence you can prior to filing a lawsuit.

2. Make a reasonable inquiry into the law—the law has likely changed since you learned it in law school. Pay attention to the decisions of the Iowa Supreme Court and the U.S. Supreme Court; the Court may not be as likely to sanction you if you miss an unpublished case.

3. If the "landscape materially changes" during the pendency of the lawsuit, change with it. Dismiss claims if you believe that they can no longer be supported.

4. Keep on top of your cases. Do not give the Court the impression that you are saying what is necessary to "get through the moment" and do not engage in a pattern of conduct that persists in putting forth an unsustainable position.

5. Remember that sanctions apply to all pleadings, not just petitions. Additionally, a Court can impose sanctions on either party.

6. If opposing counsel notifies you of a difference of opinion on the law or fact, respond in a respectful and professional matter. Avoid making the relationship hostile or unprofessional.

[153] Id.

Creating a Winning First Impression

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Create a Winning First Impression©

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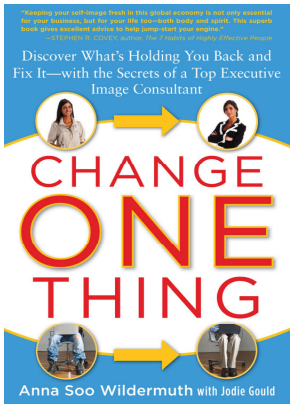
About Anna Soo Wildermuth, AICI CIM

The founder of Personal Images Inc., a recognized leader in the image industry. Her professional credentials include being past President of the Association of Image Consultants International, the largest image consulting organization in the world; one of only seven Certified Image Masters in the world; a Toastmaster ATB; a member of the American Society of Training and Development (ASTD) and certified Platinum Rule® trainer and coach.

Anna's professionalism and that of her company have been recognized with numerous awards. Personal Images, Inc. received the CMBDC 2011 Supplier of the Year and in 2008 Association of Image Consultants International Award of Excellence. In 2004, Personal Images was named Professional Service Firm of the Year by the U.S. Department of Commerce Minority Business Development Agency (MBDA) and the Chicago Minority Enterprise Development Council. The company also was recognized with the 2004 Outstanding Minority Success Award from the China Star Media Corporation.

A seasoned image and communication specialist, trainer, and coach since 1983, Anna regularly conducts workshops, seminars, and presentations for corporations, including *HSBC, Bank of Montreal, Northern Trust Company, True Value, Humana, J.C. Anderson Company and General Electric Company;* and not-for-profit organizations. She helps corporate executives and management teams enhance their credibility and relationship building skills by strategizing their professional image, and sensitizing them to the nuances of business/social etiquette and the issues prompted by diversity.



Anna has been highlighted in the *Chicago Tribune, New York Times* and *Wall Street Journal;* quoted as an image expert in *Success*, *Star* and *Crain's Chicago Magazines* and featured on television's *ABC7 Chicago*, *CNN Financial and Fox News*. She also has written articles for numerous local and national publications. Anna's book *CHANGE ONE THING: Discover What is Holding You Back Fix it with the Secrets of a Top Executive Image Consultant -McGraw-Hill August 2011.*

"Keeping your image fresh in this global economy is not only essential for your business, but for yourself too - both body and spirit."

"Change One Thing is a superb book that gives excellent advice to help jumpstart your engine. **Stephen R. Covey**, author, **The 7 Habits of Highly Effective People**.

Follow Anna on:

My Blog: http:// www.personalimagesinc.com/blog/

Twitter: http://twitter.com/AnnaSWildermuth

Linkedin: http://www.linkedin.com/in/annawildermuth

Assess Yourself

Approachability

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Smile	Affirming, likeable, approachable			
Introduce yourself to others	Engaged, welcoming, safe			
Open a conversation by being in the moment, for instance, talking about immediate place, the event, etc.	Safe, socially aware			
Act as if you expect to be found physically attractive	Appealing, confident, comfortable with yourself			

Engagement

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Look at and lean toward others when they are speaking	Interested, attractive, affirming			
Ask open-ended questions	Interested, attractive			
Listen actively	Focused, interested			
End interactions knowing as much about your conversational partner as they know about you	Interested, connected			

Conversational Topics

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Open with a topic about the immediate surroundings and ease into discussions	Approachable, comfortable, socially aware			
Generate a variety of topics	Broad-minded, entertaining, stimulating			
Talk about accessible topics such as everyday life, current events and entertainment	Socially aware, comfortable, interesting			

Self-Disclosure

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Share basic information about yourself	Non-threatening, socially appropriate			
Reveal deeper feelings	Sensitive, interested in connecting			
Share your passions and interests	Self-reliant, independent, engaged in life			
Share vulnerabilities and laugh at your mistakes	Self-aware, self-confident, having a sense of humor			

Conversational Dynamics

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Pay attention to others' preference for how much they like to speak, and add a *complementary* amount	Perceptive, socially generous			
Instill emotional tone into your speech	Emotionally rich, elevating			
Engage in regular turn taking	Engaging, easy to connect with			
Keep your input short	Other-oriented, interested			
Yield when someone speaks at the same time as you; let others interrupt	Interested, not self-focused			

How Others See You

If You do This:	You May Seem:	Do I do this? Seldom/ Sometimes/ Frequently		
Start with a positive comment, and save your critical commentary for later	Pleasant, approachable			
Communicate a positive mood	Happy, likeable, pleasant to be around			
Flexible when faced with unexpected or undesired circumstances	Not self-absorbed, comfortable			
Modest about your position relative to others	Comfortable to be around, accessible, connecting			
Appear equal and similar to others	Accessible and connecting			

Give yourself 4 points for each frequently, 3 points for sometimes and 1 point for Seldom. Total Score_____

How Effective Is Your Professional Image?

1. Do you look your professional best all the time? Yes or No
2. Do you project authority and confidence in your clothes? Yes or No
3. Can you combine your ensemble with complete confidence? Yes or No
4. Do you feel confident in your ensemble in front of your clients? Yes or No
5. Do you have the "right" thing to wear for any presentation? Yes or No
6. Do you know what colors look best on you? Yes or No
7. Are all the clothes in your wardrobe less than 4 years old? Yes or No
8. Do your clients view you as the expert? Yes or No
9. Is your hairstyle less than two years old? Yes or No
10. Are your eyeglasses less than three years old? Yes or No
11. Do you check your breath often to remove any offensive odors? Yes or No
12. Do you dress to relate to your clients and senior management? Yes or No
13. Are your accessories well maintained (shoes and belts)? Yes or No
14. Is all the clothing in your wardrobe spot and pill free? Yes or No
15. Do you review your wardrobe once a year? Yes or No
16. Are your nails well groomed, no torn cuticles and jagged nails? Yes or No
17. Is your tote bag or brief case well maintained and not ragged? Yes or No

- If you answered yes to all 17questions your image is one of professional best.
- If you answered yes to 10 or more your image is close to being professional best.
- If you answered yes to 9 or fewer your image needs an update to be your professional best. You are not putting your best foot forward.

The Power of Color and Clothing

Why Create Your Impact?

- Sets the tone of your impact.
- Defines your business style.
- Determines your action.

- Limit your wardrobe to three dominant colors to make buying clothing and organizing your closet easier. You can have more than one color capsule in your wardrobe if you choose pieces with this in mind. Each color capsule should have three colors: two dominants and one accent. Traditional color cores are understood by everyone and promote predictable emotions.

(Creative) Dramatic:	Contrasting Colors and Vivid Colors
(Corporate) Classic:	Navy and Gray Colors
(Communicator) Sporty:	Brown, Olive and Tan Colors

Test: Hold color up to your face in natural light. The clearer and warmer your skin looks, the more the color enhances your overall features.

Color Families:

Bright Tones:	Warm	Bright Yellows, Greens Oranges
Pale Tones:	Cool	Muted colors in the cool tones
Deep Tones:	Cool	Reds and Blacks, Jewel Tones
Neutral Tones:	Warm	Browns, Greens and some Reds

Your Hair Color_____

Your Eye Color_____

Your Skin Tone_____

List Three Favorite Foundation Colors: Accent Colors Your Style

_____

_____

_____

How Do You Look To Others?

Change your visual impression for a particular situation.

Inherent Visual Impression is determined by value of your coloring; contrast between your hair, skin, and eyes, as well as the structure of your body and facial features.

Your Inherent Visual Impression is:

_____Formal (Powerful or Distant)

_____Friendly (Approachable or Amiable)

_____Combination

Your effect can be balanced (repeat for emphasis) or *counterbalanced* (make another statement other than your inherent one) by creative use of textures and colors.

- Formal, Distant, Powerful - **You want to appear more approachable, friendly**

- **Soft surface fabrics** are more approachable than hard shiny fabrics.
- **Soft and or light to** medium value are more approachable than dark colors.
- **Muted and diffused patterns** are more approachable than bold ones.
- Medium to light color values are more approachable on people with light skin and medium to dark value colors are more approachable than light colors on people with dark skin tones.

- Friendly, Approachable, Amiable -**You want to appear more powerful, formal**

- **High contrast colors** are more formal than soft colors.
- **Hard surface fabrics** are more formal than soft knits.
- **Strong colors and/or darker** are more formal than muted neutral colors.
- **Distinct patterns** are more formal than muted small patterns.
- Dark value colors are more formal and powerful on people with light skin tones and light value colors are more formal on people with dark skin tones.

The Secrets of Smart Style for Men

SUITS

- Never button bottom button of suit or vest.
- Correct jacket length is two fingers below derrière.
- Pant cuffs are 1.5" to 1.75" and cover ¾ of the shoe.
- Correct pant length is long enough to "break" on top of shoe.
- Single-breasted jackets are buttoned when standing-unbuttoned when sitting down.

DRESS SHIRTS

- Collar should show ½ inch above suit collar.
- Sleeve should show ½ inch below sleeve length.
- French cuffs worn only with suits. They are not appropriate with sport jackets.
- Under a suit, there is no such thing as a "short sleeve dress shirt."
- Mixing and matching stripes in shirts and ties, stripes are never the same thickness.

TIES

- Tuck small end of tie into label.
- Suit label & tie width should be similar.
- Correct length is tip touching top of buckle.
- The size of knot matches the spread of the collar.
- A properly tied tie has a "dimple" below the knot.
- English rep ties – stripe goes from left to high right to viewer. This is opposite for American repp ties.

ACCESSORIES

- Belt and shoes are the same color and same smoothness in finish.
- Tie and hanky should not match.
- Belts or braces – never at the same time.
- Sock color matches or blends with shoe or pants.
- Socks match the fabric of the slacks. Dress slacks with dress socks.
- "Over-the-calf socks are worn with all your slacks the only exception – jeans.

EVENING WEAR

- Pants never cuffed.
- Socks are black thin silk.
- Only hand tied bow ties.
- Cummerbund pleats go "up" (To provide place for tickets).
- Shoes are patent leather "pumps" or patent leather plain lace-ups.
- Braces are only worn, with or without cummerbund.
- Dinner jacket is always vent less, and to be correct, with peaked lapels.

Secrets of Successful Style for Women

SUITS

- Never button all of the buttons on a jacket.
- Jacket length should never end at the widest part of your hips.
- Pant cuffs are worn on trouser style pants.
- Correct pant length is long enough to "break" on top of shoe.
- Double-breasted jackets must be buttoned.

TOPS

- Blouse or shell should have a collar if worn with a collarless jacket or without a jacket
- Sleeve length should hit the top of your palm.
- Blouses with French cuffs can be worn without a suit.
- Sweater sets can take the place of a jacket."
- V-neck tops are best on a full figured body.
- Round neck, tops are best on a thin body.

SCARVES

- Scarves must have one color in the print that matches with the jacket or blouse.
- Scarves are best when tucked in a jacket or blouse.
- Silk scarves with a suit.
- Main color must be in the same color temperature of your face.
- Scarves tied around the neck are sporty.
- Scarves worn with a coat can be in a larger pattern.

ACCESSORIES

- Belt and shoes are the same color and same smoothness in finish.
- Purses must match or be compatible in color with your shoes.
- Hose matches shoes.
- Trouser socks (over the calf) worn with slacks.
- Choose navy color hose darker than shoes.
- Brief case best in dark brown (raisin).

EVENING WEAR

- Black tie optional means short skirt or pants suit.
- Black tie means skirt.
- Shoes must be in fabric or dressy metallic leather.
- Purses in fabric, beaded, or metal and only in metallic leather.
- Business functions dressy suit more appropriate.

MISCELLANEOUS – Trench Coats: Only tie a belt in front or it can be belted and hanging down in back.

Make Your First Impression Your Best Impression©

- Appearance speaks volumes, leading others to form instant opinions about our competence and credibility before we even have a chance to speak.
  Project the right visual impression that will promote success by the following:
  - Check your calendar and consider what to wear in advance.
  - To guide your thinking and ultimate decision, answering the following seven questions will make your first impression a powerful one.

1. **Who will I be presenting to? (location, culture)**_____

_____

2. **What will I be doing? (situation, occasion)**_____

---

3. **Who will I be with and who will see me?** _____

_____

4. **What do I need to accomplish? (interaction, outcome)**_____

_____

5. **What statement or message do I want or need my clothes to make (desired perception)?**

_____

6. **What clothes will communicate my message? (review closet)**

_____

7. **Why will these clothes meet my needs?** _____

\

The Platinum Rule

Summary of Styles

RELATER STYLE

- Slow at taking action and making decisions
- Likes close, personal relationships
- Dislikes interpersonal conflict
- Supports and "actively" listens to others
- Weak at goal setting and self-direction
- Has excellent ability to gain support from others
- Works slowly and cohesively with others
- Seeks security and the need to belong
- Good counseling skills

SOCIALIZER STYLE

- Spontaneous actions and decisions
- Likes involvement
- Dislikes being alone
- Exaggerates and generalizes
- Tends to dream and gets others caught up in their dreams
- Jumps from one activity to another
- Works quickly and excitedly with others
- Seeks esteem and acknowledgment
- Good persuasive skills

DIRECTOR STYLE

- Likes control, dislikes inaction
- Prefers maximum freedom to manage himself and others
- Cool, independent, and competitive
- Low tolerance for feelings, attitudes, and advice of others
- Decisive actions and decisions
- Works quickly and impressively alone
- Good administrative skills

THINKER STYLE

- Cautious actions and decisions
- Likes organization and structure
- Dislikes involvement
- Asks many questions about specific details
- Prefers objective, task-oriented, intellectual work environment
- Wants to be right, can be overly reliant on data collection
- Works slowly and precisely alone

Create the Win/Win Communication

Increase Behavioral Adaptability

Relaters Need To

- Say "No" occasionally
- Control time and emotions
- Attend to completion of tasks
- Develop a more objective mindset without oversensitivity to other's feelings
- Take risks by stretching beyond comfort
- Delegate to others
- Accept necessary changes
- Verbalize their feelings and thoughts

Socializers Need To

- Control time and emotions
- Develop a more objective mindset
- Spend more time checking, verifying, specifying and organizing
- Follow through on agreements
- Concentrate on the task at hand
- Take a more logical approach
- Try to complete more what you start

Thinkers Need To

- Openly show concern and appreciation
- Practice "active" listening
- Occasionally try short cuts and measures
- Adjust more readily to change and disorganization
- Work on timely decision making
- Use more caution
- Initiate new projects
- Compromise with the opposition
- State unpopular decisions
- Use policies as guidelines, rather than laws

Directors Need To

- Project a more relaxed image by pacing themselves
- Develop more patience, humility, sensitivity and empathy
- Verbalize the reasons for conclusions
- Identify with a group
- Be aware of existing sanctions
- Verbalize compliments to others

General Strategies by Behavior Type

In Relationships with Relaters:

- Support their feelings by showing personal concern
- Assume that they will take everything personally
- Allow them time to trust you
- Move along in an informal, slow manner
- Show that you are "actively" listening
- Provide guarantees that any action will involve a minimum amount of risk

ABOVE ALL BE: Warm and Sincere.

In Relationships with Socializers:

- Support their opinions, ideas and dreams
- Do not hurry the discussion
- When you disagree, discuss personal feelings
- Summarize in writing who is to do what, etc.
- Be entertaining and fast moving
- Use testimonials and incentives to positively them

ABOVE ALL BE: Interested in them.

In Relationships with Thinkers:

- Support their organized, thoughtful approach
- Be systematic, exact, organized, and prepared
- List advantages and disadvantages of any plan
- Provide solid, tangible, factual evidence to influence decisions
- Actions with brief supporting analysis
- Provide guarantees that actions cannot backfire

ABOVE ALL BE: Thorough and well prepared

In Relationships with Directors:

- Support their goals and objectives
- Demonstrate through actions rather than words
- If you disagree, argue facts – not personal feelings
- Recognize their ideas – not them personally
- Be precise, efficient, and well organized
- Keep your relationship businesslike

ABOVE ALL BE: Efficient and competent. **Dr. Tony Alessandra**

How Behavioral Styles Dress

One of the best ways to tell a person's style is to look at the way they are dressed. The best thing about fashion indicators is that you can analyze their behavior style even before the conversation begins, so you can start it on the right foot!

RELATORS Indirect and Open	**SOCIALIZERS** Direct and Open
Nothing too loud for them **Steady Relaters dislike calling attention to themselves, so they tend to wear subdued colors and conservatively cut clothing, favoring conventional styles that do not stand out too much.**	**They like glitz and pizzazz!** **The way Interacting Socializers dress often relates to their need for recognition. Since they like others to notice them, they may dress in the latest style. Look at me. Socializers like bright colors and unusual clothes that prompt others to compliment them. Many Interacting Socializers even prefer negative comments to none at all. "Are you dressed for Halloween today, Rhonda?" At least she is getting the attention she craves.**
THINKERS Indirect and Guarded	**DIRECTORS** Direct and Guarded
Noticeably understated **Cautious Thinkers tend to wear more conservative clothes, but with unique, often perfectly matched accessories. While the Socializer may draw attention to himself with glitz and glitter, Thinkers usually prefer a more understated, faultlessly groomed look with nary a hair out of place. However, their taste may differ from the people around them. They like expressions of individuality and creativity, but within guidelines.**	**Power symbols** **Dominant Directors tend to dress comfortably and typically pay less attention to their appearance than the other types. They may program themselves primarily for work results, so wardrobe tends to play a secondary role in most fields of work. They may be candidates for a timesaving personal shopper or tailor who can choose or measure outfits for them in the privacy of their own offices. Dominant Directors gravitate toward authority symbols, so they may wear navy blue or charcoal gray power suits.**

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A Different Way to View Restatement of Torts Third

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Restatement Third, Torts

The Basics

David L. Baker

I. The Basics- Duty and Breach

§ 6. Liability For Negligence Causing Physical Harm

An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.

f. Duty of reasonable care. The rule stated in § 7 is that an actor ordinarily has a duty to exercise reasonable care. That is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. *Thus, in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty.* They may proceed directly to the elements of liability set forth in this Section. Nevertheless, the duty of reasonable care can be displaced or modified in certain types of cases, as explained in § 7. In these cases, courts need to give explicit consideration to the question of duty. Moreover, the duty of reasonable care is ordinarily limited to risks created by the actor's conduct. The conduct that creates the risk must be some affirmative act, even though the negligence might be characterized as a failure to act. For example, an automobile driver creates risks to others merely by driving, although the negligence may be failing to employ the brakes at an appropriate time or failing to keep a proper lookout. By contrast, when the only role of an actor is failing to rescue or otherwise intervene to protect another from risks created by

third persons or other events, courts need to give explicit consideration to the question of duty. See Chapter 7.

§ 7. Duty

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

a. The proper role for duty. As explained in § 6, Comment *f*, actors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm. *In most cases, courts can rely directly on § 6 and need not refer to duty on a case-by-case basis.*

§ 3. Negligence

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

A Comparison of Restatement Third and Second - Defining Breach vs. Duty

The following is a comparison of certain portions of the Restatement Third to the Restatement Second. I think it illustrates the use of certain

circumstances that were previously defined as duties, but are now on the breach side of the equation.

§ 12. Knowledge and Skills If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.	§ 289 Recognizing Existence of Risk The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising (a) Such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and (b) Such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.
§ 13. Custom (a) An actor's compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence. (b) An actor's departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor's negligence but does not require a finding of negligence.	§ 295A. Custom In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them.

§ 14. Statutory Violations as Negligence Per Se An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.	§ 285 How Standard of Conduct Is Determined The standard of conduct of a reasonable man may be (a) Established by a legislative enactment or administrative regulation which so provides, or (b) Adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or (c) Established by judicial decision, or (d) Applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision. § 288B. Effect of Violation (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself. (2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.
§ 15. Excused Violations	§ 288A. Excused Violations

An actor's violation of a statute is excused and not negligence if: (a) The violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation; (b) The actor exercises reasonable care in attempting to comply with the statute; (c) The actor neither knows nor should know of the factual circumstances that render the statute applicable; (d) The actor's violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public; or (e) The actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.	(1) An excused violation of a legislative enactment or an administrative regulation is not negligence. (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when (a) The violation is reasonable because of the actor's incapacity; (b) He neither knows nor should know of the occasion for compliance; (c) He is unable after reasonable diligence or care to comply; (d) He is confronted by an emergency not due to his own misconduct; (e) Compliance would involve a greater risk of harm to the actor or to others.
§ 16. Statutory Compliance (a) An actor's compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent under § 3 for failing to adopt precautions in addition to those mandated by the statute. (b) If an actor's adoption of a precaution would require the actor to violate a statute, the actor cannot be found negligence for	§ 288C. Compliance with Legislation or Regulation Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.

failing to adopt that precaution.	
§ 17. Res Ipsa Loquitur The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's physical harm is a type of accident that ordinary happens as a result of the negligence of a class of actors of which the defendant is the relevant member.	§ 328D. Res Ipsa Loquitur (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) The event is of a kind which ordinarily does not occur in the absence of negligence; (b) Other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) The indicated negligence is within the scope of the defendant's duty to the plaintiff. (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.
§ 18. Negligent Failure to Warm (a) A defendant whose conduct creates a risk of physical	§ 297 Acts Dangerous Intrinsically or Because of Manner of Performance

harm can fail to exercise reasonable care by failing to warn of the danger if: 1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and 2) a warning might be effective in reducing the risk of physical harm. (b) Even if the defendant adequately warns of the risk that the defendant's conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of physical harm will remain.	A negligent act may be one which involves an unreasonable risk of harm to another (a) Although it is done with all possible care, competence, preparation, and warning, or (b) Only if it is done without reasonable care, competence, preparation, or warning. § 301 Effect of Warning (1) Except as stated in Subsection (2), a warning given by the actor of his intention to do an act which involves a risk of harm to others does not prevent the actor from being negligent. (2) The exercise of reasonable care to give reasonable adequate warning prevents the doing of an act from being negligent, if (a) The law regards the actor's interest in doing the act as paramount to the other's interest in entering or remaining on the area endangered thereby, or (b) The risk involved in the act, or its unreasonable character, arises out of the absence of warning.
§ 19. Conduct That Is Negligent	§ 302A. Risk of Negligence

Because of the Prospect of Improper Conduct by the Plaintiff or a Third Party The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.	or Recklessness of Others An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person. § 302B. Risk of Intention or Criminal Conduct An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

What has changed?

Duty + Breach= Negligence

Restatement Second

Duty (specific) + Breach= Negligence

Restatement Third

Duty (general § 7) + Breach (specific) = Negligence

Fewer motions for summary judgment. (Duty is not generally an issue)

More deference to the jury.

II. The Basics- Causation

§ 26. Factual Cause

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

§ 29. Limitations On Liability For Tortious Conduct

An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

§ 30. Risk Of Harm Not Generally Increased By Tortious Conduct

An actor is not liable for harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm.

To understand this case, a basic review of the elements of causation and the role of the court and the jury under the Restatement of Third is required. The Court has recently adopted and applied the causation analysis under the Restatement of Third, Torts. *See Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839 (Iowa 2010); *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009).

There is a causation continuum. At one end is the run of the mill case where "scope of liability" need not be given. The only issue is "but for". This is expressed in Restatement of Third, Torts, Section 26 which provides:

> Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

As the comment to the Iowa Bar Association Jury Instruction notes, "[i]n most cases, scope of liability will not be in dispute or will be adjudicated by the court on a dispositive motion. This instruction should be given only if under the facts of the particular case scope of liability is a question for the jury." See Restatement (Third) § 29, Comment a and b.

The other end of the spectrum is *Royal Indemnity*. The Restatement (Third) expresses the limitation that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.* § 29, at 493. "Central to the limitation on liability of this Section is the idea that an actor should be held liable only for harm that was among the potential harms-the risks-that made the actor's conduct tortious." *Id.* cmt. *d*, at 495-96. Of equal importance is the notion that the act or failure to act must have increased the risk to the plaintiff. Restatement (Third) § 30. ("An actor is not liable for harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm."). Thus, even if "but for" is met, *Royal Indemnity* tells us that certain cases cannot meet the "scope of liability" test as a matter of law.

In the middle is *Thompson* where a "scope of liability" is an issue. In explaining this situation, the Court, in *Thompson*, stated:

Most importantly, the drafters of the Restatement (Third) have clarified the essential role of policy considerations in the determination of the scope of liability. "An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious." *Id.* § 29, at 575. This principle, referred to as the "risk standard," is intended to prevent the unjustified imposition of liability by "confining liability's scope to the reasons for holding the actor liable in the first place." *Id.* § 29 cmt. *d,* at 579-80. As an example of the standard's application, the drafters provide an illustration of a hunter returning from the field and handing his loaded shotgun to a child as he enters the house. *Id.* cmt. *d,* illus. 3, at 581. The child drops the gun (an object assumed for the purposes of the illustration to be neither too heavy nor unwieldy for a child of that age and size to handle) which lands on her foot and breaks her toe. *Id.* Applying the risk standard described above, the hunter would not be liable for the broken toe because the risk that made his action negligent was the risk that the child would shoot someone, not that she would drop the gun and sustain an injury to her foot. *Id.*

The scope-of-liability issue is fact-intensive as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks. …

The drafters advance several advantages of limiting liability in this way. First, the application of the risk standard is comparatively simple. The standard "appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but for no others." It also is flexible enough to "accommodate fairness concerns raised by the specific facts of a case." *Id.*

> Foreseeability has previously played an important role in our proximate cause determinations… For example,
>
> " 'An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable and such an act is either the remote cause, or no cause whatever, of the injury.' "
>
> …
>
> Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks-potential harms-that made the actor negligent.... [W]hen scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the *factfinder* must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent. (emphasis added)

What has changed?

A new test.

Substantial factor is gone.

More deference to the jury.

III. The Basics- Whose job is it?

§ 8. Judge And Jury

(a) When, in light of all the evidence, reasonable minds can differ as to the facts relating to the actor's conduct, it is the function of the jury to determine those facts.

(b) When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.

Comment:

a. Background. In tort cases involving physical or emotional harm, trial by jury is almost always requested by one of the parties. Many of the rules in this Restatement concern, explicitly or implicitly, the respective roles of judge and jury—for example, whether the judge should decide the case under the heading of no duty, and whether certain evidence is merely evidence of negligence (or nonnegligence) or is instead negligence (or nonnegligence) per se of the sort that would justify a directed verdict. Accordingly, this Section clarifies the general rules as to the allocation of function between judge and jury.

b. Explanation and rationale. This Section acknowledges the obvious authority of the court to rule on all questions of law; for example, whether there is any duty limitation on liability (see § 7), or what the legal standard is concerning an actor who is a child (see § 10). What this Section addresses is the division of responsibility between judge and jury over questions of fact and over determinations of negligence. As for the former, the authority of the jury in rendering findings of fact is governed by the rules of the jurisdiction that apply not just in tort litigation but in civil litigation generally. There is nothing peculiar to tort law, therefore, in Subsection (a). The basic idea it incorporates is expressed in varying ways: for example, that a jury's finding on an issue of fact should be respected by the court so long as the evidence is sufficient to support it, or so long as the finding has a legally sufficient evidentiary basis. For purposes of Subsection (b), the facts in question are those facts that the jury could reasonably find, or could reasonably have found; alternatively, in the event that a special verdict has been

returned, Subsection (b) refers to those factual findings that the jury has actually rendered.

In light of the facts relating to the actor's conduct, the question arises whether that conduct is negligent—whether it lacks reasonable care under all the circumstances. Because this is a matter of the law's evaluation of the legal significance of the actor's conduct, such a question could be characterized as a question of law that should be decided by the court. More precisely, it can be characterized as a mixed question of law and fact. Yet this characterization is not itself sufficient to determine whether the question should be given its answer by the court or instead by the jury. The longstanding American practice has been to treat the negligence question as one that is assigned to the jury; to this extent, the question is treated as one that is equivalent to a question of fact. Accordingly, so long as reasonable minds can differ in evaluating whether the actor's conduct lacks reasonable care, the responsibility for making this evaluation rests with the jury. To be sure, in some cases reasonable minds can reach only one conclusion. Accordingly, the rule recognized in this Section permits a directed verdict or judgment as a matter of law—that the actor's conduct must be found negligent, or free of negligence. *Yet most of the time, the rule set forth in this Section calls for a jury decision on the negligence issue.* Section 3 identifies the factors that ordinarily play the primary role in making determinations on the negligence issue. However, as § 3, Comment *h*, explains, these factors frequently cannot be quantified; they often involve intangible benefits and burdens; and they sometimes require an assessment of social values. In all, reaching a decision on the negligence issue requires an exercise of judgment by the jury. The jury is assigned the responsibility of rendering such judgments partly because several minds are better than one, and also because of the desirability of taking advantage of the insight and values of the community, as embodied in the jury, rather than relying on the professional knowledge of the judge.

What does this mean? The role of the court remains critical. Although in most cases, the issue of causation and negligence will be determined by the fact finder, the court still retains the role to determine whether, as a matter of law, the specification of fault could constitute either negligence or a cause of the harm. See *Royal Indem.*, 786 N.W.2d at 851-52; *Thompson*, 774 N.W.2d at 838 citing § 29 cmt. *d,* at 580, 584. ("courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining [the defendant's] conduct tortious."). In discussing the role of the court, the drafters of the Restatement recognize the role of the court to serve as a gatekeeper to determine whether an act is not negligence or outside the scope of liability as a matter of law:

> In light of the facts relating to the actor's conduct, the question arises whether that conduct is negligent—whether it lacks reasonable care under all the circumstances. Because this is a matter of the law's evaluation of the legal significance of the actor's conduct, such a question could be characterized as a question of law that should be decided by the court. More precisely, it can be characterized as a mixed question of law and fact. Yet this characterization is not itself sufficient to determine whether the question should be given its answer by the court or instead by the jury. The longstanding American practice has been to treat the negligence question as one that is assigned to the jury; to this extent, the question is treated as one that is equivalent to a question of fact. Accordingly, so long as reasonable minds can differ in evaluating whether the actor's conduct lacks reasonable care, the responsibility for making this evaluation rests with the jury. To be sure, in some cases reasonable minds can reach only one conclusion. Accordingly, the rule recognized in this Section permits a directed verdict or judgment as a matter of law—that the actor's conduct must be found negligent, or free of negligence.

Restatement (Third) § 8, Comment b.

Thus, in serving this function, if the court finds that "but for" has been met, and it is *potentially* within the scope of liability, where the connection is attenuated and certainly disputed, the full instruction must be given. We find this in two separate places within the Restatement.

Restatement (Third) § 8 provides:

> When, in light of all the evidence, reasonable minds can differ as to the facts relating to the actor's conduct, it is the function of the jury to determine those facts.

Similarly, Comment q to Restatement (Third) § 29 notes:

> *Judge and jury.* Scope of liability is a mixed question of fact and law, much like negligence. As with negligence, the court's role is to instruct the jury on the standard for scope of liability when reasonable minds can differ as to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious, and it is the function of the jury to determine whether the harm is within the defendant's scope of liability.

Thus, if the court finds that there may be some connection between the alleged act of negligence and the ultimate harm, then the court must instruct on "scope of liability". *Thompson*, 774 N.W.2d at 840.

What has changed?

More deference to the jury.

Challenging Functional Capacity Evaluations

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Forensic Dissection of a Functional Capacity Evaluation

Presented to the Iowa Defense Council, September 16, 2011
Darrell Schapmire, MS

Contents

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Forensic Dissection of a Functional Capacity Evaluation

Goal

Give you the basic information you need to begin the process of understanding how to challenge the experienced expert witness with a medical background who is making unsupportable claims related to "lost function" and "validity of effort."

Why It Matters

- Direct costs of comp >$140 billion annually (NASI)
- $78.2 in SSD in 2005 (Christian)
- No estimates for:
  - FELA
  - Jones Act

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Why It Matters

- No estimates for:
  - FELA
  - Jones Act
  - LTD and STD
  - Wage loss insurance
  - Coverage for homes, autos, boats, etc. when there is an injury

Why It Matters

- Indirect costs = 4.5x direct costs (OSHA)
- Conservative estimate for total annual costs:

$1.0 - $1.5 trillion

Potential Savings

>$100 billion annually . . .

if only 10% of the costs arise from waste, fraud and mismanagement

Daubert v. Dow, 1993

The subject of an expert's testimony must be “scientific . . . knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."

So What!

Standard FCE methodology, while widely used and is certainly “the consensus” in the field ***right now***. However, there is one thing “standard” assessments of validity of effort cannot stand even when the Frye standard is the standard of admissibility. So what if you are unable to get a Daubert ruling?

The Players and Their Weakest Links

- The FCE evaluator—most do not have a solid understanding of their FCE protocol’s methods “whys.” Past focus has been on the “hows.”
- The physicians—know even less about FCE methodology.
- Opposing counsel—cannot prevent the asking of questions pertaining to methodology and can not answer the questions any better than the witness.
- Arbitrators—do not like to be overturned on appeal.

Final Questions and Responses, Taken from an Actual Deposition

Q. You referred to the observations you made during this test are subjective observations, correct?

A. Yes.

Q. There is no objective testing for self-limiting behavior, correct?

A. Correct.

Hancock *v.* Wal-Mart Decision

The award of $20,000 included payment for the plaintiff attorney, $8,000 in outstanding medical bills and $3,500 in expert witness fees. The arbitrator denied future medical.

How About This?

The plaintiff attorney in Clewell and the defense attorney in Hancock used the same questions!

Past Practice

The physician makes the call on final RTW restrictions, based on a professional opinion. The attorney challenges the physician's final restrictions.

Major Confounding Variables

- Diagnosis does not predict outcome.
- The effects of various psychological, social and financial factors are not objectively quantifiable.

Two Questions for Every Comp Case

- Is the claimant able to return to work?
- Did the claimant cooperate during physical examinations, not only by the physician, but also during a functional capacity evaluation (FCE)?

What's Good for the Goose . . .

The same issues and questions which can be asked of an FCE administrator can also be used with witnesses (i.e. physicians) who have indicated the claimant is unable to return to work even when no FCE has been conducted.

How is this Possible?

The physician must either assess cooperation/motivation in some way or rely on an FCE's conclusions to support his/her recommendations.

Two Avenues to Defend Your Case

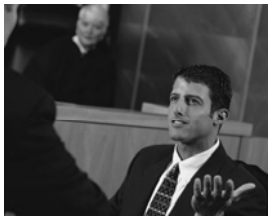
- Use FCE methodology that actually classifies validity of effort objectively.
- Challenge adverse expert witness statements regarding function and cooperation with:
  - Logic.
  - Basic statistics.
  - Anatomy and physiology.
  - Published studies on assessment of validity of effort.

Failed Attempts to Control Costs:

- Safety programs
- Human resources approaches
- Accounting gimmicks

The Worst Failures:

The Other Side Has an Expert Witness



How Many Times Have You Had This Happen?

Perry Mason:	I have just a couple of questions. You referred to the observations you made during this testing that are subjective observations. Correct?
Witness:	Correct.
Perry Mason:	There is no objective testing for self-limiting behavior. Correct?
Witness:	Correct.
Perry Mason:	I have no further questions.

If your questions are effective and if a witness responds honestly and forthrightly to questions pertaining to standard validity of effort testing, your task is quite straightforward when using this litigation approach. But when the witness is inept, uninformed, confused or evasive, you have another problem.

Dep Prep in General Terms

- Understand basic concepts and terms related to functional testing.
- Get the "raw material" you need to prepare a devastating line of attack. When possible, use the same studies which "support" the methodology to undermine the protocol itself.
- Identify the medical or therapy conclusions you wish to challenge, focusing on the conclusions that you ***know*** you can successfully challenge.

During Testimony:

- Define major terms.
- Do not challenge the report on a line-by-line basis.
- Attack the methods, not the conclusions.
- Go systematically from one category of data to another.
- Killer questions first or last?
- Be prepared for the unexpected.

Initial Questions—Definitions

- Merriam-Webster defines the word "objective" as "expressing or dealing with facts or conditions perceived without distortion by personal feelings, prejudices, or interpretations, limited to choices of fixed alternatives and reducing subjective factors to a minimum." Is this a definition with which you agree?

Initial Questions—"Gotta Say Yes"

- Is it important to you that your methodology be evidence-based?
- Is it important the your methodology is based on published studies?
- Is it important that your evidence is current or has stood the test of time?
- Is it important that your conclusions be based on objective methodology?

Four Components of an FCE

- Intake interview
- Pain questionnaires
- Clinical assessment
- Functional testing
  - Tolerance testing
  - Hand strength assessments
  - Machine testing
  - Lifting

Cardinal Rules

- Understand the fundamental differences between observations and measurements.
- When challenging observations, focus on questions which highlight the subjective nature of observations.
- When challenging measurements, understand not only the testing process but the rationale, including the published studies, which are said to "support" the method.

Challenging Interpretations of Clinical Tests

For Challenging Conclusions Arising from a Clinical Assessment

Interpretations of clinical tests assume two things:

- The claimant has given a truthful response when asked if the clinical tests affect the pain.
- The test was a standardized test which was conducted properly.

Social Media Proof

Challenging the Methodology for Clinical Tests

- Is this test accurate in identifying the problem you have said it identified?
- Is this an objective test?
- Is this a standardized kind of clinical assessment?

Challenging the Methodology for Clinical Tests

- Where did you learn to do the test?
- If you learned this method from a textbook, what is the name of the book and who authored it?
- Is this test performed the same way every time by everyone else? If not, then is it truly standardized?
- If it is not actually standardized in the field, then how do we know which version is the best?

Challenging the Methodology for Clinical Tests

- Can you cite any published study that validates the conclusions you have drawn using this method? If so, what are they?
- Did you rely primarily on the claimant's subjective response to the clinical test to make your interpretation of the results? **If yes, then continue.** How do you know the response was truthful? **If no, go to next series.**

Challenging The Tests for "Function"

Have You Ever Taken Testimony Regarding These Testing Methods?

- Standard hand strength assessments:
  - Coefficient of variation (COV)
  - Bell Curve
  - Rapid Exchange Grip (REG) testing
- Isometric (static) testing.
- Isokinetic testing.
- Visual assessment of effort during a lifting task.
- Heart rate as an index of validity of effort.

What Do Those Methods Have In Common?

Not one of them is legally defensible if you understand how to question the witness. Even when the expert witness knows what questions you will ask, it will not help the witness give credible testimony.

Studies Discrediting Standard Hand Strength Assessments

Too numerous to mention here. See your handout.

Studies Discrediting Isometric Testing

- Feeler L, St James J.D., Schapmire D. W. (2010). Isometric strength assessment, Part I: static testing does not accurately predict dynamic lifting capacity. *Work. 37*(3):301-308.

Study of >130,000 subjects. The standard error of estimate is so large that predictions of dynamic lifting capacity on the basis of static strength is completely meaningless.

Studies Discrediting Isometric Testing

- Townsend R., Schapmire D. W., St James J. D., Feeler L. Isometric strength assessment, Part II: static testing does not accurately classify validity of effort. (2010). *Work. 37*(4):387-394.

This is the first published controlled study on the use of the Static Leg Lift and Static Arm Lift to classify validity of effort. More than half the subjects in the study produced a COV <15% when feigning weakness.

Accepted for Publication

- D. Schapmire, J.D. St. James, R. Townsend, L. Feeler. Accuracy of visual estimation of effort during a lifting yask. Accepted for publication in *Work,* to be published in 2011.

Accuracy is slightly higher than chance. Lay subjects are as accurate as "trained and experienced therapists."

Have You Ever Taken Testimony Regarding These Testing Methods?

- Standard hand strength assessments:
  - Coefficient of variation (COV)
  - Bell Curve
  - Rapid Exchange Grip (REG) testing
- Isometric (static) testing.
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- Visual assessment of effort during a lifting task.
- Heart rate as an index of validity of effort.

Challenging Standard Hand Strength Methods

Call for Volunteers!

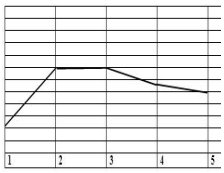
Challenging the Bell Curve

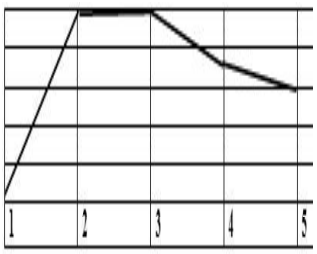
It All Began Right Here:

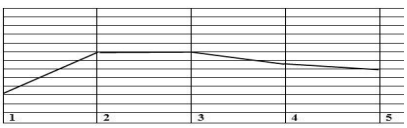
Stokes HM. (1983). The seriously uninjured hand—weakness of grip. *Journal of Occupational Medicine, 25*(9):683-4.

The so-called "analysis" of the "Bell Curve" supposedly answers these questions:

- Is the hump in the right spot?
- Is the hump high enough?







Limitations of a Visual "Analysis" of Graphs

- Sizes of graphs not standardized
- Amount of space above and below the line not standardized
- Relative scales of *x* and *y* axes not standardized
- No way to standardize impressions

2

Challenging Standard Hand Strength Assessments

Introduce the list of published studies which discredit the standard hand strength methodology.

- Do you have any criticism of any of the studies on this list?
- Are you prepared to say these studies are incorrect in the conclusions you have drawn?
- Do know of any specific studies which refute the ones on this list?
- Will you revise your interpretation of the results?

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

- What is the basis for using heart rate to draw conclusions about validity of effort?
- Is it true that factors other than physical exertion can affect heart rate?
- Does being deconditioned affect HR, and if so, how?
- Do you suppose that there is a certain amount of anxiety that people have when they take part in an FCE?
- Can anxiety increase heart rate?

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

- Can medication affect heart rate?
- Can the interaction between medication, anxiety and being deconditioned affect heart rate?
- How much do these variables affect heart rate?
- How much did they affect HR in the claimant you tested?

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

- Did you terminate some of the activities in this test because the claimant's HR reached a specific percentage of maximum predicted HR?
- How did you determine the claimant's maximum HR?
- Did you use the "220 – Age" formula to predict maximum HR?
- What is the difference between a prediction and a guess?
- How much error is there when you use that formula?

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

- At what percentage of predicted maximum HR did you terminate the activities in this test?
- Why did you choose that cutoff instead of one that was 5 or 10 percent higher or lower?
- Can you cite any authority for choosing that cutoff?

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

Please read into the record No. 1 under Conclusions And Recommendations on Page 7 of the Robergs review.

Based on this review of research and application of HRmax prediction, the following recommendations can be made;

1. Currently, there is no acceptable method to estimate HRmax.

For Challenging Conclusions Based on Heart Rate, BP or Respiration Rate

- Do you have any evidence this literature review of dissertations, textbooks and published studies spanning a period of about 35 years is in error? If so, what is your evidence.

In Conclusion

- The field of functional testing has largely failed to adopt testing methods that accurately assess validity.
- It has ignored its own research.
- Most current FCE's use testing methods that are not legally defensible—and this contributes to the contentious nature of litigated cases.
- The field needs your assistance if it is to reform.

Give your best effort.

Thank You

The materials below taken from *Forensic Dissection of a Functional Capacity Evaluation* by Darrell Schapmire and James D. St. James, edited by Greg Cairns, Esq. This 564-page digital publication is available through X-RTS. References which are associated with Internet addresses can be downloaded free of charge at the URLs listed in this document. Many of the questions in *Forensic Dissection* use the same studies which are said to "support" a methodology to discredit the methodology.

Studies Discrediting Standard Hand Strength Assessments

Have you ever seen these terms in FCE reports: COV, REG (Rapid Exchange Grip) and Bell Curve Analysis? These concepts comprise the "standard" methods of classifying effort—and they have no scientific foundation. When you see them in a report, there are only two possibilities: 1) A claimant's effort has been validated—for legally-indefensible reasons; 2) A claimant's effort has been invalidated—for legally-indefensible reasons. The studies below tell us that these methods simply do not perform as advertised. Go to www.pubmed.com to download abstracts for these articles.

Ashford RF, Nagelburg S, Adkins R. Sensitivity of the Jamar Dynamometer in detecting submaximal grip effort. *J Hand Surg [Am]*. 1996 May;21(3):402-5.

Birmingham TB, Kramer JF. Identifying submaximal muscular effort: reliability of difference scores calculated from isometric and isokinetic measurements. *Percep Motor Skills*. 1998 Dec;87(3 Pt 2):1183-91.

De Smet L, Londers J. Repeated grip strength at one month interval and detection of voluntary submaximal effort. *Acta Orthopaedica Belgica.* 2003 Apr;69(2):142-4.

Dvir Z. Coefficient of variation in maximal and feigned static and dynamic grip efforts. *Am J Phys Med Rehabil*. 1999 May-Jun;78(3):216-21.

Fairfax AH, Balnave R, Adams RD. Variability of grip strength during isometric contraction. *Ergonomics*. 1995 Sep;38(9):1819-30.

Fishbain DA, Cutler R, Rosomoff HL, Rosomoff RS. Chronic pain disability cxaggeration/malingering and submaximal effort research. *Clin J Pain*. 1999 Dec;15(4):244-74.

Goldman S, Cahalan TD, An KN. The injured upper extremity and the JAMAR five-handle position grip test. *Am J Phys Med Rehabil*. 1991 Dec;70(6):306-8.

Gutierrez, Z., Shechtman, O. The effectiveness of the five-handle position grip strength test in detecting sincerity of effort in men and women. *Am J Phys Med Rehabil*. 82:847-855, 2003.

Hamilton A, Balnave R, Adams R. Grip strength testing reliability. *J Han Ther*. 1994 Jul-Sep;7(3):163-70.

Hoffmaster E, Lech R, Niebuhr BR. Consistency of sincere and feigned grip exertions with repeated testing. *J Occup Med*. 1993 Aug;35(8):788-94.

Lechner DE, Bradbury SF, Bradley LA. Detecting sincerity of effort: a summary of methods and approaches. *Phys Ther*. 1998 Aug;78(8):867-88.

Niebuhr BR, Marion R. Detecting sincerity of effort when measuring grip strength. *Am J Phys Med*. 1987 Feb;66(1):16-24.

Niebuhr BR, Marion R. Voluntary control of submaximal grip strength. *Am J Phys Med Rehabil*. 1990 Apr;69(2):96-101.

Schapmire D, St James JD, Townsend R, Stewart T, Delheimer S, Focht D. Simultaneous bilateral testing: validation of a new protocol to detect insincere effort during grip and pinch strength testing. *J Hand Ther*. 2002 Jul-Sep;15(3):242-50.

Shechtman, O. Using the coefficient of variation to detect sincerity of effort of grip strength: A literature review. *J Hand Ther,* 2000, 13(1):25-32.

Shechtman, O. Is the coefficient of variation a valid measure for detecting sincerity of effort of grip strength? *Work*, 13(2):163-169, 1999.

Shechtman, O. The coefficient of variation as a measure of sincerity of effort of grip strength. Part I: The statistical principle. *J Hand Ther*. 14(3):180-187, 2001.

Shechtman, O. The coefficient of variation as a measure of sincerity of effort of grip strength, Part II: sensitivity and specificity. *J Hand Ther*. 2001 Jul-Sep;14(3):188-94.

Shechtman O, Taylor C. How do therapists administer the rapid exchange grip test? A survey. *J Hand Ther*. 2002 Jan-Mar;15(1):53-61.

Shechtman, O. & Taylor, C. The use of the rapid exchange grip test in detecting sincerity of effort. Part II: The validity of the rapid exchange grip test. *J Hand Ther,* 2000; 13:203-210.

Shechtman, O., Gutierrez, Z., Kokendofer, E. Analysis of methods used to detect submaximal effort with the five-rung grip strength test. *J Hand Ther*. 18(1): 10-18, 2005.

Shechtman, O., Anton, S., Kanasky, W. F., Robinson, M.E. The use of the coefficient of variation in detecting sincerity of effort: a meta-analysis. *Work*, 26(4):335-341, 2006.

Taylor, C. & Shechtman, O. The use of the rapid exchange grip test in detecting sincerity of effort. Part I: The administration of the Rapid Exchange Grip Test. *J Hand Ther*, 2000; 13:195-202.

Tredgett M, Pimble LJ, Davis TR. The detection of feigned hand weakness using the five position grip strength test. *J Hand Surg [Br]*. 1999 Aug;24(4):426-8.

Tredgett MW, Davis TR. Rapid repeat testing of grip strength for detection of faked hand weakness. *J Hand Surg [Br]*. 2000 Aug;25(4):372-5.

Westbrook AP, Tredgett MW, Davis TR, Oni JA. The rapid exchange grip strength test and the detection of submaximal grip effort. *J Hand Surg [Am]*. 2002 Mar;27(2):329-33.

Lastly in this section, we call your attention to this study: Stokes, H.M. The seriously uninjured hand--weakness of grip. *J Occup Med.* 1983 Sep;25(9):683-4. This is one of the most widely cited sources, said to "prove" or "support" the concept of the "bell curve." Note that it has only two subjects.

Challenging Isometric Test Results

Obtain the studies listed below when challenging isometric strength methodology. Isometric (static) testing is promoted for its alleged abilities to predict dynamic function. Although isometric testing has been performed in the clinical setting for over 40 years, until 2010, no serious investigations into either of these claims had ever been conducted. The Feeler et al. study had over 130,000 subjects and conclusively demonstrates that there is significant error in making isometric-to-dynamic strength predictions. In fact, such predictions are no longer legally defensible—and if used by an employer to make hiring decisions will result in a disparate impact on female applicants. The Townsend et al. study was the first published study to assess the accuracy of the two most commonly performed isometric lifts—the Static Arm Lift and Static Leg Lift. Over half the subjects in this study performed "consistently" (had a COV <15%) when feigning weakness. The Hansson study addresss the issue of "safety."

Feeler L, St James J. D., Schapmire D. W. (2010). Isometric strength assessment, Part I: static testing does not accurately predict dynamic lifting capacity. *Work. 37*(3):301-308. ***http://xrts.com/Feeler_Isometrics_Part I.pdf***

Townsend R., Schapmire D. W., St James J. D., Feeler L. Isometric strength assessment, Part II: static testing does not accurately classify validity of effort. (2010). *Work. 37*(4):387-394. ***http://xrts.com/Townsend_Isometrics_Part II.pdf***

Hansson, T. H., Stanley, J., Bigos, S. J., Wortley, M. K., & Spengler, D. M. (1984). The load on the lumbar spine during isometric testing. *Spine*, 9, 720-*724*.

Challenging Isernhagen (DIS) and WorkWell FCEs

Obtain the studies below when taking the deposition of a therapist who has performed the Isernhagen (DSI) or WorkWell FCEs.

Isernhagen, S. L., Hart, D. L., & Matheson, L. M. (1999). Reliability of independent observer judgments of level of lift effort in a kinesiophysical functional capacity evaluation. *Work, 12*:145-150.

Reneman, M. F., Fokkens, A. S., Dijkstra, P. U., Geertzen, J. H., & Groothoff, J. W. (2005). Testing lifting capacity: validity of determining effort level by means of observation. *Spine (Epub*), *30*:E40-46. ***http://dissertations.ub.rug.nl/FILES/faculties/medicine/2004/m.f.reneman/c10.pdf***

Schapmire D., St James J. D., Townsend R., Feeler L. Accuracy of visual estimation of effort during a lifting task. In Press, scheduled for publication in 2011. *Work.* ***http://xrts.com/Schapmire_Visual Estimation of Effort_Pre-Publication Copy.pdf***

Challenging the ErgoScience FCE

Obtain these studies prior to taking deposition from anyone who has performed the ErgoScience FCE.

Lechner, D. E., Jackson, J. R., Roth, D. I., & Straaton, K. V. (1994). Reliability and validity of a newly developed test of physical work performance. *Journal of Occupational Medicine, 36*: 997-1004.

Lechner, D. E., Bradbury, S. F., & Bradley, L. A. (1998, Aug). Detecting sincerity of effort: a summary of methods and approaches. *Physical Therapy*, *78*(8):867-888.

Schapmire D., St James J. D., Townsend R., Feeler L. Accuracy of visual estimation of effort during a lifting task. In Press, scheduled for publication in 2011. *Work.* ***http://xrts.com/Schapmire_Visual Estimation of Effort_Pre-Publication Copy.pdf***

Stokes, H. M., Landrieu, K. W., Domangue, B., & Kunen, S. (1995). Identification of low-effort patients through dynamometry. *Journal of Hand Surgery [Am], 20*:1047-1056.

Challenging the Matheson and Blankenship FCEs

Obtain these studies when challenging the Matheson and Blankenship FCEs. Not that many persons who are not using these protocols on an official basis will nonetheless use these methods.

Brubaker, P. N., Fearon, F. J., Smith, S. M., McKibben, R. J., Alday, J., Andrews, S. S., Clarke, E. and Shaw, G. L. (2007, Apr). Sensitivity and specificity of the Blankenship FCE system's indicators of submaximal effort. *Orthopedic and Sports Physical Therapy. 37(*4):161-168.

Jay, M. A., Lamb, J. M., Watson, R.L., Young, I.A., Fearon, F. J., Alday, J. M, and Tindall, A.G. (2000, Jun). Sensitivity and specificity of the indicators of sincere effort of the EPIC lift capacity test on a previously injured population. *Spine*, *25*(11):1405-1412.

Lemstra, M., Olszynski, W. P. and Enright, W. (2004, Mar). The sensitivity and specificity of functional capacity evaluations in determining maximal effort: a randomized trial. *Spine*. *29*(9):953-959

Matheson, L. N, Mooney, V., Holmes, D., Leggett, S., Grant, J. E., Negri, S. & Holmes B. (1995, Oct), A test to measure lift capacity of physically impaired adults. Part 1—Development and reliability testing. *Spine. 20*(19):2119-2129

Schapmire D., St James J. D., Townsend R., Feeler L. Accuracy of visual estimation of effort during a lifting task. In Press, scheduled for publication in 2011. *Work.* ***http://xrts.com/Schapmire_Visual Estimation of Effort_Pre-Publication Copy.pdf***

Challenging Use of Heart Rate, Blood Pressure or Respiration as Indexes of Effort

It has long been assumed that "pain" during an activity is evidence that a claimant is "cooperating" during an FCE. It has been further assumed that "pain" causes predictable increases in heart rate, blood pressure and respiration. Lord & Woollard demonstrate conclusively in a very large study that these "physiological signs" are not in any way predictably related to pain that is reported by patients under emergency conditions. The Robergs study destroys the concept that "220 – Age = Maximum Heart Rate." Collectively, these two studies form the basis for attacking the use of "physiological signs" to classify validity of effort.

Lord B., Woollard M. (February 2011). The reliability of vital signs in estimating pain severity among adult patients treated by paramedics. *Emergency Medicine Journal*. *28*(2):147-50. Epub 2010 Oct 6.

Robergs R.A. and Landwehr R. (2002). Surprising history of the "HRmax = 220- age" equation, *Journal of Exercise Physiology Online*:1-10. ***http://faculty.css.edu/tboone2/asep/Robergs2.pdf***

Initial Questions for the FCE Evaluator

Lay the foundation for taking testimony with these questions. They establish the witness' confidence in the functional testing he/she has conducted. Moreover, they set the witness' later testimony to be in conflict with testimony that is offered in answering these particular questions. ***Do not underestimate the importance of these questions.*** Understand that they are used for the sole purpose of making it much easier to challenge the methods when the lines of questioning turn more specifically to the results of the FCE itself.

1. Let us begin by coming to an agreement on the use of basic terminology during this testimony. The Merriam-Webster Dictionary defines the word "objective" as "expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations, limited to choices of fixed alternatives and reducing subjective factors to a minimum." Is this a definition with which you agree? If no, then ask for clarification. The Merriam-Webster Thesaurus lists these words as being related to the word "objective": "actual, factual, genuine, material, real, indisputable, undeniable, demonstrable, provable and verifiable." Do you have any substantial disagreement with these words being classified by the Merriam-Webster Thesaurus as similar to "objective?" The Merriam-Webster Dictionary defines "subjective" as: "peculiar to a particular individual, modified or affected by personal views, experience, or background and arising out of or identified by one's perceptions." Would you agree with Merriam-Webster's definition of the word "subjective?" Merriam-Webster defines "observation" with these words: "a judgment or inference from what one has observed." Would you agree with this definition? Would you, therefore, agree the terms "observation" and "judgment" are synonymous? Merriam-Webster defines "measurement" as "the act of measuring and a figure, extent or amount by measuring." Would you agree with this definition? Merriam-Webster lists these words as synonyms for "measurement": "bulk, dimension, extent, measure, size and proportion." Would you agree that these are synonyms for the word "measure?" By extension, therefore, can we agree before we start that the term "objective measurements" involve taking measurements of some kind that are facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations which reduce subjective factors to a minimum?" Lastly, with the definitions, can we agree that by combining the definitions to which we have agreed, the term "subjective observations" refer to "judgments or inferences which are peculiar to a particular individual, modified or affected by personal views, experience, or background and arising out of or identified by one's perceptions?"

Important note: It is entirely possible that witnesses will offer testimony which will essentially "rewrite" their definitions of "objective" and "subjective." They may also attempt to offer testimony contradicts these definitions of "objective measurement" and "subjective observations." It is for that reason that the questions below in this text box are offered as countermeasures to the equivocating witness. They are also included in the list of questions found in Aces in the Hole, Chapter 16).

1. I would remind the witness that he/she has previously defined the term [**pick one: *"objective," "subjective," "objective measurement," "subjective observation"***] in a manner that is inconsistent with the testimony you have just given. For the record, will the recorder please read the initial questions for this proceeding, specific reference being made to the definitions of these terms?
2. Do you wish to revise the testimony you have just given in light of the apparent inconsistencies between what you have just said as compared to the definition to which you agreed when we began this proceeding?
3. If the witness does not wish to acknowledge this inconsistency, then we will make note of this inconsistency for the record and proceed to the next questions.

2. Would you agree that objective measurement of function is important during an FCE? Would you agree that to the extent possible subjective interpretations of observations should be minimized as much as possible in an FCE so that the data which are reported are as objective as possible? Would you also agree that if subjective observations or subjective judgments that are based on methods that have been demonstrated to be inaccurate are not appropriate for use during an FCE?
3. Would you agree that information in an FCE report must be relevant? Do you agree that the information in a report must also be accurate? Would you agree that there is a difference between objective information and subjective information? Would you agree that objective information involves making observations or taking measurements that are consistent with provable facts? Would you agree that subjective information which requires an interpretation of some kind or other? In other words, information that is "subjective" may or may not give us meaningful information with regard to the functional status of a claimant? Would you also agree that even objective information is not necessarily meaningful? For example, the claimant might have pink eyes, and while that might be an objective statement, it may not be necessarily relevant or even particularly useful. Would you agree that "sensitivity" is a term that refers to the percentage of times a methodology identifies when a condition is present? Would you agree that "specificity" is a term that refers to the percentage of times a methodology identifies the absence of a condition? Would you agree that "accuracy" is a statistic that refers to the percentage of times a methodology actually makes a correct classification? Would you also agree that a correlation statistic shows the relationship between two different variables? Are you aware that correlation statistics in your field's literature can be expressed with either an *r* value and that this value ranges from "0" which indicates "no correlation" between the two variables and "1.0" which indicates a "perfect agreement" between the two variables? Are you also aware that when correlations for observational studies are done, the agreement between observers is also expressed in that

same 0 to 1.0 range? Would you agree then, that any correlation less than 1.0 indicates that the relationship is not "perfect" as the statisticians would say? With specific reference being made to inter-rater observational studies, would you agree that if such agreement is less than 1.0, then all of the observers do not have the same interpretation of what they are observing? Logically then, if all of the observers are not in agreement, would you agree that some of the observers are correct in their observations and some are incorrect? Would you also agree that a correlation statistic for observational studies does not tell us which of these observers are right and which are wrong? As an extension of that reasoning, then would you also agree that if we do not know who is right and who is wrong, we cannot draw any conclusions regarding the accuracy of the methodology? In other words, you would agree that correlation statistics and statistics such as sensitivity, specificity and accuracy are actually not giving us the same information at all? Lastly, would you agree that since correlations do not necessarily tell us anything about sensitivity, specificity and accuracy of a method that conclusions based on the use of such studies are ***not necessarily*** valid, in and of themselves?

4. Do you believe your assessment of the claimant's validity of effort was accurate?
5. Do you believe you made that assessment based on good science?
6. Do you believe that the protocol you administered is supported by good science?
7. Are you familiar with the research used to conduct this test?
8. What is the commercial name of the protocol you conducted?
9. Who developed this protocol?
10. Do you believe you have an understanding of the methods, analysis and conclusions of any study that is said to validate your methodology?
11. Do you believe you have drawn your conclusions on validity of effort with an acceptable degree of scientific certainty?
12. Do you believe you have drawn your conclusions on validity of effort with an acceptable degree of scientific certainty?
13. What is the acceptable level of proof to establish scientific certainty?
14. Do you believe the study (or studies) you cited established that degree of certainty?
15. If that degree of certainty was not established in the study (or studies) you cited, is it fair to say that this protocol and the conclusions you made were not, in fact, established with scientific certainty?
16. If scientific certainty is not demonstrated, then would you agree that the methodology and conclusions are basically a subjective interpretation of the things that occurred during this test?
17. Would you agree that subjective interpretations are subject to error?
18. Would you also agree that if two conflicting opinions are subjective, not based on a scientific analysis, that the assessment of validity of effort becomes more or less boils down to "professional opinions" that are offered by opposing expert witnesses?
19. In your opinion, should a subjective professional opinion is contrary to what is known from a scientifically provable perspective be given much weight in legal testimony?

Initial Questions for the Physician Making Decisions on the Basis of an FCE

Physicians frequently make a wide range of case management decisions on the basis of information obtained from an FCE. Therefore, it is legitimate to ask questions related to their decision-making process, including their understanding of the FCE testing process and the justification for their reliance on the FCE. These questions are intended to set the stage for broadening the inquiry so that it is possible to pose any of the other questions in this list to the witness.

1. Would you agree that information in an FCE report must be relevant? Do you agree that the information in a report must also be accurate? Would you agree that there is a difference between objective information and subjective information? Would you agree that objective information involves making observations or taking measurements that are consistent with provable facts? Would you agree that subjective information which requires an interpretation of some kind or other? In other words, information that is "subjective" may or may not give us meaningful information with regard to the functional status of a claimant? Would you also agree that even objective information is not necessarily meaningful? For example, the claimant might have pink eyes, and while that might be an objective statement, it may not be necessarily relevant or even particularly useful. Would you agree that "sensitivity" is a term that refers to the percentage of times a methodology identifies when a condition is present? Would you agree that "specificity" is a term that refers to the percentage of times a methodology identifies the absence of a condition? Would you agree that "accuracy" is a statistic that refers to the percentage of times a methodology actually makes a correct classification? Would you also agree that a correlation statistic shows the relationship between two different variables? Are you aware that correlation statistics in your field's literature can be expressed with either an *r* value (a Spearman or Pearson's *r*) and that this value ranges from "0" which indicates "no correlation" between the two variables and "1.0" which indicates a "perfect agreement" between the two variables? Are you also aware that when correlations for observational studies are done, the agreement between observers is also expressed in that same 0 to 1.0 range? Would you agree then, that any correlation less than 1.0 indicates that the relationship is not "perfect" as the statisticians would say? With specific reference being made to inter-rater observational studies, would you agree that if such agreement is less than 1.0, then all of the observers do not have the same interpretation of what they are observing? Logically then, if all of the observers are not in agreement, would you agree that some of the observers are correct in their observational studies does not tell us which of these observers are right and which are wrong? As an extension of that reasoning, then would you also agree that if we do not know who is right and who is wrong, we cannot draw any conclusions regarding the accuracy of the methodology? In other words, you would agree that correlation statistics and statistics such as sensitivity, specificity and accuracy are actually not giving us the same information at all? Lastly, would you agree that since correlations do not necessarily tell us anything about sensitivity, specificity and accuracy of a method that conclusions based on the use of such studies are ***not necessarily*** valid, in and of themselves?

2. Did you use the FCE to help you make your recommendations regarding the management of this case?
3. With regard to determining the actual functional status of the person being tested, did you rely heavily on this test?
4. **If No. 22 = Yes:** Do you believe that functional status was established accurately? Do you believe that the assessment of validity of effort is necessary to determine functional ability in a test of this kind? Do you believe that without an accurate assessment of validity of effort that the conclusions with regard to function are speculative?
5. **If No. 22 = No:** Do you believe you can predict functional status on the basis of a diagnosis? **If Yes, then:** What is the basis for that belief? If you think you can predict function, then why did you send this person out for an FCE? Can you cite anything in the medical literature that tells us that diagnosis predicts functional status? If this was possible, is it not true that there would be little need for cases managers or even adjusters, simply because the diagnosis would tell us whether a person could go back to work or not?
6. Have you relied on such information in the past? How often have you used such tests to make case management decisions? Do you believe you have a good basis for
7. Have you ever attended any classes that provide specific training in how to conduct an FCE? Have you ever conducted an FCE? Are you familiar with any of the published literature related to validity of effort testing? If so, what have you read? What were the conclusions? Were those controlled studies, or did they identify correlations between various factors?
8. How accurate do you believe this system of testing to be? What is the sensitivity? **Sensitivity is the identification of poor effort, feigned weakness, etc.** What is the specificity? **Specificity is the identification of good effort, maximum effort, etc.** If you do not know the sensitivity and specificity, how do you know what the accuracy is? How can you testify that you are certain of the classification of effort?
9. Presumably, you believe this case has a scientific basis. Is that true? Is your confidence in the test results based on your belief that the result is scientific? If the basis for the test was not based in science, would you agree that the conclusions related to validity of effort are called into question? In such an event, would you change your recommendations?

Challenging Dictionary of Occupational Titles Classifications

The Dictionary of Occupational Titles definitions are completely arbitrary and subject to significant confusion and misrepresentation. The cutoff points for the physical demand levels (Light, Medium and Heavy) are based on the definitions are either references to the maximum weight lifted on the job. Dividing the maximum amount of weight an individual lifts during an FCE by 2 ***is often presumed*** to predict what the claimant is capable of doing on a "frequent" basis. Dividing the prediction for "frequent" by 2 ***is often presumed*** to predict "continuous" lifting capacity. There is no evidence for either of these assumptions.

"Frequency" and "duration" as defined in the *Dictionary of Occupational Titles* are completely arbitrary concepts and designations. "Occasional" is defined as "33%" of the

workday or an activitiy that occurs up to 100 times a shift. "Frequent" is defined as "67%" of the workday or 101 – 500 times a shift. "Constant," is defined as activities that occur more than 500 times a shift.

If frequency, duration or Physical Demand Level is an issue, reduce the concepts to the absurd. For instance, lifting 100 pounds 50 times would be considered as "occasional" lifting at the "Heavy Physical Demand Level" and would result in lifting 5,000 pounds per shift. In contrast, a person who is required to lift 80 pounds 100 times a day would be performing "occasional" lifting at the "Medium-Heavy Physical Demand Level, but would be lifting 8,000 pounds per shift. The disparity between these designations is obvious—and the distinction between them is obviously arbitrary. Unfortunately, indemnity is often awarded, to a large extent, on the basis of the *Dictionary of Occupational Titles* Physical Demand Level that is assigned to an individual—on the basis of terms which make little practical sense.

Along the lines of the challenging the definitions themselves, it may be useful to explore the definitions in the context of basic mechanical physics, an area which few persons doing FCEs are prepared to discuss during deposition. Exploit this weakness. "Work" is defined as weight x distance. Assuming a worker lifts 50 pounds 50 times over a distance of 3 feet during a work shift, "total work" is calculated with: 50 pound x 50 (repetitive) x 3 feet (distance). Therefore, total work = 7,500 pounds/feet. Using the same formula, "total work" for a worker who has to carry 50 pounds for 25 feet 10 times a day is 12,500 pounds/feet. Which is the more physically demanding job? Even with these numbers, the answer is not straightforward because carrying does not require repetitive bending at the hips, knees and ankles. Therefore, expanding on this theme in the context of the medical history may also prove to be a fruitful avenue to pursue.

1. What is the definition of "Sedentary Physical Demand Level" with regard to maximum load lifted on an occasional basis? **[Answer: 0 - 10 lbs.]**
2. What is the definition of "Light Physical Demand Level" with regard to maximum load lifted on the job on an occasional basis? **[Answer: 11 - 20 lbs.]**
3. What is the definition of "Medium Physical Demand Level" with regard to maximum load lifted on the job on an occasional? **[Answer: 21 - 50 lbs.]**
4. What is the definition of "Heavy Physical Demand Level" with regard to maximum load lifted on the job on an occasional basis? **[Answer: More than 50 lbs.]**
5. What is the definition of "occasional" (or "frequent") in terms of the duration of a work shift?
6. Is that time period at the beginning of the work day?
7. Is that time period at the end of the work day?
8. Is that time period throughout the work day?
9. What is the frequency of activities described as being "occasional" during this 33% (or 67%) of the work shift? **[Answer: Occasional = 1 – 100 times/shift, Frequent = 101 – 500 times/shift, Constant = >500 times/shift]**
10. How do you calculate the ability to lift frequently, based on an occasional lift (or the ability to lift constantly on the basis of occasional)?
11. What is the clinical basis for that extrapolation?
12. What is the research basis for that extrapolation?

13. What is the difference between an extrapolation, a prediction, a projection, an estimate—and a wild guess?
14. If a person lifts 99 pounds 100 times a day, what is the physical demand level of that job? How much weight is lifted during the day in this case? So that's why this job would be classified as at the Medium Physical Demand Level?
15. If a person lifts 100 pounds 10 times a day, what is the physical demand level of that job? How much weight is lifted during the day in this case? So that's why this job would be classified at the Heavy Physical Demand Level?
16. Does this make any sense to you? Are you willing to adjust your report so that it omits the use of predictions that have neither a scientific basis nor a basis in logic?

Sometimes, physical performances are classified as "sub-sedentary" when the claimant is unable to perform a bilateral lift, initiating the lift with the knuckles on the floor. This practice is based on a misuse of the *Dictionary of Occupational Titles* classifications. Basically, this practice consigns persons who cannot perform such lifts to permanent total disability—a practice which is, on its face, absurd. If you run into these circumstances, reduce the premise to absurdity. These are the questions suggested for taking legal testimony:

17. **If the classification was based on the *Dictionary of Occupational Titles* (*DOT*):** Can you produce the table the *DOT* which you say justifies your classification of the claimant as "sub-sedentary?" **If the table is produced:** Please point out the text on the table that supports your classification of the claimant. It is not on the table. Since this information is not on the table, can you cite any source that is supportive of your classification of the claimant as "sub-sedentary?" **To reduce this practice to absurdity:** Out of 100 people who are working right now, how many do you suppose would be unable to perform a bilateral lift, initiating the lift with the knuckles on the floor while maintaining ideal body mechanics? Did you base your classification of the claimant's physical demand level largely upon the fact that he/she was unable to perform a bilateral lift from the floor? How high from the floor could the claimant safely lift initiate such a lift, in your opinion? If a person could initiate a lift of 100 pounds with the knuckles 10" from the floor, how would you classify their physical demand level if they could not initiate a lift with knuckles on the floor? Would 8" be close enough? How about 6"? What about 4"? What about 1.579"? So are you testifying that to be capable of working, all persons must be able to initiate lifts with the knuckles on the floor? What about an NFL lineman who likely has tight hamstrings that would limit his range of motion, but could lift 200 or 300 pounds, is that person incapable of performing any occupational activity? Are you suggesting that everyone who is unable lift with knuckles is incapable of working? If not, then how did you arrive at that conclusion in this particular case?

Challenging Isokinetic Results

Other than "black box" technology that uses a "proprietary formula" for the alleged purpose of predicting function, there are no studies that demonstrate the ability to use isokinetic measures to predict functional abilities such as lifting. Furthermore, despite major literature reviews on the subject finding no evidence that isokinetic strength testing can accurately classify

validity of effort, the technology is still promoted for that alleged purpose. When the "proprietary formula" is not used to classify function, this is done by "visually analyzing" a graph. This kind of "analysis" has the same flaws which the so-call "Bell Curve" analysis used in standard hand strength assessments is used. Specifically, the sizes and the relative scales of the axes are not standardized. These factors affect the visual appearance. Furthermore, such methods are not standardized. They have never been subjected to peer review and they can be easily challenged by a knowledgeable attorney. An (as-yet) unpublished doctoral dissertation used a very sophisticated statistical approach to solve this problem—and even then, sensitivity to feigned weakness was only 31% ***http://xrts.com/Almosnino_Isokinetic.pdf***

Challenging the Bell Curve Analysis Used in Standard Hand Strength Assessments

As mentioned at the end of the list of studies pertaining to hand strength assessments, the "Seriously Uninjured Hand" by H.M. Stokes had only two subjects. Nonetheless, this is one of the most widely cited "supportive references" in FCE bibliographies. These are the questions we would suggest using when this kind of assessment to challenge "graph interpretations."

1. What do you believe is most objective in classifying validity of effort, some kind of impression or the use of hard data such as force values that are generated during a repeated measures protocol? **If this question is asked first and if you use the questions below if any visual assessment of the Bell Curve has been made, the task of challenging a "visual interpretation" is much easier. Most likely, you will know if this approach is taken if line graphs have been included in the FCE report. Regardless as to whether a COV for peak forces or a COV for forces produced during sustained contractions are used, start here as opposed to jumping to the questions below.**
2. **If a "visual estimation" of a graph was used to classify validity of effort:** Please describe how you visually assessed and classified validity of effort for the isometric tests that were conducted. Essentially, are you making a judgment with regard to how far apart the lines are on the graphs that you looked at? **For the questions that follow, there are no standards the witness will be able to cite.** What is the standard size to display a graph on a computer? What is the standard size to display a graph on a written report? If the graphs are larger, then, the lines appear farther apart? If the graphs are smaller, the lines could appear closer together? What is the standard amount of space above and below the lines of the kinds of graphs you looked at? What is the standard scaling of the *x* and *y* axes in the kinds of graphs you looked at?
3. If a "visual estimation of a graph was used to classify validity of effort: Generally speaking, are impressions of any kind really standardized measurements? Are impressions of one person necessarily held by all other persons? If impressions are not phenomena that are universally perceived the same way by all people in all circumstances, is it fair to say that such impressions are an "art" instead of a "science?" Is it appropriate to make your judgments in a medical-legal case on the basis of an art?

Challenging the Methodology for Clinical Tests

1. Is this test accurate in identifying the problem you have said it identified?
2. Is this an objective test?
3. Is this a standardized kind of clinical assessment?
4. Where did you learn to do the test?
5. If you learned this method from a textbook, what is the name of the book and who authored it?
6. Is this test performed the same way every time by everyone else? If not, then is it truly standardized?
7. If it is not actually standardized in the field, then how do we know which version is the best?
8. Can you cite any published study that validates the conclusions you have drawn using this method? If so, what are they?
9. Did you rely primarily on the claimant's subjective response to the clinical test to make your interpretation of the results? **If no, skip to Question 10.** How do you know the response was truthful? Doesn't this simply boil down to an opinion?
10. Since you did not simply rely on your opinion in this matter, did you rely on anything you could hear, feel or measure to draw your conclusion regarding this test**? If no, skip to Question 11.** What did you hear, feel or measure? Would the things you heard or felt be universally perceived and interpreted in the same way by every other evaluator? If not, then this is your professional opinion, correct?
11. Did you rely on correlating the results of various clinical tests? If so, which tests did you compare? Have these been shown to correlate in the statistical sense in published studies or is this your judgment, based on your experience? Based on your own experience, what is the correlation between these various tests results that you are comparing? By that, I mean, what is the correlation, or *r* value? Can you cite it? Have you actually tracked your results over time? If not, then would you agree that your testimony on this specific issue is anecdotal? Would you also agree that you have no way to document the accuracy of your testimony on this issue?

Forensic Dissection of a Functional Capacity Evaluation

Chapter 13

Legally defensible Validity of Effort Testing

Most commonly administered assessments of validity of effort are simply not "scientific" in any reasonable sense of the term. The methods used in those protocols are subject to legitimate and extremely effective challenges. There has been an over-emphasis on various kinds of reliability (inter-rater, intra-rater, test-rest and inter-protocol). In fact, the research has overlooked a basic fact: *Even highly reproducible data may not actually represent a maximum voluntary effort, but instead may be the physical performance data of a very proficient fake.* There has also been a focus on various types of validity (content, construct, criterion). But, most particularly in the research related to the visual estimation of effort, there has been no meaningful attention paid to the *internal validity* of physical performance data.

We emphasize that there are many competent people performing FCEs. We emphasize that we do not believe that it is impossible to correctly classify validity of effort using standard testing protocols. But we are also firm in our position that those methods are not legally defensible. As a result, compensation cases devolve into contests between competing attorneys, expert witnesses that contradict one another and hearings or trials before arbitrators, judges and juries that ***interpret the accuracy of interpretations!*** The ultimate results are contentious, litigated systems in which the involved parties, i.e. claimant, employer and guarantor may or may not receive fair treatment.

There are viable alternatives to the shopworn methods. They have been developed by X-RTS. "X-RTS" is an acronym for "cross-reference" testing system. The two commercial products developed by X-RTS are the X-RTS Hand Strength Assessment and the X-RTS Lever Arm (which is used to classify validity of effort during a lifting assessment). Both testing protocols are based on one of the most basic tenets of comparative science: repeated measures. But the X-RTS tests do not confuse the issues of "reliability" and "validity." The repeated measures in the X-RTS protocols are "distraction-based" tests, meaning that activities are re-tested in non-obvious way or in ways which minimize the odds of successful deception.

In the X-RTS Hand Strength Assessment, the claimant is tested to see how much force can be produced with each hand, using the standard testing gauges. The data from these trials are compared to the amount of force produced with the "distraction" of simultaneous testing of both hands. Since there is no physical reason for significant differences between forces produced during the one-handed trials and the bilateral trials, excessive variation between these values indicates that motivation is a problem—and we do the analysis by applying seven statistically-based criteria. The most commonly used hand strength tests for validity of effort have a well-known error rate of at least 30%. In contrast the X-RTS Hand Strength Assessment was shown to be 99.5% accurate in a large controlled study. Subsequent research showed it to be appropriate for use in a patient population. Although the seven criteria

are copyrighted, they have been published in the peer-reviewed literature. They are not a set of secret formulas that only the authors can examine.

In the X-RTS lifting assessment, the "distraction" is the visual appearance of the workload. "Actual" workloads are determined by how much weight is added to the device—and where it is placed. It is possible to place 100 pounds on this device to create an actual workload of 20 pounds—and possible to place 5 pounds in a position that will result in a workload of nearly 30 pounds. In one of our recently published studies (***http://xrts.com/St. James_Hand Strength_Part II.pdf)*** it was found that subject estimations of actual workloads on the Lever Arm differed from the actual workloads approximately 80% and the odds of visually estimating three different workloads on the device with less than 25% error are about 1.5%. Watch a video here: ***http://www.xrts.com/X-RTS Lever Arm Video.wmv*** (wait for link to load).

We have been involved in an ambitious, wide-ranging research initiative. The result has been six primary research studies. These studies either bring completely new information to the field or bring new insights into subject matter that has been published in the past by other persons. Below, the reader will find information pertaining to these studies. All were approved by the Millikin University Institutional Review Board. Other individuals who took part in the research initiative are Larry Feeler, PT and CEO of WorkSTEPS, Inc. (Austin, TX), Joseph Kleinkort, PT, PhD of Joseph MR. A. Kleinkort, PC (Trophy Club, TX) and Robert Townsend, MS (Work Conditioning Systems (Palos Heights, IL). It is important to note that Part I of the isometric study, the largest study of its kind to be published in a peer-reviewed journal, was made possible only through the foresight of WorkSTEPS, Inc. in compiling the world's largest database of employment tests (more than 1,000,000 tests). The company is unique in the field in that its continuous evolution of testing methods has been made possible only by a process of continuous evaluation and re-evaluation of its testing practices.

*****

Schapmire, D., St. James, J. D., Townsend, R., Stewart, T., Delheimer, S., Focht, D. Simultaneous Bilateral Testing: Validation of a New Protocol to Detect Insincere Effort During Grip and Pinch Strength Testing. (2002, Jul-Sep). *Journal of Hand Therapy*. *15*(3), 242-50.

Abstract: The detection of feigned weakness in hand-grip strength assessment is difficult. We review several proposed methods and their weaknesses. A comparison of unilateral testing and simultaneous bilateral testing with the Jamar dynamometer and the Baseline pinch gauge is demonstrated as a solution. An experiment employed 100 asymptomatic subjects tested twice, once under instructions to give a full effort and once under instructions to feign weakness. Seven statistical criteria of noncompliance were chosen. Defining noncompliance as failing two or more of the seven criteria, 99% of the instructed-noncompliant subjects were correctly classified

as noncompliant. No subjects were incorrectly classified as noncompliant during instructed compliant testing. Twelve subjects failed a single criterion. On retesting, all but one were correctly classified. One subject in the instructed-noncompliant group passed all criteria.. Including retesting of the 12 "grey-zone" subjects, accuracy was 99.5%.

The abstract above describes the most accurate method of assessing validity of effort during hand strength testing that has ever been reported in peer-reviewed literature. In this chapter, you will find two related abstracts of recently published studies. The most recent studies demonstrate that X-RTS is appropriate for use in a patient population. Furthermore, they show that failure of the X-RTS validity criteria is due to test behavior and cannot be reasonably attributed to "pain."

*****

Accuracy of Visual Estimation in Classifying Effort During a Lifting Task
In Press, Scheduled for publication in *Work* in 2011
Schapmire D, St. James JD, Townsend R, Feeler L

Abstract

Objective: The objective was to determine if visual estimation of effort (VEE) during lifting tasks is accurate in classifying relative levels of exertion or distinguishing between incomplete lifts that may be potentially unsafe and incomplete lifts of "actors" feigning weakness. **Participants:** A convenience sample of 117 health professionals and lay subjects participated in the study. **Methods:** Four actors were videoed performing four complete dynamic lifts (sets of five repetitions) of varying levels of exertion (relative to subjects' physical maximum). Subjects viewed the videoed performances, presented in no apparent order, attempting to properly classify the lifting tasks. For the four levels of exertion, participants were to judge if the lifts were 25%, 50%, 75% and 100% of each actor's maximum lifting capacity and to distinguish between an incomplete (failed) lift of 110% of maximum and a feigned failure of a lift of 25% of maximum. **Results:** Accuracy for in classifying all lifting activities was marginally higher than chance. There were no differences in the accuracy of health professionals or lay subjects. **Conclusion:** The VEE does not accurately classify relative levels of exertion or distinguish between incomplete feigned effort lifts and lifts that are potentially too heavy to safely lift. For a free pre-publication copy, go here: ***http://xrts.com/Schapmire_Visual Estimation of Effort_Pre-Publication Copy.pdf.*** This study will be published in the last quarter of 2011.

The Visual Estimation of Effort study above renders such methodology legally indefensible—-*if the attorney who challenges the results knows what questions to ask.* There may be profound implications for many commercially available FCE systems.

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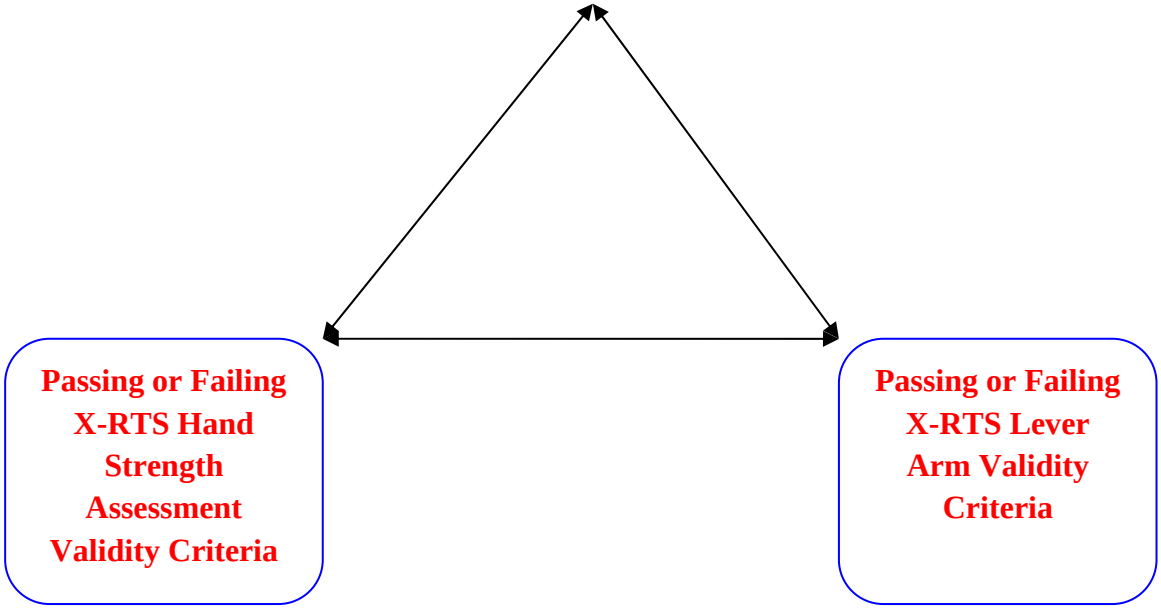
Schapmire D. W., St James J. D., Feeler L., Kleinkort J. (2010). Simultaneous bilateral hand strength testing in a client population, Part I: diagnostic, observational and subjective complaint correlates to consistency of effort. *Work. 37*(3):309-320.

Abstract

Objectives: 1. To determine if scores on pain questionnaires and overt behaviors during a functional capacity evaluation (FCE) were related to variability between repeated measures during a hand strength assessment. 2. To determine if failure of statistically-based validity criteria, as proposed by Schapmire, St. James and Townsend et al. is likely to be due to pain. **Participants:** 200 consecutive clients presenting for an FCE. **Methods:** Subjects filled out pain questionnaires, were observed for various behaviors and were administered the distraction-based hand strength assessment. **Results:** Clients failing two or more of the statistically-based validity criteria had higher scores on most pain questionnaires, presented with a higher frequency of various pain behaviors ($p < .05$ and $<.001$, respectively), and had a lower rate of relevant surgeries ($p < .001$). There was no statistically significant difference in the number of failed validity criteria between this group of clients and for normal subjects feigning weakness in a controlled study ($p > .05$). **Conclusions:** Pain does not reasonably explain the failure of the statistically-based validity criteria. The protocol is appropriate for use in a client population. For a free download, go here: ***http://xrts.com/Schapmire_Hand Strength_Part I.pdf.***



Part I (above) and Part II (below) triangulate the results of the X-RTS Hand Strength Assessment and X-RTS Lever Arm with *test behavior*. In other words, the passing or failing of the validity criteria is due to behavior, not pain or medical history—and the results on one test are highly predictive of the results of the other.

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St. James J. D., Schapmire D. W., Townsend R., Feeler L., Kleinkort J. (2010). Simultaneous bilateral hand strength testing in a client, Part II: relationship to a distraction-based lifting evaluation. *Work. 37*(4):395-403.

Abstract

Objective: To determine if passing or failing statistically-based validity criteria during a distraction-based hand strength assessment is related to test behavior during a lifting assessment. **Participants:** 200 consecutive clients presenting for an FCE. **Methods:** The two testing protocols, one involving a hand strength assessment, the other involving an assessment of lifting capacities, were administered to assess the variability between repeated measures. **Results:** Clients failing two or more statistically-based hand strength validity criteria had significantly more variability between repeated measures in the lifting assessment, $p = .001$ and .014 for right and left unilateral lifts, respectively, and $p < .0005$ for three different bilateral lifts. C**onclusions:** A pattern of performance related to the degree of variability in repeated measures protocols for these two distraction-based protocols is revealed. Passing or failing the hand strength assessment are each equally predictive of test outcome during the distraction-based lifting assessment. The failure of the validity criteria in these two distraction-based tests cannot be attributed to a history of surgery but, rather, is the result of abnormal test behavior. For a free download, go here: ***http://xrts.com/St. James_Hand Strength_Part II.pdf.***

*****

Feeler L, St. James J. D., Schapmire D. W. (2010). Isometric strength assessment, Part I: Static testing does not accurately predict dynamic lifting capacity. *Work. 37*(3):301-308.

Abstract

Objective: To determine if isometric (static) strength accurately predicts dynamic lifting capacity. **Participants:** 107,755 male and 23,078 female prospective workers taking part in a post-offer employment test. **Methods:** Subjects were tested for strength with three standard static lifts and attained physical maxima for four dynamic lifts. **Results:** The data confirms modest for all isometric-to-dynamic predictions make such predictions meaningless for the practical purpose for which they are most commonly used. **Conclusions:** The Static Leg Lift, Static Arm Lift and Static Back (Torso) Lift are not appropriate for making predictions relative to dynamic lifting capacity. Given the likely degree of error in such predictions, and in light of potential safety concerns as reported by previous investigators, employers, clinicians and risk managers now have substantial objective evidence to call such testing into question. For a free download, go here: ***http://xrts.com/Feeler_Isometrics_Part I.pdf.***

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Townsend R., Schapmire D. W., St. James J. D., Feeler L. Isometric strength assessment, Part II: Static Testing Does Not Accurately Classify Validity of Effort. (2010). *Work. 37*(4):387-394.

Abstract

Objective: The purpose of this study was to determine if these two commonly administered isometric tests are accurate indices of effort. **Participants:** 34 healthy subjects were tested once giving a maximum voluntary effort and once attempting to feign weakness of 50% of maximum. **Results:** During feigned weakness sessions, 20 of 34 subjects (58.5%), produced CVs of 15% or less during the Leg Lift. At the 95% CI, the expected frequency of false negatives for feigned weakness is 42.3 to 75.3% for the Leg Lift. At the 95% CI, the expected frequency of false negatives for feigned weakness is 51.9% to 83.3% for the Arm Lift. **Conclusions:** Neither isometric lift is appropriate for classifying validity of effort. Use of these isometric lifts should be discontinued for the assessment of effort. For a free download, go here: ***http://xrts.com/Townsend_Isometrics_Part II.pdf.***

The two isometric studies on the topic of isometric (static) testing render isometric testing essentially legally indefensible. Attorneys in need of assistance in challenging isometric test results should contact X-RTS.

Outcomes for X-RTS Cases and Cases Using Our Litigation Approach And/Or the X-RTS FCE

1. **Knapp v. Mckay, County Illinois Case No. 97L25, 2001:** Claimant sued for injuries allegedly sustained in low impact automobile accident involving less than $200 in auto body damage. More than $40,000 in non-surgical medical expenses was billed out for diagnostic treatment and palliative care. Claimant alleged permanent total disability (PTD), citing loss of income, loss of consortium, and pain and suffering. The diagnosis was "fibromyalgia and chronic pain." The claimant passed validity criteria for Key Assessment FCE, was declared permanently and totally disabled by her physician and was awarded Social Security Disability prior to trial for the injuries alleged to have been sustained in the automobile accident. The indemnity claim was for $400,000. Using questions provided by the first author of this book, the defense attorney, Evan Johnson (Erickson, Davis, Murphy & Johnson, Decatur, IL), successfully challenged a Key Assessment System FCA—which was subsequently withdrawn from evidence. The claimant was re-tested at another facility. The X-RTS Hand Strength Assessment was administered. The claimant failed 6/7 validity criteria for X-RTS Hand Strength Assessment (X-RTS HSA). No Lever Arm testing was conducted because the FCE occurred prior to use of device in clinical setting. In trial, two physicians offered expert opinions in conflict with one another. Testimony related to X-RTS HSA was provided in jury trial by Darrell Schapmire. Testimony revolved around X-RTS HSA and combined odds calculations. As the last witness in the trial, Schapmire testified that the failure of the 6 criteria would be expected in 1 test of every 250 billion cooperative subjects. After 30 minutes of deliberation, jury returned an award of $0 and no coverage for outstanding medical expenses. For more information, go here: ***http://xrts.com/Knapp v. McKay.pdf.***

2. **Algonzio *v*. Family Resources, File 1283008, State of State of Iowa Workers Compensation, Decision rendered March 23, 2004:** Claimant filed claim involving a foot injury alleged to have resulted in Reflex Sympathetic Dystrophy and was seeking

permanent total disability. Claimant was diagnosed as having RSD by four physicians—solely on the basis of subjective pain reports. A well-known physician specializing in RSD requested a triple phase bone scan and an EMG, both of which were essentially normal. Claimant failed X-RTS Hand Strength Assessment and Lever Arm validity criteria. Claimant was released to sedentary work by multiple physicians. The case was heard by an arbitrator for the State of Iowa Workers Compensation Commission. Defendant was given credit for 32 weeks of TTD benefits and ordered to pay an additional $5,000 (20% of which was set aside for the petitioner's attorney). Credit for TTD already issued was deducted from the award. Defense for the case considered this a significant win and credited the FCE with m*i*nimizing the indemnity in the case. Click here for the arbitrator's decision: ***http://www.xrts.com/algonzino.pdf***.

3. **Clewell *v.* State of Illinois, final disposition pending before full Industrial Commission with a final decision expected in Summer 2011:** The petitioner was represented by Todd Reese (Reese & Reese, Rockford, IL, ***http://reeseandreese.com/***). The claimant was a nurse, injured on the job while employed by the State of Illinois. Her benefits were suspended in March 2009 as the result of giving allegedly "self-limited" performance during ErgoScience FCE. Allegedly, the self-limiting behavior occurred during the hand strength testing and the lifting evaluation. The claimant underwent testing in an X-RTS FCE. She passed all seven X-RTS HSA validity criteria and the validity criteria for the X-RTS Lever Arm testing. Petitioner's attorney, requested assistance in developing line of questioning for the ErgoScience protocol. Assistance was provided by the first author of this book. The ErgoScience test administrator was forced to admit: 1) "Self-limiting behavior" referenced in *t*he report was "a subjective professional opinion." 2) There was no objective ***basis for classifying the claimant's test behavio*r *as "self-limiting." Schapmire offered testimony during deposition to the effect t*h*at the combined odds of an indiv***idual passing the X-RTS HSA and the X-RTS Lever Arm testing are 1 in 10,000—-if the person is actually giving a submaximal effort. Therefore, it was concluded the client gave a maximum effort during the X-RTS Lever Arm testing. The arbitrator ruled that the "ErgoScience FCE was not credible" and accepted evidence from an X-RTS FCE. ***The arbitrator awarded back pay for suspended benefits, substantial*** penalties and interest and permanent total disability. The case is now on appeal to the full Illinois Industrial Commission. Chapter 7 contains the deposition of the ErgoScience FCE provider.

4. **Kimberly Hancock *v.* Wal-Mart and American Home Assurance, File 5034064:** This was a case in which the claimant had filed at least four previous low back claims. The defense was represented by Laura Ostrander, Gilason & Hunter, Des Moines, IA, ***http://www.gislason.com/index.php.*** The petitioner attorney paid for an FCE conducted in Des Moines, IA by a "faculty member" of WorkWell, a system relying on the "visual estimation of effort" to classify validity of effort. The indemnity demand was $300,000. The arbitrator refused to allow the defense an opportunity to have another FCE. The first author of this book prepared an analysis of the FCE and provided Ms. Ostrander with a list of questions to ask the WorkWell faculty member. The transcript of this deposition is found in Chapter 9. The arbitrator's decision can be found here: ***http://www.xrts.com/Hancock Decision.pdf*.**

- The petitioner had filed for $300,000 indemnity. The arbitrator awarded her approximately $20,000. From this total the following expenses (approximate) were to be paid by the claimant:
    - $6,500 to the petitioner attorney
    - $3,500 to expert witnesses used by the petitioner
    - $8,000 outstanding medical expenses

In the Hancock case, the arbitrator released the defense from any future medical expenses, an unusual outcome in Iowa compensation cases, according to Ms. Ostrander. The plaintiff attorney has filed an appeal to the Iowa Industrial Commission. A final decision is pending. Wal-Mart, the defendant, has counter-appealed and will seek to have the entire award dismissed. Ms. Ostrander has informed us that reversals of arbitrator decisions in matters such as this are very rare.

In addition to the cases above, all of which are matters of public record, we have had other successes in using a combination of consulting services and X-RTS FCE tests to help settle problematic cases. Table Below is the information we are able to release publicly. We have documentation in our possession and can share non-sensitive portions of it with individuals who contact us. The two claimant whose cases are marked with an asterisk (*) were also captured on video surveillance, engaged in activities they had indicated they could not perform. Greg Cairns, ***www.cairnslegal.com***, has indicated that the savings noted in the last column for the Colorado cases are conservative estimates of the savings the settlements eliminated future medical expenses. In the case of Ms. I.S., the plaintiff attorney withdrew from the case when confronted with the wealth of evidence presented by the defense. It is important to point out that the case of Clewell *v.* State of Illinois, it was the plaintiff who benefited substantially from X-RTS testing. As we said in Chapter 1, validity of effort testing has no agenda.

Table 1. Negotiated Settlements

Case Citation	Attorney	Diagnosis	X-RTS FCE	Adverse FCE	Demand	Status
Mr. W.G.L. *v.* John W. Hunter and Heartland Express, Inc. (multi-party MVA/comp case)	Dennis Sadler, Leitner, Williams, Dooley & Napolitan (Memphis, TN)	C5-C6 fusion	No	Yes, "valid," ErgoScience FCE, unable to work	$1.1M	Adverse FCE withdrawn from evidence, jury trial late August 2011. Per Sadler, "Saved several hundred thousand dollars."
Ms. D.J.R. *v.* Pueblo City Schools District #60 (Colorado case)	Greg Cairns, Cairns Legal, Denver, CO, 303-248-6548	Athroscopic Hip surgery	Yes, invalid effort	Yes, "valid" FCE, no lifting >9 lbs.	$240K	Settled for $35K, savings on indemnity + future medical were "approximately $300K," according to Cairns
Ms. E.R. *v.* Fantastic Sams and State Farm (Colorado case)	Drew Rzepiennik, Ruegsegger, Simons, Smith & Stern	Carpal tunnel surgery	Yes, valid, 24 lb. lifting	Yes, "valid" FCE, 7-9 lb. lifting	$300K	Settled for $50K, no future medical, savings on indemnity + future medical >$300K
Mr. L.L. *v.* Defalco Construction of Longmont, CO*	Greg Cairns, Cairns Legal, Denver, CO, 303-248-6548	Wrist debridement, disputed complex regional pain syndrome	Yes, invalid effort	Yes, "valid, poor strength, impaired coordination and inability to sustain work postures prevents him from doing any work."	$320K	Settled for $75K, hearing on future medical scheduled for July 2011
Ms. I.S. *v.* Meinhold LLP, Denver, CO*	Drew Rzepiennik, Ruegsegger, Simons, Smith & Stern	Cubital tunnel release, disputed regional pain syndrome	Yes, invalid effort	Yes, "valid" results, unable to work	$300K	Plaintiff attorney withdrew from case when shown analysis of adverse FCE, X-RTS FCE and surveillance video

This is a sampling of the kind of success that is possible when comp cases are litigated on the basis of objective information about function and cooperation. There are three tactics which are key to the success of this approach is contesting any adverse FCE on record:

1. Submitting a document into the record which consists of a well-organized, annotated critique of the methods used in the adverse FCE.
2. Taking the deposition of the FCE evaluator, using the questions in this book.
3. In some cases, it is not possible to take the deposition of the FCE evaluator. In such instances, it may be necessary to take testimony in front of a jury or trier of facts. Alternatively, the document referenced above can also be provided to the attending physician and/or the independent medical evaluator for his/her consideration in rendering an opinion regarding the case. The text below has been lifted verbatim from an IME report. It contains the physician's responses to the attorney's written interrogatories.

"Could you comment on the important findings in the 03/20/2011 X-RTS FCE?

> Yes, I have commented on them in the review of the records. They do support my opinions that were expressed in my original report from the date I saw her here for the Independent Medical Evaluation. There are clearly inconsistencies with her presentation and exaggeration of her pain complaints."

"Could you comment on the report of Ms. Gerig [FCE evaluator] dated 11/23/20107 [a critique critical of X-RTS methodology]?

> Ms. Gerig's comments are certainly her opinions [about X-RTS], however, the XRTS system was developed specifically to provide belter objective measurements than one would rely upon in the subjective reportings that are done in typical functional capacity evaluations. I stated in my initial Independent Medical Evaluation, functional capacity evaluations that rely too heavily upon subjective reports are fraught with problems in providing appropriate levels of patient's functional abilities. FCEs which rely heavily on subjective reporting cannot be used in patients that present like Ms. [name redacted] . . . Regarding whether XRTS protocols have problems, all functional capacity evaluation have inherent problems when they rely too heavily on subjective reports. The X-RTS system, however, was designed to take out as much of the subjective reporting as possible and make the FCE more reliant on objective testing and consistency."

"What opinions in your original report if any, would you change based on your follow-up record review of Ms. [redacted] and the supplemental documents sent to you with this letter?

> None of the opinions expressed by Ms. Gerig or the new records change my opinions in any way and, if anything the X-RTS FCE supports my opinion and the opinions expressed by others that Ms. [redacted] has an exaggerated chronic pain condition that is not physically based."

Venus vs. Mars:
From Depositions through Voire Dire, Trial and Appeal – Lessons from Iowa Women Trial Lawyers

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Women in the Courtroom

Best Practices Guide

DRI™
The Voice of the Defense Bar

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Produced in the United States of America

CONTENTS

EXECUTIVE SUMMARY

Three years ago, the DRI Task Force on Women Who Try Cases was formed to address the question of why female litigators are leaving outside litigation. The result was the white paper: *A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases*. This paper was so well received that it became the cornerstone for seminars across the country. DRI demonstrated its commitment to diversity in the legal profession by turning the Task Force into a standing committee, Women in the Courtroom. For the last three years, this committee has provided programs on women in the law to state and local defense organizations, national seminars and individual law firms.

However, now that DRI had addressed why women were leaving, could DRI assist firms in retaining their top female litigators? The white paper established the financial need to do so because firms were losing hundreds of thousands of dollars in training new associates just to see them leave, and clients were increasingly demanding a female presence on matters from the simplest of tasks to the ultimate task, trial. In addition, there was the morale issue. Firms were seeing some of their best and brightest leaving for firms with dedicated programs for women, for in-house counsel positions, for public sector jobs and, sometimes, leaving the law altogether.

The committee endeavored to answer this question by providing a *Best Practices Guide*. Over the past year, committee members researched hundreds of articles on the subject and gathered information on dozens of firms attempting to address the issue. Members then interviewed managing partners and leaders of women's forums in firms ranging in scope from local to international. The interview results were kept anonymous so that firms could detail both their successes and failures in this endeavor. The committee also interviewed heads of corporations to obtain their perspectives on the importance of women in litigation firms. From this research the Committee determined that there were four key areas firms needed to address in order to keep their top female litigators: Professional Development, Mentoring, Marketing and Work/Life Assistance.

Although women have made up almost half of law school graduates for decades, only 18 percent hold leadership positions in firms. Women attorneys will continue to leave in record numbers unless there is a conscious effort by firms to send female associates and junior level partners to trial (whether that be on *pro bono* cases, trial training programs with the public sector or paid matters within the firm); guide female attorneys through the marketing process (including introduction to contacts, turning over business and holding female specific marketing seminars and programs); actively mentor female attorneys on issues important to women and ensure that mentors are the correct mentors for each mentee; and establish and fol-

low through with specific policies to address work/life balance issues faced predominantly by women.

Research has demonstrated that many firms merely paid lip service to these issues only to discover that despite their "best efforts" women were still leaving. Those firms that developed a method for measuring the success, or lack thereof, of their efforts were far more successful in ultimately retaining their top female litigators.

Law school enrollment for women is dropping; more women attorneys are choosing roles as general counsel, faculty or judges over a partner position in law firms and women are now earning even less compared to men than they did in the past. The message appears to be clear—if law firms don't take action soon, they will lose the few top female litigators they have.

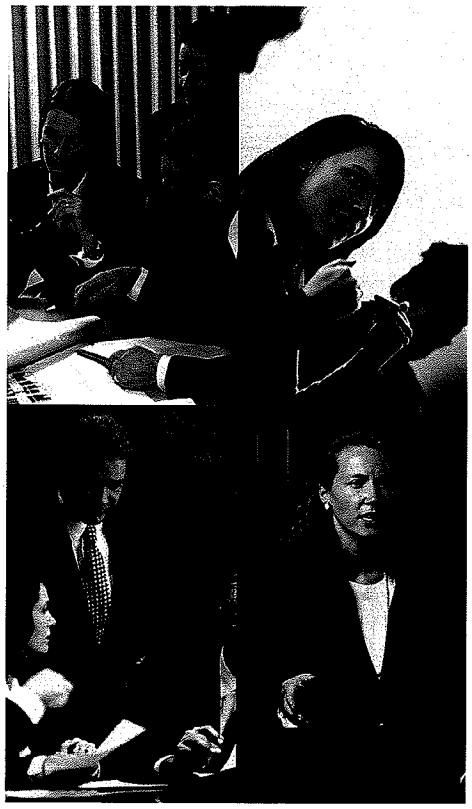
INTRODUCTION

In 2004, DRI was pleased to publish the results of work of the DRI Task Force on Women Who Try Cases. That work, "A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases," identified a number of challenges women face who have chosen careers as trial lawyers.[1] Among the challenges identified were a lack of fair treatment in the courtroom by judges, clients and other attorneys; gender stereotyping of women who undertake aggressive advocacy on behalf of their clients; a failure of effective mentoring for females at all levels in law firms; and a lack of experience and opportunity for client development, which in turn creates an impediment to law firm career advancement. Of course, the greatest challenge to women trial lawyers continues to be work/life balance as women continue to bear primary responsibility for family obligations and maintenance of the home. However, women who want to become equity partners will generally be required to have a solid book of business that will contribute to the profits of the law firm.

In examining these challenges, the Task Force identified a number of recommended practices ranging from finding opportunities for actual courtroom experience to taking advantage of opportunities that demonstrate competence and expertise, which will clearly show clients and potential clients that a woman is worthy of being their lawyer of choice.[2] The Task Force also recommended that law firms adopt more flexible and user-friendly

[1] DRI Task Force on Women Who Try Cases, *A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases*, DRI (2004).

[2] *Id.* at 20.



rules to assist women who wish to ascend to partner, firm governance and leadership. Law firms were urged to incorporate internal programs that focused on inclusion of women if for no other reason than the substantial investments made by law firms in recruiting and retaining women lawyers.

Despite identifying challenges and making recommendations, the Task Force recognized that its work was not and perhaps never would be complete. Accordingly, the Task Force embarked on the second phase of evaluation. The focus of this phase was practical. Once again, Task Force members conducted interviews with both in-house and outside counsel. These interviews addressed specific practices that positively contribute to the successful recruitment, development, and retention of female lawyers. These practices were often as simple as a mentor taking a female clerk, associate, and equity partner to lunch on a regular basis to explore not only the legal issues of a specific case, but also other aspects of the practice of law that lead to professional success. Additional concrete suggestions included ensuring that females participate in client development, actually perform client work, and receive appropriate remuneration and credit for that work. Each participant in the process agreed that accountability with respect to issues of recruitment and retention was necessary because relying on people to "do the right thing" may not be a sufficient motivator.

What follows is a guide that serves to help all concerned achieve the utmost success for both the women who join law firms and the law firms themselves.

PROFESSIONAL DEVELOPMENT

A common concern raised throughout the interviews conducted was the professional development of female attorneys in law firms and, specifically, the fact that women are not adequately represented at the management level of law firms.

In addition to the need for young female attorneys to receive guidance through mentoring and female-dedicated marketing initiatives, our committee learned that female attorneys face other unique professional development issues that firms have been working to address through a variety of efforts.

One issue is the promotion of female attorneys to law firm leadership positions. Although many firms hire approximately equal numbers of female and male associates, women are not represented in leadership roles to the same extent. Of the firms interviewed, the number of female attorneys in leadership positions ranged from one percent to fifty percent. Although a number of firms have female managing partners or co-chairs, numerous interviewees acknowledged that the percentage of female attorneys in leadership positions has not reached optimal levels. They also collectively expressed a desire for firms to focus efforts on increasing female participation in firm management.

A second issue facing female attorneys is an increasing lack of "courtroom experience" and the limited opportunities for women to act as lead trial counsel. A number of factors account for the decrease in courtroom experience for all attorneys including the advancement of alternative dispute resolution programs and the cost of litigation. However, some factors also appear to be unique to women. Namely, interviewees acknowledged that many clients still specifically request that senior male partners try cases even where a female partner has performed substantial work on the file. To address this concern, some firms have begun tracking professional development for attorneys to ensure that trial experience is provided at the appropriate level of an attorney's career.

Finally, a concern regarding the professional development of women in private practice arises in the context of the decrease in the number of female senior associ-

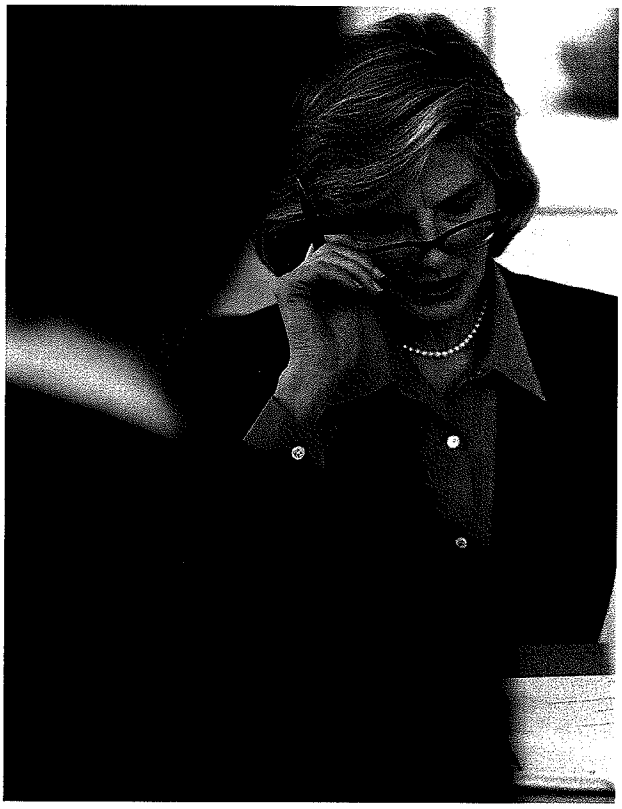
ates and non-equity partners who advance to equity partnership status. The range of female equity partners within the firms interviewed ranged from one percent to forty-eight percent. Although there are many reasons why women leave firms before becoming an equity partner, as addressed in the work/life balance section of this manual, a number of firms recognize that the percentage of female equity partners can and should increase through the adoption of certain initiatives that prepare women to become equity partners and support them in their efforts to balance partnership responsibilities with home and family obligations.

Although a number of firms have female managing partners or co-chairs, numerous interviewees acknowledged that the percentage of female attorneys in leadership positions has not reached optimal levels.

Initiatives utilized by different firms to promote and foster the professional development of female attorneys include

- Encouraging and sponsoring senior female associates to attend various "Women in Leadership" conferences that are held by any number of organizations
- Conducting breakout sessions for female partners at annual firm partnership meetings that discuss women's issues which are later presented to firm management
- Creating leadership programs for female attorneys designed for senior associates and non-equity partners that meet one to two weekends per year with assignments focused on marketing, client development and participation in management issues
- Promoting active firm involvement in women's bar associations and research and advisory organizations dedicated to advancing women in business
- Incorporating active female participation on every key firm management committee
  —Management
  —Compensation
  —Hiring
  —Professional Development
- Developing women's partnership groups, which focus on business development opportunities for women
- Advertising/highlighting women rainmakers within the firm and having them present seminars to female associates on how to succeed in marketing
- Hosting women's conferences with clients to address business issues facing both female attorneys and females in business management positions
- Assigning a partner to review female attorneys participation on client matters and ensuring that trial experience is being provided and encouraged
- Utilizing women presently in leadership roles to prepare and mentor future female leaders of the firm
- Developing business plans focused on senior female associates and their internal advancement within the firm
- Creating a committee to monitor the progress and professional development of female attorneys at different stages of their careers

MENTORING



Mentors are key ingredients to any successful law firm. They guide those new to the law as well as those new to the firm toward a successful practice. All of the participant law firms in our survey had formalized mentoring programs for associates. A few continued their mentoring programs past the associate level and others were considering that practice. Approximately forty percent had additional mentoring programs tailored specifically for women. Many of those who did not have such specifically tailored programs were considering adding mentoring programs for women.

Why should a firm modify its mentoring programs specifically to target female attorneys? Surveys relied upon by firms in addressing retention issues indicate that female attorneys are leaving the litigation practice in far greater numbers than men. More than fifty percent of those who leave go to corporate offices, government positions or non-profit organizations primarily as a result of flexibility in scheduling.[3] Interestingly, there is no difference in the demographics, *i.e.*, level of experience, law school ranking (often top five percent) when compared to men who stay.

Women also are changing firms for different reasons than men. Of female associates who have children, only one-third work more than fifty hours a week compared to three quarters of male associates who have children. Approximately one-third of female attorneys take advantage of flexible work schedules compared to less than five percent of men.[4] Consequently, those who leave are looking for firms that offer such schedules without "stigma." In exit interviews with female litigators who leave law firms, the oft-cited reason is that although firms claim to provide flexible schedules, the stigma, both spoken and unspoken, is too great to bear. The perception is that those women who leave have difficulty assimilating themselves back into the law firm's culture or the law practice in general and their salaries are approximately twenty percent lower than those who do not take a leave to bear/raise a child or

[3] Sacha Pfeiffer, *Many Female Lawyers Dropping Off Path to Partnership*, BOSTON GLOBE, May 2, 2007.

[4] Mona Harrington and Helen Hsi, *Women Lawyers and Obstacles to Leadership*, MIT WORKPLACE CENTER, Spring 2007, at 7.

other family-related reasons. Additionally, nearly sixty percent of younger employees indicated they would change jobs if they were allowed to telecommute. More importantly, they reported that had they felt they had someone to speak with about the firm's culture on these types of issues, they may not have left.

When to Start

Because mentoring is really about recruitment, development, and retention, those firms interviewed discovered that a firm can never begin too early. The mentoring program should be part of the recruiting process for law clerks as well as first-year associates. Female law students are being encouraged by their law school programs to ask questions of prospective employers regarding mentoring and how the firm aids new female attorneys in achieving a work/life balance while learning the ropes as an attorney. By choosing interviewers from your firm who possess demonstrated mentoring skills and assigning mentors to summer and first-year associates, a firm can demonstrate an interest in the ultimate success of the woman lawyer, which can guide the woman's development as a lawyer and litigator. This practice can also foster the allegiance of the person who is mentored to the mentor and to the firm.

- In a large firm, a suggested beginning is to match everyone from senior associates to senior partners with summer and first-year associates who graduated from the same law school. In this way, the new associate sees that someone who chose the same education as she has succeeded and can assist her in achieving similar success.
- Work with local women's lawyer organizations to obtain mentors from outside the firm.
- Partner with clients. Clients who mentored firm associates indicated those associates developed a stronger bond to the firm.

Understanding these steps will help a firm achieve the ultimate goal and objective that the associates hired will become excellent lawyers, outstanding litigators and equity partners.

Who Should Serve

The selection of mentors is a fundamental issue that participating firms find they must address. Excellent mentors need not be women, nor do they always have to be lawyers. In selecting potential mentors firms should consider the whole individual and evaluate all the skills in each individual's repertoire.

- Firms should evaluate not only the technical skills such as how well the person writes a motion, takes a deposition, or cross-examines a trial witness, but also determine whether the potential mentor communicates well, is a good teacher, and has the time and willingness necessary to mentor a younger lawyer.
- Consideration should be given to assigning more than one mentor.
- When establishing mentor/mentee relationships, mentors can and should come from all experience levels within the firm and come from a variety of practice groups.

How Often to Meet

There was no consensus as to the optimum frequency of these meetings. However, there was agreement that there could not be too many.

- Most of the responding firms had formal meetings between mentors and mentees at least monthly. Some had formal meetings more frequently; but all encouraged frequent, informal meetings.
- One common factor among all of the mentoring programs was the existence of social activities at least twice a year.
- Topics discussed during these meetings ranged from the technical aspects of the job to work-life balance. Other topics included:
  —Opportunities for growth
  —Exposure to practice areas and clients
  —Marketing
  —Types of legal assignments
  —Access to upper management
  —Availability of part-time employment
  —Ramping back or opting in after a leave of absence following childbirth or care for a family member
  —Partner track status.

Participating firms also suggested other avenues for collegiality such as teleconference book clubs that discuss professional issues, skill building workshops with mock trials where mentors serve as advisors, and business development coaching.

Follow-up

No program will succeed without follow-up. Mentors should meet to discuss common issues arising with mentees to make sure that they are offering consistent advice, creating new programs, and ensuring equity in assignments.

Excellent mentors need not be women, nor do they always have to be lawyers

MARKETING

The success of any program to develop female attorneys as rainmakers requires a long-term commitment from the firm management committee so that all members of the firm endorse the commitment and ensure that firm resources are committed. This point is true regardless of the size of the firm. Two common elements found in all firms, from small to large, which have successful women's initiative programs are a formal committee responsible for overseeing the implementation of the program and accountability for the success of the program to the firm management committee.

A firm's investment in developing female attorneys into rainmakers translates into higher retention rates for senior women and women partners. A lack of senior women and women partners can harm a firm's recruiting efforts and even result in the loss of prospective and existing clients. Today many clients require diversity in gender and ethnicity in their outside counsel. Some clients have even ended relationships with firms that do not show a commitment to diversity or meet the diversity requirements of the client.

Some of the initiatives and programs for developing female rainmakers that have been successful include

- Having a formal training program supervised by a women's initiative committee or diversity committee
- Tracking the success of formal training programs through firm management, a women's advisory committee, or a diversity committee
- Holding monthly women's breakfasts or luncheons where female attorneys can share business opportunity leads, ideas or concerns and talk about career paths
- Inviting business development trainers such as consultants, authors, professors, and others to talk to women attorneys—both associates and partners—about how to market, develop opportunities for business, and adapt to different client styles
- Forming or joining executive women's networking groups where each female attorney brings a client whom she can introduce to other female attorney attendees
- Having female attorneys submit business plans with benchmarks, a list of the resources and guidance to accomplish the plan, metrics to measure success against benchmarks and an outline for assisting or retooling if necessary
- Hosting alumni events where current female attorneys can network with attorneys (both male and female) who now practice with other firms or who have gone in-house, become judges, or assumed governmental positions

A firm's investment in developing female attorneys into rainmakers translates into higher retention rates for senior women and women partners.

- Holding luncheons where successful rainmakers (male and female) within the firm share proven skills and ideas in obtaining, developing and retaining business
- Having break out meetings at firm partnership retreats where female partners can discuss women's issues and business development
- Requiring female attorney participation in client presentations
- Including female attorneys in client events such panel counsel meetings, annual reviews, client visits and client dinners
- Enrolling first-year female associates and new lateral hires in a one-time intensive leadership program (lasting six months to one year) that includes personal coaching, mentoring, reading assignments and marketing skill development to compliment existing and ongoing firm programs
- Ensuring client contact by female attorneys for each file on which the female associate is handling client communications and is responsible for development of the client relationship

WORK/LIFE ASSISTANCE

Many lawyers today assume full-time family responsibilities in addition to the significant obligations inherent in their careers. In addition to parental responsibilities, many attorneys have obligations to elderly or infirm parents as the average life span continues to increase. Added to this dynamic is a growing demand from younger lawyers for work/life balance and a desire to opt out of law firms' escalating billable hour requirements that are often related to increasing associate salaries due to the law firm economic model based on billable hours. Parallel with these life balance issues is the need of law firms to attract and retain the best and the brightest, to have legal talent that is reflective of clients, and to address the impending worker shortage with the imminent retirement of the baby boomers. Firms that successfully address these issues have a common attribute: flexibility—both in stated policy and in reality. This flexibility takes on many shapes and sizes, but the end result is the same: loyalty, job satisfaction, and the ability to meet client needs with a high caliber and seasoned work force. Some practices that demonstrate flexibility by successful firms include the following:

- Being receptive to flexible work schedules, reduced hours, telecommuting and job sharing
- Having a written policy that is openly communicated and adhering to it while periodically examining the policy to evaluate its effectiveness
- Making the program available to all attorneys, regardless of gender, religious belief or tenure with the firm (*e.g.*, childcare, eldercare, wanting reduced hours for lifestyle reasons)
- Involve practice leaders/management in evaluating individual requests for alternate arrangements to determine feasibility and how to accommodate the request while maintaining client demands
- Entering into an agreement with the participating attorney that sets forth both parties' expectations; the agreement should cover hours, compensation, benefits, eligibility for bonus, compensation in the event the attorney exceeds the agreed upon hours, and status on returning to full-time
- Keeping the participants on a partnership track—to the extent desired—commensurate with the hours worked by the attorney and to the extent that participants meet other criteria for partnership
- Monitoring those attorneys on reduced hour arrangements to discuss scheduling, whether "schedule creep" is occurring, and whether the attorney is still

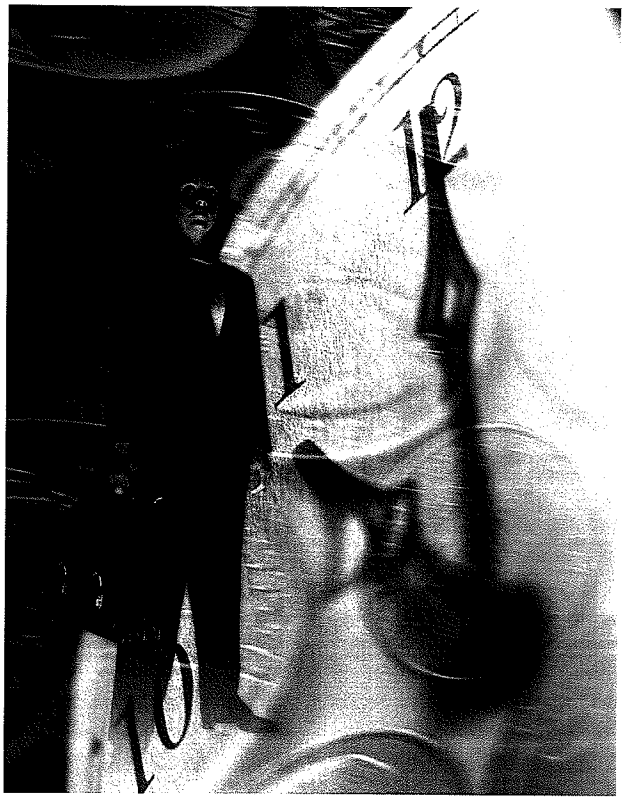
receiving appropriate assignments and having appropriate opportunities in the courtroom and with clients

- Offering alternative tracks for attorneys with different career goals; *i.e.*, some firms offer reduced hour arrangements to associates and partners and also have an alternate of counsel or staff attorney position. The former programs are structured with the notion that those attorneys will ultimately continue to progress in their career and may eventually choose to return to full-time status; the latter programs are structured for those attorneys who choose to work a certain number of billable hours without making the commitment to other non-billable activities. These flexible arrangements are desirable because the law firms retain top talent without the same level of overhead, and thus can charge a lower billable rate.
- Offering other arrangements that provide flexibility, such as the ability to work at home as appropriate, based on demands, sabbaticals, or the opportunity to take time off without pay with the option to return to the firm at a later date. Law firms are starting to follow other industries in the "opt back in" movement by retaining spots for those attorneys who, for whatever reason, have opted out of the private practice of law for a period of time. When these lawyers are ready to re-intensify their legal careers, the opt-in arrangement permits them to either update their skills and/or re-enter the private practice or simply increase their workload.

Firms that successfully address these issues have a common attribute: flexibility—both in stated policy and in reality.

Firms that are successful in assisting their attorneys with work/life balance issues recognize that the needs surrounding work/family balance shift over the course of one's career. Taking a long-range approach with flexibility at the centerpiece will lead to the retention of a talented and diverse attorney base, which ultimately will lead to client and firm success.

MEASURING SUCCESS



So now that you have invested significant energy and resources into creating a women's initiative program that offers mentoring, marketing and professional development training, how do you measure its success? How do you know that next year, or five years from now, you will not see the same attrition numbers that you experienced last year? That is the million-dollar question. Indeed, many respondents observed that their firms had no means of measuring the success of their efforts, and others similarly expressed doubt as to whether a satisfactory measurement method exists.

As lawyers we have come to recognize that "success" is subjective. But attrition rates are not. Therefore, firms must find some way to take stock of their efforts to retain valuable attorneys before it is too late.

A firm's retention program can be measured on both qualitative and quantitative levels. Attendance at events designed for the firm's women attorneys—along with surveys following the events—can provide some evidence of the level of interest in and support for the firm's programs and long-term goals. An increase in the number of women attorneys seeking leadership positions and committee appointments also reflects a commitment on behalf of women attorneys to stay and impact the firm's future. But more and more, the firms that are successful in lowering their attrition rates are those that have established targets and benchmarks directed to female retention and involvement in the firm; those firms have also tracked progress at an executive level rather than simply observing trends after the fact. These firms incorporate set targets into their strategic plans and appoint at least one committee chair who is held accountable for the implementation of these goals; the chair then reports to the executive committee or managing partner on progress. Many firms have signed onto their local or state bar association's objectives related to women attorneys' professional development. These can be useful benchmarks, but every firm should undergo a self-evaluation to determine whether their clients or their own attorneys support or demand even higher standards.

Finally, it is important to keep in mind that a firm's retention efforts need not stop when women attorneys leave the firm. It is commonplace for firms to perform

exit interviews for outgoing attorneys; more recently many firms have taken advantage of this process to learn more about the pros and cons of the firm's policies affecting women. To prevent history from repeating itself, this valuable feedback must be communicated to the diversity committee or women's forum committee that is responsible for the firm's future programming activities, to office managers who can address concerns that might be regional in scope and to the executive or management committee for use in the firm's annual reviews. Indeed, informal meetings with past attorneys even years after their departure may provide important lessons for the future livelihood of the firm. Perhaps these attorneys would have remained at the firm if it had provided better mentoring, had a part-time policy, or created a contract attorney position—but firms will never know unless they ask.

No firm expects to maintain a zero attrition rate, and it would be foolish to presume that attrition is due solely to the firm's failure to effectuate its female retention policies properly. However, firms that establish concrete qualitative and quantitative goals and consistently evaluate their performance can expect to retain more women attorneys than those that sit idly by and lament the exodus of women attorneys.

The following are some suggested means of measuring the success of your firm's female retention policies.

Qualitative

- Informal survey responses following meetings or events
- Comments included in annual associate and partner evaluations
- Feedback from exit interviews
- Interest in the creation of new affinity groups
- Client feedback
- Informal comments from attorneys
- Increased respect and involvement at the management level
- Increase in national/local rank

Quantitative

- Increase in attendance at women's group meetings
- Increase in the number of women on firm committees
- Increase in the number of women in management positions
- Increase in the number of women serving on bar association committees
- Increase in the number of women participating in client development activities
- Increase in the number of women working for the firm's top billable clients
- Increase in the number of women who have served as first chair at trial
- Increase in the number of women who act as responsible or billing attorneys
- Increase in the number of women in each equity and non-equity partnership class
- Increase in the number of new and lateral female attorneys
- Increase in the budget designated for women's group meetings and sponsorships
- Decrease in female attrition rates

The bottom line is that despite the ambiguous nature of individual satisfaction, firms can and should measure the success of their retention efforts. While each firm is different, and the amount of time and revenue that each firm can spend will depend among other things on its size and need for improvement, it is noteworthy that firms that have been successful in this area have formed a committee designed to address women's issues with one or two chairs and a separate budget. Larger firms may find it helpful to have regional vice-chairs in each of the firm's major offices to identify and address local office concerns. Smaller firms may find it sufficient simply to appoint a single senior woman partner to monitor the firm's progress. For firms that have established a committee, chairs are encouraged to work with the firm's management committee to design goals specifically geared towards the retention of women attorneys based on the applicable qualitative and quantitative factors listed above, which in turn should be incorporated into the firm's strategic plan. Committee chairs may then review statistics on these goals at least annually and present progress reports at annual shareholder meetings and at the firm's annual all-attorney meetings. Feedback from exit interviews should be shared with the committee chairs to aid in designing future programs and policies, and all attorneys should be encouraged to comment on the program's progress and success as well. Only after statistics are communicated openly and are taken seriously by firm management can firms expect them to improve.

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WOMEN'S BAR ASSOCIATIONS

State Associations

Arizona

Arizona Women Lawyers Association—www.awla-maricopa.org/
- Cochise Chapter
- Maricopa Chapter
- Northern Arizona Chapter
- Southern Arizona Chapter

California

California Women Lawyers—www.cwl.org

Lawyers Club of San Diego—www.lawyersclubsandiego.com

Women Lawyers Association of Los Angeles—www.wlala.org

Queens Bench Bar Association (San Francisco)—www.queensbench.org

Women Lawyers of Sacramento—www.womenlawyers-sacramento.org

Women Lawyers of Santa Cruz Count—www.wlscc.org

Colorado

Colorado Women's Bar Association—www.cwba.org

District of Columbia

Women's Bar Association of the District of Columbia—www.wbadc.org

Florida

Florida Association for Women Lawyers—www.fawl.org

Hillsborough Association for Women Lawyers—www.hawl.org

Georgia

Georgia Association for Women Lawyers—www.gawl.org

Georgia Association for Black Women Attorneys—www.gabwa.org

Illinois

Women's Bar Association of Illinois—www.wbaillinois.org

Black Women's Bar Association of Greater Chicago—www.bwla.org

Iowa

Iowa Organization of Women Attorneys—www.iowawomenattorneys.org

Kansas

Kansas Women Attorneys Association—www.kswomenattorneys.com

Louisiana

Association for Women Attorneys—New Orleans—www.awanola.org

Maryland

Women's Law Center of Maryland—www.wlcmd.org

Women's Bar Association of Maryland—www.wba-md.org

Massachusetts

Women's Bar Association of Massachusetts—www.womensbar.org

Michigan

Women Lawyers Association of Michigan—www.womenlawyers.org

Minnesota

Minnesota Women Lawyers—www.mwlawyers.org

Missouri

Association of Women Lawyers of Greater Kansas City—www.awl-kc.org

Women Lawyers Association of Greater St. Louis—www.wlastl.org

New Hampshire

New Hampshire Women's Bar Association—www.nhwba.org

New Mexico

New Mexico Women's Bar Association—http://www.nmbar.org/Content/NavigationMenu/Other_Bars_Legal_Groups/Womens_Bar_Association/Womens_Bar_Association.htm
E-mail: nmwba@msn.com

New York

New York Women's Bar Association—http://www.nywba.org/

Brooklyn Women's Bar Association—www.brooklynwomensbar.org

Women's Bar Association of the State of New York—www.wbasny.bluestep.net

North Carolina

North Carolina Association of Women Attorneys—www.ncawa.org

Ohio

Ohio Women's Bar Association—www.owba.org

Oregon

Oregon Women Lawyers—www.oregonwomenlawyers.com

South Carolina

South Carolina Women Lawyers' Association—www.scwla.org

Tennessee

Lawyers Association for Women—Marion Griffin Chapter (Tennessee)—www.law-nashville.org

Texas

Texas Women Lawyers—www.texaswomenlawyers.org

Association of Women Attorneys—Houston—www.awahouston.com

Dallas Women Lawyers Association—www.dallaswomenlawyers.org

Utah

Women Lawyers of Utah—www.utahwomenlawyers.org

Virginia

Virginia—Metropolitan Richmond Women's Bar Association—www.mrwba.org

Washington

Washington Women Lawyers—www.wwl.org

Wisconsin

Wisconsin—Association for Women Lawyers—www.wisbar.org/AM/Template.cfm?Section=Association_for_Women_Lawyers

National Bar Associations

National Conference of Women's Bar Associations—www.ncwba.org

National Association for Women Lawyers www.abanet.org/nawl/

Alliance of Black Women Attorneys—http://www.msba.org/links/md/specialty/abwa/index.htm

RECOMMENDED READING: WOMEN IN THE COURTROOM

Sacha Pfieffer, "Many Female Lawyers Dropping Off Path to Partnership," *Boston Globe*, May 2, 2007

DRI Task Force on Women Who Try Cases., "A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases," DRI, 2004

Mona Harrington and Helen Hsi, "Women Lawyers and Obstacles to Leadership," MIT Workplace Center, Spring 2007

Fernando Cohen, "After Baby, Boss Comes Calling," *New York Times*, May 17, 2007

Sandhya Bathija, "Women lawyers find a relaxing way to network," *The National Law Journal*, May 16, 2007

Lynne Marek, "Large Firms Have Trouble Retaining Women," *The National Law Journal*, June 18, 2007

Gregory Gallopoulos , "How to Be a Full Partner on a Part-Time Schedule," *The National Law Journal*, February 6, 2007

Deborah L. Rhode , "Women in the Professions: Subtle Sexism Exists," *The National Law Journal*, January 18, 2007

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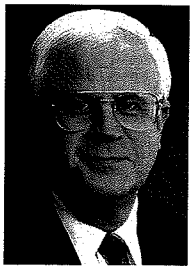

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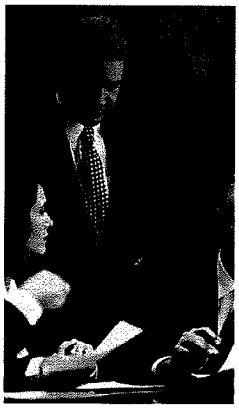
A Career in the Courtroom:

A Different Model for the Success of Women Who Try Cases

DRI™
The Voice of the Defense Bar

A NOTE FROM THE CHAIR



In March 2004, a group of DRI members actively engaged in defense practice was given a unique opportunity by DRI President William R. Sampson. President Sampson asked the group to form a task force that would undertake a ground-breaking DRI project on the subject of challenges facing women defense attorneys, a subject many of us in the task force know well, having been practicing defense attorneys for a number of years. As chair of the Task Force, I had the good fortune to work with a group of talented defense attorneys who are well respected in the legal community. The work of the Task Force in designing and conducting the interviews, sharing other research on the subject, and writing this report was a truly collaborative effort.

The findings and recommendations contained in this report were formulated by the Task Force after compiling and analyzing a substantial amount of interview and survey data, with the invaluable assistance of the DRI staff. The Task Force is grateful to the women defense attorneys we interviewed for candidly sharing their experiences and their views on how we can implement policies and practices for the mutual benefit of women defense trial lawyers and law firms. The Task Force also appreciates the participation of the judges, in-house corporate counsel, clients, and managing partners who gave up their time to answer our questions and give their perspective on the subject. We found the interviews to be very interesting, thought provoking, and fun; it was also interesting to discover similarities between what we each heard from our interviewees. We also thank the women who took the time to respond to the survey developed by the Task Force.

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EXECUTIVE SUMMARY

A DRI Task Force was formed to identify professional challenges unique to women who are defense trial lawyers and to suggest ways to meet those challenges.

To gather facts and viewpoints, the Task Force conducted in-depth interviews with over 100 affected persons, mostly women in the private practice of law. In addition, an electronically transmitted survey was completed by 765 women lawyers from all parts of the nation. The Task Force also researched studies done by other organizations regarding challenges facing women lawyers.

The Task Force found that, while the number of practicing lawyers continues to rise, women are often underrepresented in the ranks of law firm partnership—a goal that often indicates success in the practice of law. Too many of them leave their firms before being promoted, even though the firm has made a long-term investment of time, effort, and money in their training and development.

The premise of the Task Force report is that many defense law firms, by not providing equal opportunities to women lawyers, or by not taking into account their needs and desires, are not reaping full benefit from their investment.

When they leave the firm, many women become in-house corporate counsel, government lawyers, judges, or take other positions, all of which are perceived as more hospitable to women lawyers. Or, they leave the field of law completely.

The Task Force identified and analyzed gender-based challenges and difficulties faced by women lawyers that often lead to their early departure from many law firms. The challenges include:

- advancing in firms—and in a professional field—dominated by men
- allowing women litigators to be as aggressive and confrontational as male litigators
- developing a clientele—a "book of business"—for the firm
- balancing the time demands of a private law trial practice with family life

Women lawyers believe that there is a "glass ceiling" that inhibits their advancement. They are expected to work harder than male trial lawyers, yet receive less professional respect from clients and male lawyers. They also report gender bias in work assignments, in the courtroom, from opposing counsel, and among their male colleagues in the firm.

INTRODUCTION

The DRI Task Force on Women Who Try Cases was formed to identify the challenges facing women attorneys as defense trial counsel and to provide a set of recommended practices for women attorneys and law firms. DRI President Sampson appointed ten DRI members to the Task Force, eight women and two men. They were charged with the mission of conducting interviews to explore the challenges facing women attorneys and effective strategies for dealing with those challenges. Interviews were conducted by the Task Force members with women in private practice, women who had left the practice to become in-house counsel, judges, full-time moms, along with women who practiced part-time or had done so in the past. Additionally, Task Force members interviewed both male and female managing partners of firms and men who are practicing attorneys, judges or clients. The majority of the interviews conducted were of practicing women attorneys whose years of practice range from 2–29 years. In addition to conducting over 100 interviews, a survey was sent electronically to women DRI members, to which 765 women attorneys responded.

The Task Force also undertook research of studies done by other bar organizations regarding challenges facing women attorneys and retention. Recent information suggests that while substantial progress has been made in the last two decades, women remain under-represented in the ranks of partnership in law firms, accounting for only 16 percent of law firm partners. This is despite the fact that for the last 20 years the number of women graduating from law school ranged from 39 percent to 49 percent of the total number of graduates. In the past, firms have attributed the low percentage of women partners to under-representation in law schools, and have reasoned that the number of women partners would increase over time as more women joined the ranks of law firms. This is no longer a viable explanation. The statistics indicate that issues exist regarding retention of women attorneys by law firms and/or the advancement of women attorneys within the firms. These are significant issues for both women attorneys and law firms: if 40 percent to 50 percent of a firm's hires are women, and only 15 percent end up becoming partners, the firm has invested a great deal of its resources without success. Therefore, the Task Force also looked at the reasons for departure of women attorneys from law firms and from the litigation practice.

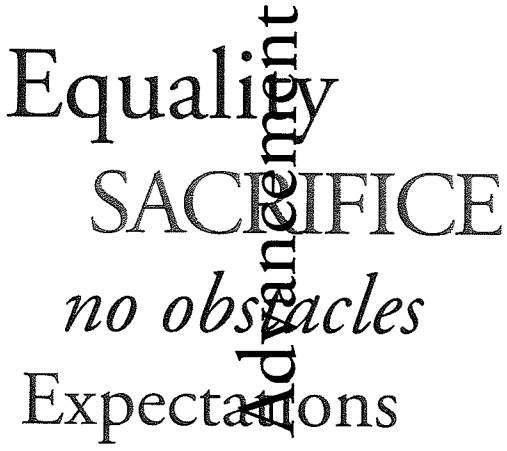
This report sets forth the Task Force's findings regarding challenges facing women who try cases. The challenges include those related to advancement in law firms, challenges in balancing practice demands and family life, and challenges in business development. The Task Force also examined perceptions regarding gender-based difficulties for women that are inherent in the litigation practice and culture. Practicing women attorneys who were interviewed talked about the challenges of working in a male-dominated field, including the delicate balance of being assertive while not being labeled as "aggressive," and the general feeling that women have to work harder than

men to get ahead in law firms. They also voiced their frustration with the difficulties in balancing a litigation practice and family demands, lack of flexibility in the workplace, fewer opportunities for mentoring, the "old boys' network" and exclusion from law firm marketing opportunities.

Although women have made great strides in obtaining equality in the legal profession in the last 20 years, today 65.3 percent of the women surveyed believe that there is a "glass ceiling" for women defense attorneys, 61.6 percent have considered leaving the practice of law due to issues related to their gender, and 70.4 percent have experienced gender bias in the courtroom. Even among women attorneys who have been successful in law firms, battles are still being fought on the front lines of firms to promote women into the ranks of first chair trial lawyers, rainmakers, and senior law firm managers.

The Task Force recognizes that women attorneys have found a way to excellence, despite the difficulties expressed, with the assistance of law firms that have enhanced and enabled their success. The legal profession now offers a number of models of women defense attorneys who have been successful in breaking through the "glass ceiling" and/or in finding work environments that are "user friendly." Women attorneys have entered the law firm ranks in great numbers in the past two decades, with many defense law firms reporting that more than 50 percent of their recent hires have been women. The majority of law firms have successfully incorporated women attorneys into their practice and into their culture. Also, many firms have put into effect policies and practices that have allowed women attorneys to remain in litigation defense while devoting time to raising their children. Therefore, Task Force members also focused on "best practices" of women defense attorneys and law firms that have led to the progress made to date.

This report sets forth the Task Force's recommendations resulting from its research for the advancement of women attorneys in their practice and for management and retention strategies of law firms. The recommended practices for women attorneys include using effective strategies for law firm politics, developing mentor relationships, becoming experienced trial lawyers, and improving business development. Calling upon the experience of successful female defense attorneys, the Task Force has identified best practices for enhancing opportunities and potential for success for women attorneys in litigation, in firms, and in balancing work and life. The recommended practices for law firms include retention strategies, flexible work schedules, workable part-time policies, law firm culture considerations, the promotion of women attorneys within the firm, and business development assistance. The Task Force believes that these goals can be achieved through the continued partnering of male and female defense trial attorneys in order to ensure the long term good health and success of law firms, their members, and the legal profession.



country she will not retain a woman attorney because of entrenched gender biases that she perceived still exist in the court system in those areas. In contrast, many women attorneys felt the courtroom was the one place where they would receive equal treatment and being female often worked to their advantage.

These perceptions, and many others, were pervasive among those surveyed and interviewed, both male and female. Although the legal profession has come a long way in trying to eliminate gender-based inequality, if continued progress is to be made, perceptions and stereotypes that create obstacles for women litigators must be acknowledged and addressed. In the litigation practice, the differences between men and women may be amplified because of the adversarial nature of the practice and the pressures of the workplace. However, to truly achieve equality in the profession and level the playing field, gender differences must be respected, accepted, and not demeaned.

Challenges Faced by Women Advancing in Law Firms

Despite an ever-increasing number of women entering law schools and the private practice of law, they continue to be a small percentage of law firm partners and an even smaller percentage of law firm upper management. Although the DRI Task Force survey and interviews did not specifically ask women what they believed to be the cause of this phenomenon, the survey and interview results shed light on the reasons why women continue to experience so little progress in this area.

The first and foremost reason articulated by many was a lack of effective mentoring relationships, not only in learning legal skills but on other issues that have an impact on one's ability to advance, such as marketing and balancing lifestyles. Addressing issues of mentoring, one interviewee commented that "many firms assign mentors based on gender," even though those assignments are not the best for and are not necessarily conducive to the development of the attorney.[1] The net effect of such assignments is that poor relationships develop and the female attorney is not positively viewed or received by the other partners in the firm.

However, it is not just the inappropriate assignment of mentors that impacts advancement in the firm. The very absence of female role models causes insecurity among men and women. Women would like to have them, and do not. Men worry about what to expect if there are too many.

Many survey participants expressed their belief that lack of flexibility—a resistance to change—was an impediment to advancement in law firms. The lack of flexibility was not only reflected in issues related to balancing family and the practice of law but also in partnership selection criteria. Law firms could significantly increase the number of women in their partnership and management ranks by re-examining the firm's criteria for partnership. For example, in law firms where trial work is the life's blood of the firm, it is not unusual to expect that those who aspire to partnership must first

[1] Several interviewees commented that the assignment of young female attorneys to female mentors may in some way be counter-productive because many females who have moved into the ranks of partnership and management have had to endure significant sacrifice in order to attain these goals. Having made such sacrifices, these individuals were perceived to be less empathetic to the struggles and issues with which many younger female trial lawyers are grappling.

have significant "first chair" trial experience. Reliance on standards such as the "first chair" criterion persist even though fewer cases are actually being tried—either as a result of mandatory alternative dispute resolution or concern about the risk of unreasonable verdicts.

Another practice with a negative impact on advancement is the failure to provide female associates the opportunity to view the entire case and instead ask them only to complete only discrete assignments. Limiting associate's involvement to discrete aspects of the case lessens the opportunity for the developing lawyer to understand how her assignment affects the overall lawsuit. Without this perspective, many attorneys do not learn how to evaluate litigation and are therefore rendered unsuitable for the greater responsibilities attendant to partnership.

Insistence on trial experience and the need to view the big picture are not the only criteria that have created obstacles for advancement of women in law firms. Because the practice of law has become increasingly focused on the bottom line and increasingly more business-like, many law firms have adopted a requirement that those who wish to be partners must have their own "book of business," *i.e.*, develop their own clientele for the firm's benefit. Although many who are presently partners were the beneficiaries of existing long-time client relationships, the decreasing number of clients, the increasing number of lawyers, and fading client loyalty has made it difficult for established partners to develop and/or retain clients. Requiring a book of business prior to consideration for partnership creates a greater burden on many in the profession, particularly women. Several interviewees, including judges, corporate counsel, and those in private practice, expressed frustration that law firms failed to take into account the difficulty of finding and developing clientele without neglecting other equally important personal priorities such as attending school functions for children and providing necessary support and nurturing to the family. Others reported that they were hindered in the development of business because they did not have the opportunity to develop close relationships with senior partners because of divergent personal interests. Many women believe that they were not able to "inherit" established clientele because they didn't talk or play sports on a daily basis with the partners, but were more interested in other cultural activities.

> ***"Women are much more restricted in marketing due to social and moral expectations."***
>
> —Survey respondent

The requirement of having and maintaining a "book of business" was a factor in the decision of many successful women trial attorneys to leave trial practice and pursue careers that had what one might describe as a built-in clientele. Several interviewees indicated that their measure of success was different than many of their male partners. Success should not necessarily be judged by the size or value of one's book of business, but instead should be measured by a variety of factors. Yet, in many law firms, the primary criterion for measuring success is the length of the client list the lawyer has developed.

Among the other challenges faced by women attempting to advance in law firms include perceptions and behaviors of those in positions of power. Because women, by

and large, continue to have the primary familial responsibilities, they continue to be plagued by the perception that they may not be as committed to the practice as their male counterparts. One male interviewee opined that women were either leaving trial practice or unable to succeed in trial practice because they "don't like the demands on their time." This opinion may very well manifest itself in the manner and opportunities afforded to female trial lawyers in law firms. It may lead to a perception by women of a generalized bias against their moving up the law firm ladder and actually discourage those who might otherwise be motivated to advance. A study found that while male associates were no more likely to be satisfied with long hours or inability to balance work and personal responsibilities, most women associates felt that their male colleagues had most to gain from the *status quo* of private law firms.[2] One interviewee described the attitudes of the men in the firm as, "why bring you along when you're just going to leave anyway or work will no longer be a priority?" Of course, this woman no longer works for the firm in question, which lost the opportunity to have a well-qualified woman attorney among its ranks.

Women lawyers also face challenges in earning respect from firm colleagues as they attempt to advance within the firm. As women are sometimes perceived as "aggressively" advocating for their clients, they may be seen as being overly aggressive by the men in the firm. This perception can, at times, make their male counterparts uncomfortable and therefore unwilling to support their advancement. Moreover, because women view and handle matters from a different, less traditional perspective, many men do not believe that they possess the qualities to be good business people and therefore, are less likely to consider them for firm management positions. Also, many women interviewed by the Task Force believe that the "good ole boy" network is still alive and well such that it creates a stumbling block to their advancement within the firm. They believe that men tend to promote other men, instead of women, both within the firm and with clients.

In sum, women lawyers see multiple stumbling blocks to their advancement within defense law firms. These stumbling blocks contribute to many women's belief that there is a "glass ceiling." Although significant progress has been made over the years, the glass ceiling is tougher to crack than the overt discrimination of the past. The Task Force believes the obstacles to advancement of women attorneys can and must be addressed by thoughtful and informed actions on the part of those who manage what has now become the business of the practice of law. The key to removing the glass ceiling is education first and action thereafter.

Balancing the Demands of the Practice with Family Life

The most commonly cited challenge facing women defense attorneys by those interviewed by the DRI Task Force, male and female, was the challenge of balancing heavy workloads and unpredictable hours that make up the litigation practice with the demands of raising a family. There is no doubt that each woman makes her own decision to have children; the reality is that most women who enter the legal profes-

[2] Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms* (2000) ("MCCA Report").

sion will have and raise children at some point during their career. This presents a difficult balancing act for most of them, particularly those who have the ambition to be a success in a law firm and as a trial lawyer. Women attorneys have to meet the demands of their firm for billable hours, and meet the demands of clients that they be readily available to handle their needs. At the same time, they are expected to handle most of the day-to-day domestic responsibilities that come with raising children or other family duties, such as caring for elderly parents. As any woman lawyer with children knows, these responsibilities present a very heavy load that can be overwhelming at times.

Although many women have successfully met the challenge of both a litigation defense practice and raising children, there are consequences from doing so. Because a person can only put energy into so many places, women are at risk if they do not take the time to take care of themselves. One woman interviewed stated that women must care for themselves both physically and psychologically in order to be able to balance their responsibilities effectively. If they do not, then it will be harder for them to take care of the needs of their clients and families. However, often it is impossible for a woman attorney to find time for herself—and that can lead to stress in the workplace and at home. As a defense trial practice is already very stressful, the combined stresses can take a heavy toll, a toll that some women said affects their family life more than their practice.

Often, women's expectations of themselves are higher than can realistically be achieved and they find it difficult to accomplish everything they wish. One woman reported that after getting legal work done and tending to home responsibilities, she had no time for professional and law firm social events. This can diminish the woman's perception that she is part of her peer group at the firm; one woman stated that she was able to fit in as "one of the guys" because she did not have children. Moreover, it is harder to find the time to read new materials and keep abreast of recent developments in the law. The combined responsibilities can also cut the time available for participating in marketing events or attending out-of-town seminars. Such absences can adversely impact the lawyer's ability to network and develop business.

The difficulty of balancing professional and family responsibilities is one of the leading reasons why women leave firms or decide to work part-time. It is also a factor for some women in the timing of having children or whether to have children at all. Of the lawyers surveyed, 52 percent responded that the practice of law influenced their personal decision on the timing of motherhood. Several stated that they postponed having children until after they were made a partner so that they could meet demands necessary to be considered for partnership, demands that they perceived to be in conflict with child rearing. Others who made the decision to have children, and attempted to return to the partnership track, eventually decided to cut back their hours and get off the track because they could not meet the demands of their practice without negatively impacting their family. As one women attorney put it, "I came to the conclusion that I could not be the 110 percent lawyer I had always been and also be the 110 percent mother and wife I wanted to be." Her desire to spend more time with her husband and children was such that she made the decision to cut back to 80 percent part-time.

For women who decide that they want to be at home with their children as much as possible while they are young, that will mean an inevitable decision to reduce practice time or get out of the litigation practice altogether. The realities of being a defense trial lawyer are such that it is not possible to structure a part-time practice with set hours in light of the unpredictable nature of the time required on any given day or week. So in certain respects the issue of how to accommodate a woman's desire to have a successful career in a law firm with her desire to be a good mother is a conundrum. The balancing act is difficult under the best of circumstances and usually something is going to be sacrificed—either the career or the time with the kids, or maybe the marriage. However, from the comments of the women interviewed, it appears that most of them believed that if firms offered greater flexibility, their chances for success in their career would be enhanced. Trying to achieve such flexibility in their work arrangement with the firm was one of the challenges most frequently mentioned by the women interviewed. Therefore, it is critical for law firms to offer flexible work schedules if they are going to support the careers of the women attorneys who are trying to move up the firm's ladder, but who also place a high priority on their role as the family caretakers.

Of the women interviewed who had gone to a corporate house counsel position or otherwise left private practice, a majority of them made the change because of lifestyle issues. Those with children left because they could not balance trial work with their desire to spend more time with their children. One of the female in-house lawyers interviewed by the Task Force left her firm after her daughter was born because she found that the job was too time-consuming. Also, the hours were too unpredictable, and she wanted to work at a place where she could leave at a decent hour each night. Women attorneys who opt for a part-time practice usually do so for child-rearing reasons. They may leave the practice altogether, often to spend more time with their children than even a part-time litigation practice would allow. One woman attorney who had been part-time stated that she left because she found that she was not doing the kind of job she wanted to do as a trial lawyer, nor was she getting the quality of life that she wanted with her family. Many women who go part-time find that they are spending more hours than called for in their agreement with the firm, just to keep up with their responsibilities, but being compensated less. This is another deterrent to staying in private practice.

The pressures of a litigation practice affect both men and women, but women appear to be more likely to leave the practice because of their desire to have a change in lifestyle. A number of women stated that they got tired of the billable hours, tired of the constant fighting, and tired of having to spend time on client development on top of all of the other demands. In short, these women wanted a life that they found more satisfying. This was also true for the women who chose to stay in the profession but took an in-house counsel position. Even though most of those in the latter group continued to put in long hours at work, they felt that they had a better quality of life than they did while in private practice.

The DRI Task Force realizes that changing the pressures and demands of litigation practice such that defense lawyers can achieve a balanced life is a tall order and one that is beyond the scope of this project. However, it should be recognized that those of us

who are in the trenches every day have forgotten what it is like to have a life that is not dominated by the pressures of the workplace. Full-time lawyers sometimes do not appreciate just how stressful the litigation practice is because they get used to being in the pressure cooker environment. Although the practice of law can be very gratifying and provide great rewards, we should not lose sight of the importance of maintaining balanced lives, particularly in the context of giving women defense attorneys the flexibility to practice law and devote time to the important task of raising the next generation.

Challenges in Business Development for Women Litigators

In today's practice of law, being a good attorney is not enough to become a law firm equity partner. The practice has become a business, with a larger number of attorneys competing for fewer clients. Long-standing clients or institutional clients upon whom firms traditionally counted to provide a steady flow of legal work are becoming fewer due to corporate mergers, bankruptcies, and the ups and downs of the economy. Today, attorneys who want to be considered for equity partner must go out and find their own "book of business." Developing business for any attorney is difficult and a challenge; but, women attorneys face additional challenges in marketing that are unique to them.

As all effective marketers know, obtaining and developing business takes time. Women attorneys with children have little time for this activity, given the demands of raising a family, caring for elderly or infirm parents, maintaining a household, and their daily work schedule. Often, female attorneys take on a greater role in raising a family (caring for infants and small children) than their spouses—or they may be single parents—leaving little time for marketing. Other reasons that cut down the time available for business development may include the inherent nurturing aspect, attitudes of society, and the lawyer's spouse's inability or unwillingness to take on a greater caretaking role.

Because of the demands on women attorneys' time, it is more difficult for them to develop a practice comparable to their male counterparts. The success in developing business increases exponentially with the amount of time devoted to the task. One author on rainmaking suggests spending three hours a week getting involved in community activities, business luncheons and service organizations.[3] A consistent flow of new business is not created overnight but requires consistent effort over time.

Some women attorneys are not comfortable or do not enjoy pursuing marketing activities that have traditionally been done by men for obtaining business. One senior attorney interviewed by the DRI Task Force remarked that she does not enjoy playing golf and has no desire to go to a gentlemen's club, so she avoids these potentially fruitful activities in her marketing efforts. A potential client's choice of social/business activities can preclude female attorneys from marketing activities. These personal preferences may have nothing to do with gender or race. Yet, when a woman lawyer turns down an invitation for a golf outing, she may miss out on a marketing oppor-

[3] Tobin Eason, *Women Lawyers Can Be Superb Rainmakers*, 9 (Lawyers Research Publishing Co., 1999).

tunity with a client. However, this should not deter the female attorney from finding other common social/recreational interests she can share with the client.

Women litigators also face the challenge of having their behavior misconstrued when marketing to male clients. Although the majority of female attorneys strive to cultivate professionalism, sometimes underlying sexual overtones are present by virtue of the nature of the male-female relationship. While she may be an attorney, she is also a woman in the eyes of her male client. Some female attorneys make a conscious effort to avoid one-on-one marketing events such as going to dinner or events at night that may be misconstrued by male clients. They reported that they felt more comfortable if others were invited along, creating a group and enabling a mix of males and females.

Although there were no sexual overtones involved, one female attorney interviewed by the Task Force reported that when she invited a male client to a basketball game, the client's wife reacted negatively. In another instance, a male partner thought that he was doing his single female partner a favor by encouraging her client's interest in her as a woman. The client then proceeded to ask the female partner for a date. She refused. When she conveyed her misgivings regarding the ethical propriety of the situation and her feelings of discomfort to her male partner, he did not understand her concerns.

Since 1984, 39 percent to 49 percent of students graduating from law school have been women.[4] Despite their representation in law firms, the majority of female attorneys the Task Force surveyed expressed frustration over their exclusion from certain firm marketing activities due to what they perceived as the "good ole boy" mind set. One female attorney interviewed stated that when a team was put together to solicit new business, she was never included even though her qualifications and expertise may have greatly benefited the prospective client. Another female attorney stated that despite her good relationship with her male partners, when a new case arrived at the firm that was within her expertise, the managing partner would give it to one of his buddies even though she may have been more qualified to handle the case.

While some of what may be gender bias has a foundation in active exclusion by the male attorneys, other times the behavior could be innocent and attributable to insensitivity. One study noted that men are most comfortable with others like themselves[5] whether it is junior male partners or male associates. This comfort level may be fostered by either a common interest in sports, similar backgrounds, or some intangibles. These informal relationships form the basis for mentors to pass on their "book of business" to their protégés, a key factor in attaining partner status.

One senior woman associate reported that although she was highly valued by her supervising partner, when he retired he passed on his more valuable clients to a male associate who was junior to her and not more qualified. In retrospect, she believed that this occurred because of the close personal relationship the partner and the young man developed from their mutual interest in playing basketball. In some instances, female associates face self-protective barriers erected by female partners. One reported that a

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[4] Wendy Werner, "Where Have the Women Attorneys Gone?" in *Law Practice Today* (American Bar Association Law Practice Management Section, May 2004).

[5] MCCA Report, *supra* note 2.

woman partner at her firm would not delegate any work to associates, whether male or female, because of her fear of losing clients.

There are few women rainmakers in the area of litigation defense; thus, there are few role models for other female attorneys to look to for guidance in effective marketing techniques that work for women. As discussed in this section, some women contend with the barriers of the "good ole boy" mind set or choose not to engage in traditional "male marketing activities" for a variety of reasons. Many female attorneys market on their own and learn through trial and error. However, it has been observed that women are not as comfortable as men in promoting themselves. Men are better at tooting their own horns, whereas women are more conditioned to work hard and think that they will get business by the recognition of how good their work product is.[6] However, in today's competitive climate, a more aggressive approach to marketing is usually required.

One woman partner interviewed by the Task Force advised that because the male partners at her firm did not involve her in any marketing opportunities, she was required to develop business on her own. This view was also expressed by other women who felt that they were not included in cross-marketing by their male partners. Several related that they had difficulty being included in law firm team presentations to prospective clients. Again, this situation was reported by interviewees with surprising consistency and similarity, even among senior women partners who were experienced and successful litigators.

The lack of women rainmaker role models in litigation defense affects the development of female associates who do not have mentors and who want to be partners. They have little guidance in developing profiles that would make them strong candidates for partnership. They lack role models to provide advice on career choices, opportunities to have client contact to develop rainmaking skills, intervention on their behalf with other partners, and delegation of challenging work to develop their skills as effective litigators. This often puts them at a disadvantage in comparison to their male counterparts.

> ***"It is more difficult for a woman to participate in traditional rain-making activities. The challenge is to find new avenues... it can be accomplished."***
>
> —Survey respondent

Despite the challenges faced by women litigators in developing business, they continue to strive forward, blazing a path for other female lawyers to follow. Law firms' commitment to include women as equal marketing partners with their male counterparts is essential to break through the barriers that are real or perceived. The women attorneys who were successful early in their careers in developing client relationships had mentors, primarily male, who allowed them to work directly with the clients. As a result of doing good work and being given opportunities in the courtroom, they were able to gain the confidence of the clients and then build on that to find other clients. It is still necessary for law firms to make sure that women attorneys are given opportunities for business development and are not excluded because of a traditional male-oriented approach to marketing.

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[6] Tom McCann, *2004 Diversity Survey: Women Struggle to Reach the Highest Ranks*, in Chicago Lawyer, July 2004.

RECOMMENDED PRACTICES

Strategies for Women Attorneys for Advancement in Their Practice

There is no substitute for competence. Across the board, respondents to the DRI Task Force survey in private practice, in the judiciary, and in corporate practice, cite "good work, good work and good work," "be responsive and do solid, helpful work for the client," "do high quality legal work" as prerequisites for women attorneys to advance in the practice of law. Even as women attorneys develop competence in the substantive areas in which they practice, their progress as trial lawyers and advancement in the profession hinge upon developing competence in the courtroom, in marketing and client development, and in traversing the office politics of their law firms.

Developing Competence as a Trial Lawyer

Young lawyers, female and male, rarely have the same opportunities to try civil cases early in their careers as did lawyers who entered the practice 20 or more years ago.[7] That said, women who have a strong interest in litigation can find numerous opportunities to train and practice litigation skills so that they can develop into competent and worthy trial lawyers.

One of the most obvious opportunities, and, according to judges, one of the most overlooked, is for women lawyers to go to court "even if it is just to come along to watch and learn," as one judge said, "take them into the courtroom as often as possible." Another judge reports, "it does not appear that there is any mentoring in most firms—senior lawyers should invite younger attorneys to come to court even if they can't bill time." Women who aspire to be trial lawyers should ask when attorneys in their firms are going to court—whether to argue motions, participate in pre-trial conferences, or try a case—and go along even if they cannot sit at counsel's table.

In addition, many state and federal courts post their dockets and trial calendars on the Internet. Young lawyers can, and should, take advantage of opportunities to sit in on civil and criminal cases to see how it is done, which procedures or behaviors are favored in a given judge's courtroom, and to evaluate whether the lawyer she is observing is effective.

Women attorneys interested in litigation should pursue opportunities to serve as second chair in depositions and trials, and then through demonstrated competence, move to first-chairing depositions and trying cases with the help of experienced second-chair counsel. As the younger attorney becomes more competent, her partners should commend her to clients so that the clients know that the young woman assigned to their case is up to the task.

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[7] A January 2004 report prepared for the American Bar Association Section of Litigation found that from 1962 to 2002 the number of federal civil cases resolved by trial plunged from 11 percent of the total to 1.8 percent. Marc Galanter, *The Vanishing Trial.* The report will also appear in the *Journal of Empirical Legal Studies* in November 2004.

Many women who choose to become trial attorneys come to a law firm with a background in public speaking through debate, undergraduate leadership positions, internships, or volunteer work. Law firms should continue to offer their young female litigators public speaking opportunities through in-house client seminars, and local or national continuing legal education programs, so that they can improve the skills that enhance their experience and presence in a courtroom.

A woman lawyer interested in litigation should ask her firm to send her to a trial training course, such as the Defense Counsel Trial Academy of the International Association of Defense Counsel, or to trial practice seminars. Specialized seminars on how to take a deposition, such as those organized by the National Institute of Trial Advocacy also provide excellent training.

Although many law firms do not allow junior lawyers to select the area of practice in which their time will be focused, there are alternative routes to learn hands-on courtroom skills. A female associate who wants to pursue a career in litigation can volunteer for *pro bono* work through the local bar association. *Pro bono* work offers an associate courtroom experiences sooner than she would find in the law firm. Judges acknowledge that certain practice areas have a high percentage of cases going to trial, or entail frequent court appearances. Domestic relations is one such area. Another is employment litigation, which has a higher concentration of women litigators than some other areas of civil litigation.

Older, more experienced litigators recognize that their trial skills are honed by trying cases. Women who want to develop as trial attorneys should seek out opportunities and take advantage of every experience offered to critically observe other litigators in action. Each should ask what the litigator is trying to accomplish, whether the litigator is effective, and what she would do if this was her case to challenge that witness, make that argument or pursue that position.

Developing Competence in Marketing

Doing solid legal work and being responsive to clients are still the keystone of the marketing efforts of most women litigators. Women interviewed by the Task Force emphasized that good communication skills, frequent contact with clients, listening to clients, and paying attention to their concerns and questions are all critical to retaining and developing business. Many reported that public speaking at CLE seminars, industry-wide seminars, or in-house programs was an important part of their marketing; it provided an opportunity to demonstrate competence in a specific field and to show good communication skills. Survey respondents also recommended active participation in DRI and other professional organizations to "get your name out"; this includes speaking at seminars, writing articles about a niche area of practice and "networking" with others. As one woman attorney noted, "being a speaker at a DRI conference reinforces your credentials."

Another suggestion is to focus on becoming known in the lawyer's own community by speaking, writing, or serving on non-legal boards or commissions or civic organizations. As one female partner said, "do what you like to do and recognize that business development opportunities could show up in surprising ways when you are not looking for them." Women attorneys need to become comfortable with the idea of promoting themselves. Some respondents found that a marketing consultant hired by the firm helped them learn how to market their practice effectively.

Several lawyers recognized that the focus on having "a book of business" in order to make partner in a firm can cause younger female attorneys to overlook opportunities to develop business one-on-one by establishing relationships with existing clients. Too often the attorneys may believe that the successful marketer (and a partner candidate) is someone who brings in a large institutional client. The challenge of delivering an institutional client can be so overwhelming that a female associate overlooks the very realistic marketing opportunities before her with individual client representatives or insurance adjusters.

The Role of the Mentor

No action has figured as prominently in the advancement of women attorneys in their law firms as establishing and nurturing an effective mentoring relationship with a more senior lawyer in the firm. Women lawyers in private practice, judges, lawyers who have left private practice, managing partners and male defense lawyers single out effective mentoring as critical to the development and retention of women litigators in private practice. As one judge interviewed stated, "mentoring is probably the most important consideration for law firms to develop female litigators."

Mentoring takes different forms. Learning the "nuts and bolts" of the law office and office policies and procedures is one area in which a mentor can be of great assistance. Equally important is the advice and assistance given in balancing the firm's reasonable demands with the young lawyer's desire for a personal life. Women attorneys must feel that the firm will support them not only as trial lawyers, but as people with families and personal concerns. Several Task Force survey respondents suggested that young female attorneys have two mentors: one for professional development and one for personal development. One advantage to having several mentors simultaneously, or to have a rotating system within the law firm, is that the female associate is then exposed to different perspectives on the practice of law, on marketing and on the firm itself.[8]

Many of the respondents recognize that not all law firm partners are very helpful in bringing associates and junior partners up through the ranks. Some partners have neither the time nor the necessary interpersonal skills to be good mentors. Moreover, not all law firms provide mentoring for young attorneys, female or male. Women associates and junior partners may need to look outside the firm to find career coaches or mentors who can offer feedback as well as guidance in the office politics that the woman lawyer may be encountering.

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[8] See *Empowerment in Leadership: Tried and True Methods for Women Lawyers* (American Bar Association Commission on Women in the Profession, 2003).

Women lawyers must understand that although their experience in a firm may be different from that of male associates, one of the most successful strategies is to be a team member rather than to compete against their male colleagues. In most firms, doing your best and teaming with others, male and female, will enhance everyone's opportunity to advance and progress in the firm.

One male defense lawyer spoke of "huge advances in leveling the playing field for women in litigation" during the 24 years he has been in practice. He acknowledges, however, that "core values" in traditional law firms are still based on a man's experience and a man's perspective. He spoke of "aggressive self-promotion, success measured by competition and high productivity" as the male model, and noted that "women lawyers, particularly those with children, often lack the external support systems that male attorneys have." These core values create a subtle obstacle that can be tough for women attorneys to hurdle.

An effective mentor can help level the playing field for a woman in the traditional male-dominated law firm. The mentor can ensure that the young woman does not become isolated from the others in the firm, and can help her establish interpersonal professional relationships with her peers and the more senior partners. Those relationships then can, over time, transform the culture of the firm and the hiring committees can feel more comfortable in recruiting women lawyers.

Diversity and Numbers—A Benefit for All

In the past, too many defense law firms have largely avoided equal treatment for minority and women lawyers by a system of "tokenism." That is, they believed that hiring one lawyer of color and a couple of women would satisfy any demands for diversity in the firm's professional ranks. However, with so many minority persons and women graduating from law school these days, it is neither fair nor good business to limit hires to a few tokens.

Although the issue is not just one of numbers, the presence of women in significant numbers in a law firm can alleviate concerns about tokenism. In a 2004 book, *Closing the Leadership Gap*, the author discusses why the number of women in positions of responsibility or visibility matters:

> A single woman leader or a few women in a larger group are tokens; Each token has to prove she is man enough for the job.... In the '70s women and minorities were scattered throughout corporations—one here and one there—isolated as stereotypes, often unable to speak their minds unless they agreed with the dominant conclusion.... Until there are enough diverse females in authority so that a chosen few are not expected to speak for an entire race or gender, those few will continue to carry the burden for us all. It is a fact that the more people like *you* in a working group, the more likely *you* are to be yourself.[9]

In a telling anecdote, the author cites a 2003 interview with Sandra Day O'Connor in which Justice O'Connor described how she felt when Ruth Bader Ginsberg was

[9] Marie C. Wilson, *Closing the Leadership Gap: Why Women Can and Must Help Run the World*, xiii (Viking Press, 2004).

appointed to the Supreme Court: "...the minute Justice Ginsberg came to the Court, we were nine justices. It wasn't seven and then 'the women.' We became nine. And it was a great relief to me..."[10] If a woman at the pinnacle of the legal profession feels the pressure of being the sole female voice, is it that difficult to appreciate the isolation and pressure of a single woman associate in her law firm?

Isolation and pressure are common situations for women lawyers. The risk of an associate being isolated can be particularly acute for women attorneys of color. A report by the Minority Corporate Counsel Association notes that "for women attorneys of color, the acute stress of being isolated at work as a person of color and the pressures of balancing family demands as working mother can lead to early burnout and high attrition rates, even for 'high performers.'"[11]

Firms that are friendly and open to hiring and promoting young women litigators do exist. Women interested in litigation should look for these firms, should talk to their colleagues and identify law firms that are committed to the development, progression and advancement of women litigators. Recognition that some types of practice are more accommodating to a balance between work and family life offers women lawyers the option to remain in the profession even if not in private practice. If a woman attorney finds herself in a firm that is not honestly committed to the advancement of women litigators, she has several choices: (1) stay the course and try to change the culture; (2) do good work and hope the partners recognize and acknowledge her value; or (3) move to a more accepting and inviting firm or environment. Such opportunities do exist and the liberating experience they offer is exhilarating. If a woman lawyer does choose to change law firms or move into a governmental or in-house position, she should maintain the best possible relationship that she can with colleagues in the organization she is leaving. Don't burn bridges. Many lawyers get a substantial part of their business from referrals by other lawyers, often from the old firm.

Finally, one step toward success for women in the practice of law is to recognize that their careers may not be linear. A woman can choose to sequence her career, *i.e.*, to work for the government or in a public interest legal group when she has young children, and later enter or return to private practice when the balance between work and family life so allows.

Management and Retention Strategies for Law Firms

Women trial lawyers bring to their firms and to their clients a wealth of talent, intelligence, drive, tenacity, and creativity. In many respects, the qualities female trial lawyers bring to their work differ insignificantly from the qualities of their male counterparts.[12] Their clients are well served, as are their firms.

Today, women litigators are viewed as a hot commodity, and most firms recognize their value. Women attorneys who have been in litigation for 20 to 30 years are now reaping the rewards of their hard work and are earning respect for their impressive

[10] *Id.* at xiv.

[11] *See* MCCA Report, *supra* note 2.

[12] Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, 9 (American Bar Association Commission on Women in the Profession, 2001).

CLOSING ARGUMENTS
The Girl=s View

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A*Tell me and I=ll forget. Show me and I=ll remember. Involve me and I=ll understand.*
~ Confucius

AI never saw twelve men in my life that, if you could get them to understand a human case, were not true and right.@
~ Clarence Darrow

I. <u>Cardinal Rules and Tips</u>: Developing the theme/continuing the theme - (through opening, evidence, and closing).

Use a common experience.

Psychological connection.

Use what you learned from the jury.

Credibility of witness and the attorney.

Promises came true. AI told you....@

Attacking the lawyer! Do not respond.

Have a connection but don=t suck up. Be yourself.

Have to object - report the argument.

Don=t overstate your case.

Use real life analogies.

Do not use a power point for the entire closing.

(reading it, jurors reading not listing, no eye contact).

Always make the jury part of finding the solution. ADoing the right thing@ = time-honored principle of life theme applicable to the case. Richard C. Waites, *Courtroom Psychology and Trial Advocacy*, 535-37 (2003).

Use demonstrative exhibits. Blowups are great! Using the medical records!!

Repetition is powerful. (But only as to the important points).

Always argue damages.

Using notes, outline or some type of checklist.

ATelevision experience@/reduced attention span.

Talk about the important jury instructions to your case...do not read them again!!

II. <u>Proper Summation</u>:

It is proper to:

1) Draw conclusions from the testimony as long as conclusions do not go outside the record. *Lawyer v. Stansell*, 217 Iowa 111, 250 N.W. 887 (1933). Making computations which jurors could have made for themselves from the facts in evidence was not error. *Kuper v. Chicago & North Western Transp. Co.*, 290 N.W.2d 903 (Iowa 1980). Counsel can draw conclusions and argue all permissible inferences which may flow from the record and which do not misstate the facts, but counsel cannot interject personal beliefs. *State v. Williams*, 334 N.W.2d 742 (Iowa 1983)

2) Use a per diem formula for showing damages where used as a suggestion or illustration. *Althof v. Benson*, 147 N.W.2d 875 (Iowa 1967); *Corkery v. Greenberg*, 253 Iowa 846, 114 N.W.2d 327 (1962).

3) Read portions from the evidence of witnesses taken from the record. *Willis v. Schertz*, 188 Iowa 712, 175 N.W. 321 (1919).

4) Comment on the failure of counsel to produce testimony within his or her control. *Smith v. Cedar Rapids County Club*, 255 Iowa 1199, 124 N.W.2d 557 (1963); *Johnson v. Kinney*, 232 Iowa 1016, 7 N.W.2d 188 (1942).

5) Comment on the effect of a potential verdict. *Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985).

6) Discuss facts introduced, exhibits, facts of common knowledge and reasonable inferences based on the evidence. *Lane v. Coe College*, 581 N.W.2d 214 (Iowa App. 1998).

III. <u>Improper Summation</u>:

It is improper to:

1) Appeal to juror prejudice against corporations. *Kuper v. Chicago & North Western Transp. Co.*, 290 N.W.2d 903 (Iowa 1980).

2) Refer to wealth or poverty of the parties. *Mongar v. Barnard*, 248 Iowa 899, 82 N.W.2d 765 (1957).

3) State scientific or other authorities not in the evidence.

4) Assert belief in the justice of the client=s case or your personal belief of counsel. *Rosenberger Enterprises, Inc. V. Insurance Service Corp. of Iowa*, 541 N.W.2d 904 (Iowa App. 1995)(even asserted religious imagery telling the jury AYou=re my dad in this case and God is my Judge).

5) Argue the AGolden Rule@ for determination of damages. *Oldsen v. Jarvis*, 159 N.W.2d 431 (Iowa 1968).

6) Make personal attacks on opposing party and counsel. *Riggins v. Chicago, M. & St. P. Ry. Co.*, 193 Iowa 266, 186 N.W. 856 (1922). But, calling party Ablack sheep of family@ or Arenegade@ not deemed Amisconduct@ of attorney. *In re Roberts= Estate*, 231 Iowa 1088, 3 N.W.2d 161 (1942).

7) Discuss items limited by court=s ruling. *Carter v. Wiese Corp.*, 360 N.W.2d 122 (Iowa App. 1984).

8) Comments about settlement or compromise. *Yeager v. Durflinger*, 280 N.W.2d 1 (Iowa 1979).

9) Read from law books. *State v. Mayes*, 286 N.W.2d 387 (Iowa 1979).

IV. <u>Other Case Law on Closing</u>:

1) Ordinarily failure to object when alleged misconduct occurs during counsel=s final argument waives any impropriety in counsel=s remarks. *Team Central Inc. v. Teamco, Inc.*, 271 N.W.2d 914 (Iowa 1978). Objections must be timely made, but make sure you are right.

2) The trial court has discretion to limit scope of the discussion of matters in closing. *Carter v. Wiese Corp.*, 360 N.W.2d 122 (Iowa App. 1984). Court did not allow plaintiff=s counsel to comment on absence of defense witness mentioned in opening where matter on which witness was competent did not become an issue at trial. *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986).

3) Defense counsel allowed reply to Plaintiff=s reply argument to respond to exhibit that was not mentioned in either preceding argument. *Janvrin v. Broe*, 239 Iowa 977, 33 N.W.2d 427 (1948). However, scope of closing argument is not strictly confined, but rests largely with the sound discretion of the trial court. *Lane v. Coe College*, 581 N.W.2d 214 (Iowa App. 1998).

4) Jurors should not be addressed by name during the closing arguments. *In re Maier=s Estate*, 236 Iowa 960, 20 N.W.2d 425 (1945).

5) Improper conduct in a closing argument can result in a new trial where prejudice resulted so that a different result would have been probable but for the misconduct. *Rosenberger Enterprises, Inc. V. Insurance Service Corp. of Iowa*, 541 N.W.2d 904 (Iowa App. 1995).

6) A timely objection or motion for mistrial at the time of the offending conduct serves to preserve the issue of misconduct for appeal. Such motion for mistrial can be made prior to the submission of the case to the jury, when closing arguments are reported, certified, and made part of the record. *Rosenberger Enterprises, Inc. V. Insurance Service Corp. of Iowa*, 541 N.W.2d 904 (Iowa App. 1995). Rule 1.903(h) of the *Iowa Rules of Civil Procedure* requires reporting of the closing, any objections and the court=s ruling, unless waived by the parties.

7) Misconduct during closing, dealt with by the trial court, after timely motion will not result in new trial where no mention is made in the motion for new trial and the issue is not addressed in the trial court=s ruling, as the issue is waived. *Collier v. General Inns Corp.*, 431 N.W.2d 189 (Iowa 1988). If a record was not made of the offending remarks, that party must establish the record, including all objections made, through a bill of exceptions under *Iowa Rule of Civil Procedure* 1.1001 or through a statement of evidence under *Iowa Rule of Appellate Procedure* 6.806. Clearly, not as effective as having the closing reported.

V. <u>Ethics of Closing</u>:

1) Standards for Professional Conduct, Chapter 33, *Iowa Rules of Court*. Rule 33.2 (1): AWe will treat all other counsel, parties and witnesses in a civil and courteous manner....@

2) Rules of Professional Conduct, Rule 32:3.3, Comment 4: ALegal argument based on a knowingly false representation of law constitutes dishonestly towards the tribunal.@

3) Rules of Professional Conduct, Rule 32:3.4(e): AA lawyer shall not:...in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.@

Protecting Medicare's Interest – An Update

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MEDICARE SECONDARY PAYER UPDATE 2011

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Introduction

The Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b) (2010), continues to be a source of litigation as the Centers for Medicare and Medicaid Services, claimants, defendants, employers, insurance companies, Medicare Advantage plans, attorneys, and others attempt to ascertain their rights and obligations under the Act. Several decisions issued over the past year have provided new insight into the extent to which the Centers for Medicare & Medicaid Services or its contractors may enforce rights of recovery under the Act, while other cases continue to adhere to well-established principles. To serve as an update on recent cases, below are brief summaries of decisions pertaining to the Medicare Secondary Payer Act issued within the past year by courts across the country.

Statute of Limitations

In ***United States v. Stricker***, No. CV 09-BE-2423-E, 2010 WL 6599489 (N.D. Ala. Sept. 30, 2010), the United States filed an action seeking conditional payment recovery in connection with a $300 million settlement executed in 2003. The lawsuit was filed against various law firms who represented the claimants, underlying corporate defendants, and insurers. The United States alleged that its interests were not adequately protected at the time of settlement; specifically, the defendants did not sufficiently determine whether the settling claimants were Medicare beneficiaries, and if so, whether Medicare was entitled to repayment for conditional payments it had made. The relief sought included reimbursement of Medicare conditional payments, double damages, and a declaration that future primary payers must notify the Centers for Medicare & Medicaid Services ("CMS") when payments are being issued to its beneficiaries.

On September 30, 2010, the court dismissed the lawsuit against named defendants who argued that the action was barred by the statute of limitations. The court distinguished claims involving corporate defendants from those against attorneys. It concluded that the applicable statute of limitations as to corporate defendants was three years, under the Federal Claims Collection Act for actions arising from *torts*. 28 U.S.C. § 2415(b) (1998). It further determined the applicable statute of limitations for the attorney defendants was six years, based upon another provision of the Federal Claims Collection Act for actions involving *contracts*. 28 U.S.C. § 2415(a) (1998). Noticeably absent from the court's decision was any reference to the Medicare Secondary Payer Act's provision regarding the claim filing period. 42 U.S.C. § 1395y(b)(2)(B)(vi) (2010).

CMS Cannot Require Reimbursement within Sixty Days if a Final Decision Has Not Been Made and Cannot Recover Payments from a Beneficiary's Attorney

The plaintiffs brought an action against the Secretary of the Department of Health and Human Services challenging the legality of processes employed by the Centers for Medicare & Medicaid Services (CMS) in collecting conditional payments in ***Haro v. Sebelius***, No. CV 09-134 TUC DCB, 2011 WL 2040219 (D. Ariz. May 9, 2011). Specifically, the plaintiffs questioned whether CMS could require the reimbursement of a conditional payment within sixty days of a decision, even if the actual amount owed was not finally decided (where the beneficiary appealed the decision or applied for a waiver) and whether plaintiff's attorneys can be held personally responsible for reimbursing Medicare. The attorneys asserted the procedures used by CMS exceeded the Secretary's authority under the Medicare Secondary Payer Act and violated their rights to due process of law. The court decided that requiring the reimbursement of a conditional payment within sixty days was:

> neither rational nor consistent with the statutory scheme providing for waiver and appeal rights. [The Secretary's] interpretation is not permissible because it unnecessarily chills a beneficiary's right to seek a waiver or to dispute the reimbursement claim and reaches beyond the fiscal objectives and policies behind the 60-day reimbursement provision.

Id. at 11. Therefore, according to the court in the Haro case, CMS cannot require reimbursement within sixty days when the amount owed is pending on appeal or a waiver requests and has not been finally decided.

In Haro, the plaintiffs' counsel also challenged the legality of the Secretary bringing direct actions against attorneys to recover reimbursement claims. They raised an issue as to whether attorneys are prohibited from dispersing funds to their clients before Medicare recovery amounts are paid. The court found that there is no statute to support the notion of bringing a direct action against an attorney who has dispersed funds to a client. The court noted that attorneys are bound by rules governing professional conduct, which ensure that a lawyer will not disperse funds to a client when there are reasonable grounds for a dispute over a portion of the funds. Thus, the court found for the plaintiffs on both issues and CMS was forced to change its sixty-day reimbursement requirement when the amount owed is not finally decided and cannot bring reimbursement actions against a claimant's attorney.

An appeal has been filed by the Secretary in the Haro case. Watch for additional information as to this case as it is a key case in clarifying the roles of injured parties, counsel, and the Secretary under the Medicare Secondary Payer Act. Following the Haro decision, the Medicare Secondary Payer Recovery Contractor made revisions to its conditional payment recovery procedures. For current information as to Medicare's conditional payment recovery process, view the resources available on the website of the Medicare Secondary Payer Recovery Contractor: www.msprc.info

Recovery of Conditional Payment from Wrongful Death Settlements

In ***Bradley v. Sebelius***, 621 F.3d 1330 (11th Cir. 2010), a wrongful death suit was brought by surviving children against a nursing home due to alleged neglect and abuse. The survivors settled the wrongful death action for the nursing home's liability insurance policy limits of $52,500.00, and notified

Medicare of the settlement because prior to the decedent's death, Medicare paid $38,875.08 for his medical care. A state probate court determined the value of Medicare's interest in the settlement was $787.50, which the survivors paid, but under protest. After administrative remedies were exhausted, the U.S. District Court held that the Secretary's interpretation of the Medicare Secondary Payer was reasonable and Medicare was entitled to the reimbursement of $22,480.89, which was the amount of Medicare's payments less the costs of procurement. The U.S. Court of Appeals for the Eleventh Circuit *reversed* and concluded that "there is a strong public interest in the expeditious resolution of lawsuits through settlement" and "[t]he Secretary's position would have a chilling effect on settlement." *Id.* at 1339. The Eleventh Circuit limited Medicare's right of recovery to the portion of the settlement proceeds allocated by the probate court to the Estate. The court further explained that the Medicare policy manuals and enforcement guidelines were not entitled to the force of law.

However, in ***Benson v. Sebelius***, the court held that CMS could demand the reimbursement of conditional payments from a wrongful death settlement allocated to the estate or if the settlement included funds for medical expenses that were actually paid by Medicare. --- F. Supp. 2d ---, No. 09-1931(RMU), 2011 WL 1087254 (D. D.C. Mar. 24, 2011). In that case, CMS made conditional payments for Plaintiff's mother's medical costs prior to her death totaling $40,213.74, as a result of a fall in her home. Plaintiff brought a wrongful death and survival action against the mother's landlord and included the medical expenses in the damages sought. Plaintiff received a $90,000.00 settlement from the landlord; 80 percent of the funds were allocated to the wrongful death claim and 20 percent to the survival action. CMS sought the reimbursement of $25,868.58 for the mother's medical expenses, less its share of the procurement costs.

Plaintiff argued that CMS could not recover funds obtained from the wrongful death settlement, relying on ***Denekas v. Shalala***, 943 F. Supp. 1073 (S.D. Iowa 1996) and ***Bradley v. Sebelius***, 621 F.3d 1330. In both of these cases, CMS was denied the recovery of conditional payments obtained from the wrongful death settlements of children whose parents' medical expenses were funded by CMS. However, in both of those cases, the plaintiffs bringing the wrongful death actions did not specifically seek the recovery of medical costs in their claims. The court distinguished these cases because, in this instance, there was evidence that the mother's medical expenses were considered in determining the amount of the settlement. Therefore, in the Benson case, the court upheld CMS' right to recover conditional payments from the wrongful death settlement because medical expenses were awarded in this settlement. The court further held that Plaintiff's due process rights to his property were not violated when the lower court placed $40,213.40 in an escrow account to protect Medicare's interest in recovering conditional payments.

Attorney Fees Obtained from a Medicare Set Aside Account

A settlement agreement was reached allocating $180,600.00 of a $600,000.00 settlement to a Medicare Set Aside account in the third-party liability case of ***Hinsinger v. Showboat Atlantic City***, 420 N.J. Super. 15, 18 A.3d 229 (N.J. Super Ct. Law Div. 2011). After the settlement was reached, the plaintiff's attorney filed a motion seeking to withdraw his fees from the Set Aside account. The court held that attorney fees could be deducted from the Set Aside account. The amount of the money to be deducted from the Medicare Set Aside allocation for procurement costs was computed using the ratio of the procurement costs to the total settlement or judgment. Since the ratio of procurement costs to the

total settlement was 32.778 percent, that ratio was applied to the amount of money allocated for procurement costs that could be deducted from the Medicare Set Aside allocation.

The court determined that 42 C.F.R. § 411.37 (2008) was applicable to funds allocated to future medical expenses, as it is with conditional payments, which allows procurement costs to be deducted from the amount owed to Medicare. While the Center for Medicare Management has issued a directive prohibiting attorneys from charging fees specifically associated with establishing a Set Aside account, the court determined that this was not applicable to attorney fees incurred in a civil lawsuit. The fairness of both plaintiffs and Medicare sharing procurement costs was also cited as support for the court's decision.

Motion to Determine Future Medical Expenses

The parties to a settlement agreement asked the court to determine the amount of future medical expenses to be allocated to a Medicare Set Aside account to protect Medicare's interest in the settlement. The case of ***Big R Towing, Inc. v. Benoit***, No. 10-538, 2011 WL 43219 (W.D. La. Jan. 5, 2011), involved a sea captain who was employed by Big R Towing and was injured while performing work-related duties. Litigation was filed after disputes developed as to whether the medical treatment following the injury was necessary because of the alleged accident or a pre-existing medical condition.

During a settlement conference, the parties agreed to settle for $150,000.00. Since the claimant was receiving Social Security Disability benefits at the time of the agreement, the parties asked the court to decide the amount of future medical expenses to be "set aside" to protect Medicare's interest in the settlement proceeds. The court concluded that the amount of the settlement was reasonable and allocated $52,500.00 of the settlement proceeds to be placed in a Medicare Set Aside account. The court also ordered the claimant to promptly reimburse Medicare if it sought the recovery of any accident-related past conditional payments issued on behalf of the claimant.

Lack of Subject Matter Jurisdiction

Although the court dismissed the action since subject matter jurisdiction had not been properly established, several interesting points were raised in the case of ***Bindrum v. American Home Assurance Co. Inc.***, No. 5:10-cv-116, 2011 U.S. Dist. LEXIS 11373 (D. Vt. Feb. 4, 2011). A workers' compensation claimant signed a settlement agreement that reflected the amount of funds to be allocated to a Medicare Set Aside account. The agreement was approved by the Centers for Medicare & Medicaid Services (CMS), but the claimant later sought to argue that the account was underfunded. The court determined that underfunding would not pose any economic risk to the claimant because Medicare approval of the amount in a Set Aside account ensures Medicare will cover medical costs when the funds are depleted. Since the plaintiff could not recover damages for an underfunded Set Aside account, the amount in controversy did not meet the minimum requirement of $75,000.00 to establish jurisdiction and the case was dismissed. Since the court did not reach the merits of the case, there was no specific finding that by signing the settlement documents the claimant agreed to the Medicare Set Aside account and waived this claim.

In ***Gonzales v. Haydon Brothers Contracting, Inc***., No. 11-83-ART, 2011 WL 2534455 (E.D. Ky. June 27, 2011), the court held that, "[w]hether a Medicare lien exists is at best a procedural issue, and it has nothing to with . . . federal jurisdiction." Discovery is not a basis for federal-question jurisdiction; thus, federal question jurisdiction cannot be based on the need to learn if Medicare has a lien against a party.

See also ***Wasson v. Sebelius***, No. 2:11CV46MLM, 2011 WL 2837882 (E.D. Mo. July 18, 2011), in which the court granted plaintiff's motion to remand the case to State court from federal court. The court explained that although a claim for conditional payments made by Medicare is established under federal law, the claimant was pursuing an action to apportion the funds of a wrongful death settlement pursuant to Missouri state law, and the action should not have been removed to federal court.

Agreement Not Effective until Amount of Set Aside Account Determined

The Supreme Court of Kentucky held that the amount of funds to be allotted to a Medicare Set Aside account must be determined for a settlement agreement to be complete in ***Hudson v. Cave Hill Cemetery***, 331 S.W.3d 267 (Ky. 2011). The claimant and his employer entered into a settlement agreement, which was approved in 2003. However, this agreement did not include a waiver or buyout of the claimant's future medical expenses. In 2007, when the claimant required further medical care, he filed a motion asking his former employer to pay the expenses. The employer disputed his liability since an agreement had been reached in 2003. The claimant, on the other hand, argued that a new agreement had been reached based on correspondence between his attorney, the employer's attorney, and the employer's insurance adjuster. The claimant's attorney faxed a message to the insurance adjuster accepting a settlement offer of $500,000.00. The insurance adjuster also sent a letter confirming acceptance of the offer, but the agreement was neither drafted nor approved.

The court held that this settlement agreement was not binding and incomplete. It reasoned that the amount allocated to a Medicare Set Aside account is an essential element of a settlement agreement because of the potential legal and financial consequences that may result when the amount remains undecided. Determining the amount of funds to be placed in the account is essential and must be agreed upon before a settlement agreement becomes final and enforceable.

Settlement Not Effective until Approved by CMS

In ***Harrelson v. Arcadia***, a Louisiana appellate court determined that a settlement is not effective and enforceable until the Centers for Medicare & Medicaid Services approve of the funds to be placed in a Medicare Set Aside account. No. 2010 CA 1647, 2011 La. App. LEXIS 755 (La. App. June 10, 2011). The plaintiff filed suit under LA. REV. STAT. ANN. § 23:1201G (2005), which provides for damages, if a settlement is not paid within thirty days. The court held that approval of the Set Aside allocation amount by the Centers for Medicare & Medicaid Services (CMS) is a precondition to the settlement becoming effective and enforceable. Therefore, the defendant had thirty days after CMS approved the Set Aside account to pay the plaintiff the settlement funds, and the claimant was not entitled to damages for late payment of an award under the facts of that case.

In ***Schexnayder v. Scottsdale Insurance Co***., No. 6:09-cv-1390, 2011 U.S. Dist. LEXIS 83687 (W.D. La. July 28, 2011), the plaintiff was injured in an automobile accident while working. Although the plaintiff was able to recover from the injuries, he required maintenance medical care. A settlement of the workers' compensation claim was accomplished. Mediation was then held as to the third party liability claim and a settlement agreement was reached as to the liability claim. The liability settlement provided for a Medicare Set Aside account to protect Medicare's interest under the Medicare Secondary Payer Act. CMS approval of the proposed Medicare Set Aside account was sought, but CMS advised the plaintiff that approval may not be forthcoming, and if it was, it would not be for quite some time. The parties then filed a joint motion for declaratory judgment in which approval of the settlement was sought with a specific finding that Medicare's interest in the settlement was adequately protected through the proposed Set Aside. An evidentiary hearing was scheduled and Notice of the hearing was provided to the Secretary of Health and Human Services, who declined to appear. After the evidentiary hearing, the court found that the plaintiff was not a Medicare beneficiary and would not qualify for Medicare within 30 months; furthermore, he had never received any medical expenses relating to the accident from Medicare.

The court specifically found:

> Medicare does not currently require or approve Medicare set asides when personal injury lawsuits are settled. Medicare does not currently have a policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases.

The court determined that the amount of money allocated to future medical expenses reasonably accounted for Medicare's interest. Finally the court explained:

> Since CMS provides no other procedure by which to determine the adequacy of protecting Medicare's interests for future medical needs and/or expenses in conjunction with the settlement of third party claims, and since there is a strong public interest in resolving lawsuits through settlement, . . . the Court finds Medicare's interest have been adequately protected in this settlement.

Id. at *21. Thus, the court found that Medicare's interests were protected and the parties' settlement could proceed. In its opinion, the court set forth very detailed factual findings to support its conclusions. The structure of the factual findings in the written Order entered by the court may be of benefit to others who seek court orders as a means to attempt to demonstrate appropriate consideration of Medicare's interest at the time of settlement.

Denial of Motion to Name Medicare as a Payee on the Draft Paying a Judgment

In ***Zaleppa v. Seiwell***, 2010 Pa. Super. 208, 9 A.3d 632 (Pa. Super. 2010), a 69 year old woman who was injured in a motor vehicle accident obtained a judgment against the driver who struck her vehicle. A verdict in the amount of $15,000.00 was entered, of which the jury allocated $5,000.00 for future medical expenses. Concerned about Medicare's interest in the settlement, the defendant filed a post-trial motion in which he asked the court to either decide that Medicare should be listed as a payee

on the draft paying the judgment or that the funds be paid into the court until Medicare confirmed whether it would seek recovery of conditional payments. The trial court declined to grant the relief requested. On appeal, it was noted there was no evidence presented at trial that Medicare had paid any of the injured woman's medical expenses. The appellate court determined the Medicare Secondary Payer Act bars private entities from asserting the interests of the United States government. Since the United States government was not a party to the lawsuit, the court held that adding Medicare as a payee to the settlement draft would interfere with the rights of the injured woman as determined by the jury.

Medicare Advantage Plans Do Not Have a Federal Statutory Right of Action

Three recent decisions have determined that Medicare Advantage ("MA") plans do not have a federal statutory right of action to recover conditional payments. Federal legislation affords MA plans *subrogation* rights, but does not create a federal right of recovery; thus, these federal courts lacked jurisdiction to hear the MA plans' claims regarding recovery. *See* 42 U.S.C. § 1395w-22(a)(4) (2010); 42 U.S.C. § 1395mm(4) (2010); 42 C.F.R. § 422.108(f) (2005).

In ***Humana Medical Plan, Inc. v. Reale***, the plaintiff MA provider filed an action to recover medical expenses it had funded for the defendant after defendant had received a settlement for her injuries. No.10-21493-Civ., 2011 U.S. Dist. LEXIS 8909 (S.D. Fla. Jan. 31, 2011). The plaintiff filed the action in federal court and argued jurisdiction was appropriate under the Medicare Secondary Payer Act, 42 U.S.C. 1395y(b)(2), and 42 C.F.R. §422.108(f), which affords MA organizations the right to recover from a primary payer when the Secretary of the Department of Health and Human Services has a right to recover under the Medicare Secondary Payer Act. The defendant argued that jurisdiction was not proper and the court agreed. The court explained that the language of 42 C.F.R. §422.108(f) provides that MA organizations can recover when the Secretary would be able to, but the *United States*, not the Secretary has the ability to bring a reimbursement action under the Medicare Secondary Payer Act. Thus, the court dismissed the action for lack of subject matter jurisdiction.

Likewise, the court in ***Parra v. Pacificare of Arizona, Inc***., held that a Medicare Advantage plan provider did not have a private cause of action under the Medicare Secondary Payer Act. No. CV-10-008-TUC-DCB-DTF, 2011 WL 1119761 (D. Ariz. Feb. 4, 2011). The court justified its decision by explaining that Congress did not intend to create a private cause of action and that federal statutes create a reimbursement right, but not a federal private right of action to enforce rights under the Medicare Secondary Payer Act. The court determined that it lacked jurisdiction and stated that Pacificare should bring its reimbursement action in state court, under a theory appropriate in that forum, such as a contract claim.

This issue was again addressed in *In re Avandia Marketing, Sales Practices and Products Liability Litigation,* Nos. 07-md-01871, 10-6733, 2011 WL 2413488 (E.D. Pa. June 13, 2011). Humana, a Medicare Advantage organization, brought its action to recover conditional payments from GlaxoSmithKline ("GSK") since it paid for its beneficiaries' medical expenses after they took Avandia, a drug manufactured by GSK. GSK filed a motion to dismiss the action, arguing that the Medicare Secondary Payer Act does not provide MA plans a private cause of action. The court agreed and held MA plans do not have an express or implied private right of action under federal statutes and regulations

to bring reimbursement actions in federal court. As in *Parra*, the court explained that Humana should pursue its claim in state court.

In ***Phillips v. Kaiser Foundation Health Plan, Inc.***, No. C 11-02326 CRB, 2011 WL 3047475 (N.D. Cal. July 25, 2011), the court granted the defendant Medicare Advantage plan provider's motion to dismiss. The plaintiff initially claimed in State court that the defendant had illegally demanded the repayment of medical expenses after an enrollee obtained a settlement from a third party. The Medicare Advantage plan removed the case to federal court and asserted the claims should be dismissed due to preemption and failure to exhaust administrative remedies. The federal court held that since the Medicare Act provided Medicare Advantage plans with secondary payer rights and included an express preemption provision, the provider could indeed be reimbursed through settlement funds. If the plaintiff was claiming that the amount the defendant was seeking is greater than the amount provided by the Medicare Act, the plaintiff would need to exhaust administrative remedies before filing an action in federal court. Thus, the plaintiff's claims regarding reimbursement were dismissed. Finally, the plaintiff's state law claims that the defendant violated the Unfair Competition Law and the Consumer Legal Remedies Act were also dismissed. The court cited ***Uhm v. Humana Inc.***, 620 F.3d 1134 (9th Cir. 2011) and explained that CMS extensively regulates the marketing materials used by Medicare Advantage plans. This combined with the Medicare Act's preemptive provisions, demonstrated that the plaintiff's claims were preempted. Thus, the court dismissed the claims. It did not grant leave to amend as the claims required exhaustion or were preempted, and amendment would not cure those deficiencies.

Direct Right of Action Distinguished from Right of Subrogation

In ***Farmers Insurance Exchange v. Forkey***, 764 F.Supp.2d 1205 (D. Nev. 2010), the court determined that the Medicare Secondary Payer Act grants an independent right of recovery against primary payers or entities that receive payment for Medicare-related items or services. This right of recovery is "separate and distinct from [the] right of subrogation and is not limited by the equitable principle of apportionment stemming from the subrogation right." *Id*. at 1208 (quoting ***Zinman v. Shalala***, 67 F.3d 841, 845 (9th Cir.1995)). The Secretary's right of recovery was pursued through a direct right of action and was thus, not limited by state laws of apportionment. The Secretary's right of recovery took precedence over all other claims.

Exhaustion of Administrative Remedies

Decisions continue to reiterate that all administrative remedies must be exhausted before an action can be filed in district court. In, ***Braucher v. Swagat Group, LLC***, No. 07-CV-3253, 2011 WL 832512 (C.D. Ill. Mar. 3, 2011), the plaintiff's motion to adjudicate a Medicare lien was dismissed since all administrative remedies were not exhausted before filing an action in district court. Similarly, a plaintiff cannot add the Secretary of the Department of Health and Human Services as a party to an action when Medicare has not yet made a determination on conditional payments, as in ***Black v. Doe***, No. 11-25-DLB-JGW, 2011 WL 1642540 (E.D. Ky. May 2, 2011). Only once Medicare has reached a decision and the plaintiff has exhausted all administrative remedies, can the plaintiff file an action against Medicare in district court. Therefore, the Secretary cannot be made a party to an action determining a settlement or judgment since Medicare has not made a final decision. *See* ***Alcorn v.***

Pepples, No. 3:10-CV-00284, 2011 WL 773418 (W.D. Ky. Feb. 28, 2011) (refusing to add the Secretary as a party to an automobile accident case because administrative remedies had not yet been exhausted).

The plaintiffs brought an action asking the court to vacate its previous dismissal of their claims due to CMS' continued delay in deciding their administrative appeals in the case of ***Merrifield v. United States***, No. 07-987 (JBS), 2011 WL 1205473 (D. N.J. Mar. 28, 2011). Before CMS filed its response to the plaintiffs' Complaint, it resolved the pending requests of three of the plaintiffs and the court, therefore, dismissed their claims as moot since their issues with CMS had been settled. The court further explained that because plaintiffs had not established certified class action [including other Medicare recipients that could be harmed by CMS' actions], they would have to demonstrate each plaintiff may individually suffer harm again for there to be an exception to the mootness doctrine. Thus, since the plaintiffs settled with Medicare, there were no issues for the court to decide and it dismissed the case, in regards to these three plaintiffs, as moot.

With respect to the fourth plaintiff in ***Merrifield v. United States***, Plaintiff Heiser, CMS did not resolve her requests, but rather dismissed her appeal as untimely. CMS was responsible for lengthy delays and errors that occurred during the processing of Plaintiff's simple request for a waiver. The court rejected the plaintiff's argument in support of federal question jurisdiction due to the "functional unavailability of administrative recourse" because the Plaintiff failed to show that the process itself denies claimants relief. *Id.* at 7. The court dismissed Plaintiff Heiser's claims based on lack of jurisdiction because she had not exhausted all administrative remedies before filing the lawsuit. Consistent decisions establish that dismissing an administrative appeal as untimely does *not* constitute a final decision. The court refused to waive the requirement of complete exhaustion in spite of the CMS delays. Therefore, it did not have jurisdiction over the suit and dismissed Plaintiff's action. The court expressed its disfavor as to the inequitable results for Plaintiff Heiser due to CMS' poor handling of her request, but confirmed it was not deciding the outcome of the claim on equitable grounds.

Settlement Agreement Does Not Have a Preclusive Effect on Issues

In ***Harris v. Heubel Material Handling, Inc***., the U.S. District Court for the District of Kansas determined that a compensation settlement agreement between a claimant, his employer, and the employer's insurance did not have a preclusive effect on issues in future litigation. --- F. Supp. 2d ---, No. 09-1136-EFM, 2011 WL 1231155 (D. Kan. Mar. 29, 2011). The settlement for work related injuries sustained while operating a pallet truck was approved by both CMS and an Administrative Law Judge. Plaintiff then sued Defendant for negligently maintaining and repairing the pallet truck. Defendant moved for issue preclusion, arguing that the amount of Plaintiff's future medical expenses had already been settled, and the amount agreed upon in the settlement with his employer and its insurer should be the amount of medical expenses used in this case.

This was an issue of first impression in Kansas and no other states had decided whether a workers' compensation settlement is preclusive, but there are numerous other decisions where a third party settlement has been found to have no preclusive effect on future actions. Preclusion requires an issue to be fully heard and decided by the courts. The court held that a workers' compensation settlement agreement is neither litigated nor judicially decided and thus, it should not be precluded.

Therefore, the workers' compensation settlement, even when approved by an outside entity, does not preclude the plaintiff from litigating the issue of future medical expenses.

Insurance Company Did Not Act in Bad Faith in Delaying Payment

In ***Wilson v. State Farm Mutual Auto. Ins. Co.***, Plaintiff had an uninsured motorist policy with Defendant for $50,000.00. --- F. Supp. 2d ---, No. 3:10-CV-256-H, 2011 WL 2378190 (W.D. Ky. June 15, 2011). After Plaintiff was injured by an uninsured motorist, Medicare paid some of Plaintiff's medical expenses. Defendant did not pay Plaintiff the policy funds until it knew the value of Medicare's lien. When it learned the value of the lien two months later, Defendant paid Medicare and Plaintiff the following day. Plaintiff brought an action claiming it was bad faith for Defendant to delay the payment. The court granted Defendant's motion for summary judgment finding it was not bad faith to delay payments. Defendant did not have an ill motive, but was complying with the law and protecting its own interest, as it could be liable for the lien if Plaintiff did not reimburse Medicare. Furthermore, Plaintiff did not agree to any of Defendant's attempts to pay the claim sooner. The court dismissed the case with prejudice since Defendant was not acting in bad faith and paid the claim as soon as it learned the value of Medicare's lien.

Standing to Sue, Plaintiff May Assert His Own Interest in Recovery of Conditional Payments

Courts have reiterated that the Medicare Secondary Payer Act is not a *qui tam* statute. A *qui tam* statute allows a private citizen to file a lawsuit in the name of the United States government and then share in any proceeds recovered. In ***Brown v. U.S. Steel Corp***., No. 10-780, 2010 WL 4388075 (W.D. Pa. Oct. 29, 2010), the court rejected the defendant's argument that the plaintiff lacked standing since he could not bring a suit on behalf of the government's interest under the Act. The court explained that while the Medicare Secondary Payer Act is not a *qui tam* statute, the plaintiff does meet the constitutional standing requirements and can sue under the Medicare Secondary Payer Act because he is asserting *his* interest in resolving the conditional payment issue. However, the court did not decide the case on its merits as it found for the defendant on a summary judgment motion since the plaintiff was treated as a retiree by the his former employer and the Medicare Secondary Payer Act is only applicable to active employees.

Resources

Information about **Medicare's conditional payment recovery** is available on the website of the Medicare Secondary Payer Recovery Contractor:

www.msprc.info

Information about **Medicare Set Asides** in workers' compensation cases is available on the website of the Centers for Medicare & Medicaid Services:

https://www.cms.gov/WorkersCompAgencyServices/

Information about **Medicare Mandatory Insurer Reporting** is available:

http://www.cms.gov/MandatoryInsRep/01_Overview.asp#TopOfPage

Information about the **Strengthening Medicare And Repaying Taxpayers Act of 2011 (SMART Act)** [H.R. 1063] introduced in the House of Representatives on March 14, 2011, through which reforms under the Medicare Secondary Payer Act are being sought, is available at:

http://thomas.loc.gov/cgi-bin/bdquery/D?d112:2:./temp/~bdFCnz::|/home/LegislativeData.php|

Conclusion

The Centers for Medicare & Medicaid Services and its contractors continue to refine procedures to enable the federal government to assert its rights under the Medicare Secondary Payer Act. Court decisions are being issued that clarify the rights and obligations of Medicare beneficiaries, CMS, and others who are involved in injury-related claims involving Medicare beneficiaries. Attorneys who handle claims in which Medicare beneficiaries (or prospective Medicare beneficiaries) are involved must remain current as to developments under the Medicare Secondary Payer Act as the law in this area is rapidly evolving.

Case Law Update I: Civil Procedure, Juries & Trial, Insurance, Judgment & Limitation of Actions

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Iowa Case Law Update I
Civil Procedure, Jurisdiction & Trial, Insurance,
Judgment & Limitation of Actions
2010–2011

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* See also the Employment, Commercial, Contract, Constitutional Law, Damages, & Government Case Law Update.
** See also the Negligence & Torts Case Law Update.

CIVIL PROCEDURE

Claim Preclusion/Issue Preclusion
Lawcheck Ltd. v. Qwest Communications Federal Services, Inc., 791 N.W.2d 712 (Iowa Ct. App. 2010) (Huitink) (unpublished opinion)

FACTS: In 2003, Qwest obtained a judgment in Colorado against Lawcheck for $2 million, plus interest. In 2008, Qwest registered the judgment, then worth more than $3 million, in Iowa. In October 2008, Lawcheck contacted Qwest to negotiate a settlement agreement for the debt. Lawcheck believed the parties reached an agreement to settle the debt for $500,000 and sent settlement documents to Qwest. Lawcheck also sent a $500,000 cashier's check to an Iowa attorney to be placed in his trust account. Qwest received the settlement documents, but did not sign or repudiate the documents. Qwest requested updated financial reports from Lawcheck, but Lawcheck refused to provide them.

In January 2009, Qwest filed a notice of garnishment of the $500,000 held in Lawcheck's attorney's trust account. Lawcheck challenged the garnishment and filed a petition seeking to enforce the settlement agreement and seeking damages for failure to negotiate in good faith. After a hearing on the garnishment, the district court determined there was no evidence of a specific assent to a settlement agreement by Qwest and concluded the $500,000 placed in trust was subject to garnishment.[1]

Qwest filed a motion for summary judgment on Lawcheck's lawsuit, arguing all Lawcheck's claims were barred by both claim and issue preclusion. The district court granted the motion for summary judgment.

HOLDING: The court held the issues were the same in the lawsuit as those raised in the garnishment proceeding and claim preclusion was warranted. The court also found that issue preclusion was appropriate, and that Lawcheck did not show an exception applied in this case. The district court did not err in granting the motion.

ANALYSIS: The court examined the challenge to the garnishment and the petition filed by Lawcheck and concluded both documents were essentially identical. The court noted Lawcheck indicated it was prepared to present evidence on the settlement at the garnishment proceeding and was not prevented by the court from doing so. The court concluded because the issues raised were the same, claim preclusion applied.

Lawcheck argued in the alternative that the issue of whether the settlement agreement was enforceable was not necessary or essential to the issue of garnishment, thus issue preclusion did not apply. The court noted one of the issues raised by Lawcheck at the garnishment hearing was whether there was a settlement agreement and the district court found no evidence of assent to the settlement by Qwest. Thus, issue preclusion applied.

[1] This decision was appealed and upheld by the Iowa Court of Appeals. *See Qwest Bus. & Gov't Servs. v. Lawcheck, Ltd*., No. 09-0579 (Iowa Ct. App. 2010).

Lawcheck also argued the differences in the scope and extensiveness of garnishment proceedings compared to regular proceedings provided an exception to the doctrine of issue preclusion. The court noted such an exception applied to small claims cases, but noted that Lawcheck failed to show how a garnishment proceeding was similar to a small claims action.

Finally, the court concluded Lawcheck's claim for failure to negotiate in good faith was also addressed by the district court in the garnishment proceeding, and thus there were no new issues present to litigate.

Default Judgment
Primebank v. Smith et al., 791 N.W.2d 711 (Iowa Ct. App. 2010) (Doyle) (unpublished opinion)

FACTS: In May 2009, Plaintiff filed a petition to foreclose a mortgage. Defendant MERS[2] was served with the original notice and foreclosure petition, but did not file an answer. In June 2009, Plaintiff moved for entry of default judgment, which the district court granted in July 2009. Defendant MERS moved to set aside the default in August 2009, asserting their failure to answer was the result of mistake, inadvertence, and excusable neglect and that they had a defense as the mortgage had been satisfied from the proceeds of notes and mortgages between Defendants Smith and Defendant MERS. Copies of payoff and settlement statements were attached to the motion. Hearing on the motion was unreported, but on December 22, 2009 the district court set aside the default judgment noting the final foreclosure decree had not yet been entered and that the motion was confined to the issue of priority between Plaintiff and Defendant MERS. The motion did not affect Plaintiff's claims against Defendants Smith or against the property itself. The district court noted setting aside the default best serves the purpose of determining the litigation on the merits.

HOLDING: The district court did not abuse its discretion in concluding MERS met the burden of establishing good cause based on excusable neglect under Iowa Rule of Civil Procedure 1.977.

ANALYSIS: The payoff and settlement statements attached to Defendant MERS motion established MERS was asserting a defense of priority in good faith. Furthermore, the district court made a finding that MERS did not willfully ignore or defy the rules of civil procedure in failing to file a timely answer. Because of those findings, the court declined to overturn the district court's ruling.

DISSENT
(Vogel): Iowa Rule of Civil Procedure 1.977 requires the moving party to establish the default was the result of mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty, in addition to asserting good faith defenses. MERS did not set forth any reason in its motion to explain the delay in filing an answer. Because the record was devoid of any factual basis to support a good cause ground under 1.977, he would have overturned the district court's decision.

[2] Defendant MERS refers to two defendants: Mortgage Electronic Registration Systems, Inc. and American's Wholesale Lender.

Dismissal

Butler v. Nalvanko, 797 N.W.2d 624 (Iowa Ct. App. 2011) (Danilson) (unpublished opinion)

FACTS: Plaintiff alleged that on April 13, 2004, Defendant struck her with his car while she was riding her bicycle. Plaintiff attempted to serve the Defendant by process server, but discovered he had moved to Florida. Plaintiff instead filed original notice of the suit with the director of the Iowa Department of Transportation on February 6, 2011, and mailed the petition and original notice by certified mail to the Defendant on February 8, 2011. Iowa Code § 321.501 required the original notice be sent by restricted certified mail.

In mid-February the original notice was returned undelivered and unopened with the notation "Return to Sender, Attempted – Not Known." On March 16, 2011 Plaintiff's counsel filed an affidavit indicating service on Defendant pursuant to Iowa Code § 321.501 had been obtained. The 90 day deadline passed on April 6, 2010. On April 29, 2010, Defendant filed a pre-answer motion to dismiss contending Plaintiff failed to send service by restricted certified mail, and Plaintiff could not prove Defendant ever accepted or rejected service of the original notice and petition. Plaintiff resisted and requested additional time to serve Defendant.

The trial court denied Defendant's motion to dismiss and granted Plaintiff's motion to extend the time to serve.

HOLDING: District court erred in failing to grant Defendant's motion to dismiss.

ANALYSIS: The court of appeals noted where there was no service within 90 days, the delay is presumptively abusive. The court of appeals found there was not substantial evidence on the record to support a finding of good cause for the delay in service. Despite the fact that Plaintiff attempted to serve the Defendant two days after filing suit, the statute required use of restricted certified mail. Furthermore, the returned notice indicated only that mail deliverer could not locate the Defendant. The failure to serve by proper notice under Iowa Code § 321.501 and the Plaintiff's post-motion application for an extension of time does not satisfy Plaintiff's burden of ensuring timely service.

Kats v. Broadway, 797 N.W.2d 622 (Iowa Ct. App. 2011) (Danilson) (unpublished opinion)

FACTS: In November 2006, Plaintiffs filed a lawsuit against Defendant and Lyon County for personal injuries arising from a motor vehicle accident. On January 11, 2008, the district court granted summary judgment in favor of Lyon County. On February 19, 2008, the Plaintiffs moved to continue the trial and extend the deadline for rule 1.944 dismissal to investigate Plaintiff Michael Kat's ongoing symptoms and because interlocutory appeal was being sought on the dismissal of Lyon County. On March 10, 2008 the court granted the motion to continue. The deadline for 1.944 dismissal was set for July 1, 2009.

On May 11, 2009, Plaintiff's counsel sought to withdraw and Defendant's resisted arguing a settlement had been reached and the only thing left to do was draw up

paperwork. On June 11, 2009, the court allowed Plaintiff's counsel to withdraw. On June 15, 2009 Plaintiff's counsel filed a motion to extend the rule 1.944 deadline to allow Plaintiffs to find new counsel. On June 26, 2009, the court overruled the motion as improperly filed because the attorney was no longer Plaintiff's counsel at the time the motion was filed. Plaintiffs filed a pro se motion to extend the rule 1.944 dismissal on June 29, 2009 so they would have the opportunity to present their information to a new attorney. The district court concluded the case was dismissed by operation of law on July 1, 2009.

Plaintiffs filed a pro se motion to reinstate the lawsuit on December 14, 2009. The district court overruled the motion as it failed to show oversight, mistake or other reasonable cause to reinstate the suit. The district court concluded difficulty in obtaining counsel was not a sufficient reason to reinstate and noted the motion to extend the deadline was filed two days before the deadline.

HOLDING: The district court did not err in dismissing the motion to extend the Rule 1.944 deadline and refusing to reinstate the case.

ANALYSIS: The court of appeals noted the motion to extend the deadline was filed almost five months after the court had been informed a settlement had been reached and trial was no longer necessary. Plaintiffs did not inform the court of the dispute about settlement and did not seek an alternative trial date.

It was the Plaintiffs' responsibility to obtain an order of continuance before the automatic dismissal occurred, and the mere filing of a motion for continuance does not stay the dismissal. While Plaintiffs argued reinstatement of their suit was mandatory because they failed to affix proof of service to their motion to extend, the court of appeals found the claim was not made to the district court and therefore not properly before them.

Buhr v. Howard County Equity, 2011 WL 1584348 (Iowa Ct. App. 2011) (Tabor) (unpublished opinion)

FACTS: In June 2003, Defendant applied herbicide to twenty-eight acres of Plaintiff's farmland. Plaintiff sued for breach of contract, negligence, and fraud seeking damages for loss of yields.

At his deposition, Plaintiff refused to answer any question beyond his name and address stating that he could not answer the question because he did not have counsel to advise him. Defendant filed a motion to compel discovery and sought sanctions for Plaintiff's evasive answers. The court ordered Plaintiff to answer questions propounded to him during deposition and warned him that his failure to answer any questions may lead to sanctions. The court ordered Plaintiff to pay Defendant's reasonable expenses and attorney fees incurred in obtaining the order.

Plaintiff then filed a series of pro se petitions accusing Defendant's counsel of tampering with witnesses, alleging the court was prejudiced against him, and requesting the court issue an arrest warrant for Defendant's counsel. At a

hearing on the petition, the court read Iowa Rule of Civil Procedure 1.413 and explained to Plaintiff that any document the Plaintiff signed and did not properly research or was not based on existing law would subject him to possible sanctions. The trial court concluded Plaintiff's petitions were in violation of Iowa Rule of Civil Procedure 1.413 and sanctions were appropriate, but chose to stay the imposition of sanctions.

In December 2009, Defendant moved to dismiss Plaintiff's petition because Plaintiff failed to pay the fees ordered by the court and issued two witness subpoenas in violation of the Iowa Rules of Civil Procedure. Defendant resisted stating the motion was filed solely to harass him. Plaintiff then filed another series of petitions for "expanded media coverage," to "modify trial dates," and a petition to "set aside order for sanctions against plaintiff." The court held a hearing on the Defendant's motion and Plaintiff's petitions. The court dismissed Plaintiff's petition concluding he violated Rule 1.413(1) by continuing to file pleadings that are not supported by Iowa law and were for the purpose of harassing the Defendant.

HOLDING: The district court erred in invoking Rule 1.413 as an independent ground for dismissing Plaintiff's lawsuit.

ANALYSIS: Rule 1.413 allows a court to impose an appropriate sanction for violating any of the three elements of the rule: reading, inquiry, and purpose. Noting purpose was the element at issue, the court of appeals stated the Plaintiff's status as a pro se litigant and his possible ignorance of the law would not shield him from the operation of Rule 1.413. However, the court looked to the Iowa Supreme Court's decision in *K. Carr v. Hovick*, 451 N.W.2d 815 (Iowa 1990) that rule 1.413 (then numbered Rule 80) did not provide "an independent basis dismissal."

The court of appeals acknowledged federal courts allow dismissal under Federal Rules of Civil Procedure 11, but noted that federal law, unlike the *K. Carr* case, was not controlling in this instance. The court of appeals refused to uphold the dismissal on the grounds that the district court's decision was proper under Rule 1.945 as the district court designated Rule 1.413 as the sole basis for its decision.

Personal Jurisdiction
McCourt Mfg. v. Rasmussen v. Triplett, 791 N.W.2d 430 (Iowa Ct. App. 2010) (Sackett) (unpublished opinion)

FACTS: Plaintiff attended an event organized by her employer and was injured when a rented chair in which she sat collapsed. Plaintiff sued the chair's manufacturer, Defendant McCourt, and "Fund Ways, Inc. a/k/a Tom's Rental-Tops Rental" the group that allegedly rented chairs to Plaintiff's employer. Defendant Fund Ways filed an answer to the petition.

Rasmussen testified at trial as a shareholder and former officer of Fund Ways. Rasmussen testified that Fund Ways was his father's company, and that he was the president of another company "Tops Rental" which had originally been

named Tom's Rental. Defendant Rasmussen's company purchased tables and chairs and then leased them to Fund Ways to rent out to events.

Defendant McCourt submitted jury instructions arguing "Tom's Rental-Top's Rental" was a separate entity for the jury to consider when apportioning fault. The attorney appearing for "Fund Ways, Inc. a/k/a Tom's Rental-Tops Rental" objected. The district court overruled the objection and found that Tom's Rental-Tops Rental has appeared and subjected itself to the jurisdiction of the court as a separate entity. The jury verdict form allowed for fault to be apportioned between Defendant McCourt, Defendant Fund Ways, and Defendant Tom's Rental-Top Rental. The jury apportioned no fault to Fund Ways Inc., but found Defendant McCourt 75% at fault, and Tom's Rental-Top's Rental 25% at fault. The amount of the verdict was upheld on appeal.

Defendant McCourt filed suit against Rasmussen seeking contribution for paying more than its equitable share of the judgment. Rasmussen d/b/a Tops Rental f/k/a Tom's Rental filed a petition to vacate the judgment arguing he was never a party defendant in the underlying lawsuit, never was served, never appeared, never had counsel of record appear on his behalf, and thus was not able to properly defend himself at any stage of these proceedings. Plaintiff was allowed to intervene in the action. Defendant McCourt filed a motion for summary judgment in Rasmussen's action to vacate the judgment, arguing there was no judgment filed against Rasmussen, thus McCourt's action for contribution should be allowed to go forward. Plaintiff argued the appearance of counsel for "Fund Ways, Inc., a/k/a Tom's Rental-Tops Rental" eliminated the need for service upon Rasmussen. The district court granted Defendant McCourt's motion for summary judgment. The ruling allowed Defendant McCourt to proceed with its action for contribution.

HOLDING: The court did not err in granting the motion for summary judgment. There was no personal jurisdiction over Rasmussen d/b/a Tops Rental f/k/a Tom's Rental.

ANALYSIS: The record shows Tops Rental f/k/a Tom's Rental is a separate entity from Fund Ways, and there was nothing in the record to show Rasmussen retained an attorney, authorized the attorney to answer for him or file any responsive pleading for him or knowingly acquiesced in the attorney's actions or statements. The court of appeals determined the judgment was absolutely void against Rasmussen as it was rendered without personal jurisdiction. Defendant McCourt could proceed with its action for contribution.

Personal Service
Yellow Book Sales & Dist. Co. v. Walker, 791 N.W.2d 429 (Iowa Ct. App. 2010) (Mansfield) (final publication decision pending)

FACTS: Plaintiff filed suit against Defendant Walker and his company alleging breach of contract for failing to make payments for advertising space within one month of publication. Plaintiff filed an affidavit of service with the district court noting the original notice and petition were served on Defendant Walker by serving a co-occupant of his home or usual place of abode. The co-occupant, Thanya Ruenprom, filed a handwritten note with the clerk of court stating Defendant

Walker did not live at her address and did not accept the petition from her when she attempted to give it to him.

Defendant Walker never filed an answer, and the district court granted Plaintiff's application for default judgment. Eight months later, Plaintiff applied to take a debtor's examination of Defendant Walker to aid its efforts to collect the judgment. The application was granted and personally served on Defendant Walker. Defendant Walker moved to set aside the default judgment on the grounds he had never been personally served with any documents other than the examination order. The district court denied Defendant Walker's motion and determined that Ruenprom's attempt to provide the original notice and petition to him constituted sufficient compliance with the subservice requirements of Iowa Rule of Civil Procedure 1.305(1).

HOLDING: Personal service was not achieved. The district court erred in denying the motion.

ANALYSIS: Service at Ruenprom's residence was not enough under the rules of personal service because Defendant Walker did not live there. However, assuming Ruenprom's attempt to serve Defendant Walker was a valid chain of service, the court of appeals disagreed with the district court's decision to uphold service. Iowa law requires more than an effort to serve papers and a defendant's refusal to accept service. The court cited to Federal Practice and Procedure and noted that after attempting personal service and informing the defendant of the nature of the papers to be served, the server would leave the documents in the defendant's physical proximity. In this case there was no indication that Ruenprom left the petition for Defendant Walker or made him aware of the contents of the papers.

The court of appeals also noted that defendants may not be able to set aside a default judgment based on a mere technical failure of service, but noted that service in this instance was not just a technical failure. When Ruenprom did not leave the documents with Defendant Walker, she may have prevented him from learning about the contents of the papers.

SECONDARY SOURCE: 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1095, at 516-17 (3d ed. 2002).

Restatement (First) of Judgments § 129 cmt. b. (1942)

Savings Statute - § 614.10

Furnald v. Hughes, 795 N.W.2d 99 (Iowa Ct. App. 2010) (Eisenhauer) (final publication decision pending)

FACTS: Plaintiff was injured in a motor vehicle accident and brought suit against defendant driver and his own insurance company for underinsured/uninsured benefits. Trial was set for April 14, 2009, but at some time prior to February 27, 2009 the parties agreed to binding arbitration and scheduled it for April 14, 2009,

the day of trial. Eleven days prior to April 14, 2009, Plaintiff dismissed his suit without prejudice.

Plaintiff filed a second identical lawsuit on June 29, 2009, noting it was brought under Iowa Code § 614.10. Defendant driver filed a motion for summary judgment arguing the claim was barred by the statute of limitations. The district court granted Defendant driver's motion.

HOLDING: The district court did not err in granting defendant driver's motion.

ANALYSIS: The court of appeals acknowledged Iowa's savings statute allowed a litigant a new chance when he has been thrown out of court on a procedural point and not due to his own negligence. The court further noted a common thread running through the few Iowa cases discussing the savings statute: in order to take advantage of the savings statute, one who voluntarily dismisses a lawsuit must do so under compulsion. In a footnote, the court acknowledged the Eighth Circuit's decision in *Davis v. Liberty Mut. Ins. Co.*, 55 F.3d 1365 (8th Cir. 1995) that the requirement of compulsion was abandoned after *Weisz v. Moore*, 265 N.W.2d 606 (1936), but respectfully disagreed.

The court of appeals reviewed *Archer v. Chicago, Burlington & Quincy Railroad Co.*, 22 N.W. 894 (Iowa 1885), *Pardey v. Town of Mechanicsville*, 83 N.W. 828 (Iowa 1990), *Ceprley v. Town of Paton*, 95 N.W. 179 (Iowa 1903), and acknowledged Iowa case law did not require plaintiffs to file a formal motion for continuance. After reviewing *Weisz v. Moore*, 265 N.W. 606 (Iowa 1936), the court concluded plaintiffs must first make "at least some effort to continue or delay the trial before voluntarily dismissing the case." In this case, the dismissal was voluntary, not compulsory, and the record was devoid of any effort by Plaintiff's counsel to continue or delay the trial. Therefore, the suit was not saved by § 614.10.

DISSENT (Doyle): Argued the Plaintiff's deteriorating medical condition warranted a delay to determine the permanency of his condition and distinguished *Archer*, *Perdey*, and *Ceprley*. He noting the original requirement to seek continuance originated in dicta from *Archer*, and that the case was decided on the grounds that plaintiff's reason for dismissing the case was not well-grounded. The court in this case had a legitimate and determinable reason for the dismissal. *Pardey* and *Ceprley* were both mid-trial dismissals, which was not the situation in this case. He concluded the Plaintiff's right to voluntarily dismiss a case was properly governed by Iowa Rule of Civil Procedure 1.943 and the requirement for compulsion should be discarded.

Veatch v. Bartels Lutheran Home, 2011 WL 1781438 (Iowa Ct. App. 2011) (Tabor) (final publication decision pending)

FACTS: In September 2006, Plaintiffs visited their mother at her skilled-care residential unit at Bartels Lutheran Home. A Bartels employee reported that she saw Plaintiff Veatch shove her mother into a wheelchair, and the Defendant Home reported the conduct to the Iowa Department of Inspections and Appeals (DIA), the State Ombudsman's Department of Elder Affairs, the Iowa Department of

Human Services (DHS), and the Waverly Police Department as possible elder abuse. Veatch was arrested and spent one night in jail, and was found not guilty of assault after a jury trial. A DHS investigation into the matter concluded the allegations of elder abuse were founded, but an administrative law judge reversed the determination.

On June 9, 2008, Plaintiffs filed their initial lawsuit in federal court seeking to recover damages for the allegations. Plaintiffs sued Bartels Lutheran Home, Bartels' President and CEO, Bartels' Director, the City of Waverly, and the arresting officer. In October 2009, the federal court granted the city defendants' motion for summary judgment, declined to exercise jurisdiction over the remaining state law claims, dismissing them without prejudice on October 15, 2009.

On November 13, 2009, Plaintiffs filed another lawsuit against Bartels defendants and the Waverly defendants in Iowa district court asserting their state tort claims. The second lawsuit was outside the statute of limitations, but within the six month filing period of Iowa Code § 614.10. The Waverly defendants moved for summary judgment. On April 9, 2010, the Plaintiffs voluntarily dismissed their claims against the Bartels defendants, but maintained their action against the Waverly defendants. Also on April 9, 2010, the Plaintiffs filed a separate lawsuit against the Bartels defendants only, again in state court and again within the six month filing period of Iowa Code § 614.10. The Bartels defendants moved for summary judgment arguing among other points, that the statute of limitations barred the third action. The district court granted Bartels' motion for summary judgment, determining Iowa's savings statute allowed a party only one filing within the six-month period provided by the statute.

HOLDING: The court upheld the district court's decision that Iowa Code § 614.10 allows only one refilling within six months.

ANALYSIS: The court engaged in statutory interpretation and concluded the statute failed to define the terms "second" or "new" and so the court applied the common definitions of the word. The court determined the statute saves only one refiling as "second" refers to a particular identifiable action and the legislature could have chosen a less-specific term if they had intended multiple refilings to be saved by the statute. The court also highlight the legislature's use of "a new one" instead of "any new one" also referred to a single refiling.

The court noted that Defendants were unable to show how they were prejudiced by the multiple refilings, but concluded prejudice was not a consideration in the case. The court determined they were bound by the language of the savings statute without regard to the presence or absence of prejudice. The court concluded Plaintiffs' first action was filed in federal court and their second action was filed in state court on November 13, 2009. Thus, the third petition filed against the Bartels defendants was not saved by Iowa Code § 614.10.

STATUTE: "If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first." Iowa Code § 614.10 (2011).

INSURANCE

Agent Duty/Negligence
Langwith v. Am. Nat. General Ins. Co., 793 N.W.2d 215 (Iowa 2010) (Ternus)

FACTS: Plaintiffs purchased the majority of their insurance through their agent, including automobile liability insurance and an umbrella policy. These policies covered the Plaintiffs and their two children. In December 2003, the Plaintiffs' son had his driver's license suspended. The Plaintiffs had to take their son off their automobile policy and sign a form excluding coverage for their son under their umbrella policy. When their son's license was reinstated, the Plaintiff mother spoke with the agent regarding coverage for their son on their agent's recommendation. Plaintiffs purchased a high-risk policy for their son. The Plaintiffs assumed coverage for their son was reinstated under the umbrella policy, but the exclusion form they signed remained in effect precluding coverage for their son.

On July 16, 2006, the Plaintiffs' son was in a car accident while driving a vehicle titled in the Plaintiff father's name. The injured driver of the other vehicle sued the Plaintiffs' son and the Plaintiff father. Defendant Insurance Company acknowledged coverage under the automobile policy, but denied coverage under the umbrella policy. Plaintiffs filed suit against the company and the agent alleging the agent breached a duty of care to them by failing to disclose the driver exclusion in the umbrella policy continued after the son's license was reinstated and by failing to advise Plaintiffs that they could have avoided liability by transferring title of the vehicle to their son. The Plaintiffs sought to hold Defendant Insurance Company vicariously liable for the agent's alleged breach of duty.

Plaintiffs filed two partial motions for summary judgment: (1) adjudication of the issue concerning proximate cause as it related to Plaintiffs' contention that the agent should have advised them to transfer title, and (2) ruling that the advice by an agent on how to title a vehicle is not legal advice rendering an agent's conduct the unauthorized practice of law. Defendant Agent filed a motion for summary judgment contending the acts Plaintiffs' contended constituted a breach of duty were outside the scope of an agent's duties. The district court granted the Defendant Agent's motion.

HOLDING: The Court held that it was for the fact finder to determine, based on all circumstances, the agreement of the parties with respect to the service to be rendered by the agent and whether that service was performed with the skill and knowledge normally possessed by insurance agents under like circumstances.

There were material issues of fact regarding the Defendant Agent's failure to inform Plaintiffs their son was still excluded from coverage under the umbrella policy. However, there were no facts to support the contention that the Defendant Agent undertook a duty to advise Plaintiffs on risk avoidance and that they should transfer title of their vehicle to their son.

ANALYSIS: The Court reviewed their decisions in *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457 (Iowa 1984), *Collegiate Mfg. Co. v. McDowell's Agency , Inc*., 200 N.W.2d 854 (Iowa 1972), and *Humiston Grain Co. v. Rowley Interstate Transportation Co*., 512 N.W.2d 573 (Iowa 1994), and concluded: (1) *Collegiate* and *Sandbulte* discussed the circumstances under which an insurance agent owes a more expansive duty to a client than a general duty to procure requested insurance, and (2) *Humiston* defined the standard of care that applies to an agent's exercise of his or her duty and how a breach of that standard must be proven. The Court noted the issue in this case was the scope of the duty owed by an agent to his client, not the standard by which performance of the duty is judged.

The Court acknowledged *Sandbulte* described narrow circumstances under which an expanded agency agreement could arise, and stated a more flexible approach was needed. The Court overruled *Sandbulte* to "the extent it limits an expanded duty to those cases in which the agent holds himself out as an insurance specialist, consultant, or counselor and receives compensation for additional or specialized services." The Court looked instead to the Restatement (Third) of Agency, which tied the duty of agents to the agent's contractual undertaking. In a footnote, the Court noted that the duty analysis in this case involved economic loss and therefore the duty analysis adopted by *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) was not dispositive.

The Court determined the fact finder could determine the contractual undertaking by the agent by examining these factors: (1) the nature and content of the discussions between the agent and the client, (2) the prior dealings of the parties, if any, (3) the knowledge and sophistication of the client, (4) whether the agent holds himself out as an insurance specialist, consultant, or counselor, and (5) whether the agent receives compensation for additional or specialized services.

Applying those factors to the case, the Court concluded a fact issue existed as to whether the Defendant Agent breached her duty by failing to inform the Plaintiffs their son was still excluded on the umbrella policy. However, the Court determined there were no material issues of fact regarding the Defendant Agent's failure to inform Plaintiffs they should transfer title to their son. The Court noted there was a material distinction between insuring risk and avoiding risk, and that no facts indicated the Defendant Agent undertook a duty to advise Plaintiffs on risk avoidance.

SECONDARY SOURCES:
Restatement (Third) of Agency § 8.07
43 Am. Jur. 2d *Insurance* § 162 (2003)
3 *Couch on Insurance* 3d § 46:61 (1995)

LEGISLATIVE ACTION: In March 2011, the Iowa Legislature amended Iowa Code § 522B.11: "The general assembly declares that the holding of Langwith v. Am. Nat'l Gen. Ins. Co., (No. 08-0778) (Iowa 2010) is abrogated to the extent that it overrules Sandbulte and imposes higher or greater duties and responsibilities on insurance producers than those set forth in Sandbulte." Iowa Code § 522B.11(7)(b) (2011).

Merriam v. Farm Bureau Ins., 793 N.W.2d 520 (Iowa 2011) (Cady)

FACTS: In 2004, Plaintiffs were assigned to agent as clients from previous agent. At the time of the assignment, Plaintiffs had a homeowner's insurance policy. Plaintiff Timothy Merriman was an independent over-the-road truck driver since the late 90s. In early 2005, Plaintiffs contacted the agent about insuring a second residence. The agent met with the insureds and agreed to obtain a quote to insure the additional residence and other additional items including the Plaintiffs' horses, guns, new garage and chicken coop. The agent also agreed to obtain a quote on life insurance for the Plaintiffs' mother. During the meeting the agent became aware Plaintiff Timothy Merriam was a self-employed truck driver, but no discussion of workers' compensation insurance or other policies for personal injury coverage took place during the meeting.

A few weeks later Plaintiff Timothy Merriam was injured on the job and did not have workers' compensation insurance. The Plaintiffs alleged the agent was negligent in failing to advise them that Timothy Merriam had no workers' compensation insurance unless he purchased the coverage for himself.

HOLDING: Plaintiffs failed to establish a genuine issue of material fact with regards to the existence of an expanded agency agreement.

ANALYSIS: The Court framed the issue as whether the agent had a duty to affirmatively inquire or advise the plaintiffs on Timothy's need for workers' compensation insurance. The Court cited to *Langwith v. Am. Nat'l Gen. Ins. Co*., 793 N.W.2d 215 (Iowa 2010) and noted the decision was to limit an insurance agent's duty to procuring the kinds of insurance a client requested and relieve him of any duty to advise clients of the kinds and amounts of insurance that could afford protection unless there was evidence of an expanded agency agreement. The Court also noted *Langwith* placed the burden of proving an expanded agency agreement on the insurance client.

The Court found the agent did not hold himself out as any kind of an insurance specialist, Plaintiffs made no specific inquiries regarding workers' compensation insurance, and the agent's suggestions regarding covering personal vehicles was in order to obtain more favorable rates for the Plaintiffs. The Court highlighted the fact that the agent received no additional compensation for the additional insurance products he sold the Plaintiffs, and that the agent's knowledge of Plaintiff Timothy Merriam's self-employed status and million dollar life insurance policy did not trigger a duty to inquire.

Contractual Statute of Limitations

Hesseling v. State Farm Mut. Ins. Co., 795 N.W.2d 99 (Iowa Ct. App. 2010) (Tabor) (unpublished opinion)

FACTS: In March 2005, Plaintiffs were injured in a motor vehicle accident. Plaintiffs brought suit against the other driver and obtained a default judgment on March 9, 2007. Also on March 9, 2007, Plaintiffs' attorney sent a letter to State Farm

noting they were filing suit against the driver and owner of the other vehicle involved in the collision and stated they would also be asserting their rights under the underinsured/uninsured policy provisions of their own policy. State Farm denied coverage stating Plaintiffs could no longer state a claim under their policy as they had not filed suit against State Farm within the two year contractual limitations period.

The Plaintiffs filed suit in May 2009, arguing they were entitled to uninsured benefits pursuant to the policy as the driver and owner of the other vehicle were judgment proof. State Farm filed a motion for summary judgment contending the Plaintiffs' claims were barred. The district court denied the motion for summary judgment stating a factual dispute existed regarding whether the policy's two year period of limitations was reasonable.

HOLDING: The two-year period was reasonable, and district court erred in denying Defendant carrier's motion for summary judgment.

ANALYSIS: The court of appeals rejected Plaintiffs' argument that the policy's two year statute of limitations did not allow them sufficient time to determine the tortfeasor's insured status and noted Iowa courts do not require plaintiffs to affirmatively establish a tortfeasor's uninsured status prior to filing suit against their own insurance carrier. Rather, Iowa courts impose a lower burden requiring plaintiffs employ "all reasonable efforts" to determine the tortfeasor's insured status. At that point an inference arises that other vehicles are uninsured and the burden to prove otherwise shifts to the defendant insurer.

The court also noted that Plaintiffs' policy did not require the Plaintiffs to exhaust remedies against the tortfeasors before filing an action against their carrier, but rather directed Plaintiffs file a contemporaneous action against both the tortfeasors and State Farm. Policy language stating Defendant carrier would pay for damages "an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle" did not mandate Plaintiffs must first obtain a judgment against the tortfeasors. As support for the proposition, the court cited to *Leuchtenmacher v. Farm Bureau Mut. Ins. Co*., 461 N.W.2d 291, 294 (Iowa 1990).

Robinson v. Allied Property & Cas. Ins. Co., 2011 WL 2556951 (Iowa Ct. App. 2011) (Tabor) (final publication decision pending)

FACTS: In June 2004, Plaintiff sustained neck injuries in a motor vehicle accident. At the time of the accident Plaintiff had underinsured motorist benefits through Defendant carrier. Plaintiff sought care from several physicians and was finally able to resolve her neck pain after surgery in 2007. In 2005, Plaintiff entered into settlement negotiations with the tortfeasor's insurance carrier, State Farm, and eventually settled for policy limits in 2008. Just prior to settlement with State Farm in 2008, Plaintiff sent a letter to Defendant carrier noting the likelihood of settlement for policy limits with State Farm, requesting authorization to settle, and advising Defendant carrier that Plaintiff would be asserting a claim for underinsured benefits.

In 2008, after settlement with State Farm, Plaintiff offered to settle her claim with Defendant for the underinsured policy limits. Defendant declined the offer of settlement noting the two year period of limitations in the policy barred Plaintiff's claim. Plaintiff commenced suit in May 2010 seeking to recover underinsured benefits. Defendant filed a motion for summary judgment, arguing the two year period of limitations was reasonable and applied to bar Plaintiff's claims. Plaintiff argued she was unable to ascertain her damages within the two year time frame as she went through treatment on an ongoing basis for continuous neck pain, and therefore the two year period of limitations was unreasonable.

HOLDING: The court held the two year period of limitations was unreasonable and unenforceable as it required Plaintiff to bring suit before she was able to ascertain her damages despite diligent efforts.

ANALYSIS: The court stated the outcome of the case was controlled by the fact that the Plaintiff was unable to ascertain her damages within the two year period despite her diligent efforts. The court relied on Plaintiff's participation in physical therapy and diligent follow-up with treating physicians. Defendants cited to an unpublished Iowa Court of Appeals case upholding a two year period of limitations despite the plaintiff's inability to determine the tortfeasor's policy limits, but the court distinguished the situation noting discovery of monetary policy limits, unlike latent physical injuries, are readily discoverable. Citing to *Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880 (Iowa 1996), the court stated the relaxed burden placed on plaintiffs when determining tortfeasor's insurance coverage is not present in the context of determining a plaintiff's injuries for purposes of bringing a UIM claim. The court determined the present situation was more akin to that in *Faeth v. State Farm Mut. Automobile Ins. Co.*, 707 N.W.2d 328 (Iowa 2005), and that the Plaintiff should be able to pursue underinsured benefits when later occurrences render the tortfeasor underinsured.

Defendants argued Plaintiff could have brought suit against Allied at the same time she sued State Farm, but the court noted at that time she would have been subject to a motion for summary judgment as her medical expenses had not yet exceeded the limits of the State Farm policy.

Consent to Settlement/Exhaustion Clause
Estes v. Progressive Classic Ins. Co., 789 N.W.2d 165 (Iowa Ct. App. 2010) (Tabor) (unpublished opinion)

FACTS: Plaintiff was injured when a car struck him while he was checking the brake pads on his daughter's car in the parking lot of Sam's Club. Plaintiff settled his personal injury claim with driver and premises liability claim with Sam's Club for less than policy limits. He then filed suit against Progressive seeking underinsured motorist benefits under his own policy. Defendant filed a motion for summary judgment arguing Plaintiff settled his claims without Defendant's consent as required by the policy. Defendant also argued Plaintiff's damages did not exceed the limits of the tortfeasors' policies. The district court denied Defendant's motion and the jury found in favor of the Plaintiff.

HOLDING: No language in the policy required Defendant's consent to settlement, thus the district court did not err in denying the motion for summary judgment.

ANALYSIS: The language of Plaintiff's insurance policy required Plaintiff to sign and deliver legal documents to defendant, to aid the company in the exercise of its rights, and do nothing after the loss to harm the company's rights. The court of appeals concluded the policy language did not require Plaintiff to obtain Defendant's consent prior to settlement. Defendants argued Plaintiff's recovery under his UIM policy should be limited to the difference between his policy limits and the total recovery received from the tortfeasor driver. The court also determined that the settlement from Sam's Club would not be included in the total recover, as it was not a recovery under a bodily injury liability policy.

Duty to Defend/Bad Faith
Estate of Deters v. USF Ins. Co., 797 N.W.2d 621 (Iowa Ct. App. 2011) (Eisenhauer) (unpublished decision)

FACTS: Decedent incorporated his own business, which performed maintenance and service on television and radio towers and antennas, and served as president. Decedent purchased equipment, negotiated contracts, trained, hired, and fired other employees, and performed work on towers with other employees. Starting in July 2004, Decedent's business had a $1,000,000 CGL policy with Defendant. The policy contained an exclusion precluding liability coverage for employers when employees suffered bodily injury while performing business duties. The policy also contained a "separation of insured" clause requiring potential coverage for the Decedent to be analyzed separately from the potential coverage for his business.

On May 31, 2006, Decedent and three other employees were working on a tower. Decedent and two other employees had climbed the tower, but subsequently fell to their deaths. Defendant investigated and denied coverage based on the exclusion precluding coverage for employee's bodily injuries.

The estates of the two employees brought suit against the Decedent's estate seeking damages for negligence. Defendant refused to defend Decedent's estate based on the same exclusion. Decedent's estate hired their own counsel, and attempted to tender defense per *Zenti v. Home Ins. Co*, 262 N.W.2d 588 (Iowa 1978). In *Zenti*, the court found coverage under the business's CGL policy when injured employees brought suit again the business's corporate officers. Defendant again denied coverage, and Decedent's estate settled with the employees' estates. Decedent also agreed to allow employee estates to seek satisfaction of the remaining judgment from Defendant. Decedent's estate brought a cause of action for bad faith.

The trial court concluded Decedent was an "executive officer", and therefore an insured, under the policy and Defendant had a duty to defend and indemnify. The jury returned a verdict of $1,000,000 in punitive damages, and the court awarded attorneys fees.

HOLDING: The district court did not err in entering judgment in favor of decedent's estate.

ANALYSIS: The court of appeals rejected Defendant's argument that Decedent was not a corporate officer, and thus an insured, under the policy because he merely exercised daily operation or managerial control over the business. The court noted that existing law and treatises discussing and analyzing coverage under CGL policies did not make such a distinction and that after a proper investigation, reasonable minds would not disagree on the coverage-determining facts and the law. In evaluating the punitive damages award, the court of appeals noted Defendant's denial left the estate financially vulnerable, the Defendant made an intentional decision to refuse to defend, and Defendant refused to research, reconsider, investigate, and reevaluate its duty to defend and indemnify even after the Decedent's estate brought case law to its attention. The court considered the potential harm resulting from Defendant's bad faith and found that $1 million in punitive was constitutionally permissible.

JURISDICTION

Personal Jurisdiction
Statler v. Faust, 791 N.W.2d 428 (Iowa Ct. App. 2010) (Danilson) (unpublished opinion)

FACTS: In September 2008, the rear wheels of a semi-trailer came off as the semi was traveling north on I-35. One wheel bounced over the median striking the hood and windshield of a pickup, causing it to become airborne. The driver was killed and the passenger was injured. The family of the driver brought suit against the owners of the semi-trailer, the company the semi had been leased to, and the driver. The Plaintiffs also filed suit against Defendant Aguirre doing business as Eagle Trailer repair.

Defendant Aguirre filed a motion to dismiss citing a lack of personal jurisdiction. Aguirre claimed he did business in California, Arizona, and Nevada; he had never advertised in Iowa, never done business in Iowa, did not have an office in Iowa, and had no contacts whatsoever with Iowa. The district court found Iowa courts had jurisdiction because Aguirre's company inspected semi-trailers that traveled across the country and he should have foreseen the trailers inspected would at some point be traveling through Iowa.

HOLDING: Defendant's ability to foresee the trailers he inspects might be traveling in Iowa was not sufficient to grant Iowa courts personal jurisdiction over Defendant.

ANALYSIS: The court noted forseeability alone is not sufficient for personal jurisdiction, but that minimum contacts with foreseeability which is a virtual certainty has been found sufficient. The court determined that even if the trailers traveling through Iowa was a virtual certainty, it was not enough absent a finding the Defendant purposefully directed his activities at residents of the forum state. The court concluded Defendant Aguirre's contacts with Iowa were attenuated and due to the unilateral activity of the owner of the semi-trailer, and that Defendant Aguirre did not direct his activities toward Iowa.

JURIES & TRIAL

Damages

Lawson v. Kurtzhals, 792 N.W.2d 251 (Iowa 2010) (Baker)

FACTS: While driving his car, Defendant struck the Plaintiff on his bicycle. In June 2007, Plaintiff brought suit against Defendant for personal injuries and property damage. The Defendant answered the petition, and the next day served interrogatories on Plaintiff. Two of the interrogatories requested Plaintiff detail the losses he incurred and the damages he was seeking. Plaintiff indicated his clothes had been destroyed and he damages were not yet determined, but would be supplemented.

Trial was set for July 15, 2008. Plaintiff was deposed on January 29, 2008, and asked what was the specific amount of compensation he was seeking from Defendants. Plaintiff said past medical bills, and that he and his attorney had not yet determined the specific amount of compensation beyond that. On April 9, 2008, Defendant wrote to Plaintiff and requested a settlement demand. Defendant received no response. On May 23, 2008, Defendant offered to confess judgment for $23,000, and again received no response from Plaintiff.

Plaintiff requested and received a continuance one week prior to trial. The trial was rescheduled for September 23, 2008, but the order did not extend any of the deadlines previously set. On September 17, 2008, the parties attempted to settle but were unsuccessful. On that day, Defendant filed a motion in limine requesting the court prohibit Plaintiff from presenting any evidence of damages not set forth in his interrogatory responses. On September 18, 2008, five days before trial, Plaintiff provided supplemental answers to interrogatories. The motion in limine was taken up the day before trial and denied, but reserved for reconsideration later in the proceedings. After additional arguments were submitted to the court, it reversed its decision and granted the motion in limine, limiting Plaintiff's testimony on damages to past medical expenses.

Plaintiff put on evidence for three days and then rested his case in chief. Defendant moved for a directed verdict, which the court took under advisement. On the morning of the fourth day, Plaintiff moved to voluntarily dismiss the case without prejudice under Iowa Rule of Civil Procedure 1.943. The trial court concluded the Plaintiff had an absolute right to dismiss under the rule and granted the motion. Plaintiff then immediately filed a new petition essentially identical to the claim dismissed. Defendant moved for sanctions. The trial court assessed sanctions against Plaintiff's counsel, but not the Plaintiff.

HOLDING: (1) The district court did not abuse its discretion in prohibiting the admission of damage evidence not timely provided to Defense counsel. (2) Anytime after the ten days before trial is scheduled to begin, the ability to seek a voluntary dismissal without prejudice is not absolute. Discretion lies with the trial court. In this case, the court abused its discretion in granting the voluntary dismissal.

ANALYSIS: The Court noted a trial court has inherent power to maintain and regulate cases proceeding to final disposition, including the power to exclude evidence for failure to supplement discovery. The Court noted Defendants attempted to learn the amount of damages through interrogatories and Plaintiff's deposition, and that

Plaintiff had failed to respond to a settlement demand. The Court acknowledged the trial court had three options: (1) allow the supplementation of damages provided only days before trial, (2) allow a continuance of the trial, or (3) dismiss the claim. Analyzing whether the trial court properly considered its options, the Court listed factors the trial court should have considered: the party's reason for not providing the evidence during discovery, the importance of the evidence, the time needed by the other side to prepare to meet the evidence, and the propriety of getting a continuance.

The Court dismissed the Plaintiff's argument that it was Defendant's duty to demand supplementation of discovery answers prior to trial and noted the duty rested on Plaintiff to supplement. Plaintiff was also bound by the scheduling order. The information sought was extremely important, as the defending party needs to know the amounts claimed for damages. The Court also noted timing was a factor as the disclosure in this case occurred at the eleventh hour. While a continuance was an option, the Court noted the case had already been continued once.

In regards to the voluntary dismissal, the Court reviewed the legislative history and concluded the drafters wished to make voluntary dismissals more lenient, but did not intend to take away a court's discretion to deny voluntary dismissal motions. The inclusion of a time from which a party must obtain a court's consent to dismiss necessarily implies the trial court has discretion in granting or denying the motion. At the time Plaintiff's motion was made, the trial court had discretion to grant or deny the motion. In a footnote the Court listed the factors a federal court considers when considering a motion to dismiss with approval: the expense and inconvenience to the defendant, legal prejudice suffered by the defendant, and whether the terms and conditions imposed by the court can make the defendant reasonably whole.

Improper Arguments/New Trial
Conn v. Alfstad, 2011 WL 1566005 (Iowa Ct. App. 2011) (Tabor) (unpublished opinion)

FACTS: On August 12, 2004, twelve-year Brittany Conn was bit on the face by her neighbor's golden retriever while walking it and several other dogs. Plaintiff, Brittany's father, sued dog's owner alleging strict liability for the damages Brittany suffered as a result of the bite and facial scarring, negligence, and a bystander claim for Brittany's sister who witnessed the attack.

At trial, the parties chose not to have closing remarks recorded, but partway through the Defendant's closing remarks, Plaintiff's counsel asked to be heard outside the presence of the jury. Plaintiff moved for mistrial based on two lines of argument made by Defendant: (1) counsel alleged bringing a case like this was like going to a casino and hitting a jackpot; (2) counsel referred to the $600,000 claim and said that amount of money "would change the lives of you and me or anybody in the courtroom . . . ." The district court agreed the remarks were improper and admonished counsel. The district court also admonished Defense counsel for the remark that "everyone around the state" and around "the world is watching them" as they decide a verdict. The district court declined to grant a mistrial.

During deliberations, the jurors sent a note to the judge posing the following question: "Can items b. c. d. be put in a trust until Brittany is 18 years of age or made available when she determines to have surgery?" Items "b", "c", and "d" were damages for future medical expense and past and future physical pain and suffering. The court responded "Iowa has laws which govern distribution of money to minors. In any event, how plaintiff's money is managed should not be considered by you in answering the questions on the verdict form."

The jurors found in favor of the Plaintiff and awarded $34,761.95 in damages for past medical expenses, future medical expenses, and past and future pain and suffering. Plaintiff moved for a new trial alleging their rights were materially affected and inadequate damages appeared to be influenced by passion or prejudice. Plaintiff argued the jury would have reached a different verdict if not for the comments made by Defendant in closing argument. The district court agreed and granted the motion for new trial.

HOLDING: The district court did not abuse its discretion in granting the new trial.

ANALYSIS: The court of appeals reviewed the two comments objected to by Plaintiff's counsel and the comment raised by the district court. With regard to the comment that $600,000 would change the lives of anybody, the court concluded the comments violated the "do-unto-others" rule and constituted impermissible argument because it encouraged the jury to decide the damages based on their personal interest rather than on the evidence. The jackpot comment was also considered improper argument by the court, as it cast Plaintiff's lawsuit in an unfair light and interjected Defense counsel's personal views regarding the legitimacy of the lawsuit. Finally, the court of appeals considered Defense counsel's comments about the world watching the jury to be impermissible argument. The court of appeals noted that counsel should not be permitted to advance arguments that could reasonably intimidate jurors into thinking that their verdict would subject them to public disapproval. The court of appeals emphasized the jury must decide the case based on the evidence and the law, and not on how the average citizen may view the size of the damage award.

The court of appeals then examined whether Plaintiff's were prejudiced by Defense counsel's comments, and concluded that the trial court was in the best position to evaluate the prejudice of the remarks. The court of appeals cited the district court's new-trial order and the judge's remarks that when considering Defense counsel's jackpot comment and the juror's question "it is clear from this question that the jurors openly deliberated about who will manage the money awarded and further how it would be spent." The court of appeals deferred to the trial court's decision to grant a new trial as it found no clear abuse of discretion.

Peremptory Strikes
Morales v. Miller, 797 N.W.2d 621 (Iowa Ct. App. 2011) (Mansfield) (unpublished opinion)

FACTS: Plaintiff brought a medical malpractice action against her attending physician and hospital after her caesarian section delivery led to an emergency hysterectomy. On the morning of July 23, 2004, Plaintiff gave birth by c-section to a healthy

baby boy at Henry County Health Center. By that evening, Plaintiff's condition had deteriorated to the point where the doctors transferred her to the University of Iowa Hospitals and Clinics. An exam revealed blood in the Plaintiff's abdomen and an emergency hysterectomy was performed, leaving the Plaintiff unable to have other children.

Plaintiff brought suit on March 6, 2006 against her doctor, the family practice and the Henry County Health Center, alleging the c-section incision extended into her broad ligament resulting in profuse bleeding. The Plaintiff alleged the doctor and staff at the hospital were negligent in their post-operative care, in not detecting and repairing the alleged incision, and failing to properly administer post-operative medications.

At trial the court granted each of the three Defendants and the Plaintiff four peremptory strikes. The jury found the doctor and family practice were not negligent and that the Henry County Health Center was negligent, but that its negligence was not a proximate cause of Plaintiff's injuries. On appeal, the Plaintiff alleged it was error to allow each Defendant four peremptory strikes and not grant her additional juror strikes.

HOLDING: The allocation of peremptory strikes was permissible under Rule 1.915(7) and the district court did not abuse its discretion.

ANALYSIS: The court of appeals reviewed Iowa Rule of Civil Procedure 1.915(7), and concluded that the district court did not err in allowing each defendant four peremptory strikes as each Defendant was represented by separate counsel. The Plaintiff argued the Defendant's interests were so closely aligned that they should be considered one defendant for the purpose of peremptory strikes. However, the court of appeals disagreed noting the bases for liability against the doctor and Henry County Health Center were different and arose from different sets of alleged acts and omissions.

STATUTE: "Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed, plaintiff and defendant shall alternately exercise their strikes." I. R. Civ. P. 1.915(7) (2011).

Surprise/Withheld Evidence

Whitley v. C.R. Pharmacy Service, Inc., 2011 WL 1584354 (Iowa Ct. App. 2011) (Doyle) (final publication decision pending)

FACTS: Plaintiff was a member of the Iowa Army National Guard with aspirations to be an officer in the armed forces. However, Plaintiff's eyesight was too poor according to military guidelines, and she therefore sought out a doctor to perform LASIK surgery to improve her eyesight.

The procedure was performed on November 3, 2005, correcting Plaintiff's vision to 20/20. However, by March 2006 she developed some corneal haze or scarring, a possible risk of the surgery, which caused her vision to decline. The

doctor recommended a second procedure to remove the haze. A chemotherapeutic medication called mitomycin is routinely used during the procedure, and was ordered from the Defendant at a 0.02% concentration.

The medication was prepared by the Defendant and used in the procedure. The procedure to remove the corneal haze was performed on March 9, 2006, and the mitomycin was applied. At a follow-up appointment a few days later, Plaintiff reported her vision was poor and she could only see shapes and general colors. Plaintiff was then examined at the University of Iowa Hospitals and Clinics. A doctor at UIHC observed severe inflammation and performed emergency surgery that night. The doctor opined that the inflammation suggested the wrong dilution of mitomycin was used during the procedure.

The doctor who performed the corneal haze procedure retrieved the mitomycin from his refrigerator and sent it to UIHC for testing. The testing revealed the medication did not contain any mitomycin, and further testing was recommended. The doctor declined further testing and the sample was destroyed. The Plaintiff had to undergo a corneal transplant in both eyes, but only one was successful and the other eye was eventually removed. Plaintiff originally sued the doctor who performed the corneal haze removal and the pharmacy, but settled with the doctor. The case proceeded to trial against the pharmacy.

The trial order establishing deadlines set the discovery deadline at July 10, 2009, unless extended by the courts for good cause. A final pretrial conference was held on February 12, 2010 where the parties exchanged exhibits and pretrial statements. The final pretrial order noted "[a]ny exhibit not identified will not be admitted at trial unless this order is modified by the court, for good cause shown, by any part wishing to offer such exhibit." Exhibits identified included: (1) a copy of the pharmacy deliveryman's delivery log from March 9, 2006, signed by "Karen M", the receptionist at the eye clinic office, (2) a delivery ticket with a computer receipt dated March 9, 2009 noting mitomycin 0.02% solution for the eye clinic and doctor that performed the corneal haze removal procedure, and cash register receipt for the price charged for the mitomycin.

Trial began on March 1, 2010. The Defendant's strategy up to that point, as illustrated in its interrogatory answers, was that it properly prepared and delivered the mitomycin, but that the doctor mistakenly applied the wrong medication to the Plaintiff's eyes. However, the defense strategy changed sometime after the final pretrial conference when the Defendant Pharmacy's manager discovered documents showing the mitomycin was picked up by the eye clinic's office manager. Over Plaintiff's objections, the manager testified to the pharmacy's pickup log and pickup receipt. Both the pickup log and pickup receipt were admitted into evidence. Plaintiff objected, arguing the evidence had not been disclosed prior to trial. The district court overruled the objection, and the pickup receipt and log became the centerpieces of Defendant's closing argument. Defendant theorized that someone at the eye clinic grabbed the wrong medication out of the refrigerator and that the doctor who performed the corneal haze procedure did so without the mitomycin. Defense counsel suggested that when the doctor found the mitomycin in his refrigerator and realized he had been given the wrong medication, the doctor switched labels with another medication to cover up the mistake.

The jury found in favor of the Defendant, and Plaintiff moved for a new trial arguing the verdict was the result of Defendant's failure to comply with the rules of discovery. The Defendants argued the exhibits were found after the final pretrial conference, they had no duty to supplement Plaintiff's untimely served interrogatories, and the exhibits were entered as rebuttal evidence. The trial court sided with the Defendant stating he believed counsel was acting in good faith, and while it would have been preferable for counsel to phone or email the Plaintiff, there was no "technical breach of the rules."

HOLDING: The district court abused its discretion in denying Plaintiff's request to exclude the evidence. The court of appeals acknowledged the choice of sanctions rests with the discretion of the trial court, but noted it could not countenance what occurred in this case and reversed the district court's decision and remanded for a new trial.

ANALYSIS: Defendant had a duty to supplement its interrogatory response and it had a duty to adhere to pretrial orders directing parties to exchange all exhibits prior to trial. The court of appeals noted the purpose of discovery was to "effectuate the disclosure of relevant information to the parties" and that purpose was defeated in this case. Characterizing Defendant's actions as a "deliberate and unapologetic failure to disclose vital evidence," the court of appeals stated that while Defendant may not have "technically violated our discovery rules by not supplementing its responses, it certainly violated the spirit and purpose of the rules."

The court of appeals recognized that Defendant did not discover the exhibits until after the final pretrial conference, but stated it did not excuse Defendant's decision not to disclose the exhibits in the two intervening weeks before trial. Because of Plaintiff's inability to adequately respond to the evidence, the exhibits raised more questions than they answered.

Telling Stories: Closing Argument and the Talking Frog

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Closing Arguments

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Introduction

Closing argument is an essential part of a trial. It is considered so important in the adversary process that in criminal cases, the United States Supreme Court has held the right to close is guaranteed by the Sixth Amendment right to counsel.

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. The issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.

Herring v. New York, 422 US 853 (1975)(footnotes omitted). Moreover,

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

Id.

Closing arguments serve the same purpose in civil cases, presenting the opportunity to tie it all together, to explain what really happened and to advocate for a defense verdict.

> The single purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence. *State v. Melk*, 543 N.W.2d at 301. Thus, when exercising its discretion in determining the proper scope of closing argument, the trial court should give counsel the latitude to make comments and arguments within the framework of the legal issues and evidence introduced at trial. *Id.*; *State v. Veal*, 564 N.W.2d 797, 811 (Iowa 1997). This latitude is compatible with effective advocacy. *Id.*

Lane v. Coe College, 581 N.W.2d 214 (Iowa App., 1998)(reversing defense verdict for lack of non delegable duty instruction; regarding closing, plaintiff improperly restricted from arguing effect of

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indemnity agreement on witness credibility where defense suggested Marriott's witnesses had no reason to lie because their employer wasn't sued). Of course, telling the story of your client's case had to start from the first pleading, through depositions and discovery and from the first moment you speak to the jury in *voir dire*. "Closing argument is not the time in the trial to begin to tell the jury your story. Nor is closing argument the first time you articulate your theory or themes. If you have tried the case properly, you began the trial by telling the jury a story in opening statement."[3]

A ton of stuff has been written on opening and closing,[4] and there are as many approaches as there are personalities. This paper offers rule and case authority focused on Iowa law as to what counsel can and cannot do when making opening statements and closing arguments and discusses various techniques, strategies, and personal suggestions as to how to craft persuasive, effective jury presentations.

Rules, rules, rules…

While there are tons of cases and articles about opening and closing, the rules are fairly sparse and simple. Rule 1.923 of the Iowa Rules of Civil Procedure provides:

> The parties may either submit the case or argue it. The party with the burden of the issue shall have the opening and closing arguments. In opening, the party shall discuss all points the party relies on, and if the party's closing argument refers to any new material point or fact not so disclosed, the adverse party shall reply thereto, which shall close the argument. A party waiving opening argument is limited, in closing, to reply to the adverse argument; otherwise the adverse party shall have the closing argument. The court may limit the time for argument to itself, but not for arguments to the jury.[5]

While the rules suggest that plaintiff's rebuttal be confined to responding to matters raised in the defense closing, it is within the discretion of the court, and not reversible error, to allow additional argument. For example, in *Tilghman v. Chicago & N.W. Ry. Co.*, 115 N.W.2d 165, 253 Iowa 1339 (Iowa 1962), plaintiff's counsel argued in rebuttal about the nature and extent of his client's injuries. Defendant objected that those issues were not addressed in his closing. The court stated: "The decisions generally hold it is not reversible error to refuse to limit plaintiff's closing argument

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[3] Linda A. Listrom, Crafting a Closing Argument, 33 Litigation 19 (ABA Spring 1997).

[4] Some of the articles I read in preparing this paper include James W. McElhaney, *Trial Notebook*, 479 (2d ed., American Bar Association 1987); Linda A. Listrom, Crafting a Closing Argument, 33 Litigation 19 (ABA Spring 1997); Laurence M. Rose, "Closing Arguments: An Exercise in Persuasion," How to Persuade the Jury, Jury Dynamics from the Juror's Perspective, American Bar Association (1997); David A. Dukes, "Sex, Drugs & Alcohol: Creating Curiosity in Your Opening Statement," Defense Trial Counsel of West Virginia, Annual Meeting, Myrtle Beach, SC, May 2007; Stephen G. Morrison, Opening Statements: Creating Curiosity and Conviction, Presentation to the Association of Defense Trial Attorneys, Spring 2007, San Diego, CA.

[5] Iowa R. Civ. P. 1.923 (2011). Local Rule 83.5 of the U.S. District Court for the Northern and Southern Districts of Iowa adds a time limit in federal cases:

> Closing arguments for each side must not exceed one hour. The plaintiff's allotted time includes any time for rebuttal argument. Counsel for each side may divide their time between themselves, but no more than two lawyers for each side will be allowed to address a jury during closing arguments, except with the permission of the court granted before closing arguments open.

N.D. & S.D. Iowa Civ. R. 83.5 (2011).

to strict reply to defendants' argument, at least so long as no new matter is introduced and it is not outside the issues or evidence." (citing *Reddell v. Norton*, 225 Ark. 643, 285 S.W.2d 328, 331-332; *Chandler v. Miles*, 8 W.W.Harr. 431, 38 Del. 431, 193 A. 576, 580; *Fickerle v. Seekamp, Inc.*, 274 Ill.App. 310, 324; Cumming v. Allied Hotel Corp., Mo.App., 144 S.W.2d 177, 182; *Republic Ins. Co. v. Hale*, Tex.Civ.App., 69 S.W.2d 482, 484, rev'd on other grounds 128 Tex. 616, 99 S.W.2d 909; *Kaime v. Trustees Village of Omro*, 49 Wis. 371, 5 N.W. 838, 844).

Standard of Review on Appeal....

> A trial court has broad discretion in deciding on the propriety of closing arguments to the jury and an appellate court will not reverse unless there has been a clear abuse of this discretion. *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970); *Carter v. Wiese Corp.*, 360 N.W.2d 122, 131 (Iowa Ct.App.1984). "Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable but for such misconduct." *Laguna v. Prouty*, 300 N.W.2d 98, 102 (Iowa 1981) (citing Rasmussen v. Thilges, 174 N.W.2d at 391).

Lange v. City of Des Moines, 404 N.W.2d 585 (Iowa App., 1987). Under Iowa law, improper remarks during closing only merit new trial where there is a prejudice or a different result would have occurred but for the statements.

> Even when a court decides that counsel's statements during closing argument were improper, a new trial is warranted only when the misconduct resulted in prejudice to the other party or a different result would have been probable but for the alleged misconduct. *See Smith v. Haugland*, 762 N.W.2d 890, 900 (Iowa Ct. App. 2009). In determining prejudice, we consider whether a curative instruction was requested or given. *See id.* at 900-01. We also look to the cumulative effect of counsel's impermissible statements. *See Rosenberger Enters., Inc.*, 541 N.W.2d at 908-09. A court also may grant a new trial when the jury awards "inadequate damages appearing to have been influenced by passion or prejudice." Iowa R. Civ. P. 1.1004(4); *see Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 162 (Iowa 2004).

Conn v. Alfstad, No. 10-1171, 2011 WL 1566005, at *6 (Iowa Ct. App. April 27, 2011).

Don't Do That....

Before discussing what to do in closing, think about what you cannot do. Professor James W. McElhaney, author of *McElhaney's Trial Notebook*, offers six basic rules for opening statements and closing arguments which are worth study:

- You may not misstate the evidence or the law.
- You may not argue facts off the record.
- You may not state your personal belief in the justice of your cause.
- You may not personally vouch for the credibility of any witness.
- You may not appeal to passion or prejudice.

- You may not urge an irrelevant use of evidence.[6]

It is improper to argue that the jury should not assess liability against one party regardless of actual fault because to do so would reduce damages against another party. *Rosenberger Enterprises, Inc. v. Insurance Service Corp. of Iowa*, 541 N.W.2d 904 (Iowa Ct. App. 1995). In *Rosenberger*, it was also improper for counsel to try and influence the jury with references to God ("as God is my judge....") or to the death of his father. *Id.* While counsel's statements making comparisons to facts not in the record, suggesting plaintiff had to pay costs if he lost, and suggesting the absence at trial of public officials (long out of office) showed they were ashamed were close to the line, they were withdrawn and the jury instructed upon objection, and were not prejudicial. *Lange v. City of Des Moines*, 404 N.W.2d 585 (Iowa Ct. App. 1987).

You Gotta Object

> Generally, a timely objection or motion for a mistrial will serve to preserve an issue for appeal. *See State v. Smith*, 228 N.W.2d 111, 112 (Iowa 1975). Where the alleged impropriety involves the conduct or remarks of counsel during closing argument, a motion for mistrial is considered timely if made prior to the submission of the case to the jury, when closing arguments are reported, certified, and made part of the record. *State v. Nelson*, 234 N.W.2d 368, 371 (Iowa 1975).

Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995).[7] "[I]t is the duty of the aggrieved party to object and thereby provide the trial court with an opportunity to admonish counsel or instruct the jury as it may see fit." *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987) (citing *Andrews v. Struble*, 178 N.W.2d 391, 401 (Iowa 1970)). This prevents the tactical strategy of "foregoing an objection, awaiting a favorable verdict, and then trying to recreate a record later, if an unfavorable verdict is received." *Johnson v. Jennings*, 2000 WL 1520050 (Iowa Ct. App. 2000) (citing *State v. Epps*, 313 N.W.2d 553, 555 (Iowa 1981)). Objections must be made before the case is submitted to the jury. Id. However, "[m]isconduct consisting of misstatements, or improper remarks or arguments, may be cured through the action of the offending counsel by promptly withdrawing or correcting the improper remarks or misstatements." *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987).

If an argument is unreported, error "must be preserved by a bill of exceptions and certified by the court." *Schwennen v. Abell*, 471 N.W.2d 880, 888 (Iowa 1991) (citations omitted). The problem is largely solved, however, by Rule 1.903 of the Iowa Rules of Civil Procedure, which requires the reporting of all trial proceedings, including oral comments, *voir dire*, opening statements, oral testimony, written or other evidence, motions, and "[c]losing arguments, any objections, and the court's rulings."[8]

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[6] James W. McElhaney, *Trial Notebook*, 479 (2d ed., American Bar Association 1987).

[7] *See also* Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 101 (Fla. 2000) (holding a party cannot claim error based on closing argument absent contemporaneous objection or motion before trial court).

[8] Iowa R. Civ. P. 1.903(2) (2009). Both parties have to agree to waive the reporting requirement. *Id.*

Liars and Cheaters

Both opening and closing are supposed to be about the case, and not about attacking the court, counsel, witnesses or the other side. You should be a zealous advocate, but do so in a respectful, diligent manner.[9] "A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms."[10] Thus, don't call people "liars," or "rip-offs," or use other derogatory terms.[11] Zealous advocacy has limits, and you just shouldn't use disparaging or vituperative language in opening statements and closing arguments.

A few West Virginia cases are illustrative. In *Slaven v. Balt. & O.R. Co.*, 171 S.E. 818, 821 (W. Va. 1933), the Supreme Court of Appeals held that plaintiff's counsel made an improper argument when he argued to the jury that defendant's witnesses lied in their testimony:

> Counsel in argument asserted that [the defendant's witnesses] had lied. This is a very harsh term for any occasion and is certainly out of place in a trial in a court of justice. There, deliberation and equanimity should prevail, without vituperation or invective, which are discordant notes. Inconsistencies in testimony and falsification, if there be either, can be pointed out by counsel without resort to "the short and ugly word." Such expression and similarly virulent and affronting ones are improper, and their use may constitute sufficient ground for setting aside a verdict favorable to the party represented by counsel using them.

In *Jenrett v. Smith*, 315 S.E.2d 583, 591 (W. Va. 1983), the Supreme Court of Appeals stated that it did not approve of plaintiff counsel arguing in his closing argument that the defendant was a "rip-off" and a "liar."

A reasonable question may be how you can tell a jury a witness is lying without calling the witness a liar. The key is to use the court's instructions which invariably detail how the jury may examine witness testimony particularly as to credibility, and explain why the witness, in light of all the facts, simply cannot be believed. So, instead of saying "Bill Jones is a liar," you can spend a couple of minutes telling the jury that "Bill Jones' testimony is not worthy of your consideration. It is at odds with established facts, and Bill, as the plaintiff's best friend and business partner, has admitted his bias to you. Recall the judge's instruction that you may take into account the bias exhibited by a witness." Thus, rather than the conclusory "he is a liar," you demonstrate a careful analysis that leads the jury where you want them to go. Conversely, if you call witnesses liars and

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[9] Iowa Rules of Prof'l Conduct R. 32:3.3–3.5 (2011).

[10] Iowa Standards for Prof'l Conduct R. 33.1(1) (2011).

[11] *See* Jenrett v, Smith, 315 S.E.2d 583, 591 (W. Va. 1983) (using the words "liar" and "rip-off"); Thorsen v. City of Chi., 392 N.E.2d 716 (Ill. 1979) (cited in *Jenrett*, 315 S.E.2d at 591) (referring to opposing counsel as a "liar" who was "lying through (his) teeth"); Bowers v. Watkins Carolina Express, Inc., 192 S.E.2d 190 (S.C. 1972) (cited in *Jenrett*, 315 S.E.2d at 591) (branding the plaintiff a "liar"); Texas Employers Ins. Assn. v. Jones, 361 S.W.2d 725 (Tex.Civ.App. 1962) (cited in *Jenrett*, 315 S.E.2d at 591) (using racial and religious slurs).

thieves without explanation, you open yourself to a rebuttal closing pointing out the lack of support for your accusations.[12]

Golden Rule

A "golden rule" argument asks jurors to determine how they would want to be compensated or treated if they were in the same position as one of the parties.[13] Golden rule arguments, which are prohibited by the courts, make "[d]irect appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries." *Russell v. Chi., Rock Island & Pac. R.R. Co.*, 249 Iowa 664, 672, 86 N.W.2d 843, 848 (1957). This argument is generally held impermissible because it invites jurors to depart from their role as neutral decision makers and decide the case based on their own personal interests and biases.[14] "The distinguishing feature of a golden rule argument is that the jurors are urged to put themselves in the place of the victim or the victim's family."[15]

"A majority of courts...hold that a golden rule argument is appropriate when used by defense counsel to ask the jury to assess the reasonableness of a defendant's action."[16] For instance, in *Shaffer v. Ward*, 510 So.2d 602, 603 (Fla. Dist. Ct. App. 1987) , the court held that the following argument was not a "golden rule" argument because it was only "an attempt to ask the jury to use their common, everyday experience in deciding the case:"

> You all drive, you're on the road, you know how far you can see when you drive. You know the importance of brake lights and how that assists you. And you watch and see brake lights come on and you start braking. You also know if you have a sudden stop or unexpected stop in front of you, it puts you in a position where you maybe might hit the car in front of you. I think everyone has had a close call because of what happened in front of them. And it wasn't a close call because you were negligent or not paying attention, it was a close call because the car in front of you unexpectantly stopped, stopped with no warning.

Golden rule arguments are not limited to the plaintiffs. Finding a violation by the defense, the court in *Conn v. Alfstad*, No. 10-1171, 2011 WL 1566005, at *5 (Iowa Ct. App. April 27, 2011), affirmed a new trial for plaintiff, stating:

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[12] As my high school AP History teacher used to point out, all generalities are false. There may be a case where it is so obvious that a witness is lying that you lose credibility if you don't say it. Don't forget to explain why.

[13] *See* Crum v. Ward, 122 S.E.2d 18, 24 (W. Va. 1961) (recognizing that "the law has declared the standard for measuring damages for personal injuries to be reasonable compensation and has entrusted the administration of this criterion to the impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence. This does not mean that jurors are free to fix what they would want as compensation if they had sustained the injuries or what the pain and suffering would be worth to them. The so-called golden rule argument may not be applied to such damages").

[14] 75A Am. Jur. 2d Trial § 650 (2007).

[15] State v. Clements, 334 S.E.2d 600, 606 (W. Va. 1985) .

[16] Lopez v. Langer, 761 P.2d 1225, 1231 (Idaho 1988) .

> We conclude defense counsel's suggestion to the jurors that their lives would be changed by receiving an award of more than $600,000 was an impermissible argument because it encouraged them to decide damages based on their personal interest rather than on the evidence. Advocating for jurors to put themselves into the shoes of a party is improper whether it is done by plaintiff's counsel or defense counsel. *See Edwards v. City of Phila.*, 860 F.2d 568, 574 n.6 (3d Cir. 1988) (rejecting position that golden-rule argument is only improper when used by plaintiff with respect to damages and not when used by defense with respect to liability). By asking the jurors to envision how their lives would change if they received the amount of damages requested by the Conns, defense counsel appealed to their emotions and passions. Defense counsel violated the prohibition against making a "golden rule" argument.

"Golden rule" arguments are dangerous. Courts see them as skewing jury verdicts, requiring the grant of a new trial. For defense counsel trying to communicate to the jury the task of judging the defendant without the benefit of hindsight, care must be given to avoiding golden rule arguments.

Who is Paying?

It is improper for counsel to either inform or imply to the jury in the opening statement or closing argument that the defendant is, or is not, covered by insurance.[17] Rule 411 of the Iowa Rules of Evidence (2002) states, in part: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."[18]

Mention of insurance in *voir dire* is not improper, if counsel acts in good faith to obtain information for peremptory challenges of jurors and not to inform the jury that the defendant has insurance. *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 377 (Iowa 1972). In *Johnson v. Jennings*, 2000 WL 1520050 (Iowa Ct. App. 2000), the court stated: "Litigants have the right to examine prospective jurors in such a way as to enable them to select a jury composed of persons who can determine the facts in issue without bias, prejudice, or partiality." *Id.* (citing *Anderson*).

In Iowa, "absent a showing of prejudice, the introduction of insurance coverage into a negligence suit will not be critical." *Bloodgood v. Organic Techs. Corp.*, 2001 WL 98656, at *7 (Iowa Ct. App. 2001) (citing *Carter v. Wiese Corp.*, 360 N.W.2d 122, 130 (Iowa Ct. App. 1984)). In *Bloodgood*, the court found that questioning of a witness regarding insurance was not prohibited by Rule 411 because it related to whether the defendant used insurance proceeds he received and was not to suggest he had insurance coverage for the claims in the case.

Iowa adheres "to the long standing and well established rule that it is improper to suggest to the jury either directly or indirectly that the damages sued for are covered by insurance protecting

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[17] *See* Graham v. Wriston, Syl. Pt. 2, 120 S.E.2d 713 (W. Va. 1961) (holding that "[i]n an action for recovery of damages arising from the operation of a motor vehicle, the jury should not in any manner be informed that the defendant is not protected by insurance); Hewett, 401 S.E.2d at 227 (stating that "a jury should not in any manner be informed of the insured or uninsured status of a defendant").

[18] Rule 411 of the Iowa Rules of Evidence further states: "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, if controverted, or bias or prejudice of a witness."

against personal liability." *Price v. King, Hartford Acc. & Indem. Co., Intervenor*, 122 N.W.2d 318, 323, 255 Iowa 314, 322 (Iowa 1963). *See also Evans v. Howard R. Green Co.*, 231 N.W.2d 907 (Iowa 1975); *Carter v. Wiese Corp.*, 360 N.W.2d 122, 129 (Iowa App.1984); *Charter v. Chleborad*, 551 F.2d 246 (8th Cir.), cert. denied, 434 U.S. 856, 98 S.Ct. 176, 54 L.Ed.2d 128 (1977). Moreover, "[e]rror resulting from improperly injecting insurance coverage into evidence is not cured by an instruction." *Price v. King, supra.* While Rule 411 provides some exceptions, it does not allow, for example, cross examination of an expert about retention by an insurance company. *Strain v. Heinssen*, 434 N.W.2d 640 (Iowa 1989).

Thus, in the evidence and particularly in arguments, mention by either counsel of defendant's insurance status will "ordinarily constitute reversible error, notwithstanding the fact that the jury is instructed by the court not to consider such remarks in arriving at a verdict."[19]

"A remark clearly implies that a defendant is protected or unprotected by insurance if it otherwise has no relevancy to any issue properly raised in the case, or if its repetition exceeds the bounds of proper, enthusiastic advocacy."[20] In *Kaiser v. Hensley*, 318 S.E.2d 598, 602 (W. Va. 1983), the West Virginia Supreme Court of Appeals held that defense counsel's argument that the defendants would have "to pay" any judgment rendered against them did not "drum the concept of payment, and consequently insurance, into the jurors' heads."

Personal Beliefs

As Professor McElhaney offered in his six basic rules for opening statements and closing arguments, counsel cannot tell the jury that he personally "believes" in his client's case. In *Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904 (Iowa Ct. App. 1995), the court found it was improper for counsel to inject personal religious beliefs and the death of his father into his closing. Similarly, in *Conn v. Alfstad*, No. 10-1171, 2011 WL 1566005, at *5 (Iowa Ct. App. Apr. 27, 2011), defense counsel's comparison of the plaintiff's case to "jackpot justice" was an impermissible insertion of counsel's "personal opinion about the merits of the case, which is not acceptable argument." (citations and internal quotations omitted). A West Virginia case is also instructive. In *Bd. of Educ. of McDowell Cnty. v. Zando, Martin, & Milstead, Inc.*, 390 S.E.2d 796, 810-811 (W. Va. 1990), the West Virginia Supreme Court of Appeals held that plaintiff's counsel made an improper, personal remark when he mentioned in his closing argument that he "believed in" his client's case. In sum, it is improper for a lawyer to "state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."[21]

Stuff That Works: Strategies for Making Opening Statements and Closing Arguments

Isn't the real purpose of closing argument pretty simple? You must tell the jury what you want. Tell them how they should rule and tell them why. What stuff works in closing?[22] From the

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[19] *Graham*, Syl. Pt. 2, 120 S.E.2d at 713.

[20] *Kaiser v. Hensley*, Syl. Pt. 5, 318 S.E.2d 598 (W. Va. 1983).

[21] Iowa Rules of Prof'l Conduct R. 32:3.4(e).

[22] "Stuff that works" is taken from the song with the same title by Guy Clark, which goes

first day of trial practice in law school, the importance of opening and closing – the direct communication with the jury that is the pinnacle of the trial lawyer's calling – is repeatedly drummed into us. As to opening statements, which set the stage for your client's story, David Dukes, former DRI president, states:

> The opening statement is the defense lawyer's first opportunity to engage directly with the jury and explain the case in such a way as to lead the jury to the desired result - a verdict for the defendant. The opening statement must provide the logical format for decision, but it must also substitute a desire to decide for the plaintiff based on emotions, with a desire to reach the outcome the defense lawyer urges. Successful trial lawyers direct a jury's common curiosity shaped during the opening statement so that they can, and want to, decide in their favor.[23]

If you have thought it through, your opening will have set the stage for your closing and the jury will have the framework to understand your case. Closing brings it all together:

> The purpose of closing argument is to give the jurors the tools they need to reach a verdict. In a well-tried case, both the plaintiff and defendant will have themes, and each party's themes will resonate with at least some of the jurors. For this reason, when the jurors begin their deliberations, it is likely that they will be divided, with some favoring the plaintiff and some favoring the defendant. As they deliberate, the stronger jurors will become advocates who attempt to persuade the others to their view of the case. To do this, these jurors will use what they have heard in closing argument. In closing argument, then, you must tell the jurors what is important to their decision, and why. You must also explain what is unimportant, and why. You must remind them of the evidence they heard during the trial and explain why this evidence entitles you to a verdict. In short, you must give the jurors the ammunition they need to argue your case effectively to the other jurors.
>
> Closing argument is the only time in the trial when you can do this effectively. In contrast to other phases of the trial, in closing argument you are permitted to argue. This means you can not only remind the jurors about the evidence they have heard but also explain to them why it is important to the decision they must make. Argument is a powerful tool.

Linda A. Listrom, Crafting a Closing Argument, 33 Litigation 19 (ABA Spring 1997).

1. *Common Experiences.*

Your best friends are those with whom you have shared common experiences, whether happy or sad. A trial is a common experience you and your client will share with jurors. Jurors start with having to take off work, sit through sometimes personal and embarrassing questions posed by

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> Stuff that works, stuff that holds up,
> The kind of stuff you don't hang on the wall
> Stuff that's real, stuff you feel
> The kind of stuff you reach for when you fall.

Guy Clark, Stuff That Works, Dublin Blues (1995).

[23] David A. Dukes, "Sex, Drugs & Alcohol: Creating Curiosity in Your Opening Statement," Presentation to the Association of Defense Trial Attorneys, Spring 2007, San Diego, CA.

strangers in a strange environment, and then swear to be fair. You and your client are there after months if not years of working on the case, ready to put on evidence. Stop when planning your trial – from *voir dire*, to opening, direct and cross, and closing – and think in terms of common experience with jurors. How do you humanize your client, whether a person or corporation? How do you put things in terms regular people use and understand? Why should they rule in your favor? After all, these are things you must tell the jury if they are to understand your case and find in your client's favor. The issue of common experience thus has a place throughout the trial, and in particular in closing argument.

2. *Start Strong, Tell Them What You Want. Don't Overdo the Thanks…..*

Primacy is the term for the psychological theory that people, including your jurors, remember what they hear first.[24] Even if you have introduced yourself and your client in *voir dire*, and opening, do it again. "As you know, Dr. Powell is an obstetrician who has delivered babies in this community for forty years. I have had the privilege these past weeks of representing him at this trial."[25] If you have set up the closing in your opening, you may start strong with "as I told you last Tuesday in my opening, I am here to ask you for a verdict in his favor. "You remember I told you in opening…. Now you know why…." Start with "Dr. Jones provided excellent care to the plaintiff, and you know this from the evidence…." I often say, quoting Stan Starnes, a fine trial lawyer from Birmingham, Alabama, you have to tell the jury "what your client did and why he did it."

Don't spend the first ten minutes thanking the jury for being there; save it for later, and start in as concise a manner as possible to tell them why the evidence supports your client, and why your client deserves their verdict.

3. *Get organized, and get a theme.*

Every opening and closing has to have organization and some kind of theme. Face it, there is a limit to how long six people are going to hang on your every word, and some say that the jury makes up its mind early. If you waste time wandering because you aren't organized, you are losing points.

Organization has many elements, both as to form and substance. During opening, tell the story of the case. You need explain the evidence in a way the jury can follow. Timelines, visual aids and demonstrative evidence are important parts of this task. Used properly in opening, and then during the trial, they can drive home your theme and position in closing. You need to be prepared to use them – the opening should not be the first time you have put up your PowerPoint, used Trial Director or even a low tech writing pad. Don't be afraid to practice, but don't practice so much that you are scripted (and don't read your opening – use notes as little as possible).

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[24] McElhaney, Trial Notebook 89 (2d Ed. 1987) (hereafter Trial Notebook). As to primacy, one commentator suggests, based on a University of Chicago study, that 80% of jurors make up their minds on liability during the plaintiff's opening. Laurence M. Rose, "Closing Arguments: An Exercise in Persuasion," How to Persuade the Jury, Jury Dynamics from the Juror's Perspective, American Bar Association (1997).

[25] In *voir dire*, jurors are always asked if they know the counsel in the case. I like to ask if any of the jurors have any hard feelings about lawyers generally, or any problem with lawyers doing their jobs. This can key into the opening and closing.

The theme of the case should begin with *voir dire*, and carry through opening and closing. "It is the ultimate rule of your presentation. A good theme provides the common understanding that will captivate the jury and lead them where you want them to go."[26] Themes don't have to be complicated and they don't have to be snappy. A theme can be as simple as a physician's judgment in an emergency situation, or regular human beings making understandable decisions based on the information available. It appeals to the common experience jurors may have with your client.

4. *Talk Law.*

Don't talk like a lawyer[27], but you have to talk law. The plaintiff has the burden to prove every element of the case, and you are there to tell the jury why they didn't make it. In closing, you need to discuss key instructions of the court so as to persuade the jury that the plaintiff has not met the burden of proof, has not proved elements of the case, or is asking for speculation.

Some themes that come up in a lot of defense cases fit with a discussion of the law. Negligence, which is based on foreseeability, cannot be the result of hindsight. This is a powerful argument for the defense – the fundamental fairness of holding people to reasonable care cannot give way to retrospective judgment. Personal responsibility must apply (where the evidence allows it) to both sides in cases of comparative fault. Tie these themes of fairness to the judge's instructions in closing.

5. *Confront Emotion*

Every case begins with an injury and some are catastrophic. With the exception of cases where you catch the plaintiff malingering and can argue there is no injury, the issue of catastrophic injury must be addressed by the defense, starting with voir dire and opening and particularly in closing. This does not mean minimizing the injury, but rather addressing it in terms of whether your client should be held to pay if the evidence does not demonstrate liability or causation, regardless of the sympathy and emotion anyone must have for the injured plaintiff. Particularly in closing, the jury instructions are important, as most general charges caution against sympathy or emotion.

6. *Be Yourself.*

It sounds simple, but you have to be yourself in front of a jury. Jurors know if you are trying to be something you aren't. In the words of John Prine, "you are what you are and you ain't what you ain't."[28] Enough said.

Final Thoughts

Closing is your chance to wrap up the evidence, showing the jury it came out just as you suggested in opening, and that it supports your client. Don't forget to practice, so that you can talk with the jury persuasively – hopefully with minimal use of notes – and guide them in the direction of ruling for your client.

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[26] Duke, supra, at p. 3.

[27] Professor McElhaney suggests you talk to jurors as you would talk to someone in a bar. Terrence McCarthy, a wonderful speaker on cross examination, offers similar advice.

[28] John Prine, "Dear Abby," Sweet Revenge (1973).

Tough Clients, Tough Issues

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Tough Clients, Tough Issues

By Todd C. Scott

Law school doesn't usually prepare a lawyer for dealing with an overly-angry client or someone who always goes into hiding when you want to ask them why they haven't paid their bill. But how you handle yourself during certain, crucial client interactions can make the difference between a successful client matter and a possible malpractice claim.

Tough clients come in all forms. Some don't realize the problems they create for their lawyer and their troubles stem from a lack of understanding of how the legal process works. Simply put, they are well meaning but they don't understand how you, their lawyer, need to do your job. Others are a disaster waiting to happen, and a good lawyer will recognize at the outset that there's a strong likelihood that the client will be trouble to work for.

Identifying the obstacles to successful client advocacy and declining an offer to represent those who display the characteristics of a troubling client is the goal for avoiding tough issues with your clients. Declining representation is not always easy, especially for newer lawyers establishing their law practice or a lawyer whose practice is challenged by tough economic times. But experienced lawyers usually recognize that the cost of declining representation is an affordable price to pay after considering the expense of wasted time for which the lawyer will never get paid. Or worse, after incurring the expense of a malpractice claim asserted by a client that your gut told you from the start could never be made happy.

A wise lawyer once said that no lawyer ever looked back on the day of their retirement and wished they hadn't fired that one client who looked like they would be trouble. Unfortunately, the reverse is often true. Ignoring your gut instinct and taking on an offer to represent a client who displayed all the signs of trouble is a regret that too many lawyers know all too well.

Making a Proper Withdrawal

It may not be too late to terminate representation of a matter for a client who is fast creating the conditions for an unsuccessful outcome. But withdrawing from representation needs to be done correctly or your client problems could go from bad to worse.

A lawyer's obligations to a client upon withdrawal are primarily governed by local and state court rules. Court rules vary depending on the jurisdiction, but there are some common requirements that you can expect to see when investigating what's required for an attorney withdrawing from representation. For example, almost always the courts will require that in order to be effective, an attorney who has already appeared in a legal proceeding and is withdrawing from the matter must serve a notice of withdrawal to all parties and the court administrator. Typically, the notice of withdrawal will include the address and phone number where your client can be served or notified of matters relating to the action.

In most instances, once an appearance has been made on behalf of a client, you should assume that you must have approval of the court in order to withdraw. The court, when considering whether the lawyer has stated reasonable grounds for withdrawing from representation, doesn't always consider the

client's failure to pay your fee as a reasonable excuse for terminating representation. Courts will want to look at the terms of payment and whether the lawyer gave the client sufficient warning that the lawyer would withdraw from representation unless their obligation to make payment has been fulfilled.

ABA Model Rule 1.16 Declining or Terminating Representation also defines several instances where withdrawing from representation may be permissible. Good cause for withdrawal exists when:

- Withdrawal can be accomplished without adverse effect on the interests of the client;
- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- The client has used the lawyer's services to perpetrate a crime or fraud;
- The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

The professional rules of ethics also define certain circumstances where terminating client representation is not just an option, but it is mandatory to do so. ABA Model Rule 1.16 Declining or Terminating Representation states that a lawyer must withdraw from representation if the lawyer has been discharged by the client, the representation will violate the rules of professional conduct or other law, or the lawyer is impaired in such a way that the representation will be affected.

In no case does attorney withdrawal create an automatic right for a continuance or any other rights for your client. The pace of litigation will not slow down because you are off the case so you need to make sure your actions do not prejudice the client's standing with the trial courts and that there is reasonable time for substitute counsel to transition the matter.

To further emphasize this point, ABA Model Rule 1.16(d) states that the lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

Tough, Tougher, Toughest

If a client never returns your phone calls, or stops in the office without calling ahead for a daily personal update, sometimes a direct and honest conversation with the client about their problem behaviors is all it takes to get the matter back on track and free from distractions. You should be prepared at all times to discuss issues head-on with clients. Clients who are never told that the firm expects to be paid within 30 days from the date of invoice will often assume you have a lax payment policy and are usually more than happy to take advantage of the situation.

Other client matters may not be so quick to resolve, and some may be doomed from the start. The following list is a sampling of the tough issues attorneys routinely encounter with troubling clients, and some practical advice for dealing with the problems they create.

The Super-Saver Client

The Super-Saver client wants to handle many of the tasks and chores related to their legal representation in order to save costs and fees. To these clients, the lawyer client relationship as one where the lawyer can work closely with the client, dividing the tasks related to investigation and negotiation in order to save some of the lawyer's time, and consequently, some of the costs their legal services. To the lawyers faced with these client requests, they usually see these kind of lawyer-client relationships as nothing but trouble. Problems can arise quickly in these matters where the client wants to do some of the work, usually when the lawyer and the client fail to perform a critical task because they each assume the other has it under control. There are times that it is appropriate for a client to take on certain tasks related to their legal matter. The key to keeping the matter on track is that it should be the lawyer – not the client – that identifies which, if any, of the tasks related to the matter should be assigned to the client. Additionally, the lawyer should oversee the client's progress just as they would if they were working with their own non-lawyer staff.

The Friends and Family Client

Sometimes trouble comes in nice packages. It may not seem like it at first, but representing a friend or family member is frequently the cause for lawyer anxiety and regret. How could the people that care about you the most be the one of the biggest sources for a headache and a potential malpractice claim? The answer is that quite often a lawyer representing a friend or a family member throws out all their usual rules for controlling a client matter and keeping it on track when a friend or family member is asking for legal help. A friend or a family member that has a very high level of trust in you will seek you out for legal assistance, without regard for your area of practice or specialty. Lawyers should resist the urge to dabble in unfamiliar practice areas, or even worse, unfamiliar jurisdictions, because someone close to them needs help. If you are called upon for legal help, be mindful of the systems and methods you have developed to help keep your legal matters on track. Ask that the individual meet you in your office and establish a client file and, calendar all important deadlines for the matter, just as you would for any other client.

The "You'd Better Fix it" Client

It's a rare thing when a lawyer can continue to represent a client after making a mistake on that client's matter. Although your instinct may be to continue with the matter to fix the problem you may have created, the continued handling of the matter creates a conflict of interest with your client that is likely unwaivable. Once a critical mistake is made on a client's matter, the lawyer's independent professional judgment is invaded by thoughts that may run contrary to the client's best interest and toward the lawyer's own – such as taking the next settlement offer that comes in. Depending on what kind of mistake you made, your error could be the type which unwittingly makes you a party to the matter. In that case, most states have professional rules modeled after ABA Model Rule 3.7 Lawyer as Witness that preclude a lawyer from acting as an advocate in a matter where the lawyer reasonably knows they may be called as a witness. If you are unsure whether you can continue representing a client in a particular matter because of an error that you may have made, the best thing to do is to contact a claims representative from your professional liability carrier for advice on continued representation. A conversation about continued representation is in order to make sure the client's matter is on track and safely handled by their legal representative – whoever that may be.

The Always and Forever Client

Even the most sophisticated clients will sometimes presume that you are their lawyer for all their legal matters – past, present, and future – even though you may have been retained to handle only a single matter. Clients often appreciate having an open-ended relationship with their lawyer, giving them the ability to stop in the lawyer's office and discuss just about any matter that gives them concern. Problems arise when the lawyer, who is focused on the matter for which they've been retained, don't realize that from the client's perception, they have been keeping you informed about other matters for which they assume you are looking out for their best interests. Things get more complicated when you are handling multiple matters for the client, some of them ongoing. The key to avoiding these difficult misunderstandings is to separate out each representation with an engagement letter and ending each representation with a closing or termination letter. If a client engages you regarding other matters, clarify that you are not equipped to provide adequate advice on matters you have not been retained to handle, and if necessary, follow up with a note or letter to the client clarifying that you do not represent them in the other matter.

The Missing Client

Nothing can be more frustrating for an attorney than when you find yourself prepared to represent a client – but finding the client is not nearly so easy. A common problem for busy lawyers is locating a client who has moved their residence but didn't think to tell you about their change of address. What's worse is when you are unable to find a prospective client to inform them that you do not plan on handling their case, after they left you with their personal legal documents. A little preliminary work at the first client meeting can go a long way to prevent these troubling situations. At the outset, stress to the client the need for them to stay in regular contact with you so that critical decisions can be made in a timely manner. Ask that the client not only provide you with a current phone number, email, and address, but also the same contact information for a close family member that will presumably, always know how to contact the client. If you are unable to gain contact with a client and a critical deadline is approaching, sending the client a registered letter through U.S. Postal Service with return receipt requested is a good method of locating a client since many individuals forward their mail, and the return receipt is evidence you've taken reasonable steps to locate the missing client.

The Remorseful Client

A client who is experiencing difficult problems in their life may be anxious to resolve their legal matters quickly. In their desire to get the matter over with and "get on with their life," they may push for a quick settlement without regard to the long-term consequences of their decision, and completely ignoring your better advice. Trouble comes when the client's life is finally back in order, and they begin to look again at their legal matter and have remorse for the decisions they may have made. For clients anxious to get their legal matter over with, it is more important than ever to accurately document the client file to include information that you have given the client advice and the client has chosen to disregard it. In these circumstances, is probably necessary to follow up the advice with a letter to the client, or some other documentation memorializing the conversation and your client's decision to pass up your recommendation. If the client's disregard for your advice can only lead to negative possible outcomes you may want to consider withdrawing from the case for some of the reasons stated above in ABA Model Rule 1.16(d).

The Client Who Won't Pay

Many lawyer-client disagreements start with the client's unwillingness to pay the lawyer's fee in a timely way. Suing a client for payment of fees frequently makes the problem worse as many clients respond with a counter-claim for malpractice. The best way to handle a matter involving a client who won't pay

your fee is to address the client head on. Contact the client and ask them if there is a problem with your fee or the legal services you have provided to them. Often a client who won't pay a bill has failed to do so because it slipped their mind, or they are having trouble coming up with the resources that are owed for your services. Either way, a quick conversation with the client on the matter can clear up a lot of misunderstanding. It is important for lawyers who are owed a lot of money to ask themselves, why did they ever let the bill get so high? Delinquent payments that are dealt with immediately can train the client early on that they are expected to pay your invoice just like any other bill or you will simply be unable to continue to represent them.

The Sneaky Client

Desperate people will do desperate things. Even so, it is often a great surprise when your client who is wrapped up in a difficult and painful legal case reveals to you that they have taken matters into their own hands and have broken the law in order to get a leg up on the opposing party. With the rapid development of personal technology, more and more lawyers are reporting that their clients have taken questionable steps, such as recording telephone conversations, reading other people's email, and hacking into an opponent's computer, in order to gain a competitive advantage in their case. If the client's activities are clearly illegal then you have no choice but to withdraw from representing the client for the reasons stated in ABA Model Rule 1.16(d) Declining or Terminating Representation. Even if it is not so clear that the activities were illegal, such questionable conduct can so severely taint the client's reputation in the eyes of a judge –and possibly yours – that prudence dictates you should inform the client that their activities has caused you to withdraw from representing them on their case.

The Angry Client

No matter how far along you are in your legal career, and despite the high quality of work and service you deliver day-to-day, at some point you are likely to run into a very angry client. Legal matters have often brought out the worst in some individuals, but more frequently, lawyers are reporting significant security concerns as very angry clients see their lawyer as the sole person making their life difficult. The level and severity of the client's anger may come without warning, but it is important for your safety and the safety of the others you work with to handle the matter calmly and with some compassion for the client. If such an episode of anger occurs in your office, try to meet with the client in a conference room or a common area so others may be aware of what's going on. Also try to listen to what the client is saying and validate their points in order to diffuse the high level of tension. Do not attempt to give the client advice or get into details about their matter – the goal is to diffuse the situation and take an extended break from the disussion until the client has had some time to calm down. It is also important to train your staff to recognize these situations when they are happening and to know how to call someone for help, such as another colleague, a security guard, or the police. Your staff should be trained to understand that these situations will likely occur and therefore, they need to be ready to help bring the situation to a peaceful ending.

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PRETRIAL MANAGEMENT, DISCOVERY AND PROCEDURES IN FEDERAL COURT

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I. INTRODUCTION

In the United States District Court for the Southern District of Iowa almost all pretrial matters are assigned to the three United States magistrate judges stationed in this district, including those civil cases that the parties consent to trial to the magistrate judge pursuant to 28 U.S.C. § 636(c)(1).

Pretrial management and discovery has evolved in the last several years as a result of amendments to the Federal Rules of Civil Procedure, and the local rules of this Court. The Court by necessity has become more productive and involved in pretrial issues and management.

With the burgeoning issues arising because of electronically stored information (ESI), a concerted effort among judges and lawyers is required because of the frequent complexity of ESI matters.

This outline will supplement the presentation regarding federal court pretrial issues, and hopefully serve as a reference and guide for moving more productively through pretrial discovery and preparation of pretrial conference documents, and trial readiness.

II. FEDERAL RULES OF CIVIL PROCEDURE

A. The Federal Rules of Civil Procedure that have most relevance to civil pretrial matters are:

1. Rule 16. Pretrial Conferences; Scheduling; Management.
2. Rule 26. Duty to Disclose; General Provisions Governing Discovery.
3. Rule 27. Depositions to Perpetuate Testimony.
4. Rule 29. Stipulations About Discovery Procedure.
5. Rule 30. Depositions by Oral Examination.
6. Rule 31. Depositions by Written Questions.
7. Rule 32. Using Depositions in Court Proceedings.
8. Rule 33. Interrogatories to Parties.
9. Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.
10. Rule 36. Requests for Admission.
11. Rule 37. Failure to make Disclosures or to Cooperate in Discovery; Sanctions.
12. Rule 41. Dismissal of Actions.
13. Rule 65. Injunctions and Restraining Orders.

14. Rule 68. Offer of Judgment.
15. Rule 72. Magistrate Judges: Pretrial Order.
16. Rule 73. Magistrate Judges: Trial by Consent; Appeal.

B. Local Rules of the Northern and Southern Districts of Iowa.

The following are the local rules that have most pertinence to the issues of pretrial management and discovery:

1. LR 1. General Provisions; Effective Date; Scope.
2. LR 5. Service; Facsimile Delivery of Documents; Sealed Documents; In Camera Documents.
3. LR 5.1. Initial Disclosures, Expert Disclosures, and Discovery Materials Not Filed.
4. LR 5.2. Electronic Filing and Electronic Access to Case Files.
5. LR 7. Motions and Other Requests for Court Action.
6. LR 15.1. Motions to Amend Pleadings.
7. LR 16. Scheduling Order and Discovery Plan.
8. LR 16.1. Final Pretrial Conference.
9. LR 16.2. Alternative Dispute Resolution (ADR).
10. LR 26. Pretrial Discovery and Disclosures.
11. LR 37. Discovery Disputes -- Motions to Compel.
12. LR 41. Dismissals of Actions.
13. LR 72. United States Magistrate Judges.
14. LR 72.1. Appeals from Rulings of United States Magistrate Judges in Civil Cases.
15. LR 73. Conduct of Trials and Disposition of Civil Cases by Magistrate Judges Upon Consent of the Parties -- 28 U.S.C.§ 636(c)

III. ELECTRONICALLY STORED INFORMATION ISSUES

As noted above in Section I., electronically stored information has become a much more integral part of pretrial matters. The limits on this presentation and this outline would not allow an in-depth discussion of all of the various problems, considerations and issues that arise as a result of ESI matters.

To assist lawyers in this area, attached is a copy of the ESI status report which I require to be filed in all civil cases in which I have pretrial management responsibility. The status report will be discussed in greater detail in the presentation.

IV. PRETRIAL MANAGEMENT CONSIDERATIONS

1. Scheduling conferences pursuant to Fed. R. Civ. P. 16.

2. Monthly status conferences:
   a. In person;
   b. By telephone.
3. Telephonic or electronic contact with the magistrate judge.
4. Contact with the magistrate judge during depositions.
5. Telephonic, electronic and/or facsimile messages to the magistrate judge.
6. The filing of motions in limine and motions pursuant to Fed. R. Evid. 104.

V. SETTLEMENT CONFERENCES

In the Southern District of Iowa, settlement conferences are conducted almost exclusively by the magistrate judges. Settlement conferences in this district are only scheduled by the mutual consent of all the parties. A party may not unilaterally force another party into a court-sponsored settlement conference. Local Rule 16.2, cited above, governs the general administration of settlement conferences in this district.

As a general note, all settlement conferences which I conduct require participation by counsel and the parties. The lawyers are required to provide to the Court three days prior to the settlement conference a confidential statement of the issues. Those statements are not filed, and are not served upon opposing counsel.

During the settlement conference, lawyers must be present with party representatives who have <u>full</u> authority to settle the case. Absent exigent, emergency situations, no party representative may appear by telephone, and no person with ultimate settlement authority may appear by telephone.

Injury Causation and Human Biomechanics

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Injury Causation and Human Biomechanics is a one-hour course designed to help the participant understand the mechanics of tissue injury and the injury potential associated with different incident scenarios. The course will provide some familiarity with human anatomy, and will provide a variety of examples in which claimed injuries are analyzed in light of the incidents that reportedly caused them, so that personal injury allegations may be more clearly understood. The course will focus on the dynamics and injury mechanisms associates with different types of low-speed accidents.

Injury Causation and Human Biomechanics
Speaker – Richard V. Baratta

Outline

I. GENERAL INTRODUCTION (5 Minutes)

a. Course Objectives
b. Anatomical Orientation

II. TISSUE BIOMECHANICS (10 Minutes)

a. Tissue Properties
b. Bone
c. Muscle
d. Ligaments and Tendons

III. TISSUE INJURY (10 Minutes)

a. Fractures
b. Sprains
c. Strains & Muscle Tears

IV. DYNAMICS AND MECHANISMS IN LOW SPEED ACCIDENTS (20 minutes)

a. Rear-End
b. Frontal
c. Lateral
d. Sidewipes

V. INVESTIGATION METHODOLOGY (5 minutes)

a. Assessment of Situation Mechanics/Accident Dynamics
b. Medical Record Review
c. Analysis

VI. Wrap-Up – (10 minutes)

a. Sample Cases
b. General Questions and Answers

New Premises Liability Law: Slips, Trips, Falls

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NEW PREMISES LIABILITY LAW SLIPS, TRIPS, AND FALLS

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After first questioning it "almost four decades ago", the Iowa Supreme Court finally abolished the common-law distinction between invitees and licensees in premises liability cases in *Koenig v. Koenig,* 766 N.W. 2d 635 (Iowa 2009). In so doing, it adopted a general negligence standard for all lawful visitors setting forth a multifactor approach to be applied in determining whether an owner or occupier of land exercised reasonable care. *Id.* at 645-646. Specifically, Koenig Court adopted the seven factors to be considered as set forth by the Nebraska Supreme Court in *Heins v. Webster County,* 250 Neb. 750, 552 N.W.2d 51 (1996).

The *Koenig* decision was later incorporated into the Iowa Civil Jury Instructions when they were updated in September 2010. Iowa Civil Jury Instructions 9.01 and 9.02 (2010). However, after applying the directive of the Iowa Supreme Court, the drafters of the Iowa Civil Jury Instructions potentially slipped, tripped, and fell.

I. ADOPTION OF THE REASONABLE CARE STANDARD

A. Nebraska First Adopts The "Reasonable Care" Standard

Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996)

a. Eliminates the distinction between invitee and licensee. Lumps all *lawful entrants* into one standard of care – REASONABLE CARE
b. "We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be

    1. the foreseeability or possibility of harm;
    2. the purpose for which the entrant entered the premises;
    3. the time, manner, and circumstances under which the entrant entered the premises;
    4. the use to which the premises are put or are expected to be put;
    5. the reasonableness of the inspection, repair, or warning;
    6. the opportunity and ease of repair or correction or giving the warning and
    7. the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection."

c. “Although we have set forth some of the factors to be considered in determining whether a land owner or occupier has exercised reasonable care for the protection of lawful visitors, it is for the fact finder to determine, on the facts of each individual case, whether or not such factors establish a breach of the duty of reasonable care.”

B. Nebraska Modifies Its Pattern Instructions Consistent with *Heins*

NJI2d Civ. 8.26. Damage To Lawful Entrant-Condition Of Premises-Effect Of Findings And Burden Of Proof

> If you find that the plaintiff was a lawful entrant on the defendant's (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That the defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition;
>
> 2. That the defendant should have realized that the condition involved an unreasonable risk of harm to such lawful entrants;
>
> 3. That the defendant should have expected that lawful entrants such as the plaintiff either:
>
> a. would not discover or realize the danger; or
> b. would fail to protect themselves against the danger;
>
> 4. That the defendant failed to use reasonable care to protect lawful entrants against the danger.
>
> 5. That the condition was a proximate cause of some damage to the plaintiff; and
>
> 6. The nature and extent of that damage.

NJI2d Civ. 8.82. Reasonable Care Defined

> Reasonable care means the care that a reasonable person would exercise under similar circumstances.

C. Better Late Than Never – Iowa Adopts The *Heins* “Reasonable Care” Standard

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

a. “We now adopt the multifactor approach advanced by the Nebraska Supreme Court…” Specifically, the Court adopts the seven *Heins, supra* factors.
b. “This multifactored approach will ensure that the interests of land owners and injured parties are properly balanced. It further allows the jury to take into consideration common sense notions of reasonable care in assessing liability.” *Id.* at 645.

c. “On remand, the district court should develop a more direct, simple instruction consistent with our adoption of the multipronged test to guide the jury in its deliberations.”

D. Iowa Modifies Its Pattern Instructions in an Attempt to Make Them Consistent with *Koenig* (and *Heins*)

900.1 Essentials For Recovery - Condition Of Premises - Duty To Lawful Visitors.

The plaintiff must prove all of the following propositions:

1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.

2. The defendant knew or in the exercise of reasonable care should have known:

a. the plaintiff would not discover the condition, or
b. the plaintiff would not realize the condition presented an unreasonable risk of injury, or
c. the plaintiff would not protect [himself] [herself] from the condition.

3. The defendant was negligent in (set forth the particulars of the claim of negligence in failing to protect the plaintiff).

4. The negligence was a cause of the plaintiff's damage.

5. The nature and extent of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____.]

900.2 Reasonable Care – Factors to Consider for Landowner or Occupier.

Owners and occupiers owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. You may consider the following factors in evaluating whether the Defendant has exercised reasonable care for the protection of lawful visitors:

1. The foreseeability or possibility of harm;

2. The purpose for which the visitor entered the premises;

3. The time, manner, and circumstances under which the visitor entered the premises;

4. The use to which the premises are put or are expected to be put;

5. The reasonableness of the inspection, repair, or warning;

6. The opportunity and ease of repair or correction or giving of the warning; and

7. The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

8. Any other factor shown by the evidence bearing on this question.

Does anyone see a problem with the Iowa instructions yet?

II. THE BASIC RULES FOR JURY INSTRUCTIONS

A. Iowa adopted the following guidelines in drafting jury instructions:

1. Instructions should not marshal the evidence or give undue prominence to any particular aspect of the case;
2. Courts, when instructing the jury, should not attempt to warn against every mistake or misapprehension a jury may make; and
3. Jurors must be left to their intelligent apprehension and application of the rules put forth in the instructions. *Hagedorn v. Peterson*, 690 N.W.2d 84, 91 (Iowa 2004).

B. In Iowa, parties are entitled to have their legal theories submitted to the jury, though the instruction presenting those theories must meet these requirements:

1. The jury instruction expressing a legal theory must be a correct statement of the law;
2. The jury instruction must be applicable to the case;
3. The theory in the instruction must not be otherwise covered in other instructions; and
4. The proposed instructions must also be supported by the pleadings and substantial evidence in the record. *Wolbers v. Finley Hosp.*, 673 N.W.2d 728 (Iowa 2003); *See also*, *Trial Handbook* (Glenn Norris & Lex Hawkins eds., 3d ed., Iowa Academy of Trial Lawyers 1999).

C. While Iowa has been reluctant to disprove uniform jury instructions, it is not required that the court use uniform jury instructions.

1. A trial court is not required to word jury instructions in a particular way and may draft instructions as it sees fit as long as the instructions fairly cover all the issues. *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) (citing *Schuller v. Hy-Vee Food Stores, Inc.*, 407 N.W.2d 347, 351 (Iowa 1987)).
2. As long as the applicable law is correctly covered when all the jury instructions are read together, the trial court is free to instruct how ever it so desires. *Vaughn v*. *Theo's,* 707 N.W.2d 337 (Iowa App 2005) (citing *Sate v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996)).

3. A trial court is not required to instruct in the language of requested instructions so long as the topic is covered by the court's own instructions. *State v. Ripperger*, 514 N.W.2d 740, 751 (Iowa App. 1994) (citing *State v. Horn*, 282 N.W.2d 717, 730 (Iowa 1979)).

III. SPECIFIC OBJECTIONS TO JURY INSTRUCTIONS

A. Incorrect Statement of the Law- A jury instruction must not provide the jury with an incorrect statement of the law. *Vaughn v. Theo's Inc*, 707 N.W.2d 337 (Iowa App. 2005); *Boyle v. Alum-Line, Inc.,* 710 N.W.2d 741 (Iowa 2006); *Thompson v. City of Des Moines,* 564 N.W.2d 839 (Iowa 1997).

B. Undue Emphasis- A jury instruction must not place undue emphasis on specific evidence. *Mora v. Savereid*, 222 N.W.2d 417 (Iowa 1974); *Peters by Peters v. Vander Kooi*, 494 N.W.2d 708 (Iowa 1993)

C. Misleading- A jury instruction should not mislead the jury as it deliberates. *Vaughn v. Theo's Inc.*, 707 N.W.2d 337 (Iowa App. 2005); *Norton v. Adair County*, 441 N.W.2d 347 (Iowa 1989); *Sammons v. Smith*, 353 N.W.2d 380 (Iowa 1984).

D. Confusing- The jury instructions must give the jury a clear understanding of the applicable law so it may properly decide the issues before it. The instructions the court gives to the jury must present the applicable law so that the jury has a clear understanding of the issues it must decide. *Boyle v. Alum-Line, Inc.,* 710 N.W.2d 741, 748-49 (Iowa 2006) (citing *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)). Counsel may object on the grounds that the jury instructions are cumulative, confusing, and prejudicial because one instruction amounts to a restatement of another instruction offered to the jury. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2002).

E. Inconsistent- A jury should not be given instructions which are inconsistent with one another. When a court provides inconsistent instructions and the jury returns only a general verdict, it is impossible to tell which instruction the jury followed and this may mean reversal. *Childers v. McGee*, 306 N.W.2d 778, 780 (Iowa 1981).

F. Not Supported by the Evidence- A jury instruction must be supported by the evidence at trial. A trial court has the responsibility to submit only those instructions that have support in the record. *Field v. Palmer*, 592 N.W.2d 347 (Iowa 1999).

G. Not Specific- Jury instructions must be specific. Where a theory of negligence is involved, for an instruction to be sufficiently specific it must identify either:

a. a certain thing that the allegedly negligent person did which the party should not have done, or
b. a certain thing that party omitted to do which should have been done – *Balboa Ins. Co. v. Pixler Elec. of Spencer, Iowa, Inc.*, 484 N.W.2d 453, 454 (Iowa 1995).

Example: Insufficient comparative fault instructions – *In Balboa Ins. Co. v. Pixler*

H. Instructions as a Whole- Jury instructions are to be considered as a whole and not in isolation. *Anderson v. Webster City Community School Dist.*, 620 N.W.2d 263, 268 (Iowa 2000) (citing *Leaf v. Good Year Tire & Rubber Co.*, 590 N.W.2d 525, 536 (Iowa

1999)). All jury instructions when read as a whole must correctly explain the applicable law to the jury and not mislead the jury. *Id.* "Instructions must be considered as a whole, and if some part should not have been given, error is cured if the other instructions properly advise the jury as to the legal principles involved. An instruction is not confusing if a full and fair reading of all the instructions leads to the inevitable conclusion that the jury could not have mistaken the issue. Thus, if the jury has not been misled there is no reversible error." *Welter v. Humboldt County*, 461 N.W.2d 335, 339 (Iowa App. 1990) (citing *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986)).

III. POTENTIAL PROBLEMS WITH IOWA CIVIL JURY INSTRUCTION 900.1

1. There is a list.
2. It is a partial list.
3. It applies to only one party.
4. It stands alone in the instructions.
5. It is inconsistent with other instructions.
6. It creates other problems.

IV. NEBRASKA'S PERSPECTIVE

The drafters of the Nebraska Civil Jury Instructions left the *Heins* factors out of the instructions. In doing so, the Committee specifically recognized in its "Comments" section to NJI2d Civ. 8.26 the following:

> "The [*Hein*s] Court did not discuss whether these seven factors have any place in the jury instructions and, if so, what place they do have.
>
> "[L]isting [the *Hein*s factors] would give undue emphasis to some of the factors that may be considered or the list would have to be expanded or contracted depending on which items on the list are applicable to a given case."
>
> "In a routine negligence case the jury is not given instruction on a list of factors they may consider. In effect, invitee cases have always been negligence actions, and now licensee cases are as well."
>
> "It does not seem possible to draw up an all inclusive list of the things that the jury may consider when determining whether a defendant has exercised reasonable care. To draw up a partial list and tell the jury that they may consider these things, among other unspecified things, gives undue emphasis to the items on the list."
>
> "It is the position of the Committee that these seven factors do not have any place in the jury instructions. They are for attorney argument."

V. PRACTICAL CONSIDERATIONS

What is the defense to do?

Economic Loss Doctrine

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I. INTRODUCTION

The economic loss doctrine[1] is described as "one of the most confusing doctrines in tort law."[2] Iowa's version of the rule is not exempt from the confusion. The perplexity surrounding the rule inevitably leads to inconsistent application.[3] While some judges and lawyers have never heard of the economic loss doctrine, those who have become acquainted with the rule may not consider themselves so fortunate. Judges and lawyers often have difficulty understanding the rule, and mastering its application could well be called a feat. Still, unknowing business and insurance clients must live with the consequences of often unpredictable application of the rule.[4] This presentation attempts to make some sense of it.

II. ECONOMIC LOSS

Economic loss is made up of two types of loss: direct economic loss and indirect or consequential economic loss.[5] "Direct economic loss" generally means loss in value of the product itself.[6] In Iowa, it means "damage flowing directly from insufficient product quality."[7] This loss includes "ordinary loss of bargain damages."[8] In product cases, this loss is generally measured by the difference between the actual value of the goods

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[1] The economic loss doctrine is also commonly referred to as the economic loss rule. The Iowa supreme court has referred to it as both.

[2] *See* R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1789 (2000).

[3] *See* Erik S. Fisk, *Stigma Damages in Construction Defect Litigation: Feared by Defendants, Championed by Plaintiffs, Awarded by (Almost) No Courts—What Gives*?, 53 Drake L. Rev. 1029, 1043 (2005).

[4] *See* Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 Fla. B.J 34, 34 (1995) (noting that "it is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine.")

[5] *See* Gary L. Wickert, *Subrogation and the Economic Loss Doctrine: A 50 State Survey*, at 2, NASP SUBROGATOR, Spring/Summer 2007, *available at* http://www.mwl-law.com/CM/Resources/Economic-Doctrine-Article.pdf.

[6] *Id.*

[7] *Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 309 (Iowa 1995).

[8] *Id*.

accepted and the value they would have had if they had been as warranted.[9] In construction defect cases, this loss is generally measured by the cost of correcting the defects or completing the omissions.[10] In other words, the reasonable cost of reconstruction and completion in accordance with the contract.[11]

In contrast, "indirect or consequential economic loss" means all damages beyond direct economic loss caused by the defective product.[12] This loss includes loss of profits, loss of business reputation, and loss of goodwill.[13]

As will be discussed below, economic loss, as contemplated by the rule, is damage to a product itself (i.e., direct economic loss) and monetary loss caused by the defective product (i.e., indirect or consequential economic loss) that does not cause personal injury or damage to other property.[14]

III. THE DOCTRINE

The economic loss doctrine is a court-developed rule that a majority of U.S. state and federal courts have adopted.[15] In its traditional form, the rule bars tort recovery by plaintiffs suffering only economic loss. Put another way, plaintiffs cannot recover damages for economic loss in tort absent personal injury or property damage.[16] For

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[9] *Id*.; *see* Iowa Code § 554.2714.

[10] *See Service Unlimited, Inc. v. Elder*, 542 N.W.2d 855, 857 (Iowa Ct. App. 1995).

[11] *Busker v. Sokolowski*, 203 N.W.2d 301, 304 (Iowa 1972). Cost of repair is limited by the concept of economic waste. *Serv. Unlimited, Inc., 542 N.W.2d at 857*. For example, if the "defects can be corrected only at a cost grossly disproportionate to the result or benefit obtained by the owner, or if correcting the defect would involve unreasonable destruction of the builder's work, the proper measure of damage is the reduced value of the building." *Id.* The diminution in value is the difference between the value of the building if the contract had been fully performed and the value of the performance actually received. *Id*.

[12] *Wells Dairy, Inc. v. Amer. Indus.*, 762 N.W.2d 462, 476 (Iowa 2009); *see* Iowa Code § 554.2715 (defining consequential damages as any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise).

[13] *Beyond the Garden Gate, Inc.*, 526 N.W.2d at 309.

[14] *See* Wickert, *supra* note 5, at 2.

[15] *See id*. at 1.

[16] *See* Stewart I. Edelstein, *Beware The Economic Loss Rule*, at 1, TRIAL, June 2006, *available at* http://www.cohenandwolf.com/?t=40&an=4619&format=xml&p=3199.

example, when a product defect or failure causes damage to the product itself, but does not damage property other than itself or cause personal injury, tort recovery is barred.

As our Iowa supreme court recently observed in *Annett Holdings, Inc. v. Kum & Go, L.C.*, -- N.W.2d --, -- (Iowa 2011), the first noteworthy decision involving the economic loss doctrine is the U.S. Supreme Court case *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927), an admiralty decision authored by Justice Holmes. But, as the court points out in *Annett Holdings*, the rule did not originate in *Robins*:

> For well over a century, it has been a settled feature of American and English tort law that in a variety of situations there is no recovery in negligence for pure economic loss, that is, for economic loss unrelated to injury to the person or the property of the plaintiff.[17]

The rule originated in the products liability context.[18] Despite its origin, courts have given widespread application to the rule.[19] Iowa courts have applied the doctrine in a variety of cases as the doctrine continues to develop and evolve. As one scholar explains, "[J]udicial decisions [applying the rule] reflect an evolving body of law seeking to balance a party's right to pursue complete compensation for injuries with the potential of unlimited liability for financial losses."[20]

IV. PURPOSE

The purpose of the economic loss doctrine is to maintain the distinction between contract and tort remedies in situations in which both theories could apply.[21] The rule serves as the line between contract law, which protects bargained-for expectations, and tort law, which protects duties of care existing independent of any bargained-for

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[17] *See Annett Holdings*, -- N.W.2d at -- (citing Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. Rev. 823, 823 (2009)).

[18] *See* Edelstein, *supra* note 9, at 1.

[19] *See* Mark A. Olthoff, *If You Don't Know Where You're Going, You'll End Up Somewhere Else: Application of Comparative Fault Principles in Purely Economic Loss Cases*, 49 Drake L. Rev. 589, 589 (2001).

[20] *Id*.

[21] *See* Edelstein, *supra* note 9, at 2..

agreement.[22] As the Iowa supreme court recently explained, the rule prevents "litigants with contract claims from litigating them inappropriately as tort claims."[23] The court further explained that "[p]urely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions."[24] In practice, the rule prevents a party to a contract from circumventing agreed-upon contract remedies and seeking broader remedies under tort theory.

A common argument in favor of the rule is that it eliminates a tortfeasor's exposure to unlimited liability for economic loss.[25] This argument is based on the "perception that the policies behind tort law argue for manageable limits on recovery, maintaining that a physical harm requirement serves as a convenient touchstone for limiting recovery."[26] Court following this view usually "perceive[] the physical consequences of negligence as limited, but consider[] indirect economic injury as boundless."[27]

Another common argument in favor of the rule is that tort law should not be expanded to undermine basic contract principles.[28] In other words, as our supreme court has acknowledged, the rule is partly intended to prevent "the tortification of contract law."[29] "When two parties have a contractual relationship, the economic loss rule prevents one party from bringing a negligence action against the other over the first party's defeated expectations—a subject matter that parties can be presumed to have

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[22] *See id.*; Wickert, *supra* note 5, at 2.

[23] *Van Sickle Const. Co. v. Wachovia Comm. Mortg., Inc.*, 783 N.W.2d 684, 693 (Iowa 2010).

[24] *Id*. at 693.

[25] *See* Olthoff, *supra* note 11, at 592-93.

[26] Kelly M. Hnatt, *Purely Economic Loss: A Standard for Recovery*, 73 Iowa L. Rev. 1181, 1182 (1988).

[27] *Id*.

[28] *See* Edelstein, *supra* note 9, at 2.

[29] *Annett Holdings*, -- N.W.2d at --.

allocated between themselves in their contract."[30] Courts following this view usually expect parties to a contract to protect themselves through negotiations.[31] It is argued that imposition of tort liability, in these cases, would tend to burden the parties entering into a contract with obligations not voluntarily assumed.[32] Courts observe that when a party enters into a contract, that document should control the party's rights and duties.[33]

V. VARIATIONS

Despite the simplicity of conceptualizing a bright line between tort and contract theories, it has not been easy for courts to create and apply such a bright line rule.[34] As a result, courts have developed several variations of and exceptions to the rule.[35]

A. Majority Rule

The majority of states follow the rule in its traditional form. In these states, a plaintiff cannot recover purely economic damages in tort, no exception.[36] The focus of the majority rule is on the *type* of damage.[37] For example: A product fails, resulting in lost revenue to the business that owns the product. Under the majority rule, the business would be barred from recovering lost profits in tort against the manufacturer of the product because the business sustained only economic loss—lost profits. As even this simple example demonstrates, the "stringent application of the majority rule has its drawbacks."[38] Specifically, it fails to protect victims from unforeseeable dangers, dilutes the underlying tort policy of protection against physical injury, significantly limits the discretion of the courts and leads to arbitrary results in certain circumstances.[39]

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[30] *Id*. (citations omitted).
[31] *See* Olthoff, *supra* note 11, at 592-93.
[32] *See id*.
[33] *Annett Holdings*, -- N.W.2d at --.
[34] *See* Edelstein, *supra* note 9, at 2.
[35] *See id*.
[36] *See* Wickert, *supra* note 5, at 4.
[37] *See id*. at 5.
[38] *Id*. at 4.
[39] *See id*.

B. Intermediate Rule

Over time, some courts have created various exceptions to the majority rule, ultimately resulting in an intermediate rule.[40] These courts, including Iowa courts, follow the majority rule in its traditional form, but allow recovery of tort damages in certain circumstances.[41] In contrast to the majority rule, where the focus is on the *type* of damage, the focus of the intermediate rule is on the *nature of the defect or the way in which the failure occurred*.[42] Focusing on the nature of the defect is an attempt to differentiate between the disappointed consumer and the endangered customer.[43] For example: A product fails due to a manufacturing defect, resulting in lost revenues to the business that owns the product. Under the intermediate rule, the business would be barred from recovering lost profits in tort against the manufacturer because the damages were the result of the failure of a product to function as intended and were therefore contractual in nature. But if the same product explodes due to a manufacturing defect, the business may be entitled to recover lost profits in tort against the manufacturer because the damages were "sudden and dangerous" and were therefore tortuous in nature.[44] "The intermediate rule discourages dangerous defects and still provides a limitation on liability necessary to preserve the integrity of the consumer transaction and the agreement of sale entered into between the buyer and the seller."[45] By considering the nature of the defect, the intermediate rule attempts to offer the equitable justice that the majority rule does not.[46]

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[40] *See id*.
[41] *See id*. at 5.
[42] *See id*.
[43] *See id*.
[44] Whether the business would *actually* be entitled to recover lost profits in tort against the manufacturer could depend on whether the explosion damaged only the product itself, or damaged "other property." This important distinction is discussed below.
[45] *Id*.
[46] *See id*.

C. Minority Rule

A minority of states simply do not apply the rule.[47] Plaintiffs in these states are not limited in their ability to recover in tort for economic loss.[48] For example: A product fails, resulting in lost revenues to the business that owns the product. Under the minority rule, the business could recover lost profits in tort against the manufacturer.

VI. "OTHER PROPERTY" DAMAGE

A complicating aspect in the application of the rule is determining whether "property damage" exists. In making this determination, courts distinguish between damage to the product itself and damage to "other property."[49] Most courts bar tort recovery where damage is limited to the product itself.[50] Some courts allow tort recovery where there is damage to the product itself and to other property when the damage is caused by a sudden and dangerous occurrence.[51] And still other courts allow tort recovery where there is damage to the product itself and to other property, even in the absence of a sudden and dangerous occurrence.[52]

The determination of whether damage is limited to or extends beyond the product often involves application of the "integrated system rule," which has become the general rule.[53] The integrated system rule provides that if a defective product causes damage to the system of which it is a part, the resulting damage does not constitute damage to "other property" sufficient to permit the injured party to pursue tort remedies.[54] For

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[47] *Id*. at 3.
[48] *Id*.
[49] *See id*. at 5.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] The integrated system rule was initially set forth by the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 860-61 (1986) (determining defective valves that caused damage to a ship's turbines that, in turn, damaged the propulsion system did not constitute damage to "other property" and was therefore economic loss).
[54] *See* Ralph C. Anzivino, *The False Dilemma of the Economic Loss Doctrine*, Faculty Publication, Paper 2, at 1122, 2010, *available at* http://scholarship.law.marquette.edu/facpub/2.

example: A component part of a product explodes due to a manufacturing defect, causing damage to the component part and to the product but does not damage anything else. Although the defect did cause property damage (by damaging the product), under the integrated system rule, the damage is not the type of damage sufficient for most courts to allow tort recovery because the damage is limited to the integrated system—the product. In this situation, damage limited to the product itself amounts to loss of product and is appropriately remedied in contract.[55]

VII. IOWA'S DOCTRINE

A. *Nebraska Innkeepers*—Traditional Form

The Iowa supreme court considered the economic loss doctrine as an issue of first impression in *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 125 (Iowa 1984). *Nebraska Innkeepers* involved the construction of the Siouxland Veteran's Memorial Bridge, which spans the Missouri River and connects Sioux City, Iowa, and South Sioux City, Nebraska.[56] After the bridge was completed and opened to public traffic, cracks were discovered in a steel structural member of the bridge, rendering it unsafe.[57] The bridge was closed to public traffic.[58] *Id*.

The plaintiffs were associated with a motel and restaurant located in South Sioux City, Nebraska. *Id*. The defendant served as the general contractor on the project and also fabricated and sold structural steel members installed in the bridge. *Id*. The plaintiffs sought $65,000,000 in damages for themselves and all people in Sioux City and South Sioux City associated with restaurants, bars, motels, and other retail establishments who sustained damages as a result of the closing of the bridge. *Id*. Discovery established that the plaintiffs suffered economic loss, including lost profits,

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[55] *See id*.
[56] *Nebraska Innkeepers*, 345 N.W.2d at 125.
[57] *Id.*
[58] *Id.*

reduced income, increased expenses, and diminution of value of real estate and investment interests, but no personal injury or property damage.[59]

The relevant issue before the supreme court concerned the plaintiffs' negligence theory.[60] The plaintiffs contended that they should be able to "recover for their purely economic or businesses losses sustained as a result of non-intentional harm to a public bridge, resulting in its closing, even though no physical or direct harm occurred to their property or persons."[61] Because this was an issue of first impression, the court analyzed cases from other jurisdictions.[62] In synthesizing these cases, the court determined "the common thread running through these cases establishes unequivocally that a plaintiff cannot recover for purely economic loss, in the absence of physical injury, against a defendant who has negligently caused the closing of a public bridge or river."[63] The Court held, in accordance with the majority of jurisdictions, that the plaintiffs could "not maintain a claim for purely economic damages arising out of the defendant's alleged negligence."[64] With this holding, the court essentially adopted the economic loss doctrine in its traditional form.[65]

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[59] *Id*. The plaintiffs did not own the bridge, nor did they have a contractual relationship with the defendant. *Id*.

[60] *Id*. The plaintiffs sought recovery on theories of ordinary negligence, *res ispa loquitur*, strict liability in tort, and breach of implied warranty of merchantability and fitness for a particular purpose in connection with the manufacture/fabrication of the steel structural member and the erection of the bridge. *Id*.

[61] *Id*. at 126.

[62] *Id*.

[63] *Id*. at 128.

[64] *Id*.

[65] *But see Annett Holdings*, -- N.W.2d at -- (Wiggins, J., dissenting) ("In reality, we did not adopt the economic loss rule [in *Nebraska Innkeepers*]. We applied the proximate-cause-remoteness doctrine and called it the economic loss rule.").

B. *Nelson*—"Refined" to the Intermediate Rule

Because the plaintiffs in *Nebraska Innkeepers* sustained no property damage, the court applied the traditional form of the rule, focusing entirely on the type of damage claimed.[66] As a result, the absence of property damage essentially became the determinative factor in the court's application of the rule. In the undisputed absence of property damage, the court appeared to have no difficulty determining the plaintiffs' claimed "business loss" damages were purely economic and therefore not recoverable in tort. However, *Nelson v. Todd's, Ltd.*, 426 N.W.2d 120, 123 (Iowa 1988) presented a more complex application of the rule. Unlike the plaintiffs in *Nebraska Innkeepers*, the plaintiffs in *Nelson* did claim that they sustained property damage. As such, the court was required to consider, for the first time, *what* constituted property damage for purposes of the rule. In doing so, the court "refined" its position on pure economic loss claims, adopting a tort-contract analysis.[67]

The plaintiffs in *Nelson* owned a butcher shop.[68] The business offered custom butchering, retail sale of cured meat products, and freezer-locker space rental.[69] The plaintiffs purchased a curing agent produced by the defendant to cure the company's meat products.[70] The purpose of the curing agent was to kill bacterium that can spoil meat during the smoking process.[71] The active ingredient in the cure, according to the label, was sodium nitrate.[72] Without sodium nitrate, smoked meat spoils quickly because bacteria thrive at the warm temperature required to smoke meat.[73]

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[66] *Nebraska Innkeepers*, 345 N.W.2d at 125.
[67] *See Determan v. Johnson*, 613 N.W.2d 259, 262 (Iowa 2000).
[68] *Nelson*, 426 N.W.2d at 121.
[69] *Id*. at 122.
[70] *Id*. at 121.
[71] *Id*.
[72] *Id*.
[73] *Id*.

The plaintiffs received and used a particular batch of curing agent that, as later tests revealed, contained no sodium nitrate.[74] Consequentially, substantial amounts of meat prepared and sold by the plaintiffs spoiled and was returned by customers.[75] The plaintiffs alleged the incident significantly damaged their business reputation, which led to a substantial decline in meat sales.[76] The plaintiffs claimed damages for lost profits and loss of value of their meat processing equipment and property.[77]

The relevant issue on appeal concerned the plaintiffs' ability to claim strict liability in tort to recover damages for purely economic losses.[78] While the court had no difficulty extending the rule adopted in *Nebraska Innkeepers* to strict liability claims (in addition to ordinary negligence claims), the court observed that the plaintiffs' alternative contention—that the curing agent caused physical harm—presented a "difficult quandary" with a conclusion "not so easily reached."[79] The plaintiff asserted that the meat curing agent caused physical harm to the plaintiffs' property by allowing bacteria to destroy their meat before it was sold.[80] Based on this assertion, the plaintiffs contended that their economic losses were consequential damages flowing from the harm to their property.[81] The court admitted that "[f]ew courts have squarely faced the question presented to us here: whether strict tort liability is applicable when a manufacturer produces a product designed to prevent harm to a purchaser's property, and the product fails to work resulting in the very harm sought to be prevented."[82]

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[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id.* The plaintiffs' claim for loss of value of their meat processing equipment and property was based on their contention that the building housing the butcher shop was built specially as a meat locker and butchering facility and would be worth considerably less if sold for other purposes. *Id*. The plaintiffs also claimed damages for the value of the meat that spoiled, but the district court did not submit this claim to the jury due to insufficient evidence. *Id*.
[78] *Id*. at 123.
[79] *Id*.
[80] *Id.*
[81] *Id.*
[82] *Id.*

Instead of focusing on the *type* of damage (i.e., the mere presence or absence of physical harm) as it was able to in *Nebraska Innkeepers*, the court analyzed cases from other jurisdictions in which courts focused on the *nature of the defect* in "relation to what the product was supposed to accomplish."[83] At the outset of a lengthy analysis, the court cited with approval the following reasoning and illustration from *Fireman's Fund Am. Ins. Cos. v. Burns Elec. Sec. Serv.*, 417 N.E.2d 131, 133 (Ill. App. 3d 1980):

> We see no reason to make the presence or absence of physical harm the determining factor; the distinguishing central feature of economic loss is not its purely physical characteristic, but its relation to what the product was supposed to accomplish. For example, if a fire alarm fails to work and a building burns down, that is "economic loss" even though the building was physically harmed; but if the fire is caused by a short circuit in the fire alarm itself, that is not economic loss.[84]

The court explained that the essence of this reasoning is that some losses are within the purview of contract law principles and others within tort law principles.[85] The court then cited with approval the following explanation from the *Fireman's* decision, which discusses the distinction between tort and contract:

> When good are sold, their soundness is the core of the bargain. It is for the parties to decide what the consequences will be if the bargain founders. An entire body of law, contracts—of which product warranties is a part—is available to govern those areas of the relationship concerning which the bargain is silent. When a buyer loses the benefit of his bargain because the goods are defective . . . he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.[86]

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[83] *Id*. at 124 (citing *Fireman's*, 417 N.E.2d at 133).

[84] *Id*. at 124 (citing *Fireman's*, 417 N.E.2d at 133).

[85] *Id*.

[86] *Id*. (citing *Fireman's*, 417 N.E.2d at 133-34). The court also agreed with a concurring opinion in *Lobianco v. Property Protection Inc.*, 437 A.2d 417 (Pa. Super. 1981), which considered safety as an aspect of the tort-contract analysis. The court acknowledged that the concurrence in *Lobianco* noted that the prevailing interpretation of "defect" in tort law is "that the product does not meet the reasonable expectations of the ordinary consumer as to its safety." *Id*. at 124 (citing *Lobianco*, 437 A.2d at 426). In characterizing the nature of the plaintiff's loss, the court reiterated:

> The malfunction of the burglar alarm in the case did not render the alarm *unsafe*, although it certainly made it ineffective. The loss suffered . . . was not physical injury resulting from an unsafe product, but rather, the foreseeable consequence of a malfunctioning burglar alarm.

Id. (quoting *Lobianco*, 437 A.2d at 426).

Following its review of *Fireman's*, as well as *Lobianco v. Property Protection Inc.*, 437 A.2d 417 (Pa. Super. 1981), the court sought to characterize the harm to the plaintiffs' meat to determine whether contract law or tort law was best suited to the nature of the loss claimed, focusing specifically on anything dangerous to the user in the nature of the defect.[87] In making this characterization, the court cited with approval a federal court of appeals' use of a factored-approached to establishing the line between contract and tort:

> The line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.[88]

The court agreed that the line to be established is between tort and contract, rather than between physical harm and economic loss.[89] The court explained that contract remedies apply when the "loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause."[90] In contrast, the court explained, tort remedies apply when "the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect." *Id*. In applying the tort-contract analysis, the court concluded that the harm to the plaintiffs' meat in *Nelson* was contractual in nature—the foreseeable result from a failure of the product to work properly because of a defect or omission from the product.[91] *Id*.

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[87] *Id*.

[88] *Id*. at 124-25 (quoting *Pa. Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1173 (3d. Cir. 1981)).

[89] *Id*. at 125.

[90] *Id*.

[91] Notably, the court explained for illustrative purposes that had the cure caused chemical burns to the plaintiffs' hands or damaged their meat processing equipment, tort would then be the appropriate remedy. *Id*.

Accordingly, the court held that the trial court erred in submitting the plaintiffs' strict liability claim to the jury. *Id*.[92]

C. *Determan* and Others

While *Nelson* was a products case, the tort-contract analysis developed in *Nelson* has served as the blueprint for Iowa courts' application of the economic loss doctrine in other types of cases, including construction defect cases.[93] It is well-established in Iowa that the rule applies in construction defect cases.[94] In fact, in recent years, the rule has undergone the most development in the construction defect arena.

i. *Determan*

The leading Iowa supreme court decision applying the rule in the construction defect context is *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000). In *Determan*, the plaintiff purchased a house from the defendants.[95] After several years of living in the house, the plaintiff discovered sagging in the roof.[96] Later investigation revealed inadequate roof support and improper vapor barrier installation.[97] These defects caused sagging in the roof, cracks in the walls and moisture spots on the walls and ceilings.[98] Furthermore, the plaintiff's experts opined that the roof presented a danger of collapse,

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[92] The court re-affirmed its tort-contract analysis in *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103 (Iowa 1995). In *Tomka*, the plaintiff operated a custom cattle feeding operation. *Id*. at 105. The plaintiff sued the manufacturer of a growth hormone product in tort and strict liability for lost profits alleging the product failed to work in that the cattle did not gain weight as they should have. *Id*. at 105-06. The court explained that "defects of suitability and quality are redressed through contract actions and safety hazards through tort actions." *Id*. (citations omitted). The court found the damages sustained by the plaintiff clearly fell within contract theory, not tort theory. *Id*. at 107.

[93] Although there has been substantial litigation involving the rule in construction defect cases in other jurisdictions, no uniform application has been established. *See* Olthoff, *supra* note 11, at 594. As such, the rule and its exceptions vary among jurisdictions.

[94] Notably, some courts have recognized that the rule applies only in a commercial context, *see*, *e.g.*, *Bowling Green Mun. Util. v. Thomasson Lumber Co.*, 902 F. Supp. 134, 136 (W. D. Ky. 1995), and not to a consumer who purchases goods for personal, residential use, *see Frankenmuth Mut. Ins. Co., v. Ace Hardware Corp.*, 899 F. Supp. 348, 351 (W.D.Mich. 1995). But this is not the case in Iowa.

[95] *Id*. at 260.

[96] *Id*.

[97] *Id*.

[98] *Id*. at 263.

despite the fact the roof had not actually collapsed.[99] The plaintiff sought recovery under several negligence theories.[100]

The court began its analysis by noting its adoption in *Nebraska Innkeepers* of the general rule—the doctrine its traditional form—that a plaintiff "cannot maintain a claim for purely economic damages arising out of a defendant's alleged negligence."[101] The court then acknowledged that in *Nelson* it had "refined"[102] the doctrine by distinguishing between tort and contract instead of physical harm and economic loss.[103] The court confirmed what it had explained in *Nelson*—that tort law generally applies when damage is caused by "a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect."[104] And contract law, in contrast, generally applies when the loss relates to "a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause . . . ."[105]

The court then reiterated its reliance on the multi-factor test set forth in *Nelson*, which includes consideration of the nature of the defect, the type of risk, and the manner in which the injury arose, to distinguish between tort and contract in determining whether the "safety-insurance" policy of tort law or the "expectation-bargain" protection policy of warranty law better applies.[106] Significantly, the court stated that in addition to the requirement that the damage be caused by a sudden or dangerous occurrence, the

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[99] *Id*. at 261, 263.

[100] *Id*. at 261. The plaintiff also sought recovery under several non-tort theories, but the district court dismissed these theories. *Id*. at 261, fn 1.

[101] *Id*. (quoting *Nebraska Innkeepers*, 345 N.W.2d at 128).

[102] The court's refined doctrine was essentially an adoption of the intermediate rule, which focuses on the nature of the claimed loss in relation to what the product was supposed to accomplish.

[103] *Id*. (quoting *Nelson*, 426 N.W.2d at 123).

[104] *Id*.

[105] *Id*.

[106] *Id*.

damage must extend beyond the product itself to "other property" for tort recovery to be appropriate.[107]

The court recognized that the plaintiff's damages, which were limited to the cost of repairing the defects, resulted from the deterioration of the house due to poor construction.[108] The court characterized these damages as being the result of unfulfilled expectations with respect to the quality of the house.[109] And, although the plaintiff contended the risk of roof collapse created a danger to occupants of the house, the court rejected the contention because the roof had not collapsed the danger had not come to pass.[110] Accordingly, the court concluded that the plaintiff damages were not caused by any "sudden or dangerous occurrence."[111] The court further concluded that the damage caused by the defects was limited to the house itself and did not extend to other property.[112] Having determined the plaintiff's damages were contractual in nature, and did not extend beyond the house itself to other property, the court applied the rule to bar the plaintiff's tort claims.[113]

ii. *Flom*, *Richards*, and *Lipps*

The court's application of the doctrine in *Determan* was in accordance with its earlier decision in *Flom v. Stahly*, 569 N.W.2d 135 (Iowa 1997). Although *Flom* involved

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[107] *Id*. (citing *Am. Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 438-39 (Iowa 1999)). In *American Fire*, a truck caught fire causing damage to the truck and its contents. *American Fire*, 588 N.W.2d at 438. The court permitted tort recovery because the damage was caused by a sudden and dangerous occurrence—a fire—and the damage extended beyond the truck to other property—the contents within the truck. *Id*. at 438-39.

[108] *Determan*, 613 N.W.2d at 263.

[109] *Id*.

[110] *Id*.

[111] *Id*. (citing *Nelson*, 426 N.W.2d at 125).

[112] *Id*. at 264. Although the court did not explain the basis for this conclusion or expressly refer to the integrated system rule, the court's treatment of each individual product installed in the house as part of the integrated system of the entire house is in accordance with the rule. (Recall, the integrated system rule provides that if a defective product causes damage to the system of which it is a part, the resulting damage does not constitute damage to "other property" sufficient for most courts to permit the injured party to recover in tort.)

[113] *Id*.

different issues on appeal than *Determan*,[114] both cases involved similar facts. In *Flom*, the plaintiffs purchased a house from the defendants.[115] After, the plaintiffs discovered several construction defects in the house.[116] Specifically, improper construction of the walls caused rotting wood and moisture spots in the stucco.[117] Also, improper installation of the heating system caused the ductwork to disintegrate.[118] The Court determined, like it later did in *Determan*, that the plaintiffs' damages were contractual in nature, and did not extend beyond the object of the contract—the house—to other property.[119] The Court accordingly concluded that the plaintiffs' claim was not subject to Iowa's comparative fault statute.[120]

In *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649 (Iowa Ct. App. 1996), the Iowa court of appeals engaged in a similar analysis and reached a similar conclusion. In *Richards*, the plaintiff contracted with a homebuilding company for the construction of a house.[121] The homebuilder purchased brick from the defendant brick company.[122] Years after completion of the house, the plaintiff noticed bricks chipping and cracking.[123] The plaintiff brought claims based on negligence and strict liability, among other grounds.[124]

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[114] In *Flom*, the relevant issue on appeal was whether the plaintiffs' recovery should be reduced by their own fault under Iowa's comparative fault statute. *See Determan*, 613 N.W.2d at 263. The court determined that the comparative fault statute was limited to liability in tort. *Flom*, 569 N.W.2d at 141. After making this determination, the court considered whether the plaintiffs' claim was "contractual in nature or cognizable in tort." *Id*.

[115] *Id.* at 138.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id*. at 141.

[120] *Id.*

[121] *Richards*, 551 N.W.2d at 650.

[122] *Id*.

[123] *Id*.

[124] *Id*.

The plaintiff contended that damages extended beyond the defective brick itself to other parts of the house.[125] But the court rejected this argument for two reasons. First, the plaintiff did not produce evidence that the brick caused damage to other parts of the house.[126] Contrary to the plaintiff's contention, record evidence revealed damage was limited to the product itself.[127] Second, the plaintiff's damages—which the court concluded were the result of the plaintiff's disappointed expectations with respect to the quality and failure of the bricks—were contractual in nature.[128] The court consequentially barred tort recovery.[129]

The court reached a similar conclusion in *Lipps v. Hjelmeland Builders, Inc.*, 2008 WL 4877458 (Iowa Ct. App. Nov. 13, 2008) (unpublished decision). In *Lipps*, the plaintiff homeowners sued the defendant subcontractor bricklayer who performed brickwork on the exterior of the house.[130] The plaintiffs sought damages for losses sustained when water entered their house due to the defendant's alleged negligence in erecting the brick exterior.[131] The plaintiffs contended the defective bricks caused damage extending beyond the bricks themselves to other areas of the house, which the plaintiff asserted constituted damage to "other property."[132] The court rejected the plaintiffs' argument, but did not by applying an integrated system rule analysis. Instead, the court cited *Determan* for the proposition that defective products that cause damage to other parts of the house result from unfulfilled expectations with respect to the quality of the home.[133] The court

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[125] *Id*. at 651.
[126] *Id*.
[127] *Id*. Even if the plaintiff *had* produced evidence that the defective brick caused damage to other parts of the house, under the integrated system rule, which the Court later essentially followed in *Flom* and *Determan*, the plaintiff's contention still would have likely failed. The other parts of the house allegedly damaged would merely be considered integrated parts of the entire house, and therefore would not likely constitute damage to other property.
[128] *Id*.
[129] *Id*.
[130] *Lipps*, 2008 WL 4877458, at *2.
[131] *Id.*
[132] *Id.*
[133] *Id.*

determined the plaintiffs' damages were the foreseeable result of the failure of the exterior brick to protect the home from the elements.[134] The court held contract law to be the appropriate remedy.[135]

From *Determan*, *Flom*, *Richards*, and *Lipps* it is apparent that Iowa follows the integrated system rule in the construction defect arena. That is, when defective installation of a product into a house or other building causes damage to other components of the structure, the damage does not constitute other property damage.

D. Exceptions

If a claim falls under an exception to the rule, economic losses are recoverable in tort absent personal injury or property damage. Several exceptions to Iowa's economic loss doctrine exist.

i. Professional Negligence

The most developed exception is the professional negligence exception. The leading Iowa supreme court case involving the professional negligence exception is *Kemin Indus., Inc. v. KPMG Peat Marwick LLP*, 578 N.W.2d 212 (Iowa 1998). *Kemin* involved a professional negligence claim brought against an accounting firm. In *Kemin*, the court determined that its holding in *Nelson* was limited to the application of the rule in cases involving strict liability in tort, and did not address the applicability of the rule in cases involving "the specialized situation of professional negligence."[136]

The court acknowledged that "[a]lmost all relationships involving professional negligence services arise from an offer and acceptance that would constitute a simple contract."[137] The court explained, however, that "a claim that a provider of professional services has failed to meet the standard of care that the law has placed on that party is

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[134] *Id.*
[135] *Id.*
[136] *Kemin*, 578 N.W.2d at 220.
[137] *Id*. at 221.

essentially a negligence cause of action."[138] The court determined that "to hold otherwise would render inapplicable the provisions of chapter 668 that are specifically tailored to actions involving professional negligence."[139] Many subsequent Iowa state and federal decisions cite *Kemin* for the broad proposition that the rule does not apply to professional negligence claims, without limiting the exception to certain types of professionals.[140]

Iowa state courts have not specifically addressed whether architects and engineers fall within the professional negligence exception.[141] But *Kemin* almost certainly brings architects and engineers within the purview of its holding and, therefore, within the professional negligence exception.[142]

ii. Negligent Misrepresentation and Agency

The economic loss doctrine does not apply to negligent misrepresentation claims.[143] Also, "when a duty of care arises from a principal-agent relationship, economic losses may be recoverable."[144]

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[138] *Id*.

[139] *Id*. (referring to Iowa Code § 668.11 (disclosure of expert witnesses in cases involving licensed professionals) and § 668.12 (statute of repose as applied to licensed engineers and architects)).

[140] *See*, *e.g.*, *Van Sickle Const. Co. v. Wachovia*, 783 N.W.2d 684, 693, n.5 (Iowa 2010) (acknowledging that purely economic losses are recoverable in professional negligence claims against attorneys and accountants); *John T. Jones Const. Co. v. Hoot General Const.*, 543 F. Supp. 2d 982, 1009 (S. D. Iowa 2008) (stating "[t]he economic loss rule does not apply to claims of professional negligence."); *Burns Philp Inc. v. Cox, Kliewer & Co., P.C.*, 2000 WL 33361992, at *7 (S.D. Iowa 2000) ("This Court believes that the Iowa Supreme Court intended for the economic loss doctrine to not apply to claims of professional negligence").

[141] *See* Roger W. Stone, *Architects' and Engineers' Liability Under Iowa Construction Law*, 50 Drake L. Rev. 33, 43 (2001).

[142] In Iowa, "[a] design engineer may be held liable for failing to exercise the ordinary skill of the profession in drafting plans and specifications or in supervising construction work." *Shepherd Components., Inc. v. Brice Petrides-Donohue & Assoc., Inc.,* 473 N.W.2d 612, 615 (Iowa 1991) (citation omitted). The extent of that duty is not limited by privity of contract. Instead, duty extends to those who would foreseeably rely on the engineer's services, or be harmed by their negligent performance. *John T. Jones Const. Co. v. Hoot Gen. Const.*, 543 F. Supp. 2d 982, 1009 (S.D. Iowa 2008), *aff'd by John T. Jones Const. Co. v. Hoot Gen. Const. Co., Inc.*, 613 F.3d 778 (8th Cir. 2010). A claim alleging plans and specifications prepared by an architect or engineer were defective and did not meet the appropriate standard of care is a negligence claim. Stone, *supra* note 141, at 40.

[143] *Van Sickle*, 783 N.W.2d at 692, n.5.

VIII. PRACTICAL CONSIDERATIONS

In practice, the economic loss doctrine is raised most often in a motion for summary judgment. While the doctrine can be raised in a motion to dismiss, the appropriateness depends on the nature of the allegations and the specificity of the petition. In light of Iowa's notice pleading standard, a motion for summary judgment is often the most appropriate way to raise the rule as a defense. In any event, the rule can be re-raised in a motion for directed verdict.

Plaintiffs' attorneys often plead both contract and tort theories as a matter of course, no matter the nature of the claimed damage. Defense attorneys should raise the rule in order to, at a minimum, "clean up" the pleadings before trial by knocking out an inappropriately pled tort theory.

Plaintiffs often seek tort recovery when the plaintiff has contractually waived recovery for consequential damages, or the defendant has contractually disclaimed or limited liability for consequential damages. Contractual waivers, disclaimers, and limitations of damages are generally enforceable in Iowa, absent unconscionability.[145] Similarly, plaintiffs often seek tort recovery when a warranty does not provide adequate coverage for a loss.[146] In these cases, plaintiffs' ability to recover consequential damages in contract could be barred or severally limited. Defense attorneys should raise the rule in these cases to prevent plaintiffs from circumventing contract and warranty limitations to seek consequential damages in tort.

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[144] *Annett Holdings*, -- N.W.2d at -- (citing *Langwith v. Am. Nat'l Gen. Ins. Co.*, 793 N.W.2d 215, 222 (Iowa 2010)).

[145] *See* Iowa Code § 554.2719 (3) (stating that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable"); Bruner & O'Connor of Construction Law § 19:52, Agreed Upon Remedies and Damages Measures (2002).

[146] On this point it is important to note that a non-privity purchaser cannot maintain a suit for breach of implied warranties, including merchantability and fitness for a particular use, from a manufacturer where the only damages sought are for consequential economic loss. *See Tomka*, 528 N.W.2d at 108.

Because Iowa's comparative fault statutes do not apply to tort claims, the rule often impacts claims for contribution among co-defendants and third-parties. Contribution requires common liability.[147] If the rule applies to bar a plaintiff's negligence claim against a party, that party may not be liable to another for contribution under Iowa's comparative fault statue for the plaintiff's damages due to lack of common liability. This often has serious implications in third-party practice.

[147] Section 668.5(1) governs contribution. It provides:

> A right of contribution exists between or among two or more persons *who are liable upon the same indivisible claim for the same injury, death, or harm,* whether or not judgment has been recovered against all or any of them.

Id. (emphasis added). Section 668.5(1) requires the party seeking contribution have "common liability" with the contributor. *See Estate of Ryan v. Heritage Trails Assoc., Inc.*, 745 N.W.2d 724, 730 (Iowa 2008). "Common liability exists when the injured party has a legally cognizable remedy against both the party seeking contribution and the party from whom contribution is sought." *Id.*

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Case Law Update III

Employment, Government, Damages,
Contract, Commercial, Constitutional

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EMPLOYMENT

Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) (Appel)

Facts: Swiss Colony employee who worked 30 hour per week was injured, resulting in amputation of his left leg below the knee. The worker's compensation deputy calculated the employee's wages under Iowa Code § 85.36(9), which pertains to part-time employees. Before using this method, the deputy must make a preliminary finding that the employee earned no wages or less than the usual weekly earnings of a regular full-time adult in the same line of industry and locality. There was no such evidence in the record. The deputy based his belief that the employee was part-time on his personal knowledge of the average work week. The employer overpaid the employee for benefits prior to the commissioner's decision and sought a credit for those overpayments pursuant to Iowa Code § 85.34(5).

Holding: Where the hearing record is inadequate, a remand for additional evidence is not appropriate and the issue will be decided adversely to the party bearing the burden of proof, unless there are good reasons for the failure to present evidence. In addition, Iowa Code § 85.34(5), allowing an employer credit for overpayment of benefits, applies to all overpayments, including weekly benefits, and not just the entire benefit award.

Discussion:

Calculation of Benefits

The commissioner erred when, despite a clear lack of evidence in the record, he decided that that an average work week consisted of forty hours for purposes of analysis under Iowa Code § 85.36(9). Whether an employee works a forty-hour week is not the sole criterion for determining whether he earns less than similar laborers in his field. Because there was no evidence of the usual weekly earnings of laborers in the employee's field, the deputy's finding regarding the employee's part-time status is unsupported by substantial evidence.

Remand is appropriate only for recalculation of benefits under another method, not for additional evidence regarding wages. The precedent that required the deputy to make a preliminary finding that the employee earned less than the usual weekly earnings of a laborer in his industry and locality was decided twenty years earlier and there was no good reason for the absence of such evidence at the hearing.

Credit for Overpayment of Benefits

The Court examined Iowa Code § 85.34(5), which allows an employer to take a credit for overpayment of benefits. The plain language of the statute allows a credit for overpayment of "any weekly benefits" against payments for subsequent injuries. The use of the word "any" requires an expansive interpretation. Accordingly, the employer is entitled to a credit for overpayment of weekly benefits only as against future injuries, but not with regard to the overall payment for the instant injury.

Andover Volunteer Fire Dept v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75 (Iowa 2010) (Cady)

Facts: Farm employee, who was also a volunteer fire fighter, attempted to rescue farm owner who fell into manure pit while both were working on the farm. Employee died due to anoxic brain injury incurred in attempted rescue. Farm worker's compensation carrier paid benefits to the employee's estate and sought indemnification from volunteer fire department worker's compensation carrier. The farm carrier argued the employee summoned himself to duty and was acting as a volunteer fire fighter when the fatal injuries arose, and claimed that the fire department's carrier was responsible for the benefits paid to his estate.

Holding: A volunteer fire fighter is summoned to duty and placed in his course of employment as a fire fighter only when he is called to duty by a third party authorized by the fire chief and that call is communicated to him.

Discussion:
Under the general scheme of worker's compensation, employers are required to pay only for injuries that "arise out of and in the course of employment." The statute specifies that a volunteer fire fighter's injuries are in the "course of employment" if the injuries are sustained between when the fire fighter is summoned to and discharged from duty. In this context, "summoned" denotes a command or call from a third party, as the statute does not indicate the Legislature intended to use anything other than the plain meaning of the word. Accordingly, a volunteer fire fighter must be called to duty by a third party authorized by the fire chief before injuries that arise in rescue efforts are covered by worker's compensation. A summons places a volunteer fire fighter in the "course of employment" only once it is communicated to the firefighter.

Cincinnati Insurance Companies v. Kirk, 2011 WL 2041818 (Iowa Ct. App. 2011)

Facts: Employee claimed arm injury arose out of his employment. Worker's compensation carrier approved his claim and paid medical treatment and indemnity benefits. The carrier conducted surveillance when the claimant's condition did not improve as expected and discovered that he appeared to be intentionally hurting himself prior to medical appointments. The carrier sued the claimant on allegations of fraudulent misrepresentation, unjust enrichment, money had and received, and restitution. The claimant sought dismissal, arguing that the matter fell within the exclusive jurisdiction of the Worker's Compensation Commissioner and the District Court therefore lacked jurisdiction.

Holding: The District Court has jurisdiction over employer's claim that worker's compensation claimant engaged in fraudulent conduct because there is no adequate remedy under the Workers' Compensation Act for such a claim.

Discussion:
The Workmen's Compensation Act does not provide an adequate remedy for the insurance carrier in this matter. Under the Act the carrier may claim a credit toward future payments for

overpaid indemnity benefits, but not seek repayment of benefits wrongfully paid. This remedy is inadequate because it could allow the worker to profit, particularly where the worker is no longer employed by the same employer. Similarly, the Act provides no mechanism for the carrier to seek repayment of medical benefits obtained by fraud. Finally, the Act provides no remedy for the carrier to seek punitive damages due to the employee's fraudulent conduct. To ensure a remedy is available in these situations, the District Court must have jurisdiction over claims of fraud against an employee who received worker's compensation benefits.

The District Court has jurisdiction in cases involving allegations that a carrier or claimant engaged in fraud extrinsic to the actual injury. Because the claimant's alleged fraud was independent of and subsequent to the actual injury, the District Court has jurisdiction under this line of reasoning.

The District Court applied the principles in Zomer v. West River Farms, 666 N.W.2d 130 (Iowa 2003), too broadly. In Zomer the Commissioner had jurisdiction over a dispute about whether a worker's compensation policy should be reformed because such a finding was an "essential prerequisite to a determination of compensability." Because determination of coverage was not an "essential prerequisite" to resolution of the case, the Zomer rule does not operate to give the Commissioner jurisdiction.

The inconsistencies that may arise due to the fact that both the District Court and the Commissioner must hear evidence and reach factual findings should be resolved through principles of issue preclusion and judicial stays.

Figley v. W.S. Industrial, 2011 WL 2089847 (Iowa Ct. App. 2011)

Facts: Plaintiff Figley was employed by W.S. Industrial Services (WSI) as a foreman apprentice. While on an assignment Figley went out drinking with other employees, one of whom then crashed a company van while drunk. After being fired, Figley claimed violations of the Fair Labor Standards Act (FLSA) and the Iowa Wage Payment Collection Act, contending that he was entitled to overtime compensation and a discretionary bonus. The employer counterclaimed on the FLSA claims and for breach of contract and negligence. Figley alleged the employer's counterclaim was retaliation for his overtime wage complaint.

Holding: An employer's counterclaim in an employee's Fair Labor Standards Act action for disputed overtime compensation is not an "adverse action" for purposes of a retaliation claim if the employer's counterclaim is supported by law or fact.

Discussion:
To establish a prima facie case of retaliation, Figley must show (1) he engaged in a protected activity; (2) he suffered an adverse action; and (3) a causal connection exists between the protected activity and the adverse action. Figley engaged in a protected activity when he filed suit to recover disputed compensation. However, an employer's counterclaim is an "adverse action" only if the suit is baseless. WSI's counterclaim for negligence and breach of contract was grounded in law and fact and therefore was not an adverse action.

Berry v. Liberty Holdings, 789 N.W.2d 165 (Iowa Ct. App. 2010) (Unpublished)

Facts: Employee filed a personal injury lawsuit against his employer for an injury he sustained while on his way home from work. The employee settled the lawsuit and is subsequently fired by the employer. The employee sued for wrongful termination, alleging his he was fired in response to his personal injury suit.

Holding: An employee's right to bring a personal injury lawsuit under Iowa Code Chapter 668 is a clearly defined public policy that forms an exception to the at-will employment doctrine, such that firing an employee for bringing such a suit is not a lawful discharge.

Discussion:
Under Iowa's at-will employment laws, an employer can fire an employee for any lawful reason or no reason, so long as the discharge does not violate public policy. However, an employee's right to seek redress for his injury in civil court is "as well-recognized and …clearly defined as his right to seek worker's compensation benefits if the injury has occurred on his worksite." Chapter 668 and a tradition of civil legal redress should be viewed as creating a clear and well-defined public policy and should not be contravened by employer's termination of employees.

Judge Vaitheswaran dissented, noting that Iowa Code Chapter 668 does not define a right, but creates a system for apportioning fault among potential tortfeasors, and therefore should not serve as the basis for a public policy exception.

GOVERNMENT

Schneider v. State, 789 N.W.2d 138 (Iowa 2010) (Hecht)

Facts: The State relocated a bypass and bridge spanning a creek outside the town of Denver. The creek was designated as a regulatory floodway, meaning it must be kept clear of encroachment to allow a 100-year flood to occur without substantial increase in flood heights. The bypass/bridge was built to accommodate a 50-year flood and encroached on the floodway. During a 250-year flood event the bridge/bypass embankment worsened flooding in the town. The state subsequently redesigned and extended the bridge, increasing the capacity of the floodway.

Property owners damaged in the 250-year flood alleged the State negligently designed and built the bridge and bypass. The State asserted discretionary function immunity, claiming the design and construction of the project were discretionary functions and conformed with a generally recognized engineering or safety standard.

Holding: Where State builds a highway bypass and bridge obstructing a regulatory floodway, in violation of state and federal regulations and statute, the State is not protected by discretionary immunity because it could not exercise discretion to violate the pertinent statutes and regulations. In addition, Iowa Code § 314.7 imposes a duty on those who undertake highway improvements

to use strict diligence in draining surface water from the road to conform with general riparian principles.

Discussion:
Under the Iowa Tort Claims Act the State is immune from claims based upon the State's exercise or performance of a discretionary function. To qualify for discretionary function immunity the State must show: (1) there was an element of judgment or discretion involved in the design and construction of the project and (2) the judgment or discretion was of the type the Legislature intended to shield from liability. Iowa Code § 455B.275(1) bans all obstructions within a floodway without approval from the Department of Natural Resources and a civil penalty may be imposed against violators. Federal statute, codified at 44 C.F.R. § 60.3(d)(3), prohibits encroachments in a floodway unless the encroachment would not increase flood levels. The State could not choose to ignore these statutory and regulatory prohibitions on building in a floodway and did not have a choice to design and build an encroaching, noncompliant structure. Because State employees could not exercise this discretion, the employees who designed and built the bridge are not protected by discretionary immunity. The State is entitled to immunity on plaintiffs' claims that their properties were permanently devalued. The State demonstrated that the post-flood redesign of the bypass and bridge conformed with generally accepted engineering criteria existing at the time of the reconstruction.

The Court also addressed Iowa Code § 314.7, which prohibits those improving or maintaining a highway from turning natural drainage to the harm of adjoining landowners. The statute imposes a general duty to ensure water drains in conformity with general riparian principles throughout the vicinity of the project and is not confined to preventing water from the road from draining onto adjoining property.

Cross-reference: Negligence

The Sherwin-Williams Company v. Iowa Department of Revenue, 789 N.W.2d 417 (Iowa 2010) (Ternus)

Facts: Sherwin-Williams is an Ohio-based company that owns and operates 38 retail outlets in Iowa and sells products to other Iowa stores. The company uses machinery at all locations that sell its paint to create the precise color desired. The Iowa Department of Revenue (DOR) imposed a use tax on Sherwin-Williams related to the paint machinery. Sherwin-Williams argued that it had no liability for use taxes under Iowa Code §422.45(27)(*a*), which contains a manufacturing exemption and filed a refund claim for use taxes it paid from 1992 through 2000. The DOR issued a decision that Sherwin-Williams was not a "manufacturer" and did not qualify for the exemption. The District Court found, and the Court of Appeals confirmed, that Sherwin-Williams was a "manufacturer" and exempt from the use tax.

Holding: An agency's interpretation of a statute in the context of a specific matter pending before it can be accorded the same deference given to an interpretation of a statute embodied in an agency rule, as articulated in Renda v. Iowa Civil Rights Comm'n., 784 N.W.2d 8 (Iowa 2010).

Discussion:
Iowa Code § 422.45(27)(*a*)(1) contains a use tax exemption for "manufacturers." The DOR argued that Sherwin-Williams did not qualify as a "manufacturer" and relied, in part, on its own administrative rule defining that term. The DOR argued its interpretation of "manufacturer" was entitled to deference under Iowa Code § 17A.19(10)(*l*), which states the court "shall reverse, modify or grant other appropriate relief from agency action… if the substantial rights of the person seeking judicial relief have been prejudiced because agency action is… based upon an irrational, illogical or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency." Sherwin-Williams argued that this standard of review was not applicable because the DOR did not have an "official interpretation" of the term "manufacturer."

There is nothing in Iowa Code § 17A.19(10)(*l*) to restrict its use to interpretations contained in agency rules. The standard can be used to analyze an agency's interpretation made in the course of a pending proceeding, if the Legislature granted the agency authority to interpret that term. Under this holding, the DOR's definition of "manufacturer" is still not entitled to the deferential standard of review in Iowa Code § 17A.19(10)(*l*) because there is no indication that the Legislature intended to provide the agency with such authority, the term "manufacturer" was already interpreted by Iowa Code § 428.20, and DOR's rule simply parrots the statutory definition.

DAMAGES

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010) (Hecht)

Facts: In a nuisance claim against an electric utility based on the effects of stray voltage, Plaintiff dairy farm seeks money damages and an order to enjoin and abate future stray voltage. Defendant seeks application of comparative fault principles to the damages claim, citing Iowa Code § 657.1(2). Plaintiff contends that under that statute, which addresses use of comparative fault defense by an electric utility in an action to abate a nuisance, comparative fault is permitted only in actions for injunctive relief, but not for damages.

Holding: A comparative fault defense is available to an electric utility in a civil nuisance action seeking damages for past injury, but not to reduce a plaintiff's recovery for the diminution in value to the property caused by the nuisance.

Discussion:
Comparative Fault
Iowa Code § 657.1(2) provides a comparative fault defense to an electric utility "in an action to abate a nuisance against an electric utility." Because the statute is ambiguous, the Court used principles of statutory construction to ascertain the Legislature's meaning. The legislative intent behind Iowa Code § 657.1(2) was to "authorize a comparative fault defense in any nuisance action seeking damages against an electric utility if the utility demonstrates compliance with the standard and secures the permits and approvals referenced in the statute." Iowa Code § 657.1(1) authorizes an action for injunctive relief and damages, contemplating a single cause of action with two possible remedies. This demonstrates the Legislature's intent to use the phrase "action

to abate a nuisance" in Iowa Code § 657.1(2) as a "shorthand" for suits seeking both money damages and to enjoin future activity. In addition, the statute refers to comparative fault principles in Iowa Code § 668.3, which addresses application of comparative fault to both past and future damages.

Constitutionality of Statute under the Takings Clause
An unconstitutional taking could occur if Iowa Code § 657.1(2) is applied to reduce all elements of the landowner's damages under comparative fault principles. When a nuisance is permanent the proper measure of damages is the diminution in the market value of the property. A statute that attempts to immunize a defendant from liability for the value of diminution of property due to a nuisance is an unconstitutional taking. Broad application of comparative fault principles under Iowa Code § 657.1(2), could reduce or eliminate owner's recovery even if the defendant was found to have caused a nuisance. To avoid the constitutional problem, the Court interpreted Iowa Code § 657.1 so as not to permit the comparative fault scheme to reduce or eliminate a plaintiff's recovery for the diminution of the value of the property caused by the nuisance.

Cross-reference: Negligence

Deters v. USF Insurance Company, 797 N.W.2d 621 (Iowa Ct. App. 2011)

Facts: Deters was the owner and president of a Deters Tower Service, Inc., which serviced TV and radio antennas. Deters Service, Inc. had a commercial general liability (CGL) policy with a $1 million limit. Deters and two employees died when they fell at work and the employees' estates sued Deters' estate. The insurance company refused to provide coverage to Deters' estate, citing a policy exclusion for employee claims against an employer for bodily injury arising in the course of employment, but did not consider covering Deters as an executive officer.

Deters' estate sought a declaratory judgment based on coverage and bad faith claims, which were bifurcated. After a jury verdict in the coverage trial that the insurance company had a duty to defend and indemnify the Deters estate, the company settled with the employees' estates for $500,000. At the bad faith trial, the court found that the insurance company had no fairly debatable ground for denying coverage to the Deters estate and granted a directed verdict on that issue. A jury verdict awarded $1 million in punitive damages. The insurance company appealed the jury verdict, arguing it was unconstitutionally excessive.

Holding: $1 million in punitive damages in a bad faith claim is not unconstitutionally excessive where an insurance company continually refuses to provide coverage under a commercial general policy for the estate of an insured employer/executive officer in personal injury suit by employees estates, where the insured's estate was financially vulnerable and the insurance company's acts were intentional, it refused to investigate and repeatedly denied coverage.

Discussion:
The Court considered three guideposts to determine whether the $1 million punitive damages award was excessive: (1) degree of reprehensibility of defendant's misconduct; (2) disparity

between the actual and potential harm; and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases.

The degree of reprehensibility is the most important indicium of the reasonableness of a punitive damages award. The reprehensibility here was high because Deters' estate, which was valued at $1.3 million, could have been decimated by the employees' claims and the cost of defending those claims. The insurance company's infliction of economic injury was intentional and the record reveals trickery, affirmative misconduct and deceit. Finally, the insurance company intentionally decided not to defend even under a reservation of rights, refused to investigate and repeatedly denied coverage over an 18-month period. With regard to the disparity between actual and potential harm, the court declined to endorse a particular mathematical formula, but assessed instead the compensatory damages, potential harm and actual harm. The compensatory damages were $69,908, the refusal to deny coverage was "in the range" of $1 million and the actual harm was between $500,000 and $750,000. Based on these figures, the punitive damage award was not unreasonable. There are no comparable civil penalties, and therefore that issue is not pertinent.

Cross-reference: Insurance

CONTRACT

Galloway v. State, 790 N.W.2d 252 (Iowa 2010) (Hecht)

Facts: Fourteen-year-old girl on a field trip conducted by a University of Northern Iowa youth outreach program was struck by a car as she attempted to cross the street. Before the trip, the girl's mother signed a Permission Form that stated, in part, that she would not hold UNI responsible for any accidents, losses, damages or injuries resulting from a field trip, and that she would release the youth outreach program and UNI from all liabilities. The mother also signed a Release and Medical Authorization, stating that she assumed all risks of the child's injury that could result from the field trip, released and agreed to indemnify, defend and hold harmless UNI, state agencies and program participants against any legal claims or lawsuits in equity for an injury that could result from negligence.

The mother sued the State and various other parties for the injuries sustained by her daughter. The State sought summary judgment based on the pre-injury waivers.

Holding: Pre-injury waivers executed by a parent waiving personal injury claims of their minor children are void and therefore unenforceable.

Discussion:
The court analyzed Plaintiff's argument that pre-injury releases are incompatible with public policy and therefore unenforceable. Courts must "be attentive to prudential considerations and exercise caution" when public policy is asserted against the enforcement of a contract. This principle has been used to uphold contracts exempting a party from its own negligence. However, there is a well-established public policy that children must be protected from the improvident decisions of their parents, such as the requirement that a parent obtain court

approval before settling a child's personal injury claim. This public policy requires that minor children be protected from a parent's forfeiture of a personal injury claim by execution of a pre-injury waiver or release.

The court found it significant that a child usually does not read or sign the waiver. When an adult signs a pre-injury waiver, it is usually the participant who reads and signs for himself. If one adult signs a waiver for another, the participant knows to be vigilant and can withdraw from the activity if he perceives unreasonable risk. Children are more vulnerable because do not typically read or understand pre-injury releases and may not have the knowledge and experience to assess or avoid risks. The parent is typically not present during the activity and cannot protect the child from unanticipated risks, and the child may not be able to remove himself from an unsafe activity.

Seneca Waste Solutions v. Sheaffer Manufacturing Co. LLC, 791 N.W.2d 407 (Iowa 2010) (Hecht)

Facts: Sheaffer Manufacturing hired Seneca Waste Solutions to clean a defunct pen manufacturing plant. Sheaffer provided a written description of the work, stating the expectation that most of the wastewater would be transferred to the on-site treatment facility and about 4,000 gallons would be transported off-site for treatment. The contract was on a time and materials basis and contained a "not-to-exceed" price of $170,000. The contract contained clause stating that it represented the complete agreement of the parties and stated that any waiver, modification or amendment would be effective only if in a writing signed by both parties. A letter bid and Estimate Worksheet, both prepared by Seneca, were attached to the contract as Exhibit A. Seneca's letter bid and the contract estimates the cost of disposing of the 4,000 gallons would be $5,186.00.

Once the work began Sheaffer shut down its wastewater facility and directed Seneca to send the wastewater off-site, resulting in 18,000 gallons disposed of in that manner. The contract was not modified to reflect this change. Seneca billed Sheaffer for $211,559, rather than the $170,000 "not to exceed" price. Shaeffer tendered payment totaling $170,000, but Seneca rejected it and sued for the full cost of its work.

Holding: When a party to a contract orally modifies the scope of the contract to request "extras" or additional work, the party must pay the fair and reasonable cost of that work.

Discussion:
Modification of Written Contract
The definition of the "scope of work" in the contract defines the issue. The contract described in detail the work to be performed and specifically referenced the disposal of 4,000 gallons of wastewater off-site. A reasonable fact-finder could determine that Shaeffer's directive to dispose of more wastewater off-site made Seneca's job more onerous and resulted in a contract modification. Although the written contract states that any modification must be in writing, under prior case law a written contract may be modified by a subsequent oral contract having the essential elements of a binding contract. Such consent may be either express or implied from

acts or conduct. When one party modifies a contract by asking the other to perform extra or additional work, that party must pay the fair and reasonable value of the extra work.

Integration of Documents into Contract
The Court also addressed Seneca's contention that language in three documents it argued were integrated into the contract could be interpreted as an agreement to exceed the price cap. This interpretation will not stand because it would render some of the contract language superfluous.

Lewis Electric Co. v. Miller, 791 N.W.2d 691 (Iowa 2010) (Ternus)

Facts: Miller hired Lewis Electric to perform electrical work at his stores in Le Mars and Sioux City. Lewis billed Miller $4,164.53 for work in the Sioux City store. Miller contracted with Lewis Electric for $49,200 for work in the Le Mars store. After Miller paid Lewis $30,000 for work in the Le Mars store, a dispute arose.

Lewis Electric sued Miller for $18,871.64 allegedly owed on the work at the Le Mars store and for $4,164.53 on the Sioux City store. Miller counterclaimed for $22,975.15 for the work Lewis allegedly failed to complete in Le Mars. The district court found that Lewis Electric substantially performed its contract. The court awarded Lewis $16,927.50 for the work in Le Mars and $4,164.53 for the work in Sioux City. The Court of Appeals reversed, finding that there was not substantial evidence that Lewis Electric did not breach its contract. It vacated the judgment of $16,927.50 for work done in the Le Mars store and remanded the matter to the District Court "for resolution." Lewis Electric appealed, contending that the appellate court's instructions on remand were insufficiently specific because they did not direct the action to be taken by the district court to resolve the parties' claims.

Holding: A construction contractor who fails to perform substantially under the contract can recover at most only in quantum meruit for the value of the work. The measure of recovery where the performance is "incomplete but remediable" is the unpaid contract price minus the cost of completing any unfinished work and remedying other defective work, plus any other damages suffered by the owner, not to exceed the benefit actually received by the owner.

Discussion:
The District Court on remand must determine the costs incurred by Miller to complete or repair Lewis Electric's work. If Miller's costs in remedying or completing the work started by Lewis Electric exceed the remaining contract price of $19,200, Miller is entitled to a judgment in that amount. Lewis Electric will recover only if the remaining contract price of $19,200 is greater than the cost incurred by Miller in completing or remedying Lewis Electric's work.

Additional Authority: Restatement (Second) of Contracts § 347.

C&J Vantage Leasing v. Wolfe, 795 N.W.2d 65 (Iowa 2011) (Wiggins)

Facts: Royal Links, an advertising company, offered to lease a snack cart to Lake MacBride, a golf course. Lake MacBride executed a program agreement and lease agreement. The program agreement provided that Royal Links would pay Lake Macbride $299 per month to advertise on the cart for 5 years and gave Royal Links the option to buy the cart at the end of the term for $1.00. The lease agreement identified C & J Vantage as the lessor, Lake MacBride as the lessee and Royal Links as the equipment supplier, and obligated Lake Macbride to pay $299 per month to C & J Vantage to lease the cart. The lease contained a hell-or-high-water provision stating that it was non-cancelable, allowed Lake Macbride to buy the carts for $1.00 at the end of the term and disclaimed any warranties. Lake Macbride received the cart and signed a delivery and acceptance certificate acknowledging that Royal Links was not an employee or agent of C & J Vantage.

Royal Links subsequently stopped paying for advertisements on the cart and Lake MacBride stopped making rental payments. C & J Vantage sued Lake MacBride for breach of contract based on the lease agreement. Lake MacBride asserted affirmative defenses and filed a counterclaim/third-party petition against C & J Vantage and Royal Links alleging, among other things, that the lease was actually a disguised secured transaction. C & J subsequently assigned the lease and personal guaranty to Frontier.

Holding: Where an agreement substantively qualifies as a sale with a security interest under the Iowa Code, it is immaterial whether the parties intended to treat it as a lease or finance lease. An express hell-or-high-water clause contained within a disguised sale with a security interest is fully enforceable because to do otherwise would be to improperly reconstruct the contract contrary to the parties' intent. In addition, an assignee may enforce a hell-or-high-water clause irrespective of its status as a holder in due course.

Discussion:

Status of Lease Agreement as Finance Lease or Disguised Sale with Security Interest

The facts of each transaction determine whether an agreement is a finance lease or a sale with a security interest. A finance lease involves three parties: a lessee/business, which selects the equipment and negotiates for it, the equipment supplier, and the finance lessor, which buys the equipment from the supplier and leases it. Iowa Code § 544.13102(l)(*j*) specifically excludes a transaction that retains or creates a security interest from the definition of a finance lease. A security interest is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." Iowa Code § 544.1201(37)(b) contains a bright-line test to determine whether an agreement creates a security interest. First, the lessee's consideration is an obligation for the term of the lease not subject to termination by the lessee. This element is satisfied by the lease agreement's hell-or-high-water-clause and clauses preventing default by Lake Macbride. The second part of the test is satisfied by a showing that the lessee has an option to own the goods for no or nominal consideration upon compliance with the lease. The provision allowing Lake Macbride to buy the cart for $1.00 at the end of the term satisfies this element. Accordingly, the agreement is actually a sale with a security interest, rather than a lease or finance lease.

The Court rejected Frontier's argument that the agreement states that it is a lease and it should be treated as such. Before a transaction can be a finance lease, it must qualify as a lease, and there is no authority for the parties to treat a sale with a security interest as a lease. The fact that the parties intended to treat the agreement as a lease or a finance lease is immaterial so long as it substantively qualifies as a sale with a security interest under the Iowa Code.

Hell-or-High-Water Provision in Secured Transaction
The cardinal rule of contract interpretation is to determine the intent of the parties when they entered into the agreement and to strive to give effect to all contract language, which is the best evidence of such intent. In a secured transaction agreement, the court must give effect to the hell-or-high-water clause, which is a contractual provision that requires the lessee to fulfill its obligation in the lease in all events

Lake MacBride argued that Frontier, as an assignee of C & J, is not a holder in due course and therefore cannot enforce the hell-or-high-water clause. A party must be a holder in due course in order to enforce a waiver of defenses clause. In Iowa, an assignee may enforce a hell-or-high-water clause irrespective of its holder in due course status. Waiver of defenses and hell-or-high-water clauses are distinguishable because the former protects the assignee of a lessor while the latter protects the lessor.

Apparent Authority
Lake MacBride claimed there were genuine issues of material fact as to whether Royal Links was an agent for C & J. Apparent authority is authority the principal has knowingly permitted or held out the agent as possessing. The court must focus on the principal's actions and communications to a third party to determine whether apparent authority existed. Here, the third party (Lake MacBride) dealt almost exclusively with the alleged agent (Royal Links): the Royal Links sales representative contacted Lake MacBride, Royal Links was on the credit application and the monthly payments due from Lake MacBride to C & J were identical to those amounts Lake MacBride received from Royal Links for advertising. These facts create a genuine issue of material fact as to whether Royal Links was an agent for C & J.

Additional Authority: U.C.C. 2A-103 (distinguishing a secured transaction and finance lease)

Soults Farms Inc. v. Schafer, 797 N.W.2d 92 (Iowa 2011) (Wiggins)

Facts: Soults and his father were co-directors of a family corporation, Soults Farms Inc. ("SFI"). During the pertinent time period Soults signed SFI's annual corporate reports, served in officer positions and controlled the company. In a series of transactions shortly before and after the father's death, Soults unilaterally mortgaged SFI's real property to Schaefer to secure a debt of $300,000.00. Soults told Shaefer the loans were for farm expenses. The promissory notes and checks did not reference SFI. The money was deposited into Soults' personal account and $359,000.00 was later transferred into SFI's corporate account.

In 2002 State Security Bank, which also had mortgages on SFI's farmland, foreclosed on those mortgages. During the pendency of that proceeding Soults abandoned SFI and disappeared.

SFI filed suit to quiet title on Schafer's mortgage. Shaefer counterclaimed and filed a third party claim against Soults, seeking judgment for his loans to Soults and seeking to foreclose his mortgage. SFI denied liability for the loans and argued Soults lacked authority to mortgage SFI's property. The District Court ruled for Shaefer and awarded damages against Soults and SFI for $598,884.34 as principal and interest on the loans, as well as $61,345.75 for attorney fees.

Holding: President of family farm corporation acts as corporation's agent in obtaining loans where farm and president are closely interwoven, the loan was secured with a promise to use it for the farm, the loan was consistent with short-term capital loans and much of the proceeds were used for the farm. The president had actual authority to obtain loans for the farm where he managed the farm, had complete autonomy, represented to lender the need for capital and his action was incident to the nature of a corporate manager. Also, where parties mistakenly characterize the outstanding debt on a mortgage as being derived from a single promissory note, reformation of the parties' inaccurate expression of their agreement does not revise, modify or alter the parties' agreement, but reforms the mortgage to reflect the parties' actual intent.

Discussion:

Agency

The Court found that Soults was SFI's agent when he mortgaged the corporate property to secure the loans from Shaefer. Agency results from (1) the manifestation of consent by the principal that the agent shall act on the former's behalf and subject to the former's control and (2) the consent of the latter to so act. The existence of an agency relationship turns upon the principal and agent's manifestations of assent, derived from written or spoken words or other conduct, and often inferred from surrounding facts and circumstances. Agency does not require the agent to expressly intend his actions to bind the principle. It is clear that SFI manifested assent for Soults to act as its agent as its President. Soults assented to act as SFI's agent when mortgaging the corporate property because Soults and SFI were "closely interwoven," Soults had unfettered authority to operate SFI, and SFI paid inadequate attention to corporate formalities. In addition, Schafer believed that the loan proceeds were necessary to operate SFI based on Soults' representations when obtaining the loans.

Authority

Actual authority exists if the principal has expressly or impliedly granted the agent authority to act on the principal's behalf. The president of a corporation has implied authority to bind a corporation to pay a promissory note. As the president of SFI, Soults had actual authority to procure operating capital for the corporation and therefore he acted as SFI's agent when mortgaging SFI's property to secure the Shaefer loans.

Contracts

SFI contended that the Schaefer mortgage is void because it is supported by inadequate consideration. The Court found that adequate consideration supported the mortgage where Shaeffer, the mortgagee, received security for future lending, did not foreclose on pre-existing loans and was incentivized to continue lending.

SFI argued that Schaefer's $300,000 mortgage was unenforceable because it purported to secure a promissory note that did not actually exist. The mortgage referred to September 18, 1998 promissory note with a $300,000 principal due October 31, 1999. However, no such note was executed. Upon de novo review, the Court found that the mortgage was intended to secure a $300,000 loan in the amounts of $25,000 in July 1999 and $275,000 in September 1999. The July loan was due on October 31 with no year indicated and the September loan was due October 31, 1999. The promissory note described in the mortgage and the July and September notes were identical in substance. The notes were drafted without representation, in haste and casually. Based on the circumstances the parties intended the mortgage to secure the notes signed in July and September 1999, despite reference to a non-existent note from September 18, 1998 and the mortgage should be re-formed to reflect the parties' intent.

Additional Authority: Restatement (Third) of Agency §1.01 (2006)

Scenic Builders v. Peiffer, 2011 WL 2078225 (Iowa Ct. App. 2011)

Facts: Scenic Builders filed a petition against the Peiffers alleging breach of contract for new home construction. The Peiffers filed a counterclaim for damages under Iowa Code 714H, which allows a consumer to bring suit to recover damages for the loss of money or property resulting from certain prohibited practices, including unfair practice, deception, fraud, false pretenses and false promises related to the advertisement, sale, or lease of consumer merchandise. Scenic Builders moved to dismiss the counterclaim for failure to state a claim, alleging that Iowa Code Chapter 714H does not apply to a contract for home construction.

Holding: Contracts for home construction are included in the protections of Iowa Code Chapter 714H.

Discussion: When terms are defined within a statute, those definitions are the foundation of the court's analysis. The term "consumer merchandise" is defined in Chapter 714H.2 as "merchandise offered for sale or lease, or sold or leased, primarily for personal or family, or household purposes. " The word "merchandise" is defined to include, "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services" in Iowa Code § 714.16(i). "Real estate" and "Services" are not defined in the statute, so the court looked to the dictionary definitions of those terms. Based on the plain language of the statute, the hone construction contracts are within the purview of Chapter 714H.

Robinson v. Allied Property and Casualty Insurance Company, 2011 WL 2556951 (Iowa Ct. App. 2011)

Facts: Plaintiff was injured in a car accident on June 15, 2004. She underwent treatment for nine months, after which her doctor opined that there were no complications or secondary effects, no additional treatments were required and her condition was likely to improve over time. Plaintiff sued the tortfeasor on October 1, 2005. Plaintiff had additional treatment in late 2005 and surgery in 2007, after which her doctor opined she would require future additional treatment and have permanent activity restrictions. In August 2008 she settled with the tortfeasor's insurance

for the $100,000 policy limits. She offered to settle with her underinsured motorist carrier on August 13, 2008 for $50,000. The carrier declined to settle, asserting the two-year statute of limitations. In May 2010 Plaintiff filed suit against the carrier for UIM benefits as a result of the 2004 collision.

Holding: Where a UIM contract requires the insured to bring her UIM claim within two years of her loss, before she was able to ascertain her loss or damages despite her diligent efforts to do so, the contractual statute of limitations period of two years is unconscionable and therefore unenforceable.

Discussion:
The goal of underinsured motorist coverage is to provide full compensation to the victim and courts have adopted a "broad coverage" view of UIM coverage questions. UIM claims are contractual in nature and the statute of limitations is for ten years for contractual claims. The court enforces contractual limitations if they provide the insured with a reasonable amount of time within which to bring a lawsuit to recover UIM benefits. In this case Plaintiff was unable to determine the extent of her damages within two years of the collision, even though she diligently pursued medical care during that time. She also pursued her legal claims against the tortfeasor. Despite those efforts, the severity of the medical condition was not determined until over two years after the collision. Because in these circumstances the requirement of bringing a claim within two years is unreasonable, the two-year requirement is unconscionable and unenforceable. The ten-year statute of limitations period governs instead.

The UIM carrier argued that Plaintiff could have sued for UIM coverage when she sued the tort feasor. However, Plaintiff did not know at that time that her damages exceeded the policy limits, despite her efforts to determine the severity of her injuries. Plaintiff should be allowed to bring her UIM claim when later occurrences render her underinsured.

Cross-reference: Insurance

CONSTITUTIONAL

Hensler v. City of Davenport, 790 N.W.2d 569 (Iowa 2010) (Wiggins)

Facts: Davenport parental responsibility ordinance requires a parent or guardian to "exercise reasonable control" over a minor for whom the parent is responsible. This duty is breached by an "occurrence," defined as when a law enforcement agency has probable cause to believe a child engaged in a delinquent act and files a complaint in delinquency court, or takes the child into custody. A rebuttable presumption that the parent failed to exercise reasonable control of the minor arises when there is a second "occurrence" and prior notice to the parent of the ordinance. A rebuttable presumption also arises upon adjudication of a minor as a delinquent or the entry of an adjustment agreement involving the minor related to any unlawful act, plus prior notice to the parent of the ordinance. The presumption can be rebutted by evidence that the parent takes specifically enumerated steps to counter the minor's behavior. The city sends a warning letter after the first offense requires a parenting skills course after the second offense and imposes a monetary penalty after the third offense.

Plaintiff is the mother of seventeen-year-old repeatedly picked up by the police and referred to the juvenile court system for drug use and possession and running away. Davenport cited the parent twice under the ordinance. She filed a petition claiming the ordinance violated her right to due process of law.

Holding: A rebuttable presumption is arbitrary and irrational in violation of the Due Process Clause of the Fourteenth Amendment when it allows a fact finder to presume parental negligence and causation of her child's delinquency based on (1) two "occurrences" as defined by the ordinance, or (2) an adjudication or the entry of an informal adjustment agreement involving the minor related to any unlawful act. The presumption is arbitrary and irrational because there are many potential causes of delinquency.

Discussion:
The court struck down the portion of the ordinance containing a rebuttable presumption as violating the Due Process Clause. A presumption in a civil case violates the federal Due Process Clause if it is arbitrary or denies a fair opportunity to rebut it. The ordinance contains a rebuttable presumption that a parent is negligent upon a second "occurrence," as defined in the ordinance. Without the presumption, the city would have to prove by clear, satisfactory and convincing evidence that the parent failed to exercise reasonable parental control and the second "occurrence" was caused by a failure to do so. It is well-settled law that the occurrence of an incident does not mean that there was negligence. The ordinance's presumption that the parent's control, or lack thereof, directly caused the child's conduct is similarly arbitrary and irrational. There are many reasons for a minor to commit an "occurrence," such as illness or family disruption.

The rest of the statute survived a substantive due process analysis. Substantive due process prevents the government from interfering with rights "implicit in the concept of ordered liberty." Because the Davenport ordinance did not directly and substantially interfere in parental decision-making, it did not trigger strict scrutiny. The court applied the rational basis test, which asks whether there is a reasonable fit between the government interest and the means used to advance that interest. Davenport's interest in protecting the community from juvenile delinquency is legitimate and there is a reasonable fit between this interest and the ordinance, since the sanctions will motivate a parent to exercise better control over her child.

KFC Corp v. Iowa Dept. of Revenue, 792 N.W.2d 308 (Iowa 2010)(Appel)

Facts: In 2001 the Iowa Department of Revenue (DOR) assessed KFC $284,658.08 for unpaid corporate incomes taxes, penalties and interest. KFC is a Delaware corporation with its principal place of business in Kentucky. KFC owned no property and has no employees in Iowa, but licensed intellectual property to independent franchisees in the state. KFC argued that under Constitutional and statutory principles the DOR could not impose the state income tax because KFC had no physical presence in Iowa. The DOR argued that KFC's income from franchisees was taxable because it derived from Iowa customers and that physical presence was not required when a franchisee licensed intellectual property.

Holding: Intangible property owned by an out-of-state corporation but used by Iowa franchisees is sufficiently connected to the state to constitute a physical presence and allow Iowa to impose an income tax on revenue earned by the out-of-state entity from the intangibles.

Discussion:
The United States Supreme Court has held that the "negative sweep" of the Commerce Clause, also known as the dormant Commerce Clause, limits state taxation power over out-of-state entities. To satisfy the dormant Commerce Clause, an out-of-state taxpayer must have a physical presence in a state to be subject to sales and use tax by that state under Quill Corp. v. North Dakota, 504 U.S. 298 (1992). The court also noted decisions from other state courts finding that the presence of intangible intellectual property within a state creates a "business situs" in that state, which permits taxation of out-of-state entities that receive income generated from that property despite a lack of physical presence.

The dormant commerce clause is not offended by imposition of Iowa income tax on royalties received by an out-of-state corporation with franchisees in the state. KFC satisfies the Quill physical presence test because it has substantial intellectual property at use by franchisees that are firmly anchored in Iowa. That intellectual property is the functional equivalent of physical presence. KFC's possession of "intangibles" in Iowa, in the form of intellectual property used by its franchisees, created a business situs sufficient to support tax on revenue generated by the use of those intangibles. In addition, the transactions that lead to revenue received by KFC also constitute sufficient "physical presence" to support taxation by Iowa.

Simmons v. State Public Defender, 791 N.W.2d 69 (Iowa 2011) (Appel)

Facts: By statute, the State Public Defender capped the fee for appellate work for indigent criminal defendants at $1,500 per case, with $1,000 due at the filing of the proof brief and the balance upon filing the final brief. Attorney Simmons prevailed in two cases and submitted bills for $3,980 in one case and $4040 for the other. The public defender denied payment beyond $1,000 at the proof brief stage. At trial, Simmons presented evidence that the average overhead per lawyer for most Iowa attorneys exceeds $40 per hour and testimony regarding the inadequacy of the public defender's rates.

Holding: The public defender may not establish a hard cap on fees paid to attorneys assigned to represent indigent clients. The statute authorizing the public defender to set fee rates authorizes the establishment of a range of hourly rates, the procedure for making fee claims, and soft fee caps in categories of cases, which may be rebutted by a showing of reasonableness and necessity.

Discussion:
The federal and state constitutions provide the right to the effective assistance of counsel. One method to enforce this right is to state a claim that the state's method of ensuring counsel is provided is inadequate. This claim requires a showing that a structural element of the system of providing criminal defense to indigent clients threatens or is likely to impair realization of the

right to effective assistance of counsel. Unlike individual claims of ineffective assistance of counsel, claimant need not show prejudice in a structural inadequacy claim.

The $1500.00 fee cap has a profound chilling effect on obligation to ensure effective assistance of counsel. First, an attorney working at this rate and taking cases in accordance with standards promulgated by the National Legal Aid and Defender Association would earn $40,000 annually, while an average Iowa attorney pays overhead of about $70,000 annually. Second, this cap would pay Attorney Simmons at a little over $12.00 an hour. Finally, the court used its own experience to determine that the $1500 cap cannot provide adequate compensation in many cases. These restrictions limit the number of attorneys willing to take on indigent defendants, and lowers the quality of the representation, pitting the attorney's economic interest against the client's interest in effective representation.

Statler v. Faust, 791 N.W.2d 428 (Iowa Ct. App. 2010) (Unpublished)

Facts: Driver and passenger were injured when two rear wheels came off a semi-trailer traveling on a highway, bounced over the median and struck a vehicle on the other side, killing the driver and injuring the passenger. Plaintiffs sued a trailer inspection company that inspected the trailer based in Arizona about one month before the underlying accident. The inspection company had no locations, contacts or advertisement in Iowa. It did business in California, Arizona and Nevada and made the inspection in Arizona. The inspection company claimed Iowa lacked personal jurisdiction over it because it lacked the minimum contact required.

Holding: Due process requirements for personal jurisdiction are not satisfied where Defendant, an Arizona trailer inspection company, did not purposefully avail itself of the privilege of conducting activities in Iowa, even if it was foreseeable to a virtual certainty that vehicle inspected by Defendant would travel through the State.

Discussion:
To satisfy Due Process requirements, a Plaintiff seeking personal jurisdiction over an out-of-state Defendant must show that Defendant made "minimum contacts" with the forum state. The "minimum contacts" requirement is met when Defendant (1) "purposefully directed" his activities at residents of the forum statue and (2) the litigation results from alleged injuries that "arise out of or relate to" those activities. Sufficient minimum contacts exist when a Defendant should "reasonably anticipate being haled into court" in the forum state. The purposeful availment requirement is not satisfied by random, fortuitous or attenuated contact or as the result of the unilateral activities of another party of third person. Once those requirements are satisfied, the Court must determine whether the assertion of personal jurisdiction over the Defendant would comport with fair play and substantial justice.

The Court found that Defendant trailer repair company did not purposefully avail itself of the privilege of conducting activities in Iowa because it had never been to Iowa, does not advertise in Iowa and has no contacts in the State. It agreed with the District Court that it was foreseeable to a virtual certainty that the semi-trailer that Defendant inspected would pass through the State because I-80, which runs coast-to-coast, passes through Iowa. However, without purposeful

availment, high foreseeability of contact with the forum state does not satisfy the minimum contacts test.

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