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Annual Meeting & Seminar Committee: Bruce Walker, Chair; Gregory Barntsen, James Craig, Noel McKibbin

IOWA DEFENSE COUNSEL ASSOCIATION

48th Annual Meeting & Seminar Agenda
September 13 – 14, 2012

Approved for 12.75 Hours State CLE Activity Number 90440 (Includes 2.0 hours Ethics)
Approved for 11.25 Hours Federal CLE

THURSDAY, SEPTEMBER 13, 2012

7:00 a.m. – 3:45 p.m.	**Registration Desk Open** [Concord Foyer]
7:00 – 7:45 a.m.	**Exhibitor Set-Up** [Concord Foyer]
7:00 – 8:00 a.m.	**Continental Breakfast** [Concord Foyer]
7:45 a.m. – 5:45 p.m.	**Exhibits Open** [Concord Foyer]
8:00 – 8:15 a.m.	**Welcome & Opening Remarks** [Grand Ballroom] Gregory G. Barntsen, IDCA President Bruce L. Walker, Annual Meeting & Seminar Chair
8:15 – 9:15 a.m.	**Courtroom Communications and Related Issues** [Grand Ballroom] Judge Robert Hanson, 5th Judicial District, Des Moines, IA
9:15 – 10:15 a.m.	**Dirty Tricks: Spying, Hacking & Stealing Client Data** [Grand Ballroom] Todd Scott, Minnesota Lawyers Mutual Insurance Co., Minneapolis, MN *This program qualifies for 1.0 hours Ethics.*
10:15 – 10:30 a.m.	**Exhibits Open & Networking Break** [Concord Foyer]
10:30 – 11:00 a.m.	**Legislative Updates** [Grand Ballroom] Scott Sundstrom, IDCA Lobbyist, Nyemaster Goode, Des Moines, IA Senator Robert Hogg, Senate District 19, Cedar Rapids, IA *This program does not qualify for Federal CLE.*
11:00 a.m. – Noon	**Ethics and the Trial Lawyer: You Too Can Make Mistakes You Will Regret** [Grand Ballroom] Nicholas Critelli, Nicholas Critelli, P.C., Des Moines, IA *This program qualifies for 1.0 hours Ethics.*
Noon – 12:45 p.m.	**Exhibits Open** [Concord Foyer] **Lunch on Your Own** *You may enjoy lunch in CK's Restaurant located in the hotel or at a nearby restaurant.*
12:45 – 1:30 p.m.	**How Case Facts Intersect with Juror Values, Life Experiences and Decision Making Style** [Grand Ballroom] Douglas Keene, Ph.D., Keene Trial Consulting, Austin, Texas
1:30 – 2:15 p.m.	**Voir Dire** [Grand Ballroom] Randall Sellers, Starnes Davis Florie, LLP, Birmingham, AL
2:15 – 3:15 p.m.	**Seeing is Believing – Winning with Effective Demonstrative Aids and Evidence** [Grand Ballroom] Charles Fox and Mark McGrory, Demonstratives, Inc., Ames, IA
3:15 – 3:30 p.m.	**IDCA Annual Meeting & DRI Update** [Grand Ballroom] Gregory G. Barntsen, IDCA President J. Michael Weston, First Vice President, DRI Robert Shively, Mid Region Director, DRI

SAVE THE DATE: 49th IDCA Annual Meeting & Seminar
September 19 – 20, 2013
West Des Moines Marriott, West Des Moines, IA

IOWA DEFENSE COUNSEL ASSOCIATION

48th Annual Meeting & Seminar Agenda
September 13 – 14, 2012

Approved for 12.75 Hours State CLE Activity Number 90440 (Includes 2.0 hours Ethics)
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THURSDAY, SEPTEMBER 13, 2012, *continued*

3:30 – 3:45 p.m. **Exhibits Open & Networking Break** [Concord Foyer]

3:45 – 4:45 p.m. **Panel Discussion: Current Issues of Significance to the Insurance Industry**
[Grand Ballroom]
Moderator: Ted J. Wallace, American Family Mutual Insurance, Davenport, IA
Noel McKibbin, Farm Bureau Property and Casualty Company, West Des Moines, IA
Brenda Meade, State Farm Insurance, Des Moines, IA
Chris Owenson, IMT Insurance, West Des Moines, IA

4:45 – 5:00 p.m. **IDCA Sponsor Showcase** [Grand Ballroom]

5:00 – 5:45 P.M. **IDCA Reception with Exhibitors** [Concord Foyer]
Join us and network with exhibitors and colleagues during the IDCA Reception. ***This reception with hosted bar is open to all registered attendees at no additional cost.***

5:45 – 7:45 p.m. **IDCA Dinner and Awards with Entertainment** [West Des Moines Ballroom]
Continue networking and enjoy the sounds of the Scott Davis Trio over a dinner and drinks. Also, be among the first to congratulate IDCA's newest Award recipients! This dinner is a "don't miss" event! This is your chance to relax, share and unwind with a glass of wine and great food while making new professional connections. **This event is included in your Full Meeting and Thursday Only registration fees.**

8:00 – 9:00 p.m. **Young Lawyers Reception** [Blue Moon Dueling Piano Bar, West Glen Town Center, 5485 Mills Civic Parkway, West Des Moines, IA]
The IDCA Young Lawyers Reception is back and full of energy! If you are a Young Lawyer, then we encourage you to attend this event! Beverages at this event are hosted by the IDCA Young Lawyers & Social Media Committee.

IOWA DEFENSE COUNSEL ASSOCIATION

48th Annual Meeting & Seminar Agenda
September 13 – 14, 2012

Approved for 12.75 Hours State CLE Activity Number 90440 (Includes 2.0 hours Ethics)
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FRIDAY, SEPTEMBER 14, 2012

7:00 a.m. – 2:45 p.m. **Registration Desk Open** [Concord Foyer]

7:00 a.m. – 1:15 p.m. **Exhibitors Open** [Concord Foyer]

7:00 – 8:00 a.m. **Continental Breakfast** [Concord Foyer]

8:00 – 8:45 a.m. **Medicare Compliance Update** [Grand Ballroom]
Jessica Smythe, Crowne Paradis Services Corporation, North Reading, MA

8:45 – 9:00 a.m. **Case Law Update: Employment, Litigation of Actions** [Grand Ballroom]
Megan R. Dimitt, Lederer Weston Craig PLC, Cedar Rapids, IA

9:00 – 9:30 a.m. **The Defense of Employment Cases** [Grand Ballroom]
Mark Zaiger, Shuttleworth & Ingersoll, Cedar Rapids, IA

9:30 – 9:45 a.m. **Case Law Update: Commercial Contract** [Grand Ballroom]
John Lande, Dickinson Law, Des Moines, IA

9:45 – 10:15 a.m. **The Challenge of Closely Held Corporation Litigation** [Grand Ballroom]
David Charles, Crowley Fleck, PLLP, Billings, MT

10:15 – 10:30 a.m. **Exhibits Open & Networking Break** [Concord Foyer]

10:30 – 10:45 a.m. **Case Law Update: Negligence & Tort** [Grand Ballroom]
Drew A. Cumings-Peterson, Shuttleworth & Ingersoll, PLC, Cedar Rapids, IA

10:45 – 11:15 a.m. **Dram Shop** [Grand Ballroom]
Thomas Henderson, Whitfield & Eddy, PLC, West Des Moines, IA
Mark J. Wiedenfeld, Wiedenfeld & McLaughlin LLP, Des Moines, IA
This program does not qualify for Federal CLE.

11:15 a.m. – Noon **What Human Factors Experts Can Bring to the Courtroom** [Grand Ballroom]
Suzanne Alton-Glowiak, M.M.E., CED Investigative Technologies, Inc., Oak Brook, IL

Noon – 12:30 p.m. **What's New in Iowa Courts** [Grand Ballroom]
Justice David S. Wiggins, Iowa Supreme Court, Des Moines, IA
This program does not qualify for Federal CLE.

12:30 – 1:15 p.m. **Exhibits Open** [Concord Foyer]
Lunch on Your Own
You may enjoy lunch in CK's Restaurant located in the hotel or at a nearby restaurant.

1:15 – 1:30 p.m. **Case Law Update: Construction** [Grand Ballroom]
Paul Burns, Bradley & Riley PC, Cedar Rapids, IA

1:30 – 2:00 p.m. **How Architects Can Best Work with Attorneys in Defending Lawsuits** [Grand Ballroom]
John Kujac, Kujac Design/Build Co., Madrid, IA

2:00 – 2:45 p.m. **Traumatic Brain Injury** [Grand Ballroom]
Robert Jones, University of Iowa, Iowa City, IA

SAVE THE DATE: 49th IDCA Annual Meeting & Seminar
September 19 – 20, 2013
West Des Moines Marriott, West Des Moines, IA

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*D.J. Goode, 1966 – 1967
*Harry Druker, 1967 – 1968
*Philip H. Cless, 1968 – 1969
Philip J. Willson, 1969 – 1970
*Dudley J. Weible, 1970 – 1971
Kenneth L. Keith, 1971 – 1972
Robert G. Allbee, 1972 – 1973
*Craig H. Mosier, 1973 – 1974
*Ralph W. Gearhart, 1974 – 1975
*Robert V.P. Waterman, 1975 – 1976
*Stewart H.M. Lund, 1976 – 1977
*Edward J. Kelly, 1977 – 1978
*Don N. Kersten, 1978 – 1979
Marvin F. Heidman, 1979 – 1980
*Herbert S. Selby, 1980 – 1981
L.R. Voigts, 1981 – 1982
Alanson K. Elgar (Hon.), 1982 – 1983
*Albert D. Vasey (Hon.), 1983
*Harold R. Grigg, 1983 – 1984
Raymond R. Stefani, 1984 – 1985
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David L. Phipps, 1986 – 1987
Thomas D. Hanson, 1987 – 1988
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*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
Stephen J. Powell, 2010 – 2011

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

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	2011	Gregory A. Witke

*First Special Edition "Eddie" Award

ROBERT M. KREAMER AWARD FOR PUBLIC SERVICE RECIPIENTS

This Public Service Award is given to Senators, Representatives, or Judges that have helped IDCA achieve their legislative goals for the year. In 2011, the IDCA voted unanimously to change the name of this award to the Robert M. Kreamer Award, in honor and recognition of IDCA's long-standing executive director and lobbyist.

2004	Rep. Kraig Paulson
2004	Sen. Maggie Tinsman
2006	Honorable Louis Al Lavorato, Chief Justice, Iowa Supreme Court
2010	Sen. Robert M. Hogg
2011	Robert M. Kreamer

LIFETIME AWARD RECIPIENTS

The Lifetime Award is bestowed upon IDCA members whose longstanding committment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

	Leroy R. Voights
	Alanson K. Elgar
	Raymond R. Stefani
	Robert G. Allbee
2004	Herbert S. Selby

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association
September 2011 – August 2012

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IDCA Committees

Board of Editors - Defense Update

Responsible for keeping the creating a timeline for the quarterly newsletter and keeping the committee members on track.

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IDCA Committees

Commercial Litigation & Products Liability

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. 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.

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IDCA Committees

Employment Law & Professional Liability

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. 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.

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IDCA Committees

Membership & Marketing Committee

Review and process membership applications and communications with new Association members. Responsible for membership roster. 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.

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IDCA Committees

Tort and Insurance Law & Worker's Compensation Committee

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. 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.

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IDCA Committees

Young Lawyers & Social Media

(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.

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IDCA Committees

IDCA's committees are the heart of the organization, and there are several opportunities for you to get involved! This is a great way to explore leadership opportunities in IDCA. The commitment is minimal, the benefits are many.

We are looking for members to help guide the direction of IDCA in the following committees:

Commercial Litigation & Products Liability Committee
Purpose - 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. 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.

Employment Law & Professional Liability Committee
Purpose - 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. Monitor legislative activities in the area of professional liability; act as a resource for the Board of Directors and membership on professional liability issues.

Membership & Marketing Committee
Purpose - Analyze current membership strategies and develop recommendations to increase membership and expand member benefits options.

Tort and Insurance Law & Worker's Compensation Committee
Purpose - 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. 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.

Young Lawyers & Social Media Committee
Purpose – Invite and encourage member participation in the growth of IDCA through social media and other technology; improve communications between members and leaders through social media and other technology.

Time Commitment
January 1 – December 31, 2013. There will be a minimum of two meetings. The initial meeting will be to determine priorities and communication guidelines for the committee.

Meeting(s) Location
You must be able to participate by phone and email.

Roles and Responsibilities
You will be expected to contribute in any meetings by phone or in any email discussions. Your contribution should be strategic and you should be prepared to discuss issues that affect defense attorneys in the State of Iowa. Committees are responsible to:

- Submit one article to *Defense Update* during the calendar year.
- Provide topic suggestions for the IDCA Annual Meeting & Seminar or IDCA Webinars.
- Provide input to the Legislative Task Force on proposed legislation affecting this committee's area of law.
- Meet a minimum of twice per year.
- Submit updates to the IDCA President prior to each IDCA Board Meeting.
- Succession planning: identify new task force members, chairs and board members.
- Recruitment: identifying and recruiting new IDCA members.

Benefits
For each individual who participates fully in committee activities, IDCA will send a letter recognizing your participation to your firm's partners; Recognition in the *Defense Update* and at the Annual Meeting; First-hand knowledge of issues affecting the profession.

If you are interested in serving on any of these committees,
please contact IDCA Headquarters at staff@iowadefensecounsel.org today!

IDCA Annual Meeting Sponsors

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Suzanne Alton-Glowiak, CED Investigative Technologies, Inc., Oak Brook, IL
Suzanne Alton-Glowiak is a Senior Mechanical and Forensic engineer with 24 years of experience. She holds a Bachelor of Science Degree from the Illinois Institute of Technology and a Masters Degree in Manufacturing Engineering from Northwestern University. After graduating from the Illinois Institute of Technology, Suzanne worked at Triodyne Inc, a mechanical engineering firm specializing in the safety of engineering systems and mechanical devices. While at Triodyne, she was responsible for safety analysis and testing of industrial and consumer products, on-site accident investigation, accident reconstruction, research in safety-related subjects, and mechanical design and analysis of human locomotion. Prior to joining CED, she also held the role of affiliated consultant with Wiss, Janney, Elstner Associates, Inc. in the Chicago area where she was retained as a premises liability expert and a safety analysis engineer who testified on both the state and federal court level. Additionally, Suzanne has been a sitting member on the American National Standards Institute and the Robotic Institute of America and has been instrumental in developing standards for safety requirements and Robotics.

Paul Burns, Bradley & Riley PC, Cedar Rapids, IA
Paul Burns received his Bachelor's degree from the University of Northern Iowa and his J.D. with high honors from the University of Iowa. He joined Bradley & Riley PC in 1997 and served as a law clerk to the Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa. Paul is a member of the American Bar Association, Iowa State Bar Association, Johnson County Bar Association, and Linn County Bar Association. He has written articles for several publications, is active in his community and is the 2006 recipient of the *Corridor Business Journal's* Forty Under 40 Award.

David Charles, Crowley Fleck, PLLP, Billings, MT
David Charles is Of Counsel in the Litigation Department of Crowley Fleck PLLP. He lives in Billings, Montana, and works out of the Crowley Fleck office in Billings. His practice focuses on civil jury trial work, both plaintiff and defense, with types of cases including general commercial disputes of all types, personal injury, product liability, employment, trade secrets, Lanham Act, medical malpractice, various estate disputes and condemnation matters. David has experience in cases involving the oil and gas industry and in appellate work of all types. He has handled cases in numerous state and federal jurisdictions including Iowa, Kansas, Maryland, Mississippi, Montana, Nebraska, North Dakota, Nevada, Texas and Washington. David graduated with High Distinction from the University of Iowa College of Law in 1974 subsequent to receiving a political science degree in 1972, graduating Magna Cum Laude from Parsons College in Fairfield, Iowa. He has been Board Certified as a Trial Advocate by National Board of Trial Advocacy since 1989. After practicing law for 30 years in Iowa he moved his practice to Montana but still maintains an office in Des Moines and an active practice in Iowa.

Nicholas Critelli, Nicholas Critelli, P.C., Des Moines, IA
Nick Critelli founded Nicholas Critelli, P.C. in 1967. He is a practicing American trial lawyer and an English Barrister. He is admitted to the Bars of England and Wales, (MT 1991); New York (1990), U.S. Supreme Court (1971) and Iowa (1967). He received his core legal education at Drake University (J.D. 1967) and City University in London. He is a past president of the Iowa State Bar Association (2004-5); American Academy of ADR Attorneys (2003); Iowa Academy of Trial Lawyers (1985). Nick is a fellow in the American College of Trial Lawyers and the International Society of Barristers; an advocate in the American Board of Trial Advocates and is board certified as a Civil Trial Specialist by the National Board of Trial Advocacy. Nick is an "AV" rated lawyer and is listed as a "Best Lawyer" in America and as a "Super Lawyer". He is the current chair of the Iowa State Bar Association's Ethics and Standards Committee.

Drew Cumings-Peterson, Shuttleworth & Ingersoll, PLC, Cedar Rapids, IA
Drew Cumings-Peterson is an associate attorney at Shuttleworth & Ingersoll, P.L.C. Drew has a general litigation practice including, but not limited to, Labor and Employment law, and Health law. Drew is a 2011 graduate of the University of Iowa College of Law.

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.

SPEAKER BIOGRAPHIES

Charles Fox, Demonstratives, Inc., Ames, IA
Charles (Chuck) Fox has been creating winning demonstrative material for over 15 years. Chuck led the DI production team (Affymetrix v. Illumina) that produced graphics illustrating DNA microarray technology, which Affymetrix's attorneys used to show how Illumina infringed several Affymetrix patents, resulting in a $90 million settlement for Affymetrix. He has experience leading projects in a number of technical disciplines, including biotechnology patent, pharmaceutical patent, medical device patent and accused personal injury from environmental exposure, as well as creating compelling graphics on damages issues. Prior to his work in litigation services, Chuck was a Pharmaceutical Research and Manufacturers of America (PhRMA Foundation) post-doctoral fellow at the University of Michigan and received his doctorate in Molecular, Cellular, and Developmental Biology from Iowa State University.

District Court Judge Robert Hanson, 5th Judicial District Court Des Moines, IA
Judge Hanson was appointed to the bench in 2003. He received his undergraduate education from Stanford University in 1978. He went to the University of Iowa and earned his law degree in 1981. He clerked for the Iowa Supreme Court and practiced law privately prior to his appointment. He is a member of the Polk County, Iowa State and American Bar Associations.

Thomas Henderson, Whitfield & Eddy, PLC, Des Moines, IA
Tom Henderson's legal practice includes over 30 years of experience in handling litigation, trials, and appeals with regard to construction personal injury, municipal, and workers' compensation matters. As a result of his legal work, he has been recognized by his peers by inclusion in the Iowa Academy of Trial Lawyers. In addition, he has been active in Iowa's legal community by holding a number of leadership positions in the Iowa State Bar Association, including Young Lawyer Division President, and by serving as an adjunct professor at the Drake Law School.

Senator Robert Hogg, Senate District 19, Cedar Rapids, IA
Sen. Rob Hogg is currently serving his second term as state senator from Senate District 19 in Cedar Rapids after two terms as a state representative. Among his committee assignments, he serves as vice chair of the Judiciary Committee and vice chair of the Justice System Budget Subcommittee. He is currently the only lawyer in the Iowa Senate. In 2010, he received the "Public Service Award" from the Iowa Defense Counsel Association. In addition to serving in the Legislature, Rob is an attorney with Elderkin & Pirnie in Cedar Rapids. Previously, he served as a judicial clerk for Judge Michael J. Melloy, then chief judge of the U.S. District Court in Cedar Rapids, and for Judge Donald P. Lay on the Eighth Circuit Court of Appeals in St. Paul, Minnesota.

Robert Jones, University of Iowa, Iowa City, IA
Robert Jones is an Associate Professor at the Benton Neuropsychology Laboratory at the University of Iowa Department of Neurology. His clinical specialties include brain-behavior relationships, disorders of vision, forensic neuropsychology, traumatic brain injury, memory and amnesia, dementia and epilepsy. Dr. Jones received his BA with Honor from the University of Wisconsin, and his M.A. and Ph.D from the University of Iowa. He is a widely published author and is a member of the National Academy of Neuropsychology, Society for Neuroscience, International Neuropsychological Society, International Brain Research Organization, American Board of Clinical Neuropsychology, and American Psychological Association.

Douglas Keene, Keene Trial Consulting, Austin, TX
Doug Keene is a Litigation Consultant with a national practice. He has been an invited speaker and author for the American Bar Association, ABOTA, the American College of Trial Lawyers, American Association for Justice, the Product Liability Advisory Council, ALFA International, and numerous state bar associations. He has been a featured expert on news outlets including *The New York Times*, *Fox News*, *Time*, the *Los Angeles Times*, and numerous others. As a clinical and forensic psychologist, Dr. Keene testified as an expert witness over 100 times from 1990 – 1997. As a litigation consultant he is frequently called on to design and implement pre-trial research strategies, including various types of focus groups and mock trials, in addition to witness preparation, jury selection strategies, and case strategy. Dr. Keene's consulting practice began with a focus on personal injury cases, but over time has developed a large focus on commercial litigation of various types (contracts, intellectual property, shareholder litigation, probate, banking cases, and many different product liability cases). Notable cases and clients include Anna Nicole Smith (probate litigation), Investment banks and securities companies (plaintiff and defense), pharmaceutical companies (plaintiff and defense), consumer product cases, Roman Catholic priest sexual abuse (plaintiff and defense), and both plaintiff and defendant clients in major aviation litigation. After completing his term as President of the ASTC, Doug joined the faculty of the University of Texas School of Law in the spring of 2010 as a member of the adjunct faculty of the Trial Advocacy program.
In both 2010 and 2011, the blog of Keene Trial Consulting (The Jury Room) was honored by the ABA Journal as one of the top 100 legal blogs in the country, and one of the top 10 in the 'Litigation' category.

SPEAKER BIOGRAPHIES

John Kujac, Kujac Design/Build Co., Madrid, IA
John Kujac is the President of Kujac Design/Build Co. in Madrid, Iowa. John's areas of expertise include architectural design defects, construction defects, standard of care for architects and contractors, building codes, statutes and regulations, construction industry standards and more. He is a licensed architect in the State of Iowa and holds memberships in the National Council of Architectural Registration Board, National Fire Protection Association, National Safety Council, Iowa/Illinois Safety Council, International Code Council and Iowa Association of Building Officials. John has served as an expert witness in several construction and design cases and disputes.

John Lande, Dickinson Law, Des Moines, IA
John represents both businesses and individuals in all phases of commercial litigation. His practice covers a range of commercial litigation matters including foreclosures, collections, business torts, and agency regulatory actions. John also provides internal investigation services to corporate and financial services clients to ensure proper compliance with regulatory requirements. Before joining Dickinson Law, he worked as a law clerk in Cedar Rapids for the Federal Public Defender and at Riccolo & Semelroth, P.C. An Iowa native, John earned his law degree from the University of Iowa College of Law (With Distinction; Willard L. Boyd Public Service Distinction) and his undergraduate degree from Drake University with honors. Last year, he was recognized as Future Leader of the Bar by the Iowa State Bar Association. In addition to the ISBA, John is a member of the Polk County and American Bar associations.

Mark McGrory, Demonstratives, Inc., Ames, IA
Mark joined DI in 2008 after 12 years at Sprint Corporation as senior counsel, where he oversaw all of Sprint's intellectual property litigation, as well as Sprint's most significant complex commercial litigation. As in-house counsel at Sprint, Mark worked with major law firms across the country and participated in numerous trials, arbitrations and mediations. Previously, he was a member of the litigation department at Kansas City's Morrison & Hecker firm (now Stinson Morrison Hecker) for 12 years, including six years as an equity partner. Mark received his juris doctorate from the University of Iowa and is rated AV by Martindale-Hubbell. In addition to his duties at Demonstratives, Mark is Of Counsel at Rouse Hendricks German May PC, a litigation boutique in Kansas City, MO.

Noel K. McKibbin, Farm Bureau Property and Casualty Company, West Des Moines, IA
Noel McKibbin is the Vice President of Property-Casualty Claims at Farm Bureau He has been at Farm Bureau since 1997. Noel received his J.D. from Drake University, grading with honors. He is an author and served as an adjunct professor at Drake Law School. He has served as IDCA's Treasurer since 2004 and is on the IDCA Editorial Committee, which is responsible for *Defense Update*.

Brenda Meade, State Farm Insurance, Des Moines, IA
Brenda has been with State Farm Insurance for 25 years, working with property damage claims, injury claims and as a litigation injury specialist. She has worked with State Farm in Texas, Oklahoma, Kansas and Iowa. Currently, she focuses on auto injury claims and complex injury claims and litigation.

Chris Owenson, The IMT Group, West Des Moines, IA
Chris is the Vice President Claims of The IMT Group, a position he has held for the past 12 years. He has been at IMT Insurance for 27 years, holding various positions within the company, including marketing, reinsurance, and claims. Chris is a graduate of UNI.

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. Todd had previously served as Attorney/Claims Representative for MLM, and was the head of their technology subsidiary, Mutual Software. He 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.

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Randy Sellers has practiced at Starnes Davis Florie for over 30 years and serves on the firm's Executive Committee. His practice has been devoted to civil litigation including healthcare, professional medical liability, long-term care, intellectual property and complex commercial litigation. He has tried more than 175 complex civil cases to a jury verdict. Randall has been honored by his peers for his litigation accomplishments. He is a Fellow of the American College of Trial Lawyers (ACTL), past Chair of the ACTL Legal Ethics & Professionalism Committee, is currently Chair of the ACTL Alabama State Committee, and is a Diplomate of the American Board of Trial Advocates (ABOTA). He also served on the Faculty at the 2011 International Association of Defense Counsel (IADC) Trial Academy at Stanford Law School. Randall has been recognized as a "Tier 1" Litigator for the state of Alabama in the 2008 - 2012 editions of Chambers USA, and was named a Litigation Star for the state of Alabama in the 2008 - 2012 editions of *Benchmark Litigation*. He has been listed in *Best Lawyers in America*® for 11 consecutive years, 2001 - 2012, and has been named one of the top attorneys in the state of Alabama by *Alabama Super Lawyers*® magazine, 2008 - 2012.

Jessica Smythe, Crowe Paradis Services Corporation, North Reading, MA
Jessica Smythe is a national Medicare Secondary Payer compliance consultant with Crowe Paradis Services Corporation. Prior to joining Crowe Paradis, Jessica was a North Carolina defense attorney. Her clients included national and international corporations, self insured companies, insurance carriers and TPAs. Jessica, consequently, dealt with the issues of Medicare compliance while defending claims and now uses this practical knowledge in her current role as a compliance consultant and national speaker. Jessica presents seminars on all aspects of Medicare compliance issues, including Medicare set asides, the negotiation and settlement of conditional payments and MMSEA reporting requirements. She provides Medicare compliance training to the world's largest insurance carrier and the nation's largest carriers, third party administrators, self-insureds, state funds and guaranty associations. Jessica is a certified Medicare Set Aside consultant (MSCC) and a Certified Medicare Secondary Payer Professional (CMSP) and is on faculty for both certification programs. She is the author of "Hope on the Horizon: New Cases Challenge Medicare's Established Collection Practices Under the Medicare Secondary Payer Act," published in the Winter 2011 Edition of *The Defender*, the quarterly publication of the North Carolina Association of Defense Attorneys.

Scott Sundstrom, IDCA Lobbyist, Nyemaster Goode, Des Moines, IA
Scott Sundstrom is IDCA's lobbyist and is a shareholder in Nyemaster Goode's Governmental Affairs Department. In that capacity, Scott lobbies on behalf of a number of clients before the legislature, the Governor, and regulatory agencies. Scott has a broad and varied lobbying practice involving insurance, transportation, legal, economic development, taxation, and regulatory issues affecting a number of industries. Scott also assists clients with appellate matters before Iowa state and federal courts. Scott regularly speaks before groups about current legislative and regulatory topics and the Iowa political environment. Prior to joining Nyemaster Goode, Scott served as a law clerk to the Hon. Carlos Lucero, a judge on the United States Court of Appeals for the Tenth Circuit, and practiced at law firms in Denver, Colorado, and Palo Alto, California. Scott received his law degree with honors from New York University School of Law, where he served as an Articles Editor on the NYU Law Review. Scott is married and has twin daughters who took fourth place at this year's Iowa State Fair twins contest.

Ted J. Wallace, American Family Mutual Insurance Company, Davenport, IA
Ted Wallace attended the University of Iowa School of Law graduating with distinction in 1990. He began practice with a small insurance defense firm in Rock Island, Ill. After three years, he joined American Family Insurance as staff counsel and has been in that position for 19 years. As staff counsel, Ted has personally handled hundreds of litigation defenses of insureds as well as supervising outside counsel on behalf of the company.

Mark J. Wiedenfeld, Wiedenfeld & McLaughlin LLP, Des Moines, IA
Mark Wiedenfeld is a partner in the firm of Wiedenfeld & McLaughlin in Des Moines. Mark specializes in civil litigation, primarily insurance defense but also does some plaintiff's work. Most of the cases involve personal injury and arise from motor vehicle accidents, assaults, dog bites, falls, construction disputes, etc. Mark has been involved in many cases brought under the Iowa Dramshop Act. Usually these cases arise out of bar fights or motor vehicle accidents. He is a member of Iowa Defense Counsel Association, Defense Research Institute, Association of Defense Trial Attorneys, Iowa Academy of Trial Lawyers, and Iowa and Polk County Bar Associations. Mark graduated from the University of Iowa College of Law with high distinction and received his undergraduate education at the University of South Dakota.

SPEAKER BIOGRAPHIES

Justice David Wiggins, Iowa Supreme Court, Des Moines, IA
Justice David Wiggins was appointed to the Iowa Supreme Court August 29, 2003, to fill the vacancy created by the retirement of Iowa Supreme Court Justice Linda K. Neuman. Justice Wiggins was born in Chicago, Ill. He attended the University of Illinois in Chicago where he received his bachelor's degree in 1973. He graduated with honors, Order of the Coif, from Drake University Law School in 1976. He served as associate editor of the *Drake Law Review*. From 1976 until his appointment to the court, Justice Wiggins practiced law in West Des Moines. While a practicing attorney, Justice Wiggins served on a number of judicial branch advisory groups including the redistricting commission, the advisory committee on rules of civil procedure, and the special committee on cost of litigation. Justice Wiggins was also active in numerous bar organizations. He served as chairperson of the Judicial Qualifications Commission from 2000 until his appointment to the court.

Mark Zaiger, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA
Mark Zaiger is a Senior Vice President at Shuttleworth & Ingersoll, P.L.C. Mark's work focuses on labor and employment law, trade secrets, noncompete cases, commercial lawsuits and federal court litigation. His professional affiliations include: Listed in the Best Lawyers in America®--Labor and Employment Law and Commercial Litigation (1995-present); listed as a Great Plains Super Lawyer®--2009 and 2011 -- Employment & Labor; listed as Iowa Super Lawyer® 2007; listed in Chambers USA®--America's Leading Lawyers for Business (2003-present). He holds membership in the American College of Trial Lawyers, Iowa Academy of Trial Lawyers, American Bar Association (Member of the Labor & Employment Law Section); Iowa State Bar Association (Member of the Labor & Employment Law and Litigation Sections); and Linn County Bar Association. Mark graduated from Harvard University, A.B. (cum laude) and received his J.D. (with distinction) from the University of Iowa.

Courtroom Communications and Related Issues

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Judges, journalists clash over courtroom tweets

Getting news from a big trial once took days, moving at the speed of a carrier pigeon or an express pony. The telegraph and telephone cut that time dramatically, as did live television broadcasts.

Now comes Twitter with more changes, breaking up courtroom journalism into bite-size reports that take shape as fast as a reporter can tap 140 characters into a smartphone. But the micro-blogging site is increasingly putting reporters on a collision course with judges who fear it could threaten a defendant's right to a fair trial.

The tension was highlighted recently by a Chicago court's decision to ban anyone from tweeting or using other social media at the upcoming trial of a man accused of killing Oscar winner Jennifer Hudson's family. Reporters and their advocates insist the practice is essential to providing a play-by-play for the public as justice unfolds.

"We're troubled by this ban," said Ed Yohnka, Chicago spokesman for the American Civil Liberties Union. Tweeting and social media are "merely the 21st century version of what reporters have always done - gather information and disseminate it."

Judges, he said, should embrace Twitter as a way to shed light on the judicial process, which, for many Americans, remains shrouded in mysterious ritual. The judge in the Illinois case fears that feverish tweeting on smartphones could distract jurors and witnesses when testimony begins April 23.

"Tweeting takes away from the dignity of a courtroom," said Irv Miller, media liaison for Cook County Judge Charles Burns. "The judge doesn't want the trial to turn into a circus." Burns is allowing reporters to bring cellphones and to send e-mails periodically, a notable concession in a state that has only recently announced it will begin experimenting with cameras in court and where cellphones are often barred from courtrooms altogether.

There's also an overflow courtroom where reporters can tweet freely. But there will be no audio or video of proceedings in the room, just live transcripts scrolling across a screen.
The issue extends beyond journalists to jurors, whose tweets have raised issues of their own across the country.

Last year, the Arkansas Supreme Court threw out a death row inmate's murder conviction after one juror tweeted during proceedings and another slept. Juror Randy Franco's tweets ranged from the philosophical to the mundane. One read, "The coffee sucks here." Less than an hour before the jury returned with a verdict, he tweeted, "It's all over."

There's little gray area regarding jurors tweeting. The Arkansas trial judge had warned jurors, "Don't Twitter anybody" about the case. Burns was similarly explicit during jury selection in Chicago.

But there's no consensus among either state or federal judges about the propriety of in-court tweets, so individual judges are often left to craft their own rules.

For instance, the judge in the child sexual abuse case of former Penn State assistant football coach Jerry Sandusky has allowed reporters to tweet from pretrial hearings but not to transmit verbatim accounts or to take photographs. Judge John Cleland hasn't indicated whether he will change that policy for the June trial.

In some ways, Judge Burns has gone further than others.

To ensure his ban is respected, he's assigned a member of the sheriff's department to track reporters' Twitter accounts while court is in session. To get accreditation to cover the trial, reporters had to disclose their Twitter handles.

If there appears to be a tweet from inside the courtroom, Penny Mateck will report it to the judge. "He'll decide what action to take," she said. Penalties could include contempt-of-court sanctions.

Peter Scheer, director of the California-based First Amendment Coalition, said having a sheriff's employee monitor tweets makes him uneasy, but it doesn't seem to violate anyone's rights because most Twitter feeds are already open for anyone to see.

Still, some observers are puzzled why e-mails would be OK, but tweets are out of order.

The judge, Miller explained, believes that having reporters constantly hunched over their phones pecking out tweets is

more disruptive than sending an email every 10 or 15 minutes.
"We have been dealing with this issue of tweeting in court a lot these days - but this is an approach I have never heard of before. It's weird," said Lucy Dalglish, director of the Virginia-based Reporters Committee for Freedom of the Press.

She wondered if there wasn't a greater risk of inaccuracies when reporters at the scene e-mailed colleagues at news bureaus, who then put their own interpretation on emailed text and published it on websites or their own Twitter accounts.

Radio journalist Jennifer Fuller is equally perplexed.

"We've been taking notes in courts for years," said Fuller, president of the Illinois News Broadcasters Association. "If a dozen reporters put their heads down to start writing at the same time, couldn't you say that's as disruptive as tweeting?"

It's not just Twitter's potential to distract. Other judges worry that tweets about evidence could pop up uninvited on jurors' cellphones, possibly tainting the panel.
In their request for a new trial, attorneys for Texas financier R. Allen Stanford, who was convicted of fraud last month, argued that tweeting by reporters distracted jurors and created other risks. The federal judge denied the request without explanation.

And a Kansas judge last week declared a mistrial after a Topeka Capital-Journal reporter tweeted a photo that included the grainy profile of a juror hearing a murder case. The judge had permitted camera phones in court but said no photos were to be taken of jurors.

Reporter Ann Marie Bush hadn't realized one juror was in view, Publisher Gregg Ireland said, adding that the company "regrets the error and loss of the court's time."
Journalists understand judges' concerns, Dalglish said. But the better solution is for courts to do what they have done for decades - tell jurors not to follow news on their case, including by switching off their Twitter feeds.

One obstacle to reaching a consensus is that no one can agree on just what Twitter is or does. Some judges say it's broadcasting, like TV, which is banned from courtrooms in some states. Fuller says tweets are more like notes that get shared.

Because Twitter has become the medium through which some consumers get most of their news, it's all the more urgent for judges and journalists to come to an accommodation, Fuller said.

And her association's policy on tweeting in court?

"We don't have one yet," she said. "We're working at it. Finding a middle ground will take time."

CHAPTER 25

RULES FOR EXPANDED MEDIA COVERAGE

Rule 25.1. Definitions

As used in this chapter:

"Expanded media coverage" includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public.

"Good cause" for purposes of exclusion under this chapter means that coverage will have a substantial effect upon the objector which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media.

"Judge" means the magistrate, district associate judge, or district judge presiding in a trial court proceeding, or the presiding judge or justice in an appellate proceeding.

"Judicial proceedings" or "proceedings" shall include all public trials, hearings, or other proceedings in a trial or appellate court, for which expanded media is requested, except those specifically excluded by this chapter.

"Media coordinator" shall include media coordinating councils as well as the designees of such coordinators or councils.

Renumbered from Canon 3 and amended Nov. 9, 2001, eff. Feb. 15, 2002.

Rule 25.2. General

Broadcasting, televising, recording, and photographing will be permitted in the courtroom and adjacent areas during sessions of the court, including recesses between sessions, under the following conditions:

25.2(1) Permission first shall have been granted expressly by the judge, who may prescribe such conditions of coverage as provided for in this chapter.

25.2(2) Expanded media coverage of a proceeding shall be permitted, unless the judge concludes, for reasons stated on the record, that under the circumstances of the particular proceeding such coverage would materially interfere with the rights of the parties to a fair trial.

25.2(3) Expanded media coverage of a witness also may be refused by the judge upon objection and showing of good cause by the witness. In prosecutions for sexual abuse, or for charges in which sexual abuse is an included offense or an essential element of the charge, there shall be no expanded media coverage of the testimony of a victim/witness unless such witness consents. Further, an objection to coverage by a victim/witness in any other forcible felony prosecution, and by police informants, undercover agents, and relocated witnesses, shall enjoy a rebuttable presumption of validity. The presumption is rebutted by a showing that expanded media coverage will not have a substantial effect upon the particular individual objecting to such coverage which would be qualitatively different from the effect on members of the public in general and that such effect will not be qualitatively different from coverage by other types of media.

25.2(4) Expanded media coverage is prohibited of any court proceeding which, under Iowa law, is required to be held in private. In any event, no coverage shall be permitted in any juvenile, dissolution, adoption, child custody, or trade secret cases unless consent on the record is obtained from all parties (including a parent or guardian of a minor child).

25.2(5) Expanded media coverage of jury selection is prohibited. Expanded media coverage of the return of the jury's verdict shall be permitted. In all other circumstances, however, expanded media coverage of jurors is prohibited except to the extent it is unavoidable in the coverage of other trial participants or courtroom proceedings. The policy of the rules in this chapter is to prevent unnecessary or prolonged photographic or video coverage of individual jurors.

25.2(6) There shall be no audio pickup or broadcast of conferences in a court proceeding between attorneys and their clients, between co-counsel, between counsel and the presiding judge held at the bench or in chambers, or between judges in an appellate proceeding.

25.2(7) The quantity and types of equipment permitted in the courtroom shall be subject to the discre-

tion of the judge within the guidelines set out in this chapter.

25.2(8) Notwithstanding the provisions of any of the procedural or technical rules in this chapter, the presiding judge, upon application of the media coordinator, may permit the use of equipment or techniques at variance therewith, provided the application for variance is included in the advance notice of coverage provided for in rule 25.3(2). Objections, if any, shall be made as provided by rule 25.3(3). Ruling upon such a variance application shall be in the sole discretion of the presiding judge.

Such variances may be allowed by the presiding judge without advance application or notice if all counsel and parties consent to it.

25.2(9) The judge may, as to any or all media participants, limit or terminate photographic or electronic media coverage at any time during the proceedings in the event the judge finds that rules established under this chapter, or additional rules imposed by the presiding judge, have been violated or that substantial rights of individual participants or rights to a fair trial will be prejudiced by such manner of coverage if it is allowed to continue.

25.2(10) The rights of photographic and electronic coverage provided for herein may be exercised only by persons or organizations which are part of the news media.

25.2(11) A judge may authorize expanded media coverage of investitive or ceremonial proceedings at variance with the procedural and technical rules of this chapter as the judge sees fit.

Renumbered from Canon 3 and amended Nov. 9, 2001, eff. Feb. 15, 2002.

Rule 25.3. Procedural

25.3(1) *Media coordinator and coordinating councils.* Media coordinators shall be appointed by the supreme court from a list of nominees provided by a representative of the media designated by the supreme court. The judge and all interested members of the media shall work, whenever possible, with and through the appropriate media coordinator regarding all arrangements for expanded media coverage. The supreme court shall designate the jurisdiction of each media coordinator. In the event a media coordinator has not been nominated or is not available for a particular proceeding, the judge may deny expanded media coverage or may appoint an individual from among local working representatives of the media to serve as the coordinator for the proceeding.

25.3(2) *Advance notice of coverage.*

a. All requests by representatives of the news media to use photographic equipment, television cameras, or electronic sound recording equipment in the courtroom shall be made to the media coordinator. The media coordinator, in turn, shall inform counsel for all parties and the presiding judge at least 14 days in advance of the time the proceeding is scheduled to begin, but these times may be extended or reduced by court order. When the proceeding is not scheduled at least 14 days in advance, however, the media coordinator or media coordinating council shall give notice of the request as soon as practicable after the proceeding is scheduled.

b. Notice shall be in writing, filed in the appropriate clerk's office. A copy of the notice shall be sent by ordinary mail to the last known address of all counsel of record, parties appearing without counsel, the appropriate court administrator, and the judge expected to preside at the proceeding for which expanded media coverage is being requested.

c. The notice form in rule 25.5 is illustrative and not mandatory.

25.3(3) *Objections.* A party to a proceeding objecting to expanded media coverage under rule 25.2(2) shall file a written objection, stating the grounds therefor, at least three days before commencement of the proceeding. All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to expanded media coverage, and all objections by witnesses under rule 25.2(3) shall be filed prior to commencement of the proceeding. The objection forms in rule 25.5 are illustrative and not mandatory. All objections shall be heard and determined by the judge prior to the commencement of the proceedings. The judge may rule on the basis of the written objection alone. In addition, the objecting party or witness, and all other parties, may be afforded an opportunity to present additional evidence by affidavit or by such other means as the judge directs. The judge in absolute discretion may permit presentation of such evidence by the media coordinator in the same manner. Time for filing of objections may be extended or reduced in the discretion of the judge, who also, in appropriate circumstances, may extend the right of objection to persons not specifically provided for in this chapter.

Renumbered from Canon 3 and amended Nov. 9, 2001, eff. Feb. 15, 2002. Amended May 27, 2010, effective May 27, 2010.

Rule 25.4. Technical

25.4(1) *Equipment specifications.* Equipment to be used by the media in courtrooms during judicial proceedings must be unobtrusive and must not produce distracting sound. In addition, such equipment must satisfy the following criteria, where applicable:

a. *Still cameras.* Still cameras and lenses must be unobtrusive, without distracting light or sound.

b. *Television cameras and related equipment.* Television cameras are to be electronic and, together with any related equipment to be located in the court-

room, must be unobtrusive in both size and appearance, without distracting sound or light. Television cameras are to be designed or modified so that participants in the judicial proceedings being covered are unable to determine when recording is occurring.

c. *Audio equipment.* Microphones, wiring, and audio recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the judicial proceeding being covered. Any changes in existing audio systems must be approved by the presiding judge. No modifications of existing systems shall be made at public expense. Microphones for use of counsel and judges shall be equipped with off/on switches to facilitate compliance with rule 25.2(6) .

d. *Advance approval.* It shall be the duty of media personnel to demonstrate to the presiding judge reasonably in advance of the proceeding that the equipment sought to be utilized meets the criteria set forth in this rule. Failure to obtain advance judicial approval for equipment may preclude its use in the proceeding. All media equipment and personnel shall be in place at least fifteen minutes prior to the scheduled time of commencement of the proceeding.

25.4(2) *Lighting.* Other than light sources already existing in the courtroom, no flashbulbs or other artificial light device of any kind shall be employed in the courtroom. With the concurrence of the presiding judge, however, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light bulbs), provided such modifications are installed and maintained without public expense.

25.4(3) *Equipment and pooling.* The following limitations on the amount of equipment and number of photographic and broadcast media personnel in the courtroom shall apply:

a. *Still photography.* Not more than two still photographers, each using not more than two camera bodies and two lenses, shall be permitted in the courtroom during a judicial proceeding at any one time.

b. *Television.* Not more than two television cameras, each operated by not more than one camera person, shall be permitted in the courtroom during a judicial proceeding. Where possible, recording and broadcasting equipment which is not a component part of a television camera shall be located outside of the courtroom.

c. *Audio.* Not more than one audio system shall be set up in the courtroom for broadcast coverage of a judicial proceeding. Audio pickup for broadcast coverage shall be accomplished from any existing audio system present in the courtroom, if such pickup would be technically suitable for broadcast. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom.

d. *Pooling.* Where the above limitations on equipment and personnel make it necessary, the media shall be required to pool equipment and personnel. Pooling arrangements shall be the sole responsibility of the media coordinator, and the presiding judge shall not be called upon to mediate any dispute as to the appropriate media representatives authorized to cover a particular judicial proceeding.

25.4(4) *Location of equipment and personnel.* Equipment and operating personnel shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the presiding judge. The area or areas designated shall provide reasonable access to the proceeding to be covered.

25.4(5) *Movement during proceedings.* Television cameras and audio equipment may be installed in or removed from the courtroom only when the court is not in session. In addition, such equipment shall at all times be operated from a fixed position. Still photographers and broadcast media personnel shall not move about the courtroom while proceedings are in session, nor shall they engage in any movement which attracts undue attention. Still photographers shall not assume body positions inappropriate for spectators.

25.4(6) *Decorum.* All still photographers and broadcast media personnel shall be properly attired and shall maintain proper courtroom decorum at all times while covering a judicial proceeding.

Renumbered from Canon 3 and amended Nov. 9, 2001, eff. Feb. 15, 2002.

Rule 25.5. Rules specific to the supreme court and court of appeals

25.5(1) *Video recording, Internet streaming, and expanded media coverage of oral arguments.*

a. All regularly scheduled supreme court and court of appeals oral arguments shall be subject to video recording, streaming over the Internet, and expanded media coverage. The rules in this chapter allowing objections to expanded media coverage do not apply to supreme court and court of appeals oral arguments.

b. The prohibitions in rule 25.2(4) on the types of cases subject to expanded media coverage do not apply to supreme court and court of appeals oral arguments.

25.5(2) *Expanded media coverage.*

a. The rules in this chapter pertaining to expanded media coverage apply only to media coverage occurring within the supreme court and court of appeals courtrooms. Recordings of supreme court and court of appeals oral arguments made from other locations within the judicial building are not subject to the rules on expanded media coverage.

b. A written request for expanded media coverage within the supreme court and court of appeals court-

rooms must be filed with the clerk of the supreme court no later than the Friday immediately preceding the week in which the argument is to be held.

Adopted eff. Feb. 17, 2006. Amended April 9, 2009, eff. April 9, 2009.

Rules 25.6 to 25.9. Reserved

Dirty Tricks:
Spying, Hacking
& Stealing Client Data

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Dirty Tricks: Understanding Spying, Hacking & Stealing Client Data in Legal Matters

(IA Rules)

By Todd C. Scott
VP Risk Management

Recently, an attorney handling a dispute on behalf of a client who had been fired from his job at a car sales dealership was confronted with a difficult situation. His client presented him with information that he thought would help prove his former employer wrongfully terminated him. The attorney suspected that the information was taken from the employer's computers but he was afraid to ask the client how he got the data.

Suspecting that his client wanted to "get a leg up" on in the legal matter, and not wanting to get caught off guard about the source of information, the attorney questioned his client about how he came to possess the data. The client proudly stated he knew his former employer used a wireless computer system, so he parked his car in the dealership lot at night and was able to gain access to the employer's network through his laptop and download data the client thought would be important to his case.

More often lately lawyers are confronted with situations where they strongly suspect their client has illegally hacked into someone's computer data. It happens frequently in family law matters where emotions run very high, and otherwise ordinary people will go to extraordinary means in order to have a successful outcome to their dispute. Often parties to a marriage dissolution or child custody matter will use surreptitious means to gain login credentials to a spouse's email account, or resort to rudimentary hacking by guessing at passwords until access is granted.

Even more alarming is that computer forensic professionals are now discovering small, hidden software products that are readily available and allow anyone who has access to a computer or mobile device to always have immediate, trouble-free access to all the information on the device. Software such as "key loggers" can be installed unknowingly by a computer user receiving an email that will relay back to the hacker all the information that has been typed into the computer. Software spy products are readily available through the internet and can be purchased for as little as $150.

Mark Lanterman, President and CEO of Minnesota based Computer Forensic Services, recently discovered a type of eavesdropping software that had been added to a client's iPhone that even the FBI was not aware of. The software can be purchased for $350, and when added to an iPhone it allows the hacker to listen in on all conversations in range of the phone – even those where the phone is not in use.

Lawyers faced with potentially stolen information often ask, "What do you do when you suspect your client's information was obtained through illegal means such as hacking into emails and computer data?" It can be a troubling situation, but it is important that lawyers understand that possessing hacked information is illegal and it is no different than possessing stolen paper files.

Electronic Privacy Laws

In 1968, Congress passed the *Omnibus Crime Control and Safe Streets Act*. Title III of that Act is the Wiretap Act which prohibits the interception of wire or oral communication unless one party to the communication consented to the interception. In 1986, Congress went further and enacted the *Electronic Communications Privacy Act*. This law and the case of *Bartnick v. Vopper, 532 U.S. 514, 524 (2001)* amended the Wiretap Act to prohibit intentional interception of electronic communications including communications in cell phones, cordless phones, and e-mail.

The *Electronic Communications Privacy Act of 1986* expanded the Wiretap Act (Title I of the 1986 ECPA) was and established a private cause of action against anyone who intercepts wire, oral, or electronic communication. The 1986 Act also designated that evidence obtained in violation of the Act is inadmissible.

So what is wiretapping in the context of e-mails and computer data? In general, email on a hard drive is not deemed to be subject to the Wiretap Act. The email must be intercepted in transmission to violate the Act. Once it is stored on a hard drive it is no longer deemed to be in transmission.

The Stored Communications Act, (Title II of the 1986 ECPA) prohibits the intentional, unauthorized access to a facility through which an electronic communication service is provided and thereby obtains, alters, or prevents to a wire or electronic communication while it is in electronic storage in the system. [See U.S.C. §2701(a)(1)]. The Act provides a civil cause of action to the aggrieved party like the Wiretap Act, however, there is no exclusion provision for evidence obtained in violation of the *Stored Communication Act*. A hacker can be prosecuted under this law if they access information without authorization. It may also be a violation of this Act to retrieve e-mails from a remote server such as Google's Gmail because those emails are still in transmission.

The *Computer Fraud and Abuse Act of 1986* [U.S.C. § 1030] makes it unlawful to access a computer without authorization and (1) obtain information from a computer if the conduct involves interstate or international communication; (2) further and intended fraud and obtain something of value; or (3) intentionally cause damage to a computer. The computers involved must be used in interstate commerce. However, any computer attached to the internet for email use likely meets this requirement. The private cause of action from this act may come into play where certain acts are done without authorization. For example, when a hacker goes into a computer and damages or deletes certain files, or where a party to a matter intentionally accesses the computer to cause damages.

Many states and jurisdictions have enacted their own statutes prohibiting unauthorized access to a computer, making it a crime to attempt or to successfully penetrate a computer security system. Additionally, computer theft statues often make it illegal for an individual to take, transfer, conceal, or retain possession of any computer or computer data with the intent to deprive the owner of use or possession.

The question of hacking can become very confusing when it involves a family computer where many members of the family may have access to the PC. Does a party to a legal matter have a right to take information from their family computer that was password protected by someone else in the household? If certain accounts are password protected, this suggests that the person storing the information on the family computer has certain expectations of privacy and the data is considered protected.

Ethical Considerations Involving Stolen Computer Information

Lawyers have an affirmative duty to act on matters where they believe their client has engaged in illegal activity, including illegal activity involving computer data. Action by a lawyer in these situations may involve a full understanding of the rules involving confidentiality of client information, and the circumstances in which a lawyer can reveal confidential client information to prevent a crime or a fraud upon the court.

> **Rule 32:1.6 Confidentiality of Information** of the Iowa Rules of Professional Conduct states:
>
> "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted [under the exceptions to the rule]."

Despite the strict rule prohibiting the dissemination of confidential client information, a lawyer's duties involving the handling of the client's case may change significantly if the lawyer reasonably suspects the client has engaged in a criminal act.

> **Rule 32:1.6(b)** states that:
>
> "(b) A lawyer may reveal information relating to the representation of a client to the extent a lawyer reasonably believes necessary...
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;"

The rules leave little doubt that a lawyer's responsibility once he or she suspects their client is contemplating engaging in criminal activity involving theft of computer data. The lawyer should immediately inform the client of the potential consequences of the action and advise the client not to commit the illegal act.

If the client has already committed the act or continues to act illegally, the lawyer may be required to withdraw from representing the client under **Rule 32: 1.16 – Declining or Terminating Representation** of the Iowa Rules of Professional Conduct.

> **Rule 32:1.16(b)** advises:
>
> "A lawyer may withdraw from representing a client if
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is fraudulent;"

Additionally, if your client's computer hacking is discovered sometime after the information he or she obtained illegally was unknowingly submitted as evidence in a legal proceeding you must inform the

court to prevent the further perpetration of the illegal activity. **Rule 32:3.3 - Candor Toward the Tribunal** of the Iowa Rules of Professional Conduct addresses this circumstance.

> **Rule 32:3.3(b)** states:
>
> "A lawyer who represents a client in an adjudicative proceeding and who knows that person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal."

Desperate People Do Desperate Things

As technology changes and data becomes more accessible through electronic means, lawyers should understand the impact these changes have on their client's lives. Much, if not all, of your client's personal information is contained in electronic files on a computer or mobile phone device that the client has likely set up all on their own. Consequently, when they are under great stress, clients will contemplate accessing the data on these devices without giving thought to whether their family members consider the data to be private.

Clients often misunderstand the law or fool themselves into thinking their illegal activity is justified. They sometimes assume that since they purchased the family computer all the data within it is owned by them and can be obtained at any time. The client who logged onto his former employer's wireless network mistakenly assumed that a wireless network that is not password protected is open to the public and any data from it is free for the taking.

Although many client behaviors involving computers derive from a misunderstanding of the law, some clients are well aware of their illegal activity. It is true that desperate people will do desperate things, especially those who feel they have been wronged in a highly acrimonious dispute, or may potentially be deprived of their parental rights.

A wise family law attorney once said, "My clients are wonderful people who are all temporarily insane." It is vitally important that lawyers understand the impact certain computer activity may have on their client's lives, and the level of temptation for clients to take actions that they know are wrong. If necessary, when agreeing to represent a client in an acrimonious matter, talk to your clients and inform them that it is illegal to listen to private telephone calls or remove data from a computer that is not theirs. Your initial conversation with the client can help them to understanding that you as the attorney are in control of the legal matter, and they should always consult with you before contemplating any action on their own that could jeopardize the case.

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Legislative Updates

This program does not qualify for Federal CLE.

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POST-SESSION LEGISLATIVE REPORT

IOWA DEFENSE COUNSEL ASSOCIATION

By IDCA Lobbyists Scott Sundstrom and Brad Epperly
of
NYEMASTER
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June 8, 2012

The second session of the 84th Iowa General Assembly convened on January 9, 2012 (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). The legislature adjourned sine die on May 9, for a total of 122 days, which was 22 days after legislators' per diem expired. Taken together with the previous session, which lasted 172 days, the 84th General Assembly was one of the longest in memory.

Control of the legislature remained the same in 2012 as it was in 2011. Republicans controlled the House by a 60 to 40 margin. Democrats maintained a slim 26 to 24 majority in the Senate. Although the number of Democrats in the Senate did not change, one Senate seat did change hands. Swati Dandekar (D-Marion) resigned her seat last fall to take a position as a Utilities Board Commissioner. Her resignation triggered a special election in her Senate district. The special election was closely watched because a Republican pick-up would mean that the Senate would have moved from Democratic control to a 25-25 tie. Democrat Liz Mathis won a very hotly contested and expensive election, thus maintaining the Democrats' control of the Senate.

In 2012 we monitored the following legislative activity for the Iowa Defense Counsel Association (IDCA):

- 1,202 bills and study bills (study bills are prospective committee bills)
- 98 resolutions
- 779 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 63 bills, study bills and resolutions on behalf of the IDCA.

The governor has 30 days after the legislature adjourned sine die (i.e., until June 8, 2012) 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 thirty-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. Budget bills are subject to item vetoes, meaning the Governor has the power to veto parts of those bills and allow other parts to become law. This report will state whether each bill included in it has been enacted. Unless otherwise noted, enacted bills take effect on July 1, 2012.

Bills that were not finally acted upon during the 2012 session do not carry over and are not eligible for consideration during the 2013 legislative session The first session of the 85th Iowa General Assembly will convene on January 14, 2013.

I. ENACTED LEGISLATION

Judicial Branch Funding

This year, IDCA worked in conjunction with other lawyer groups (the Iowa State Bar Association, the Iowa Association for Justice, and local bar associations), judges, court reporters, and others to seek full funding for Iowa's judicial branch. The goal was to seek a modest $10 million increase in funding for Iowa's court system. Funding the court system at the same level as last year (a "staus quo budget") would not be adequate to fund built-in costs, such as mandated salary increases, and would result in further service cuts by an already overburdened court system. A significant part of the joint effort for full court funding, known informally as "Full Court Press," involved lawyers, judges, and clients meeting with their local legislators to educate lawmakers about the importance of adequate funding of Iowa's court system.

The Full Court Press effort was successful in securing a $5.6 million increase for the judicial branch budget. While the courts did not receive the full $166.4 million requested (i.e., a $163.3 million operating budget plus a $3.1 million witness and jury fee budget), the judicial branch appropriations bill, House File 2338, provided a total of $162 million (i.e., a $158.9 million operating budget plus a $3.1 million witness and jury fee budget). The judicial branch appropriations bills was signed into law by Gov. Branstad on May 25.

The judicial branch also received an additional $4 million in the Rebuild Iowa Infrastructure bill, Senate File 2316, for continued development of the EDMS electronic filing system. Gov. Branstad signed that bill into law on June 7.

Policy Issues

Retaliation for Reporting Child Abuse. Senate File 2225 was signed into law by Gov. Branstad on March 30. The bill enacts new Iowa Code section 232.73A, which prohibits an employer from retaliating against an employee who reports suspected child abuse. The prohibition on retaliation includes termination, failure to promote, or failure to "provide an advantage in a position of employment." The new prohibition is enforceable by a civil action. A successful aggrieved employee may receive reinstatement, back pay, and attorney fees.

II. LEGISLATION CONSIDERED, BUT NOT ENACTED

Not surprisingly given the split control of the House (Republican) and Senate (Democratic), very little substantive policy legislation affecting the judicial system was enacted this session. Discussed below are a few bills of note this session that received attention, but were not enacted:

Seat Belts: The IDCA had one affirmative legislative proposal this year. House Study Bill Seat 575 would have removed the arbitrary 5% limit on mitigating damages when a plaintiff fails to wear a seatbelt. The bill received a subcommittee hearing in the House, but faced strong opposition from both the Iowa Association for Justice and the Iowa State Bar Association. It did not advance. Attempts to amend that bill onto other bills were not successful either.

Trespassing: House File 2367 would have put into statute the duties a landowner owes to a trespasser. Although the bill generally codified the current common law duties, it deviated in some

significant ways that could favor plaintiffs, particularly in "attractive nuisance" cases involving minors. Consequently, the IDCA opposed the bill after it was amended on the House floor. The bill was not taken up in the Senate.

Statute of Repose for Building Defect Claims: The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects sought legislation this session to shorten the statute of repose for building defect claims. Iowa currently has a fifteen-year statute of repose, which is among the longest in the nation. House File 2307 proposed to change the statute of repose to ten years (an earlier version of the bill had eight years). The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. It was approved by the House Commerce Committee, but was not debated on the House floor.

Civil Procedure: Both the House and Senate Judiciary Committees approved bills that made several changes to procedure in civil cases (House File 2425 and Senate File 2305, respectively). The bills included a hodge-podge of changes, some of which were defense-friendly, others of which were plaintiff-friendly. There was not great enthusiasm for either bill by any interested party. Neither bill was taken up for debate on the floor of either chamber. One concept discussed in the House bill, a simplified procedure for small-dollar civil cases, is of interest to the IDCA and is a recommendation of the recently released Iowa Civil Justice Reform Task Force appointed by the Iowa Supreme Court (the report is available at http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf). This issue may receive significant discussion during the 2013 legislative session.

Statute of Limitations for Claims Alleging Sexual Abuse of Minors: Senate File 2295 modifies the statute of limitations for civil and criminal actions relating to the sexual abuse of minors. The bill would extend the time to file a claim that occurred when the injured person was a minor from one year after the attainment of majority to ten years after the attainment of majority. The bill also provides that a civil action for damages relating to sexual abuse that occurred when the injured party was a child under fourteen years of age, shall be brought within ten years from the time of the discovery of both the injury and the causal relationship between the injury and the sexual abuse. Current law specifies such an action shall be brought within four years of the time of discovery of both the injury and the causal relationship between the injury and the sexual abuse. The bill passed the Senate and was approved by the House Judiciary Committee. It was never brought up for debate in the House.

Juror Identification. House File 2097 would have required attorneys to refer to jurors only by numbers assigned to the jurors and would have prohibited referring to jurors by their names during voir dire and trial. The bill was filed by Rep. Mary Wolfe (D-Clinton), an attorney. A subcommittee meeting was held on the bill, where objections were voiced by attorney groups and the media. The bill did not advance.

Unemployment Discrimination. In response to the economic downturn, bills were filed in both the House and Senate that would have prohibited discrimination based on a person's "status as unemployed." The Senate bill, Senate File 2259, was approved by the Senate Judiciary Committee. The bill provided that its provisions would be enforced by the Attorney General and included monetary penalties for violations. Not surprisingly, the business community opposed the bill. It was not debated.

Stand Your Ground. Iowa law currently provides that a person may use deadly force to protect him- or herself but only in limited circumstances. Deadly force currently is authorized only where an alternative course of action entails a risk of life or safety, or the life or safety of a third party, or requires a person to abandon or retreat from one's residence or place of business or employment. House File 2115 would have modified the situations in which a person is authorized to use deadly force. The bill would have allowed the use of deadly force, if it is reasonable to believe such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party. The bill further provided that a person may be wrong in the estimation of the danger or the force necessary to repel the danger as long as there is a reasonable basis for the belief and the person acts reasonably in the response to that belief. The bill also changed the duty to retreat by stating that a person who is not engaged in an illegal activity has no duty to retreat from any place where the person is lawfully present before using force. The House passed the bill, but it died in the Senate Judiciary Committee.

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

Bills enacted become effective July 1, 2012 unless otherwise indicated.

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2012 which were of particular interest to the IDCA's members.

SUMMARY OF THE 2012 LEGISLATIVE SESSION

By State Senator Rob Hogg

NOTES: (1) At the legislative web site, www.legis.iowa.gov, you can review all bills in the "bill quick search" and find all code sections amended by clicking on "Iowa law and rules" and then "code and acts sections amended."
(2) All bills have effective date of July 1, 2012, unless otherwise provided.
(3) Be careful – the Governor might veto or line item veto some bills, and bills can be amended by other bills – including the effective date provisions. Many bills are amended in the Standings Bill (HF2456).
(4) Code Editor's Bills (SF2203 and SF2285) amend many sections for stylistic reasons so they show up a lot in "code sections amended."

AGRICULTURAL

HF589 - Misrepresentation on employment applications for animal operations

BUSINESS/COMMERCIAL/CONSUMER LAW

SF466 - Residential construction contracts after disasters
SF2202 - Banking omnibus bill
SF2260 - Iowa Nonprofit Corporation Act Update
SF2265 - Revised uniform law on notarial acts
SF2279 - Credit union omnibus bill
HF2145 - Surplus lines insurance regulation
HF2321 - UCC Article 9 updates (security interests)
HF2465 - Infusion of liquor by bars and restaurants

CRIMINAL LAW

SF93 - Strangulation domestic abuse offenses
SF2208 - Confidentiality of arrest warrant
SF2218 - School bus safety (Kadyn's Law)
SF2231 - State public defender practices and procedures
SF2296 - Solicitation to commit murder
SF2343 - Expand schedule of controlled substances (K2-like products)
HF2335 - Department of Corrections to address facilities for sexual predators
HF2379 - Expunging criminal records
HF2390 - Obscene material, child pornography, and human trafficking
HF2465 - Credit for time served upon revocation of probation

FAMILY LAW & HUMAN SERVICES

SF2159 - Child support enforcement/protection of child support information
SF2165 - Notice of alleged paternity and support debt
SF2225 - Child abuse reporting policies for school districts

SF2289 - Expand individual disaster assistance
SF2325 - Child abuse income tax checkoff
HF2226 - Child abuse reports and disposition data
HF2387 - Elder abuse
HF2465 - Custody factors include unsupervised contact with sex offenders

HEALTH LAW

HF2465 - Prohibit different co-pays for chiropractic visits
HF2465 - Rules for “navigators” under the federal Affordable Care Act

LABOR AND EMPLOYMENT

SF2221 - Criminal background checks for school bus drivers
HF2337 - Economic development budget funds deputy work comp commissioner

MUNICIPAL LAW

SF430 - Public information board to review open records requests
SF2217 - Flood protection projects
HF2460 - Tax increment financing amendments
HF2465 - Referendum for temporary franchise fee increase to pay judgment

PROBATE

HF609 - Probate and trust code update
HF2165 - I-POST (physician orders for scope of treatment)

REAL ESTATE

SF2170 - Property tax sale notice requirements
SF2294 - Auctioneer activities in auctions of real estate
HF675 - State construction lien registry for all mechanics’ liens
HF2101 - Public land survey corner certificates
HF2335 - Extend mortgage foreclosure notice for counseling or mediation
HF2370 - Lis pendens, municipal nuisance abatement, nonjudicial foreclosure

TAXES

SF2328 - Department of Revenue tax bill
HF2150 - Internal Revenue Code reference updates
HF2465 - Capital gains tax credit for ESOPs

TOP THINGS LAWYERS CAN DO TO HELP THE LEGISLATURE

State Senator Rob Hogg
Iowa Defense Counsel Association
September 13, 2012

10. Contact legislators on issues important to you – by email, call, or letter

    Legislators' contact information is available at www.legis.iowa.gov

9. Alert legislators to "bad" regulations, statutes, or judicial decisions

8. When you find a "bad" law, propose a solution and offer to help

7. Let your clients know about possible legislative solutions to "problems," and offer to help

    Remember, if you are being paid or billing your clients to contact legislators, you may need to register as a lobbyist – see Iowa Code §§ 68B.2(13), 68B.36 (2011)

6. Monitor draft legislation, bills, and amendments – and let us know why they are bad

    Provide a cover page with 3-4 bullet points, and attach your analysis

5. Feel free to contact lobbyists – they are powerful gatekeepers

    A complete list of lobbyists and their clients, and clients and their lobbyists, is available under "lobbyist information" at www.legis.iowa.gov

4. Get to know the legal community's lobbyists and offer to help

    Scott Sundstrom, Iowa Defense Counsel Association, 515-283-8174
    Jim Carney and Jenny Tyler, Iowa State Bar Association, 515-282-6803
    Bill Wimmer, 515-283-1801 (representing Iowa Association of Justice, Iowa Court Reporters Association, and Iowa Judges Association)
    Lisa Davis Cook, Iowa Association of Justice, 515-280-7366
    Eric Tabor, Office of Attorney General, 515-281-5191
    Susan Cameron, 515-480-4401, and Joe Kelly, 515-265-1497 (representing Iowa County Attorneys' Association)
    Mark Smith, State Public Defender's Office, 515-242-6513
    Mike Heller, 515-988-0592 and Paula Feltner, 515-778-7230 (representing Iowa Friends of Legal Services, Iowa Academy of Trial Lawyers, and Iowa Association of Magistrate Judges)

3. Contribute to legal community political action committees

    The Iowa Defense Counsel Association does not have a political action committee. The Iowa State Bar Association has LAWPAC. The Iowa Association for Justice has the Justice for All PAC.

2. Volunteer on a campaign (except my opponent)

1. Run for office (except against me)

Ethics and the Trial Lawyer: You Too Can Make Mistakes You Will Regret

This program does qualify for 1.0 Ethics.

Nicholas Critelli
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CritelliLaw, P.C.

A comparison of the Rules on Advertising

Iowa Rule 32.7 et.seq. and ABA Model Rule 7 et. seq.

Nick Critelli

2011

317 Sixth Avenue/ Des Moines, Iowa / www.critellilaw.com

Iowa Rule 32:7	ABA Model Rule 7
32:7.1 (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. (b) A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services.	7.1 A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
32.7.2 Advertising (a) The following communications shall not be considered advertising and accordingly are not subject to rules 32:7.2, 32:7.3, and 32:7.4: (1) communications or solicitations for business between lawyers; (2) communications between a lawyer and an existing or former client, provided the lawyer does not know or have reason to know the attorney-client relationship has been terminated; or (3) communications by a lawyer that are in reply to a request for information by a member of the public that was not prompted by unauthorized advertising by the lawyer; information available through a hyperlink on a lawyer's Web site shall constitute this type of communication. Nonetheless, any brochures or pamphlets containing biographical and informational data disseminated to existing clients, former clients, lawyers, or in response to a request for information by a member of the public shall include the disclosures required by paragraph (h) when applicable. MEDIA (b) Subject to the limitations contained in these rules, a lawyer may advertise services through written, recorded, or electronic communication, including public media. Any communication made pursuant to this rule shall include the name and office of at least one lawyer or law firm responsible for the content.	Rule 7.2 Advertising [Iowa 32:7.2(b)] (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. [Iowa 32:7.2(l)] (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; (3) pay for a law practice in accordance with Rule 1.17; and (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement. (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

TELEPHONE DIRECTORIES (c) Subject to the limitations contained in these rules, a lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements: (1) Only a lawyer's name, address, telephone number, and designation as a lawyer may be alphabetically listed in the residential, business, and classified sections of the telephone or city directory. (2) Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a lawyer who has complied with rule 32:7.4(e) may be listed in classifications or headings identifying those fields or areas of practice as listed in rule 32:7.4(a). By further exception, a lawyer qualified under rule 32:7.4 to practice in the field of taxation law also may be listed under the general heading "Tax Preparation" or "Tax Return Preparation" either in lieu of or in addition to the general heading "Lawyers" or "Attorneys." CITY DIRECTORIES: (3) All other telephone or city directory advertising permitted by these rules, including display or box advertisements, shall include the disclosures required by paragraph (h) when applicable. (d) Subject to the limitations contained in these rules, a law firm may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements: (1) The firm name, a list of its members, address, and telephone number may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory. (2) Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in rule 32:7.4(a) in which one or more members of the firm are qualified by virtue of compliance with rule 32:7.4(e). (3) All other telephone or city directory advertising permitted by these rules, including display or box advertising, may contain the firm name, address, and telephone number, and the names of the individual lawyer members of the firm. All display or box advertisements shall include within the advertisement the disclosures required by paragraph (h) when applicable. RADIO-TELEVISION	

(e) Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications shall contain the disclosures required by paragraph (h) when applicable. CONTENT: Fee Information (f) Whether or not the advertisement contains fee information, a lawyer shall preserve for at least three years a copy of each advertisement placed in a newspaper, in the classified section of the telephone or city directory, or in a periodical, a tape of any radio, television, or other electronic or telephonic media commercial, or recording, and a copy of all information placed on the World Wide Web, and a record of the date or dates and name of the publication in which the advertisement appeared or the name of the medium through which it was aired. "SAFE HARBOR" (g) The following information may be communicated to the public in the manner permitted by this rule, provided it is presented in a dignified style: (1) name, including name of law firm, names of professional associates, addresses, telephone numbers, Internet addresses and URLs, and the designation "lawyer," "attorney," "J.D.," "law firm," or the like; (2) the following descriptions of practice: (i) "general practice"; (ii) "general practice including but not limited to" followed by one or more fields of practice descriptions set forth in rule 32:7.4(a)-(c); (iii) fields of practice, limitation of practice, or specialization, but only to the extent permitted by rule 32:7.4; and (iv) limited representation as authorized by rule 32:1.2(c); (3) date and place of birth; (4) date and place of admission to the bar of state and federal courts; (5) schools attended, with dates of graduation, degrees, and other scholastic distinctions; (6) public or quasi-public offices; (7) military service; (8) legal authorships; (9) legal teaching positions; (10) memberships, offices, and committee and section assignments in bar associations; (11) memberships and offices in legal fraternities and	

legal societies; (12) technical and professional licenses; (13) memberships in scientific, technical, and professional associations and societies; and (14) foreign language ability. CONTENT: FEE INFORMATION (h) Fee information may be communicated to the public in the manner permitted by this rule, provided it is presented in a dignified style. (1) The following information may be communicated: (i) the fee for an initial consultation; (ii) the availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both; (iii) contingent fee rates, subject to rule 32:1.5(c) and (d), provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that, in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; (iv) fixed fees or range of fees for specific legal services; (v) hourly fee rates; and (vi) whether credit cards are accepted. (2) If fixed fees or a range of fees for specific legal services are communicated, the lawyer must disclose, in print size at least equivalent to the largest print used in setting forth the fee information, the following information: (i) that the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and (ii) if the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged. (3) For purposes of these rules, the term "specific legal services" shall be limited to the following services: (i) abstract examinations and title opinions not including services in clearing title; (ii) uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support, or property	

settlement. *See* rule 32:1.7(c); (iii) wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries; (iv) income tax returns for wage earners; (v) uncontested personal bankruptcies; (vi) changes of name; (vii) simple residential deeds; (viii) residential purchase and sale agreements; (ix) residential leases; (x) residential mortgages and notes; (xi) powers of attorney; (xii) bills of sale; and (xiii) limited representation as authorized by rule 32:1.2(c). (4) Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone or city directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall within the described services. In that event or if a range of fees is stated, the lawyer shall render the service for the estimated fee given the client in advance of rendering the service. (i) In the event a lawyer's communication seeks to advise the institution of litigation, the communication must also disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process. <u>LAW LISTS:</u> (j) A lawyer recommended by, paid by, or whose legal services are furnished by an organization listed in rule 32:7.7(d) may authorize, permit, or assist such organization to use means of dignified commercial publicity that does not identify any lawyer by name to describe the availability or nature of its legal services or legal service benefits. (k) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name: (1) in political advertisements when the professional status is germane to the political campaign or to a political issue; (2) in public notices when the name and profession of a lawyer are required or	

authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients; (3) in routine reports and announcements of a bona fide business, civic, professional, or political organization in which the lawyer serves as a director or officer; (4) in and on legal documents prepared by the lawyer; (5) in and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and (6) in communications by a qualified legal assistance organization, along with the biographical information permitted under paragraph (g), directed to a member or beneficiary of such organization. (l) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item or voluntarily give any information to such representatives which, if published in a news item, would be in violation of rule 32:7.1.	
Rule 32:7.3. Direct contact with prospective clients: (a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client. (b) A lawyer may engage in written solicitation by direct mail or e-mail to persons or groups who may need specific legal services because of a condition or occurrence known to the soliciting lawyer. A lawyer must retain a copy of the written solicitation for at least three years. Simultaneously with the mailing of the solicitation, the lawyer must file a copy of it with the Iowa Supreme Court Attorney Disciplinary Board along with a signed affidavit in which the lawyer attests to: (1) the truthfulness of all facts contained in the communication; (2) how the identity and specific legal need of the intended recipients were discovered; and (3) how the identity and specific need of the intended recipients were verified by the soliciting lawyer. (c) Information permitted by these rules may be communicated by direct mail or e-mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. A lawyer must simultaneously file a copy of the	**Rule 7.3 Direct Contact With Prospective Clients:** (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: [Iowa 32:7.2(1)] is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer. (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment.

communication with the Iowa Supreme Court Attorney Disciplinary Board and must retain a copy of the communication for at least three years. (d) All communications authorized by paragraphs (b) and (c) shall contain the disclosures required by rule 32:7.2(h) when applicable. These communications shall, in addition to other required disclosures, carry the following disclosure in 9-point or larger type: “ADVERTISEMENT ONLY	(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.
Rule 32:7.4. Communication of fields of practice and specialization (a) A lawyer may communicate the fact that the lawyer practices in or limits the lawyer’s practice to certain fields of law as authorized by this rule. Subject to the exceptions and requirements of this rule, a lawyer may identify or describe the lawyer’s practice by reference to the following fields of practice: Administrative Law Adoption Law Agricultural Law Alternate Dispute Resolution Antitrust & Trade Regulation Appellate Practice 9 Aviation & Aerospace Banking Law Bankruptcy Business Law Civil Rights & Discrimination Collections Law Commercial Law Communications Law Constitutional Law Construction Law Contracts Corporate Law Criminal Law Debtor and Creditor Education Law Elder Law	Rule 7.4 Communication of Fields of Practice and Specialization (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation. (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation. (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.

Election, Campaign & Political Eminent Domain Employee Benefits Employment Law Energy 10 Entertainment & Sports Environmental Law Family Law Finance Franchise Law Government Government Contracts Health Care Immigration Indians & Native Populations Information Technology Law Insurance Intellectual Property International Law International Trade Investments Juvenile Law Labor Law Legal Malpractice Litigation 11 Media Law Medical Malpractice Mergers & Acquisitions Military Law Municipal Law Natural Resources Nonprofit Law Occupational Safety & Health Pension & Profit Sharing Law Personal Injury Product Liability Professional Liability Public Utility Law Real Estate Securities Social Security Law Taxation Tax Returns Technology and Science Toxic Torts Trademarks & Copyright Law 12 Transportation Trial Law Wills, Trusts, Estate Planning & Probate Law Workers' Compensation Zoning, Planning & Land Use Any member of the bar desiring to expand this list may	

file an application with the supreme court specifying the requested change. In describing the field of practice the lawyer may use the suffix “law,” “lawyer,” “matters,” “cases,” or “litigation.” (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patents,” “Patent Attorney,” “Patent Lawyer,” or “Registered Patent Attorney.” (c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty,” or a substantially similar designation. (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by the Iowa Supreme Court Attorney Disciplinary Board; and (2) the name of the certifying organization is clearly identified in the communication. (e) Prior to publicly describing one’s practice as permitted in paragraph (a) and (c), a lawyer shall comply with the following prerequisites: (1) For all fields of practice designated, a lawyer must have devoted the greater of 100 hours or 10 percent of the lawyer’s time spent in the actual practice of law to each indicated field of practice for the preceding calendar year. In addition, the lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each indicated field of practice during the preceding calendar year. (2) A lawyer who wishes to use the terms “practice limited to ...” or “practicing primarily in ...” must have devoted the greater of 400 hours or 40 percent of the lawyer’s time spent in the actual practice of law to each separate indicated field of practice for the preceding calendar year. In addition, the lawyer must have completed at least fifteen hours of accredited continuing legal education courses of study in each separate indicated field of practice during the preceding calendar year. Prior to communication of a description or indication of limitation of practice, a lawyer shall report the lawyer’s compliance with the eligibility requirements of this paragraph each year to the Commission on Continuing Legal Education. *See* Iowa Ct. 13 R. 41.9. (f) A lawyer describing the lawyer’s practice as “General practice including but not limited to” followed by one or more fields of practice descriptions set forth in this rule need not comply with the eligibility requirements of paragraph (e).	
Rule 32:7.5. Professional notices, letterheads, offices, and signs	**Rule 7.5 Firm Names And Letterheads** (a) A lawyer shall not use a firm name,

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates rule 32:7.1. A lawyer or law firm may use the following professional cards, signs, letterheads, or similar professional notices or devices if they are in dignified form: (1) A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer's law firm, and any information permitted under rule 32:7.4. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification. (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in the lawyer's association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under rule 32:7.4. A dignified announcement of a change in location of office, the addition of a new partner, equity holder or associate, or a change in the name of a law firm may be published in one or more newspapers of general circulation over a period of no more than four weeks. (3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under rule 32:7.4. (4) A letterhead of a lawyer identifying the lawyer by name and as a lawyer and giving the lawyer's addresses, telephone 14 numbers, the name of the lawyer's law firm, associates, and any information permitted under rule 32:7. 4. A letterhead of a law firm may also give the names of members and associates, and names and dates related to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession. (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to	letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located. (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

practice in the jurisdiction where the office is located. (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. (e) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. However, the name of a professional corporation, professional association, professional limited liability company, or registered limited liability partnership may contain "P.C.", "P.A.", "P.L.C.", "L.L.P." or similar symbols indicating the nature of the organization and, if otherwise lawful, a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. (f) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, and shall not be identified as a lawyer in any publication in connection with the lawyer's other profession or business.	
Rule 32:7.6. Political contributions to obtain legal engagements or appointments by judges A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.	Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges. A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
Rule 32:7.7. Recommendation of professional employment (a) A lawyer shall not, except as authorized in rules 32:7.2 and 32:7.3, recommend employment of the lawyer, the lawyer's partner, or an associate of the lawyer, as a private practitioner, to a nonlawyer who has not sought advice regarding employment of a lawyer. (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may: (1) pay the reasonable costs of advertisements or communications permitted by rule 32:7.2; (2) pay the usual charges of a lawyer referral service operated or sponsored by the bar association; and (3) pay for a law practice in accordance with rule 32:1.17.	

(c) A lawyer shall not request that a person or organization recommend or promote the use of the lawyer's services or those of a partner, associate, or any other lawyer affiliated with the lawyer's firm, as a private practitioner, except as authorized in rules 32:7.2 and 32:7.3, and except that: (1) A lawyer may request referrals from a lawyer referral service operated or sponsored by the bar association. (2) A lawyer may participate in a directory listing by Iowa lawyers in an organization or association of lawyers engaged in a particular area of practice upon authorization by the Iowa Supreme Court Attorney Disciplinary Board. *See* Iowa Ct. R. 34.14(1). (3) A lawyer may cooperate with the legal service activities of any of the offices or organizations enumerated in paragraphs (d)(1) through (4) and may perform legal services for those to whom the lawyer was recommended by the office or organization to do such work if both of the following requirements are met: (i) The person to whom the recommendation is made is a member or beneficiary of such office or organization. (ii) The lawyer remains free to exercise independent professional judgment on behalf of the client. (d) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partners or associates or any other lawyer affiliated with the lawyer's firm, except as permitted by this rule. However, this rule does not prohibit a lawyer, a partner, an associate, or any other lawyer affiliated with the lawyer or firm, from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of the lawyer's services or those of a partner, associate, or any other lawyer affiliated with the lawyer or the firm: (1) A legal aid office or public defender office operated or sponsored by a duly accredited law school, a bona fide nonprofit community organization, or a governmental agency, or operated, sponsored, or approved by a bar association. (2) A military legal assistance office. 17 (3) A lawyer referral service operated, sponsored, or approved by a bar association. (4) A legal services plan. A legal services plan is any bona fide organization that recommends, furnishes, or pays for legal services to its members or its beneficiaries provided all of the following conditions are satisfied: (i) Such organization, including any affiliate, is organized and operated so that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised, or selected by it except in connection with matters where such organization bears ultimate liability	

of its member or beneficiary. (ii) Neither the lawyer, nor any partner, associate, or other lawyer affiliated with the lawyer's firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate, or affiliated lawyer. (iii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization. (iv) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter. (v) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, independent of the arrangement, if such member or beneficiary so desires, and at the person's own expense, select counsel other than that furnished, selected, or approved by the organization for the particular matter involved. (vi) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that the representation by counsel furnished, selected, or approved would be unethical, improper, or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief. (vii) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court, and other legal requirements that govern its legal service operations. (viii) The legal services plan is developed, administered, and operated so as to prevent a third party from interfering with or controlling a lawyer's performance of his or her duties or a third party's receipt of any part of the consideration paid to a lawyer for furnishing legal services. (ix) There is no publicity and solicitation concerning the arrangement except by means of simple, dignified announcements. Such announcements may only set forth the purpose and activities of the organization and the nature and extent of the benefits provided under the arrangement. The announcements shall not identify the lawyers who render the legal services, and such announcement must be solely for the good faith purpose of developing, administering, or operating the arrangement, and not for the purpose of soliciting business for any specific lawyer. Nothing in this rule shall prohibit a statement in response to individual inquiries regarding the identities of the lawyers rendering services for the organization. Such responses may provide the names, addresses, and telephone numbers of such lawyers. (x) Such organization has filed with the Iowa Supreme Court Attorney Disciplinary Board on or before July 1 of	

each year the report required by Iowa Ct. R. 34.14(2). A lawyer will not be deemed in violation of this provision if such organization has failed to file the required report so long as the lawyer does not know or have cause to know of such failure. 18 (e) A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person seeking legal services does so as a result of conduct prohibited under this rule.	

How Case Facts Intersect with Juror Values, Life Experiences and Decision Making Style

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Values, Priorities, and Decision-Making: Intergenerational Law Offices, Intergenerational Juries

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Our age and our generation shapes the lens through which we view the world. Not only because of the number and type of life experiences age presents, but also due to the key events that teach each generation what is important, and what needs to be considered in determining personal priorities and justice. Those experiences have patterns across the generations, but also differences. The marker events that shape our views can't be transferred so easily. For those who grew up looking at black and white television images of the civil rights demonstrations in the 1960's, the world is different than for those who grew up with iPods and text messaging. But *how*? Are we really that different? Can a workplace successfully accommodate the differences? Can juries come to a collaborative verdict with diverse age groups in the box?

The legal blawgosphere has been filled with anecdotal tales of what is termed "generational conflict" for years now. Based on conversations with our clients, contentious inter-generational interaction is not just out there "on the web". It's everywhere. We've written extensively on issues related to generations--both in the courtroom and in the office.

As litigation consultants, we hear senior partners aiming sharp criticism toward both younger jurors and younger lawyers (especially new law school graduates), and we see the associates roll their eyes and grit their teeth at the disrespect they feel from some partners. The work ethic of the younger attorneys (judged as inadequate by older attorneys) is blamed for their trouble in finding jobs. "If they were not so lazy", the opinion seems to go, and "if they did not want instant success, they wouldn't have such a tough time finding work." It is, in short, their own fault they are unemployed. They have bad values. Or so it is said by many of their elders. Especially the subgroup of employers, supervisors, and-- occasionally-- parents. But is that accurate?

It turns out that it's likely untrue. A recent editorial in the LA Times points out that from 2004 to 2008, the legal field grew less than 1%[1] on average (and the same growth rate is predicted until 2016). The number of likely attorney positions opening per year is thus 30,000. US law schools are graduating 45,000 new JDs every year. Fully one-third of US law school graduates will likely not find employment as attorneys.

What we've learned is that cross-generational communication is complicated. There isn't an easy recipe for success, but there is a path toward effectiveness. There are principles and strategies to use both in successful intergenerational work teams as well as effective jury dynamics. In other words-- they don't all have to be just like you in order for things to go smoothly. The following pages are an effort to show you both "how to" and "why to" strategies that will aid you in skillfully negotiating generational differences--in the courtroom and in the office.

The Intergenerational Office

> Generational names are the handiwork of popular culture. Some are drawn from a historic event; others from rapid social or demographic change; others from a big turn in the calendar.
>
> ***The Millennial Generation*** falls into the third category. The label refers those born after 1980 – the first generation to come of age in the new millennium.
>
> ***Generation X*** covers people born from 1965 through 1980. The label long ago overtook the first name affixed to this generation: the Baby Bust. Xers are often depicted as savvy, entrepreneurial loners.
>
> ***The Baby Boomer*** label is drawn from the great spike in fertility that began in 1946, right after the end of World War II, and ended almost as abruptly in 1964, around the time the birth control pill went on the market. It's a classic example of a demography-driven name.
>
> ***The Silent Generation*** describes adults born from 1928 through 1945. Children of the Great Depression and World War II, their "Silent" label refers to their conformist and civic instincts. It also makes for a nice contrast with the noisy ways of the anti-establishment Boomers.
>
> ***The Greatest Generation*** (those born before 1928) "saved the world" when it was young, in the memorable phrase of Ronald Reagan. It's the generation that fought and won World War II.
>
> Generational names are works in progress. The zeitgeist changes, and labels that once seemed spot-on fall out of fashion. It's not clear if the Millennial tag will endure, although a calendar change that comes along only once in a thousand years seems like a pretty secure anchor. (Pew Research, 2010)[2]

Generations in the both the workplace and jury room now include: the Silent Generation (born 1933 to 1945); Baby Boomers (born 1946 to 1964); Generation X (born 1965 to 1980); and Generation Y/Millennials (born 1981 to 2000). Were it not for the economic recession of the past decade, Boomers would now be retiring. However, for many, retirement accounts (if they had any to begin with) have been undermined by recent economic instability, and they are now planning to work for the indefinite future. This leaves members of Generation X without upward mobility (since Boomers hold many of the senior positions) and the Millennials with record levels of unemployment despite (simultaneously) having educational accomplishments unmatched by prior generations entering the workforce.

Given this "new normal", workplaces have begun to shift their focus from an aging worker focus [as members of the Silent Generation and the Boomers age] to a multigenerational focus (Cekada, 2012) with many large workplaces now employing four distinct generations of workers. With this shift, more attention is being paid to major themes around which the various generations differ. Communications styles, attitudes toward authority, comfort with technology, boundaries between work life and non-work life, and the role of family, friends, and religion are among the ways the generations are distinct.

Cekada (2012) offers a glimpse of the differences in various life events and perspectives across the four generations now (and for the indefinite future) in the workplace. Despite the increased attention being paid to focus and perspective of the various generational groups, there continue to be common areas of friction and tension in the workplace. We are not all alike. And there are patterns of difference that need to be expected and respected for a satisfying workplace environment.

Major Generalizations of Each Generation (Cekada, 2012)

Silent Generation	Baby Boomers	Generation X	Generation Y/ Millennials
Self-sacrificing	Committed	Practical	Optimistic
		Accept diversity	Embrace diversity
Great Depression economy	Booming economy	Downturn in economy	
Kids contributed to family success	Strong home support	Latchkey kids	Coddled kids
	Develop and follow rules	Resist rules	Rewrite rules
	Fight technology or use it efficiently	Use technology	Assume technology
	Typewriter	Use the PC	Internet/portable technology
Strong work ethic	Independent workers	Solve problems on their own	Prefer work in teams
	Hard workers		Sense of entitlement
	Argumentative		Prefer getting along (community)
Long-term loyalty to company	Loyalty to company	Mistrust organizations	Irrelevance of organization
		Multitask	Multitask fast
	“Do the time” before you make demands		Demand flexible work schedules
	“Live to work”		“Work to live”--want flexibility in their jobs

Common areas of friction/difference

Here are some of the most frequent complaints we hear about office friction/differences which we've detailed in earlier writing on generation and office relationships[3]:

> *Millennials are lazy with bad attitudes*. (The research doesn't support this belief.)
>
> *Millennials believe they are entitled in the workplace*. (The research says that may be true.)
>
> *Millennials are lacking in loyalty and appreciation*. (The research doesn't support this belief.)
>
> *Millennials are needy and immature*. (As were we all.)

Most of these issues seem to revolve around what is commonly referred to as a "*failure to communicate*". Failures to communicate come in multiple forms: conflicting goals, timing, power struggles, geography, perceived risk, technology and lack of trust. These are often attributed to intergenerational differences rather than what they likely reflect--ineffective communication. While it may be hard to believe that conflict in the workplace stems from communication failures and not from generational idiosyncrasies--it is largely true.

We need to back up a bit here and give you a little information about "*defining events*". These are the moments in time experienced by all members of a generation that, in hindsight, shape their lives and perspectives. Think the Great Depression, World War II, Vietnam, the sexual revolution, birth control, dual career couples, latchkey kids, divorce rates, 9-11-2001, the Second Great Depression, and so on.

These defining events have had impact on the generations and color how all of us see the world, cement our attitudes and values, and look at those who are different than us. Papers on "generations" necessarily summarize (and therefore stereotype) large groups of people. We do not mean to infer (nor do we believe) that all members of generations are the same and every person of this age will share the same characteristics. If that were true, voir dire would be a simple matter indeed. Instead, generational groupings (and stereotypes) allow us to consider broad categories which must be refined via pretrial research and careful examination of life phase, attitudes, values, experiences and beliefs.

The following table briefly presents generational groups, birth years, current ages, size of group, defining moments and the perspective each generational group has had historically as well as their current perspectives. [For additional data on current perspectives, see our most recent generational update paper here.[4]]

Generational Snapshots in 2011

Generation Name(s)	Birth Years	Defining Moment(s)	Generational Descriptors	Current Perspectives[5]
Silent Generation Came of age during Truman and Eisenhower presidencies. Now 66-83 years old.	1928-1945. Turned 18 from 1946 to 1963. Comprise 80% of those aged 65+ in the US. Now roughly 34M in size.	Korean Conflict	Helpmate Mediators Conservative Recently political activists	Conservative. More uncomfortable than younger generations with social changes (including racial diversity & homosexuality). Social Security as top voting issue. 79% non-Hispanic whites. Very frustrated with government and seen as important political activist voting block for upcoming elections.
Baby Boomers Came of age during LBJ, Nixon, Ford and Carter. Now 47-65 years old.	1946-1964. Turned 18 from 1964 to 1982. Roughly 79M in size.	Vietnam War	In Youth: Idealistic, Dreamers and Entitled. Now: Worried about money	Nearly half say life in US has gotten worse since the 1960s. Concerned about finances & may not retire. Express as much frustration with government as the Silent Generation–Boomers have grown more critical of government in the last decade. Jobs most important voting issue.
Generation X Came of age during Reagan, George H.W. Bush and Clinton. Now 31-46 years old.	1965-1980. Turned 18 from 1983 to 1998. Roughly 51M in size.	Social changes: Divorce Latchkey Increased violence 9/11/2011??	Multicultural Friends replace 'family' Work/life balance "Emerging adulthood" introduced for this generation	Similar to Millennials on social issues. Since 2009, financial worries. Backed Obama in 2008 but went Republican in 2010. Jobs most important voting issue.
Millennials (aka Gen Y) Came of age in G.W. Bush presidency. Now 18-30 years old.	1981-1993. Turned 18 from 1999 to 2011. Roughly 75M in size.	Candidates: Terrorist attacks in US 1st Gulf War Iraq War Columbine shootings	Civic personality "Can-do attitude" Entitled Disorganized Digital natives	Socially liberal. High rates of unemployment but still upbeat. Most diverse generation: only 59% are non-Hispanic whites. Welcome the new face of America. Jobs most important voting issue.

Given these defining events and perspectives, you may begin to see some of the reasons generational conflicts can occur. Here are some of the stereotypes generations have of each other (that are, as are many stereotypes, misinformed and frankly inaccurate).

Stereotyping those younger and older ("This is how *they* are")

Older generations stereotype younger generations. It's been true for countless centuries.

> "*I see no hope for the future of our people if they are dependent on frivolous youth of today, for certainly all youth are reckless beyond words…When I was young, we were taught to be discreet and respectful of elders, but the present youth are exceedingly wise [disrespectful] and impatient of restraint.*"
>
> –Hesiod, 8th century BC

Those who are established see change and resent it. Our generation made the rules (and they are right and should not be questioned) and here are these young (read: undeserving) upstarts coming along and challenging our authority and the wisdom of established rules.

You will thus hear most of these stereotypes through the eyes of the Boomers (the previously largest and now one of the oldest generational groups). And it doesn't only go one way. Younger generations are also quite prone to stereotyping older generations as controlling dinosaurs who resent having their rules questioned. If this sounds like typical family conflict--it is likely a good analogy to consider.

Generation X members are the children of the older Boomers while Millennials are a combination of the children of the older members of Generation X and the ("second chance children") of the younger Boomers. Gen X parents are reacting to their own experiences as latchkey kids[6] and Boomers with Millennial children are trying to get it right this time. You've heard of helicopter parents?[7] That's what happened to the Millennials. We all are a product of our times and the attention (or lack thereof) lavished upon us by our parents.

With that analogy in mind, let's examine a few of the stereotypes we hold of each other and compare that with the actual facts:

Generation X: Remember them? Cynical, jaded, depressive punks of the 1980's and 1990's? Unwashed slackers? Well, it's time for a mental reset. They grew up. Gen Xers are now 30 to 45 years old and have mortgages, families and careers. And guess what they've done?! They are the most educated generation ever. They are employed at a higher proportion than any other generation. They are married with children and are credited with reducing the divorce rate to the lowest we've seen in decades. They have retained and concretely defined their youthful values of family, work/life balance and acting locally not globally so that their lives actually reflect their values. And they are happy.[8]

The Millennials: This group was born with an internet connection in their mouth. They expect immediate communication regardless of the hour of the day or mode of communication chosen. Older generations can see this as indicative of the younger person's impatience rather than as indicative of their proficiency in multitasking. They avoid responding to voice mail or even email messages. They have a bad habit of simply texting into the office when they are sick or going to be late. They don't call in. As a Boomer partner in a client law firm once said (while grinding his teeth into dust) of a Millennial associate, "I asked him why he hadn't responded to the voicemail and he replied 'I don't do voicemail.'" Older generations may see this as disrespectful or inappropriate when to the younger person, it is simply habitual and convenient (and potentially respectful, collegial and totally appropriate). Further, these are ambitious, rapid paced individuals. They want careers and workplaces that match them *now*--not when they have done their time. Boomers and Gen Xers can see this expectation as entitlement, or at best, over-ambitiousness. The Millennials constant use of social media does not sit comfortably with

Boomers: "*Boomers are more comfortable with handshakes and chats than with pokes and posts*" (Keegan, 2011). Despite the economy and unemployment rates, Millennials are notoriously upbeat and optimistic.

Boomers: The flower children of the 1960s who espoused free love, peace and individuality have grown up to be "the man". They waited their turn, made the new rules for the workplace (and in the world) and have paid their dues. They resent efforts to change the world they re-designed. They are also (following the economic collapse decimating their retirement accounts) anxious about the future and more downbeat (compared to other age groups). Boomers are currently glum. More glum—it should be pointed out—than their own parents (the Silent Generation). Ironically, Boomers are the new "grumpy old men and women". They are more likely to say they have been hurt financially by the current recession and more likely to say they are cutting back. They are less religious than their parents and more religious than their children (the Gen X and Millennial groups). Boomers cling to youth with the average Boomer saying "*old age begins at 72*" but they have lost optimism for the future.[9]

Dirty. Spoiled. Controlling. Disrespectful. Entitled. Grumpy and old. That's how different generations see each other. It's a recipe for conflict and incivility--not to mention assuming the worst in each others' behavior. Boomers were always the center of the universe, both at home and at work. Now they are blamed for the country's economic problems and resented in the workplace by the younger generations who are trying to push them out. No wonder Boomers are bummed.

A simple query posed by the Pew Research Center[10] in 2010 shows the glumness of the (now second largest generational group) Boomers:

"I am dissatisfied with the way things are going in the country today"

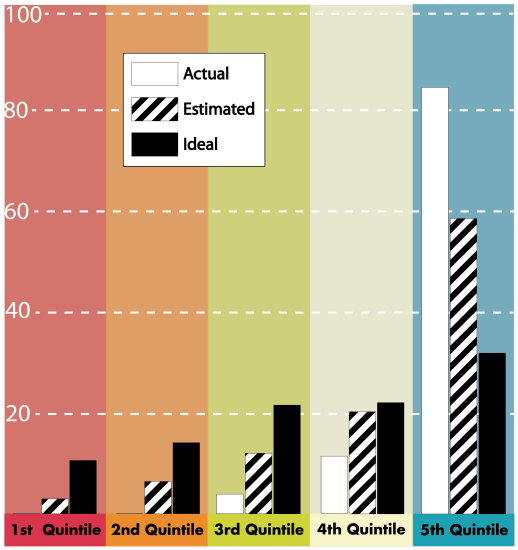
Generation	Number (and Per Cent) Agreeing
Silent and Greatest Generations (65 and older)	76%
Boomers	80%
Generation X (30 - 45 years)	69%
Millennials (18 - 29 years)	60%

What is additionally intriguing is that we Boomers raised the Millennials and Generation X. They are our children and now our colleagues and coworkers. We taught them to expect accommodation, to question authority, to challenge the status quo and to do what works for them. And now those birds have come home to roost.

To paraphrase an old Jimmy Buffett song[11] "*they are the people we never warned ourselves about*". Or to paraphrase my mother when I said I wanted a strong-willed girl child—"*I hope you get exactly what you wish for and then you will understand just how much fun that is!*". Or to paraphrase some old wife somewhere[12]—*we made this bed*….. (See our specific management recommendations for the intergenerational law firm here[13].)

But there is good news. Membership in differing generations does not necessitate conflict. We are truly more alike than we are different. Despite all the nasty ads we are seeing as the

election season ramps up–what we can tell you is that Americans [no matter our age, politics or income] want to live in a country that is much more financially equitable. We want wealth distributed more equally. We want a fairer nation. That's the good news.[14] The bad news is that we have no idea that's what we want and we have no idea just how bad things are!



Some new research illustrates this reality nicely. The graphic to the left shows American's responses to three questions about the distribution of wealth in America. Researchers asked Americans to consider wealth in this country divided up into 5 buckets or pots. The bottom 20% goes in the first bucket, the second 20% goes in the second bucket, and so on.

Most of their participants guessed that the bottom 2 buckets (the poorest 40% of the population) had about 9% of the wealth while the top bucket (the wealthiest 20%) had about 59% of the wealth. You can see their estimates in the graphic above. You can also see the reality which is wildly disparate from the guesses–the bottom 40% has only 0.3% of the wealth while the top 20% has 84% of America's wealth.

Then the researchers asked what the research participants thought would be an "ideal" wealth distribution and you can also see that in the graphic. *What is most interesting in these findings is the researchers found no differences by political affiliation, income or gender.* We want the same things. But we don't realize it, and instead tend to objectify one another.This is an important lesson for us as we plan case presentation and narrative. When we emphasize universal values, we tap into the "best" of everyone in that jury box.[15]

Before we move on to the intergenerational jury now seated in venues across the country, let's summarize the research data on differences[16] between generational groups. This won't take long since the actual, data-based list is much shorter than the stereotypes we all carry.

- There is a more liberal/tolerant focus on social issues among the Millennials and Generation X.
- There is a concern about financial issues shared by Gen X and the Boomers.
- The Millennials have an unprecedented rate of unemployment.
- The Silent Generation is happiest and yet, the most angry with government.
- There is a divide between the youngest generation (the Millennials) and the oldest generation (the Silents) that appears to be a major obstacle based on the Pew Report. Some of this is due to the age gap and the increasingly liberal views of the younger generations.

That's it. So with all the press on the "slackers" and the "narcissists" and the "flower children" of yore–why do we not see more differences between the generations? They grew up differently. They had different formative experiences. Why is there not a bright line of difference? It could be that there is–in some instances.

As it turns out, the stereotype of the Boomer rebel/hippie/flower child actually applied to only a small, iconic segment of the Boomer population. But it's the image we retain of the 1960s generation. It's part of what we do. We put people in boxes. It makes things simpler. And often, it makes us completely wrong.

We all use stereotypes as shortcuts to decision-making. Readers of our blog[17] know that we rely heavily on the newly published (not the sadly outdated) research literature to understand the evidence of emerging trends, rather than to merely parrot the anecdotal opinions found in the popular media. Here's a terrific (and pretty succinct) explanation of why stereotypes persist in spite of (data-based) evidence to the contrary:

> *"So, why might stereotypes persist in the face of evidence to the contrary? In fact, the stereotype and the data can both be correct simultaneously. If one considers a normal distribution of people, it would only take a small increase in numbers at either tail of the distribution to cause people to believe that one generation was different from another due to the disproportionate impact outliers have on influencing perceptions. This might occur even while the average within one generation stays the same as the other generations."* (Gentry, et al., 2011)

It's a critical lesson in both personal and work relationships. When a conflict is assumed to be "generational"--the communication failure at the root of the conflict is often lost. "Generation" is often a codeword for "kids" or "geezers" and as such, can be a pejorative means of avoiding responsibility for considering alternate explanations. It is dismissive. And it doesn't just happen in the office. It happens in the courtroom too.

Knowing general information about your jurors (in this case their generation) allows you to assess attitudes and beliefs that are relevant to your case and alerts you to the importance of not relying on stereotypes alone to make decisions you then have to live with throughout trial. Let's look at the realities of the intergenerational jury based on the evidence and not our assumptions.

The Intergenerational Jury

Of course, the jury pool evolves with the rest of society. Based on 2010 US Census Data[18], the Millennial Generation is now the largest population segment in America. If you combine their numbers with those of Generation X, adults between 18 and 46 years of age comprise over 50% of the adult population in this country (and are by far more heavily represented in jury pools than their older neighbors). [This is why when we recruit mock jurors for pre-trial research, we normally have about half between the ages of 30-50, with a quarter who are in the Millennial age group, and a quarter in the older Boomer group.]

Jury pools are shifting in numerous ways, and the proportion of various generations in the jury box isn't the only thing changing. Earlier this year, we did an exhaustive analysis of the research on differences between the generations that reflect visible or measurable distinctions.

There are changes in educational achievement; ethnicity makeup; the role of work; finances; comfort with multicultural diversity; gender roles and family structure; liberal versus conservative orientations; our willingness to trust others; preferred source of information; attitude toward the government; environmental views; acceptance of scientific findings; and attitudes toward the death penalty and religion. [You can review all of these distinctions in the article we wrote in January of 2012.[19]]

Litigation advocacy, like office relationships, must take the diversity of the new jury pool into consideration with every case. The law reflects reason and our interpretation of that law, combined with our life experiences and visceral reactions to the event, often reflects a complex combination of our reason and our passions. We know some groups of jurors have more sympathy for mitigating circumstances[20]. We know some prefer a Dragnet approach to justice: "Just the facts, ma'am"[21].

In any group of twelve[22], you are likely to have those swayed by sympathy and those determined to apply the evidence to the law with cool detachment. But no one decides entirely based on sympathy or entirely on evidence. Instead, all of us make decisions based on both ends of this judgment spectrum. Telling stories that speak to both ends of the continuum always serve us well, as your jury is bound to include both types[23].

The following pages summarize the varying expectations and predilections of the different generational groups when it comes to specific aspects of trial and case presentation. (If you want to understand more about Gen X jurors[24] or the Millennials[25], follow the links to see our earlier work.)

Differences in learning style and information application

One of the most well-known differences between jurors (and employees!) of varying ages has to do with work styles. Boomers and Gen X members tend to prefer to work alone. On the other hand, the Millennials grew up doing team projects and group exploration at school. They learn by doing, and respond positively to team tasks. Working in a cubicle farm or sitting in silence during endless video excerpts is experienced as "soul crushing". Boomers are not as positively disposed to team tasks and often are not productive or effective team members (Cekada, 2012). But they are better at solitary work tasks. For Boomers, especially men, true collaboration and idea interchanges can be very difficult, as it isn't a work style that they have been trained to embrace. It is more often about the dominance of ideas, and whose perspective 'wins'.

When it comes to deliberation, it makes sense to teach all of the jurors about the team nature of the task and how they should approach deliberations. This education both levels the playing field (with all group members having access to basic information on deliberative processes) and gives all group members an equal chance to participate and be heard. We've seen mock juror deliberations where Millennials play an active role and are respected for their contributions. We've seen other deliberations where they are quite silent, and appear to be oppressed until someone directs a question to them, at which point they disclose valuable views. While the views might not otherwise have been added to the discussion, that doesn't mean that their voting was passive. They aren't any more interested in submitting to domination than anyone else, but they might not offer a viewpoint that isn't welcome. Education and information allows everyone to participate in the process.

Graphics and visual evidence

Many of us are also aware that the Millennials are often more visually attuned. They are able to grasp a wealth of information through graphics and visual representations but are often resistant to reading lots of text. Computer-based learning is second nature to them and they expect you to use technology. Gen Xers are also visually skilled but not to the same degree as most Millennials, who never knew a world without the internet.

On the other hand, delivering solely computer-based visuals to the older Boomer or Silent Generation member can be an exercise in futility if they are resistant to computer use or feel that your presentation is going to be incomprehensible simply due to the delivery method. There was a transitional period 10-15 years ago when computer graphics in court were not consistently embraced; using foam boards offered a physical presence in the room, while projected images are ephemeral. Now, more people have embraced computer images, and they also like the smoothness of the presentation flow when the imagery is cleanly choreographed in a presentation. Again, you need to attend to the diversity of preferences in your audience and have something for everyone.

New research studies offer important information for the design of visual evidence. Our attention is often drawn to the center [26] of a graphic, picture or page. And we pay more attention to what the researchers call "biological cues"[27]–a pointing finger and directionally focused eyes–as we make decisions about what to examine in our environment.While a pointing finger or eyes may seem more casual than a professionally designed graphic using arrows and directional symbols–it may also be more effective with the viewer. We tend to say that whatever the conflict that has initiated the litigation–ultimately it's always about people. This research would say that's true with visual evidence as well. Make it more human (or more 'biological' as the researchers would say). Jurors will notice.

But graphics isn't a solution by itself. A recent study reported by Research Digest blog[28] provides an example of when we do better with text than graphics-- in a hospital. Some of the many graphs and charts filling patient records are subject to minsinterpretation by harried and distracted staff.[29] Researchers conclude that if those graphs were replaced or supplemented with short passages of text conveying the same information—fewer mistakes would be made.

Birth trauma cases often involve questions about proper interpretation of fetal monitor strips. In a recent case we consulted on, one challenge was that there were no physical strips. The entire system was digital—you read it on a monitor. The complication was that in order to see the pattern that had evolved throughout the labor, or through the last hour, you have to page

back and back and back… and you can't flip back and forth as easily. The image becomes less clear.[30] Jurors saw it as an easy way to get confused, or a reason to do less checking of the records than might be prudent.

Another recent study related to visual evidence tells us when to give prototypes to jurors for closer examination and when to keep them at a distance! Apparently, our ability to learn and to remember information depends on what we do with our hands while we are learning! In other words, there are differences in what you process and 'see' depending on whether something is in your hands!

> If you hold something in your hand, you notice *differences* among objects more effectively.
>
> If you look at something from a distance (not near your hands), you are more likely to note *similarities and consistencies* between those things.

The implications for patent and IP litigation are pretty straightforward, but they are equally relevant for other types of cases. If you need jurors to understand subtle features or attributes, you want to give jurors the opportunity to hold prototypes or exhibits in their hands, so they can appreciate subtle but important differences. If the point you are trying to make involves how things are the same, or how confusion is reasonable, or to raise confusion about an identification, you want jurors looking at the prototypes from a distance, when differences are seen as superficial or invisible.

It's an interesting idea. We were in North Carolina[31] on an infringement case and the prototype invention was a very heavy industrial device. Not huge, just heavy. And we saw this exact phenomenon in real life. Because of how heavy the prototype was, it was on the table in front of me as the focus group facilitator. I described the similarities and the differences in appearance and function. Jurors focused on appearance and how the two items 'looked' the same. As the group prepared for a break, jurors were told they could approach and examine the objects. They did. And as we listened in to their reactions from behind the mirrored glass we saw them poking and hefting and examining the prototypes and exclaiming they could now 'see' differences between the two prototypes.

The researchers say that humans developed this skill to survive-- when we had to tell poisonous berries from non-poisonous berries. We cannot say with certainty that they are wrong. But for us as consultants and our clients as litigators, the knowledge that there are different processes involved in close-up examination and observation from a moderate distance is a game-changer. And for those who are more tacitly-oriented (overall, Boomers and older Gen Xers), the images are especially inadequate to tell the story. For those who are more imagery-oriented (Millennials and younger GenXers), they may feel satisfied reaching conclusions based on images, but the impact of touching the object in question can still be transforming.

Most IP litigation involves claims of infringement ("these two things are the same") and validity ("this invention is different than what has come before"). The more physical the contact they can have with the exhibits, the stronger their belief in the correctness of their decisions. If the patent dispute is over highly abstract inventions (biotech compounds or organisms, software, or high-tech generally), that same value attaches to analogous objects that they might have encountered in their lives.

In short, you do best with all generations when you communicate visually:

> Use charts and graphs to simplify complex transactions or concepts.
>
> Use timelines to illustrate relationships between events and documents or transactions.
>
> Use short bursts of text to clarify relationships.
>
> Use "hard copy" (think of the missing birth monitor strip) strategically.
>
> Make it familiar through touch, and the point can become more persuasive.
>
> "Get to the point" and all your jurors will appreciate it.

Before we leave the subject of trial graphics, a comment begs to be made about PowerPoint. It is a tool, a great way of achieving some kinds of goals. But every tool has a purpose, and in trial, PowerPoint is often used for more than it can deliver. Just as you should't use a wrench to pound a nail, don't try to deliver case narratives through PowerPoint. PowerPoint is most effective to present images, not text. Research has clearly established that text-heavy slides often end up getting in the way. Specifically, the research demonstrated that if a presentation is presented in 3 formats (the lecture is largely printed on the slides, or the presentation is lightly outlined on the slides, or no slides are used at all), the audience learns to different degrees. And the best learning comes from the use of slides lightly outline the material, or show images that represent the material. Verbatim slides are the least effective presentation style, and in fact are worse than no presentation at all. If you are going to use verbatim slides, research tells us that you'd do better to show the slides, and say nothing. Just let them read the text and you can simply click them through the deck. Evidently, people will read what you show them, and reading while trying to listen actually interferes with learning. The goal is to convey a story, so don't get in the way!

Case narrative

The use of the story model is now second nature to many trial lawyers. But perhaps, the story model is not *always* the first choice.

A paper published to the *Social Sciences Research Network* (SSRN[32]) in 2010, examined the impact of the story model among court personnel. Participants were appellate judges, appellate law clerks, appellate court staff attorneys, appellate practitioners, and law professors—95 participants in total. The researcher (Kenneth Chestek) described the study rationale as follows:

> *"In early 2009, I conducted a study in an attempt to fill that gap. I wrote a series of test briefs in a hypothetical case and asked appellate judges, their law clerks, and appellate court staff attorneys, appellate lawyers, and law professors to rate the briefs as to how persuasive they were. My purpose (which I did not disclose to the test participants) was to measure whether a brief with a strong strand of story reasoning, woven in with the logos-based argument, would be more persuasive than a "pure logos" brief."*

Chestek found that of all the court personnel surveyed, law clerks were the only group that did not express an overall preference for the story brief. Chestek hypothesized that these '*new*' professionals (with less than five years experience) prefer a focus on "*the facts*" to aid them in their task-- helping their supervisors (the judges) identify laws at issue. In other words, new professionals see the informational brief as one that more closely represents "*thinking like a lawyer*".

> *"Perhaps it is because "the law" becomes familiar and the stories become the "new" information that is interesting and engages the attention of the reader. Or perhaps it is related to the fact that emotional reasoning (the "story strand" of our DNA molecule) evolved in the human brain long before logical reasoning. Perhaps as we mature, we learn to trust our emotional reasoning processes more."*

What isn't considered in his hypothesis is the generational difference that is well documented between Millennials (the law clerks) and the Gen X/Baby Boomer lawyers and judges. We have written exhaustively on the subject[33], and believe that the distinctions between generations can explain the difference just as well.

As a member of one of these older groups who reads hundreds of pleadings, motions for summary judgment, and appellate briefs every year, I know how much more I look forward to reading those written in story form. My kids would probably tell me that they wish the author would cut that stuff out and just explain what needs to be shared.

This gives credence to the old advice to "know your audience". If you are speaking (or writing) to a professionally "newer" group or jury, you may want to use a more stream-lined and factual approach. If your audience (or jury) is more experienced, a story narrative may be both more interesting to them and more persuasive.

Finally, another study assessed *need for cognition*[34] (that is, the enjoyment of thinking) as well as 'transportability' (the capacity to allow a story to 'transport' you into the narrative's alternate reality):

> Research participants read two different stories: "*One story focused on the ability of affirmative action to increase social diversity. The second was based on the role affirmative action plays in redressing generations of discrimination and disenfranchisement. Another portion of participants read one of two analogous rhetorical communications that focused either on social diversity or historical oppression and were composed of simple listings of related arguments."*

In other words, one focused on the story, and the importance of the issue, while the other focused on pure facts. The story transports, while the fact presentation has a less transporting effect. The researchers hypothesized that higher transportability would again be related to increased persuasion but only in the story conditions. And they were right.

> Highly transportable folks were more responsive to the narrative and their attitude change corresponded to changes in emotional responding (empathy) as opposed to rational appraisals (objective thoughts).

This can be an important area to consider for voir dire: "*How many of you are regularly 'transported' by reading a good story?*" "*Who can remember being brought to tears watching a movie or television show?*" The research doesn't address whether a love for narrative dramas on television is as effective a screen as reading (a past-time not embraced by all).

> If your story is one that relies on emotional appeal—you want jurors who are "high in transportability".
>
> If your story is one with a more rational or objective appeal—you want those jurors who look at you with confusion when you ask that voir dire question.

And we might suggest that if you are really looking for jurors who are low in transportability, the challenge will be to observe the jurors who sit disinterested[35] as the "transported" jurors tell their stories.

Metaphors and analogies

As we've begun to do extensive work in patent and high-tech litigation over the past ten years, the relevance of metaphors and analogies has become ever more apparent. When your case is full of abstract and conceptual ideas (like in many intellectual property disputes), jurors need ways to have it make sense in their own lives. Sometimes those metaphors arise of their own volition like this one that simply emerged in East Texas:

We were telling a story of a company (the plaintiff) suing another company (the defendant) because a third party (let's call him Joe) had given an idea to the defendant and the defendant (not knowing 'Joe' perhaps did not have clear title to the idea) taught some people how to use it, improved on it, and provided consultation on how to use the improvements. So the plaintiff sued the defendant for infringement because we all know 'Joe' doesn't have the money to recover significant damages. Finally, a construction worker mock juror raised his hand:

> *"Let me get this straight. So some guy steals a drill and brings it to my worksite. I teach him how to use it. And now I get sued for teaching him to use the drill?"*

A simple and straightforward metaphor for an abstract concept with no relevance to the lives of East Texas residents. And just like that, the relevance was given to us. There was a stunned silence in the observation room filled with attorneys and then the sound of pens scratching and keyboards clacking as the example was recorded. What's interesting is that the more huge the potential damages [36] are in a case, the more relevant the use of metaphors and analogies that relate the case facts to everyday life of the triers of fact.

Old and young alike can understand concepts, metaphors and analogies when presented in a familiar format. We've seen the esoteric technology underlying complex patents simplified using [for example] comparisons to drive through orders, vending machines, and pizza delivery. Use examples that are universal and jurors will 'get' enough of the concept to talk about it in their own words.

Along those same lines, I was recently reminded of a blog post from Dave Munger back in the glory days of Cognitive Daily blog[37]. In the post, Dave's spouse Greta (co-author of the blog) discovered that the fable of the Fox and the Grapes[38] was unfamiliar to many of her college students. *Cognitive Daily* then did a survey of their readers to see how many were familiar with the origin and meaning of the phrase "sour grapes"[39]. As it turned out, it was relatively few. Aesop didn't make the Millennial reading list.

It's a good lesson in generational communication for the courtroom. As they saw in the Cognitive Daily survey[40], those survey respondents who were avid readers were more familiar with the meaning and origin of the term "*sour grapes*". We need to remember the phase of life[41] of our jurors, as well as how actual 'reading' has decreased for many. Movie references, TV show references, book references, Bible quotes and religious references, and even pop culture references become quickly dated and meaningless [42] to your audience.

We saw this recently in a mock trial where the (Boomer generation) defense attorney was attempting to demonstrate the difference between the disputed technologies as the difference between a record album (which he held up for the mock jurors) and a CD. Both delivered music,

but with much different technology. Jurors liked the comparison and it made sense for them. But an unanticipated message came through. The attorney displayed a record album by Barry Manilow. Younger jurors saw that choice as reflecting both the attorney's age and a questionable taste in music. They were unafraid to verbalize this perception directly. It made for some amusing razzing in the observation room, and an important lesson for trial.

Argument and persuasion

The stereotype tends to be that Millennials are suspicious and cynical. They are dyed in the wool skeptics, and hard to please. But more realistically, society is generally trending in that direction. We do not like to be deceived and we are always on the lookout for liars. We prefer to learn by discovery rather than by being told what to think. This is a big change from the Greatest Generation, which is more deferential to authority and respectful of the pulpit (in church or in court). For those who were raised watching Watergate and Viet Nam on television, and for their progeny, skepticism has always been greater. And now in the age of internet fact-checking, the reluctance to trust opinions of strangers is even greater. What they will say is "give me the facts, don't tell me what to conclude."

Recently, researchers studied participants with fMRI machines while they watched a series of print advertisements. They were not asked to assess the merits (i.e., evaluate) the ads, just to passively observe. The researchers exposed the participants to three (pre-tested) advertisements deemed "*highly believable*", "*moderately deceptive*" or "*highly deceptive*". What they found is intriguing in terms of how our brains deal with threats of deception.

When the print ads were either "moderately deceptive" or "highly deceptive", the fMRI results showed increased attention was paid to the ad. Specifically, the precuneous area of the brain (associated with focusing conscious attention) was activated. In short, the more deceptive the ad, the greater the threat and the more the participant focused their attention on the ad itself.

Intriguingly, ads that were "moderately deceptive" caused more overall brain activity than the "highly deceptive" ads. The researchers suspect it is because participants had to work harder with the "moderately deceptive" ads to ascertain the truth while they were able to quickly evaluate and toss away the "highly deceptive" ads.

So how is this connected to litigation advocacy? In several ways.

Most deception in cases that make it to trial is going to be of the "moderately deceptive" type. The good news is that jurors will automatically focus more on those issues to attempt to intuit the truth behind the evidence presented to them. What we see (over and over again) is that jurors do not want to be told what to think[43]. They want to figure it out for themselves. Most effective is a tight case narrative that answers the questions that naturally emerge in the minds of jurors as they hear your story–and you want to let them draw their own conclusions.

Secondly, it isn't just our youngest jurors (the Millennials) who are suspicious and look for deception everywhere. They may simply be more consciously aware of that process. For the rest of us though, our brains are lighting up. Make us consciously aware of our suspicions[44] by questioning witnesses, subtly displaying doubt via facial expressions or tone of voice, and giving jurors alternatives to opposing counsel's explanations. What is paramount is that the jury sees you as the antidote for deception, not the source of it. Play it straight, and resist argument.

Technology

Technology comfort and use is thought of as another bright-line generational divider. According to a recent Pew Research survey, while 75% of those aged 18-30 report they use the internet daily, only 40% of those aged 65 to 74 have the same internet use on a daily basis.

> "*The older Gen X goes online to accomplish a task and then walks away from the computer. Gen Y goes online and offline seamlessly and does not make a distinction between one and the other*" (Behrstock-Sherratee & Coggshall, 2010).

Technology use difference across generational groups can be seen even more strongly with cellphone use. For those 65 or older, only 5% get all or most of your calls on a cell phone and only 11% use phones to text. Conversely, 72% of those under age 30 use their cell phones for most or all of their calls while 87% text (Elmore, 2010). This is likely why it only makes sense for the Millennials to send texts to report that they are sick or will be late to the office. It's not disrespectful--it's simply habitual and normative for their generational group.

On the other hand, do not assume only your younger jurors are technology-wise. Ask! What may surprise you is that Boomers and even the Silent Generation are also remarkably 'connected'.[45] Certainly not to the same degree as the Millennials, but Grandma is also wired (mostly).[46]

> Millennials: 91% use the internet (up from 89% in 2008) and 86% use social networks. Despite their constant connectivity, texting is more popular among this group than either email or social networks.
>
> Generation X: 88% of Gen Xers were internet users in 2011 (up from 80% in 2008) and of those online, 73% used social media. Gen Xers are "fully comfortable using both traditional and digital media channels".
>
> Boomers: 75% use the internet (up from 70% in 2010) and 93% use email. Of those online, 47% used social networks in 2010 with 20% doing so daily. Intriguingly, Boomers spend more money on technology (monthly telecom fees, gadget/device purchases) than any other demographic!
>
> Silents: 47% used the internet in 2011 (up from 36% in 2008) and of those online, 94% use email and 26% use social networks!

When you are in a tech-heavy case, make sure to use simple [even anthropomorphized] explanations for the complex layers of technology as exemplified in Barnes (2009)[48]. But for the sake of retaining your credibility and trustworthiness, be cautious about claims of ignorance regarding technology (or any aspect of your case). While you can get away with saying "When I first heard about this case, I didn't appreciate much about this technology…", jurors are not going to respect you if you don't display comfortable mastery of it at trial. Learn it and act like you know it, or sit down. Anything less means that you are not a reliable source of the information that they demand. You are the expedition leader, and you'd better know the route.

Younger jurors are going to expect that you will use technology at trial. Further, they are going to expect you to use that technology smoothly and effortlessly. A good trial technician can be worth their weight in gold when it comes to juror's sense of your technological credibility. The days of getting juror commiseration and empathy with your self-deprecating comments about "*not being good with technology*" are long-past. You get no pass.

Pretrial Publicity (PTP)

When you have an upcoming trial with much publicity, there is always the concern about the impact of pretrial publicity on your potential jury. Recent examples for which this has been a concern are the Enron trials, Casey Anthony trial, the Conrad Murray (Michael Jackson's doctor) trial, and the George Zimmerman/Trayvon Martin shooting (see our paper on this one here[49]).

Despite our beliefs about the impact of pretrial publicity on the defendant's right to a fair trial, the Supreme Court has differed from that common wisdom. There was much discussion when the Supreme Court decided Jeffrey Skilling had gotten a fair trial[50] in Enron's home town of Houston, despite extremely negative pre-trial publicity. Recently, researchers examined transcripts of 30 mock jury deliberations to assess whether pre-trial publicity affects jury deliberations.

Not only did pre-trial publicity have a powerful effect—that effect was consistent across all thirty juries. Every single one of the juries exposed to PTP discussed what they had read/heard about the trial. Rarely did a juror in any of the thirty groups halt the PTP discussion despite pre-deliberation admonitions to not discuss PTP and to halt any discussion that should arise during deliberations. Rather, they acknowledged the information came from PTP and then agreed to discuss it anyway! The researchers opine courts cannot rely on the jury to correct fellow jurors who raise PTP information.

> *Jurors who were exposed to negative PTP (anti-defendant) were significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution's case, but rarely discussed them in a manner that supported the defense's case.*

Negative PTP seems to be lumped in with the prosecution's ambiguous evidence as though it is more evidence for the prosecution's case. So ambiguous evidence is strengthened by negative PTP. As in, "*That's just like what I heard*…".

> *This study also found that PTP-exposed jurors were either unwilling or unable to adhere to instructions admonishing them not to discuss PTP and rarely corrected jury members who mentioned PTP.*

In essence, this study says that jurors' ability to hear and interpret ambiguous evidence is damaged by negative pretrial publicity. They are simply unable to process the evidence in a balanced fashion and instead they skew their interpretation to support the prosecution. Supreme Court ruling notwithstanding, pre-trial publicity does affect juror behavior. And negative PTP stacks the deck[51] for the prosecution.

Why is this topic being included in a paper about generational differences? Because there is an important generational distinction surrounding PTP (Ruva & Hudak, 2011). Their study examined how pretrial publicity affects older jurors [range = 60-80 years old, average age = 69.5] and younger jurors [range = 18-21 years old, average age = 19]. In this instance, researchers looked at the impact of both positive and negative publicity on mock juror decision-making.

Mock jurors read either positive or negative pretrial publicity accounts of the case (via mock news articles) and then, one week later, they watched an edited 30 minute video of the trial. (This video was used in previous research and found to be realistic, believable and ambiguous as to guilt. Pretrial publicity is believed to be most important when guilt is ambiguous.) Following

viewing of the trial video, they were told to disregard any relevant information from their readings the week before and then they wrote down their individual verdicts.

> Older jurors were only affected by positive pretrial publicity.
>
> Younger jurors were only moved by negative pretrial publicity.

In other words, even though the mock jurors were given identical information "pretrial" and then viewed the same video summarizing the trial, they came to very different conclusions. Older jurors were only biased by the positive PTP while younger jurors were more conviction prone than the older jurors only when exposed to negative PTP.

> What this research would suggest is that when you have negative pretrial publicity, older adults (older Boomers and Silents) are going to be less affected by it than when they have been exposed to positive pretrial publicity.
>
> If the case involves a well-known and positively regarded person, older adults are going to be more affected by the 'halo' surrounding them than will younger adults.
>
> If there is a high level of negative publicity and the litigant is relatively unknown, younger jurors are going to be more swayed (negatively) while older jurors are largely unmoved.

It's an intriguing finding for two different reasons. First, this is a demographic finding–attitudes and values are almost always more powerful in affecting decision making. The second point is the question of why the older jurors were only moved by the positive PTP. They are, for the most part, more conservative. If they were looking for reasons to be punitive, the negative PTP would be powerful. Instead, another finding in our analysis of generational research seems to fit: older jurors are happier. They prefer to pay attention to news and information that says *'the world isn't so bad after all*'. Generally speaking, expect older jurors to prefer positive stories[52], good character, and good manners.

Paths to the Attention of Younger Jurors

To engage both Millennial[53] and Gen X[54] jurors
Like them, treat them as having something to contribute. This is especially true for the Millennials who are tired of being treated disrespectfully, like “kids”.
Don’t write them off as insensitive. Use universal values to engage jurors of all ages with your specific case.
Understand the impact of growing up digital but don’t assume competence with all things technological. For both Gen X and Millennial jurors, some will be mavens and others will not. Age is not a totally reliable indicator of technological prowess.
Betrayal of trust is an important (and potentially powerful) theme. This is especially true for the Millennials who grew up in very protected and supervised environments. They are especially sensitive to betrayal of trust. Focus on issues of what is right and what is wrong.
Connection, tolerance and making a difference are case themes that resonate. Build connections: Make witnesses and parties “like” the jurors. Consider case narratives focused on relationships, family and friends. Consider how to use “balance”. Demonstrate the meaning in your case and how it personally effects them, cut especially for the Gen X juror.
Religious affiliation is lowest among the Millennials and lower among Gen X jurors than Boomers or Silents.
Help them trust the sources of information by giving information on source validity that extends beyond educational credentials.
Use effective and crisp multimedia strategies in presentation. Make the trial visual. Highlight digitized material or sound bytes that outline key points.
Stay concrete and practical. Be “cool” but not “slick”. Move around and vary your position and speech style.
Teach the jury charge so they understand what is expected of them.

Conclusions

In the courtroom, much as in the office, you are best served by maintaining your curiosity and minimizing your reliance upon stereotypes about the various generations. The ones ‘not like me’ (older or younger) are not the enemy, they are merely strangers. And strangers prefer people who appear to like and respect them. Don’t assume that disagreement or differences are a sign of disrespect or disdain-- frequently, they are just a matter of habit and personal style. There has been intergenerational tension forever. We hope this overview of generational issues helps your navigation in the “new normal” of both the office and the courtroom.

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NOTE: This paper was created to be an electronic document, and if viewed in it's original form on a computer, 54 embedded hyperlinks are available to explore. These links connect with many source documents which were originally internet-based. The source materials are generally very useful for attorneys and judges, and you are encouraged to explore them. As you will note, many of these are blog posts we have written on news and research related to various facets of this paper, and how it relates to the practice of trial law.

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Jury Selection: Beyond Voodoo

"To form a petty assize or an ordinary jury, twelve free and lawful men of the neighbourhood are summoned directly by the sheriff. In the case of a jury summoned after there has been pleading, he is bidden to choose those 'through whom the truth of the matter may be best known.'"[1]

I. INTRODUCTION.

"Much of medicine remains a mystery." This is a comment I have heard more than one doctor make over the years in reviewing with them why an unfortunate outcome occurred. This saying could easily be adopted by trial lawyers in trying to explain decisions made by juries over the years. While medicine is still far from being an exact science, scientific advances have solved many of the mysteries. The same can be said for juries. While trial lawyers are still from time to time mystified by the decisions of juries, the extensive social science work and jury research conducted in the past 25 years has greatly increased our chances of selecting truly "impartial" jurors – the stated goal of the jury selection process. This comment, however, must be tempered by the recognition that past research and future research will never allow trial lawyers (or jury consultants) to accurately and consistently determine the thoughts and feelings of individual jurors. Neither will they ever be able to predict the group dynamic that occurs in any particular jury deliberation process.

[1] Sir Frederick Pollock, Bart., M.A. LL.D. & Frederic William Maitland, LL.D., The History of English Law Before the Time of Edward I., Vol. II Ch. IX § 4 at 621 (2d. ed. 1899).

This presentation is an effort to describe a jury selection process that, while "beyond voodoo" is still very much an art rather than an exact science. What follows is a series of suggestions gleaned from study of jury research, social science studies and years of practical experience which includes many surprising, and sometimes shocking, jury decisions.

II. PRETRIAL WORK-UP.

A. Focus Groups/Mock Juries.

Do focus groups, mock juries and other jury research tools work? Well, the answer is "yes and no":

> Focus groups (or moderated discussion groups) and mock trials have frequently been identified as central data collection vehicles for trial simulations. The popularity of these techniques probably reflects the parallel between these group discussions and the type of mock trial that often is employed as a training device in legal education. Nevertheless, the logic of simulation requires that we examine closely what elements of actual trial require replication. Replicate simulations offer nothing but the chance to endure trial twice, with no assurance that the second set of unfolding circumstances will mirror the first. In fact, the notion of using simulations to predict the future, as opposed to developing insights to possible developments, is problematical unless a methodological baseline has been established.
>
> Although surveys typically would involve larger and potentially more representative samples than can be afforded by group techniques, focus groups and mock trials have an advantage in that much more elaborate case presentations can be presented in a realistic courtroom-like setting than would be possible in brief telephone interviews. More important, the process involves essentially the same type of group discussion that a real jury might use in evaluation of

> presentations by attorneys and witnesses, and in reaching a verdict.
>
> In what ways do focus groups differ from mock juries? Small focus groups usually involve moderated discussion of specific case issues with approximately six to eight subjects. The purpose is to explore juror perceptions and identify issues the defense needs to evaluate. Group members do not remain passive observers, as jurors do in an actual trial, but are encouraged to interrupt the speaker with questions, interjections and observations. The process is interactive. These groups are complicated by the necessity of presenting a substantial amount of information to convey the complicated by the necessity of presenting a substantial amount of information to convey the parameters of litigation. They are entirely exploratory and descriptive exercises and should not be used to estimate financial exposure or evaluate the likelihood of victory. They do not simulate trial.[2]

To put the above more simply, focus groups and mock juries can not predict trial outcomes. However, they can be a tremendous asset in assisting attorneys in identifying trial themes that will and will not work, as well as developing a profile for the "model" juror for a particular case.

There are numerous articles and book chapters written on the subject of how focus groups and mock juries are constructed and run. The range of options – and costs – are enormous. As with most research, the more you invest the greater the reliability of the results. Thus, the most reliable data results from multiple sessions with multiple focus groups or mock juries in each session.[3] Obviously, the lawyer, and the entity bearing the cost of trial preparation, must engage in a cost/benefit analysis to determine if the

[2] Harvey A. Moore, Ph.D. & Edward F. Gerecke, Esquire, "Qualitative Research, Thematic Development and Jury Selection in Mass Tort Litigation," Paper Presented at the Defense Research Institute Seminar on Medical Device Claims, Tampa, Florida, 5 (May 9-10, 1996).

[3] Id. at 8.

potential gains (or losses) in a given case justify the expense of this method of research and, if so, how extensive the process should be undertaken.

Another less costly form of "juror research" is the random sample telephone survey. This can be used to estimate societal attitudes on given issues in a discrete geographic location. Shortcomings to this method are several. First, the survey/interviews are limited to only a few minutes in length. Second, very broad assumptions are extrapolated from a relatively small sample. Third, there are very limited number of issues that can be addressed during the short survey/interview time.

Assuming a given case warrants the time and expense of mock trials or focus groups, they are highly recommended as tools to assist in the preparation of trial and selection of a jury. However, the experienced trial lawyer will know intuitively that these are nothing more than tools which will assist her or him. The final decision as to which jurors to strike, and how to communicate with those jurors, must ultimately rest with the attorney.

III. PRETRIAL INVESTIGATION OF JURY VENIRE.

In most jurisdictions lawyers have access to the list of jurors who have been summoned for a given jury term many days to several weeks in advance. While some of these venires can be large in number, a significant upcoming trial will often bear the time and expense of conducting research into each of the individual jurors in this computer age. The most basic research is a search of the computer database for the state for any civil or criminal actions involving the individual jurors. The next step up is a search to determine which of the individual jurors have "MySpace" or "Facebook" pages that

allow access. If access is allowed, those personal pages will typically offer significant insight into the attitudes of that individual. While most of us are familiar with MySpace and Facebook, the world of blogs and social networking is expanding at an exponential rate. Attached as "Appendix 1" is a recent blog site discussing the various social networking sites that can provide information concerning potential jurors. As with focus groups and mock juries, the amount of time that can be dedicated to this research is almost limitless and must be conducted in accordance with the magnitude of the case and your expertise (or the expertise or your staff).

Once the panel members are vetted via the various search engines, it is wise to create a chart that cross-references each juror with the information uncovered for easy reference during trial.

While the pretrial research on individual jurors is a huge first step, it is not the end of the task. Potential jurors do not cease blogging as trial approaches or as trial commences. More and more frequently it is discovered that jurors are blogging during trials, sometimes with disastrous effects. Attached as "Appendix 2" is an article posted on the New York Times website on March 17, 2009. It was discovered that a juror had conducted internet research during a trial, resulting in a new trial. In addition to conducting research, jurors frequently post comments on websites or blogsites. In one of my recent trials, we checked on the panel selected for our trial during a break in voir dire. As we were searching, one of the jurors posted a comment about the selection process. This was a rather innocuous comment about the tediousness of the process. However, it is certainly possible to obtain insight on potential jurors as the jury selection process is

being conducted. It is also suggested that these searches be conducted periodically throughout the trial as it is certainly preferable to discover that a juror is conducting research, posting comments or communicating with other jurors during the trial rather than afterward in the event that the conduct is serious. It is better to replace a juror during trial with an alternate rather than face the prospect of a new trial.

Attached as "Appendix 3" is another post from the "Deliberations" blogsite commenting on a recommended practice for dealing with jurors who "go on line" during trial.

IV. JURY QUESTIONNAIRES.

Juror questionnaires are a very useful and cost effective tool to assist the trial lawyer in obtaining insights into potential jurors that will, in turn, aid in determining which venire members to strike.

At this point the demands of professional integrity require that I advise the reader that the definitive body of work on the subject of use of jury questionnaires is authored by Thomas J. Hurney, Jr. and was published in The Defense Counsel Journal. A copy of that article is attached as "Appendix 4"*[4].

Preemptory strikes can best be used when the trial lawyer has the most information available concerning the individual members of the venire. It is surprising to no one that many jurors are reluctant to speak at all during the voir dire process. Thomas Mauet portrays the experience of a prospective juror vividly:

[4] It is technically true that Mr. Hurney is a "co-author" of this article. However, when recently questioned during an interview about the contribution of the second author, Mr. Hurney replied: "Huh?" According to Mr. Hurney, this interview was filmed and will be aired in a soon to be seen edition of *60 Minutes*.

> Put yourself in the shoes of a prospective juror. You recently received your notice to appear for jury duty. This morning you arrived at the courthouse, waited in the jury room most of the morning, read a pamphlet or watched a videotape about jury service, and were finally called, with about 30 other persons, and brought to a courtroom. You just entered the courtroom and sat down in the spectator rows. You can see the judge on the bench, and various other persons in the front of the courtroom. And then you wait some more. What is that juror thinking and feeling?
>
> Most jurors have little or no experience in the courtroom. They are in the midst of strangers. They are apprehensive and intimidated. They are worried that their ignorance about the jury trial system will show. They are concerned about their life's secrets being exposed.[5]

There certainly are techniques that can be used during voir dire with the goal of relaxing venire members and allowing them to "open up". However, some jurors will steadfastly refuse to speak during voir dire and there are also areas of inquiry that will make virtually every juror at least uncomfortable and possibly angry. Juror questionnaires are becoming an increasingly popular method of obtaining information from potential jurors and addressing areas that the potential jurors may consider personal and private. The subject was addressed in an article authored by Roslyn O. Silver, U. S. District Judge for the District of Arizona. Judge Silver, an ardent proponent of questionnaires, notes that "jurors are more likely to disclose sensitive and personal information when asked in *advance*, and when the answers are prepared in *writing* and *in private*."[6]

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[5] Thomas A. Mauet, Trial Techniques Ch. III § 3.4 at 41 (7th. ed. 2007).

[6] Hon. Roslyn O. Silver, *Mindreading, Clairvoyance, and Jury Questionnaires*, 31 Litigation 3, 4 (Fall 2004).

As Judge Silver intimates, there are three variables that significantly impact the candor that can be expected from potential jurors as they complete questionnaires. First, the more time that an individual has to devote to answering the questionnaire, the more likely she is to provide proper and complete answers. Thus, Judge Silver recommends providing questionnaires to the potential jurors as far in advance as possible. Ideally, it would be best to submit the questionnaires to jurors at least several days before they appear at court for their jury service. However, in the real world of trials, this is seldom possible. Few judges are willing to incur the cost of this process or the time necessary to distribute the questionnaires. Therefore, when questionnaires are used it is recommended that the venire or panel be given questionnaires as early in the process as possible and also given a sufficient amount of time to review, consider and answer each of the questions. Second, if the trial lawyers and court can expect candid responses to jury questionnaires, the potential jurors must be given an opportunity to answer the questions "in private". This, in effect, means that the trial judge must give the venire or panel a break long enough to afford them the opportunity to sit somewhere in the courthouse in private and prepare answers to the questionnaire. Few judges have any problem with taking a break. However, sometimes judges need prompting to allow a break long enough to afford privacy. Unfortunately, many judges are still reluctant to allow jury questionnaires. This reluctance is typically based upon a fear that the questionnaires will unnecessarily lengthen the jury selection process. Attached hereto as "Appendix 5" is the excellent article by Judge Silver. This article is not only a source of information, but also

is an excellent tool that may be cited and submitted in an effort to "win over" a judge who is reluctant to approve the use of jury questionnaires.

V. ***BATSON*.**

A discussion of *Batson* challenges including the history of *Batson* challenges and various court decisions concerning which announced reasons for specific preemptory strikes will survive a *Batson* challenge is beyond the scope of this paper. Rather, what follows is a practical approach to making and defending *Batson* challenges.

Pretrial preparation is the key to managing *Batson* issues that arise during the jury selection process. One of the reasons for the venire research discussed above in Section I is to begin to develop a list of reasons to justify juror strikes if a *Batson* challenge is made against you. During the voir dire conducted by your opponent, or counsel for co-defendants, it is important to be vigilant in identifying and making notes of responses by jurors that will justify a strike in the face of a *Batson* challenge. As discussed below, it is recommended that you not make notes while you are conducting voir dire. Consequently, I recommend that someone be assigned the task of making detailed notes during your voir dire. While it is preferable that another lawyer be assigned this task, it can be handled by a paralegal or clerk if there are budgetary or other constraints preventing the use of a second lawyer for this purpose.

In order to effectively defend or make *Batson* challenges, an ability to cite case law that supports or undermines specific reasons for a peremptory strike is crucial. Because cases addressing *Batson* challenges in federal courts and the various state courts are legion, it is virtually impossible to have a working knowledge of those cases. I

suggest that you maintain a "*Batson* notebook" that is continually updated to reflect decisions in your jurisdiction, and in federal courts, that either support or refute specific reasons for peremptory strikes. A well organized notebook will allow you to cite case law to the court in the event you are called upon to quickly provide reasons why your strike is acceptable under the guidelines of *Batson* or your opponent's strike is unacceptable under those same guidelines. In addition to having your own *Batson* notebook, if resources permit, consider assigning to someone in your firm the responsibility of becoming a "*Batson* expert." That individual can then attend the jury selection phase of trial and assist you in defending or attacking strikes on the basis of *Batson*.

Judges typically search for a reason to deny a *Batson* challenge because of difficult issues that arise if the challenge is sustained. Not only does a successful *Batson* challenge result in a delay in moving forward with the trial, it also poses issues concerning what remedy is appropriate. Which remedy that may be applied on a specific case will vary from jurisdiction to jurisdiction and even from judge to judge within a jurisdiction. It is wise to have an understanding of how a judge will respond to a successful *Batson* challenge before you go into the trial as this may influence your decision concerning whether to make a *Batson* challenge.

If your opponent makes a *Batson* challenge it is often good strategy to make a "cross-*Batson* challenge" if this can be done reasonably. On some occasions this will cause your opponent to withdraw her challenge (with the agreement that you will do

likewise). Moreover, if there are *Batson* challenges from both sides, it may increase the likelihood that the judge will deny all challenges.

VI. VOIR DIRE.

A. Is Voir Dire Best Conducted by the Judge or by Attorneys?

The issue of whether judge- or attorney-conducted voir dire is more effective is, in fact, driven by how jurors perceive the individuals who pose the questions. This issue was specifically addressed in an article appearing in *Law and Human Behavior*:

> . . . voir dire [is] a self-disclosure interview in which information is sought from potential jurors concerning their history, attitudes, and beliefs. Empirical investigations on self-disclosure have repeatedly found that individuals disclose more to (a) those from whom they receive moderate self-disclosure (reciprocity effect), (b) those whom they like more, and (c) those whom they perceive as sharing equal status with themselves (status similarity).[7]

A careful analysis of these three factors reveals that, in almost all situations, attorneys meet each of these three criteria better than judges do. First, with respect to self-disclosure (reciprocity effect), few judges actually give any information about themselves to a jury. As will be discussed below, this is crucial in placing jurors at ease as much as possible and facilitating their openness. Second, while judges are seldom rude or hostile to a jury, their position of the "authority figure" in the courtroom does not provide them with much of an opportunity to appear "likable" in the very early stages of the trial. (Of course, this is tempered somewhat by the fact that the personality of some judges is simply more pleasant than others.) Third, it is virtually impossible, and

[7] Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire, 11 Law and Human Behavior 131, 132-33 (1987).

certainly not desirable, for judges to be perceived by jurors as "sharing equal status with themselves (status similarity)". By the nature of the role, a judge must be able to control the courtroom, including the jurors. As a result, jurors naturally assign, and judges strive to protect, a differential of status between the jury and the judge. Simply put, the judge needs to be perceived by the jurors as the ultimate "authority figure" in the courtroom. The clear result of the research performed by Jones and others is that the intent on the part of jurors during judge-conducted voir dire is to provide answers that the jurors perceive to be the response that the judge desires. Thus, if the purpose of voir dire is to peak into the true thoughts, feelings and biases of potential jurors (and it is), then the process will be much more effective if conducted by attorneys who strive to fulfill the three criteria listed above.

The research concerning judge conducted voir dire does, however, provide some insight as to when you may actually prefer the court to pose a series of questions. In the event that there are one or more venire-persons who have given equivocal answers that could form the basis of a challenge for cause a decision should be made as to whether you would prefer the follow-up questioning be conducted by yourself or the court. In the event you do not want the venire-persons in question to be struck for cause, you should request that the Court pose the ultimate questions concerning whether the jurors can "fairly and impartially listen to the evidence, apply the instructions by the judge and reach a fair verdict". The venire persons will naturally perceive that the answer the judge wants to hear is "yes" and the likelihood is high that this will be the answer given. On

the other hand, if those in question are venire-persons you do want to be struck for cause, you should conduct the follow-up questioning if possible.

B. Conducting Voir Dire.

Over the past two decades it is becoming increasingly "fashionable" to use voir dire as a tool to begin your efforts to persuade the jury and "sell" your side of the case. While this is not an inappropriate goal, it should never be the primary goal in voir dire. For several reasons, it is quite difficult to actually persuade or sell your case at this point in the trial.

First, jurors are not particularly receptive to efforts at persuasion during voir dire. It is early in the trial process and jurors are very nervous and some even scared. Under these circumstances the jurors simply are not in the best mode to receive and assimilate facts or details concerning the case.

Second, most jurors enter their service with a healthy skepticism about all lawyers. As a result, during voir dire you are less likely to be perceived as a trustworthy source of information as compared to later in trial when the jurors have had an opportunity to determine that you are knowledgeable, reasonable and trustworthy. In the final analysis, your efforts in voir dire will be much more effective if that time is used to begin the process of building trust with the jurors.

Next, because of the constraints that most judges apply during voir dire, it is very difficult to present in a meaningful way much in the way of your trial themes.

Finally, the core beliefs and values that any specific individual hold cannot be changed or suspended during trial no matter how great your advocacy skills. If those

core values and beliefs are contrary to the themes of your case, those jurors will likely be fatal to your chances of obtaining a favorable verdict. Your time during voir dire is much better spent identifying those individuals with problematic core values and beliefs than trying to persuade them and the others on your panel. As a result, the best trial lawyers are those who in voir dire have as their first priority identifying core values and beliefs of the individuals on their panel.

While it is easy to say that the first priority of voir dire is to identify core values and beliefs, putting that into practice is quite difficult. A significant barrier to a meaningful voir dire is the natural reluctance of most jurors to speak any more than absolutely necessary during this process. Most people have a great fear of public speaking in any setting and the formality and unfamiliarity of the courtroom heightens this fear. In order to be effective then, it is necessary to do all in your power to meet the three criteria for obtaining disclosure that are listed above. Do begin your voir dire, to the extent allowed by the judge, with some moderate self-disclosure in order to engage the reciprocity effect. Do be friendly and courteous and do all you can to make the jury like you. Take advantage of status similarity. Do speak to the jury in the conversational tone using ordinary and everyday language. Do not take notes during voir dire as that will disrupt the conversational nature of the voir dire that you wish to establish. Do not ever talk down to any juror, belittle any juror or embarrass any juror. If these three criteria are met, you will maximize your chances to obtain a panel with member speaking freely.

Many lawyers have a great fear of jurors speaking openly and freely in the courtroom. That fear arises out of a concern that a bad answer from a juror – such as the individual who talks about her horrible experiences with nurses in the case you are defending for a hospital – will "taint" or "infect" the rest of the panel. This fear is simply misplaced. These answers will not in fact "taint" the other jurors. Core beliefs and values cannot be altered by you and will not be altered by comments from other venire members during voir dire. The alternative to hearing these "bad" answers is that a strong bias against your client goes uncovered and an unfavorable individual finds her way onto your jury. So do encourage the jurors to talk even if their responses or stories are contrary to your defense.

Armed with the knowledge that your goal is to uncover biases and core values and beliefs, the question then becomes how to accomplish that task. The problem with simply asking about core beliefs and values is summed up nicely by Mauet:

> Social science research has also demonstrated that many people are less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting. The desire to fit in and be accepted by others is strong, and people frequently tell others what they think the others want to hear. Hence, likely beliefs and attitudes are more accurately learned through indirection. Rather than asking prospective jurors directly about their attitudes, it is probably more effective to learn the backgrounds and life experiences of the jurors and use them to draw inferences about the jurors' likely beliefs and attitudes. . . . Under this approach, questioning jurors is principally a matter of getting background information from which you infer likely beliefs and attitudes relevant to the case being tried.[8]

[8] Mauet, supra, at 43-4.

Before you arrive at the courtroom, determine what core beliefs and values are consistent with your trial themes and those that are inconsistent. Then design a series of questions about life experience designed to expose those beliefs and values.

Confront the bad aspects of your case in voir dire to the extent you can. It is not only the nature of trial lawyers, it is the nature of everyone to avoid unpleasant subjects. However, the voir dire that ignores the problem aspects of the case is an ineffective one. If you are defending a nursing home in a decubitus ulcer case – show the horrible pictures. If you are representing a corporation in a dispute over fees claimed by an independent contractor, discuss the fact that there are e-mails from the plaintiff "confirming" terms that you dispute, but to which you did not respond at the time the e-mails were sent. Question the jury about their experiences with handshake versus written agreements. If you are representing a large hedge fund, find out what the folks on the panel have to say about "Wall Street". Some of the responses will not be pleasant, but you will have a better idea of who to strike. Importantly, you will be sending a strong message to the jurors who hear your case: I know there are issues that I have to face – but I do have answers to those issues and I am not afraid to address them." This is a powerful message.

VII. CONCLUSION.

Trials are gut wrenching experiences largely because there is no way to know how a jury of relative strangers will respond to you, the evidence and the arguments of counsel. Until we have the ability to know all the thoughts and feelings of jurors – and we never will – the angst of trial will remain. In the meantime, all we can do is our best

to select juries that give each party an opportunity to prove or disprove the elements of the case at hand. Choosing that jury will never be a matter of certitude, but by applying the "rules" we have discovered about the nature of juries, we can give ourselves the "best shot" at a fair jury. The research on juries continues and so we must also continue our studies to keep up with the best practices of jury selection.

APPENDIX 1

Deliberations

Law, news, and thoughts on juries and jury trials

A Trial Lawyer's Guide To Social Networking Sites

We know there are jurors who blog, and jurors who read blogs, and jurors who comment on blogs. By now you're surely convinced that you need to ask potential jurors if they're writing on line. But do you know how? There are nearly countless ways a juror could show up on the Internet. You need some sense of the landscape to ask about them, or you'll get partial answers or answers you don't understand.

If words like "Tweet" and "wiki" pop up often in your vocabulary, you don't need this post. But in case this stuff is new to you, here is *Deliberations'* short guide to the world of social networking. These are roughly grouped according to the main feature of the site, but most have overlapping features and functions.

By its nature, this page will never be "done," and it will be outdated in some way almost as soon as it's posted. If you see chances to correct, update, or add to it, please write to me; you'll get both gratitude and credit.

Basic social networking sites

Social networking 101 starts with the basic players. Members each have a personal page where they post thoughts, pictures, music (often a song starts playing as soon as you click on the page), and videos. Then friends chime in with their own thoughts, and links to their pages, and out it spreads from there. Within the community there are usually blogs (thousands), forums, groups, and dating searches, but the basic unit is the individual page. Examples:

- My Space, "a place for friends"
- Facebook
- Orkut, "We hope to put you on the path to social bliss soon."
- Zude!, "Feel free."
- Gather, "a place where you can share the things that are important to you with the people who are important to you, too."

Ethnic and special-interest communities

A company called Community Connect has social networking sites aimed at specific groups. They work like My Space and the rest, but members look more alike -- or worship more alike, or love people more like them. The five sites in October 2007:

- AsianAve.com
- BlackPlanet.com, "the world is yours"
- MiGente.com, "the power of Latinos"
- Glee.com, "Gay. Lesbian. And everyone else."
- FaithBase.com

These sites are big enough that Barack Obama has a page on each of them except Faithbase, all matching this sample from BlackPlanet. ("Sex: male. Age: 46. Primary job: government and policy.")

Blogs

A blog looks, well, like this. It's a page where you write separate posts that are organized by date. The format works well for a personal journal as well as a sort of on-line newsletter like this one. Individual blogs are typically supported by blogging platforms such as TypePad (the one I use), Blogger, WordPress, and (for law blogs) LexBlog, but you don't have to hop from site to site to search them. Several search engines search all blogs at once, or at least lots of them. Examples:

- Technorati
- Google blog search
- Feedster

- Blogdigger

"Microblogs"

As instant messages are to essays, microblogs are to blogs. Twitter, the leader here, calls itself "a global community of friends and strangers answering one simple question: *What are you doing?*" Typical "Tweets" tell the world that the author is heading out for pizza, or bored at work, or listening to music, or going to the bathroom.

People read this stuff, you ask? Yes, thousands, to the point where marketing gurus like Guy Kawasaki have joined up and are sending out their wisdom in Tweets. Microblog search engines are starting to appear, too. Examples of microblog sites:

- Twitter, "A global community of friends and strangers answering one simple question: *What are you doing?*"
- Rabble, designed to be used from mobile phones
- Jaiku
- Pownce, "Send stuff to your friends"
- Yappd, "Let your friends see what you're up to!"

Blog/social network hybrids

These are on-line communities where the user's "home base" is a blog with date-stamped entries, rather than a page with posted information. These sites have the same functions the social networking sites do -- friends, groups, posted images and videos, etc -- but they're organized around blogs. Examples:

- Xanga
- Vox, "Blogging is fun again."
- LiveJournal, "an online journaling community"

Business sites

With all the ads on MySpace and the hamster pictures on FaceBook, it's amazing it took so long for someone to develop a networking site for business. It's not clear that they're taking off, especially as FaceBook attracts older users. LinkedIn has a lot of people in it, but it doesn't encourage the kind of communication the broader sites do, so at least in my experience it's very quiet. (Word is they're developing more kinds of interaction.) LawLink is new, but people like Kevin O'Keefe at *Real Lawyers Have Blogs* and Doug Cornelius at *KM Space* wonder if it will attract anyone when it's so small and other sites are so big. Anyway, examples are:

- Linked In, "Relationships matter"
- Ryze, "helps you expand your business network"
- LawLink, "The First Online Network Exclusively For Attorneys"

Niche communities

If you're nuts for a hobby, there's a social networking site for nuts like you. A tiny, random tip of that huge iceberg:

- Fatsecret, "the diet solution of the people, by the people, for the people"
- WetCanvas!, "Cyber Living for Artists"
- Fuzzter.com, "A Social Network for Cats, Dogs and All Your Fuzzy Pets"
- BakeSpace.com, "a place for cookers and cakers"
- Common Circle: "Powered by a mix of solar/wind energy and pure love, Common Circle exists to help support the progressive movement."
- Infield Parking, co-founded by NASCAR driver Dale Earnhardt Jr., "leverages the power of social networking to bring together the millions of race fans eager to share their passion for the sport with fellow racing fans and also makes it easy for fans to connect directly with their favorite drivers," but hasn't yet mastered the art of the catchy tag line.
- Vinorati, "your wines and you"

Sharing sites

On a sharing site, the main point isn't your page, or your blog -- it's your stream. Users are there to share their images, video clips,

jokes, music (or, nowadays, music recommendations), or expertise. Most of us breeze into YouTube or Flickr to look for a specific clip or image, but for frequent users, it's more than a resource; it's a community where you can learn a lot about a person by what she shares. Many artists, for example, use a Flickr "photostream" as their main face to the world.

Examples of sharing sites include:

Images

- Flickr (the biggest player), "Share your photos. Watch the world."
- Photobucket, "where millions manage their media"
- Picasa Web Albums (Google)

Video (and a little audio)

- YouTube (hands down the best-known sharing site on the Internet), "Broadcast Yourself."
- Funny or Die, a site said to be developed by Will Farrell and others "where celebrities, established and up-and-coming comedians and regular users can all put up stuff they think is funny." Will Ferrell's profile and what are billed as his picks are here.
- blip.tv, "We focus on shows"
- ComicWonder, where funny users call in jokes by phone
- Revver, "the viral video network that pays"

and of course niche sharing sites had to be next, like

- GodTube, "Broadcast Him," with the terrific tag line, "What would Jesus download?"

Music

The file-sharing music sites you've heard about are struggling as the Recording Industry Association of America pursues those who trade songs on line. (The RIAA's recent $220,000 verdict against a Minnesota woman got a lot of press.) If you go to Grokster, once an active music-sharing site, your screen will show nothing but a notice in huge letters: "The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. . . . YOUR IP ADDRESS IS [insert long number here] AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous." Okay, okay.

The Minnesota woman's music site, KaZaA, is still on line, and the trend in this area seems to be toward music *recommendation* sites where users post lists and short clips of what they like, but not the whole song. Examples of both types:

- KaZaA
- upto11.net
- MyStrands, "What you play counts."

Expertise

You don't think of Amazon.com as a sharing site? Think again. It was one of the first places where users could demonstrate their expertise in self-published book reviews and "Listmania" lists of their recommended books on a topic. Now Amazon lets you expand your list into a "guide," with your explanatory text. One person's reviews, lists, and guides are all gathered in his profile, with links to "friends" just like any other social network.

Then there's Squidoo, brainchild of marketing guru Seth Godin, where users build a free web page called a "lens," with links and text displaying their expertise on any topic.

- Amazon.com
- Squidoo, "Everyone's an expert on something!"

Bookmarking sites

These are sharing sites too, but there are so many of them and they're so powerful that they're worth talking about separately.

Bookmarking users share things they've found on line -- news stories, blog posts, web sites. Other users get their news from the resulting flood of stories, and they in turn flag stories they like. As in other sharing sites, each user has an individual page where you can look at stories that user has shared.

These sites are big. On Digg, one of the leading bookmarking sites, the top story of the last 24 hours has been "dugg" almost 3,000 times as I write this. When somebody put one of my posts on Reddit, my page hits tripled, and stayed up there for three days.

Examples of the dozens of sites like this are:

- del.icio.us
- Digg
- Reddit
- StumbleUpon

Many feed readers have a "shared stories" feature that works like a bookmarking site. *Deliberations*' "In The News" feature consists of the stories I tag for sharing in Google Reader.

Games

Wikipedia has a separate entry for "massively multiplayer online role-playing game," or MMORPG. It's a game in which "a large number of players interact with one another in a virtual world," each living the life of a fictional character. The Wikipedia entry claims there were more than 15 million memberships in these games in 2006. Your character usually has a defined and changing personality, joins groups and makes alliances with others, and keeps interacting even when you're not playing the game. Some of the biggest MMORPGs are:

- World of Warcraft -- you're fighting your way through the fantasy world of Azeroth
- Omerta -- you're a gangster
- EVE Online -- you're in space
- World of Pirates -- you're a pirate, naturally

It's not all swash and buckle. You can post a profile with a picture in your online bridge club, spend the evening (or all night) getting to know the rest of your foursome, and head off to the chat room when you're the dummy. There are online multi-player games of all kinds, from chess to poker, where people are getting to know each other or some virtual projection of each other. You can also bond with those who would rather watch than play; 19.4 million people were playing fantasy sports games in August 2007, the Fantasy Sports Trade Association reported.

Second Life

Second Life is -- how to explain Second Life? It's an online world, "a 3-D virtual world entirely created by its Residents," the Second Life people say. As I write this on a Sunday evening in October 2007, there are more than 37,000 people directing their "avatars" through the events of their days and nights in Second Life. In the last 60 days, almost 1.3 million people have logged in, and there are over 10 million "Residents" of Second Life's world.

Isn't that just a MMORPG, you'll ask, now that you know what a MMORPG is? No, say the Second Life folks, for two reasons. First is ownership. You own what you create in Second Life, and as the *Illinois Business Law Journal* reported in September, this means there is not only an active economy in virtual currency but also a "grey market" in actual currency for virtual property. (Read that again slowly. People are paying each other actual money for the right to own stuff that exists only on an Internet web site.) Second is flexibility. Second Life isn't a gangster world or a pirate world, it's a world:

> If you want to hang out with your friends in a garden or nightclub, you can. If you want to go shopping or fight dragons, you can. If you want to start a business, create a game or build a skyscraper you can.

It's hard to convey how huge this thing is, and how closely it is interweaving itself with the thing we (so far still) call "real" life. Real professors teach seminars in Second Life classrooms, and students' avatars show up to listen. In October 2007, Timothy Zick guest-blogged at *Concurring Opinions* about a "Free Burma" event at Second Life, "which featured a 'human chain' event in which 500 people from 20 countries joined, as well as vigils and meditations in support of this cause." The event left Zick (and at least one thoughtful participant he quotes) wondering what it was about Second Life that made this event powerful, and whether it will

inspire activism offline as well.

Contests

The Internet has always teemed with contest sites, but often now the contest planners, contestants, audience, and judges are all site users. Examples:

- Bix, "Create. Enter. Judge." Typical contests are for cutest dog, best president of all time, and karaoke, karaoke, karaoke.
- Gather, listed above as a basic social network, has regular writing competitions. October 2007 brought the announcement of the five finalists in the First Chapters Romance Writing Competition.

Comments

You can have a significant Internet presence without ever having a blog, social network page, or photostream of your own. On thousands of sites, from large mainstream newspapers to major political blogs to individual photos on Flickr, readers can post comments, and many do. When jurors write on line to defend their verdicts, they often do it in the comments to a news story about the trial; on this blog we've discussed exam ples here, here, and here. To get a sense of how commenters get into conversations and develop recognizable personalities in comment threads, go to any major blog. The *WSJ Law Blog* and *Firedoglake* are two examples of blogs with heavy comment traffic and repeat commenters who get to know each other.

Forums

A forum is a discussion board, a little like comments without the underlying news story. A user starts a discussio n, usually by asking a question, and others respond. Some forums are user-generated issue forums, offering a place for people to talk about particular challen ges. It would be hard to think of an issue there's no forum for: pregnancy, parenting, cancer, weight loss, pick a problem and search it with the word "forum" and you'll find one.

Other forums are associated with a particular busin ess or author, most likely one who promotes a long-term approach that followers might need help with. Thus Weight Watchers members support each other in on-line forums, and followers of David Allen's *Getting Things Done* books ask each other questions in forums on his site.

As with comments, forums draw repeat participants whose personalities become defined. At any given time, a given forum might have a few wise sages revered by all, some enthusiastic idea-offerers who pipe up often, a handful of new arrivals full of questions, and a rabblerouser who likes to challenge everything.

Groups

Most social networking sites allow users to gather into groups, but there are also "group" sites where the group is the main event. Group sites offer a page where group members can see a shared calen dar, posted files, and links, and they also offer a single group E-mail address that sends mail to all group members. Groups can be as small as an extended family sharing baby pictures, or as large as FlyLady's group, whose 440,000 members (as of October 2007) get lots of daily reminder E-mails to help them stay organized and not overwhelmed. (FlyLady's associated web site is here. You'll either love her or want to flee.) Examples of group hosting sites:

- Yahoo! Groups
- Google Groups
- WebRing

A variation on a group site is a wiki, where users collaborate to build web pages. Big public wikis like Wikipedia are well known, but any work group, family reunion committee, or school club can have a wiki hosted at sites like

- pbwiki, "simple and secure collaboration"
- Wikispaces, "wikis for everyone"
- editme, "Edit your web"

Getting personal

The further you go down the social networking road, the more you find yourself in places where users might not want to be recognized. Dating sites are the biggest example. Consumers spent $500 million on Internet dating in 2005, about a quarter of

the $2 billion spent on all Internet content (as opposed to, for example, on-line catalog sales) that year. (Figures are from the Online Publishers Association.) The Pew Internet & American Life Project reported in 2006 that one in ten Internet users had visited an on-line dating site, 43% of those visitors had dated someone they met there, and 31% of American adults know someone who has visited a dating site. With numbers like that, it's likely that someone in the jury box knows a little or a lot about sites like:

- Match.com, "It's okay to look."
- eHarmony.com, "matches you based on compatibility in the most important areas of life"
- Chemistry, whose ads target those who were "rejected by eHarmony"

On the other hand, the technology behind dating sites is also used for things you *could* tell your grandmother about -- like Essembly, "a fiercely non-partisan social network that allows politically interested individuals to connect with one another."

Likewise, there are many ways that jurors might use the Internet that they'd want to keep private, even though they're fully legitimate. People store their tax information on Turbotax, and look for jobs at Monster.com. They can track their progress toward personal goals at Joe's Goals, and check their mental health on the various tests at Martin Seligman's Authentic Happiness site. They post lists of things they'd love to own, not only at scores of store sites like Amazon, but also at free-standing "wish list" sites" like TheThingsIWant.com and DreamofThis.com. They do all this on the promise that their personal information won't be revealed. Rule of thumb: if you couldn't see a juror's Internet profile without that juror's own password, don't ask about it in voir dire.

That way monsters lie

And then there's beyond. The American Gaming Association says almost 23 million people gambled on the Internet in 2005. Oddly, I'm not finding statistics that look trustworthy to describe how much pornography is out there, but anybody with a spam filter knows it's a lot. There are hate sites for every group you could possibly hate. Lawyers who work in these areas have to learn this territory. I have not had to, and hope not to.

Combine all ingredients and stir well

Got all that? Great. Now, to finish the list, think of as many ways to combine all these applications as you possibly can. There's an application that lets you see your Facebook friends' Second Life avatars on their Facebook profiles, and "teleport" from there to wherever they are in Second Life. Facebook applications like HobNob! let you request introductions to other people in the same way LinkedIn does. "Profile aggregators" like MyLifeBrand are emerging to let users manage all their different social networks. Mashable is the news source for all this; subscribe to their blog and watch the world turn a lot faster than you thought it did.

Just plain web sites

Finally, don't forget web sites. Your juror might have a plain ordinary old-fashioned web site. You'd hate to forget to ask about that.

(Image by Leigh Blackall at http://www.flickr.com/photos/leighblackall/6.49553.97/; license details there.)

APPENDIX 2

As Jurors Turn to Web, Mistrials Are Popping Up

By JOHN SCHWARTZ
Published: March 17, 2009

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Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock.

Enlarge This Image

Matt Rourke/Associated Press
Vincent J. Fumo and his girlfriend, Carolyn Zinni, leaving the Philadelphia courthouse Monday.

Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.

"We were stunned," said a defense lawyer, Peter Raben, who was told by the jury that he had been on the verge of winning the case. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

It might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.

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Last week, a building products company asked an Arkansas court to overturn a $12.6 million judgment, claiming that a juror used Twitter to send updates during the civil trial.

And on Monday, defense lawyers in the federal corruption trial of a former Pennsylvania state senator, Vincent J. Fumo, demanded before the verdict that the judge declare a mistrial because a juror posted updates on the case on Twitter and Facebook. The juror had even told his readers that a "big announcement" was coming on Monday. But the judge decided to let the deliberations continue, and the jury found Mr. Fumo guilty. His lawyers plan to use the Internet postings as grounds for appeal.

Jurors are not supposed to seek information outside of the courtroom. They are required to reach a verdict based on only the facts the judge has decided are admissible, and they are not supposed to see evidence that has been excluded as prejudicial. But now, using their cellphones, they can look up the name of a defendant on the Web or examine an intersection using Google Maps, violating the legal system's complex rules of evidence. They can also tell their friends what is happening in the jury room, though they are supposed to keep their opinions and deliberations secret.

A juror on a lunch or bathroom break can find out many details about a case. Wikipedia can help explain the technology underlying a patent claim or medical condition, Google Maps can show how long it might take to drive from Point A to Point B, and news sites can write about a criminal defendant, his lawyers or expert witnesses.

"It's really impossible to control it," said Douglas L. Keene, president of the American Society of Trial Consultants.

Judges have long amended their habitual warning about seeking outside information during trials to include Internet searches. But with the Internet now as close as a juror's pocket, the risk has grown more immediate — and instinctual. Attorneys have begun to check the blogs and Web sites of prospective jurors.

Mr. Keene said jurors might think they were helping, not hurting, by digging deeper. "There are people who feel they can't serve justice if they don't find the answers to certain questions," he said.

But the rules of evidence, developed over hundreds of years of jurisprudence, are there to ensure that the facts that go before a jury have been subjected to scrutiny and challenge from both sides, said Olin Guy Wellborn III, a law professor at the University of Texas.

"That's the beauty of the adversary system," said Professor Wellborn, co-author of a handbook on evidence law. "You lose all that when the jurors go out on their own."

There appears to be no official tally of cases disrupted by Internet research, but with the increasing adoption of Web technology in cellphones, the numbers are sure to grow. Some courts are beginning to restrict the use of cellphones by jurors within the courthouse, even confiscating them during the day, but a majority do not, Mr. Keene said. And computer use at home, of course, is not restricted unless a jury is sequestered.

In the Florida case that resulted in a mistrial, Mr. Raben spent nearly eight weeks fighting charges that his client had illegally sold prescription drugs through Internet pharmacies. The arguments were completed and the jury was deliberating when one juror contacted the judge to say another had admitted to her that he had done outside research on the case over the Internet.

The judge questioned the juror about his research, which included evidence that the judge had specifically excluded. Mr. Raben recalls thinking that if the juror had not broadly communicated his information with the rest of the jury, the trial could continue and the eight weeks would not be wasted. "We can just kick this juror off and go," he said.

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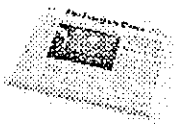
A version of this article appeared in print on March 18, 2009, on page A1 of the New York edition.



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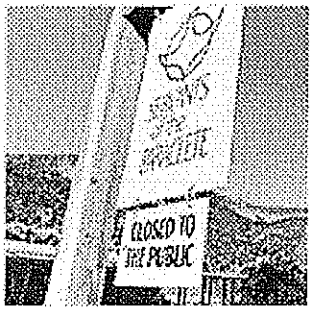

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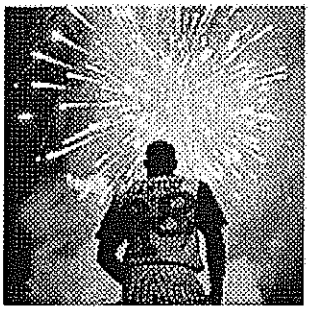


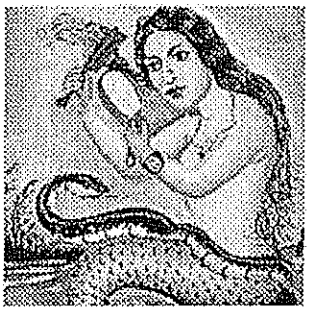
Diamond in the Rough

OPINION »

Ban the Breast Pump

New questions raise doubts about the superiority of breast-feeding over bottle-feeding, writes Judith Warner.

ART & DESIGN »



From the Deep, a Diva With Many Faces

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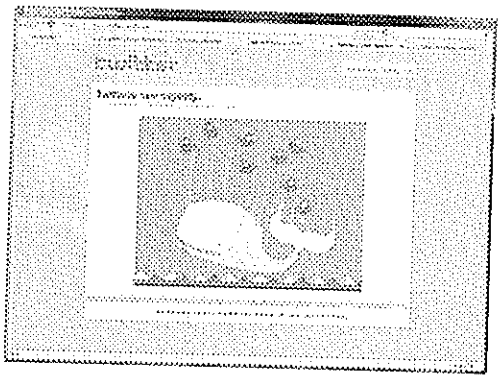
APPENDIX 3

Deliberations

Law, news, and thoughts on juries and jury trials

March 13, 2009

The One Simple Rule When Jurors Go Online



It happened again. A juror accessed Twitter from court, and everybody's twitting out about it.

In a financial fraud case in Arkansas, a juror named Johnathan tweeted a little before and after -- but not during -- the trial. In between, his jury awarded $12.6 million to the plaintiffs. Now the corporate defendant's lawyer claims Johnathan's tweets as grounds for a new trial -- and the Associated Press and *How Appealing* and dozens of other papers and blogs have picked up the story. Johnathan didn't sleep last night and took today off from work to try (unsuccessfully) to talk to the judge. "I'd be in hiding if I thought I did something wrong," he told the Northwest Arkansas *Morning News*. "I didn't."

He's right. There's nothing wrong with his "tweets". If we weren't so busy making the issue of jurors on the Internet more difficult than it needs to be, this story would never have gotten any play and Johnathan would be sleeping just fine.

One simple rule

Little band of people who read this blog, we can resolve this issue once and for all if we just tell every lawyer and judge we know that there is One Simple Rule for handling every case in which jurors access the Internet. One Simple Rule. Here it is:

If the juror had done the same thing off line, what would we do?

Seems too easy? Let's practice:

- A juror asks her friends on Facebook what her verdict should be. If she'd just asked a bunch of friends on her lunch hour, we'd -- dismiss her, right, if we were lucky enough to catch it before the verdict? So that's what should happen here (and did). This rule really works! Try it again:
- A juror looks at the scene of the accident on Google Maps Street View. If he'd gone there himself, would it be okay? Of course not. So it's not okay on his iPhone.
- A juror sitting in the waiting room, not yet picked for a trial, tweets a series of bitter complaints about how stupid jury duty is. If he'd gone to the pay phone and given the same rant to his girlfriend, would we do anything? Not if we wanted any jurors left. So we don't do anything about this guy.
- A juror, after a high-profile trial is over, publishes a blog with detailed descriptions of the trial and what the jury said about the evidence. What if she'd written a book? She'd be happily collecting her royalties. So unless her blog itself describes something that was illegal about the deliberations, it's fine.

'It is kinda exciting"

t works every time. Try it on Johnathan's tweets. He tweeted twice before he reported at all:

- "Well, I finally got called for jury duty. It is kinda exciting"
- "trying to learn about Jury duty for tomorrow, but all searches lead me to Suggestions for getting out if it, instead of rocking it"

ny different from hundreds of conversations around office coffee machines on any given day? Not a bit. He tweeted twice from ie waiting room:

- "I guess Im early. Two Angry Men just wont do"
- "Im the only one who brought toys: my laptop and a book"

What if he'd called his mom and told her this? No problem. He tweeted that he was on a jury:

- "I got selected!"

I'm pretty sure that every juror in America's history has said that to somebody. And he tweeted three times after the verdict:

- "And the verdict is ... Penguin Eds can not make fries"
- "So Jonathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money"
- "oh and nobody buy [stock in] Stoam [the defendant]. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter. http://www.stoam.com"

I don't know what "Penguin Eds can not make fries" means, but after the verdict, he can say anything he wants to. It is, as they say, a free country.

I think Johnathan's tweets are great. But even if you don't like them as much as I do, you're wasting your energy if you think you can stop social networking jurors. Go to http://search.twitter.com and search "jury duty"; at any given moment during the business day you'll find people tweeting from courthouses all over America. The issues they're creating for lawyers and judges are *not difficult*. Just apply the One Simple Rule.

Related posts here:

- If We Strike All The Facebook Jurors, Who's Left?
- Someday, Your Facebook Juror Will Come
- Blogging Jurors Part III: The Good (I liked parts I and II also)

(Image of the famous Twitter Fail Whale posted by Florian Boyd, http://www.flickr.com/people/fboyd/)

Email this • Subscribe to this feed • AddThis!

Posted at 11:58 PM in Juror misconduct | Permalink | Comments (0) | TrackBack (0)

March 12, 2009

The Price Of A Poker Face

It may be the single most frustrating piece of jury advice for young lawyers: "Watch the jury." *Watch them what?*, I used to think. *They're just sitting there!* I felt like I could watch the jury for hours and never see a facial expression.

There are many exceptions, but often, jurors keep very straight faces through even the most disturbing evidence. A new study suggests this may be harder on them than it is on you, enough so that it might make a difference in your trial.

. . . and now we'll show you -- oh yuck.

This would have been a fun study for ten-year-old boys to plan. The researchers asked half their subjects to hold a pen between their lips, not telling them the reason for this was to hold their facial muscles still. Then they showed all the subjects a series of really disgusting images, like a dirty toilet or film of an amputation. (The press release doesn't say how much they paid the subjects, and I can't find the paper itself. I hope it was a lot.)

The subjects who couldn't move their facial muscles experienced more negative emotions and held them longer, in what lead researcher Judith Grob called a "negative spiral." This happened even though the subjects didn't realize that their facial expressions were being blocked by the pen.

APPENDIX 4

Picking Juries: Questionnaires and Beyond

By **Thomas J. Hurney, Jr. and Randal H. Sellers**

A prior version of this article was presented at the Medical Liability Committee Meeting during the IADC 2008 annual meeting at The Greenbrier, White Sulphur Springs, West Virginia, where Mssrs. Hurney and Sellers spoke on jury selection. The laws of Alabama and West Virginia are featured in this article because that is where the authors practice.

SELECTING a fair jury continues to be a sometimes daunting task for defense counsel. A Harris Poll, released January 21, 2008, contains some interesting findings about jury duty:

> One of the civil duties many people dread, or try to get out of, is jury duty. And many do seem to get out of it – while two-thirds (65%) of Americans have been called to serve jury duty, two-thirds of that (68%) actually attended, leaving one-third (32%) who did not. Of those who have attended jury duty, just over half (55%) have actually served on a jury. Bringing this back to the population as a whole, a plurality of Americans (44%) has attended jury duty and one-quarter (24%) has actually sat on a jury.[1]

The article discussing the Harris Poll notes, "the reverse can also be said – three-quarters of Americans have never served on a jury and over half have never even attended jury duty. Unfortunately, looking at the numbers this way clearly shows a civic duty that many may be ignoring."

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Randal H. Sellers is a partner with Starnes & Atchison, LLP in Birmingham, Alabama. He is a Fellow of the American College of Trial Lawyers, a Diplomate of the American Board of Trial Advocates, and a member of DRI and IADC. He obtained his law degree from Vanderbilt in 1981. April Helms assisted in writing the article. She is a summer clerk with Starnes & Atchison, and attends the Cumberland School of Law.

Thus, in picking juries, we certainly face folks who do not want to be there, and search for a way off the jury panel.

Against this backdrop, *voir dire* presents an important and challenging task for every defense lawyer as we attempt to determine which jurors are possibly biased against our clients.[2] Some courts allow full *voir dire* by counsel, some by the court, and

[1] *Just Under Three in Five Americans Believe Juries Can Be Fair and Impartial All or Most of the Time*, HARRIS POLL, Jan. 21, 2008, *available at* www.harrisinteractive.com/harris_poll/index.asp?PID=861.

[2] *See, e.g.*, W. VA. CODE § 56-6-12 (1923) ("Either party in any action or suit may, and the Court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or . . . has any interest in the cause, or is sensible of any bias or prejudice therein")

some do both.[3] We defense lawyers are barraged with information about how to pick juries, to perform *voir dire* effectively, and recognize the biased juror. As we perform the important task of selecting the jury, questionnaires specific to the case are increasingly becoming a part of the process. Typically, questionnaires are drafted by both sides and submitted by agreement. These questionnaires are particularly prevalent in medical liability cases, where issues related to jurors' experiences as patients or knowledge of the health care providers involved and tort reform are often subjects that bear inquiry. While questionnaires provide important information and allow jurors to perhaps answer some of the more personal questions in a private setting, they are no substitute for *voir dire*. Regardless, they are a valuable tool in attempting to seat an unbiased jury.

I. Use of Questionnaires: General

Jury consultants generally counsel in favor of the use of jury questionnaires. One consultant advises, however, that "there are a number of instances where jury questionnaires may be harmful in trying to get a jury that will be most receptive. For instance, few attorneys, in their eagerness to have a jury questionnaire, stop to think why their opponents are equally eager to have one."[4] "While a questionnaire may offer the opportunity to ask questions that would never be posed in open court, there is a danger when it becomes a substitute for posing questions in open court. Often the judge will permit less attorney-conducted *voir dire* because of the use of the questionnaire. A questionnaire can never give the full flavor of the intensity of a juror's feelings about an issue, the salience of the issue to the juror, and his or her knowledge about it."[5]

The necessity of good *voir dire* following questionnaires is addressed in a New York Times article discussing a jury questionnaire used in a terrorism trial: "[W]hile the questionnaires were obviously intended to help both sides in the case categorize the jurors according to several broad themes, they also had the fascinating effect of taking a sociological snapshot of eighteen ordinary citizens at a time when steel barriers were being erected to protect the federal courthouse from a potential terrorist assault." Moreover, "[b]y combining the information obtained from Prospective Juror Questionnaires with in-court observation of jurors' behavior during oral *voir dire*, attorneys can make far more accurate evaluations of prospective jurors. We have been startled by the accuracy of our predictions when both sources of information are combined. Questionnaires are a valuable tool, allowing the attorney to make more astute challenge decisions while saving valuable court time."[6]

In general, whether to allow the use of questionnaires is within the sound discretion of the trial court. "The means and methods

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[3] For example, in both West Virginia and Alabama state courts, *voir dire* varies from court to court. Most judges perform the basic *voir dire*—determining residence, absence of felony conviction and attempts to get on the panel—and then allow inquiry by counsel. Rule 47 of the W. Va. R. Civ. P. governs the procedural aspects of *voir dire*, and states "(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." Rule 47(a) of the Fed. R. Civ. P. permits the court to put all questions to the prospective jurors without allowing the attorneys to ask questions directly.

[4] *When – and When Not – To Use a Jury Questionnaire*, DECISION QUEST, www.decisionquest.com/litigation_library.php question news ID=237 (last visited Aug. 27, 2008).

[5] *Id.*

[6] Susan E. Jones, *Selecting Better Juries: The Prospective Juror Questionnaire*, JURY RESEARCH INSTITUTE, www.jri-inc.com/article9.htm (last visited Aug. 24, 2008).

that the trial judge uses to accomplish [the purposes of *voir dire*] are within his discretion."[7] However, a trial court "may abuse its discretion if it so limits the *voir dire* that the litigants are unable to determine whether the jurors are statutorily qualified or free from bias."[8] Moreover, "[t]he process to select jurors should endeavor to select jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice."[9] Many courts use a general questionnaire for the entire venire panel,[10] and will, on motion or agreement of counsel, also submit questionnaires that are tailored to the particular case.[11]

Usually, however, questionnaires tailored to the particular case are used to hone in on issues and answers that merit further inquiry and to "develop information in the record regarding the presence or absence of any pertinent bias . . . and raise challenges accordingly."[12] Occasionally, challenges for cause are made on the basis of unsworn juror questionnaire answers. A difficult issue is raised when the court or counsel attempts to strike a prospective juror "for cause" on their unsworn questionnaire answers, with no follow up inquiry on *voir dire*. Few states have directly addressed the issue, and federal law deals only indirectly with the issue under the Jury Selection and Service Act of 1968.[13]

Under the Jury Selection and Service Act of 1968,[14] the court "may excuse a potential juror (1) upon showing of undue hardship or extreme inconvenience, or (2) if the potential juror may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings."[15] Federal courts have held the dismissal of prospective jurors based on jury questionnaire answers is governed by the Act.[16]

State courts have varied tests for the disqualification of jurors. For example,

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[7] Michael ex rel. Michael v. Sabado, 453 S.E.2d 419, 426 (W. Va. 1994).

[8] *Id.* at 427 (citing State v. Toney, 301 S.E.2d 815 (W. Va. 1983)).

[9] State v. Finley, 355 S.E.2d 47, 50 (W. Va. 1987).

[10] Wisconsin. (http://www.wicourts.gov/services/juror/online.htm), and Minnesota (http://www.mncourts.gov/district/4/?page=754) trial courts use online questionnaires for the initial screening of jurors.

[11] For a great variety of sample jury questionnaires, *see* DELIBERATIONS, http://jurylaw.typepad.com/deliberations/sample_juror_questionnair.html (last visited Aug. 27, 2008).

[12] State v. La Mere, 112 P.3d 1005, 1012 (Mont. 2005); *see also* People v. Robinson, 124 P.3d 363, 381 (Cal. 2005) (concluding jury questionnaire and follow-up *voir dire* questions provided adequate basis upon which parties could exercise cause and peremptory challenges); Montana v. LaMere, 112 P.3d 1005, 1011 (Mont. 2005) (holding counsel was obligated to pursue information discovered in answers to jury questionnaire through *voir dire* questioning to determine presence of bias); Gary R. Giewat, *Systematic Jury Selection and the Supplemental Juror Questionnaire as a Means for Maximizing Voir Dire Effectiveness*, 34 WESTCHESTER B.J. 49 (2007); Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 15 (2007).

[13] 28 U.S.C. §§ 1861 (1968).

[14] 28 U.S.C. §§ 1861, *et seq.* (1968)

[15] United States v. Paradies, 98 F.3d 1266, 1277 (11th Cir. 1996). 28 U.S.C. § 1866(c) (1978) provides in pertinent part:

> [A]ny person summoned for jury service may be (1) excused by the court . . . upon a showing of undue hardship or extreme inconvenience, . . . or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

[16] *See* United States v. Chanthadara, 230 F.3d 1237, 1268 (10th Cir. 2000); United States v. Contreras, 108 F.3d 1255, 1269-70 (10th Cir. 1997); Paradies, 98 F.3d at 1277-81; United States v. North, 910 F.2d 843, 909-10 (D.C. Cir.), *withdrawn and superceded in part on other grounds*, 920 F.2d 940 (1990).

West Virginia Code § 56-6-12 (1923) provides for questioning of jurors to determine "whether he is a qualified juror, or . . . has any interest in the cause, or is sensible of any bias or prejudice therein[.]" Put another way, "the test of a qualified juror is whether a juror can render a verdict based on the evidence, without bias or prejudice, according to the instructions of the court."[17] Any doubt regarding a juror's impartiality should be resolved in favor of the party seeking to strike for cause.[18] Some courts do not allow jurors who make a clear statement of bias to be "rehabilitated" by general questions about fairness.[19]

These general principles are well developed in case law addressing particular situations. Jurors have been held disqualified for having an interest in the outcome of the litigation;[20] for having a substantial family relationship-based connection with a party to a lawsuit;[21] for an attorney-client relationship with an attorney;[22] for a patient-physician relationship with a party; for employment by a party to the litigation;[23] and for false answers to questions.[24]

II. Use of Questionnaires: Criminal Cases

Several decisions address the use of questionnaires as the basis for excusal prior to *voir dire* in criminal cases, differentiating between capital and non-capital cases. These cases are instructive for civil litigators as they demonstrate the inquiry courts have undertaken in examining the usefulness of questionnaires.

The Tenth Circuit, Eleventh Circuit, and the District of Columbia allow pre-*voir dire* excusal of jurors in non-capital cases based on jury questionnaire answers alone. In *United States v. Chanthadara*,[25] the court held that excusal before *voir dire* based solely on juror questionnaire answers is sanctioned in non-capital cases; however, the court refused to address the issue of whether the rule applies in capital cases.[26] In *United States v. Paradies*,[27] the court upheld the trial court's excusal of over seventy potential jurors based solely on jury questionnaire answers because there was no substantial violation of the Jury Selection and Service Act in excluding those jurors.[28]

Excusal of jurors based solely on juror questionnaire answers in capital cases, however, is more controversial and complex. This issue was initially addressed indirectly by the Supreme Court in *Witherspoon v. Illinois*,[29] and was later clarified in *Wainwright v. Witt*.[30] In *Witherspoon*, the Court dealt with the issue of when prospective jurors could properly be excluded for cause in capital cases based on the juror's opinion of the death penalty.[31] The Court held that prospective jurors in capital cases could not be properly excused for cause if they merely "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[32] However, the Court used footnotes to express that prospective jurors

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[17] Davis v. Wang, 400 S.E.2d 230, 233 (W. Va. 1990), *overruled on other grounds by* Pleasants v. Alliance Corp., 543 S.E.2d 320 (W. Va 2000).

[18] Rine v. Irisari, 420 S.E.2d 541 (W. Va. 1992).

[19] *See* O'Dell v. Miller, 565 S.E.2d 407 (W. Va. 2002).

[20] Doe v. Wal-Mart Stores, Inc., 558 S.E.2d 663 (W. Va. 2001).

[21] State v. Archer, 289 S.E.2d 178 (W. Va. 1982).

[22] O'Dell v. Miller, 565 S.E.2d 407 (W. Va. 2002).

[23] Rine, 420 S.E.2d 541.

[24] In Roberts v. Tejada, 814 So.2d 334 (Fla. 2002), two jurors falsely denied prior litigation. After a defense verdict, plaintiff performed an investigation of the jury pool (using Auto Trak) and based on the results, amended a post trial motion based on the denials of prior litigation.

[25] 230 F.3d 1237, 1268 (10th Cir. 2000).

[26] *See also* Contreras, 108 F.3d at 1269-70 (same).

[27] 98 F.3d at (11th Cir. 1996).

[28] *See also* North, 910 F.2d at 909-10 (upholds excusal of jurors before *voir dire* based solely on juror questionnaires).

[29] 391 U.S. 510, 518-23 (1968).

[30] 469 U.S. 412, 416-35 (1985).

[31] 391 U.S. at 510.

[32] *Id.* at 522.

could be dismissed for cause in capital cases if they made "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."[33] After confusion in *Witherspoon*'s application, *Wainwright* later modified the *Witherspoon* standard.[34] In *Wainwright*, the Court held that a person's opposition to the death penalty need not be "automatic" or proved with "unmistakable clarity," but rather a prospective juror may be excused if his views "would prevent or substantially impair the performance of his duties as a juror in accordance with the instructions and oath."[35] Importantly, the Court also noted the significance of the trial judge's impressions, based upon seeing and hearing the juror's response to questions during *voir dire*.[36] Thus, it seems unlikely that a juror could be dismissed for cause in a capital case based solely on his answers to a jury questionnaire.

Several state courts have also addressed the issue of whether prospective jurors can be dismissed for cause prior to *voir dire* based on jury questionnaire answers alone in death penalty cases. In *State v. Anderson*,[37] applying the standards set forth in *Witherspoon* and *Wainwright*, the court concluded that dismissal of jurors who expressed objections to the death penalty on their questionnaires were improperly dismissed because of the possibility of rehabilitation upon *voir dire*.[38] However, the court also found it is not error "to exclude prospective jurors for cause when the answers to written questionnaire reveal some disqualification not susceptible to rehabilitation, such as relationship to case or party."[39]

The California Supreme Court held "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law."[40] In *People v. Avila*, the court held the jury questionnaire answer alone was sufficient to dismiss a juror for cause where juror had indicated that she could not set aside her personal feelings about the death penalty, could not follow the law, and would automatically vote against the death penalty in every case.[41] The court pointed out that the answer was "sufficiently unambiguous to allow the court to identify disqualifying biases on the basis of their written responses alone."[42] However, in *People v. Stewart*, the Supreme Court of California held the "cold record" of five prospective jurors' answers to jury questionnaires was insufficient to support an assessment of whether the jurors' views would substantially impair the performance of their duties as jurors; thus, dismissal of the jurors for cause based on their answers to the jury questionnaire alone was error.[43]

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[33] *Id.* at 523 n.21; *see also id.* at 515 n.9.
[34] *See* Wainwright, 469 U.S. at 416-35.
[35] 469 U.S. at 424. A later case has clarified that in order to comply with the Wainwright and Witherspoon cases, for prospective jurors to be dismissed for cause in capital cases, the juror must "unequivocally express an inability to follow the law and the judge's instructions." Gray v. Mississippi, 481 U.S. 648, 663 (1987).
[36] *Id.*
[37] 4 P.3d 369, 373 (Ariz. 2000).
[38] *Id.* at 377-78.
[39] *Id.* at 379 (citing State v. Jones, 4 P.3d 345, 358 (Ariz. 2000) (upholding dismissal of thirty jurors based solely on answers to written questionnaire when both prosecution and defense agreed to exclusion)).
[40] People v. Avila, 133 P.3d 1076, 1105 (Cal. 2006) (citing Lockhart v. McCree, 476 U.S. 162, 176 (1986)).
[41] Avila, 133 P.3d at 1105-06.
[42] *Id.*; *see also* People v. McDermott, 51 P.3d 874 (Cal. 2002) (upholding dismissal of jurors for cause in capital case where jurors made statements in juror questionnaires that would disqualify them from serving as jurors because views would "substantially impair the performance of their duties as jurors").
[43] 93 P.3d 271, 290 (Cal. 2004).

New Jersey, North Dakota and Texas also apparently allow the trial court to excuse prospective jurors for cause in capital cases based solely on written responses to jury questionnaires.[44]

Questioning can be useful in determining whether jurors can meet statutory requirements of being able to read and write. In *Gilkey v. State of Texas*,[45] the defendant challenged his conviction based on the fact that one member of the jury could not read or write sufficiently to qualify for jury duty. The juror in question testified he had been in the United States for fifteen years and completed the 11th grade. A friend helped him fill out the juror questionnaire and he did not understand some parts. The trial court ruled the juror was not qualified because he "did not have a sufficient command of the English language." Finding that "excusing a venire person for inability to read and write was a matter within the discretion of the trial court. . . ." the Appeals Court found that even if the trial court erred in the decision, the defendant did not demonstrate it affected substantial rights. Erroneous excuse of a potential juror for illiteracy does not rise to a Constitutional dimension.

In criminal cases, then, the issue of whether a prospective juror can be challenged and removed "for cause" based on unsworn juror questionnaire answers alone is raised primarily in capital murder cases. In capital murder cases the use of questionnaires in the striking of jurors is governed by the Supreme Court's analysis in *Witherspoon v. Illinois* and *Wainwright v. Witt*, which allow a prospective juror to be removed for cause based on juror questionnaire answers alone only when certain stringent criteria are met. In general, case law supports the dismissal of jurors for cause based on their answers to jury questionnaires only in specific instances, such as where the juror knows a party in the litigation or is unambiguously biased in some other way.

III. Use of Questionnaires: Civil Cases

Opinions addressing the use of juror questionnaires alone to strike jurors for cause in civil cases are less prevalent, perhaps because the issues are not as significant or polarizing. Nevertheless, there are some civil cases that address the issue of questionnaires. In this regard, counsel may base preemptory strikes in civil actions on information obtained from jury questionnaires as long as the information is racially neutral.[46] Thus, information such as employer and familial make-up are viable subjects for preemptory strikes.

In *Foster v. Spartanburg Hospital System*,[47] defense counsel attempted to strike a juror for stating he was a democrat on his jury questionnaire, arguing "a Democrat is more inclined than a Republican or some other party affiliate to favor 'the little person.'" Finding that "[s]uch a sweeping generalization about members of an entire political party is not a reasonable . . . explanation, but is mere speculation," the Court did not grant the defense's request to strike the juror.

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[44] *See* New Jersey v. Koedatich, 548 A.2d 939, 967-68 (N.J. 1988) (upholding trial court's dismissal for cause any prospective juror who indicated in their jury questionnaire that they had knowledge of defendant's prior murder conviction or pending charges in case, or had formed opinion as to defendant's guilt or innocence); Garcia v. North Dakota, 678 N.W.2d 568, 572-73 (N.D. 2004) (noting trial court successfully dismissed prospective jurors based solely on their responses to jury questionnaires); Bobo v. Texas, No. 2-02-371-CR, 2004 WL 541380 (Tex. App. Mar. 18, 2004) (noting party would have been entitled to challenge for cause to remove jury member who demonstrated automatic disposition toward bias in jury questionnaire).

[45] No. 03-98-00467-CR., 1999 WL 440621, at *1-2 (Tex. App. 1999).

[46] Brown v. Egleston Children's Hosp., 564 S.E.2d 810, 813 (Ga. Ct. App. 2002).

[47] 442 S.E.2d 624, 626 (S.C. Ct. App. 1994).

> It was also error to fail to strike Mr. Hillberry for cause because he was not rehabilitated from his statement that his beliefs regarding damages would possibly come into play during deliberations. Based upon his responses during *voir dire*, he remained equivocal about his impartiality. As a result of the court's failure to strike either of these jurors for cause, plaintiff was forced to use peremptory challenges and then had to accept Ms. Wilson, an objectionable juror, because he had exhausted his peremptory challenges. This court has consistently held that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges."[48]

In *Frasier v. Busbee*,[49] a juror, who later became the jury foreperson, knowingly answered a jury questionnaire incorrectly in an attempt to be excused from jury duty. Following an unfavorable verdict, plaintiff's counsel sought a retrial on the ground that the foreperson's communications had resulted in a tainted jury. The Court found the juror's election to foreperson to be proof that she was considered responsible. In addition, the Court stated "[c]ounsel cannot play the old game of failing to request that a juror be removed for cause for the purpose of ambushing the court with a motion such as this should there be an adverse verdict."

Courts in civil cases have considered responses to questionnaires in deciding whether to strike jurors for cause. For example, in *Delfan v. Cromer*,[50] the jury foreperson's failure to disclose his involvement in nine prior civil cases and in one prior criminal case in accordance with the questionnaire was considered grounds for a new trial.

In a medical malpractice case, *Hinkle v. Cleveland Clinic Found.*, the plaintiff's counsel asserted the trial court erred in refusing to strike two jurors—a doctor and a lawyer—after the jurors admitted to a professional relationship with, and a bias in favor of the Clinic in their jury questionnaires.[51] Stating that "[t]rial courts have discretion in determining a juror's ability to be impartial," the Appellate Court affirmed the lower court's holding that the jurors had been rehabilitated, as both jurors later testified that they could be fair to both parties.[52] Thus, the court ruled they were not subject to dismissal for cause.[53]

In *Erlandson v. Payne*,[54] a juror falsely answered a question regarding physical abuse in her home after she mistakenly classified her ex-husband's act of slapping her son to be disciplinary in action rather than abusive. Thus, the judge did not see the juror's misrepresentation to be grounds for dismissal with cause because the juror believed that she had answered all of the questions fairly and accurately at the time the questionnaire was filled out.[55]

Once again stressing the discretion of the trial court, the Appellate Court in *Excel Corp. v. Apodaca*,[56] held that a juror who admitted to being biased in his jury questionnaire was not subject to dismissal for cause because he too had been rehabilitated.

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[48] Rodriguez v. Lagomasino, 972 So. 2d 1050, 1052-53 (Fla. Dist. Ct. App. 2008) (citing Tizon v. Royal Caribbean Cruise Line, 645 So. 2d 504, 506 (Fla. Dist. Ct. App. 1994); Diaz v. State, 608 So. 2d 888, 890 (Fla. Dist. Ct. App. 1992); Jefferson v. State, 489 So. 2d 211 (Fla. Dist. Ct. App. 1986); Anderson v. State, 463 So. 2d 276 (Fla. Dist. Ct. App. 1984)).

[49] 32 Phila. Co. Rptr. 208, 218 (Pa. Com. Pl. 1996).

[50] 967 So. 2d 384, 385 (Fla. Dist. Ct. App. 2007).

[51] 823 N.E.2d 945, 952 (Ohio Ct. App. 2004) (quoting State v. Nields, 752 N.E.2d 859, 881 (Ohio 2001)).

[52] *Id.*

[53] *Id.*

[54] No. 97-35883, 1998 WL 536377, at *5 (9th Cir. 1998).

[55] *Id.* at *7.

[56] 51 S.W.3d 686, 693 (Tex. App. 2001).

Likewise, in *Caraway v. Gromwaldt*, an independent insurance agent who divulged in a jury questionnaire that he did business with AIG, a defendant in the case, was held to be rehabilitated and, thus not subject to dismissal for error, after he testified that he could be fair and impartial.[57]

IV. Commentary

As these cases demonstrate, questionnaires are a useful tool to identify answers to questions that can form the basis for disqualification or peremptory challenge, whether standing alone, or in combination with further questioning on *voir dire*. Certainly, questionnaires can be a double-edged sword, as some information gleaned may suggest a juror has attitudes more favorable to the defense. Overall, it appears the use of questionnaires can be a valuable part of the process of *voir dire* in identifying jurors with attitudes unfavorable to the defense. Although questionnaires may provide plaintiff's counsel with reason to strike a favorable defense juror, these authors strongly believe that the benefits of questionnaires outweigh this risk. Indeed, the risk of producing responses that may lead to the loss of a favorable defense juror is a reality of virtually every question asked on oral *voir dire*.

Although all trial attorneys are fearful of losing good defense jurors, that fear pales in comparison to the dread of placing the "stealth" plaintiff's juror in the box. Consequently, our default position in the realm of jury selection is that more information about prospective jurors, both good and bad, is always better than less information. Overall, it appears the use of questionnaires can be a valuable part of the process of *voir dire* in identifying jurors with attitudes unfavorable to the defense. The juror questionnaire is certainly not a panacea for all the woes associated with jury selection, but it is very often a useful tool for uncovering information, particularly when the subject to be addressed is personal and potentially embarrassing to members of the panel.

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[57] No. 12-03-00371-CV, 2005 WL 425249, at *3-4 (Tex. App. 2005).

APPENDIX 5

From the Bench

Mind Reading, Clairvoyance, and Jury Questionnaires

by Roslyn O. Silver

U.S. District Judge
District of Arizona

It was early April 1980 at the Prescott, Arizona, federal courthouse, and I was trying my first jury trial as an assistant U.S. attorney. We were about to engage in the most mysterious of all trial processes: voir dire. I knew only that it was a deselection process whereby I was supposed to strike the jury panelists biased in favor of the accused, while attempting to retain those biased in favor of the government. In truth, the only certainty I had about this enterprise was the preferred pronunciation of it, *vuwah-dear*. When the judge belted out, "Counsel are you prepared for *voredire*?" I knew I was about to enter a tunnel without a light at the end of it.

The judge asked the panelists all the questions, and I was comforted that nobody said he or she was biased. Energized with renewed verve, I began preparation for exercising my strikes. I asked myself one intuitive question after another: Does the scowl on number seven's face mean that she doesn't like me? Is the older guy in the front row, seated third from the left and wearing an earring and a Grateful Dead tie-dye T-shirt, an aging hippie still committed to "free love" and "free crime"? Then there was the panelist who answered all the judge's questions in my favor, only to tell us he had a bumper sticker that read "What Would Satan Do?"

Finally, I finished exercising my strikes. I slumped into my chair, paralyzed as I awaited learning which jurors would serve on the panel. As the deputy clerk called the name of the last juror, I exhaled, relieved that the drawn-out, painful ordeal was over. But as the trial unfolded, I grew confident that the jury was predisposed in my favor. Indeed, the jurors seemed transfixed by my every word, and I became convinced that they would sing the prosecutor's favorite one-word song, "Guilty."

In the end, my assessment of the jury was not vindicated. The words "not guilty" reverberated throughout the courthouse, delivering, as if it were an obituary, the chilling message: She lost! Fortunately, because of my inexperience, I was not burdened with carrying others' expectations of me, so I quickly recovered. But I was troubled that I might not have the knack for jury selection. So I developed my own rational strategy for choosing jurors.

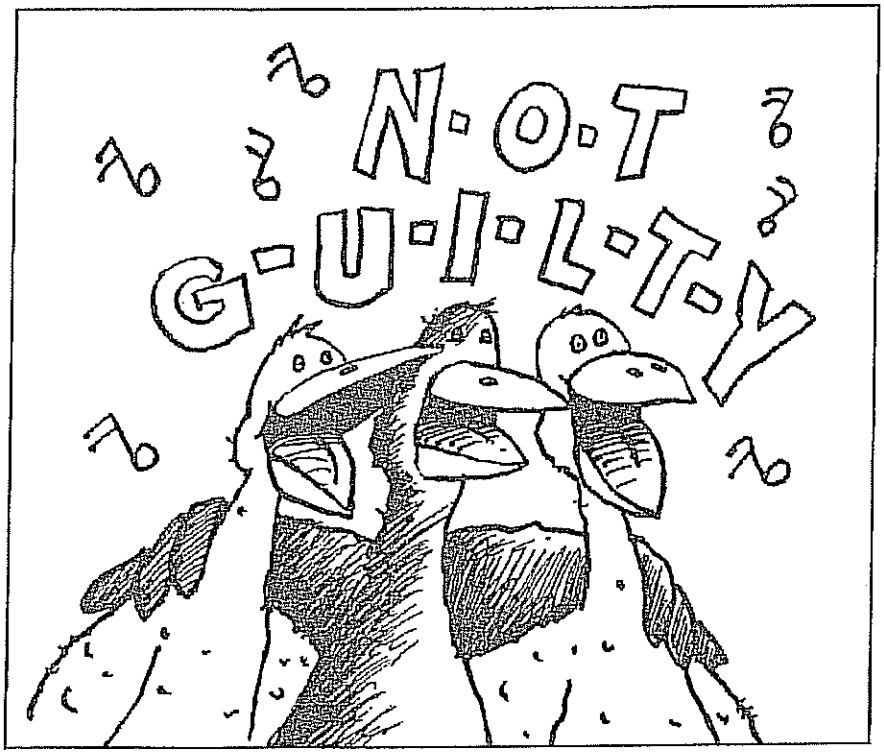
In my next several trials, to cultivate the jurors' favor, I graced each of them with a Hollywood smile and struck only those who did not smile back. I wanted short people, theorizing that they would channel their vertical challenges into a thirst for power that they would use to convict (*and* I would never be accused on appeal of selecting persons from a suspect class). And I also wore red, thinking that the color would heat up pro-government emotions and make "tough on crime" panelists identifiable.

The result? I triumphed, as I so richly deserved. Four juries returned guilty verdicts after remarkably short deliberations. As I mused about these victories, it occurred to me that I might have been bestowed with a unique capacity to formulate foolproof jury selection techniques. I offered to share this gift with my colleagues. Inexplicably, no one took me up on it.

Alas, the euphoria was fleeting. Soon a bolt of awareness hit me when I suffered a succession of three not-guilty verdicts. I was completely downcast and bewildered. I had used the same strategy in the trials I lost as I had in the trials I won. Defeated, I yearned for answers. How could this have happened? After counseling sessions with senior trial lawyers, pep talks from my colleagues, three phone calls to Miss

Cleo (the television psychic), and a weekend with a shaman, I emerged from the despair with the realization that jury selection is always an elusive and humbling experience.

Over the next 14 years I tried many jury trials. I won some that I should have lost, and I lost some that I should have won. After trial I frequently learned that unanticipated verdicts occurred because some jurors' opinions and attitudes, which never surfaced during jury selection, influenced their decisions. It is not that prospective jurors willfully failed to answer questions. Rather, I found they feared public disclosure of their personal and private matters, and they believed the information was off limits.



It is rare that a venire person is bold enough to bluntly reveal partiality in open court. One notable exception was the juror who was asked whether anything would interfere with his ability to be a fair and impartial juror. He responded, "Yes—I find you very obnoxious and insulting, and I could not be a fair juror in any case in which you are involved." James J. Gobert, *Jury Selection: The Law, Art, and Science of Selecting a Jury* § 909 (2d ed. 1990). Setting aside the embarrassment the answer caused the lawyer, for voir dire to be effective, the juror's refreshing candor is fundamental and crucial.

Fast-forward to October 14, 1994, when I became a federal judge responsible for the same selection process that flummoxed me as a trial lawyer. At first I adopted the popular and traditional system used by most federal judges. I accepted suggestions from the lawyers but assumed the responsibility for asking almost all of the questions, allowing the lawyers only limited participation.

However, at about that time, the late District Court Judge Richard Bilby and Maricopa County Superior Court Judge Michael Dann, both well-respected pioneers in jury reform, suggested that I incorporate the use of questionnaires into my voir dire. *See* Michael Dann, "Free the Jury," 23 LITIGATION at 5 (Fall 1996). Simply put, they emphasized that written questions mailed to jurors before trial generated far more candid and meaningful information than the judge-dominated, in-court voir dire. Jeffrey T. Frederick, *Mastering Voir Dire and Jury Selection* 122 (1995).

Though some courts have used juror questionnaires since 1975, they were not yet in vogue when I was appointed. *Id.* at 146. True to federal tradition, because questionnaires were described as "innovative," I did not warm to the idea. Recognizing that the Ninth Circuit already had plenty of reasons to reverse me, I was not eager to give them more. So I took the easy way out and adopted the traditional approach.

Happily, change has begun. Today, many judges have at least experimented with using questionnaires, and now there is a rich lode of publications addressing their effectiveness and offering guidance for their use in trials. *See, e.g.*, "Symposium on Selection and Function of the Modern Jury," 40 *Am. U. L. Rev.* 665 (1991); Dennis Bilecki, "A More Efficient Method of Jury Selection for Lengthy Trials," 73 *Judicature* 43 (June/July 1989). Soon I became a convert—even a questionnaires addict.

As I have learned, jurors are more likely to disclose sensitive and personal information when asked *in advance*, and when answers are prepared *in writing* and *in private*. There are various types of questionnaires. The first is the "general jury questionnaire," which, as the name suggests, seeks general background information. Its primary purpose is to determine whether the juror is qualified and available to serve. *See* 28 U.S.C. § 1866 (c) (providing "[t]hat any person . . . may be excused by the court . . . upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary"). The venire also is asked for some minimal background information such as age, occupation, residence, number of children, prior jury experience, and prior litigation experience. V. Hale Starr & Mark McCormick, *Jury Selection* § 11.01 (3d ed. 2001).

A more comprehensive form of questionnaire also has gained acceptance, called a "supplemental" or "special questionnaire." *Id.* The five constituent parts of this type of questionnaire are (1) the introduction; (2) background information; (3) knowledge of witnesses, lawyers, and parties; (4) awareness of the litigation; and (5) case-relevant opinions. Frederick, *supra* at 123. The introduction contains enough information to educate the jurors about the selection process, as well as provides a brief explanation of the case. On occasion other information is included, such as the reasons for the questionnaire, concerns about media issues, and explanations of juror privacy. *Id.*

Background information is the same as typically called for during in-court voir

(Please turn to page 70)

On June 13, 1804, Jefferson wrote to Abigail Adams:

> I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment of personal displeasure. I did consider his last appointments to office as personally unkind. . . . It seemed but common justice to leave a successor free to act by instruments of his choice.

The Adams-Jefferson Letters (L.J.F. Cappon ed., 1959); Smith, *supra*.

From the Bench

(Continued from page 4)

dire, such as name, age, employment, education, and marital and residential status. Sometimes the questionnaire identifies the witnesses, lawyers, and parties, though I prefer to ask questions about this information in the courtroom. The last phase is designed to root out jurors' knowledge, experience, attitudes, and opinions about the particular case.

These questions are all carefully tailored to inspire the venire to disclose in writing, fully and confidently, all relevant information, even if personal and private. Questionnaires have very practical value as well in reducing some of the burdens of the jury administration office. Pre-screening by early strikes reduces the number of jurors who must appear for the trial, and the monetary and procedural benefits occur without jeopardizing the requirements of random selection or altering the representativeness of the resulting jury panel. Bilecki, *supra* at 43.

Once the completed questionnaires are returned, a conference is held with the lawyers. We study the answers and identify venire persons who will be unavailable for trial at the designated times and dates, or who demonstrate indisputable bias or prejudice. Those jurors remaining at the end of the conference are told to appear the following day for trial.

At trial I inform the panel members of their responsibilities as jurors, introduce the lawyers, identify potential witnesses, and describe the legal principles that will apply. Then, in open court, every juror very briefly introduces herself and relates her employment status. This feature is essential to the lawyer's evaluation of the beliefs, attitudes, and opinions held by each juror, often visible only by nonverbal communications such as body movement, eye contact, facial expressions, and shrugs not apparent in the questionnaire answers. Frederick, *supra* at 33-34. In fact, in one of my trials this proved extremely valuable. After introducing himself as instructed, the venireman, instead of sitting down, spontaneously added that he "appreciated this opportunity to inform everyone" that he "knew that jurors were not required to follow the law if they did not like it."

In the final segment of the voir dire, the lawyers are allowed approximately five to 15 minutes of general questions asked of the entire panel. This is followed by *in camera* questions of each juror who, in open court or in questionnaire answers, displayed any bias or partiality. The entire courtroom process is completed in two hours or less.

Celebrity and otherwise high-profile cases pose their own unique challenges, including the preparation of elaborate questionnaires. Frederick, *supra* at 130, evaluates the questionnaires used in the Marion Barry, Imelda Marcos, Oliver North, and *In re Exxon-Valdez* trials. Further, he gives helpful advice for developing questions, such as keep them simple, seek complete answers, and ensure that the format is easy to follow. *Id.* at 140-47. One high-profile case I tried taught me that loading the questionnaire with numerous questions does not always produce a flawless jury. Despite the nearly 100 written questions, a selected juror belatedly was excused because during trial it became evident that he was mentally or emotionally challenged. His aberrant behavior was undetected during voir dire because his questionnaire answers were neutral, and he had been completely passive during the in-court questioning.

There are compelling reasons for using questionnaires in trials in which sensitive issues predominate. Even if they are only indirectly related to the trial issues, attitudes on race, nationality, politics, religion, medicine, and sex can have a palpable influence on the verdict. It is beyond peradventure that the venire's written answers, prepared in private, are much more effective than in-court questioning in unearthing the beliefs and opinions of the venire on these topics—information that may be vital to a fair trial. *See Jury Trial Innovations* 62 (G. Thomas Munsterman, Paula L. Hannaford, & G. Marc Whitehead eds., 2000).

During my first trial using questionnaires, it became evident early on that the race of some of the parties and witnesses might influence the verdict. Counsel jointly requested that I ask a series of questions they believed would identify jurors who were prejudiced. Initially, I declined because I thought that the venire panel would be offended by such questions. Further, I was concerned that some jurors would feign prejudice just to ensure they would be excused. I was wrong on both deductions. *See* Alexander Pope's *Thoughts on Various Subjects*: "A [person] should never be ashamed to own [she] has been in the wrong, which is but saying, in other words, that [she] is wiser today than [she] was yesterday."

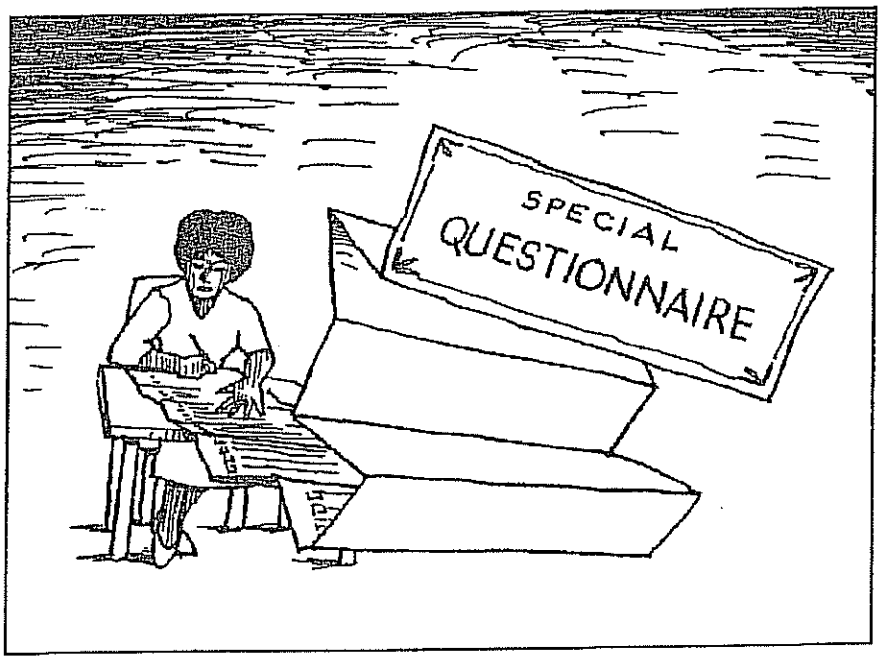
First, I incorrectly assumed that jurors would fabricate a prejudice as a pretext in order to be excused. This conclusion became apparent because all the jurors who disclosed their prejudice gave a detailed explanation of the reasons for it, as required by the questionnaire. Indisputably, these jurors fully revealed their racial beliefs and attitudes because they were comfortable that the answers would not be disclosed to the public. Luckily, only a small percentage of venire persons disclose their prejudice, ranging in level from mild to substantial. But they almost uniformly include fresh expressions of anger and hostility against the group in question.

One such answer was given in a criminal case charging the defendant with illegally entering the United States. The questionnaire asked the juror whether she disagreed with policies requiring permission from the government before authorization is given to enter. She responded, "Don't think they should be allowed in my country!" Her follow-up answers were very offensive and even more clearly illustrated her racism.

Unquestionably, the answers of all these jurors unearthed entrenched vestiges of racism. I was profoundly affected by these responses, and I became firmly committed to using questionnaires in all trials where race or nationality is an issue. *But see United States v. Barnes*, 604 F.2d 121 (2d Cir.

1979), *cert. denied*, 446 U.S. 907 (1980) (questions concerning the religious and ethnic background of the jurors precluded because there was no evidence that a particular group was biased or that the questions would have identified racial prejudice).

Indirect answers demonstrating bias also have strengthened my resolve that, despite the probing of personal issues, the questions must be asked. One of the more memorable and amusing responses was given in a sexual abuse prosecution. The questionnaire began with a neutral rendition of the facts, followed by this question: "Given that this case involves allegations of rape, is there anything about your nature that would make it impossible to sit as a juror in this case?" The venire person answered, "No—I feel pretty strongly that rapists should be sterilized. Other than that, no."



An unanticipated bonus has emerged from my use of questionnaires. Some answers are inspirational, imaginative, and humorous. Many were prompted by the question "If you could do anything in the world today, other than jury duty, what would that be?" One highly motivated juror answered, "Find a cure for cancer and bring peace to the world." Less virtuous, one woman answered, "Just about anything!"

Other memorable responses were given in a suit between two insurance carriers. The question asked whether lawsuits between insurance companies should be tried. The prospective juror responded, "Not really . . . we are asked to take money from one *voulcher* and give it to the other." He was also asked whether he had any negative opinions of insurance agencies, and he responded, "Yes! I may not have spelled *voulcher* right, but that is how I regard them."

Here is my favorite. Again, the prospective juror was asked what he would rather do than serve on a jury. His answer was "Make love." My entire staff was delighted with his response and looked forward to meeting this handsome young hunk. The courtroom deputy read his name, and forward walked a gentleman in his late 70s with a twinkle in his eyes. Some conjectured that his answer might be wishful thinking, hoping that, as a powerful federal judge, I would grant his request.

Some judges continue to find questionnaires objectionable for various legal reasons. One concern is whether the court has authority to use questionnaires and, particularly, whether they are prohibited by the Constitution or statutes. The answer is no. Starr & McCormick, *supra* §§ 11.01, 11.02. Another concern is whether questionnaires shift control of voir dire from the trial judge to the lawyers or the clerk of the court. *Jury Trial Innovations*, *supra* at 63. In *United States v. Wellington*, 754 F.2d 1457 (9th Cir. 1985), the court, interpreting 28 U.S.C. § 1866(c), held that the "use of the questionnaire sent by the district court to the prospective jurors did not constitute an unconstitutional delegation of judicial power to the court clerk." Also, there continues to be a tension between the jurors' right to privacy of personal information and the public's right to know. Addressing this issue in part, the Supreme Court held in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), that protecting the privacy of a venire person by conducting the questioning *in camera* is permitted only if the court explored alternatives to such proceedings and determined the juror had a compelling privacy interest outweighing the presumption favoring public access to judicial proceedings.

Additionally, the acceptable breadth allowed to probe jurors' personal secrets and experiences has been debated in a number of cases. For example, in *United States v. Padilla-Valenzuela*, 896 F. Supp. 968, 971 (D. Ariz. 1995), the court emphatically declined all the questions in the questionnaire, finding that they violated juror privacy rights.

Other notable decisions have held that personally intrusive questions are to be more carefully scrutinized to ensure that they have clear relevancy to the matters at issue. In *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979), the court held that juror questions are impermissible if they are "too remote from the issues in the case to warrant the intrusion into the potential jurors' private thoughts." *See also United States v. Taylor*, 562 F. 2d 1345 (2d Cir. 1977) (barring questions related to educational backgrounds of children); *United States v. Hamling*, 481 F. 2d 307, 314 (9th Cir. 1973), (excluding many "cumulative and argumentative" questions related to "biases and prejudices concerning 'obscenity' and sex."); *Florida v. Thaylor*, 528 So. 2d 67 (Fla. 1989) (rejecting the questionnaire in part because it included questions that might have permitted inquiry "unconnected" with the case and the qualifications of jurors).

While the debate goes on, jury questionnaires are increasingly an accepted means of collecting vital information. They save money. They save time. They save the judge from having to read minds or predict the future. And, best of all, they promote justice.

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SEEING IS BELIEVING

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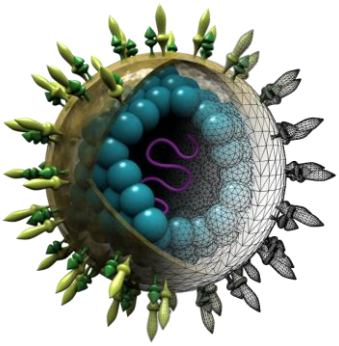
What is 3D animation?

What is 3D animation?



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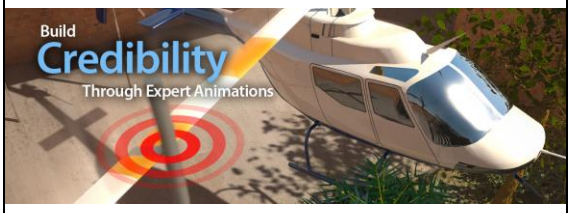

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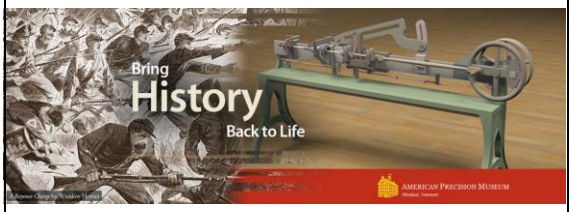

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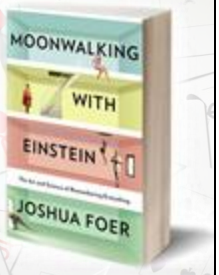
- **Simonides of Ceos – Greek Poet (550 B.C)**
- **Memory Palace**



Memory Stability

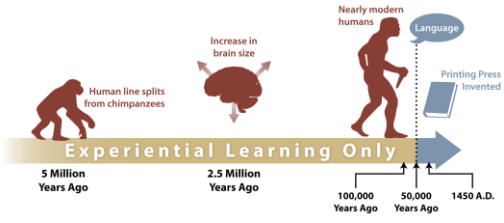
Content remembered after 14 days

Adapted from Edgar Dale "Audio-Visual Methods in Teaching" (1969) Holt, Rinehart and Winston

Memory Stability

Human Modes of Learning

Adapted from Nicholas Wade "Before the Dawn" (2006) Penguin Press, New York



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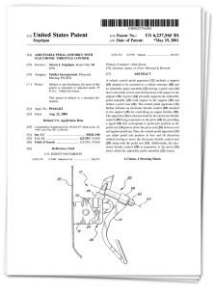
President, CEO and former General Counsel Third Wave Technologies

Visual Learning in Litigation

- **Complex Concepts Simplified**
- Bringing Theory to Life
- Relate to Personal Experience

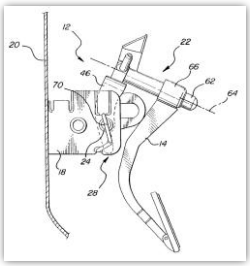
Complex Concepts Simplified



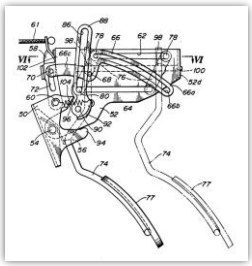
- **Teleflex** alleged **KSR** infringed (among others) the Engelgau '565 patent.
- **KSR** countered that the **Teleflex** patents were invalid as obvious.
- The **District Court** agreed with KSR and invalidated the Teleflex patents as obvious.
- The **Appeals Court** vacated the District Court decision.
- The **Supreme Court** reversed and ruled for KSR invalidating the Teleflex patent.

Complex Concepts Simplified

Engelgau Patent (Teleflex)

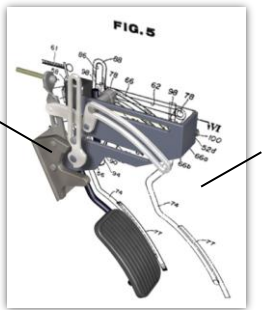


Asano Patent (Prior Art)



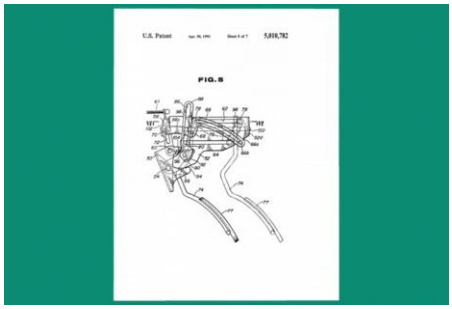
Complex Concepts Simplified

3D Model of Asano Fig. 5



Asano Fig. 5

Complex Concepts Simplified



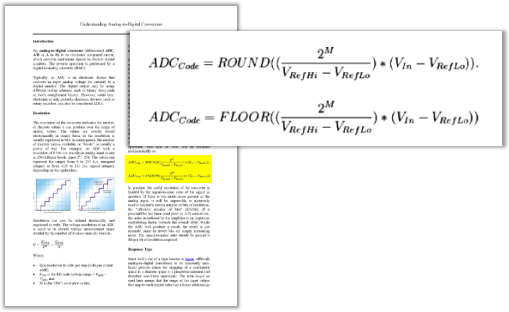
Complex Concepts Simplified

- Create graphics that **reduce** complexity
- Convert patent drawings into 3D models
- 3D models are less abstract
  - Real, familiar, less intimidating
  - Illustrate movement
- Images replace jargon allowing judges and jurors to "see and believe" technical concepts

Visual Learning in Litigation

- Complex Concepts Simplified
- **Bringing Theory to Life**
- Relate to Personal Experience

Bringing Theory to Life

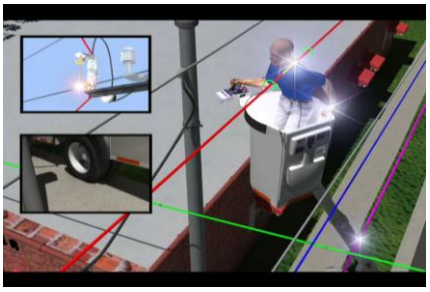


$$ADC_{Code} = ROUND((\frac{2^M}{V_{RefHi} - V_{RefLo}}) * (V_{In} - V_{RefLo})).$$

$$ADC_{Code} = FLOOR((\frac{2^M}{V_{RefHi} - V_{RefLo}}) * (V_{In} - V_{RefLo}))$$

Bringing Theory to Life

Bringing Theory to Life



Bringing Theory to Life

- Animations help fact finders visualize an expert's explanation of an accident sequence
- Techniques that verify the animation's accuracy often effective
- Animations help the expert testify effectively, increasing his/her credibility with the jury

Visual Learning in Litigation

- Complex Concepts Simplified
- Bringing Theory to Life
- **Relate to Personal Experience**

Relate to Personal Experience

- People filter information through personal experience
- Fact finders tend to believe and remember points which are consistent with their view and reject those which are inconsistent
- People construct "mental stories" to make sense of conflicting or overwhelming amounts of information – those stories should be illustrated

Relate to Personal Experience

Relate to Personal Experience

Relate to Personal Experience

- Use scientific data to animate physical properties
- Teach from your best arguments
- Improve fact finder's retention of your positions
- Connect scenarios to the viewer's experience

Admissibility

- *Lexicon*
- *Federal Rules*
- *Examples*
- *Authentication*
- *Timing*
- *Iowa*
- *Considerations*

Admissibility: *Lexicon*

Substantive Evidence: The gun used as a weapon or the smoking gun e-mail

Demonstrative Evidence: An exhibit to be entered into evidence

Demonstrative Aids: Used to explain matters but not submitted to the jury for deliberation

Admissibility: *Rules*

- **Rule 401** – Must be relevant (have a tendency to make existence of a fact of consequence more or less probable).
- **Rule 403** – Probative value substantially outweighed by danger of unfair prejudice.

BUT – "Rule 403 was never intended to exclude the likes of Clarence Darrow simply because he was effective and persuasive in the courtroom. Therefore, just because a CGE helps a jury absorb, understand and believe attorney argument or witness testimony does not mean that Rule 403 has been violated."

Admissibility: *Rules*

Rule 611 – Mode and Order of Interrogation and Presentation.
The court exercises control over evidence, including use of "demonstrative evidence."

Rule 901 – Authentication.
Prepare to offer testimony of a qualified expert that the computer and software function properly and are generally acceptable in the field.

FRCP 26(a)(2)(b) – Duty to Disclose.
Requires disclosure of "any exhibits that will be used to summarize or support" opinions.

Rule 702 and 703 – Experts.
Must be based on sufficient facts or data, be the product of reliable science, and must assist the trier of fact.

Admissibility: *Examples*

D. DE Trial Management Order:

Trial Procedures

* * * *

Demonstrative Exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence. Unless otherwise ordered by the Court, demonstrative exhibits may be used only if they have been made available to opposing counsel no later than 24 hours before their proposed use.

Admissibility: *Examples*

Federal Judicial Center – Judge's Guide to Pretrial and Trial / Effective Use of Courtroom Technology:

"A good animation … often has a presence in a courtroom akin to a separate witness. Even if the cross-examiner does a good job in discrediting the expert witness who sponsored the exhibit, the animation itself may "testify" well – that is, it may make sense to jurors and be given significant weight regardless of the status of its foundation."

"Disclosure shortly before trial is tantamount to no disclosure at all."

"Disclosure of the completed animation should be made at least 90 days before trial…."

Admissibility: *Authentication*

- Accuracy
- Lighting
- Speed
- Facts Wrong – Ignores evidence
- Animation v. Simulation

Admissibility: *Timing*

- *Stamper v. Hundai Motor Co.*, 699 N.E. 2d 678 (Ind. Ct. App. 1998)
- Animation excluded because foundation was laid using witness who had been deposed prior to disclosure of intent to use animation.
- *Bullock v. Daimler Trucks North America,* LLC, 819 F. Supp. 2d 1172 (D. Colo. 2011)
- Animation excluded where expert that oversaw modeling analysis and was necessary to establish reliability of program was not disclosed)

Admissibility: *Iowa*

- *State v. Sayles*, 662 N.W. 2d 1 (Iowa 2003) – Animation admissible
- Shaken-baby syndrome admissible with a cautionary instruction. Animation merely illustrated doctor's testimony, was helpful to understanding the phenomena, and did not favor either party's version of how the accident occurred.
- *Kennedy v. Zavala*, 2002 WL 31640639 (Iowa Ct. App. 2002)(unpublished)- Animation Inadmissible
- Plaintiff's animation in medical malpractice case relating to delivery of baby excluded due to multiple inaccuracies in animation compared to evidence.
- *Hutchinson v. American Family Mut. Ins. Co.*, 514 N.W. 282 (Iowa 1994) – Animation Inadmissible
- Animation excluded because plaintiff's expert lacked sufficient knowledge to authenticate animation, in that physician neither observed the accident nor know the speeds and force involved.

See generally

- 111 A.L.R.5th 529
- Weinraub, 'Counselor, Proceed with Caution:' The Use of Integrated Evidence Presentation Systems and Computer-generated Evidence in the Courtroom, 23 Cardozo L. Rev. 393 (2001)

Admissibility: *Considerations*

- **Timing** – Select your sponsor and involve your graphics vendor early.
- **Admissibility** – Driven by the reliability of the methodology. Is the software accepted? Can the expert justify the assumptions?
- **Tools** – 3D animation, PowerPoint, analogies, recreation.
- **Environment** – Know the court and the courtroom.
- **Prepare a Backup** – Murphy's Law
- **Disclosure** – Disclose early or stipulate to the timing of disclosure or motions in limine.

Medicare Compliance Update

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Medicare Compliance: MSAs and Beyond

Overview: This course will explore the latest developments in Medicare compliance practice and procedure. The course will address the three main focuses of Medicare compliance: conditional payment identification, negotiation and settlement, Medicare set asides, and Section 111 reporting. The course will also include an update on the most recent federal decisions challenging the constitutionality of Medicare's collection practices and liability MSAs.

I. Medicare Secondary Payer Act Framework

A. Description of the Medicare Secondary Payer Act (MSP) and included plans of insurance
B. Brief history of the MSP
C. Congressional intent behind MSP and translation into modern Medicare compliance
    1. Conditional payment reimbursement
    2. Medicare set asides

II. Conditional Payment Identification, Negotiation and Settlement

A. What is a conditional payment?
B. Requirement to satisfy Medicare "lien" upon settlement
C. Penalties for non-compliance
D. Best practices for negotiation of Medicare "liens"
    1. Early identification of Medicare beneficiary
    2. Early report of claim to Medicare and request for conditional payment amount
    3. Negotiation and settlement practices
E. Recent changes to CMS protocol and procedure for collection of conditional payments (MSPRC portal, self-calculated settlement and fixed payment options)

III. Medicare Set Asides

A. Requirement for consideration of Medicare's interests with respect to future medicals in liability and workers' compensation settlements
B. Is an MSA required in a liability settlement?
C. ANPRM (Advanced Notice of Proposed Rulemaking- June 15, 2012): CMS proposal for solutions to protection of Medicare's future interests in liability settlements

IV. Section 111 Reporting

A. MMSEA reporting requirements (ORM, TPOC events)
B. Current reporting thresholds for liability claims

C. Penalties for non-compliance
D. Impact of Section 111 reporting on overall Medicare compliance

V. Case Law Update

A. U.S. v. Hadden
B. Hearn v. Dollar Rent a Car
C. Benoit v. Big R. Towing and progeny
D. Bruton v. Carnival Corp.
E. Frank v. Gateway Ins.

Case Law Update: Employment, Litigation of Actions

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EMPLOYMENT

Covenant Not To Compete
Sutton v. Iowa Trenchless, L.C., 808 N.W.2d 744 (Iowa Ct. App. 2011) (Sackett)

FACTS: Plaintiff, along with a friend and the friend's father, founded the Defendant company. After two and a half years, Plaintiff grew tired of the extensive travel required by his job and requested his co-founders buy out his shares of the business. A written agreement was ultimately reached for the sale of Plaintiff's shares, which included a covenant not to compete. The covenant required Plaintiff to refrain from competing with the business for 7 years within a 350-mile radius of Des Moines, Iowa. Plaintiff also agreed not to have contact with any customers or potential customers of the business with whom he had contact during his ownership of the business. Plaintiff claimed that he attempted to have the covenant provision reduced to a 5 year limitation, but his former business partners would not agree.

Plaintiff remained as an employee of the Defendant company for another three years, then left to form his own construction company. Plaintiff eventually went to work for another construction company and filed a declaratory action seeking to have the covenant declared unconscionable, unenforceable, and void five years after entering into the covenant. The Defendant company alleged Plaintiff violated the agreement. After a bench trial, the court found the covenant unenforceable and denied the company's counterclaims.

HOLDING: The covenant was enforceable, and substantial evidence supported the trial court's conclusion that the Defendant failed to carry its burden to prove the Plaintiff breached the covenant.

ANALYSIS: The court noted the case was captioned in equity, but determined it was tried at law and reviewed for correction of errors at law. The court concluded a greater scope of restraint was permissible for owner-to-owner covenants as opposed to employer-employee covenants. As such, the court determined that the covenant not to compete was a reasonable restriction necessary for the protection of a young business, it was not unreasonably restrictive to the employee's rights, and it was not prejudicial to the public interest. The court further determined that because Defendant could not calculate the damages suffered from Plaintiff's alleged breach, Defendant could not carry its burden with regard to its breach of contract counterclaim.

Wrongful Termination
Anderson v. Bristol, Inc., ____ F. Supp. 2d ___, 2012 WL 959340 (S.D. Iowa 2012) (Pratt)

FACTS: Administrator of a deceased former employee's estate sued the former employer alleging violations of the Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA). The employee suffered from severe mental health impairments, alcohol and prescription drug additions, depression, a personality disorder, and severe and chronic insomnia. In July 2009, the employee's mother

became ill and the employee emailed his employers stating that he would be taking time off. The employee's mother died three days later and the employee took bereavement leave for three days. Following bereavement leave the employee worked from home for one day, and was then involuntarily hospitalized several days later until early August 2009. Because the employee did not report to work during the time he was hospitalized, the employer terminated his employment. The employee committed suicide approximately two weeks later. The employee's estate filed suit on several grounds including wrongful discharge and unlawful interference, restraint or denial of FMLA rights, retaliation for exercising FMLA rights and disability discrimination in violation of the ADA. The estate alleged the employer was aware of the hospitalization and terminated the employee in violation of the company Sick Leave Policy. The employer filed a motion to dismiss for failure to state a claim

HOLDING: The court held the employee's claim for wrongful discharge, to the extent it was based upon the FMLA, failed as a matter of law. To the extent the wrongful discharge was based upon retaliation for involuntary hospitalization also failed as a matter of law.

ANALYSIS: The court noted that Iowa's wrongful discharge claim existed "for the purpose of protecting an employee against retaliation when a statutory right is conferred but no statutory remedy is provided." Because the FMLA provides a statutory remedy for an employee whose employer interferes with leave, the claim failed as a matter of law. The estate had also argued it was against public policy to terminate an employee who had been involuntarily hospitalized. The court noted that the statute the estate relied upon only set forth the procedures for involuntarily hospitalization and did not expressly or impliedly protect any specific employment activity from retaliation. As such, those statutes were not the "well recognized or clearly defined" policies sufficient to support a wrongful discharge in violation of public policy claim.

Berry v. Liberty Holdings, Inc., 803 N.W.2d 106 (Iowa 2011) (Wiggins)

FACTS: Employer owned two companies: Liberty Holdings, Inc. (Liberty) and Premier Concrete Pumping, L.L.C. (PCP). Plaintiff employee was an at-will employee of Liberty and was injured by a concrete pumper truck owned by PCP. The employee filed a personal injury suit against PCP and ultimately settled within PCP's insurance policy limits. Approximately nine months after settlement, Liberty terminated the employee. The employee subsequently filed suit against Liberty for wrongful termination in violation of public policy "because he engaged in the protected activity of bringing a claim for personal injury" against PCP. Liberty filed a motion to dismiss for failure to state a claim, arguing that the employee failed to identify a clearly defined public policy that protects his right to file a civil suit against someone other than his employer. The district court granted the motion to dismiss and the court of appeals reversed.

HOLDING: The district court did not err in granting the motion to dismiss.

ANALYSIS: The employee identified Iowa's comparative fault statute, Code Chapter 668, as the source for public policy protecting employees from termination when they

seek redress for personal injuries caused by the negligence of another. The Court determined that Chapter 668 "more closely resembles a statute that attempts to regulate private conduct and imposes requirements that do not implicate public policy concerns." The Court noted the Chapter created a framework whereby a fact finder can assign fault to one or more parties and was not a policy statement that implicated the health, safety, morals, or general welfare of the citizens of Iowa.

Lovland v. Employers Mut. Cas. Co., 674 F.3d 806 (8th Cir. 2012) (Loken)

FACTS: A supervisor with Defendant's company reviewed 2008 employee attendance and learned Plaintiff employee had an unacceptable number of absences. The supervisor was aware of the employee's health history, which included a back injury, and asked if the employee would like to retroactively designate some of her absences as FMLA leave days. The employee provided proof that she had submitted medical certifications citing a need for intermittent FMLA leave and asked to have specific absences noted as FMLA leave. The requested absences were removed from the absenteeism calculation, but the record still reflected significant absences—scheduled and unscheduled, paid and unpaid leave. The employer reviewed the previous two years records and noted similar absenteeism issues, and therefore issued a corrective action notice. Plaintiff's attendance thereafter improved.

In March 2009, Plaintiff employee requested and received new FMLA leave time as her father was terminally ill. Plaintiff used that time to tend to her father and attend his funeral, and was granted extra time by the employer when her FMLA leave time became depleted. In May 2009, Plaintiff employee became upset after receiving her father's death certificate in the mail and told a different supervisor that she would not be in the following day. Plaintiff employee did not report her absence for two days, and pursuant to the company's two days no-call-no-show policy, she was terminated for absenteeism. Plaintiff filed suit alleging her termination unlawfully interfered with her rights under the FMLA. Specifically, Plaintiff alleged that the corrective action taken by her employer was a negative factor in her termination and that her employer included 18 hours of FMLA time in her corrective action notice and therefore interfered with her right to FMLA leave. The district court determined Plaintiff had a claim for retaliation, not interference, and she lacked proof of a discriminatory animus. The district court granted summary judgment for the employer.

HOLDING: The district court did not err in granting the motion for summary judgment.

ANALYSIS: The court noted the dichotomy between interference claims and retaliation claims under the FMLA, and held the district court correctly applied the dichotomy and dismissed Plaintiff's claim as a retaliation claim for lack of evidence of discriminatory intent. Going further, the court noted that summary judgment was appropriate even if Plaintiff had a claim for interference as an employer is not liable if its adverse decision was unrelated to the employee's use of FMLA leave. In this case, the employee had a three year history of absenteeism, and that

problem with absenteeism was the reason for the termination, not the employee's use of FMLA leave.

LIMITATION OF ACTIONS

Class Certification
*Kragnes v. City of Des Moines, Iowa***,** 714 N.W.2d 632 (Iowa 2012)(Hecht)

FACTS: Plaintiff sued the City of Des Moines arguing the City's increased franchise fee for gas and electricity services was an illegal tax. This Court held in 2006 that the City had the authority to impose the fees so long as the charge was reasonably related to the reasonable costs of inspecting, licensing, supervising, or otherwise regulating the activity being franchised and remanded the case to district court for a determination of the appropriate fees. On remand the district court calculated fees, and certified a class consisting of all City utility customers who paid the franchise fee from July 27, 1999, forward. The City filed three motions to decertify the class, all of which were denied. The City appealed arguing the district court should have decertified the class because a fundamental conflict existed between the members and class members were not allowed to opt out of the litigation. Specifically the City argued that economic interests of the class members conflict because property owners will pay more in property taxes to make up for the lost revenue than they paid as franchise fees, whereas non-property owners will simply get a refund.

HELD: The district court did not abuse its discretion in certifying and refusing to decertify the class. The heart of the case was the illegality of the franchise fee imposed and the class members have no fundamental conflict as to that issue. The arguments regarding the refund realized by property versus non-property owners was speculative.

DISSENT (Cady): Argued that a fundamental conflict existed between the members and that class certification was inappropriate. The judgment in this case was so large the city will have to raise additional revenue or reduce city services to refund the improper fee, which necessarily divides the class and renders its members antagonistic.

Consolidation of Cases
*Johnson v. Des Moines Metropolitan Wastewater Reclamation Authority, Johnson v. Polk County Aviation Authority***,** 814 N.W.2d 240 (Iowa 2012) (Waterman)

FACTS: Landowner Plaintiffs sought to consolidate two condemnation appeals pursuant to Iowa Rule of Civil Procedure 1.913. Both condemning authorities, the Polk County Aviation Authority (PCAA) and the Des Moines Metropolitan Wastewater Reclamation Authority (WRA) resisted. Plaintiffs owned 65.93 acres of agricultural land near Ankeny. PCAA sought to condemn 4.17 acres in fee simple to extend a runway and to move a street. Four months later WRA sought to condemn .92 acres for a permanent sewer easement and 9.43 acres for a

temporary construction easement. Plaintiff sought to consolidate the condemnation appeals under Iowa Rule of Civil Procedure 1.913, arguing the juries would hear similar evidence and indicated that he would argue the multiple takings of the adjacent land close in time had a combined effect of reducing the value of the remaining land. The district court granted the motion to consolidate noting it would promote judicial economy and save costs to all parties.

HELD: The district court erred in consolidating the cases. The Court noted Iowa's rule was premised on Federal Rule of Civil Procedure 42(a) and looked to federal case law for guidance on the factors to be considered when cases are consolidated. The fact finders have to determine the just compensation for two different types of takings by separate condemning authorities for unrelated projects. Evidence admissible in one case is inadmissible in the other, creating the risk of prejudice and jury confusion. There need to be common questions of law or fact, but the existence of common substantive law alone does not justify consolidation.

Excluding Evidence
Whitley v. C.R. Pharmacy Service, Inc., ___ N.W.2d ____, 2012 WL 2479588 (Iowa 2012 (Cady)

FACTS: Plaintiff sought LASIK surgery to improve her eyesight. The procedure was ultimately performed, but resulted in corneal haze requiring a second procedure to remove the haze. During the second procedure a medication called mitomycin, compounded by Defendant, was applied to Plaintiff's eyes. Days after the second procedure, Plaintiff's eyesight rapidly deteriorated and she underwent corneal transplants in both eyes but ultimately lost her left eye. 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.

At the final pretrial conference, 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."

The Defendant's strategy up to trial, 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, a pickup log and a receipt, showing the mitomycin was picked up by the eye clinic's office manager after the second eye procedure had taken place. These documents were not turned over to Plaintiff. Over Plaintiff's objections, the manager testified to the pharmacy's pickup log and receipt at trial and both documents were admitted into evidence. The documents 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 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." The Court of Appeals reversed finding Defendant violated the spirit of the rules by not disclosing the documents in the two weeks before trial.

HOLDING: The district court did not abuse its discretion in denying Plaintiff's request to exclude the evidence. Based on the circumstances existing at the time, the trial court pursued a reasonable course of action by granting a continuance and not excluding the evidence.

ANALYSIS: The Court noted the Plaintiff appealed only the district court's failure to exclude the evidence as a sanction for failing to supplement discovery and disclose the exhibits and was not the failure of the district court to grant a new trial in light of the surprise she experienced when confronted with two new exhibits. The Court determined the Defendant violated its duty to supplement discovery, but noted the trial court had discretion to impose sanctions. The trial court granted Plaintiff a continuance so she could depose the parties who would testify to the documents and ultimately decided not to exclude the exhibits. Plaintiff did not subsequently request further relief arguing the continuance was inadequate to address the issue.

Expert Testimony/Motions in Limine
*Quad City Bank & Trust v. Jim Kircher & Associates, P.C.***,** 804 N.W.2d 83 (Iowa 2011)(Wiggins)

FACTS: Quad City Bank and Trust (QCBT) loaned the Chapman Lumber Company (Chapman) substantial amounts of money through several loans and lines of credit. Despite Chapman's default on the loans, QCBT decided not to foreclose on the loan and instead hired Jim Kircher & Associates PC (Kircher) to perform a general audit. According to Kircher, the purpose of the audit was to express an opinion about whether Chapman's financial statements were presented in conformity with US generally accepted accounting principles. The audit showed overdrafts and deficit cash flows. Chapman also subsequently defaulted on its line of credit. QCBT required Chapman to acquire an infusion of venture capital or it would foreclose the loan in thirty days, which was ultimately extended by a forbearance agreement. Approximately three months later, Chapman suffered a substantial fire that destroyed the kilns central to its operation. QCBT decided to reinvest the insurance proceeds in the business to keep Chapman operational. One year later the forbearance agreement expired and QCBT called its loans due. Chapman filed for bankruptcy protection and QCBT entered Chapman's to check on its collateral. QCBT discovered that Chapman's had been defrauding the bank. QCBT filed a negligent accounting claim against Kircher, and identified a certified fraud examiner as an expert witness. The certified fraud examiner was not a certified public accountant (CPA), had not performed a general audit of a business, and was not familiar with CPA auditing standards.

Kircher filed a motion in limine seeking to prohibit the expert from testifying as to the standards of care applicable to CPAs, whether the standards were breached

or causation and perceived errors in Kircher's work papers related to the audit on the basis that the expert witness was not qualified to opine on generally accepted auditing standards. QCBT argued the expert witness could testify whether Kircher did was what the work papers required. The district court granted the motion in limine stating the expert was not qualified to testify to general CPA accounting standards. The jury returned a verdict for Kircher and QCBT moved for a new trial arguing the court improperly excluded its expert witness. The district court denied the motion, and the court of appeals reversed noting QCBT properly preserved error on the motion in limine.

HELD: The district court did not abuse its discretion in ruling QCBT's expert could not testify to generally accepted CPA auditing standards, whether Kircher breached those standards, causation. The Court noted an expert's testimony must assist the trier of fact in understanding the evidence and the expert must be qualified by knowledge, skill, experience, training, or education on the subject matter in question. While an expert does need a particular degree, license, or education, or be a specialist in an area of testimony, the area must be within the witness's general area of expertise. The district court's conclusion that the expert witness could not testify was correct, but its reasoning was flawed: it was not that the expert was not a CPA, but that the expert lacked the knowledge, skill, experience, training or education did not provide the expert with the requisite expertise in auditing or accounting to allow him to opinion on the ultimate issue.

The court also determined that QCBT failed to preserve error on the issue of whether its expert could testify concerning the accountant's work papers. The Court noted the general rule that a motion in limine, if sustained prohibits reference or introduction to evidence until its admissibility is determined by the court outside the presence of the jury. Thus, error claimed regarding a ruling on a motion in limine is waived unless a timely objection is made when the evidence is offered at trial. An exception to the rule exists when the court's ruling leaves no question that the challenged evidence will or will not be admitted, then counsel need not renew its objection at trial. In this case, the court definitively ruled on the expert's ability to testify to generally accepted CPA auditing standards, but did not definitively rule on the expert's ability to testify to the content of the work papers, thus an objection at trial was needed to preserve error on this issue.

Post-Trial Motion/Record on Review
Simon Estes v. Progressive Classic Ins. Co., 809 N.W.2d 111 (Iowa 2012) (Wiggins)

FACTS: Insured sued his insurance carrier for underinsured motorist benefits arising from personal injuries. The insurance carrier filed a motion for summary judgment arguing the insured did not seek consent to settlement with one of the two underlying tortfeasors and failed to allege damages in excess of the underlying tortfearsors' policies. The district court denied the motion, proceeded to trial on the issue of damages only, and entered judgment on the jury verdict for the insured. The insurance carrier timely moved for a new trial. After the ten day period for filing post-trial motions lapsed, the insured filed a motion to modify the judgment requesting the court apply interest from the date the insured filed suit against the underlying tortfeasors and not from the date the insured filed suit against the insurance carrier. The district court denied the insurance carrier's

motion for a new trial and granted the insured's motion to modify the judgment. The court of appeals affirmed. The insurance carrier appealed the denial of the motion for summary judgment and the court's decision to modify the judgment.

HELD: (1) In order to prevail on the motion for summary judgment, the insurance carrier had to demonstrate prejudice, an impossible task in light of the fact that the jury did not allocate fault between the underlying tortfeasors. Because the insurance carrier did not provide the Court with a transcript of the proceedings, the Court was unable to determine if the insurance carrier sought to instruct the jury on fault apportionment. The Court noted the insurance carrier had a duty to provide the court with a sufficient record and its failure to do so was a failure to preserve error on the issue of applicability of the consent to settlement and exhaustion clauses as raised in its motion for summary judgment.

(2) The district court erred granting the insured's untimely motion. The motion to modify the judgment was a decision that could be later vacated and thus fell under the ambit of Iowa Rule of Civil Procedure 1.1004 allowing 10 days for parties to file post-trial motions.

Punitive Damages
In the Matter of the Estate of Johnny Vajgrt v. Bill Ernst, Inc., 801 N.W.2d 570 (Iowa 2011) (Mansfield)

FACTS: Defendant landowner, Ernst, gave his neighbor, Vajgrt, permission to enter his land to remove a fallen tree to prevent flooding. Vajgrt entered Ernst's land, and in addition to removing the fallen tree, also tore out approximately forty live trees. Ernst did nothing upon discovering the trees had been removed, but filed a claim in probate court after Vajgrt's death approximately three years later seeking compensation for the diminution to the value of his property, the value of the trees, the expense of repair, and punitive damages. The district court declined to award punitive damages

HELD: Punitive damages should not be held against a decedent's estate. Ernst relied upon Iowa's survival statute that provides a cause of action shall survive and may be brought notwithstanding the death of the person entitled to recovery or liable to a party. The Court noted that punitive damages were not a cause of action, noted that 31 states refuse to award punitive damages after death, and refused to overturn Iowa precedent preventing the award of punitive damages against an estate.

SPECIAL CONCURRENCE (Wiggins, joined by Appel): Agreed with the dissent, and if the Court were to develop the common law further in this area, he would consider overruling prior Iowa precedent for the reasons set forth in Hecht's dissent. Because the Iowa legislature left most of the common law rules regarding punitive damages intact, he felt it was inappropriate to overturn precedent in existence at the time the legislature passed Iowa Code chapter 668A.

DISSENT (Hecht): Stated the common explanation that punishment cannot be achieved against a deceased tortfeasor is mistaken and that the disruption of a tortfeasor's post-death asset distribution is a form of punishment. Justice Hecht noted that

estate beneficiaries experience the consequences of their benefactor's pre-death decisions and conduct by the increase or decrease to the value of the estate.

Savings Statute
Furnald v. Hughes, 804 N.W.2d 273 (Iowa 2011)(Appel)

FACTS: Eleven days before trial, Plaintiff voluntarily dismissed without prejudice his personal injury and underinsured/uninsured claims arising out of an automobile accident. Plaintiff claimed he needed additional time to determine the extent of his injuries, and left two telephone messages with opposing counsel informing him of his intent to dismiss and refile. Plaintiff's counsel did not file a motion for continuance and did not seek consent of counsel regarding the dismissal. Plaintiff refiled his suit two months later. Defendant answered and asserted the statute of limitations as an affirmative defense. Defendant also filed a motion for summary judgment arguing that the savings clause of Iowa Code § 614.10 was not available to Plaintiff because "negligence in prosecution was the sole cause of the 'failure' of the prior lawsuit." The district court noted Plaintiff's counsel failed to seek a continuance and granted Defendant's motion.

HELD: The savings statute did not save the Plaintiff's case and the Defendant's motion was properly granted. The Court examined the language of the statute, other state's statutes, the savings statute in the Uniform Commercial Code, and Iowa's case precedent. The Court determined that the remedy available under the savings statute is narrow and sharp, protecting plaintiffs only from technical procedural problems that cannot be avoided through due diligence in the underlying litigation. Savings statutes are not designed to avoid the ordinary restrictions of statutes of limitations. In order for voluntary dismissals to be within the scope of "failure" as used in the statute, there must be a compulsion to the extent that a plaintiff's underlying claim has been defeated. Plaintiff in this case made a strategic choice to forego a continuance or delay, and such strategic decisions are not the kind of compulsion that "awakens" the savings statute.

The Defense of Employment Cases

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EVALUATING THE EMPLOYMENT CLAIM

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I. INTRODUCTION

Evaluating employment claims can present some special issues that are challenging to the defense lawyer or, for that matter, plaintiff's counsel. Much of employment law appears to be counterintuitive. Logic seems to play a lessened role in employment cases. Pitfalls that most of us would avoid in a personal injury or contract lawsuit present themselves and trap even experienced trial lawyers in the employment case. Jurors react to evidence that many attorneys would view as trivial. Perhaps because the employment relationship is so strongly personal to nearly all of us, jurors are prone to respond more on a personal level than in many other types of civil litigation. Moreover, because of the preponderance of fee shifting in most employment lawsuits, the entire economics of the typical employment cases is skewed. Further complicating matters is more prevalent "insurance" coverage that, more and more, seems to protect primarily the insurer rather than the insured.

All of these factors make matters more complicated in evaluating the employment claim. While it is still true that a very high percentage of employment claims have only nominal value, only with experience can counsel intelligently appraise the "market" with respect to a particular case. The problem starts with the checker board quilt of statutory, regulatory and judge made law that overlaps and complicates aspects of the employment relationship and, therefore, lawsuits arising from that relationship or its end.

Most employment litigation, in some way, relates to the issue of employment termination. A large majority of employees in the state of Iowa are still categorized as "at will". Under at-will employment, an employer (or the employee) has the authority to terminate the employment

relationship "at any time, for any reason or for no reason at all." *Boerschell v. City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994). By definition, at-will employment "does not require an employer's decision to be logical or rational." *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d 74, 82 (Iowa 2001). The legal principle is "firmly rooted in Iowa law", *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 455 (Iowa 1989), and Iowa courts refer to "only two narrow exceptions". Id.; *Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997). As a practical matter, however, statutory and judge-made exceptions to at-will employment many times threaten nearly to swallow the rule.

Because of the way that employment law developed, the judicial and statutory restrictions on employers overlap, vary depending upon geography or type of employer, are based upon different (or even conflicting) policy sources and employ different remedial schemes and administrative and procedural approaches. Attempting to generalize about the defense of employment claims (and the various legal theories that are asserted) can, therefore, be difficult. Nonetheless, notwithstanding the broad diversity of legal theories available in employment cases and widely varying legal standards, some common elements remain.

Typically, the ultimate question to be litigated in an employment case is whether the employer had the authority to terminate the employment relationship (or whether the circumstances of plaintiff's departure from employment constitute a constructive discharge for which the employer will be held responsible). Further, employment claims at the administrative level or as asserted in court tend to focus upon procedural issues more than on substantive issues. Generally, society agrees that it is for an employer to determine how many employees it needs, and which ones. Ultimately, the result is often that plaintiff's counsel presents as a main question in the litigation the route chosen by the employer and, only indirectly, the destination. Consistency and adherence to procedures (and the expectation that there should be procedures) are therefore common themes throughout most employment cases. Another, and in many respects more important, common factor applicable to most employment claims is a

practical requirement for employer conduct that, nowhere, matches the legal standard set forth in statute or in case law. Regardless of the type of claim being asserted, juries (and, to a lesser extent, administrative agencies and judges) require that the employer act **fairly**. Any lawyer defending an employment claim who cannot keep this notion firmly fixed is inviting trouble.

Because of the common themes applicable in most employment cases, certain obstacles and opportunities repeatedly present themselves. Those obstacles and opportunities suggest a fairly consistent set of strategies that apply across diverse employment claims at various points in the process. Even where the employment relationship continues, there may be attractive employment claims available, the ultimate threat of which is the potential for retaliation litigation that comes with assertion of the claim. Even those cases in which relatively small amounts of money may be at issue, depending upon the legal basis for the claim, usually greatly increase the potential cost of litigation for defendants because of the availability of attorneys' fees.

Ultimately, as in most other types of litigation, the law that applies in an employment case serves only as the backdrop. Once it is clear that an employment lawsuit will go to a jury for decision, usually a generalized notion of "fairness" determines the outcome.

II. LIMITATIONS ON THE RIGHT TO TERMINATE

A. Statutory Law

Statutory exceptions to the at-will employment rule, of course, are significant and must always be considered when evaluating a potential claim. The following is a list of some legislative exceptions to at-will employment.

1. Federal law

--Labor Management Relations Act ("LMRA"), 29 U.S.C. §158(a)(1), (3), (4) (prohibits discharge for union activity, protected concerted activity, or filing charges or giving testimony under the Act).

--Fair Labor Standards Act, 29 U.S.C. §§215(a)(3), 216(b) (prohibits discharge for exercising rights guaranteed by minimum wage and overtime provisions of the Act).

--Family and Medical Leave Act, 29 U.S.C. §2615(a) (discharge for exercising rights under the act prohibited).

--Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §660(c) (prohibits discharge of employees and reprisal for exercising rights under the Act).

--Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (prohibits discharge of employees and reprisal for exercising rights under the Act).

--Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e-2, 2000e-3(a) (prohibits discharge based on race, color, religion, sex or national origin and reprisal for exercising Title VII rights).

--Americans with Disabilities Act, 42 U.S.C. §12112(a) (prohibits discharge of a "qualified individual with a disability" because of the disability)

--Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§623, 631, 633(a) (prohibits age-based discharge of individuals over 40 and reprisals for exercising statutory rights).

--Civil Rights Act of 1866, 42 U.S.C. §1981 (prohibits race discrimination in "making" and "enforcement" of contracts).

--Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985(3) (prohibits deprivation of rights, privileges or immunities).

--Longshoremen's and Harborworkers' Act, 33 U.S.C. §948a (prohibits discharge or discrimination for exercising rights under the Act).

--Vocational Rehabilitation Act of 1973, 29 U.S.C. §793, 794 (1975) (prohibits federal contractors or any program or activity receiving federal financial assistance from discriminating against handicapped persons).

--Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1140, 1141 (prohibits discharge of employees in order to prevent them from obtaining vested employment benefits).

--Veteran's Benefits Improvement Act of 1996, 38 U.S.C. §4311 (provides protection—for a limited period—from discharge without just cause of returning service people).

--Energy Reorganization Act of 1974, 42 U.S.C. §5851 (prohibits discharge of employees who assist, participate or testify or are about to do so, in any proceeding to carry out purposes of the Act or the Atomic Energy Act of 1954).

--Clean Air Act, 42 U.S.C. §7622 (prohibits discharge of employees who commence, cause to commence, or testify at proceedings against an employer for violation of the Act).

--Federal Water Pollution Control Act, 33 U.S.C. §1367 (prohibits discharge of employees who institute or testify at a proceeding against the employer for violation of the Act).

--Consumer Credit Protection Act, 15 U.S.C. §1674(a) (prohibits discharge of employees because of garnishment of wages for any one indebtedness).

--Civil Service Reform Act of 1978, 5 U.S.C. §7513(a) (federal civil service employees protected from discharge except for existence of "such cause as will promote the efficiency of the service").

--Judiciary and Judicial Procedure Act, 28 U.S.C. §1875 (prohibits discharge of employees for service on grand or petit juries).

--Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101-2109 (prohibits termination of employment in a plant closure absent provision of 60 days' notice of closure to employees, local elected official and to the state "dislocated worker unit") (penalty is payment equal to 60 days of wages and benefits).

--Employee Polygraph Protection Act of 1988, 29 U.S.C. §2002 (prohibits submission to polygraph examination as a condition of employment or discharge of any employee who refuses such examination or institutes any proceedings related to the Act).

2. State law

--Iowa Civil Rights Act of 1965, §§216.6 (prohibits discharge on the basis of age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion or disability); §216.11(2) (prohibits discharge in retaliation for opposing unlawful employment practices or participation in proceedings under the Act).

--Iowa Code §20.10 (prohibits discipline of discharge of employees on the basis of exercise of protected rights under the Public Employment Relations Act)

--Iowa Code §642.21(2) (prohibits discharge of an employee by reason of earnings being garnished).

--Iowa Code §29A.43 (prohibits discharge for absences due to membership in military reserves).

--Iowa Code §49.109 (guaranteeing employees three consecutive hours off work to vote during time in which polls are open).

--Iowa Code §70A.2 (public employees protected from discrimination or discharge for absence for "medically related disability").

--Iowa Code §70A.28(2) (public employees protected from discrimination or discharge for reporting possible violations to authorities).

--Iowa Code §8F.3(1)(d) (SF 2410, 2006)(entities with service contracts with

government required to certify and report regarding policies that protect employees from discrimination or discharge for reporting possible violations to authorities).

--Iowa Code §730.4(2), (4), (5)(prohibits discharge of employees for refusal to submit to polygraph examination, filing a complaint or testifying in a proceeding instituted under the statute).

--Iowa Code §252D.17(10) (discharge or discipline against an employee because of withholding for child support constitutes a simple misdemeanor).

--Iowa Code §8A.417(4) (prohibits discharge of public employees in reprisal for disclosure to public bodies of information the employee "reasonably believes evidences a violation of law or rule, mismanagement, a gross abuse of funds, abuse of authority, or a substantial and specific danger to public health or safety").

--Iowa Code §§55.1 through 55.4 (requires leaves of absence for—and prohibits discharge of employees by reason of—service in elected position, voluntary emergency service or on boards, committees, task forces or commissions).

--Iowa Code §607A.45(1), (2) (prohibits discharge of employee for jury service).

--Iowa Code §730.5 (prohibits requiring drug/alcohol tests except in strict conformance with policy and statute and prohibits discipline or discharge except as set forth in specific compliance with policy and statute)

--Iowa Code §88.9(3) (prohibits discharge, retaliation or reprisal for commencing or participating in an OSHA proceeding, exercising rights under the statute or refusing to work when under a good faith and reasonable belief that to do so would be dangerous).

--Iowa Code §91A.10(5) (prohibits discharge or discrimination because an employee has filed a complaint, signed a claim or brought or cooperated in bringing a wage payment action—30 day period in which to bring claim?).

--Iowa Code §729.4(1)(general race, religion, color, sex, national origin and ancestry bar in employment decision making)

--Iowa Code §729.6(5), (6), (7) (prohibition against genetic testing; protects against discharge in retaliation for making a claim of violation of section or testifying in proceeding alleging violation)

3. Local ordinances

In addition to Iowa Code §216.6, a number of communities in the state have civil rights ordinances protecting employees within the jurisdiction from discharge on the basis of protected status. For example, well before state law was changed, ordinances in Cedar Rapids and Iowa City protected against discrimination on the basis of sexual orientation and the Iowa City ordinance also banned employment decision making based on transgender status.

B. Common Law Theories of Recovery

1. Contract-Based Claims

The employer and employee at all times have the right to "contractually alter the at will relationship." *Schoff v. Combined Insurance Co.*, 604 N.W.2d 43, 47 (Iowa 1999). Analytically, the express written contract is easiest to understand. Other contract-based claims present challenges to the employee.

a. Oral agreements. An oral contract can serve as the basis for a separate cause of action, even where the alleged contract is claimed to have been terminated solely because of age. *Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc.*, 473 N.W.2d 31 (Iowa 1991). Under *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193, 197 (Iowa 1985), all discrimination claims are preempted by the exclusive remedies set forth in the Iowa Civil Rights Act. In *Grahek*, the court held that an independent oral contract claim survived, even though the only theory plaintiff offered to explain his termination was age discrimination.

Employment contract claims have been hampered in their development by limitations placed upon contracts for "permanent" or "indefinite" employment. " 'Indefinite employment may be abandoned at will by either party without incurring any liability.' " *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 281 (Iowa 2000) (quoting *Harrod v. Wineman*, 125 N.W. 812, 813 (Iowa 1910)). Such permanent or lifetime employment contracts have been held to be enforceable only with "additional consideration" beyond the employee's mere promise to perform services. *Wolfe v. Graether*, 389 N.W.2d 643, 654-55 (1986). Whether such independent consideration exists to support a lifetime employment agreement is a factual determination that must be made on a case-by-case basis. Accordingly, where a tenured faculty member gave up lifetime job protection to accept permanent employment at another institution, the court held there to be sufficient consideration to support permanent employment. *Collins v. Parsons College*, 203 N.W.2d 594, 599 (Iowa 1973). Similarly, the sacrifice of a partnership interest in a business at the time the business changed from a partnership to a corporate form has also been held to constitute sufficient consideration for lifetime employment. *Wolfe v. Graether*, 389 N.W.2d 643, 654-55 (1986). On the other hand, giving up secure union employment under a "just cause" collective bargaining agreement is insufficient to support a claim of permanent employment. *Albert v. Davenport Osteopathic Hospital*, 385 N.W.2d 237 (Iowa 1986).

In addition to problems with the indefinite employment rule, oral contract claims also may run afoul of Iowa's statute of frauds. In *Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405 (Iowa 1997), the Supreme Court held that there exists no "part-performance exception" to the statute of frauds and, accordingly, the trial court erred in admitting parole evidence of a claimed three-year contract. Without the oral testimony to prove a three-year agreement, the court held there was insufficient evidence to submit the contract claim. 567 N.W.2d at 409.

b. Employment handbook claims. The Iowa courts recognize

another exception to at-will employment with respect to those "contracts" arising from language in an employment handbook. Although the claim was initially phrased in terms of an employee's reasonable expectations, *Cannon v. National By-Products, Inc.*, 422 N.W.2d 638 (Iowa 1988), case decisions evolved to apply traditional contract principles. *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 456 (Iowa 1989); *French v. Foods, Inc.*, 495 N.W.2d 768, 770 (Iowa 1993). Under that approach, disclaimers in handbooks emphasizing at-will employment have resulted in rulings against the existence of a contractual relationship. *See, e.g., French v. Foods, Inc.*, 495 N.W.2d 768, 770 (Iowa 1993); *McBride v. City of Sioux City*, 444 N.W.2d 85 (Iowa 1989), *Palmer v. Women's Christian Ass'n*, 485 N.W.2d 93 (Iowa App. 1992). *But see Hunter v Board of Trustees*, 481 N.W.2d 510, 515 (Iowa 1992). Also, in *Grimm v. U.S. West Communications*, 644 N.W.2d 8 (Iowa 2002), the court allowed tortious interference, intentional infliction of emotional distress and breach of employment handbook claims to proceed—despite at-will disclaimers—with respect to assertions that employment termination violated an employer policy prohibiting discrimination on the basis of sexual orientation. Grimm was decided before state law was amended to protect sexual orientation.

c. Implied duty of good faith and fair dealing. Plaintiffs in Iowa will not have much success with an implied duty claim. The Iowa courts have "consistently refused to adopt" such claims with respect to employment relationships. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 281 (Iowa 2000); *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996).

d. Promissory estoppel. In Schoff v. Combined Insurance Company of America, 604 N.W.2d 43 (Iowa 1999), the Iowa Supreme Court refused to reject a promissory estoppel theory. Instead, the court held that there was "little to distinguish [the theory] from a unilateral contract claim with respect to its compatibility with employment at will." 604 N.W.2d at 49. Although acknowledging the viability of a promissory estoppel theory, the court emphasized the difficulty plaintiffs will have in proving the requisite "clear and definite oral agreement" necessary in order to recover. 604 N.W.2d at 51.

2. Tort Based Theories

a. Discharge against public policy. The public policy claim first was recognized in *Springer v. Weeks and Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988). In *Springer*, the court approved a common law cause of action for an employer's discharge in violation of a clearly recognized public policy (the right to receive and participate in the worker's compensation process). In subsequent decisions, the Iowa courts have addressed other public policies, the violation of which would give rise to a valid cause of action. *See*, *e.g., Jasper v. H. Nizem, Inc.*, 764 N.W.2d 751, 765-66 (Iowa 2009)(administrative regulations setting forth required child care facility staff-to-child staffing ratios embody clearly defined public policy to support wrongful termination claim); *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 286-87 (Iowa 2000) (public policy supporting the provision of truthful testimony is the basis for a cause of action for one discharged for providing truthful testimony (or who has expressed a good faith intent to testify)); *Teachout v. Forrest City Community School Dist.*, 584 N.W.2d 296, 301 (Iowa 1998) (public policy favoring good faith reporting of

suspected child abuse sufficient to give rise to protection from termination); *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998) (wage payment statute, Chapter 91A, Iowa Code, plainly articulates a public policy prohibiting discharge of an employee in response to demand for wages due under an agreement); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (public policy in favor of permitting employees to seek unemployment compensation gives rise to action for wrongful discharge for seeking partial unemployment compensation benefits); *Thompto v. Coborn's, Inc.*, 871 F.Supp. 1097, 1111, 1115-16 (N.D. Iowa 1994)(wage payment statute plainly articulates a public policy prohibiting discharge of an employee in response to demand for wages: public policy in favor of obtaining advice of counsel would support cause of action for an employee discharged because of threat to "get a lawyer")[1]; *Wilcox v. Hy-Vee Food Stores, Inc.*, 458 N.W.2d 870, 872 (Iowa App. 1990) (public policy set forth in statute prohibiting polygraph testing serves as basis for cause of action); *Butts v. University of Osteopathic Medicine & Health*, 561 N.W.2d 838, 842 (Iowa App. 1997) (discharge prohibited for refusing to participate in state sales tax violations or for reporting such violations to a supervisor or appropriate civil authority).[2]

Not all efforts to assert a claim for wrongful termination in violation of public policy have been successful. To defeat the presumption of at-will employment, such policy must be well-recognized and defined, generally by state constitution or statute.[3] *Theisen v. Covenant Medical Center, Inc.***,** 636 N.W.2d

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[1] However, the Iowa Supreme Court has questioned the public policy associated with attorneys. *See Davis v. Horton*, 661 N.W.2d 533 (Iowa 2003)(hiring a lawyer connected to participation in mediation and, therefore will not serve as basis for public policy claim).

[2] With respect to the public policy tort, however, a cause of action will not lie for claimed harassment, including threatened termination of an employee for engaging in activities protected by public policy. *Below v. Skarr*, 569 N.W.2d 510, 512 (Iowa 1997). *But see Wordekemper v. Western Iowa Homes & Equipment, Inc.*, 262 F.Supp.2d 973 (N.D. Iowa 2003)(court assumes without deciding that cause of action lies for retaliatory refusal to hire on the basis of earlier workers compensation claims. Court notes, footnote 6, that the case may well be appropriate for certified question to the Iowa Supreme Court. However, defendants did not raise the issue and assumed a cause of action, so the court did, also).

In Below, the Iowa Supreme Court refused to speculate about harassment and threats "so egregious as to amount to a constructive termination . . . ." 569 N.W.2d at 512. Ordinarily, however, where an employer deliberately renders an employee's working conditions intolerable and forces the employee to quit, the courts do authorize recovery as if the employer had terminated the employment relationship directly. *See, e.g., Jenkins v. Wal-Mart Stores, Inc., 910 F.Supp*. 1399, 1418 (N.D. Iowa 1995); *First Judicial Dist. Dep't of Correctional Serv. v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 89 (Iowa 1982). The test is whether a reasonable person would have found that the conditions created by the employer were such that a reasonable person would have found them intolerable. *First Judicial Dist. Dep't of Correctional Serv.,* 315 N.W.2d at 88; *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). However, constructive discharge is not, itself, a separate cause of action. "A constructive discharge is actionable only when an express discharge would be actionable in the same circumstances." *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 643 (Iowa 2000).

[3] When there is an express statutory prohibition against discharge, the courts need not (and will not) find a common law public policy right of action. *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193, 196 (Iowa 1985). Remedies under the Iowa Civil Rights Act are exclusive and preemptive. Id. at 197; Greenland v. Fairton Corp., 500 N.W.2d 36, 38 (Iowa 1993) (test is whether the claims are separate and independent or incidental). However, because the Iowa Civil Rights Act's provisions do not apply to employers of fewer than four persons, Iowa Code §216.6(6)(a), there is an open question whether Iowa Code §729.4(1)(general race, religion, color, sex, national origin and ancestry bar in employment decision making) may form the basis of a viable public policy claim.

74, 79 (Iowa 2001). Public policy will not be declared on the basis of "generalized concepts of fairness and justice". *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 283 (Iowa 2000). Cases in which the courts have found no public policy supporting a claim for wrongful termination include *Barry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 112 (Iowa 2011)(comparative fault act does not articulate clearly defined and well-recognized public policy supporting claim); *Ballalatak v. All Iowa Agricultural Ass'n*, 781 N.W.2d 272, 274 (Iowa 2010)("no public policy protects an employee who internally advocates for the workers' compensation claim of another employee"); Theisen v. Covenant Medical Center, Inc.**,** 636 N.W.2d 74, 80 (Iowa 2001)(termination for refusal to provide voice identification did not violate public policy prohibiting compelled polygraph examination); *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994)(statutory presumption of innocence applies in criminal context only and will not serve as basis for cause of action); *Davis v. Horton*, 661 N.W.2d 533 (Iowa 2003)(participation in mediation and related hiring of lawyer insufficient basis for public policy claim); *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 686 (Iowa 2001)(public policy against retaliatory discharge for reporting abuse extends to employees only and does not apply to independent contractors); *Lloyd v. Drake University*, 686 N.W.2d 225 (Iowa 2004)(enforcement of criminal laws by private security personnel insufficient to serve as a basis for cause of action for violation of public policy); *Weinzetl v. Ruan Single Source Transp. Co*., 587 N.W.2d 809, 812 (Iowa App. 1998) (termination for absenteeism due to work-related injuries does not violate public policy). But see*,* Iowa Code §70A.2 (public employees protected from discrimination or discharge for absence for "medically related disability").

b. Negligence. The Iowa Supreme Court did affirm an award based upon a negligent misrepresentation claim in favor of employees who were terminated, *Barske v. Rockwell Int'l Corp.*, 514 N.W.2d 917 (Iowa 1994). Nonetheless, since then, the court has narrowly restricted such claims to those situations involving a "defendant who is in the business of supplying information to others." *Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997); *Fry v. Mount*, 554 N.W.2d 263, 265-66 (Iowa 1996). Moreover, the Iowa court has made clear that there is no such thing as a viable general cause of action based upon "negligent" discharge. To recognize such a theory would require "imposition of a duty of care upon an employer when discharging an employee. Such a duty would radically alter the long recognized doctrine allowing discharge for any reason or no reason at all." *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996). Nor will a cause of action lie when an employee is discharged as a result of a negligently undertaken investigation. Authorizing recovery for a negligent investigation would create an "exception swallowing the rule of at-will employment." *Theisen v. Covenant Medical Center, Inc.***,** 636 N.W.2d 74, 82 (Iowa 2001).

III. OTHER CLAIMS

A. Non-Termination Claims

Many of the statutory bases for a wrongful termination claim identified above (and the

source of a public policy that would support a wrongful termination claim) govern aspects of the workplace and ongoing employment relationships. An employer can run afoul of a regulatory rule or statutory requirement without necessarily terminating the employment relationship. For example, an employer who incorrectly pays an employee a salary rather than hourly (plus overtime) pay or improperly withholds from an employee's paycheck may face claims under the federal Fair Labor Standards Act or the Iowa Wage Payment Collection Act. If employment has not been interrupted, such claims present a real problem for the employer because of the protection the claims themselves offer to an employee. Continuing to employ an individual who is suing is not easy. Performance is likely to become an issue. Nonetheless, terminating the employee who sues his or her employer exponentially increases legal risk and expense. A retaliatory discharge case is, generally, much more threatening (or attractive or valuable) litigation than the underlying claim about a "smaller" issue. Most employers feel as if they are walking on egg shells in trying to maintain a normal employment relationship with a person who is, simultaneously, an adversary in litigation. What usually develops is an unpleasant contest of wills.

Lawyers evaluating potential employment claims need to keep in mind the additional leverage attendant to prosecuting litigation while the plaintiff remains employed with the defendant. While the parties argue about a given promotion decision or rate of pay or entitlement to family and medical leave, the employer's risk of a retaliation claim continues and dramatically increases. Even if the employer is able to maintain a work environment that does not produce a retaliation claim (and which also extracts an appropriate level of productivity and cooperation from the plaintiff), the attorneys' fees that continue to accrue, even with respect to claims for modest amounts, greatly increase the potential cost of a lawsuit as the litigation progresses.[4]

[4] One strategy that can be employed in defending a case where a potential award of attorneys' fees is disproportionate to the amount at issue is use of the Offer of Judgment pursuant to Rule 68, Federal Rules of Civil Procedure or an Offer to Confess Judgment (before or after litigation has commenced) under Iowa Code Chapters 676 and 677. If an offer is made for a sufficient amount and early enough, it can drastically reduce attorneys' fees to which an employee's counsel is entitled and place the risk of proceeding further on the plaintiff. *See Marek v. Chesny*, 473 U.S. 1 (1985).

B. Related Claims

Attorneys evaluating potential claims arising out of the workplace should also consider related tort claims. Sometimes those tort claims overshadow the underlying employment claim. For example, in *Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108 (Iowa 1984), plaintiff sued for employment termination in violation in breach of contract. Attendant claims of defamation and intentional infliction of emotional distress resulted in jury verdict amounts dwarfing the $1,600 awarded for breach of contract. Much of the substantial award (including punitive damages) survived appeal. The court noted that the case demonstrated "how mountains can be built from mole hills." 360 N.W.2d at 111. Anytime an employment termination decision involves allegations of missing or stolen property, there exists the possibility for defamation, malicious prosecution, false imprisonment, assault and battery claims, among others. Where the plaintiff contends that the reason for termination was false (and negative), defamation theoretically can be premised upon "compelled" self-publication, based upon the plaintiff's "need" to explain to prospective employers the reason given for discharge. *See Belcher v. Little*, 315 N.W.2d 734, 738 (Iowa 1982); *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d 74, 83 (Iowa 2001). The Iowa Supreme Court has also addressed claims of defamation by "dramatic pantomime". Theisen, 636 N.W.2d at 85; *Winckel v. Van Maur, Inc.*, 652 N.W.2d 453, 459 (Iowa 2002). However, with respect to the workplace, a claim for this type of "defamation by conduct" will not lie where a "terminated employee was simply escorted from the place of employment, without words or other conduct . . . ." *Theisen*, 636 N.W.2d at 86.

IV. AVAILABLE REMEDIES—federal

A. TITLE VII – Civil Rights (42 USC § 1981a)(race, color, religion, gender, et. al) and ADA – Americans with Disabilities Act (42 USC § 12117)

- Damages may include: back pay, front pay, lost benefits, reinstatement, compensatory and/or punitive damages.
- Employees may recover punitive damages if they can demonstrate that employer engaged in a discriminatory practice with malice or with reckless indifference to the employee's federally protected rights

- Amount of compensatory damages (not including backpay or front pay) for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses PLUS amount of punitive damages CANNOT EXCEED:
  - $50,000 → if employer has 14–100 employees in each of 20+ calendar weeks in the current or preceding calendar year
  - $100,000 → if employer has 101–200 employees in each of 20+ calendar weeks in the current or preceding calendar year
  - $200,000 → if employer has 201–500 employees in each of 20+ calendar weeks in the current or preceding calendar year
  - $300,000 → if employer has >500 employees in each of 20+ calendar weeks in the current or preceding calendar year
  - Reasonable attorneys' fees

Front pay is not included in the damages cap because it does not fall within the meaning of "compensatory damages" as set forth in the statute. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001).

Punitive damages against "government agencies" are expressly prohibited. 42 USC § 1981a(b)(1). *Bunda v. Potter*, 369 F. Supp. 2d 1039 (N.D. Iowa 2005).

Sufficient basis existed for award of emotional distress damages on employee's retaliation claim against employer under 42 USCS §§ 2000e-3 and 1981a, as there was evidence that employee had sought help from psychologist and family counselor after being laid off and that employee was taking antidepressant medication. *Heaton v. Weitz Co.*, 534 F.3d 882 (8th Cir. 2008).

Award of $ 260,000 in punitive damages pursuant to 42 USCS § 1981a, with resulting ratio of 6.5 to 1 to compensatory damages awarded, was not excessive, where employee's supervisor engaged in abusive and repeated sexual harassment. *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

- Punitive damage awards are based solely on employer's state of mind and employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Weissman v. Dawn Joy Fashions, Inc.* 214 F.3d 224, (2d Cir. 2000).

B. Racial Discrimination (42 USC § 1981).

- Compensatory and punitive damages are not capped for employees bringing a race-based retaliation claim.
- Attorneys' fees are available

C. FLSA – Fair Labor Standards Act (29 USC § 216)

- Willful violation of FLSA may result in a fine up to $10,000 and/or imprisonment up to 6 months. (imprisonment is only available for repeat offenders)
- Minimum wage and/or maximum hour violation may result in damages equal to:
  - the amount of unpaid minimum wages or unpaid overtime compensation,
  - additional amount equal to these liquidated damages,

    - reasonable attorneys' fees, and
    - costs of the action
- Two year statute of limitations unless violation is willful, then three years
- Retaliation against an employee may result in damages equal to:
    - employment,
    - reinstatement,
    - promotion,
    - payment of wages lost and an additional amount equal to these liquidated damages

Burden is on plaintiff-employee(s) to show that they are defendant's employees and are engaged in production of goods for interstate commerce. *Timberlake v. Day & Zimmerman, Inc.*, 49 F. Supp. 28 (S.D. Iowa 1943).

D. ADEA - Age Discrimination in Employment Act (29 USC § 626)

- Remedial scheme based on Fair Labor Standards Act legal or equitable relief is available as the court deems appropriate to effectuate the purpose of this Act, including:
    - judgments compelling employment
    - reinstatement or promotion
    - enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation
- Liquidated damages are payable only in cases of willful violations of this Act.

E. FMLA – Family and Medical Leave Act (29 USC § 2617)

- Remedial scheme based upon Fair Labor Standards Act
- Damages may equal:
    - any wages, salary, employment benefits, or other compensation denied or lost to the employee as a result of the employer's violation of this Act OR in the absence of denied or lost wages, actual monetary losses sustained by the employee (up to 12 weeks of wages or salary) as a result of the employer's violation of this Act;
    - interest on that amount; and
    - any additional amount of liquidated damages equal to the sum of the two aforementioned amounts UNLESS employer's violation of the Act was in good faith and employer had reasonable grounds for believing the act or omission was not in violation of this Act
- Equitable relief may include:
    - employment,
    - reinstatement, and/or
    - promotion
- Reasonable attorneys' fees

Emotional distress damages are not recoverable in an action filed under FMLA (29 USCS §§ 2601-2654). *Rodgers v. City of Des Moines*, 435 F.3d 904 (8th Cir. 2006).

V. AVAILABLE REMEDIES—Iowa

A. Iowa Civil Rights Act (Iowa Code Chapter 216)

- judicial relief mirrors that available from the administrative agency
- if employer has engaged in a discriminatory or unfair practice, an order that the employer to cease and desist from the discriminatory or unfair practice is available, as well as the following remedial actions as necessary:
  - o employ, reinstate, or promote employee with or without pay
    - (amount reduced by interim earned income and unemployment compensation)
  - o payment of damages which must include, but is not limited to
    - actual damages,
    - court costs, and
    - reasonable attorneys' fees
- If employer engages in unfair or discriminatory practices related to wages, damages recoverable by the employee include, but are not limited to:
  - o court costs,
  - o reasonable attorneys' fees, and
  - o EITHER:
    - 2 times the wage differential paid to another employee compared to injured employee for the time period for which injured employee has been discriminated against OR
    - when employer willfully violated this Act, 3 times the wage differential paid to another employee compared to injured employee for the time period for which injured employee has been discriminated against

"Punitive damages under the ICRA are prohibited in employment cases." *Canterbury v. Federal-Mogul Ignition Co.*, 418 F. Supp. 2d 1112, 1119, 2006 U.S. Dist. LEXIS 11204 (S.D. Iowa 2006) (citing *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996) ("Our civil rights statute does not allow for punitive damages."); *Chauffeurs, Teamsters & Helpers Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 382-84 (Iowa 1986) (punitive damages not available under the ICRA)).

The Iowa Supreme Court has interpreted the ICRA to permit the award of compensatory damages for emotional distress in an employment discrimination action "without a showing of physical injury, severe distress, or outrageous conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 526 (Iowa 1990).

- Employee is only entitled to damages actually caused by the discriminatory or unfair practice (damages for emotional distress are a component of actual damages). Even though employee does not have to show physical injury, outrageous conduct or severe distress to obtain an award for emotional distress, emotional distress must be related to the discriminatory or unfair practice NOT a negative reaction due to the filing of the lawsuit or the trial. *Dutcher v. Randall Foods*, 546 N.W.2d 889 (Iowa 1996).

B. Iowa Wage Payment Collection Act (Iowa Code Chapter 91A)

- When an employer intentionally fails to pay wages or reimburse expenses, employer is liable for:
  - wages or expenses intentionally failed to be paid or reimbursed,
  - usual and necessary attorneys' fees, and
  - in some instances, liquidated damages
    - liquidated damages = 5% x amount of wages or expenses not paid x total number of days wages or expenses were not reimbursed (excluding Sundays, legal holidays, and first seven days after date on which wages or expenses were not paid)
    - liquidated damages amount CANNOT exceed amount of unpaid wages or expenses

Iowa Wage Payment Collection Act does not permit an award of liquidated damages for the denial of accrued vacation benefits. *Cantaberry v. Tyson Foods, Inc.*, 2001 U.S. Dist. LEXIS 11524 (N.D. Iowa Aug. 8, 2001) (finding that vacation benefits are not "wages" within the meaning of the IWPCA, such that liquidated damages are recoverable) (citing *Dallenbach v. Mapco Gas Prods., Inc.*, 459 N.W.2d 483, 489 (Iowa 1990)(annual bonus not wages for purposes of recovering liquidated damages)).

The Iowa legislature intended to reserve liquidated damages for instances involving the intentional withholding of regular paychecks and commissions NOT for disputes over the calculation of discretionary bonuses payable at year-end. *Runyon v. Kubota Tractor Corp.*, 653 N.W.2d 581 (Iowa 2002).

Liquidated damages are not available if there is a dispute over whether the wages are actually owed. *Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 2005 U.S. Dist. LEXIS 19097 (S.D. Iowa July 28, 2005).

Under Iowa Code § 91A.8, the award of attorneys' fees to a successful litigant was mandatory, which included appellate attorneys' fees where appropriate. *Olver v. Tandem HCM, Inc.*, 2010 Iowa App. LEXIS 1411 (Nov. 24, 2010).

In the context of Iowa Code § 91A.8, a judge is presumed to be an expert on what are reasonable attorneys' fees. *Mississippi Valley Broadcasting, Inc. v. Mitchell*, 503 N.W.2d 617 (Iowa App. 1993).

- Where there is substantial evidence to support a finding that the employer intentionally and willfully failed to pay wages actually due to the employee, liquidated damages may be awarded. *Tapia v. Murphy*, 2009 Iowa App. LEXIS 177 (Mar. 11, 2009).

C. Discrimination against witnesses (Iowa Code § 915.23)

- Employee is entitled to recover:
  - actual damages,
  - court costs, and
  - reasonable attorneys' fees
- Additionally, employee may petition the court for:

- a cease and desist order against employer and
- Reinstatement to previous position of employment

D. Penalizing due to jury duty (Iowa Code § 607A.45)

- Employee may petition the court for:
  - recovery of lost wages (not exceeding a period of wages lost for 6 weeks),
  - reinstatement, and
  - reasonable attorneys' fees

E. Blacklisting (Iowa Code § 730.2)

- If employer blacklists a discharged employee or attempts to prevent such discharged employee or employee who voluntarily left employment from obtaining employment with another company, ex-employee may recover treble damages.

  Iowa Code § 730.2 only prohibits former employer from blacklisting discharged employee with future employers and does not apply to the former employer itself. *Thomas v. Union Pac. R.R. Co.*, 2001 U.S. Dist. LEXIS 21150 (S.D. Iowa May 23, 2001).

F. Wrongful Termination in Violation of Public Policy

"Wrongful discharge of employment in violation of public policy is an intentional tort in Iowa . . . [and] the legal remedy provided for victims of the tort covers the complete injury, including economic loss such as wages and out-of-pocket expenses, as well as emotional harm." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 769 (Iowa 2009) (citing *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 355 (Iowa 1989)).

"Lost future wages and benefits under an employment contract are normally recoverable as compensatory damage in a wrongful-termination action." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 770 (Iowa 2009) (citing *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 687 (Iowa 1990)).

"[T]he upper range of emotional-distress damages increases as the nature of the wrongful conduct involved becomes more egregious, and the emotional distress suffered becomes more severe and persistent. Even the length of the employment, compatibility of the worker in the employment, age and employment skills of the worker, and the span of time necessary to become reemployed impact the amount of emotional-distress damages." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 773 (Iowa 2009).

"Generally, punitive damages may be awarded in an action for wrongful discharge from employment in violation of public policy." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 773 (Iowa 2009) (citing *Tullis v. Merrill*, 584 N.W.2d 236, 241 (Iowa 1998)).

Case Law Update: Commercial Contract

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Iowa Defense Counsel Association Case Law Updated: Commercial Contract

Table of Contents

I. Contracts

A. Arbitration

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (Scalia)

Facts: The respondents in this case—the Greenwoods—had applied for and received a credit card issued by CompuCredit Corporation. The application for the credit card had a clause that provided: "Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, 'Claims'), upon the election of you or us, will be resolved by binding arbitration . . . ."

The Greenwoods filed a class action lawsuit against CompuCredit for alleged violations of the Credit Repair Organization Act ("CROA"). The allegations largely centered around certain CompuCredit representations that its credit card could be used to rebuild poor credit and excessive fees on the card. CompuCredit moved to compel arbitration under the terms of the application. The district court denied CompuCredit's motion to compel arbitration on the grounds that Congress had intended CROA violations to be non-arbitrable. A panel of the Ninth Circuit Court of Appeals affirmed the district court and the United State Supreme Court granted certiorari.

Holding: Where a federal statute does not specifically state that claims brought under the statute are exempt from the provisions of the Federal Arbitration Act, then courts will enforce the terms of an agreement that require arbitration.

Analysis: The issue in this case is whether the Federal Arbitration Act ("FAA") requires enforcement of an arbitration provision in a contract. The Court first noted that the purpose of the FAA, enacted in 1925, was to sweep away judicial hostility toward arbitration. To that end, the Court has followed a "liberal policy" in favor of enforcing arbitration agreements.

This liberal policy in favor of enforcing arbitration agreements creates tension with key provisions of CROA. Those provisions give consumers the right to cancel certain contracts, prohibits certain practices, and ensures enforcement through a private cause of action for consumers.

Included within CROA are also certain required disclosures. One of those disclosures informs consumers that they have a right to sue a credit repair organization for violations of CROA. The Ninth Circuit read this language to mean that consumers were guaranteed a right to bring a claim in a court of law.

The Court rejected the Ninth Circuit's reasoning. The Court explained that language in CROA that grants consumers a right to sue to enforce the statute does not necessarily require that the consumers' redress be sought in a court of law. The Court pointed to several other cases involving statutes with provisions that gave aggrieved parties the right to "sue . . . in any

appropriate United States district court . . . .” This language has not precluded parties from electing to use arbitration as an alternative means of providing relief.

In the Court’s view, this interpretation is not inconsistent with the mandatory disclaimers provided to consumers. The Court explained that the purpose of the disclosures is to provide a concise and understandable summary of rights that a layman can understand. That it is written for a layman necessarily means that some of the terminology will be imprecise. Thus, it is not inconsistent with CROA to enforce an arbitration clause.

Justice Ginsburg dissented.

B. Implied Covenant of Good Faith.

Am. Tower, L.P. v. Local TV Iowa, L.L.C., 809 N.W.2d 546 (Iowa Ct. App. 2011)

Facts: American Tower, L.P., owns a broadcasting tower in Slater, Iowa. For several years, American Tower leased broadcasting space on its tower to WHO-TV. When WHO-TV was sold to Local TV the lease was assigned to Local TV.

Local TV owned its own broadcasting tower in the vicinity, so it decided to no longer use the Slater tower. Local TV stopped acquiring FCC permits to operate the Slater Tower and stopped paying rent for the tower.

American Tower then sued Local TV for breach of contract and equitable estoppel. American Tower sought to recover the entire balance due for the remaining term of the lease—approximately $982,687.03. Local TV moved for summary judgment and argued that the terms of the lease at issue permitted it to do what it did. The district court found in favor of Local TV. The district court explained that by terminating the lease Local TV forfeited only the amount that it had prepaid on the lease.

Holding: The implied covenant of good faith implicit in exercising an option to void a contract must give way to contract language.

Analysis: The Court of Appeals structures its analysis around the two claims that American Tower raised in its petition—breach of contract and equitable estoppel.

Breach of Contract Claim

The court began by discussing the breach of contract claim. The court first looked at the language of the lease and determined that there was no need to incorporate extrinsic evidence. Specifically, the court found the following language dispositive of the claim:

> In the event that Lessee's failure to acquire, or loss of, its license or permit is due to any fault or act (or failure to act) on the part of Lessee, *then Lessee shall be entitled to no refund of rental payments previously made, but shall be relieved of any further obligations to make Lease payments* or to perform any of its other

> rental obligations for any period after the date of such termination (provided, however, that it nevertheless shall pay any unpaid additional rent or other authorized charges which may be owed through the date of termination).

In the court's view, the emphasized language clearly indicated that American Tower was not entitled to receive the balance of the lease payments as damages. Nevertheless, American Tower argued that if the lease language really did permit Local TV to void the lease at its option then implicit within that term was the requirement that Local TV exercise its option in good faith.

The court reviewed Iowa case law that requires parties with sole discretion to terminate a contract to exercise that discretion in good faith. The court agreed that the lease, which required Local TV to obtain all necessary FCC permits, contained an implied covenant of good faith. However, that implied covenant still had to contend with the above emphasized language of the lease, which limited American Tower's damages to any prepaid lease payments. The court found that any remedy for a breach of the implied covenant of good faith was removed by the contractual language limiting damages to forfeiture of any prepayments.

Equitable Estoppel Claim

The court first noted the Iowa Supreme Court's approval of equitable estoppel in contract law. The doctrine provides that parties "estop themselves from asserting any right under the contract by conduct inconsistent with the continued existence of the original contract." However, the court declined to allow an equitable estoppel remedy based on a theory of fraudulent concealment where the parties had clearly contemplated the contingency that resulted in the lawsuit. The lease provided a remedy for what happened in this case—one party deciding to terminate the lease. Therefore, American Tower was not entitled to equitable estoppel.

C. Substantial Performance.

Flynn Builders, L.C. v. Lande, 814 N.W.2d 542 (Iowa 2012) (Appel)

Facts: The Landes[1] hired Flynn to build a home. There was a dispute between the parties regarding exactly what role Flynn was hired to fulfill. Flynn believed he was the general contractor while the Landes believed they were the general contractor, and would work with Flynn to hire various subcontractors.

The Landes entered into a contract with Flynn. Unbeknownst to the Landes at the time they signed the contract, Flynn had included $20,000 in extra costs for the materials. When the Landes and their bank learned of this excess payment they refused to tender any additional payments. At that point, Flynn was approximately 85% done with his portion of the contract. At that point much of the siding was left off, there were no doors, and the rest of the house had exposed studs. When Flynn was no longer getting paid he walked off the job and filed a mechanics lien.

[1] The Landes involved in this suit are not related to the presenter.

Holding: Flynn could not recover under a mechanic's lien when he had not completed the contract.

Analysis: The issue on appeal was whether Flynn had substantially performed under the contract in order to entitle him to foreclose his mechanic's lien. The court explained that it had previously elaborated on what constituted substantial performance—performance without a material breach. The court then looked at the performance in this case. It reiterated that substantial performance cannot be defined by a mathematical formula. Here, the incomplete work materially affected the habitability of the structure, rendering Flynn's performance materially defective under the contract. Thus, Flynn could not foreclose the mechanic's lien.

D. Repudiation

Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011) (Wiggins)

Facts: Signature Management Group ("SMG") and Wild Rose Entertainment ("Wild Rose") entered into an agreement addressing future casino management operations. That agreement provided, in part, that if Wild Rose had an opportunity to manage any other Iowa casino that it would make a good faith effort to involve SMG. In May 2005, Wild Rose received a license from the Racing and Gaming Commission to develop a casino near Emmetsburg. Approximately two weeks after receiving the license, Wild Rose sent SMG a letter that terminated the Wild Rose/SMG relationship. SMG's attorney responded asking whether this meant that Wild Rose was ending negotiations for casino management. Wild Rose's attorney responded that he was going to meet with this client later to discuss the possibility of a future relationship between SMG and Wild Rose. SMG's attorney responded that SMG would await Wild Rose's reply.

Shortly thereafter, SMG sent Wild Rose a proposed management agreement for the Emmetsburg casino. Wild Rose never responded. SMG Then filed a lawsuit against Wild Rose (Pavone I). A jury found that Wild Rose violated the terms of the management agreement, which required Wild Rose to negotiate in good faith regarding any future casino development. The Iowa Supreme Court affirmed the verdict.

During the pendency of Pavone I, Wild Rose received a license from the Racing and Gaming Commission to develop a casino in Clinton. SMG filed a second lawsuit against Wild Rose when Wild Rose did not negotiate with SMG for the management of the casino in Clinton. Wild Rose filed for summary judgment. Wild Rose asserted that the doctrine of claim preclusion prohibited SMG's second lawsuit since it was premised on the same agreement as Pavone I. The district court entered judgment in favor of Wild Rose. The Iowa Supreme Court transferred it to the court of appeals, which also affirmed.

Holding: Affirmed the ruling of the district court and the court of appeals.

Analysis: SMG argued that Wild Rose did not repudiate the agreement because its original letter was ambiguous as to whether Wild Rose would not negotiate for the management of the Emmetsburg casino, or every other casino. The Iowa Supreme Court briefly reviewed Iowa law

regarding repudiation. Iowa follows the Restatement (Second) of Contracts approach, which requires that a statement be sufficiently positive as to be reasonably understood to mean that breach will occur. In this case, Wild Rose's letter stated that it considered its dealings with SMG to be over. This, in the court's view, was sufficiently positive to be reasonably understood as a repudiation. The court also pointed out that SMG's lawsuit in Pavone I would have been unnecessary if it truly believed that the agreement had not been repudiated.

Since the court concluded that there was no genuine issue of material fact as to whether Wild Rose repudiated the agreement, it then had to consider whether SMG had to bring all of its claims for damages in one action. The court explained that the doctrine of claim preclusion prohibits a second action based upon the same facts as a prior action which has reached final judgment. The court concluded that SMG had learned of the facts regarding the Clinton casino prior to filing its lawsuit regarding the Emmetsburg casino, and long before final judgment in Pavone I. SMG had a full and fair opportunity to litigate the Clinton casino claims in Pavone I, but it chose not to. SMG did not have a right to bring another lawsuit.

E. Fiduciary Duty

Pitts v. Farm Bureau Life Ins. Co., 11-0117, 2012 WL 2604622 (Iowa July 6, 2012) (Zager)

Facts: Tom Pitts ("Tom") was required to provide child support payments to his daughter, who was born in 1987. Part of that support obligation included a requirement that Tom maintain a $35,000 life insurance policy, payable to his daughter, for as long as he still owed child support. Tom then married Michele who was not the mother of the child he was providing child support for.

Tom and Michele decided to purchase a life insurance policy that would both cover Tom's child support obligation and provide a residual benefit for Michele if she survived him. Tom listed his daughter as the beneficiary of the first $35,000 and Michele as the beneficiary of any remaining proceeds.

Tom's child support obligation ended in 2005, at which time he asked his insurance agent to make Michele the primary beneficiary of the first $35,000 in proceeds from the policy. Michele believed that the agent told them on several occasions that the change had been effected. Michele also believed that Tom had completed the necessary paperwork to make the change.

When Tom passed away in 2007, Michele went to the same insurance agent's office to complete the paperwork to receive the life insurance proceeds. While Michele was in the agent's office, and in front of her parents, the agent received a call informing him that the daughter was still the primary beneficiary of the first $35,000.

During summary judgment, the district court found that Tom had not executed a written request to make Michele the primary beneficiary. Therefore, the agent's failure to remove the daughter as the primary beneficiary was because the agent lacked authority to do so. Michele filed a motion to enlarge the district court's ruling, arguing that the agent had informed Tom, Michele, and Michele's parents that Michele was the primary beneficiary. The district court denied

Michele's motion to enlarge, and dismissed the case entirely. The district court found that the agent owed no duty of care to the primary beneficiary. The court of appeals affirmed.

Holding: Where an insurance agent is aware that an individual is the intended beneficiary of the transaction between the agent and the insured, and the beneficiary can prove that she was the intended beneficiary, then an agent will be liable the beneficiary's damages resulting from the agent's own negligence.

Analysis: The court first looked at whether the district court appropriately granted summary judgment in the first place. The court found that the district court's ruling failed to address Michele's claims for relief—specifically that as the intended beneficiary the insurance agent owed her a duty of care.

The court then turned to the question of whether the insurance agent owed a duty of care to intended beneficiaries. Looking first at Iowa case law, the court noted that attorneys in Iowa do owe a duty to the "direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments." The court explained that the rationale for this rule:

> "[O]ne of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired."

The court found this rationale applicable to the insured/agent relationship as well. In extending an agent's duty to intended beneficiaries, the court was careful to note that the scope of liability will be limited. Specifically, the court explained:

> "Requiring a plaintiff to show that she was the intended beneficiary of the transaction between the agent and the insured, and the agent was aware of the plaintiff's status as the intended beneficiary, limits the universe of potential plaintiffs to those who would be foreseeable to the insurance agent."

Thus, the court has created a new duty for insurance agents, but one that will likely be limited.

The court also addressed another point that is particularly worth noting in a review of commercial contract case updates. Footnote four of the majority's opinion addressed the application of the economic loss doctrine to the facts of the case. The court noted that the insurance company had failed to raise as an argument that Michele's recovery was barred because she had only suffered economic harm. Under the economic loss doctrine, recovery in tort is limited to losses due to injury, and not economic losses arising from contract. This rule is

intended to prevent the "tortification of contract law." A breach of contract action is the sole means of recovery for economic losses.

The court seemed troubled by the difficulty of determining whether the economic loss rule would apply under the circumstances of this case, and troubled that the insurance company did not raise the argument. The court's language, however, suggests that when the issue arises the court will extend the exception to the economic loss rule for suits against professionals to liability based on this new theory of recovery.

II. Entities

Oberbillig v. W. Grand Towers Condo. Ass'n, 807 N.W.2d 143 (Iowa 2011) (Waterman)

Facts: The case centered on the West Grand Towers, a horizontal property regime formed under Iowa Code § 499B. Residents each own individual condominiums in addition to an undivided percentage interest in the common areas. The plaintiff, Oberbilligs, owned one unit and an undivided 1.310% interest in the common areas. The Scagiliones owned two units and had a 3.491% interest in the common areas. The condominium is run by an association organized as a membership corporation under Iowa Code 504 with the purpose of maintaining and repairing the building.

The corporation is run by a six member board, with each member being required to be a condo owner or married to a condo owner. Among the board's duties is the requirement to see to the maintenance and repair of common areas, which includes the parking garage. The board's governing documents require that the board set a budget for each year. That budget then determines the assessments each condo owner must pay for the year.

The controversy that arose in this case centered over the authority of the board to authorize improvements. The specific governing document language at issue provided:

> Except for the management agreement described in Article II, Section 8(c) hereof and expenditures and contracts specifically authorized by the Declaration and Bylaws, *the board shall not approve any expenditure in excess of Twenty-five Thousand Dollars ($25,000), unless required for emergency repair, protection or operation of the Common Elements or Limited Common Element,* nor enter any contract for more than five (5) years without the prior approval of two-thirds (2/3) of the total ownership of the Common Elements.

(emphasis in original). The board had been concerned about the parking garage for many years, and commissioned a study in 2006 to determine how much it would cost to repair the parking garage. The report indicated that there were several serious problems with the garage, and that it would cost close to $200,000 to repair.

The board was not sure whether the bylaws required approval of the repairs by the condominium association members. The board asked a retired lawyer and resident for a legal opinion. The opinion concluded that the board need not ask for member approval because the

garage was a common element and protection of common elements does not require member approval. The board then approved the expenditures, informed the members, and levied the assessment to pay for the repair. Only the three plaintiffs in this case did not agree to pay.

The three plaintiffs then filed suit seeking declaratory relief. Specifically, the plaintiffs asserted the board exceeded its authority when it approved the garage repairs without submitting the issue to the members. The board answered and counterclaimed for the value of the unpaid assessments for the garage repair.

The district court ruled in favor of the plaintiffs. The court concluded that the board had misinterpreted the bylaws—reading out of existence the $25,000 limitation. As a result, the district court invalidated the special assessments. The board then appealed.

Holding: The district court was reversed and remanded because the association's bylaws were ambiguous, and the business judgment rule requires the court to defer to the board to interpret ambiguous bylaws.

Analysis: The court began by noting that it has never had the opportunity to adjudicate a dispute over the meaning of condominium bylaws. The court explained that bylaws and corporate documents essentially create a contract between the members. The court explained that as a result, general principles of contract law govern the interpretation of the bylaws.

Applying principles of contract law to the case, the court first concluded that the relevant bylaw governing emergency repairs was ambiguous. The court then concluded that the association had the authority to interpret the ambiguous portions of the bylaws because the bylaws vested the board with such authority.

The last issue the court reached was whether to afford any deference to the board's interpretation of its bylaws. The court had not previously extended the business judgment rule to a nonprofit condominium association. Surveying other states, the court found many states have extended the business judgment rule to cover the actions of nonprofit home-owner associations. The court also chose to extend the scope of the rule to cover not just individual director liability, but also to protect the interpretive authority of the board over its own bylaws. This serves the underlying purpose of the rule—limiting second guessing of board decisions.

III. Priority

A. Dower Interest Priority

Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802 (Iowa 2011) (Waterman)

Facts: The facts of this case are best described in the court's own words:

> On May 25, 2007, Edward Boesen purchased commercial real estate in Ankeny. The deed conveyed the land "to Edward J. Boesen, a married person" and was recorded in the Polk County Recorder's Office the same day. To finance the

purchase, Edward obtained a $232,000 loan from Freedom Financial and executed a promissory note for $232,000 and a mortgage securing $290,000 in loans and advances on the Ankeny real estate. The mortgage was recorded within a minute of the deed. The loan documents Edward signed contained a purchase-money mortgage recital and expressly waived all dower interests. Edward's signature and Maureen's purported signature on the mortgage were acknowledged by a notary public. Maureen claims her signature was forged. The record contains no details as to the forgery.

Edward died intestate on July 15, 2008, leaving Maureen as his surviving spouse. Edward and Maureen had four children together. After Edward's death, the mortgage fell into default; Freedom Financial issued a notice of default and then filed its petition to foreclose the mortgage on August 7, 2008.

Freedom Financial's petition asserted its mortgage was superior to all other claimants' interests in the Ankeny real estate. The bank sought judgment for the $228,056.42 remaining on the promissory note and for attorney fees and costs as provided for in the promissory note and mortgage. Maureen and the estate filed answers and raised affirmative defenses, contending the mortgage was void because Maureen did not execute the mortgage and Edward could not unilaterally convey her statutory dower interest.

Freedom Financial moved for summary judgment. The bank did not challenge the allegations Maureen's signature was forged, but argued its purchase-money mortgage nevertheless remained superior to Maureen's statutory dower interest. Maureen resisted the motion and cross-moved for summary judgment on grounds she never executed the mortgage and Edward could not sign away her statutory dower interest in the Ankeny property. The estate moved for summary judgment, alleging Maureen's fraudulent signature rendered Freedom Financial's mortgage invalid as to Maureen's interest in the property. The estate also asked the court to subject Maureen's statutory interest in the real estate to its debts and charges.

On January 26, 2009, the district court granted Freedom Financial summary judgment and entered judgment against the estate in the amount of $228,056.42 plus interest, court costs, attorney fees, and other advances made by the bank. The district court ruled that, under Iowa Code section 654.12B, the bank held a purchase-money mortgage superior to “any other right, title, [or] interest ... arising through, or under Edward.” The district court concluded that Maureen's statutory dower right was a real property interest arising through Edward. The district court also ordered any foreclosure sale surplus to be paid to the estate—implicitly concluding Maureen's statutory dower interest under section 633.211 was subject to the estate's debts and charges. On February 25, 2009, the district court entered a decree of foreclosure.

Later that day, the district court filed a supplemental order rejecting Freedom Financial's contention that its mortgage entitled its nonpurchase-money advances

> to Boesen to receive purchase-money priority. After the bank sought clarification, the district court filed a March 16, 2009 order reiterating that the estate is entitled to any foreclosure sale surplus, but that Freedom Financial's secured nonpurchase-money advances retain their priority vis-à-vis other estate creditors.
>
> The estate appealed the district court's summary judgment order, its foreclosure decree, and its supplemental order. Maureen filed a "cross-appeal" appealing all rulings. The case was transferred to the court of appeals. The court of appeals affirmed the district court's foreclosure decree in favor of Freedom Financial, but reversed the district court's order awarding the sale surplus to the estate. The court of appeals held Maureen's statutory dower interest in the real property was free and clear of the estate's other debts and charges. We granted the estate's application for further review.

Holding: Where a husband purchases land and at the same time executes to the grantor a mortgage for the unpaid purchase price then that mortgage interest is superior to a wife's dower interest.

Analysis: In the court's words, the issue for it to decide was "whether a surviving spouse's dower interest—codified in Iowa Code section 633.211 (2009) as to nonhomestead real property—is subject to either a lender's purchase-money mortgage or the other debts and charges of the estate of the spouse who died intestate."

The bank argued that its purchase money mortgage interest had priority over the dower interest of the wife. After reviewing precedent, the court agreed with the bank.

The court acknowledged precedent that pointed out that a decedent cannot unilaterally convey a spouse's dower interest. However, the court also reviewed the purpose of the purchase money mortgage. According to Iowa law, a purchase money mortgage is "taken by a lender who, by making an advance or incurring an obligation, provides funds to enable the purchaser to acquire rights in the real estate, including all costs in connection with the purchase, if the funds are in fact so used." Based on this purpose, it is clear that a dower interest cannot take priority over a purchase money mortgage.

MetaBank v. Estate of Boesen, 810 N.W.2d 532 (Iowa Ct. App. 2012) (Table Decision)

Facts: Following the Iowa Supreme Court's Decision in Freedom Fin. Bank v. Estate of Boesen, yet another case involving Edward Boesen's spouse's dower interest worked its way to the Court of Appeals. At issue in this case was a different piece of property, located on Hickman road in Urbandale. As with other properties he purchased, Edward Boesen placed the Hickman property into an LLC.

Edward Boesen initially purchased the property on an installment contract, with a balloon payment for the entire principal amount of the purchase price to occur approximately one year later. This was to allow Edward an opportunity to obtain financing. Edward obtained financing from a bank and paid off the installment contract.

Seeking to remodel the building, but needing additional funds, Edward Boesen then obtained a loan from a second bank and secured the loan with mortgage on the Hickman property. He used the funds from the second bank to pay off the loan from the first bank. He then planned to use the remaining amount from the second bank's loan to remodel the building.

However, Edward Boesen needed additional funds, so he sought a loan from a third bank. Ultimately, he obtained a loan from a third bank and secured it with a mortgage on the Hickman property. He then used the money from the third bank's loan to pay off the second bank's loan.

Edward Boesen then died intestate. The mortgage with the third bank fell into default, and the bank began to foreclose. The bank named Boesen's estate as the defendant. The estate filed an answer and affirmative defenses alleging that the mortgage was void because Maureen—Edward Boesen's wife—had not relinquished her dower interest. Maureen then intervened as a third party plaintiff and brought a quiet title action against the bank. The district court ultimately concluded that the bank's interest took precedence and entered a foreclosure decree.

Holding: Where a deceased spouse fails to pay the purchase price for property, that failure prevents a surviving spouse from claiming dower not only against the immediate contract seller but against any party who stands in the shoes of the seller.

Analysis: The court of appeals began by explaining that a dower interest is a property right in the spouse, and the spouse cannot be divested of it without her consent. However, the dower interest has always been subject to certain exceptions, such as for purchase money mortgages.

Maureen nevertheless argued that the instant case did not involve a purchase money mortgage. The court of appeals agreed, but found other Iowa law instructive. Going back to a decision in 1858, the court of appeals concluded that Maureen's dower interest could not exceed the interest of her husband. The insurmountable problem with Maureen's claim was that she, in effect, sought to assert an interest in the property that was greater than what her husband possessed. The court of appeals made clear that a spouse's dower interest can never exceed the interest held in the property by the deceased spouse.

B. Agricultural Liens

Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011) (Waterman)

Facts: The case arose as a result of the competing security interests of the financial institution Primebank and the feed supplier Oyens Feed. Primebank had extended credit to a farm, securing that credit with an interest in the farm's livestock. Oyens Feed extended credit for the farm to purchase feed for the farm's livestock. Pursuant to Iowa Code § 570A.3, Oyens Feed's credit was secured by the livestock that consumed the feed—the same livestock securing Primebank's credit extension.

The farm then filed for bankruptcy. Both Primebank and Oyens Feed claimed liens on the proceeds of the sale of the farm's remaining livestock. Primebank had a perfected article 9

security interest in the livestock, while Oyens Feed relied on a perfected § 570A.5(3) agricultural supply dealer lien.

The farm filed an adversary proceeding to determine which party had priority. The bankruptcy court ultimately granted partial summary judgment in favor of Primebank on the grounds that Oyens Feed had failed to comply with the requirements of § 570A.2. The case was then appealed to district court in the Northern District of Iowa. The district court certified the following question to the Iowa Supreme Court:

> Is the special priority afforded agricultural supply dealer liens for livestock feed under Iowa Code § 570A.5(3) susceptible to the affirmative defense afforded financial institutions under § 570A.2(3), or does § 570A.5(3) instead operate independently of or as an exception to § 570A.2(3), so as to allow an agricultural supply dealer supplying livestock feed to obtain a lien that, pursuant to § 570A.5(3), has priority over a financial institution's prior perfected security interest in the same collateral to the extent of the difference between the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater, without the dealer having complied with the requirements imposed by § 570A.2(1) and contemplated under § 570A.2(3)?

Holding: A secured lender will retains its secured position up to the acquisition price of the livestock. However, to the extent that the livestock's value is increased by the addition of feed supplied by an agricultural supply dealer, then the feed supplier's security corresponds to the livestock's increased value.

Analysis: The Iowa Supreme Court began its analysis by looking at the history of security interests in livestock. It noted that Chapter 570A was enacted during the depths of the farm crisis of the 1980s. The goal of that section was to ensure that farmers, even in difficult times, could always secure funds to purchase necessary farm inputs. Pursuant to § 570A.2, a farm dealer could then ensure it had a first priority security interest in the livestock by filing a certified request with any other lien holders.

The legislature then amended Chapter 570A in 2003 for the purpose of maintaining the priority status of agricultural liens over other security interests and liens. In other words, Oyens Feed's security interest in the livestock would continue to trump Primebank's interest in livestock to the extent that the livestock's value was enhanced by Oyens Feed's feed.

The dispute in this case arose over whether Oyens Feed's security interest still took precedence over Primebank's when Oyens Feed failed to file a certified request pursuant to § 570A.2. After analysis of the legislative history of Chapter 570A, the court concluded that the overriding purpose of that chapter is to ensure that farmers are able to weather difficult times by guaranteeing access to credit for livestock feed. The court explained that there is a specific rule—imposed by § 570A.5(3)—that livestock feed suppliers be granted special priority. Thus, a feed supplier's lien will have first priority over all other liens, even prior perfected liens.

The decision has limitations that are worth noting. First, the court made it clear that this special priority status only applies to feed supplied for livestock consumption, not crop inputs. Second, the court did not address what actions a supplier must take in order to perfect its lien. Thus, an institution's perfected security interest will have priority only up to the acquisition price of the livestock. A feed supplier will have priority over any value added as a result of the livestock's feed consumption.

Peoples Trust & Sav. Bank v. Sec. Sav. Bank, 815 N.W.2d 744 (Iowa 2012) (Appel)

Facts: This case arose because of a controversy between two banks. Peoples Trust & Savings Bank ("Peoples") loaned money to a farmer who raised feeder cattle. Over time, the farmer had borrowed in excess of $500,000. These loans were secured by an interest in "farm products" which specifically included "livestock" and "cattle." Peoples filed UCC financing statements in 2000, 2003, and 2007. Nevertheless, Peoples was concerned about the farmer's financial situation and decided to not loan any additional funds to the farmer.

The farmer then turned to Security Savings Bank ("Security"). The farmer partnered with a cattle buyer from Swift & Co. The cattle buyer had a longstanding relationship with Security, so Security agreed to provide financing for cattle purchases. Security required both the farmer and the cattle buyer to be parties to the loan. Once they both signed the loan, the cattle buyer began purchasing cattle for the farmer. The cattle would then be delivered to the farmer along with an invoice. The farmer would write a check to the cattle buyer for the invoiced amount while Security deposited money in the farmers account to cover the check.

The farmer raised the cattle purchased through this arrangement. When the cattle were ready, the cattle purchaser would sell the cattle to Swift & Co and pay the proceeds to Security. Peoples was unaware of this arrangement. Peoples first learned of the Security loan while conducting a UCC search on the farmer and found the Security UCC filing. Peoples then sent notices indicating its security interest in the cattle. The farmer then sold the cattle and paid the proceeds to Security. When Peoples learned of his actions it filed a claim for conversion against Security. The district court granted Peoples' motion for summary judgment and entered judgment in favor of Peoples. Security appealed.

Holding: Where two parties sign a loan, there is a factual question as to whether property purchase using the proceeds of that loan is owned by an individual party or jointly by both parties. The factual question will be resolved with an analysis of the nature of the commercial interactions between the two parties.

Analysis: The analysis in this case, comes down to a question of whether the farmer and cattle buyer, as coborrowers under the loan, jointly owned the cattle purchased with proceeds from the loan. If the farmer became the sole owner, then the issue would be resolved and People's security interest would trump Security's interest. If, however, the cattle buyer and farmer owned the cattle jointly then the resolution becomes more problematic.

Under the facts of this case, the court concluded that the farmer and the cattle buyer were not joint owners of the cattle, even though farmer and cattle buyer cosigned the loan. The farmer

testified several times that he owned the cattle. In addition, money from the loan was deposited in the farmer's personal account, from which he would then write a check to the cattle buyer. These facts demonstrated that it was only the farmer that had an ownership interest in the cattle. The cattle buyer's sole role in the loan transaction was to help the farmer obtain financing.

IV. Procedure

A. Savings Statute

Furnald v. Hughes, 804 N.W.2d 273 (Iowa 2011) (Appel)

Facts: Plaintiff and defendant were involved in a car accident. Plaintiff then filed a timely lawsuit against defendant for personal injuries arising out of the accident, and also filed an underinsured motorist claim against the EMCASCO insurance company.

Eleven days prior to the trial against the defendant, plaintiff unilaterally dismissed the case without prejudice, which was after the statute of limitations had already run on the claim. Two months after dismissing the case, plaintiff refiled the case. Defendant asserted as an affirmative defense the expiration of the statute of limitations. Defendant then moved for summary judgment on the statute of limitations, and the district court granted it. The court of appeals affirmed.

Holding: Where a plaintiff was not "compelled" to dismiss his case by a procedural or technical requirement, then the savings statute codified at Iowa Code § 614.10 will not permit the plaintiff to refile the lawsuit if the plaintiff is already outside of the applicable statute of limitations.

Analysis: The issue on appeal was whether plaintiff's claim was covered by the savings statute at Iowa Code § 614.10. That statute provides: "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."

The plaintiff asserted that he had not negligently prosecuted the action. The reason he gave for dismissing the case was that plaintiff's injuries were continuing to develop. As a result, plaintiff desired an opportunity to reevaluate whether his claim for relief should include future medical expenses.

The defendant countered that the plaintiff should have asked for a continuance. Since the plaintiff did not ask for a continuance, and instead dismissed the case outside of the statute of limitations, the claim was barred by the statute.

The court began to address the issue in this case by noting that there is controversy over this very question in other states. On one hand, the purpose of a statute of limitations is to ensure prompt litigation of claims. On the other, savings statutes ensure that a plaintiff is not left without a remedy when a case is dismissed for an arcane or technical reason.

Under Iowa law, cases have held that a plaintiff "negligently" prosecutes his case when it is dismissed for any other reason than "compulsion." Compulsion has meant that a case is barred from proceeding, whereas in an instance of negligence there is no technical bar to the plaintiff proceeding in the litigation. The court declined the suggestion from the Eighth Circuit Court of Appeals to abandon this "compulsion" test.

The court concluded that limiting the savings statute to instances of compelled dismissal still preserves the underlying purpose of the statute. The statute would still assist a plaintiff who has sued multiple defendants, and settled with some in a way that destroys venue of the underlying action. Such a plaintiff would have his case dismissed but would still have the ability to refile in the appropriate venue.

B. Modification of Statutes of Limitation via Contract

Robinson v. Allied Prop. & Cas. Ins. Co., --- N.W.2d ---, 2012 WL 2498819 (Iowa 2012) (Waterman)

Facts: Plaintiff was involved in an accident with a motorist whose insurance had $100,000 liability policy limit. Plaintiff carried her own underinsured motorist policy with a $50,000 limit. The policy provided in relevant part:

> No one may bring a legal action against us under this Coverage Form until there has been full compliance with all the terms of this Coverage Form. Further, *any suit against us under this Coverage Form will be barred unless commenced within two years after the date of the accident.*

(emphasis in original). The plaintiff began treatment for the injuries that resulted from the car accident with defendant. During the two years following the accident, Plaintiff experienced ongoing problems with back and neck pain. However, plaintiff's overall medical costs remained relatively low—they were well within the defendant's $100,000 policy limit. Negotiations broke down with defendant, and plaintiff ultimately filed a lawsuit against defendant.

Three months after the two year anniversary of the accident—and thus beyond the limitations period for her own carrier's UIM policy—plaintiff met with a surgeon who prescribed a surgical remedy for her persistent back and neck pain. Plaintiff underwent the surgery. Plaintiff's quality of life immediately improved. However, plaintiff's doctors estimated that she would experience some permanent damage that would continue to cause pain.

By this point, defendant's insurance carrier offered to settle for policy limits. Plaintiff also offered to her carrier to settle for policy limits of $50,000. Plaintiff's carrier refused, however, and instead cited the two year limitation period provided in her policy. Plaintiff had not filed a UIM action or entered into a tolling agreement with plaintiff's carrier prior to the expiration of the two year period provided in the policy.

Plaintiff filed a UIM case against her carrier. The carrier filed for summary judgment and argued that the plaintiff's claim was barred by the two limitation period provided in the policy. The district court entered judgment in favor of the carrier. The district court concluded that the two year limitation period was reasonable. The court of appeals reversed, deciding that the two year limitation period was unreasonable.

Holding: It is per se reasonable for an insurer to select the same two year limitation period for filing an underinsured motorist claim that the legislature prescribed for all tort claims in Iowa Code § 614.1(2).

Analysis: The court began by noting that it has previously invalidated shorter limitations periods in contracts. However, the court concluded that the justifications for doing so in prior cases did not apply to the facts of the instant case. The court reasoned that a UIM claim, though ultimately based on contract, has issues that largely resemble a typical motor vehicle negligence action. A jury will still be asked to address issues of comparative fault and extent of both drivers' injuries. These issues make a UIM claim very similar to a tort claim.

The legislature long ago concluded that two years is an appropriate amount of time to require plaintiffs to bring claims for other torts, so there is nothing inherently unreasonable about requiring plaintiffs to bring UIM claims within two years. The court sought to avoid creating a burdensome factual inquiry regarding the timing of plaintiff's discovery of her injuries. Instead, the court viewed the better course to be applying standard principles of tort law to UIM claims.

Finally, the plaintiff also pointed to the difficulty of filing a UIM claim before she knew whether her damages would even exceed the defendant's policy limits. An essential element of proving a claim for UIM coverage is proving that the tortfeasor's policy has been exhausted. Moreover, if plaintiff filed a UIM claim without first knowing whether a tortfeasor's policy will be exhausted then she risks sanctions under Iowa R. Civ. P. 1.413(1), which prohibits filing frivolous pleadings.

The court rejected plaintiff's argument on this front as well. The court explained that it is common practice in Iowa to file both an action against the tortfeasor and an action against the UIM carrier at the same time. Then, the action against the UIM carrier will be stayed pending the resolution of the action against the tortfeasor. The court explained that no court should impose sanctions for filing a UIM action in order to toll a contractual limitation period.

Ultimately, the key for the court here appears to be that, unlike in cases where the court did invalidate two year limitation periods, the policy in this case did not require the plaintiff to know the *extent* of her damages. Rather, the court's opinion makes clear that during the two years following the accident, plaintiff was aware of the *existence* of damages. This is, in the court's view, no different than any other potential tort claim.

It is worth noting that there was also a dissent, written by Justice Hecht, and joined by Justices Appel and Wiggins. Justice Hecht would have instead tolled the limitation period under the contract until it became clear that plaintiff's injuries would exceed the policy limits of the defendant's policy. Justice Hecht pointed out that it was simply not possible for plaintiff to

know that she even had a claim for UIM benefits until she determined that her damages exceeded defendant's policy limits.

The Challenge of Closely Held Corporation Litigation

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THE CHALLENGE OF CLOSELY HELD CORPORATION LITIGATION

I. Classic closely held corporation cases generally involved efforts by the minority shareholders to seek relief from oppressive conduct or what is claimed to be oppressive conduct because they want out.

A. *Maschmeier v. Southside Press, Ltd,* 435 N.W.2d 377, 380 (Iowa Ct. App. 1988): involved majority shareholders transferring corporate property to company they owned and compensating self to exclusion of two minority shareholders. Here, court held that the wasting of corporate assets was oppression towards the minority stockholders. The "wasting" of corporate assets included the leasing, and ultimately the sale, of all printing machines to a competitor, leaving the company as merely a shell of a corporation.

B. *Holden v. Construction Machinery Company*, 202 N.W.2d 348 (Iowa 1982): majority shareholder compensating self through dividends and increased salary at the expense of the working shareholder, collected investment from minority shareholder. Court held that majority both borrowed money from corporation and sought to "freeze out" minority shareholder. Here, that "freeze out" included the barring of the minority shareholder from participating in any managerial activity, including the removal from any official corporate office. Additionally, the previous transfer of majority ownership from brother to brother for lifetime employment of identical compensation constituted "special" amount of consideration and was valid as a contract, establishing an employment expectation beyond those of common minority stockholder expectations. His firing breached that contract.

C. *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517 (Iowa 1974): Majority committed flagrantly wrongful acts, omissions, and concealments that were injurious to both the corporation and stockholders. Caused both damages that can be quantified as well as damage to corporation that cannot be ascertained. Court held that in rare circumstances, the corporate barrier can be "short-circuited" allowing for a stockholder to collect from controlling stockholders and officers. The majority shareholder provided himself a salary without establishing the reasonableness of his compensation, passed on equipment, food, and supply contracts between the corporation and other enterprises owned by the himself without adhering to procedural safeguards, received a loan from a minority shareholder, which instead of repaying through personal finances was repaid through the profits of the corporation, and operated the corporate affairs solely for his own benefit and not that of the corporation or its stockholders. In addition to damages, the court deemed it essential to appoint a special fiscal agent to take control of the corporation and its financial affairs to protect the short-term rights of the minority stockholder and the corporation itself.

D. *Sauer v. Moffett*, 363 N.W.2d 269 (Iowa Ct. App. 1984): Court held that Plaintiffs were considered oppressed because the defendants were unable to account for property and income diverted from the corporation over the

years because of their mismanagement or fraudulent acts. These were performed by the father, who admittedly commingled his personal crops with those of corporate crops and also diverted corporate assets and feed into his own livestock operation. The court also held that the district court order requiring a partial liquidation and redemption of the plaintiffs' shares provided appropriate equitable relief for both their individual claims of fraud and the derivative claim under 496A.94.(Repealed in 1989 and replaced by §490.1430) (Distinguished by *Brodie v. Jordan*, below)

II. **Iowa Legislature has defined the limited circumstances under which a Court can grant relief to the minority shareholder. 490.1430(2011). (copy attached)**

A. Where oppression, illegal or fraudulent conduct is found, the Court is permitted to use its equitable powers to formulate the appropriate relief.

1. A blank check?

2. Traditionally, relief might include that seen in prior Iowa cases cited in I. above.

3. Oppression – what is it really?

III. **An issue which must be addressed at the outset when a case is filed is whether the corporation can advance the money needed to defend the case. See Code of Iowa § 490.851 (director indemnification) and § 490.856 (officer indemnification). (copies attached)**

A. Determination and authorization: disinterested directors by majority vote or by special counsel selected same way or disinterested shareholders § 490.855(2).

B. Party for whom fees are advanced must provide written affirmation regarding standard of conduct in § 490.851 and an undertaking to repay funds advanced if found to have acted improperly under § 490.854 or 55.

1. See 490.853(3)(a)(2), which allows a quorum of the board or shareholders to act if disqualification of the interested parties would take below a quorum.

2. Often the case in a closely held corporation.

IV. **Second issue to address at the outset is whether corporation and majority shareholder can have same counsel.**

A. Are there potential conflicts?

B. What are the practical implications?

V. **Third issue is whether to demand a jury if Plaintiff has not.**

A. The question of whether the behavior is statutorily sufficient to constitute illegal, fraudulent or oppressive conduct is a question of law to be decided by the court. 16A Fletcher Cyclopedia of Corporations §8046.10 (2008-09), *Knapp vs. Parks* 932 A2d 531, 536 (ME 2007), *Reget vs. Paige*, 626 N.W. 2d 302 (Wis. App. 2001)

B. The court should be cautious in finding oppressive conduct and the focus should be on the reasonable expectations of the minority shareholder. Model Business Corporate Act Annotated 4th Ed. §1430, p. 14-122.

VI. Derivative action?

A. Code of Iowa 490.740-747

1. Demand

2. Motion to Dismiss

B. Some authority recognizes the right of an individual shareholder to bring a direct action as opposed to a derivative action.

1. American Law Institute latest draft of Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 11 (April 25, 199) §701(d) recognizes circumstances under which an individual may bring a direct rather than a derivative action to include: (d) if a corporation is closely held, the court in its discretion may treat an action raising derivative claims as a direct action, exempted from those restrictions and defenses applicable only to derivative actions and order an individual recovery if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) material prejudice the interests of creditors of the corporation or (iii) interfere with a fair distribution of the recovery among all interested persons. *Id,* at 798-99.

2. *O'Neal & Thompson*, O'Neal's Close Corporations §8.11, pp. 119, 122, (3rd Ed.) notes the question of whether a direct action or a derivative suit is appropriate, is difficult and that there are problems in requiring a minority shareholder to bring a derivative action. It goes on to note that some courts permit minority shareholders to bring direct suits for breaches of fiduciary duties.

C. Better and safer approach is to bring the case as a derivative action in Iowa.

VII. The bigger problem is resolving the dispute between the minority and the majority where there is no fraudulent, illegal, or truly oppressive conduct but minority is receiving no compensation and wants out.

A. Typically, the closely held corporation is initially put together by one, two, or a limited number of shareholders who all work in the joint enterprise, business, farm.

1. We recognize and applaud the Century and now the Heritage farm or business. The original incorporators likely earned their livelihood from the farm or asset. But by the time of the Century or Heritage Award, and if not by that time shortly thereafter, the asset is held by a multitude of shareholders, many of whom who have absolutely nothing to do with the underlying enterprise but have a minority interest in it. In many situations, those putting the enterprise together set up the initial organization so that the enterprise would be held together for as long as possible. Maybe majority ownership in one family, majority ownership in a single person, or voting control in a single person or family.

    (a) Tax policy structured to allow farm/business to be passed to family

B. There is no right to receive dividends. In fact, there is no right to receive any income from an asset.

C. The statutory language, and indeed that of many cases, speaks to the expectation of a party at the time he or she made the initial investment. That may lead to an analysis such as that in *Cookies Food Products, Inc. v. Lakers Warehouse,* 430 N.W.2d 447 (Iowa 1988) where the Iowa Supreme Court focused on the expectation of the parties making the initial investment in a closely held corporation and found that it did not include a right to dividends.

    1. What is the expectation of a party who simply inherits or is gifted the stock? Arguably, nothing.

D. The problem with the existing statutory framework is that it provides no basis for the relief if the minority shareholder simply wants out. Why should anybody buy his or her stock? The controlling interest by definition likely already has control and may not have the cash or the means to buy the minority interest. There likely is no desire to spend dollars to purchase more stock which provides no benefit. By the same token, the minority shareholder may be demanding a percent of the fair market value of the entity, ignoring the lack of control and traditional minority discount that exists in the context of the valuation of closely held corporate stock. That desired value also may ignore the tax consequences of a liquidation and, in fact, the demand to be bought out may force a liquidation.

    1. Family dynamics may also be involved, i.e. the minority shareholder is simply trying to take apart what the prior generation put together in quasi retaliation for perceived mistreatment.

E. Contrast the circumstance that exists if the majority shareholders of a closely held corporation change the corporate structure in some way. See Code of Iowa §§490.1301-1303 and cases decided thereunder such as *Northwest Investment Corp. v. Wallace*, 741 N.W.2d 782 (Iowa 2007).

1. The minority has a right to fair value without considering any minority discount or tax consequences because the minority had no input or control over the decisions made by the majority. (Iowa Code § 490.1302(1)(d) (giving shareholders the right to obtain "fair value" for his or her shares upon the occurrence of enumerated corporate action, including a reverse stock split) and 490.1301(4) ("fair value" means…c. Without discounting for lack of marketability or minority status…)

   However, a court could consider a "control premium" in determining the fair value of a minority shareholders' stock in an appraisal action following an enumerated corporate action. A "control premium" is the additional consideration an investor would pay over the value of the minority interest to own a controlling interest in the common stock of the company. *Northwest Investment Corp. v. Wallace*, 741 N.W.2d 782 (Iowa 2007).

VIII. Courts are thrust into the breach and often don't have the means to provide relief to the minority where there is insufficient or no evidence of fraudulent, illegal or oppressive conduct. What is the consequence?

A. Finding oppressive, illegal, or fraudulent conduct where that really does not exist.

B. Blurring the distinction between a minority forced acquisition of his, hers or its shares and a change in corporate structure by the majority which, under the statute, gives the minority fair value, without considering minority discount or tax consequence calculations.

IX. Cases from other jurisdictions on point:

A. *Goode v. Ryan,* 489 N.W.2d 1001 (Mass. 1986)

Neither corporation nor majority of shareholders is under obligation to purchase shares of minority shareholders who wish to sell. In this case, minority of shareholders was under no oppression and had not been denied benefits. Minority here solely sought to sell interest in the corporation. Refusal of majority shareholders to purchase minority interest did not violate any fiduciary obligation they owed.

B. *Brodie v. Jordan*, 447 Mass. 866 (2006).

Majority of stockholders acted to "freeze out" the minority. "Freeze out" defined as:

> "The squeezers [those who employ the freeze-out techniques] may refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority

shareholders ...; they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders...."

The trial court found that the defendants had interfered with the plaintiff's reasonable expectations by excluding her from corporate decision-making, denying her access to company information, and hindering her ability to sell her shares in the open market. The Supreme Court of Massachusetts reversed and remanded as the remedy imposed by the lower court, requiring the majority to "Buy Out" the shares of the minority at the price as a % of assets was unwarranted. When a majority acts to "freeze out" the minority, the legal remedy is to restore the minority as nearly as possible to the position had there been no wrongdoing. Here, the remedy would be to restore the benefits lost, and not to impose a buyout. For example, the remedy for a minority shareholder who had a reasonable expectation of employment by a corporation and was wrongfully terminated was reinstatement, back pay, or both. Also used as an example for restoration of benefits lost, the 1976 Massachusetts court ordered a majority to return wrongly appropriated funds to the corporation and distribute them as dividend to shareholders when the minority shareholder had a reasonable expectation of sharing in the company profits. In the case at hand, the Supreme Court of Massachusetts ordered the district court upon remand to determine the reasonable expectation of the minority shareholder and to devise a remedy that grants the minority stockowner restoration of those benefits lost.

C. *Reget v. Paige,* 626 N.W.2d 302 (Wis. Ct. App. 2001)

Until the profits of a corporation are declared as a dividend, the shareholders have no right or title in them and such profits belong exclusively to the corporation. Plaintiff must come forward with sufficient evidentiary facts to show that corporation willfully compensated select employees for the services they provided to the corporation in an effort to pay them dividends, which they willfully withheld from other shareholders. Definition of oppressive behavior: those in control of a corporation willfully treated *some of the shareholders* in a wrongful manner to which other shareholders were not subjected. In effect, oppression requires that the complaining shareholder prove that those in control of the corporation willfully and wrongfully inflicted a direct injury upon him that benefited the stockholders who were not injured. Here, no shareholder treated in a manner more favorable than the Plaintiff.

D. *Gunderson v. Alliance of Computer Prof. Inc.,* 628 N.W.2d 173 (Minn. Ct. App. 2001)

Corporation did not engage in unfair practice towards plaintiff by enforcing buy-sell agreement, signed by Plaintiff during employment, to remove him as shareholder and repurchase his stock. The Buy-sell agreement, signed by all shareholders, permitted corporation to involuntarily withdraw shareholder by a ¾ vote of the total number of shareholders. Any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements. Also, shareholder status of the Plaintiff did not indicate that the plaintiff had a reasonable expectation beyond that of an at-will employee.

E. *Whitehorn v. Whitehorn Farms, Inc.*, 195 P.3d 836 (Mont. 2008)

Plaintiff claims that he was an oppressed minority shareholder. Oppression claim was based on the Corporation's termination of his employment and his status of officer and director. The Court held "the controlling group should not be stymied by a minority stockholder's grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative." Here, plaintiff's assertions that punitive actions were oppressive were against him as an employee and officer, rather than a stockholder. The only benefits that Plaintiff lost were those associated with his status as an employee and officer, which he had no reasonable expectation to retain after he converted the Corporation's property.

X. Established Iowa law makes clear a minority shareholder has no right to force other shareholders or a corporation to buy his or her interest and has no ability to force a dissolution of the corporation.

A. *Stockholders of Jefferson Co. Agricultural Assn. vs. Jefferson Co. Agricultural Assn.*, 136 N.W. 672 (Iowa 1912) holding "the mere differences among shareholders as to the advisability for the continuance of the corporation's existence will not justify the appointment of the receiver". *Id* at 673. The court also held dissolution could only be compelled as provided by the legislature.

B. *Trautman v. Council Bluff Street Fair & Carnival Co., et al.*, 120 N.W. 730, 732 (Iowa 1909). A minority shareholder cannot control the actions of a corporation by proceedings to have it dissolved because he is dissatisfied with the method in which it is being conducted." A minority shareholder cannot obtain dissolution because of mismanagement, unsuccessful operation or management differences. *Planter v. Kirby*, 115 N.W. 1032, 1034 (Iowa 1908). Management and control of the corporation is with the majority, not the minority, shareholders. *First Natl. Bank of Waterloo v. Fireproof Storage*, 202 N.W. 14, 17-18 (Iowa 1925).

XI. Sample Case: *John R. Baur vs. Baur Farms, Inc. and Robert F. Baur,* Madison County EQCV032201, filed initially October 10, 2007.

A. Background: Baur Farms, Inc. is a family corporation which was formed on December 30, 1966 by Merritt Baur and Edward Baur, who then owned and jointly farmed ground which had been in the family since the 1850's. Merritt and Edward decided that majority ownership should go to Edward Baur, as his son, Robert Baur, was the only heir interested in carrying on the farm operation. Therefore, 51.51% of the stock went to Edward initially and subsequently to Robert. 48.49% went to Merritt, which was subsequently divided between his two sons, Jack, who received 26.29% and Dennis, who received 22.20%. Dennis died and his share went to his heirs, one of whom is currently the operator of Baur Farms, Inc. Merritt and Edward expressed their desire that the farm be kept together as long as a descendant wanted to farm it.

B. Petitioner (Jack) has wanted to sell his shares for many years but has insisted he is entitled to his percentage share of the value of the farm. Bob did not want his interest and was unwilling to pay the sum demanded, though he did engage in negotiations periodically which continually broke down. The corporation has never paid dividends.

C. On October 10, 2007, Jack filed suit alleging fraudulent, oppressive or illegal conduct as a pattern over a 30-year period. Examples pinned down during discovery included building of a cattle shed in 1984 at a cost he could not remember, paying for the birthday party of a shareholder at an estimated cost of $180, paying less than $100 for a non-business meal at an imprecise time at which others were present, failing to re-elect the plaintiff to an officer position in May 1997 after he refused to sign documents permitting the corporation to borrow, and other small items. Jack also argued he hadn't been given access to records to the records as quickly as he should have been. Jack then argued that Bob would never agree to pay him fair value for his shares and always wanted a minority discount and/or tax discount when sale of his stock was discussed.

    1. Counsel for Bob moved for summary judgement, arguing facts alleged did not establish oppression, fraud, waste or any other ground justifying relief. Baur Farms joined and asserted there had been no filing within the requisite statutory period (five years) of the allegedly fraudulent, oppressive or wasteful acts and the claim should, therefore, be dismissed. Judge Keller sustained the motion for summary judgment on the statute of limitations ground.

D. Iowa Court of Appeals, February 10, 2010, No. 9-931/09-0480, reversed the summary judgment grant based on the statute of limitations, holding that insisting on a minority discount or tax discount may be considered oppressive conduct when combined with other activity.

    1. At argument a number of questions were posed by the panel as to how Jack was to get out of the corporation.

    2. Court of Appeals cited to *Northwest Investment Corp. v. Wallace*, 741 N.W.2d 782, 783-84 (Iowa 2007) in a footnote, noting the Supreme Court's holding that discounts are inappropriate in

determining fair value in compensating a minority shareholder under Code of Iowa section 490.1302.

(a) Court of Appeals failed to note and the panel may not have recognized a distinction between Code of Iowa §490.1301, et seq., premised on a change in corporate structure and the situation where a shareholder simply wished to sell his stock and there was no change in corporate structure, as no mention of that discussion appeared in the decision.

E. Case was then tried beginning March 1, 2011 before the Honorable Paul R. Huscher. After hearing the evidence from the plaintiff who called not only Jack Baur but Robert Baur, the Court considered a motion for entry of judgment under Iowa Rule of Civil Procedure 1.945 and sustained the motion, finding at the conclusion of the plaintiff's evidence that there was insufficient evidence of oppressive conduct to allow a relief under Code of Iowa §490.1430. [File contains defendant's motion for directed verdict. Should have been a motion to dismiss. Improper name is not material. See *B & B Asphalt Co. v. T.S. McShane Co*, 242 N.W. 2d 279, 281 (Iowa 1976)] Case now on appeal to the Iowa Supreme Court. Matters have been fully briefed, case set for nonoral submission on September 13, 2012, by Court Order of July 31.

1. Case initially had been filed alleging oppression, fraudulent activity, waste and breach of fiduciary duty. Jack dismissed his claims except that seeking dissolution or other equitable relief based on oppression on the first day of trial.

2. Jury had been demanded initially by Robert Baur and the corporation so the case had been set for jury trial. Plaintiff resisted the jury demand after reducing the claims to be heard, arguing the matter had to be heard by the Court because it was entirely equitable. Court so held, dismissing the prospective panel shortly before voir dire.

3. Matter on appeal as Supreme Court No.11-0601. Briefing was completed on December 2, 2011. Parties received on July 27, 2012 a Notice of Non Oral Submission on September 13, 2012.

4. Appeal raises a Preservation of Error issue.

   (a) Case dismissed at conclusion of plaintiff's evidence. Calendar entry made same day of that ruling. Plaintiff filed a motion under Rule 1.904(2) and filed appeal 30 days after court denied that motion.

   (b) Issue is whether a Rule 1.904(2) motion extends time for appeal of the dismissed order.

XII. **Legislative consideration of the issue is needed. The minority should not be able to force the majority to purchase its interest at any price. At the same time, common sense suggests that the long-term financial health of both parties might require some ability to get minority shareholders out. One possibility is to grant the corporation the right to make payments over a period of time, with or without interest. Another is to recognize there ought to be a discount if the minority wants out and the majority does not wish to incur the cost required to do so, just as the majority ought not to be able to force corporate changes on to a minority shareholder without granting a minority a right to receive fair value for his or her share.**

Iowa Code Annotated
Title XII. Business Entities [Chs. 486-504C]
Subtitle 2. Business and Professional Corporations and Companies [Chs. 489-496C] (Refs & Annos)
Chapter 490. Business Corporations (Refs & Annos)
Division XIV. Dissolution
Part C

I.C.A. § 490.1430

490.1430. Grounds for judicial dissolution

Currentness

The district court may dissolve a corporation in any of the following ways:

1. A proceeding by the attorney general, if it is established that either of the following apply:

a. The corporation obtained its articles of incorporation through fraud.

b. The corporation has continued to exceed or abuse the authority conferred upon it by law.

2. A proceeding by a shareholder if it is established that any of the following conditions exist:

a. The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and either irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock.

b. The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.

c. The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired.

d. The corporate assets are being misapplied or wasted.

3. A proceeding by a creditor if it is established that either of the following apply:

a. The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent.

b. The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent.

4. A proceeding by the corporation to have its voluntary dissolution continued under court supervision.

Credits
Acts 1989 (73 G.A.) ch. 288, § 156, eff. Dec. 31, 1989.

Notes of Decisions (28)

I. C. A. § 490.1430, IA ST § 490.1430
Current with legislation from the 2012 Reg.Sess.

Iowa Code Annotated
Title XII. Business Entities [Chs. 486-504C]
Subtitle 2. Business and Professional Corporations and Companies [Chs. 489-496C] (Refs & Annos)
Chapter 490. Business Corporations (Refs & Annos)
Division VIII. Directors and Officers
Part E (Refs & Annos)

I.C.A. § 490.851

490.851. Permissible indemnification

Currentness

1. Except as otherwise provided in this section, a corporation may indemnify an individual who is a party to a proceeding because the individual is a director against liability incurred in the proceeding if either of the following apply:

a. All of the following apply:

(1) The individual acted in good faith.

(2) The individual reasonably believed:

(a) In the case of conduct in the individual's official capacity, that the individual's conduct was in the best interests of the corporation.

(b) In all other cases, that the individual's conduct was at least not opposed to the best interests of the corporation.

(3) In the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful.

b. The individual engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation as authorized by section 490.202, subsection 2, paragraph "e".

2. A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection 1, paragraph "b", subparagraph (2).

3. The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the relevant standard of conduct described in this section.

4. Unless ordered by a court under section 490.854, subsection 1, paragraph "c", a corporation shall not indemnify a director under this section in either of the following circumstances:

a. In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection 1.

b. In connection with any proceeding with respect to conduct for which the director was adjudged liable on the basis that the director received a financial benefit to which the director was not entitled, whether or not involving action in the director's official capacity.

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Subtitle 2. Business and Professional Corporations and Companies [Chs. 489-496C] (Refs & Annos)
Chapter 490. Business Corporations (Refs & Annos)
Division VIII. Directors and Officers
Part E (Refs & Annos)

I.C.A. § 490.853

490.853. Advance for expenses

Currentness

1. A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because the person is a director if the person delivers all of the following to the corporation:

a. A written affirmation of the director's good faith belief that the director has met the relevant standard of conduct described in section 490.851 or that the proceeding involved conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by section 490.202, subsection 2, paragraph "d".

b. The director's written undertaking to repay any funds advanced if the director is not entitled to mandatory indemnification under section 490.852 and it is ultimately determined under section 490.854 or section 490.855 that the director has not met the relevant standard of conduct described in section 490.851.

2. The undertaking required by subsection 1, paragraph "b", must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

3. Authorizations under this section shall be made according to one of the following:

a. By the board of directors:

(1) If there are two or more disinterested directors, by a majority vote of all the disinterested directors, a majority of whom shall for such purpose constitute a quorum, or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote.

(2) If there are fewer than two disinterested directors, by the vote necessary for action by the board in accordance with section 490.824, subsection 3, in which authorization directors who do not qualify as disinterested directors may participate.

b. By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the authorization.

Credits

Acts 1989 (73 G.A.) ch. 288, § 101, eff. Dec. 31, 1989. Amended by Acts 2002 (79 G.A.) ch. 1154, § 47, eff. Jan. 1, 2003; Acts 2002 (79 G.A.) ch. 1175, § 89.

I. C. A. § 490.853, IA ST § 490.853
Current with legislation from the 2012 Reg.Sess.

End of Document

Iowa Code Annotated
Title XII. Business Entities [Chs. 486-504C]
Subtitle 2. Business and Professional Corporations and Companies [Chs. 489-496C] (Refs & Annos)
Chapter 490. Business Corporations (Refs & Annos)
Division VIII. Directors and Officers
Part E (Refs & Annos)

I.C.A. § 490.856

490.856. Indemnification of officers

Currentness

1. A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to the proceeding because the person is an officer, according to all of the following:

a. To the same extent as to a director.

b. If the person is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract, except for either of the following:

(1) Liability in connection with a proceeding by or in the right of the corporation other than for reasonable expenses incurred in connection with the proceeding.

(2) Liability arising out of conduct that constitutes any of the following:

(a) Receipt by the officer of a financial benefit to which the officer is not entitled.

(b) An intentional infliction of harm on the corporation or the shareholders.

(c) An intentional violation of criminal law.

2. The provisions of subsection 1, paragraph "b", shall apply to an officer who is also a director if the basis on which the officer is made a party to a proceeding is an action taken or a failure to take an action solely as an officer.

3. An officer of a corporation who is not a director is entitled to mandatory indemnification under section 490.852, and may apply to a court under section 490.854 for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

Credits
Acts 1989 (73 G.A.) ch. 288, § 104, eff. Dec. 31, 1989. Amended by Acts 2002 (79 G.A.) ch. 1154, § 50, eff. Jan. 1, 2003; Acts 2003 (80 G.A.) ch. 44, § 85.

I. C. A. § 490.856, IA ST § 490.856
Current with legislation from the 2012 Reg.Sess.

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Case Law Update: Negligence & Tort

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Koeppel v. Speirs, 808 N.W.2d 177 (Iowa 2011) (Cady)

FACTS: Employer thought one of his two employees might be "engaged in conduct detrimental to the operation of his office." After his secret video camera did not record anything noteworthy in the reception area, he moved the camera to the office's private bathroom.

His story was that, while the camera worked well in the reception area, the camera did not effectively transmit images to his office, where he reviewed camera footage from a monitor. Police later determined the camera was pointed at the toilet. Police also learned that if they altered the camera/monitor set-up, they could get a rough image to transmit to the employer's office.

PROCEDURAL HISTORY: District court granted summary judgment to the defendant employer, arguing that a colorable claim for intrusion upon the seclusion must involve "an actual, rather than attempted, intrusion." The district court ruled that no actual invasion actually occurred, since there was no evidence that the camera and monitor ever worked for the defendant.

RATIONALE: This tort should not be confused with appropriation of name or likeness, unreasonable publicity of details of private life of another, or false light publicity. Other privacy torts relate to use and publication, while intrusion upon the seclusion governs situations where:

a. A person
b. Intentionally intrudes
c. Upon the solitude or seclusion of another or his private affairs or concerns
d. If the intrusion would be highly offensive
e. To a reasonable person.

The two broad requirements are that there is "an intentional intrusion into a matter [where] the plaintiff has a right to expect privacy." The Court focused on whether a person has intruded on the "mental well-being" of another in an "area cloaked with privacy." Thus, under the intrusion

element, plaintiffs may have a claim where a defendant intrudes on the privacy of a victim who is using areas such as a private bathroom, hospital room, or a bedroom. The focus of the tort is not on publication or use, but on an offensive intrusion into the privacy of another.

The defendant had argued he was not liable because the camera had never worked well enough for him to see anything. The Court conceded that "a belief by a plaintiff that a person invaded his or her privacy by placing an apparent recording device in a private area does not establish an intrusion if the device was not capable of being configured or operated to transmit or record in any conceivable way." In this case, though, the Court stressed that—on the plaintiff's version of the facts—the camera had worked in the past and the police had been able to send images to the monitor in the employer's office. Under the right circumstances, the camera could have sent an image to the monitor.

HOLDING: Because the camera had worked in the past and apparently could have transmitted an image, the Court held that under the intrusion prong, plaintiff had enough of a fact issue to defeat the motion for summary judgment.

TAKEWAY:

1. No requirement of transmission or use.
2. Question is whether camera could have worked. "[F]act finder must only conclude that the equipment could have been operational so as to invade the plaintiff's privacy."
3. Since part of the focus is on mental well-being, the plaintiff must reasonably believe "an intrusion occurred."

PROFESSIONAL NEGLIGENCE OPINIONS FROM LAST YEAR:

Quad City Banks & Trust v. Jim Kircher & Associates, P.C., 804 N.W.2d 83 (Iowa 2011) (Wiggins):

FACTS: Quad City Bank & Trust ("QCBT") wanted to assess the financial well-being of a client-company, to learn whether it should loan money to keep the company running, or call the loans that had come due. As part of its assessment, QCBT hired Jim Kircher & Associates, P.C. ("Kircher") to perform an audit to provide "an opinion about whether [a company's] financial statements were fairly presented in all material respects, in conformity with U.S. generally accepted accounting principles." When the company's prospects deteriorated even more and it turned out the company had committed fraud, QCBT sued the accounting firm, alleging that "Kircher negligently performed its [audit] of [the company] because it failed to discover and accurately convey the true financial condition of [the company]." QCBT alleged that if it had known that the company was in such bad condition, it would have foreclosed on the loans immediately.

To prove its claim, QCBT wanted to introduce a former IRS examiner as an expert witness. The expert "was a certified fraud examiner, but not a CPA." While he had been a revenue agent for the IRS, auditing the tax returns of businesses and individuals and later investigating fraud, he had "never performed a general audit of a business," and "was not familiar with CPA auditing standards." Furthermore, the proposed expert testified in his deposition that he was not qualified to testify as to whether a CPA had performed an audit that met the standard of care.

PROCEDURAL HISTORY: Pretrial, plaintiffs filed a motion in limine seeking to have QCBT's proposed expert bared from testifying. The district court categorically ruled that QCBT could not use its proposed expert for defining the standard of care, proving breach, or proving cause. The district court said it did not know enough to rule as to admissibility for other purposes.

Expert testimony:

RATIONALE: While there is no hard and fast rule that an expert must be licensed in the area of testimony, the Court wrote that QCBT's expert was "unqualified to testify on this issue because he lacked the knowledge, skill, experience,

training, or education to provide an adequate basis for his testimony." Among the factors in the Court's reasoning, it noted that although the proposed expert was a former IRS examiner, he was not a CPA; he had never performed an audit; his opinions were not based on whether the defendant violated the standard of care; he specifically said he wasn't testifying as to standard of care; and—perhaps most importantly—he said he did not know the standard of care.

HOLDING: Because QCBT's proposed expert did not have the training or experience to testify as to the standard of care, breach, and causation, the district court did not abuse its discretion in baring the expert's testimony on those matters.

Error Preservation:

RATIONALE: "A ruling sustaining a motion in limine is generally not an evidentiary ruling." Rather, the motion merely "'serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of the trial,'" and serves to notify parties that they will have to make an offer of proof and attempt to admit the evidence during trial. *"[T]he error only occurs, if at all, when the evidence is offered at trial and is either admitted or refused."* The exception to that general rule only arises when the trial court's ruling categorically decides the admissibility of the evidence.

HOLDING: With respect to QCBT's potential desire to use an expert to opine on the standard of care, breach, and causation, the district court's ruling left no doubt that such testimony would be inadmissible. Thus the exception applied and the error was preserved.

As for QCBT's desire to have an expert testify as to whether Kircher appropriately performed the tasks required in the work papers, QCBT did not preserve the error because it failed to obtain a definitive answer on admissibility from the judge during trial, after its offer of proof.

Hall v. Jennie Edmundson Memorial Hospital and Nebraska Methodist Health System, Inc. 812 N.W.2d 681 (Iowa 2012) (Hecht)

FACTS: CREDENTIALING: The hospital had in place a multi-level process through which both doctors and lay persons would review the credentials and reviews of the doctor to learn whether the hospital should recredential the doctor. After multiple committees had vetted the doctor's credentials and work history, the doctor's application for recredentialing made its way to the board of directors who voted for or against recredentialing the doctor.

"The Joint Commission on the Accreditation of Hospitals ("JCAH") is a national organization which promulgates standards, conducts surveys, and accredits hospitals." While the JCAH had cited issues with the hospital's procedures in the past, it had remedied any issues and procedures. The JCAH approved of the hospital's credentialing procedures in 2004 and 2007. The hospital had recredentialed the patient's doctor repeatedly, including during time periods relevant to the lawsuit.

THE PROCEDURE: Plaintiff had "a complicated surgery, involving the removal and reattachment of portions of several organs, including the pancreas, the small intestine, the stomach, the gallbladder, and the common bile duct." One of the primary risks of surgery is severing of the SMV. Doctor did sever the SMV during surgery and serious complications developed. Ultimately, another doctor at a different hospital had to complete the surgery. The patient "was comatose for almost two months" and had to undergo multiple repeat surgeries to try to correct problems with the first surgery.

PROCEDURAL HISTORY: The Court wrote that:

> The heart of the [the patient's] claim against [the defendants] was that [the doctor] did not have sufficient experience performing the [procedure] to support a grant of privileges for the procedure in 2007. [The doctor] had performed only four [similar procedures] in the previous ten years and none in

> the three years preceding [the patient's] surgery. The parties disagreed whether the court should hold the [defendants] to a "professional" standard of care or a "lay" standard of care when assessing whether they acted reasonably when they approved [the doctor's] request for surgical privileges, specifically to perform the [procedure].

The district court determined that the hospitals did owe a duty to perform credentialing in a way that met a standard of care. The plaintiff advocated for a "lay" standard of care, an argument the Court adopted in its decision. The district court said a lay standard was appropriate because privileging decisions are "made by laypeople and involved nonmedical, administrative, or ministerial acts by a hospital." The district court ultimately found that the defendants did not breach the standard of care.

Tort of Negligent Credentialing:

RATIONALE: Halls asked the Court to recognize, for the first time, the tort of negligent credentialing. The district court assumed it was a valid tort and neither defendant fought the issue at the district court or on appeal.

HOLDING: Since defendant did not contest, the Supreme Court assumed without holding that the tort was valid in Iowa.

Standard of care in case for negligent credentialing:

RATIONALE: Using the restatement third and the Court's decision in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), the district court felt that a general standard of care was appropriate under the circumstances. The Court wrote that this standard was the exact standard for which the plaintiffs advocated. While the district court made note of a special standard in its reasoning, it expressly said that it was not applying a special standard and wrote that "under an ordinary negligence analysis, defendants were not negligent in privileging and re-privileging [the doctor] to perform [the procedure]."

HOLDING: Since the district court adopted the plaintiffs proposed standard in its verdict and decided according to that standard, and because the court's verdict was supported by substantial evidence, the Court affirmed the district court's judgment for the defendants.

TAKEAWAY: The Court wrote in a footnote that: "Prominent among the reasons we defer a decision on the existence of the tort of negligent credentialing is the fact that the defendants have not claimed the tort should not be recognized and we prefer to confront and decide the issue in a case in which the matter is disputed and briefed by the parties." If an appeal squarely addressing whether the tort is valid is not already pending, expect one in the future. Attached to that appeal, expect the Court to also address the standard of care.

BREACH OF DUTY:

Pitts v. Farm Bureau Life Insurance Company and Donald Schiffer, 2012 Iowa Sup. LEXIS 76 (Iowa 2012) (Zager)[1]

FACTS: This case involves a life insurance policy. The primary players are the decedent insured, the plaintiff who was his wife when he died, and the insurance agent who wrote the life insurance policy for the insured.

As part of a child support obligation, the insured had to have in place a life insurance policy with $35,000 payable to his daughter. This "obligation would end in April of 2005." The insured married the plaintiff in 1993. The insurance agent wrote the life insurance policy in 1993, "listing [the insured's] daughter as the primary beneficiary for the first $50,000 in proceeds and listing [the plaintiff] as the beneficiary of the 'balance of [the] proceeds, if any.'"

In 1995, the insured filled out a new beneficiary designation, which changed the daughter's rights as primary beneficiary to "the first $35,000 of life insurance proceeds, and the balance was to be paid to [the plaintiff] if she survived [the insured]."

[1] As of 8/6/12, there is a petition for rehearing pending.

In 1996, there was an illegible change in beneficiary status, but all parties agreed that the change left the insured's daughter as the primary beneficiary, with the plaintiff taking the balance.

The plaintiff alleged that in 2005, after the insured's child support obligation ended, the insured contacted his agent and requested that the agent "change the beneficiary designation on the life insurance policy so that his daughter would no longer be the primary beneficiary of the first $35,000 of the insurance proceeds." The plaintiff believed her deceased husband had filled out all necessary forms to complete the change-in-beneficiary status. After the insured passed away, the plaintiff learned that the change in beneficiary status had never been made. Thus, the plaintiff claimed —though the policy does not specifically mention her as the primary beneficiary—that her husband had tried to list her as the primary beneficiary and the agent failed to make the change.

PROCEDURAL HISTORY: The district court said the agent did not owe a duty because the insurance policy required that any requests to change a beneficiary status must be in writing. Because there was no evidence of a writing, the district court held that the plaintiff's claim could not succeed. This ruling extended to the plaintiff's claim for negligent misrepresentation as well. Since there was no writing, the agent could not have altered the plaintiff's beneficiary status, so the cause was dismissed with the previous count.

An insurance agent's duty to intended beneficiaries:

RATIONALE: The Court wrote that prior cases establishing standard of care were irrelevant because the issue in the case involves whether the agent owed a duty to a beneficiary, not what substantively defined the duty.[2] Instead

[2] At Iowa Code § 522B.11(7), the Iowa legislature abrogated a 2010 Iowa Supreme Court decision that would have altered the standard of care. The Court in *Pitts* wrote that the Iowa legislature abrogated the Court's 2010 decision in favor of a prior decision that held that an insurance agent's "general duty is the duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." (citing *Sandbulte v. Farm Bureau Mutual Insurance Co.*, 343 N.W.2d 457 (Iowa 1984)).

of using Iowa Code, the Court summarized analogous case law to the effect that, in an attorney-client situation, an "intended, identifiable beneficiary of a transaction can bring an action against an attorney despite the lack of an attorney-client relationship with the defendant." Similar to an attorney-client relationship, "imposing a duty on insurance agents to the intended beneficiary of a life insurance policy would not threaten the insured-insurer relationship, nor would imposing such a duty create the types of 'divided loyalties' that" might mitigate against finding liability. Related to the conflict of interest question, the Court wrote that, under *Sandbulte*, the duty of the insurance agent remains the same—to do what the insured requests—so there is no concern for a conflict of interest.[3]

To limit the potentially expansive reading of its decision, the Court wrote that an agent only owes a duty when the intended beneficiary was the "direct, intended, and specifically identifiable beneficiar[y]." The plaintiff also must prove the other elements of negligence. Furthermore, the Court wrote that the plaintiff must identify evidence from a written instrument that shows the plaintiff is an intended beneficiary.

HOLDING: Since the plaintiff's argument on summary judgment was that the insured's intent "was that [the plaintiff] would receive all policy proceeds except for those that were required by court order," and since the plaintiff had admissible evidence sufficient to create a fact issue, the Court held that the district court's ruling granting the defendant's motion for summary judgment was improper.

Negligent Misrepresentation:

RATIONALE: The defendant moved for summary judgment, arguing that the "Plaintiff [could not] prove, as a matter of law, that she was harmed in a transaction with a third party." A claim for negligent misrepresentation can only stand where the defendant is "in the business of supplying information to others." A potential defendant may be liable depending on

[3] Justice Mansfield's dissent calls this argument into question.

several factors such as whether the transaction is adversarial or advisory, whether the party providing information "is manifestly aware of the use that the information will be put, and intends to supply it for that purpose," whether the information was gratuitous or "incidental to a different service," and, generally, the "role the defendant was playing when the alleged misrepresentation occurred."

"Accountants, appraisers, school guidance counselors and investment brokers" have been found to be potentially liable under this tort. However, people selling or servicing merchandise, persons selling a business, bankers negotiating with customers, and employers negotiating with employees are not potentially liable for negligent misrepresentation.

While insurance agents may initially be adversaries when negotiating on the original policy, and thus not liable under the tort of negligent misrepresentation, the facts of this case were such that the insured was trying to make changes after he already had the policy. Thus, on the facts of this case, the agent was assisting the insured in an advisory capacity. Similarly, in any representations he made to the plaintiff, the agent was "advising" the plaintiff on what she could expect from the policy. He was doing this "in the course of his business, profession or employment" and he was providing the information for the benefit of the insured (when communicating with the insured) and the benefit of the plaintiff (when communicating with the plaintiff).

The Court also noted that, while an insured is the natural plaintiff for claims such as this, the plaintiff in this case could also bring an action because the agent had allegedly made representations to her. "Once [the plaintiff] was told that [the insured's daughter] was no longer the primary beneficiary on the policy, she had no reason to ask her husband to take further action to change the policy or to obtain additional insurance on her husband's life from another source if [her husband] refused to take the necessary steps to effectively change the beneficiary designation."

HOLDING: Because the agent in this case was acting as an advisor in the course of his business when making representations to the plaintiff, the agent and his company were potentially liable for negligent misrepresentation and the district court erred in granting summary judgment.

***McCormick v. Nikkel & Associates, Inc.*, 2012 Iowa Supp. LEXIS 54 (Iowa 2012) (Mansfield)**

FACTS: A subcontractor properly performed work on electrical implements for a general contractor. After the subcontractor completed a large portion of the work, the general contractor said it was competent to finish the rest. Before leaving, the subcontractor secured the area and warnings were in place on the electrical implements. The general contractor had its employees finish the work. The employees were untrained and one was electrocuted.

PROCEDURAL HISTORY: The district court granted summary judgment, agreeing with subcontractor "that it owed no duty to [plaintiff] because [subcontractor] did not have control of the [electrical implement] when [plaintiff] performed work and was injured." The district court held that control of the premises decided the issue and, since the general contractor had resumed control, the subcontractor could not be liable.

RATIONALE: Courts have historically looked to the relationship of the parties, foreseeability, and public policy to determine whether one party owed a duty to another. That historical analysis changed in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), when the Court determined "foreseeability should not enter into the duty calculus." While *Thompson* changed the law related to the foreseeability prong of determining duty, the decision did not overrule existing case law related to relationships and public policy. Generally, persons employing independent contractors are not liable for action of the independent contractor. This is because the independent contractors retain control of the work they are doing. Thus, the relationship of the parties dictates whether there is a duty.

The general contractor had hired the subcontractor to perform work. When the general contractor decided it could complete the work, it relieved the subcontractor of its duty.

HOLDING: The district court was correct to find for the subcontractor because the subcontractor had given control over to the general contractor.

TAKEAWAY: This is a contracting case, but it also represents a potential step back from *Thompson v. Kaczinski*. Justice Mansfield makes clear that, while forseeability might be closed off as an avenue for defeating a duty at law, parties can still make arguments related to relationships and public policy.

Dram Shop

This program does not qualify for Federal CLE.

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IOWA'S DRAM SHOP LAW
AN OVERVIEW

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I. THE STATUTES

A. Iowa Dram Shop Act is the exclusive statutory cause of action available against a liquor licensee relating to injuries arising out of the over service of alcoholic beverages. Iowa Code § 123.92 defines this cause of action, and states:

Civil liability for dispensing or sale and service of beer, wine, or intoxicating liquor (Dramshop Act)–liability insurance–underage persons

Any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for all damages actually sustained, severally or jointly, against any licensee or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated. If the injury was caused by an intoxicated person, a permittee or licensee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person.

1. Sold and Served Requirement

It is important to note that liability is to be imposed upon those licensees who "sell and serve" alcohol. Iowa Code § 123.92. "Sold and served" requires the alcoholic beverages be served for consumption on seller's premises. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991), abrogated on other grounds by Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009).

Sale for off premises consumption is not covered by the dramshop act. This requirement has survived constitutional challenges. Eddy v. Casey's General Store, Inc., 485 N.W.2d 633 (Iowa 1992); Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987).

A plaintiff need not produce the actual server or servers of the alcohol in order to prove a dramshop claim. Smith v. Shagnasty's Inc., 688 N.W.2d 67 (Iowa 2004). "Circumstantial evidence is equally probative as direct evidence." Id. As such, a "plaintiff may meet [the 'sold and served' requirement with proof] that an establishment where alcohol is sold generally holds itself out as a place where persons are 'served' in the ordinary sense of the word, *i.e.*, one providing premises where orders are taken, patrons are waited on, and drinks are supplied in open containers." Id. (citing Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991)) . See also Iowa Code § 123.110 ("It shall not be necessary in every case to prove payment in order to prove a sale within the meaning and intent of this chapter"). The Court of Appeals has clarified, however, that although one need

not bring in the servers or show proof of payment, Shagnasty's holding is not so broad that the plaintiff "need not show the intoxicated person actually possessed a drink or obtained it in the tavern." Vaughn v. Theo's, Inc., 707 N.W.2d 337, 3 (Iowa App. November 9, 2005)

2. Knew or Should Have Known

"Knew or should have known" means that the defendant either had to have actual knowledge that person served was intoxicated or that a reasonably observant person under same or similar circumstances would have had such knowledge." Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991).

It is necessary for the Plaintiff to show that the sale and serving of intoxicants caused intoxication and that injury was done by intoxicated person, but the plaintiff does not have to show that intoxicated person consumed beverages he was given. Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989).

Subsequent Intoxicated Condition Inference – The "fact that a bar served *even one beer* to a person who shortly thereafter was in a state of serious intoxication gives rise to a question of fact whether [the intoxicated person] was visibly intoxicated at the [time of service]." Smith v. Shagnasty's Inc., 688 N.W.2d 67 (Iowa 2004) (citation omitted) (emphasis in original).

3. Broad Scope and Reach

The act is extraterritorial as it covers accidents which occur outside of Iowa if the alcohol was sold and/or served by an Iowa licensee. Bankord v. DeRock, 423 F.Supp. 602 (N.D. Iowa 1976). The cause of action also survives the death of the victim. Kendall v. Gauthier, 149 N.W.2d 286 (Iowa 1967).

Further, Iowa's dramshop statute is not preempted by federal maritime laws where gambling boats are involved because "no 'fundamental tenet of substantive maritime law' [is] frustrated by the application of section 123.92." Horak v. Argosy Gaming Co., 648 N.W.2d 137 (Iowa 2002).

4. Preempts Common Law Claims

The dramshop statute preempts common-law claims against liquor licensees for damages allegedly caused by liquor licensee's furnishing of liquor and provides the exclusive remedy against liquor licensees and permittees. Ballard v. Hazel's Blue Sky, 653 N.W.2d 609 (Iowa 2002) (finding that dramshop preempts parent's wrongful death action against liquor licensee); Hoth v. Meisner, 548 N.W.2d 152

(Iowa 1996)(minors); Summerhays v. Clark, 509 N.W.2d 748 (Iowa 1993)(adults).

It does not preempt actions against tavern employees individually for their negligence. Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984), overruled on other grounds by Gail v. Clark, 410 N.W.2d 662 (Iowa 1987); see also Rooker v. Flanagan Corp., 11-1291, 2012 WL 1439170 (Iowa Ct. App. Apr. 25, 2012) (holding that plaintiff minor has valid cause of action against non-licensee who provided alcoholic drinks, leading to plaintiff's injury)

Additionally it does not preempt a common-law action against a social host. Ballard v. Hazel's Blue Sky, 653 N.W.2d 609 (Iowa 2002) (discussing the holding of Garofalo v. Lamda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000)); Bauer v. Dann, 428 N.W.2d 658 (Iowa 1988)(the legislature later amended Iowa Code Chapter 123 to add a social host paragraph for minors, not for adults). However it applies only to liquor licensees and permittees, not individual corporate officers of licensees. Summerhays v. Clark, 509 N.W.2d 748 (1993).

It does not preempt common-law causes of action against bar owners based on assault and battery and negligent failure to keep premises safe. Golden v. O'Neill, 366 N.W.2d 178 (Iowa 1985).

B. INITIATING AN ACTION

Iowa Code § 123.93 provides that the injured party give the liquor licensee and/or the dram shop carrier notice of the injured party's claim, stating:

Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury. Such six months' period shall be extended if the injured party is incapacitated at the expiration thereof or unable, through reasonable diligence, to discover the name of the licensee, permittee, or person causing the injury or until such time as such incapacity is removed or such person has had a reasonable time to discover the name of the licensee, permittee or person causing the injury.

2. Exceptions to the Notice Requirement

To claim incapacity as an exception to the notice requirement, the plaintiff must assert a condition which renders him incapable of doing those things reasonably necessary for a laymen to commence an action against the dram shop. Harrop v. Keller, 253 N.W.2d 588 (Iowa 1977). The legislature intended that claims of incapacitation be resolved on the basis of reasonableness, and that the statute intended to free the injured party from litigation concerns until he is reasonably able to consult with an attorney. Id. To successfully assert incapacitation as an

exception to the notice requirement, a plaintiff must prove she was incapacitated at the *end* of the six-month statutory period, not merely that she was incapacitated *at some point* during the six-month period. Veach v. Prairie Meadows Racetrack & Casino, Inc., 728 N.W.2d 224 (Iowa Ct. App. 2006).

3. Strict Compliance Required

Communication to the insurer must comply with Iowa Code § 123.93. Merely advising them about a particular date, with no reference to place or circumstances and failure to mention tavern operator's name, or express any intention by complainant to bring dram shop action against operator, is insufficient to constitute notice of dram shop claim. Arnold v. Lang, 259 N.W.2d 749 (Iowa 1977). This is true even if the tavern operator has personal knowledge. Id. See also Spencer v. Truro Tavern, Inc., 728 N.W.2d 853 (Iowa Ct. App. 2007) (holding that tavern employee's witnessing of the injury-producing event is insufficient to meet notice requirement); Veach v. Prairie Meadows Racetrack & Casino, Inc., 728 N.W.2d 224 (Iowa Ct. App. 2006) (holding that the filing of a suit by another plaintiff, injured in the same incident, is insufficient notice under the statute for a second plaintiff); Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002) (reaffirming the statutory bar for failure to meet the notice requirement). The commencement of the suit itself is sufficient for notice, so long as the defendant is provided with notice regarding the time, place and circumstances surrounding the injury. Harrop v. Keller, 253 N.W.2d 588 (Iowa 1977).

4. Minors - Beware

A minor is "incapacitated" within meaning of this section and, hence, the dramshop notice period begins to run on the claim of an injured child only when the child becomes of age or is earlier emancipated. Ehlinger v. Mardorf, 285 N.W.2d 27 (Iowa 1979).

Where the notice filed by the husband of the victim informed the tavern of the intention to file a dramshop action in capacity as guardian and conservator only for the minor child, but not on behalf of the husband individually, the dramshop claim can only proceed on behalf of the minor child. Berte v. Bode, 692 N.W.2d 368 (Iowa 2005).

5. Does Not Violate Equal Protection Clause

All dramshop plaintiffs, as a "unique class" of plaintiffs, are subject to the same notice requirements of the dramshop statute and therefore because there is no deferential treatment among this class, there is no equal protection violation. Grovijohn v. J.D.'s Circle Inn, 643 N.W.2d 200 (Iowa 2002); Spencer v. Truro Tavern, Inc., 728 N.W.2d 853 (Iowa Ct. App. 2007) (affirming uniqueness of dramshop plaintiffs, even against plaintiffs injured by a licensee or permitee).

6. Statute of Limitations

In general, the normal statutes of limitation apply: two years for personal injury claims, Iowa Code § 614.1(1), five years for injury to a property right, Iowa Code § 614.1(4).

Providing written notice pursuant to Iowa Code § 123.92 is the first step in bringing a dram shop action. Because the legislature mandated that no right exists to institute or maintain a dram shop action until timely notice is given, the right of action does not accrue until such notice is provided. Davis v. R&D Driftwood, Inc., 2009 Iowa App. LEXIS 137 (Iowa App. March 11, 2009) (final publication decision pending). Therefore, the statute of limitations does not begin to run until proper notice is provided.

II. DEFENSES

A. The intoxication did not contribute to the injury.

The statute provides a complete defense to the licensee "[i]f the injury was caused by an intoxicated person, a permittee or licensee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person." Iowa Code §123.92.

Defense that intoxication, if any, of assailants was not a proximate cause of injuries to customer in a fight outside lounge on night in question was available to lounge in dramshop action if ill-feeling between combatants, rather than intoxication, led to fight which resulted in injuries. Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717 (Iowa 1986).

B. Causation: other superseding events

In contrast to injuries which are "caused by" an intoxicated person, when the injuries occur as a result of the intoxication, both cause in fact and proximate cause are appropriately the subject of inquiry. Berte v. Bode, 692 N.W.2d 368 (Iowa 2005).

Tavern's conduct in serving beer to allegedly intoxicated patron was not proximate cause of injuries suffered by accident victims who were injured in collision with pickup truck owned by intoxicated patron that was being driven by another person; tavern did not serve alcohol to driver and patron's intoxication

did not contribute to any "propensity" to entrust his truck negligently to driver. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (1991).

See Hayward v. P.D.A., Inc., 573 N.W.2d 29 (Iowa 1997) (bar's conduct in serving alcohol to intoxicated patron was not proximate cause of death of police officer who was killed when struck by another driver while performing collision-related duties in connection with accident caused by intoxicated patron, for purposes of dramshop liability to officer's estate).

C. Assumption of the Risk and Complicity

Defenses of assumption of risk and complicity differ and are not duplicative in dramshop cases; assumption of risk is a matter of knowing assent by the injured party in the activity which results in injury, while complicity is matter of involvement in the drinking. Cox v. Rolling Acres Golf Course Corp., 532 N.W.2d 761 (Iowa 1995). Complicity exists where a plaintiff seeking to assert the provisions of the Dram Shop Act has "encouraged or voluntarily participated to a material and substantial extent in the drinking of beer or intoxicating liquor" by the party who injured the plaintiff. Id. To rise to the level of complicity, this participation must be more than passively consuming alcohol with the intoxicated person, there must be affirmative acts to point to. Id. When complicity is present, it is an absolute bar to recovery for the injured party. Id.

The elements of assumption of risk are that (1) plaintiff must know and understand the nature of the risk, and (2) plaintiff must freely and voluntarily choose to incur the risk. Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985).

The standard used in determining applicability of defense of assumption of risk is subjective, not objective; assumption of risk is matter of whether plaintiff knew of risk, not whether plaintiff should have known about it. Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985); Cox v. Rolling Acres Golf Course Corp., 532 N.W.2d 761 (Iowa 1995).

D. Intoxication of the plaintiff

A patron is barred from recovering under this section for injuries sustained because of his own intoxication. Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989); Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985); Robinson v. Bognanno, 213 N.W.2d 530 (Iowa 1973); Evans v. Kennedy, 162 N.W.2d 182 (Iowa 1968).

E. Comparative Fault Not Available

Because the dramshop statute's benefits are reserved for "innocent parties," comparative fault principles play no part in the trial of a dramshop case. Horak v. Argosy Gaming Co., 648 N.W.2d 137, 147, n. 2 (Iowa 2002); Jamieson v. Harrison, 532 N.W.2d 779 (Iowa 1995). Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989).

F. Contribution v. Another Dramshop

A dramshop may bring a cause of action against another dramshop for contribution in a situation in which their combined sales of liquor resulted in injury. Schreier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988).

1. Contribution Not Extinguished by Failure to Notify

An injured party's failure to give notice of injury to licensee within time limit does not extinguish a contribution action against that licensee brought by another dramshop. The notice requirements have no application to a contribution action. Schreier v. Sonderleiter, 420 N.W.2d 821 (1988).

III. DAMAGES

A. Amounts Upheld

Award of $1,250,000 for past and future loss of parental consortium upheld. Horak v. Argosy Gaming Co., 648 N.W.2d 137 (Iowa 2002). Jury verdict of $1,375,000 upheld. Burkis v. Contemporary Industries Midwest, Inc., App.1988, 435 N.W.2d 397 (Iowa 1988). Award of $1,161,000.00 upheld. Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

B. Types of Damages Allowed

1. Medical Expenses

Medical expenses incurred by parent on behalf of minor child constitute "injury in property" for purpose of recovery under this section, as parents are required by § 597.14 to provide necessary medical treatment to their minor children. Atkins v. Baxter, 423 N.W.2d 6 (Iowa 1988).

2. Loss of Consortium

Husband's or wife's right to spousal consortium, and child's right to parental consortium, are "property" within meaning of this section; Gail v. Clark, 410 N.W.2d 662 (Iowa 1987), specifically overruling Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1985); see also Horak v. Argosy Gaming Co., 648 N.W.2d 137 (Iowa 2002) (upholding award of past and future loss of parental consortium). A parent's right to loss of a child's services is "property" within meaning of this section and may be an additional cause of action. Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989).

C. Not Allowed - Punitive Damages

Exemplary damages are not recoverable under this section. Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983).

D. Limits on Damages - Pro tanto credit applies

Pro tanto credit rule applied to case in which tavern patron settled his dram shop claim against tavern owner and obtained jury verdict on his premises liability claim, since comparative fault statute's proportionate credit rule did not apply to dramshop claim. Jamieson v. Harrison, 532 N.W.2d 779 (Iowa 1995). A defendant is entitled to a dollar-for-dollar credit for monies received by a plaintiff from settling parties in compensation for plaintiff's damages. Id. To apply the pro tanto credit rule, a defendant must show that absent such a credit, the plaintiff would receive more than full compensation for the amount of his injuries, not solely the amount of the judgment. Id. The pro tanto credit rule is designed to prevent a double recovery by the injured party, and ensures that "the plaintiff should receive no more than has been lost as the result of some tortious act." Id.

E. Joint and Several Liability

The statute expressly provides for joint and several liability among defendant dramshops. Iowa Code 123.92. See also Slager v. HWA Corp., 435 N.W.2d 349, 352 (Iowa 1989).

What Human Factors Experts Can Bring to the Courtroom

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A Legal Education Course

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Oak Brook, Illinois

After investigating and reconstructing accidents for 25 years, CED Investigative Technologies has built up a large database of premises and product liability expert opinions, reports, and depositions.

Many lessons have been learned and there is a clear trend on what has been successful in litigation-related matters. A forensic engineering expert attempts to uncover all contributing factors that cause accidents. Specific codes and standards help the engineer to arrive at the most accurate opinions.

Engineering experts investigate accidents every day and have a trained eye for contributing factors and their relationship to losses. They typically arm themselves with an understanding of applicable codes, standards and tools to measure detail and evidence. This combination brings science into the courtroom when litigating cases. It is this science which is permitted into the courtroom and creates a compelling reason the judge and jury should act.

Human Factors, in Premises Liability cases, typically involves how people interact with their environment.

Presentation Outline "What Human Factors Experts Can Bring to the Courtroom"

1. Human Factors
    a. Use in cases
    b. Analysis
2. Why use a Human Factors expert
    a. Understand story
        i. Physical evidence
        ii. Testing
        iii. Literature search
    b. Engineering resource
    c. Evaluate opposing expert's claims
    d. Human behavior needs a representative
3. Causes of accidents
    a. Trips
    b. Slips
    c. Fall from heights
4. Case examples
    a. Fall on stairs, trip in parking lot, slip and fall
        i. Number of injuries
        ii. Standards
    b. Allegations
    c. Opinions and conclusions
5. Elements of investigation
    a. Lighting
    b. Measurements
    c. Maintenance
6. Methods of photo and video documentation
7. Investigation of site
    a. Building codes
    b. Walkway surface requirements
    c. Illumination levels
8. Building code and standards compliance
9. Testing slip resistance
    a. Devices
    b. Slip resistance standards
    c. Comparing to requirements
10. How to use an expert effectively
    a. Explain how it happened/evaluate allegations
    b. Document physical evidence
    c. Mathematical analysis/testing

What's New in Iowa Courts

This program does not qualify for Federal CLE.

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WHAT'S NEW IN IOWA COURTS

I am here on behalf of the court to update you on what is happening in the court. To do so, I plan to talk about the following items.

I. Term system
   - A. Why go to a term system
   - B. The Iowa Supreme Court has a two-term system
     1. Adjudicative
     2. Administrative
   - C. Review of 2011–2012 adjudicative term
   - D. 2012–2013 adjudicative term

II. Administrative matters
   - A. Budget
   - B. Civil Justice Reform Taskforce
   - C. Iowa Standards of Practice for Attorney's Representing Parents in Juvenile Court
   - D. Advertising Rules
   - E. Appellate Rules
   - F. Chapter 21—Operating Procedures

Case Law Update: Construction

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2012 Case Law Update: Construction Law

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Iowa Defense Counsel Association
48th Annual Meeting & Seminar
September 14, 2012

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1. *Fry v. Blauvelt*, ____ N.W. 2d. ____, 2012 WL 2865882 (Iowa July 13, 2012). The Court reversed the court of appeals and affirmed the judgment of the district court. Defendant builder was not substantially prejudiced by homeowner's late disclosure of trial exhibits showing water damage and millipede infestation. The Court also upheld a damages verdict that included an award for excess interest paid by the homeowner who claimed the delay in finishing the project prevented her from converting a home equity line of credit to a conventional mortgage.

2. *Flynn Builders, L.C. v. Lande*, 814 N.W.2d 542 (Iowa 2012). An owner and contractor entered into an agreement for the construction of a new home. During construction, the owner refused to pay the contractor after discovering markups on the cost of materials. In response, the contractor halted construction and filed an action to enforce a mechanic's lien. Although the contractor did not complete construction, the district court found the contractor rendered substantial performance under the contract and entered a judgment against the owner. The court of appeals affirmed. The Supreme Court reversed in part, and remanded, finding that the contractor had not substantially completed the work. In order to enforce a mechanic's lien the work must be substantially performed by the contractor. Here, more than simply punch list items remained. The plumbing, drywall, paint, carpet, floor coverings, and trim remained unfinished. Evidence showed the work was only 80-85% complete.

3. *McCormick v. Nikkel & Assoc*., ___ N.W. 2d. ___ 2012 WL 1900113 (Iowa May 25, 2012). A subcontractor that properly performs electrical work on a jobsite, then locks up the work and transfers control to the property owner, owes no duty of care to an employee of the owner electrocuted six days later when the owner fails to deenergize the work site in contravention of various warnings and regulations. Court of appeals decision vacated and district court affirmed.

4. *Hometown Plumbing & Heating Co. v. Secura Ins. Co.*, 815 N.W.2d 779 (Iowa Ct. App. April 11, 2012) (unpublished). Insurer appealed a district court declaratory

judgment ruling finding it was obligated to provide coverage under an all risks insurance policy issued to plaintiff mechanical contractor for losses incurred when water pipes broke during three separate tests of an air cooling system. District court also found the insured loss covered the cost to replace the entire system of pipes already installed with heavier and thicker pipes. Court of appeals held that Hometown carried its burden to show the loss was due to an "external cause" by discrediting internal causes. Secura failed to prove the exclusions based on the use of insufficient materials or a design defect. The court of appeals held that Hometown proved direct physical loss to the three sections of pipe that cracked or broke, but failed to prove there was a system failure or direct physical loss to additional sections of pipe. It affirmed the district court's ruling finding coverage for the damage to the three sections of cracked or broken pipe, but reversed the district court's determination to the extent it awarded damages beyond those three sections.

5. *Aaron Luke d/b/a Town & Country Construction v. Valdez*, 815 N.W.2d 410 (Iowa Ct. App. March 28, 2012) (unpublished). A builder sued to foreclose a mechanic's lien. The court of appeals held the district court erred by failing to deduct from the builder's claim an amount for work not completed, despite builder's claim that the work was not completed because the homeowner's hindered or delayed his performance.

6. *City of Forest City v. Holland Contracting Corp.,* 810 N.W.2d 532, 2012 WL 170195, (Iowa Ct. App. January 19, 2012) (unpublished). Court of appeals upheld district court judgment in a "battle of the experts" case. Contractor's inadequate soil compaction caused cracks to form in concrete, not negligent drainage design by engineering firm.

7. *Thorson v. Hoyland*, 810 N.W.2d 533, 2012 WL 170677 (Iowa Ct. App. January 19, 2012) (unpublished). Farm tenant sued to foreclose mechanic's lien claiming he made improvements to property over a period of eight years pursuant to an agreement with landowner. Plaintiff did not bring a claim for breach of contract. District court found, and court of appeals agreed, that most of the claims were time barred under Iowa Code § 572.27 because the labor and materials were supplied more than two years and ninety days before the lien was perfected. Court also affirmed district court finding that most of the work that was performed within the two year and ninety day period was not done "by virtue of any contract" with the land owner and therefore was not recoverable under Iowa Code § 572.2.

8. *Venard v. Martin*, 810 N.W.2d 533, 2012 WL 170680 (Iowa Ct. App. January 19, 2012) (unpublished). Court of appeals affirmed district court decision. Court rejected homeowners' claim that they were not required to pay a contractor for labor charges that were not backed up with invoices.

9. *Welte Ins. v. Big Red Lighting Electrical, Inc.*, 808 N.W.2d 755, 2011 WL 5391616 (Iowa Ct. App. November 9, 2011) (unpublished). General contractor submitted subcontractors' payment requests to bank against a construction loan taken by homeowners, which requests were paid. However, subcontractors' invoices were for work on a different project, not for homeowners' project. General contractor later stopped paying subs and abandoned the project. Homeowners sought to recoup the money paid to the subcontractors. District court granted summary judgment in favor of the subcontractors where there was no evidence the subcontractors had knowledge of the general contractor's inequitable actions.

How Architects Can Best Work with Attorneys in Defending Lawsuits

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Working Effectively with your Construction Expert

Task #1

Bridge the knowledge/expertise gap between trial lawyer and expert.

- Quickly
- Thoroughly
- On point
- Cost effectively

Working Effectively with your Construction Expert

Know the Basics of *all* Construction Projects

The **4** Pillars of Construction:

Pillar 1. Statutes and Regulations.

Pillar 2. Industry Standards.

Pillar 3. Usual and Customary Practices.

Pillar 4. Agreements and Contracts.

Working Effectively with your Construction Expert

Pillar #1. Statutes and Regulations.

- Building Codes
  - Uniform Building Codes (before year 2000)
  - International Building Codes (year 2000 and after)
- Rules and Regulations
  - Iowa State Fire Code
  - State of Iowa Building Code
  - OSHA and IOSHA
  - ADA, ABA, and Iowa Disabilities Code

Working Effectively with your Construction Expert

Pillar #2. Industry Standards.

- **ANSI**—American National Standards Institute
  - ASTM—American Society for Testing Materials
  - ACI—American Concrete Institute
  - AWS—American Welding Society
- Manufacturers Vendor Data
  - Specifications
  - Installation Instructions
  - MSDS—Manufacturers Safety Data Sheets

Working Effectively with your Construction Expert

Pillar #3. Usual and Customary Practices.

Written Usual and Customary Practices.

- AIA—American Institute of Architects Standard Form Agreements.
- Trade and Professional Organization Publications.

Unwritten Usual and Customary Practices.

- Expert's opinion based upon long and successful experience in the design and construction business.
  - Longevity in the real-world of design and construction business counts.

Working Effectively with your Construction Expert

Pillar #4. Contracts and Agreements.

Written Contracts.

- AIA--American Institute of Architects Standard Form Contracts
- AGC—Associated General Contractors Standard Form Contracts
- Government Standard Form Contracts
- Proprietary Contracts

Verbal Agreements.

- Stale and Convenient Recollections of the Past
- Constant Source of Disputes

Traumatic Brain Injury

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Neuropsychological Assessment of Traumatic Brain Injury
R. D. Jones, Ph.D.

Definition of a clinical neuropsychologist
- Ph.D., Internship and Fellowship
- Houston Conference
  http://theaacn.org/position_papers/Houston_Conference.pdf
- Licensing and Board Certification
  http://www.abpp.org/i4a/pages/index.cfm?pageid=3285
- Additional issues relevant to assessment (e.g., effort testing, third party observers, release of data, use of technicians)
  http://theaacn.org/

Background of Traumatic Brain Injury
- Definition, prevalence, cost
- Concussion, mild, moderate, severe
- Pathophysiology
- Mechanisms, risk factors, scenarios

Assessment –Medical
- Acute characteristics - EMT and emergency room
- Neurologic examination
- Neuroimaging (structural and functional)
- Electrophysiologic (EEG)

Assessment – Behavioral and Cognitive
- Rating scales
- Neuropsychological assessment
  - Cognitive domains
  - Personality and affective changes

Essential information for establishing the diagnosis
- Acute medical characteristics (GCS, LOC, PTA, RA, TFC)
- Course and duration of recovery
- Background demographic information (age, education, occupation)
- Collateral information
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- Cooperation and effort
- Contact with a collateral

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Iowa Defense Counsel Association

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Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
C/O Ms. Heather Tamminga
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