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Annual Meeting & Seminar Committee: James Craig, Chair; Bruce Walker, Christine Conover, Noel McKibbin

Iowa Defense Counsel Association
49th Annual Meeting & Seminar
September 19 – 20, 2013
West Des Moines Marriott • West Des Moines, Iowa
Approved for 13.0 State CLE Hours (Includes 2.5 Ethics Hours) Activity Number 111884
Approved for 6.5 Federal CLE Hours

Time	Thursday, September 19, 2013	Location
7:00 a.m. – 3:45 p.m.	Registration Open	Concord Foyer
7:00 a.m. – 7:45 a.m.	Exhibitor Set-Up	Concord Foyer
7:00 a.m. – 8:00 a.m.	Continental Breakfast	Concord Foyer
7:45 a.m. – 6:00 p.m.	Exhibits Open	Concord Foyer
8:00 – 8:15 a.m.	Welcome & Opening Remarks	Grand Ballroom
8:15 – 9:00 a.m.	**Session**: Everyday Conflicts, *Justice David Baker* **(.75 Ethics hours; .75 State and Federal CLE)**	Grand Ballroom
9:00 – 10:00 a.m.	**Keynote**: Overcoming Expert Opinion with Facts, *Dr. Robert Barth, Ph.D* **(1.0 State and Federal CLE)**	Grand Ballroom
10:00 – 10:15 a.m.	**Case Law Update**: Negligent Malpractice, Torts, Insurance Laws, *Carrie Thompson* **(.25 State CLE)**	Grand Ballroom
10:15 – 10:30 a.m.	Networking Break Exhibits Open	Concord Foyer
10:30 – 11:30 a.m.	**Session**: The Primacy and Recency Effects: The Secret Weapons of Opening Statements, *Dr. William Kanasky, Ph.D* **(1.0 State and Federal CLE)**	Grand Ballroom

11:30 a.m. – 12:00 p.m.	**Session**: The Iowa Supreme Court: One Justice's Perspective, *Justice Brent Appel* **(.5 State CLE)**	Grand Ballroom
12:00 – 1:00 p.m.	Exhibits Open Lunch on Own	Concord Foyer Two Rivers Grill, located in the hotel restaurant
12:00 – 1:00 p.m.	Past Presidents Lunch	Boardroom A
1:00 – 1:45 p.m.	**Session**: Ten Stupid Things Defense Lawyers Do, *Brad Brady* **(.75 Ethics hours; .75 State and Federal CLE)**	Grand Ballroom
1:45 – 2:45 p.m.	**Keynote**: Chronic Pain: Scientific Findings Specifically for Claims, *Dr. Robert Barth, Ph.D.* **(1.0 State CLE)**	Grand Ballroom
2:45 – 3:00 p.m.	Networking Break Exhibits Open	Concord Foyer
3:00 – 3:30 p.m.	**Session**: Handling Claims and Lawsuits with Plaintiff in Bankruptcy, *James Snyder* **(.5 State and Federal CLE)**	Grand Ballroom
3:30 – 4:00 p.m.	**Session**: National Trends in the Civil Trial Practice: What's Happening and What DRI Is Doing, *J. Michael Weston, John Kouris, and Robert Shively* **(.5 State CLE)**	Grand Ballroom
4:00 – 5:00 p.m.	**Panel**: Differing Expectations between Insurance Companies and Outside Counsel, *Martha Shaff (moderator), Jerry Brimeyer, Rene Charles Lapierre, Lisa Simonetta, and Maureen Roach Tobin* **(1.0State CLE)**	Grand Ballroom
5:00 – 5:15 p.m.	**Sponsor Showcase**	Grand Ballroom
5:15 – 6:00 p.m.	IDCA Exhibitors Reception	Concord Foyer
6:00 – 7:45 p.m.	IDCA Awards Dinner and Guest Speaker, *John Kouris*	West Des Moines Ballroom

8:30 p.m.	YLC Hosted After-Hours Reception	Blue Moon Dueling Piano Bar
Time	**Friday, September 20, 2013**	**Location**
7:00 a.m. – 3:30 p.m.	Registration Open	Concord Foyer
7:00 – 8:00 a.m.	Continental Breakfast	Concord Foyer
7:00 a.m. – 1:15 p.m.	Exhibits Open	Concord Foyer
8:00 – 8:30 a.m.	**Session**: Legislative Update & Annual Meeting, *Scott Sundstrom* **(.5 State CLE)**	Grand Ballroom
8:30 – 9:15 a.m.	**Session**: Tell Your Clients Before They Ask – A Look at Internal Law Firm Metrics, *Jay Courie* **(.75 State CLE)**	Grand Ballroom
Concurrent Sessions 9:15 – 10:15 a.m.	**You may choose to attend these two sessions in the Grand Ballroom (1.0 CLE)**	**Grand Ballroom**
9:15 – 10:00 a.m.	**Session**: Possible Changes in State Court Discovery and Trial Rules, *Greg Lederer* **(.75 State CLE)**	Grand Ballroom
10:00 – 10:15 a.m.	**Case Law Update**: Commercial, Contracts, Construction Law Cases, *John Lande* **(.25 State CLE)**	Grand Ballroom
Concurrent Sessions 9:15 – 10:15 a.m.	**Or you may choose to attend this session in the West Des Moines Ballroom (1.0 CLE)**	**West Des Moines Ballroom**
9:15 – 10:15 a.m.	**Session**: Economic Impact of Ineffective Witness Testimony, *Dr. William Kanasky, Ph.D.* **(1.0 State CLE)**	West Des Moines Ballroom
10:15 – 10:30 a.m.	Networking Break Exhibits Open	Concord Foyer
10:30 – 11:30 a.m.	**Session:** Big E little e: Ethics and the Trial Lawyer, *Mark Olson* **(1.0 Ethics hours; 1.0 State and Federal CLE)**	Grand Ballroom

11:30 a.m. – 12:00 p.m.	**Session**: iPad in Trial, *Kevin Caster* **(.5 State CLE)**	Grand Ballroom
12:00 – 12:15 p.m.	**Case Law Update**: Employment and Civil Procedure, *Drew Cumings-Peterson* **(.25 State and Federal CLE)**	Grand Ballroom
12:15 – 1:15 p.m.	Exhibits Open Lunch on Own	Concord Foyer Restaurant in Hotel
1:15 – 2:30 p.m.	**Session**: The Prosecution of Zacaris Moussaoui: The 20th 9-11 Hijacker, *Chuck Rosenberg* **(1.25 State and Federal CLE)**	Grand Ballroom
1:30 p.m.	Exhibitor Tear-Down	Concord Foyer
2:30 – 3:15 p.m.	**Session**: How to Object and Persuade Your Way to a Better Jury, *Judge Paul Huscher* **(.75 State and Federal CLE)**	Grand Ballroom

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*Dudley J. Weible, 1970 – 1971
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*Craig H. Mosier, 1973 – 1974
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*Albert D. Vasey (Hon.), 1983
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*Raymond R. Stefani, 1984 – 1985
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Thomas D. Hanson, 1987 – 1988
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Gregory M. Lederer, 1994 – 1995
Charles E. Miller, 1995 – 1996
Robert A. Engberg, 1996 – 1997
Jaki K. Samuelson, 1997 – 1998
Mark L. Tripp, 1998 – 1999
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Marion L. Beatty, 2000 – 2001
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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
Gregory G. Barntsen, 2011 – 2012

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* 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

* Decease

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
1990	Richard J. Sapp
1991	Eugene B. Marlett
1992	Herbert S. Selby
*1992	Edward F. Seitzinger
1993	DeWayne E. Stroud
1994	Marion L. Beatty
1995	Robert D. Houghton
1996	Mark. L. Tripp
1997	David L. Phipps
1998	Gregory M. Lederer
1999	J. Michael Weston
2000	Sharon Soorholtz Greer
2001	James Pugh
2002	Michael Thrall
2003	Brent Ruther
2004	Michael Thrall
2005	Christine Conover
2006	Megan M. Antenucci
2007	Michael Thrall
2008	Noel K. McKibben
2009	Martha L. Shaff
2010	Gerald D. Goddard
2011	Gregory A. Witke
2012	Kevin M. Reynolds

*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

MERITORIOUS SERVICE AWARD RECIPIENTS

The Meritorious Service Award (formerly the Lifetime Award) is bestowed upon IDCA members whose longstanding commitment 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
2012	Philip Willson

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association
September 2012 – August 2013

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2012 – 2013 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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2012 – 2013 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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2012 – 2013 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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2012 – 2013 IDCA Committees

Legislative

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2012 – 2013 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.

Co-Chairs:

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2012 – 2013 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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Board Liaison:

2012 – 2013 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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2012 – 2013 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
September 1, 2013 – August 31, 2014. 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!

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(515) 334-1164 fax
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

COMMITTEE INTEREST FORM

Name: _____

☐ ***Annual Meeting & Seminar Committee***
Assists in organizing annual meeting events and CLE programs.

☐ ***Defense Update Board of Editors***
Responsible for keeping the creating a timeline for the quarterly newsletter.

☐ ***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.

☐ ***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.

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

☐ ***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.

☐ ***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.

☐ ***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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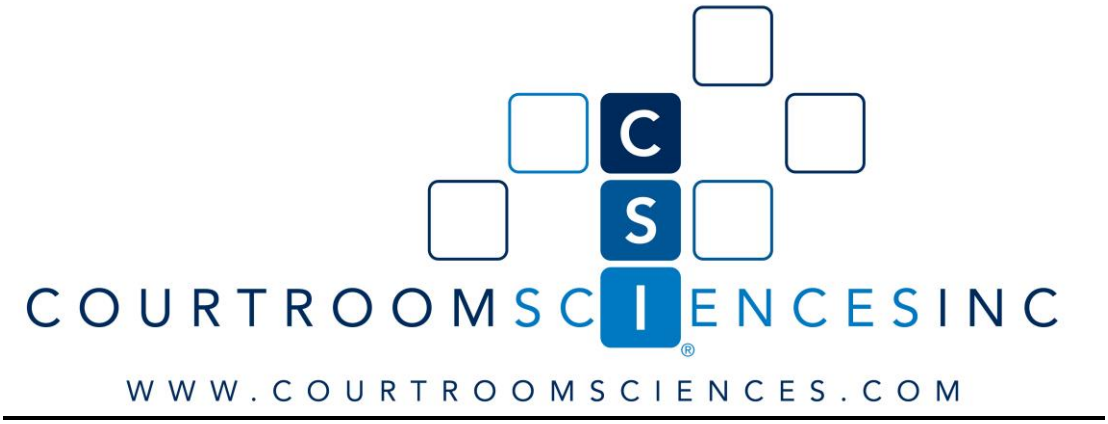

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Keynote Speaker is Dr. Robert Barth, Ph.D

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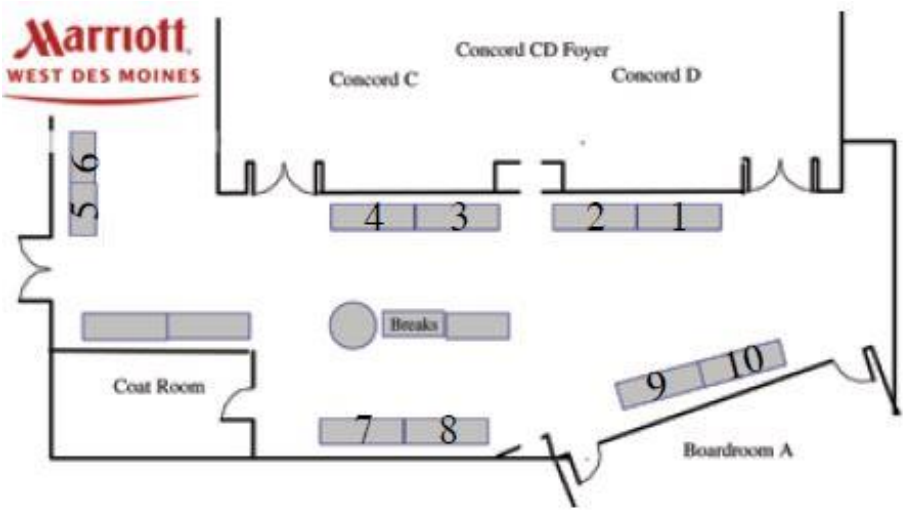

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SPEAKER BIOGRAPHIES

Justice Brent Appel, Iowa Supreme Court, Des Moines, IA
Justice Brent Appel, Ackworth, was appointed to the Iowa Supreme Court in 2006. A Dubuque native, he earned a bachelor's and master's degree from Stanford University in 1973. He received his law degree from the University of California, Berkley in 1977. Following graduation from law school, Justice Appel served as a court law clerk for the United States Court of Appeals for the District of Columbia Circuit. In 1979, Justice Appel was appointed Iowa First Assistant Attorney General, and in 1983 became Iowa Deputy Attorney General. While serving in the Iowa Attorney General's office, Justice Appel argued and briefed four cases before the United States Supreme Court, including the second "Christian burial" case, Nix v. Williams. In 1987 until 2006, Justice Appel was engaged in private practice in central Iowa. Justice Appel is an emeritus member of the C. Edwin Moore Inn of Court. He has served on the Supreme Court's Bar Conduct Committee and is currently a member of the Subcommittee on Supreme Court Rules of Practice and Procedure. In 2011, Justice Appel was appointed by Chief Justice John Roberts to serve as a member of the Federal Advisory Committee on the Rules of Evidence. His current term expires December 31, 2016.

Justice David Baker, Cedar Rapids, IA
A life-long Iowan, Justice Baker was born in Muscatine in 1952 and grew up in Waterloo. Justice Baker attended undergraduate and law school at the University of Iowa, receiving his bachelor's degree in 1975 with Honors in Sociology and his law degree in 1979 with high honors, Order of the Coif. Following graduation from law school, Justice Baker worked in the private practice of law for 25 years where he practiced in various areas including tax and corporate to bankruptcy to litigation. His initial areas of practice were a general practice with an emphasis in tax, estate planning and corporate. He evolved away from a business practice to a litigation practice, initially bankruptcy and later insurance defense. In 1989, Justice Baker began a new firm with John Riccolo under the name of Riccolo & Baker, P.C. practicing almost exclusively in the area of litigation. Justice Baker has handled cases involving personal injury, professional negligence, construction, real estate, commercial questions, employment issues, and workers' compensation. He has been involved in numerous trials as well as administrative and bankruptcy hearings. He had an extensive appellate practice. He was appointed as a district court judge for the Sixth Judicial District in the State of Iowa beginning January 3, 2005. He was appointed to the Iowa Court of Appeals in 2006. He was appointed to the Iowa Supreme Court in 2008 where he served until December 31, 2010. As a district court judge, he heard cases ranging from divorces to medical malpractice cases to land disputes. As an appellate judge, he has heard hundreds of cases covering almost every aspect of the law. Justice Baker has been involved in many professional activities. As a member of the Iowa State Bar Association, he was involved in Jury Instructions Committee, Bench/Bar Committee, and the Appellate Practice Committee where he participated in the writing of the Appellate Practice Manual. He is currently the co-chairman of the Bench/Bar Committee. Justice Baker also served as a temporary bar examiner for 10 years and has been a lecturer for the Iowa Bar Review School. In the Linn County Bar Association, he served as a member of the Ethics and Grievance Committee. He is currently a member of the Sixth Judicial District Judicial Nominating Commission. He was also a member of the Merit Selection Panel involved in the selection of the U.S. Magistrate for the Northern District of Iowa. He was the chairman of Amicus Curiae Committee for the Iowa Trial Lawyers Association. Based upon the recommendations of his peers and judges, he was inducted into the Iowa Academy of Trial Lawyers, whose membership is limited to 250 attorneys who have displayed exceptional skills and the highest integrity. He is currently a member of Mason Ladd Inn of Court. In May 2012, Justice Baker received the 2012 John F. Kennedy Profile in Courage Award. He has also been honored with the 2011 Louise Noun Civil Liberties Award from the Iowa ACLU. Justice Baker is a member of the Linn County, Iowa State and American Bar Associations.

Dr. Robert Barth, Ph.D., Barth NeuroScience, Chattanooga, TN
The American Medical Association has repeatedly listed Dr. Barth among their "internationally recognized expert authors," and has asked him to contribute to their programming for chronic pain, brain injury, and mental illness. His work for the AMA has included contributing to the Guides to the Evaluation of Permanent Impairment, and the Guides to the Evaluation of Disease and Injury Causation. He has been asked to provide faculty, writing, editorial, governance, and program development duties for many organization, including: American Medical Association, American Psychological Association and American Academy of Orthopaedic Surgeons. His work for the National Association of Workers' Compensation Judiciary and the Florida Office of Judges of Compensation Claims specifically involved being invited to educate judges. Dr. Barth has been named a Fellow of the National Academy of Neuropsychology, for having made a significant contribution to science and practice. His full-time education concluded with post-doctoral fellowship training in a Harvard Medical School program, after pre-doctoral internship training also within the Harvard Medical School system.

Brad J. Brady, Brady & O'Shea PC, Cedar Rapids, IA
Brad Brady practices with Brady & O'Shea, P.C., in Cedar Rapids, Iowa. He has been practicing law since 1978, primarily in civil litigation on behalf of plaintiffs. He also acts as a mediator. He is a member of the American College of Trial Lawyers, Iowa Academy of Trial Lawyers, American Trial Association for Justice and Iowa Association for Justice. He previously has spoken on trial, discovery, civil procedure, class actions, RICO claims, business torts, consumer fraud and other legal topics.

SPEAKER BIOGRAPHIES

Jerry Brimeyer, State Farm Mutual Automobile Insurance Company, West Des Moines, IA
Jerry Brimeyer is Auto Claims Section Manager with State Farm Insurance in Des Moines, Iowa. He has responsibility for an operation handling complex bodily injury and property damage claims in Iowa and Nebraska, including claims in litigation. He has been with State Farm since 1985 starting as an Auto Claim Representative in Dubuque, Iowa. He was promoted to Auto Team Manager in Waterloo, Iowa in 1990, and promoted to his current position in 1996. Jerry earned his Insurance CPCU designation in 1992. Jerry also has achieved professional certifications in business and leadership coaching. In 2006, he earned CPCC and ACC designations through the Coaches Training Institute and the International Coaching Federation, respectively. He is a certified facilitator of the Coaching Clinic, a Corporate Coach U two-day coaching skills training workshop. He has a BA in Psychology from the University of Iowa and MA in Educational Counseling from Loras College.

Kevin J. Caster, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA
Kevin Caster is a Senior Vice President with Shuttleworth & Ingersoll, P.L.C. Kevin's law practice focuses on commercial litigation, and particularly in construction litigation. Kevin was named “Lawyer of the Year” by Best Lawyers’ 2013 for Cedar Rapids in Construction Litigation. Kevin is an Allied Individual Member of the American Institute of Architects, and a member of the Cedar Rapids Home Builders Association. Kevin is currently serving on the Iowa State Bar Association Construction Law Section Council, and he belongs to the Construction Industry Forum of the American Bar Association. Kevin is a Fellow in the Iowa Academy of Trial Lawyers. He has tried numerous cases to the Iowa District Courts, and the United States District Courts for the Northern and Southern Districts of Iowa. Kevin has argued appeals in front of the Iowa Court of Appeals, the Supreme Court of Iowa, and the United States Court of Appeals for the Eighth Circuit. Construction law involves doctrines from both “Tort Law” and “Contract Law.” Many construction suits involve both claims about professional negligence and claims about the breach of construction contracts. Kevin has written and spoken extensively on the laws that govern construction disputes, including: Construction Contract Law; AIA Contracts; Implied Warranties in Construction Contracts; Economic Loss Doctrine; The Standard of Care for Design Professionals; and Construction Accidents. He is the author of the Iowa Chapter of State-by-State Guide to Architect, Engineers and Contractor Licensing, Second Ed, S. G. Walker, Ed. (Wolters Kluwer 2012).

Jay Courie, McAngus Goudelock & Courie, Columbia, SC
Jay Courie is a founding partner and the Managing Partner of the law firm of McAngus Goudelock & Courie, LLC. Mr. Courie represents businesses, professional associations and individuals in a variety of matters including contract negotiations, employment matters, finance and insurance issues, government relations, procurement, business development and strategic planning. Mr. Courie serves as general counsel to representative clients including businesses, technology companies, hospitals, professional practices and individuals. He is also licensed by the NFL Players Association and is member of the National Sports Lawyers Association, and serves as general counsel to coaches and professional athletes. Mr. Courie is a former member of the Clemson University Board of Visitors. He also serves as Chair of the Hammond School Board of Trustees. He is a Past President of the 1,000-member South Carolina Defense Trial Attorneys’ Association and former Chair of Francis Marion University Board of Trustees and EdVenture Children’s Museum Board of Trustees. He is active in the Defense Research Institute, where he serves as chair of the Law Practice Management Committee. He is a graduate of Leadership Columbia and Leadership South Carolina. Mr. Courie is a frequent lecturer on matters involving contract negotiations, marketing, business development, strategic planning and law firm management.

Drew A. Cumings-Peterson, Shuttleworth & Ingersoll, PLC, Cedar Rapids, IA
Drew Cumings-Peterson is an associate at Shuttleworth & Ingersoll, P.L.C. in Cedar Rapids, Iowa. He has a general practice, including but not limited to Employment law and Health law.

District Court Judge Paul R. Huscher, District 5A
Judge Huscher, Waukee, was appointed to the bench in 1997. Born in Norman, Oklahoma, he went to undergraduate college at Oklahoma State University. After graduating in 1977, he went to Drake University for law school and graduated in 1980. He was in private practice for 16 years before his appointment. Judge Huscher is a member of the Dallas County, Guthrie County, and Iowa State Bar Associations, as well as the Iowa Judges Association. ISBA Jury Instruction Committee member 2000 - 2009 and 2011 to the present; Chair 2004 - 2009, and 2012 to the present.

Dr. William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, TX
Dr. Kanasky is recognized as a national expert, author and speaker in the areas of witness preparation and jury psychology. He provides top-quality litigation research and consultation to defense counsel involved in civil lawsuits. Bill has expertise in all aspects of litigation research and consulting, including: Witness Preparation, Trial Science, and Settlement and Mediation Science. Bill's success with training witnesses for deposition and trial testimony is remarkable. His systematic witness training methodology is efficient and effective, as it is designed to meet each witness's unique needs, while concurrently teaching core principles of persuasive communication. Clients benefit from Bill's ability to transform poor or average witnesses into extraordinary communicators. Bill earned his B.A. in Psychology from the University of North Carolina at Chapel Hill, and his Ph.D. in Clinical Psychology from the University of Florida. He has been a faculty member at several trial academies where he has taught voir dire development, jury selection methodology, and witness preparation techniques. Bill is a published author in the areas of communication science and jury psychology, and has presented at numerous State Bar conventions, corporate counsel organizations, corporate legal departments, law schools, and major law firms.

John Kouris, Executive Director, DRI, Chicago, IL
John Kouris has served as the Executive Director of DRI since April 1998. Prior to assuming responsibilities at DRI, John was the Chief Operating Officer of the National Institute for Trial Advocacy (NITA), which was operated under the auspices of the Notre Dame School of Law. His professional career spans more than 35 years, 13 of which were spent practicing law in Northwest, Indiana. John also taught as adjunct faculty for the Creative Management Program at the University of Notre Dame School of Business. He was graduated from Western Michigan University (B.A.) and the University of Loyola (Chicago) School of Law (J.D.). For the past 28 years, John has spent his fall weekends as a BCS Division football official; the last 22 of those years have been in the Big Ten Conference. His officiating career has seen John selected to work numerous bowl games including the Orange Bowl, Fiesta Bowl, Cotton Bowl and the 2006 Rose Bowl, which was also the BCS National Championship contest.

John Lande, Dickinson, Mackaman, Tyler & Hagen, 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, creditor rights, 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. In 2011, 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.

René Charles Lapierre, Klass Law Firm, L.L.P., Sioux City, IA
René graduated with distinction from the University of South Dakota School of Law in 1985. Prior to law school, René obtained his Bachelor's Degree from the University of South Dakota in 1979 and his Master's Degree in 1980. He is admitted to and actively handles lawsuits and trials in federal, state and workers' compensation courts in Iowa, South Dakota and Nebraska. He is a member of the Iowa State, South Dakota State and Nebraska State Bar Associations. René was a Captain in the United State Air Force and was a Judge Advocate from 1988-1993. He was stationed at Offutt AFB in Omaha, Nebraska; Williams AFB in Chandler, Arizona; Assistant Professor, Legal Studies Department, United States Air Force Academy, Colorado Springs, Colorado; and operation Southern Watch. René was born in Westbury, New York. In his teens, he moved to South Dakota. He has been in Sioux City, Iowa, since 1993. Rene is active in local charities, serves as President of his local church, and serves on the Iowa Defense Counsel Association Board. René is currently a senior and co-managing partner with the Klass Law Firm in Sioux City.

Gregory M. Lederer, Lederer Weston Craig, P.L.C., Cedar Rapids, IA
Gregory M. Lederer is a founding member of LedererWestonCraig PLC., an eight-lawyer firm specializing in civil trial work, with offices in Des Moines and Cedar Rapids. Greg has practiced as a trial lawyer since 1979 and specializes in product liability, professional liability, drug and medical device litigation, commercial litigation, and business and personal torts. He has tried as lead counsel more than 80 civil actions to verdict or judgment. He has tried more than 20 cases with demands of $1,000,000.00 or more. He has appeared as lead counsel in more than 35 appeals. He holds an AV rating from Martindale-Hubbell. Greg is a Fellow in the American College of Trial Lawyers, an Advocate in the American Board of Trial Advocates, and a Fellow in the Iowa Academy of Trial Lawyers. He is an active member of the International Association of Defense Counsel (IADC), the Defense Research Institute (DRI), Lawyers for Civil Justice (LCJ), and the Iowa Defense Counsel Association (IDCA). Greg served as President of IADC in 2005-2006. He served as President of LCJ in 2008-2009. He served as President of IDCA in 1994- 1995. Locally, Greg served on the State Judicial Nominating Commission from 1993 to 1999. He chaired the U.S. District Court Magistrate Judge Merit Selection Panel for the Northern District of Iowa on four separate occasions, most recently in 2011. He currently serves on an Iowa Supreme Court committee tasked with revising the discovery rules and with creating a expedited discovery and trial track for smaller civil cases. Greg has authored a variety of CLE presentations and participated in many professional organization meetings as a speaker, panelist, or moderator. He has provided a civil appellate update to all of the state court judges in Iowa on an annual basis for most of the last 20 years. Greg grew up in South Sioux City, Nebraska, graduated from the University of Nebraska in 1973, and received his J.D. from Drake University in 1977. He served as a law clerk to Associate Justice M. E. Rawlings of the Iowa Supreme Court in 1977-1978. He served a second term as law clerk to Chief Justice W.W. Reynoldson in 1978-1979. He practiced at Simmons Perrine in Cedar Rapids for 28 years before starting LedererWestonCraig with Mike Weston and Jim Craig.

Mark Olson, Oppenheimer Wolff & Donnelly LLP, Minneapolis, MN
Mark Olson is a partner at Oppenheimer Wolff & Donnelly in Minneapolis, Minnesota, where he litigates and tries cases in the areas of the defense of Products Liability, Toxic Tort and other Mass Tort cases. He also handles numerous complex business litigation cases. He has served as national, regional and local counsel for a variety of manufacturers and distributors of industrial and consumer products as well as pharmaceuticals and medical devices. He has tried a significant number of cases across the country and has argued numerous cases in the Minnesota appellate courts. Mark is a graduate of the University of Minnesota Law School (1976) and Concordia College, Moorhead, Minnesota (BA 1972). He also attended Harvard Divinity School. Mark is an Adjunct Professor at the University of Minnesota Law School and at William Mitchell College of Law where he teaches Trial Advocacy. He coaches the University of Minnesota Law School's Mock Trial Team. Mark is also a frequent NITA faculty member in programs around the country involving deposition skills and trial techniques. He is a frequent CLE lecturer and has written a number of articles dealing with Products Liability, Experts and Evidence, Trial Techniques, the Death Penalty, and Legal Ethics. Mr. Olson is a member of the International Association of Defense Counsel (IADC), the Product Liability Advisory Council (PLAC), the Defense Research Institute (DRI), the Minnesota Defense Lawyers Association and a variety of other state, local and national bar organizations. As a member of the IADC, he was a faculty member of the 2004 Trial Academy. He has presented a number of CLE programs at IADC and PLAC. He was the Newsletter Editor of the Trial Techniques and Tactics Committee for a number of years and is on the Board of Editors of the Defense Counsel Journal. Mark is admitted to practice in Minnesota, Wisconsin, Pennsylvania, the Federal District Court of Minnesota and North Dakota and the Eighth, Fifth and Eleventh Circuit Courts of Appeals and the U.S. Supreme Court.

Chuck Rosenberg, Hogan Lovells US, LLP, Washington, DC
Chuck Rosenberg is a partner in at Hogan Loveels US, LLP's Washington, DC's office and a member of the White Collar Crime and Investigations practice. He focuses on federal white collar criminal defense, internal investigations, government enforcement actions, and corporate compliance. Chuck has extensive and unique experience at the highest levels of federal law enforcement. Before joining our legal practice, Chuck served as the U.S. Attorney for the Eastern District of Virginia – one of the most important districts in the nation, routinely entrusted with many of the nation's most sensitive terrorism and national security prosecutions. As the chief federal law enforcement officer for the district, Chuck supervised the prosecution of all federal crimes and the litigation of all civil matters involving the federal government. From June 2005 until March 2006, Chuck served as the U.S. Attorney for the Southern District of Texas – one of the largest and most active districts in the nation with six offices, including one in Houston and three on the border of the United States and Mexico. Before that, Chuck served in several senior posts at the Department of Justice where his work focused on counterterrorism, counterintelligence, national security, and criminal matters, including service as Chief of Staff to Deputy Attorney General Jim Comey (2004-2005), Counselor to Attorney General John Ashcroft (2003-2004), and Counsel to FBI Director Bob Mueller (2002-2003). From 1994 to 2000, Chuck was an Assistant U.S. Attorney in the Eastern District of Virginia. There, Chuck tried dozens of cases to juries and briefed and argued many of those cases to the U.S. Court of Appeals for the Fourth Circuit. Chuck prosecuted cases that ranged from complex financial fraud crimes to violent crimes and espionage.

Martha L. Shaff, Betty Neuman & McMahon PLC, Davenport, IA
Member/Partner
Civil Litigation, Commercial Litigation, Employment Litigation, Personal Injury Defense, Products Liability

Education: St. Olaf College B.A. 1986; Drake University Law School JD with honors 1989

Admissions: Iowa 1989; Illinois 1993; United States District Court Northern and Southern District of Iowa; Central District of Illinois; Northern District of Illinois; 7th and 8th Circuit Court of Appeals; United States Supreme Court

Honors: Fellow, American College of Trial Lawyers; Member, Iowa Academy of Trial Lawyers (Board of Directors 2011 – present); President of the Iowa Defense Counsel Association (2007-2008); Professional Associations; International Association of Defense Counsel; Iowa Defense Counsel Association (president 2007 – 2008); Scott County Bar Association; Iowa State Bar Association; Iowa Supreme Court Civil Procedure Committee (2008 – present); Iowa Supreme Court Judicial Task Force Committee 2011-2012; Illinois Defense Counsel Association; Defense Research Institute; Member of 7th Judicial Nominating Committee (2000 – 2006).

Lisa A. Simonetta, EMC Insurance, Des Moines, IA
Lisa received her B.A from the College of the Holy Cross. She is a graduate of the University of San Diego School of Law and practiced insurance defense law in California before coming to EMC. She is a Member of the California State bar, has taught AIC classes at the Kelley Insurance Center and completed the FDCC Negotiation College.

Lisa began working at EMC in 1992 as a litigation specialist to handle complex claims litigation and extra-contractual claims. In 2002, Lisa was promoted to Vice President of claims legal. In addition to her claims handling responsibilities, she currently has oversight of the home office claims legal staff to include litigation management, coverage counsel, subrogation, environmental and construction defect units.

Lisa's responsibilities since becoming the VP of Claims Legal in 2003 include the following: manager and direct file handler of the companies "Bad Faith" files; oversight of EMC's in-house coverage counsel attorneys; oversight of EMC's Subrogation Department; designed and manages EMC's litigation management program; designed and manages our Litigation Specialist group; direct management of the Environmental department; direct management of the Construction Defect Specialists; claims liaison for underwriting form development.

James L. Snyder, Assistant U.S. Trustee, Des Moines, IA
Employment: Assistant United States Trustee, Region 12, Southern District of Iowa, February 1992 – Present; Acting Assistant United States Trustee, District of South Dakota, January 2013 – Present; Acting Assistant U.S. Trustee, Region 19, District of Colorado, May 2007 - April 2008; Acting Attorney in Charge - on special assignment, Credit Counseling / Debtor Education Complaints, Office of the General Counsel, Executive Office for United States Trustees; May - December 2006; Attorney Advisor, Eastern District of California, 1989 – 1992; Associate Attorney, Insurance defense and business litigation, Sacramento, California, 1987 – 1989; Associate Attorney, Commercial litigation, Fresno, California, 1985 - 1987

Education: Juris Doctor, University of the Pacific - McGeorge School of Law, 1985; Bachelor of Science, Criminology and Criminal Justice, California State University at Fresno, 1982.

Scott Sundstrom, IDCA Lobbyist, Nyemaster Goode, P.C., Des Moines, IA
Scott Sundstrom is a shareholder at the Nyemaster law firm in Des Moines and is the chairman of Nyemaster's Governmental Affairs Department. Scott lobbies on behalf of a number of clients before the legislature, the Governor, and regulatory agencies. Although Scott has a broad and varied lobbying practice, with particular emphasis on issues relating to taxation, insurance, and Iowa's regulatory environment. 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*. He received his undergraduate degree with honors from Carleton College, where he was a member of an improvisational comedy troupe.

Carrie L. Thompson, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA
Carrie L. Thompson is an attorney with Simmons Perrine Moyer Bergman PLC in Cedar Rapids where she practices in healthcare law and medical malpractice defense. Carrie earned her J.D. from the University of Iowa College of Law in December 2008.

Maureen Roach Tobin, Whitfield & Eddy, PLC, Des Moines, IA

Maureen's practice areas include personal injury litigation and worker's compensation, often representing employers involved in the hospitality and trucking industries. She has additional experience in commercial litigation, employment law, appellate practice and insurance coverage. Over the course of her 25 years of practice, Maureen has tried personal injury cases to juries in state and federal courts, and has represented clients in bench trials, administrative hearings, mediations and appellate arguments. She is committed to working with her clients to develop individualized legal solutions. In addition to maintaining her practice, Maureen also served two terms on the firm's Executive Committee. She has been selected for the inaugural edition of the Martindale-Hubbell® Bar Register of Preeminent Women Lawyers™ exclusively for women attorneys who have received the highest rating in both legal ability and ethical standards from their peers. She is a past president of the Polk County Women Attorneys, and a recipient of the President's Citation from the Young Lawyers Division of the Iowa State Bar Association. Outside of the firm, Maureen has been active as a community volunteer. She currently serves as chair of the Mercy Hospital Foundation Board of Directors and as a member of the Polk County Compensation Committee. In addition, she has coached middle school and high school Mock Trial, and has taken three high school teams to the National High School Mock Trial Tournament, including the West Des Moines Valley team that won the National High School Mock Trial Championship in Oklahoma City, OK in 2006. She is a graduate of the Greater Des Moines Leadership Institute. Maureen graduated from the University of Iowa in 1979, with a B.A. in economics, and from Drake University Law School in 1987. At Drake, she served on the editorial staff of the Drake Law Review, and authored a Note and an Article published in the Drake Law Review. She joined the firm of Whitfield & Eddy, P.L.C. in 1987.

Everyday Conflicts

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Every Day Conflicts

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A. Who is client?

1. In most cases, the goals of the insured and insurer are perfectly aligned.

B. Theories

1. Represent only the insured or is there co-representation?
2. Restatement (Third) of The Law Governing Lawyers, § 134. Compensation Or Direction Of A Lawyer By A Third Person
   (1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.
   (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
   (a) the direction does not interfere with the lawyer's independence of professional judgment;
   (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
   (c) the client consents to the direction under the limitations and conditions provided in § 122.

   Comment: *f. Representing an insured.* A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment *a,* beyond the scope of the

Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14.
Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer.

3. Restatement (Third) of The Law Governing Lawyers, § 14 Formation of a Client–Lawyer Relationship

   A relationship of client and lawyer arises when:
   (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
   (a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

C. Why do we care?

1. Discipline
2. Getting sued
3. Disqualification

D. Considerations

1. Calling shots
2. Communications
3. Differing interests
4. Time
5. Business disruption
6. Health of insured
7. Reputation of client

E. Potential problem areas

1. Strategy and/ or cost controls

a. Rule 32:1.7
[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* rule 32:1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so,

that the client has adequate information about the material risks of the representation.

[13a] Where a lawyer has been retained by an insurer to represent the insured pursuant to the insurer's obligations under a liability insurance policy, the lawyer may comply with reasonable cost-containment litigation guidelines proposed by the insurer if such guidelines do not materially interfere with the lawyer's duty to exercise independent professional judgment to protect the reasonable interests of the insured, do not regulate the details of the lawyer's performance, and do not materially limit the professional discretion and control of the lawyer. The lawyer may provide the insurer with a description of the services rendered and time spent, but the lawyer may not agree to provide detailed information that would undermine the protection of confidential client-lawyer information, if the insurer will share such information with a third party. If the lawyer believes that guidelines proposed by the insurer prevent the lawyer from exercising independent professional judgment or from protecting confidential client information, the lawyer shall identify and explain the conflict of interest to the insurer and insured and also advise the insured of the right to seek independent legal counsel. If the conflict is not eliminated but the insured wants the lawyer to continue the representation, the lawyer may proceed if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation and the insured's informed consent is obtained pursuant to paragraph (b)(4).

b. Restatement (Third) of The Law Governing Lawyers, § 134, comment f,

Illustration:

5. Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's

monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 122(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.

c. Did you buy the farm? Waive any policy defenses or limits?

2. Sex discrimination employee/employer- When you want to throw the employee under the bus.

3. Reservation of rights

4. In house or captive

5. Lawyer as a witness. ("Rule 32:3.7 prohibits the lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue other than the nature and value of legal services rendered in the case. The prohibition does not apply if disqualification of the lawyer would work substantial hardship on the client." Ethics Opinion 09-03)

6. Excess problem- When do you tell them to get a personal attorney?
7. Information
   a. [D]efense counsel and the insurer inevitably share information about claims. With defense counsel and the insurer in frequent contact over the details of the litigation, the insurer has ample opportunity to inform defense counsel how different approaches to the claim might affect its interests. When the interests of the insurer differ from those of the insured, defense counsel who represents both may find itself in what we have called "an exceedingly awkward position."
   Pine Island Farmer's Coop v. Erstad & Reimer, PA, 639 N.W.2d 444, 450 (Minn. 2002)

   b. Rule 32:1.6. Confidentiality of information

      (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 by paragraph (b) or required by paragraph (c).
      COMMENT

      [1] This rule governs the disclosure by a lawyer of information relating to the representation of a client

during the lawyer's representation of the client. See rule 32:1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 32:1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 32:1.8(b) and 32:1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See rule 32:1.0(e) for the definition of informed consent. ("(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

c. Restatement (Third) of The Law Governing Lawyers, § 134, comment f:

When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 60) without explicit informed consent of the insured (see § 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 60, Comment *l* (confidentiality in representation of co-clients in general)).

8. Never have sex with client- ever! ("[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. *See* rule 32:1.8(j).")

9. Dissolutions- never represent both sides.
   a. "I'm just the scrivener"
   b. No one ever remembers this

10. Wandering lawyers
   a. Rule 32:1.10. Imputation of conflicts of interest: general rule

      (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

      (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

      (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

      (2) any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.

b. (Chinese Walls)

Date of Opinion: 02/25/1999

Opinion Number: 98-18

Title: CHINESE WALL

Opinion: You have requested an opinion as follows:

> "After carefully reviewing your letter of December 3, 1998, and Formal Opinions 87-33 (June 10, 1998) and 91-47 (May 28, 1992), this office, in consultation with _____, has formulated a proposed 'Chinese Wall' procedure. We believe this procedure will insulate the new lawyer from any contact with _____ County cases filed while he worked in the office of the _____ County Attorney. We hope this procedure will allow the other attorneys in this office to participate in _____ County cases."

The Board is of the opinion that if the proposed and established internal screening policy is precisely carried out and all affected personnel adhere strictly to the expressed restrictions:

1. The employment of the involved new lawyer would not per se be improper, and

2. If operating properly within the limits of the expressed

policy, the other members could practice law in the county of the new lawyer's former employment.

The Board does not approve the proposed association of personnel or related representation except as limited by the facts related in your request for opinion and only if there is total compliance, including full disclosure to and consent of the involved client.

The Board does not hereby establish a blanket rule applicable in such questions of possible conflicts of interest. Each such incident or proposed relationship must be considered on its own merits.

F. Protection

1. The process
   Rule 32:1.7.
   COMMENT [2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.

2. Engagement letter
   a. Rule 32:1.7.
      COMMENT [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* rule 32:1.0(e) (informed

consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved. *See* comments [30] and [31] (effect of common representation on confidentiality).

b. Restatement (Third) of The Law Governing Lawyers, § 134, comment b: *Initial client consent.* As stated in the Section, under § 122 a client must consent to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created (see § 122, Comment *c*).

3. Keep client informed

Overcoming Expert Opinion with Facts

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Resolving Claims through Facts, Rather than Expert Opinion:

Examples of CRPS, RSD, Back Pain, Neck Pain, Posttraumatic Headache, Chronic Pain, Brain Injury, Mental Illness, PTSD, Kernicterus, etc.

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Biographical Information

The American Medical Association has repeatedly listed Dr. Barth among their "internationally recognized expert authors", and has asked him to contribute to its programming and publications for chronic pain, brain injury, and mental illness. His work for the AMA has included contributing to the *Guides to the Evaluation of Permanent Impairment* and the *Guides to the Evaluation of Disease and Injury Causation*.

Dr. Barth has also been asked to take on faculty, editor, author, or governance responsibilities for all of the following:

- American Medical Association
- American Psychological Association
- American Academy of Orthopaedic Surgeons
- Multiple Sclerosis Association of America

- European Union of Medicine in Assurance and Social Security
- American Academy of Disability Evaluating Physicians
- North American Spine Society
- American Academy of Neurology
- American College of Occupational and Environmental Medicine
- Journal of Bone and Joint Surgery
- Journal of Hand Surgery / American Society for Surgery of the Hand
- National Association of Workers' Compensation Judiciary
- American Bar Association
- International Association of Industrial Accident Boards and Commissions
- Official Disability Guidelines Treatment in Workers Compensation
- Occupational and Environmental Medicine Press
- Several state and provincial governments

Dr. Barth has been named a Fellow of the National Academy of Neuropsychology, for having made a significant contribution to science and practice. His full-time education concluded with post-doctoral fellowship training in a Harvard Medical School program, after pre-doctoral internship training also within the Harvard Medical School system.

A Law Journal Parallel to this Paper

The original version of this paper was written for a conference that took place early in 2012. Shortly thereafter, the American Bar Association published an article which involved a very similar focus, but was specifically focused on medical liability claims. The reference information for that ABA article is:

Davidson TM & Guzelian CP. Evidence-Based Medicine (EBM): The (Only) Means for Distinguishing Knowledge of Medical Causation from Expert Opinion in the Courtroom. Tort Trial and Insurance Practice Law Journal, 2012, Volume 47, Issue 2, pages 741-779.

An example of the information that can be found in this law journal article: “radiologists who testified for plaintiffs exhibited a 21-fold increase in positive findings of asbestos-induced respiratory changes over disinterested colleagues.”

Additional quotes from this article which highlight the misdirected nature of the court system's emphasis on opinions:

- "The current practice of relying upon adverse expert opinion testimony alone to establish the standard [of medical care] is primitive, crassly subjective, and prone to exploitation, if not actual corruption."
- Rhetorical question: "Why do courtroom medical experts invariably have opposing opinions?"
- Rhetorical question: "Why do judges and juries often evaluate in-court expert scientific opinions as much by the experts eloquence is by the scientific truth of the matter?"

Please adopt the following perspective when you read this paper:

This paper was written for attorneys. Attorneys use the words "facts" and "opinions" in ways that are different from the ways that people who are not attorneys use those words. For example:

- Facts: *Attorneys often automatically interpret the word "facts" to be a reference to the details of an individual case. But this paper is focusing primarily on facts that have an independent existence beyond the case – such as the general scientific findings that are of relevance to the case at hand, but which have an existence that is completely independent of the case. Example: Complex regional pain syndrome type 1 is an inherently non-injury-related phenomenon. Notice how this fact would exist even if the case you are litigating had never come into existence. This is the type of fact that is the focus of this paper.*

- Opinions: *Attorneys often consider anything that is said by an expert witness to be an opinion. For example, it is a verifiable fact that the sky is blue on a clear day, but if that fact is stated in the context of expert testimony, attorneys automatically label it as an opinion.*

This paper steadfastly avoids using the words "fact" and "opinion" in the way that attorneys typically use those words. This is intentional, because the way in which attorneys use those words is corrupting the legal systems, and corrupting the practice of any attorney who aspires to practice in a credible manner.

Consequently, if you are an attorney, please begin your reading of this paper by taking a moment to try to remember how you thought about the words "facts" and "opinions" BEFORE you went to law school.

Tangible Steps You Can Take to Free Your Practice From the Scourge of Opinions

The remainder of this handout addresses the corrupting influence that expert opinions have on legal systems, and the role that a focus on facts can play in combatting that corruption. This section is being provided at the beginning of this document in order to provide rapid access to tangible steps that you can immediately implement in your practice.

Preliminary Discussion with YOUR potential expert:

"Let's pretend that you are not going to be allowed to offer opinions. What FACTS, of relevance to this case, can you offer from:

- the scientific knowledge base
- your field of expertise."

"Ideally, these would be facts that have an independent existence:

- Independent of you and your potential testimony
- Something that you can direct us to in the scientific or professional literature."

Direct Examination of YOUR Expert

Your question to your expert: *"The testimony that you just offered – was that a fact or an opinion."*

Your expert's testimony should be formulated in a fashion that facilitates the following answer: *"That was an easily verifiable fact. There were not any opinions involved in that testimony."*

Discovery deposition of the other side's expert:

"Please refer us to scientific or professional literature that we can review in order to find independent confirmation for the testimony that you just offered."

"Please provide us with full reference information, sufficiently extensive to ensure that we can track down that literature."

"Can you provide us with a copy of that literature?"

The general vocabulary of your work (e.g., preparation of legal paperwork, formulation of examination questions):

- For your experts, try to use words such as "testimony" instead of opinion, and "testify" instead of "opine". In so doing you will be emphasizing that your experts are attempting to avoid subjective opinions (in favor of objectively verifiable facts).

- Limit your use of the word "opinion" to your discussion of the other side's experts. In so doing, you will be emphasizing that they are offering nothing other than subjective opinions.

A. Opinions as the Problem, Facts as the Solution

A. 1. The Problem: Expert Opinion

The legal system has provided a special status for expert witnesses, allowing them to offer opinions (in contrast to testimony from other types of witnesses being limited to facts). This special status has resulted in a widespread tendency for experts to offer baseless opinions (especially within medical claims). Such opinion-based testimony complicates litigation, causing it to be unnecessarily complex, prolonged, and expensive.

The frequently baseless nature of medical testimony is reflective of the nature of American healthcare in general. For example, focused scrutiny of American healthcare has led to estimates that 80% of what doctors say and do has absolutely no scientific credibility (for example, see BusinessWeek cover story May 29, 2006). The credibility of other fields is even more lacking (e.g. life care plans, vocational rehabilitation experts, etc.).

Sometimes the baselessness of the expert testimony is disguised behind facades of "experience", "training", or other impressive sounding nonsense. Here is a paraphrasing of such strategies, as originally detailed in the British Medical Journal (Isaacs D & Fitzgerald D. Seven alternatives to evidence based medicine. BMJ 1999; 319: 1618).

- Experience as a basis for opinions:
    - In terms of medical claims, this involves "clinical experience" which has been defined as "making the same mistakes with increasing confidence over an impressive number of years".
    - *Note:* An individual expert's experience is always idiosyncratic, and consequently cannot provide a credible basis for forensic testimony.

- *Note:* Scientific studies have repeatedly indicated that the experience of the clinician is not predictive of accuracy or adequacy of health care, or of health outcomes.

- *Example:* A neurosurgeon attempted to use his claim that he implants more cerebral spinal fluid shunts than all other neurosurgeons in town combined, as a basis for claiming that his experience is a superior basis for forensic opinions – when it is actually a clear indication that he is unscrupulously excessive in his practice patterns.

- *Example:* Pain specialists are notorious for claiming that their unique experience provides them with superior expertise for offering forensic testimony about chronic pain complaints, when in fact, the severely misdirected nature of the entire field of pain management causes such specialists to be especially inept.

- Vehemence as a basis for opinions:

  - Some expert witnesses think that by speaking at high volume (in terms of decibel level and/or in terms of amount of verbiage), they can brow beat more timorous attorneys, and convince less skeptical attorneys and decision-makers.

  - *Example:* A recent quote from such a "pain management" expert witness in a discovery deposition: "Your question reveals your ignorance of this matter and your general stupidity, and does not warrant an answer from me." In the same deposition, this expert had at first claimed that a diagnostic protocol for complex regional pain syndrome did not exist, and then later testified that he actually used that protocol (even though he had already testified that it did not exist).

- Eloquence as a basis for opinions:

  - Instead of arming him or herself with facts, the expert relies on such armor as perfect hair, pristine white coat with embroidered name, a fine silk tie, Armani suit, and smooth tongue. The expert's hope is that sartorial elegance and verbal eloquence will be powerful substitutes for facts.

- Excessive healthcare as a basis for opinions:

  - Instead of facts, the expert arranges for an abundance of testing and treatment.

        - For example, the expert claims that his or her use of dozens of meaningless tests and years of providing misdirected treatment for the plaintiff/claimant provide a stronger foundation for forensic opinions than that which would be provided by facts from the scientific knowledge base or professional standards.

- Confidence as a basis for opinions:
    - The expert believes that facts are not necessary, because he or she has a wealth of bravado to offer instead.
    - Isaacs & Fitzgerald joked(?) that this is restricted to surgeons, in order to emphasize that the field of surgery as a whole (e.g. surgery textbooks) generally involves baseless self-confidence, rather than a scientific knowledge base.
    - Needless to say, this approach is not actually limited to surgery, as it is commonly demonstrated by pain specialists and psychiatrists, and it can be demonstrated (perhaps to a lesser extent) by any other type of specialist.

In regard to "training" is the basis for expert witness testimony:

- The Davidson and Guzelian law journal article that was referenced above specifies the long-established concern (originating from a Harvard Medical School dean) that "half of what medical students learned would be proven wrong in a decade, but no one knew which half". The article goes on to provide specific examples of practices which were comprehensively taught in medical school being discovered to be misdirected, and even harmful, when subjected to scientific scrutiny.
- BusinessWeek's 2006 attempt to comprehensively scrutinize the American healthcare system produced a conclusion that 80% of what American medical doctors are trained to do has no scientific credibility.
- Scientific findings have indicated that research projects which address healthcare "standards of care" are more likely to overturn the supposed standard of care, than to support it (for example, see Prasad et al, Mayo Clinic Proceedings, August 2013).

The legal system seems to have fallen deeply into a world of opinions, and consequently lost contact with the world of facts. The reliance on opinions is so deeply entrenched, that the court system seems to have difficulty identifying a fact as being a fact (the court system actually tends to refer to any fact communicated by an expert witness as an "opinion", thereby obfuscating its factual nature). Unscrupulous attorneys use this

vulnerability of the court system as a strategy for dismissing facts which are harmful to their side of the case, and the court system allows (even encourages) those attorneys to engage in such misleading falsification. I have heard directly from one judge (who spent decades working as a plaintiff's attorney prior to becoming a judge) that he actually disdains any discussion of facts in his courtroom, and that he regularly restricts expert witnesses to opinion-based testimony.

A. 2. The Solution: Focus on Facts, Rather than Opinions

By simply focusing on facts, baseless opinions can be overcome, and litigation can be simplified. The remainder of this presentation provides examples of facts which facilitate the resolution of medical-legal claims (in contrast to the tendency for opinions to impede resolution).

The primary lesson from this presentation is: Never allow experts to get away with baseless testimony (e.g. testimony based on opinions, experience, training, or anything other than independently verifiable facts). For example, if a discovery deposition of the other side's expert is possible, consider asking questions such as:

"Please refer us to scientific or professional literature that we can review in order to find independent confirmation for the testimony that you just offered."

"Please provide us with full reference information, sufficiently extensive to ensure that we can track down that literature."

"Can you provide us with a copy of that literature?"

Most medical experts respond to such questioning by admitting that they cannot offer any such independent verification.

B. Examples of General Facts, of Relevance to Almost Any Medical Claim

B. 1. Causation (e.g. injury-relatedness, work-relatedness, etc.)

The American Medical Association has published a standardized, fact-based, scientifically credible protocol that doctors can use to determine whether a clinical presentation is causatively related to a specific set of circumstances (such as a litigated event, accident, or injury). (Reference: Melhorn, Talmage, Ackerman, & Hyman. *Guides to the Evaluation of Disease and Injury Causation, Second Edition*. 2013. American Medical Association.)

The American Medical Association has also published a simple summary of the protocol from the causation *Guides*, and the value of that protocol as a mechanism for using facts

to combat expert opinions (Barth RJ. Determining Injury-Relatedness, Work-Relatedness, and Claim-Relatedness. *AMA Guides Newsletter*, May/June 2012. American Medical Association). This latter publication provides many self-assessment questions that doctors can use to determine whether their causation analysis has been credible and adequate. Those questions can also be used by anyone who is reviewing an expert witness's causation claim, in order to determine if the expert's claims have been developed in a credible fashion.

The following is an extremely simplified review of the protocol from these AMA's causation *Guides*. It should be noted that the steps of this protocol are to be conducted in sequence – if an earlier step cannot be completed in a manner that credibly supports a legal claim, then the entire process comes to a halt (later steps cannot be used as justification for a causation claim if earlier steps cannot be adequately completed). For example, if a truly explanatory diagnosis cannot be definitively established based on objective evidence during the first step, then the remaining steps cannot be credibly used to justify a causation claim.

> 1st step: *A diagnosis, which is truly explanatory, must be definitively established (based on objective data).*
>
> 2nd step: *Facts from epidemiologic science must be applied to the individual case in order to determine if there is a scientifically established causative link between the claimed cause and the diagnosis that was definitively established in the first step.*
>
> > *Note:* This is a primary example of the emphasis on facts that runs through the paper that you are reading right now. Attorneys often automatically interpret the word "facts" to be a reference to the details of an individual case. But this paper is focusing primarily on facts that have an independent existence beyond the case – such as the general scientific findings that are to be used in this step of the causation analysis. This step requires the expert to incorporate general scientific findings into the process, rather than focusing exclusively on the details of this one case.
>
> 3rd step: *Determinations must be made regarding the exposure of the individual to the claimed cause.*
>
> > *Note:* This requires the expert to compare general scientific findings to the details of this one case (rather than focusing on the details of the case in an isolated matter that fails to incorporate general scientific information).
>
> - Magnitude of exposure: What evidence, predominantly objective, is available which clearly verifies that the exposure to the claimed cause was of sufficient magnitude (e.g., frequency, intensity, and duration) to

account for the development of the diagnosis that was definitively established in the first step?

- Relationship in time between the exposure and the clinical presentation: Did the clinical presentation develop and evolve in a manner that has been scientifically established as being consistent with the claimed or documented temporal exposure to the claimed cause?

  The causation *Guides* explains that actual measurements of exposure are the most reliable information for this step, while the examinee's report of exposure is among the least reliable information.

4th step: *A determination must be made regarding whether issues, other than the claimed cause, are more credible causes for the clinical presentation.*

The causation *Guides* specifies that questions which need to be addressed in this step include:

- Are there risk factors, other than the cause that is being claimed in this specific case, which could contribute to the development of the claimed clinical presentation?

- Are any such risk factors relevant to this case? What other relevant factors are present in this case? Are there individual risk factors other than the litigated circumstances that could contribute to the development of the clinical presentation?

Note: The expert should be clearly articulating a process of applying every scientifically established risk factor and determining which ones apply to this case.

5th step: *The evidence from the claim must be intensely scrutinized to determine whether it is consistent, coherent, free from internal contradictions, free from bias, and free from confounding factors.*

6th step: *The information from the previous steps is synthesized and summarized.*

Perhaps more than any other health science literature, the AMA causation *Guides* advises doctors to base forensic work and testimony on facts, instead of allowing the legal system to entice them into the business of selling opinions. Consequently, healthcare expert witnesses who are in the business of selling opinions will act as if this AMA *Guides* does not exist.

Example of the difference between opinions and facts for causation determination:

Typical Opinion:

- "It is my opinion that the clinical presentation was caused by the litigated event, based on my training and experience."

Facts which will be true for the vast majority of cases:

- The American Medical Association has published a protocol that doctors can use to determine injury-relatedness based on facts and scientific credibility, rather than based on opinion, experience, or training.

- There is no documentation of the expert who issued the above opinion having applied that protocol to this case.

- The expert has chosen to base a causation conclusion on subjective idiosyncratic opinion, rather than on the AMA's standardized, fact-based, scientifically credible protocol.

- When the protocol is actually applied to this case, it reveals obstacles to credibly concluding that the litigated events are the cause of this clinical presentation.

B. 2. The plaintiff/claimant says that they did not have relevant problems prior to the litigated event.

Most cases will involve some healthcare expert concluding that a clinical presentation is claim-related (e.g. injury-related, work related, etc.) based on nothing other than the plaintiff/claimant's report that he did not have relevant problems prior to a specific event (e.g., an accident, injury, or going to work one day). Such pre-versus-post reports from a plaintiff/claimant are not a credible basis for such clinical or forensic decision-making, and are also not a credible basis for administrative decision-making (such as decisions rendered by the judge, jury, workers compensation commission, etc.).

- When such reports from claimants/plaintiffs have been scientifically scrutinized, such reports have been found to be false approximately 100% of the time. (Reference: Barth RJ. Claimant-Reported History is Not a Credible Basis for Clinical or Administrative Decision-Making. *The Guides Newsletter*, September/October, 2009. American Medical Association).

- The American Medical Associations causation *Guides* (referenced above) specify that any such an opinion is an example of a logical fallacy, rather than representing a credible demonstration of expertise.

Example of the difference between opinions and facts for this issue:

Typical Opinion:

- "It is my opinion that the clinical presentation was caused by the litigated event, because the patient told me that he did not have this problem prior to that event."

  Note: The expert witness usually will not be this clear. It will often take scrutiny and questioning to reveal that there is no other basis for the opinion.

Facts which will be relevant to most such cases:

- When such pre-versus-post reports from claimants/plaintiffs have been scientifically studied, they have been found to be false approximately 100% of the time.
- Consequently, such reports from claimants/plaintiffs are obviously not a reliable basis for such clinical or forensic decisions.
- By basing this opinion on nothing other than the report from the claimant/plaintiff, the expert has completely failed to actually demonstrate or utilize any professional expertise. We could have simply declared the plaintiff/claimant to be the expert, rather than having wasted time with this "expert".
- In order to have brought any actual expertise into the discussion, the "expert" should have testified about some findings which are independent of the claimant's/plaintiff's report. For example, if an injury is being claimed, what clinical findings would have confirmed that an injury is the cause of the clinical presentation, if the expert did not have any reports from the claimant/plaintiff?
- The expert's reasoning has been singled out in the AMA's causation *Guides* as a logical fallacy.

B. 3. The expert completely ignores the diagnostic requirements for assessing the possibility of malingering.

The diagnostic system provides a protocol for addressing the issue of malingering. This protocol is provided in the diagnostic manual of the American Psychiatric Association (reference: American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. Washington, D.C., American Psychiatric Association, 2013).

A more thorough discussion of how this protocol is to be used has been published by the American Medical Association (reference: Patterson CS, Barth RJ, Brigham CR, Talmage JB, Leclair S, and Coupland M. Malingering and Other Validity Considerations. AMA Guides Newsletter, January/February, 2012. American Medical Association).

This standardized protocol requires doctors to adopt a strong suspicion of malingering for any case that involves any two of the following criteria:

1. Medical-legal context of presentation

2. Marked discrepancy between the person's claimed distress or disability and the objective findings

   Note: Did the expert even attempt to comply with this aspect of the diagnostic process, by arranging for the utilization of objective assessments such as the psychological tests discussed below?

3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen

   Note: Did the expert even attempt to comply with this aspect of the diagnostic process, by reviewing a comprehensive set of records to determine what the treatment recommendations have been, and to determine the claimant/plaintiff's level of cooperation with that treatment and with any evaluation efforts?

4. The presence of antisocial personality disorder

   Note: Did the expert even attempt to comply with this aspect of the diagnostic process, by arranging for the utilization of the diagnostic protocol for antisocial personality disorder?

NOTE: Because this protocol was developed by the American Psychiatric Association, some unscrupulous experts and attorneys will attempt to claim that it is only relevant to claims of mental illness. A reading of the relevant text will reveal that the protocol was actually developed for purposes of applying to all types of claims (it was developed by the Psychiatric Association simply because malingering is always a behavioral issue).

There are several noteworthy aspects of this part of the diagnostic process, including:

- As is evident in the nature of the criteria, this protocol is not accusatory. Doctors almost never actually know whether an individual is faking. This protocol is designed to address the issue in a tangible and professional way which frees doctors from claiming to actually know precisely what is going on.

- Instead of being accusatory, the protocol is focused on protecting the health of the individual:
    - By applying this protocol to any individual case, clinicians identify cases which warrant a strong suspicion of malingering.
    - This alerts clinicians that there is an elevated risk of health care doing more harm than good for such a case.
    - Relevant findings are an obstacle to credibly claiming that a diagnosis is warranted, or that treatment is warranted.
    - Doctors are consequently alerted to cases which warrant an extremely conservative approach to diagnosis and treatment (thereby protecting the patient from health care that is going to be associated with an elevated risk of doing more harm than good).
    - In a claims context, utilization of this protocol can also help to protect patients from unjustified exposure to the reliably detrimental health effects of involvement in medical-legal claims (involvement in a claim reliably leads to a worse health outcome.
        - Reference: Caruso GM, Barth RJ, et al. Cornerstones of Disability Prevention and Management. In Hegmann, KT, Hughes, MA, Biggs JJ (Eds). *American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, 3rd Edition*, Elk Grove Village, IL: ACOEM. 2011.).
        - Reference: Barth RJ. Chronic Pain: Fundamental Scientific Considerations, Specifically for Legal Claims. American Medical Association Guides Newsletter, January/February 2013. American Medical Association.

Examples of the difference between opinions and facts for this issue:

Typical Opinion:

- "It is my opinion that the plaintiff's presentation is genuine. I did not see any evidence of exaggeration or faking.

Fact-based response that will apply to most cases:

- The documentation and testimony from the expert who offered the above opinion fails to record any utilization of the diagnostic protocol for malingering.
- The expert who issued the opinions listed above "did not see any evidence of exaggeration or faking", because that expert actually avoided any utilization of the relevant diagnostic protocol. It is easy to claim that "I did not see any evidence" if one actually refuses to look for any such evidence.
- Instead of utilizing the standardized diagnostic protocol, that expert chose to address this issue through idiosyncratic and subjective opinion.
- In so doing, the expert has failed to follow professional standards that are designed to help protect the health of patients. This raises a question in regard to why the expert is willing to jeopardize the health of the plaintiff/claimant in this fashion.
- When two or more of the criteria are actually found to be relevant to an individual case:
    - The diagnostic system mandates that a strong suspicion of malingering should be adopted in response to a presentation such as this.
    - That mandate serves as a warning that health care is going to carry an elevated risk of doing more harm than good for this person.
    - Consequently, an extremely conservative approach to diagnosis and treatment would be well-advised.
    - An extremely conservative approach to consideration of the plaintiff's/claimant's legal claim would also be well-advised, given the elevated risk of a poor health outcome that is reliably associated with such claims, and given the elevated risk of the claim being unjustified (which is indicated by the consistency of the clinical presentation

with the formal guidelines for the assessment of malingering).

B. 4. Reliance upon subjective complaints, rather than utilizing objective testing.

Most cases will involve some healthcare expert relying on the subjective complaints of the claimant/plaintiff, in the absence of any objective/scientifically credible evaluation of such complaints.

For example, a variety of psychological tests have been scientifically validated for purposes of objectively discriminating between honest versus exaggerated/fraudulent presentations of disability, pain, cognitive impairment, and mental illness. Examples of tests which have been scientifically validated in this regard include the Minnesota Multiphasic Personality Inventory (MMPI), the Battery for Health Improvement (BHI), Green's Word Memory Test (WMT), the Structured Interview of Reported Symptoms (SIRS), and the Modified Somatic Perception Questionnaire.

Many experts who are in the business of selling opinions will act as if such testing does not exist. They will also act as if subjective complaints from the claimant/plaintiff are automatically and always honest (which, as was discussed above, is the extreme opposite of the truth).

Example of the difference between opinions and facts for this issue:

Typical Opinion:

- "It is my opinion that the plaintiff's presentation is genuine. I did not see any evidence of exaggeration or faking."

Fact-based responses that will be relevant to most claims:

- The expert who issued the opinion listed above "did not see any evidence of exaggeration or faking", because that expert actually avoided any utilization of standardized assessments that have been scientifically validated for purposes of addressing this issue in an objective fashion. It is easy to claim that "I did not see any evidence" if one actually refuses to look for any such evidence.
- Instead of utilizing standardized assessments that have been scientifically validated for purposes of addressing this issue in an objective fashion, that expert chose to address this issue through idiosyncratic and subjective opinion.
- In so doing, the expert has failed to utilize the health science knowledge base in a manner that can protect the health of patients

from health care that would be associated with an elevated risk of doing more harm than good. This raises a question in regard to why the expert is willing to jeopardize the health of the plaintiff/claimant in this fashion.

- When such testing is actually used, and the plaintiff produces responses that are objectively consistent with exaggeration or faking, fact-based discussions such as the following can be presented:

    - "The plaintiff's responses to standardized, scientifically validated assessment of his pain complaints were of a nature that causes his presentation to be objectively more consistent with research participants who were exaggerating their pain complaints, rather than being consistent with research participants who were free from financial incentives."

    - "The plaintiff's responses to standardized, scientifically validated assessment of his cognitive complaints were of a nature that causes his presentation to be objectively more consistent with research participants who were identified as definitely malingering, rather than being consistent with research participants who were free from financial incentives. In fact, his responses were so extreme in this regard, that no honest clinical patient in research samples had ever obtained such a score so extremely consistent with malingering. In other words, in scientific samples, such a result has only been obtained from individuals who were identified as definitely malingering, and has never been demonstrated from any honest clinical patient."

    - "The plaintiff's responses to standardized, scientifically validated assessment of his claims of mental illness were of a nature that causes his presentation to be objectively more consistent with research participants who were faking, rather than being consistent with mentally ill individuals who were free from financial incentives. When compared to scientific samples, this result is consistent with an 80% probability of faking."

        NOTE: The 80% figure is simply an example. Such results can be as high as 100%, depending on the specific nature of the examinee's responses.

- "These results serve as a warning that health care is going to carry an elevated risk of doing more harm than good for this person."
- "Consequently, an extremely conservative approach to diagnosis and treatment would be well-advised."
- "An extremely conservative response to the patient's legal claim would also be well-advised, given the elevated risk of a poor health outcome that is reliably associated with such claims, and given the elevated risk of the claim being unjustified that is indicated by the objective consistency of the test results with research subjects who had filed spurious claims."

Warnings:

- I have repeatedly seen healthcare experts unscrupulously claim that they have utilized such tests in a credible and objective fashion, when in fact they have not.
  - For example, many experts claim to have used a credible testing process in this regard, when in fact they have deliberately chosen tests that are scientific failures (for example, tests that have been found to only be capable of identifying one out of 500 fakers). Examples of tests which claim to be of value in evaluating the validity of clinical presentations but which have failed scientific scrutiny (e.g. scientific study revealed that they are not sufficiently sensitive to malingering) include the Test of Memory Malingering (TOMM) and the Rey 15 Item Test.
- Additionally, I have witnessed many examples of experts claiming that a test result objectively indicated that the plaintiff/claimant's reports were honest, when in fact the test result was actually indicative of a fraudulent presentation.
  - This is an example of a larger trend among some experts to compromise such testing by offering subjective interpretations of the test results (e.g., offering their opinions about what the test results mean, instead of stating objective facts about the test results).

Therefore, it is critically important to scrutinize such claims by investigating whether a credible approach to testing was utilized, and whether the test results were analyzed in an objective fashion.

- Almost all such tests are deliberately designed to *fail* to identify a large portion of the population of people who are faking or exaggerating.

- Therefore, it is very easy for an unscrupulous expert to obtain an honest-like result on a single test, and then to falsely claim that this one test has completely ruled out malingering.
- Scientific study has repeatedly revealed that a single test result cannot be relied upon in that manner.
- For example, studies have actually revealed a *probability* of malingering when only a *minority* of the administered tests produced malingering-like results.

B. 5. Treating clinicians offering forensic opinions.

Some attorneys unscrupulously attempt to create the impression that treating clinicians are somehow more trustworthy than independent evaluators/consultants. The perceived viability of this strategy is one of the unfortunate consequences of the legal system's entrenchment in a world of opinions rather than facts. If the discussion is limited to facts, then it does not matter who communicates those facts, because the facts have an independent and verifiable existence. The attorneys who are utilizing this strategy are apparently hoping that decision-makers will not notice that legal conflicts can be resolved based on facts, that the decision-makers will be fooled into thinking that they must base their decision on expert opinion, and that the decision-makers can consequently be misled into a process of attempting to determine which communicators of "opinions" are more trustworthy (instead of simply focusing on a search for relevant facts).

This strategy can be combated with a variety fact-based approaches. For example, decision-makers can be presented with facts, the facts can be highlighted as being facts instead of opinions, and the value of facts as a basis for resolving legal disputes can be emphasized.

The strategy can also be combated with specifically relevant facts, such as:

- The American Medical Association has published discussions of the extreme conflicts of interest (both financial and social) that arise when treating clinicians allow themselves to become involved in forensic testimony. Independent experts do not have the extreme financial conflict of interest that treating clinicians have, and independent experts do not have the social conflicts of interest that treating clinicians have. (Reference: Barth, RJ, and Brigham, CR. Who is in the better position to evaluate, the treating physician or an independent evaluator. *The Guides Newsletter*. September/October 2005: 8-11. American Medical Association.)
- Scientific efforts have repeatedly revealed that treating clinicians admit to a high level of willingness to lie on behalf of their patients, in

regard to issues including disability, severity of symptoms, diagnosis, and clinical findings.

- References:
  - W Zinn, et al; Physician perspective on the ethical aspects of disability determination. *J Gen Intern Med* 1996; 11 (9): 525-532.
  - Mayhew HE & Nordlund DJ; Absenteeism certification: The physician's role. *J Fam Pract* 1988; 26: 651-655.
  - L England & K Svardsudd; Sick-listing habits among general practitioners in a Swedish county. *Scand J Prim Health Care* 2000; 18: 81-86.
  - Wynia MK, et al. Physician manipulation of reimbursement rules for patients. *Journal of the American Medical Association*. 2000 Apr 12;283(14):1858-65.)

Example of the difference between opinions and facts for this issue:

Typical Opinion from a treating doctor:

- "As a treating clinician, I have more access to the patient. I am also involved for healthcare reasons, rather than having been hired by a lawyer. Therefore, I am in a better position to understand what is really going on with this patient."

Fact-based response to such claims:

- The American Medical Association and other healthcare publishers have published discussions explaining that independent experts are in a much better position to address forensic issues, than are treating clinicians.
- Such literature has explained that treating clinicians have extreme financial conflicts of interest when they engage in forensic testimony, and that they additionally have social conflicts of interest. Independent experts are free of such conflicts.
- Scientific findings have repeatedly demonstrated that treating clinicians admit to a high level of willingness to lie on behalf of their patients.

- None of the prominent issues in medical-legal claims requires a treating relationship or extensive access to the patient:
    - Diagnosis, causation analysis, and treatment planning can all take place within a single evaluation. None of the relevant protocols require more than one evaluation for the process to be completed. The claim that a treating clinician's more extensive exposure to a patient leads to a better understanding of the patient does not mesh with healthcare protocols in any way.
    - If the treating clinicians have actually done their jobs properly, then everything that an independent expert would need to know about the case would be clearly documented in the records, and there would actually not be any need for an independent expert to conduct any direct evaluation. Consequently, a treating clinician's claim that he or she understands a case better than an independent evaluator could understand it is actually an admission by the treating clinician that he or she has failed to document their claimed knowledge of the case (an admission that the treating clinician has been keeping secrets about the case).

B. 6. Disability: "Can this plaintiff work?" is almost always the WRONG question.

Relevant references:

- Barth, RJ, and Roth, VS. (2003). Health Benefits of Returning to Work. *Occupational and Environmental Medicine Report*, 17, 3, March, 2003, p13-17.
- Waddell GE, Burton AK. Is work good for your health and well-being? The Stationery Office, London. 2006.
- Talmage JB, Melhorn JM, and Hyman MH. *AMA Guides to the Evaluation of Work Ability and Return to Work, Second Edition*. American Medical Association, 2011.

Medical claims will often involve some healthcare expert claiming that the plaintiff/claimant is no longer capable of working. This will usually be an extremely subjective judgment call (if the plaintiff is truly incapable of working, then there would not be a need for testimony on the subject from a clinician, because the disability would be obvious).

Scientific findings and professional standards indicate that it is almost always a bad idea for clinicians to opine that a person is unable to work. It is a bad idea because of several reasons, including:

- Doctors/clinicians almost never have any relevant training or expertise in regard to such disability issues. It is fundamentally misdirected to be asking a clinician whether or not a person can work.

- Withdraw from work is reliably bad for health, while returning to work, and staying at work, are reliably good for health. Relevant scientific findings specifically include work being good for complaints of pain, cognitive impairment, and mental illness. In fact, withdrawing from work is so detrimental to health, that it has actually been scientifically linked to an early death. Therefore, whenever a clinician opines that a plaintiff is incapable of working, that clinician is actually contributing to a worse health outcome for that plaintiff (including raising the risk of premature death).

- Given all of the above, whenever a doctor is asked, "Can this plaintiff return to work?", the doctor should respond, "That is the wrong question, and there is no right answer to a wrong question. My job as a doctor is to address how we get this person back to work, and how we get him to stay at work, for the sake of his health. I cannot credibly endorse a withdrawal from work, because that would significantly increase the chance of a poor health outcome."

Examples of the difference between opinions and facts for this issue:

Typical Opinions:

- “The plaintiff cannot work because of his pain."

- "The plaintiff cannot work because of his cognitive impairment."

- "The plaintiff cannot work because of his mental illness."

Note: When sufficient scrutiny is applied to such opinions, it eventually becomes obvious that they are usually based on nothing other than what the plaintiff told the expert. The expert typically fails to introduce any professional expertise, or anything from the scientific knowledge base, into the discussion. The expert's opinion usually boils down to nothing but the following: "It is my opinion that the plaintiff cannot work because the plaintiff told me that he cannot work. I am basing this opinion completely and totally on what the plaintiff told me. I do not have any professional expertise of scientific knowledge to offer on this issue. In fact, you do not actually need me to be talking about this, because

since I am doing nothing but parroting what the plaintiff told me, you could have simply made the plaintiff the expert."

Fact-based responses that will be relevant in most cases:

- For the sake of his health, the plaintiff should return to work and stay at work. Withdraw from work is associated with an elevated risk of poor health outcomes, including an elevated risk of an early death.
- A fundamental part of the plaintiff's treatment plan should be a focus on facilitating his returning to work and staying at work, for the sake of his health.
- It is not appropriate to be asking doctors, "Can this person return to work?". It is not appropriate because doctors typically do not have relevant expertise, and because it is reliably a bad idea for anyone to withdraw from work for health reasons. The appropriate question for clinicians and for anyone else who cares about this plaintiff's health is, "How can we facilitate a return to work and staying at work?".
- The American Medical Association has published guidance on how doctors should address this issue (*AMA Guides to the Evaluation of Work Ability and Return to Work*, fully referenced above*).* The expert who issued the opinions listed above has avoided utilization of that guidance from the AMA, in favor of idiosyncratic and subjective opinion.

C. Examples of Facts of Relevance to Specific Types of Claims

C. 1. Back "Injury" examples:

The clusters in this section are formatted in coordination with references that can be reviewed in order to verify the facts in each cluster.

- Back pain is not indicative of injury.
- Back pain is normal. Significant episodes of back pain are experienced by 80% of Americans.
- Back pain is more similar to headaches and stomach aches, than it is to injury. We should be thinking about back pain in terms of back *ache* (like a headache or a stomach ache), instead of back "injury".

- Historically, people moved away from an understanding of backache, toward a false assumption of back "injury", because of the rise of occupational injury claims systems, rather than because of any scientific advances.

- The "injury" model for backache is doing more harm than good (i.e. leading to misdirected health care that produces a worse outcome than that which is obtained by people who stay away from doctors).

    - Relevant references:

        - Hadler NM. Occupational Musculoskeletal Disorders, 3rd Edition. 2004.

        - Melhorn and Ackerman. AMA's *Guides to the Evaluation of Disease and Injury Causation*. 2008.

        - Hadler NM, Tait RC, Chibnall JT. Back pain in the workplace. JAMA. 2007 Apr 11;297(14):1594-6.

        - Waddell G. The Back Pain Revolution, Second Edition. Churchill Livingstone, 2004.

- The use of spine imaging (e.g., MRI) in response to back pain complaints is an example of the general problematic trend toward over-testing and over-treatment in American health care.

- No currently available general medical test (including imaging) actually explains back pain complaints.

- No currently available general medical treatment provides demonstrable benefit for back pain.

- Back pain sufferers are statistically much better off if they stay away from imaging, and from doctors.

    - Reference: Hadler NM. MRI for regional back pain: need for less imaging, better understanding. *JAMA*. 2003 Jun 4;289(21):2863-5.

- Keeping in mind that back pain is normal, the best predictor of a new onset of back pain is depression (not injury).

    - Reference: Jarvik JG, Hollingworth W, Heagerty PJ, Haynor DR, Boyko EJ, Deyo RA. Three-year incidence of low back pain in an initially asymptomatic cohort: clinical and imaging risk factors. *Spine*. 2005 Jul 1;30(13):1541-8.

- Nothing of a general medical nature predicts who will file a workers compensation claim for back "injury".

- The best predictors of who will file such a claim are:

    - Job dissatisfaction

    - Elevations of Scale 3 of the MMPI (a measure of consistency with patients who have physical complaints for which no general medical explanation can be found)

- Reference:

    - Bigos SJ, et al. A prospective study of work perceptions and psychological factors affecting the report of back injury. Spine, 1991, 16, 1-6.

- The most common healthcare finding for chronic back pain patients who are claiming to be disabled and who have filed a legal claim is a pre-existing personality disorder (a pervasive form of mental illness which leads to impairment regardless of whether an injury occurs).

    - Reference: Dersh J, et al. Prevalence of psychiatric disorders in patients with chronic disabling occupational spinal disorders. *Spine*. 2006 May 1;31(10):1156-62.

- In the only relevant research project ever conducted (e.g., prospective and long-term), the only people who complained of persistent back pain after an accident were those who were eligible for compensation.

    - Barth, RJ. Chronic Pain: Fundamental Scientific Considerations, Specifically For Legal Claims. *AMA Guides Newsletter*, in press (reportedly to be published in the November/December 2012 issue). American Medical Association.

    - Barth RJ. Chronic Pain. In: Melhorn JM. *14th Annual American Academy of Orthopaedic Surgeons Occupational Orthopaedics and Workers Compensation: A Multidisciplinary Perspective*. In press, reportedly to be published November 2012. American Academy of Orthopaedic Surgeons.

- The development of chronic disabling low back pain is more about psychology than anatomy, injury, or any other general medical considerations.

- Other than eligibility for compensation/litigation, the best predictors of the development of chronic disabling back pain are:
    - maladaptive pain behaviors
    - non-organic signs
    - reduced activity
    - mental illness
    - subjective perception of poor general health
    - excessive fears
- Reference:
    - Chou R and Shekelle P. Will this patient develop persistent disabling low back pain? *Journal of the American Medical Association*, 2010; 303:1295–1302.

C. 2. Claims of Complex Regional Pain Syndrome and/or Reflex Sympathetic Dystrophy

Most of the facts listed in this section are more fully discussed in the following references, or in additional publications that are referenced in the following references:

- Barth RJ. A Historical Review of CRPS in The American Medical Association's Guides Library. *The Guides Newsletter*, November/December, 2009. American Medical Association.
- Barth RJ and Haralson R. Differential Diagnosis for Complex Regional Pain Syndrome. *The Guides Newsletter*, September/October 2007. American Medical Association.

- Reflex sympathetic dystrophy (RSD) was a complete scientific failure, and was consequently deleted from the diagnostic taxonomy by 1994.
- Complex regional pain syndrome type 1 (which replaced RSD in the diagnostic taxonomy) was designed to be extremely different from the concept of RSD.
- Complex regional pain syndrome type 1 is an inherently non-injury-related concept.

- Presentations consistent with the concepts of RSD and complex regional pain syndrome (CRPS) are best predicted by pre-existing psychopathology and eligibility for compensation/litigation. They are not predicted by injury.
- The prognosis for CRPS-like presentations is excellent. Most patients demonstrate complete recovery over a short period of time, in the absence of any treatment.
- CRPS was intentionally created in a fashion that causes it to be ambiguous.
- CRPS is a controversial, unreliable, and unvalidated concept.
- The controversy that plagues this concept has actually increased over time.
- CRPS is a social construct that cannot be comprehended based on health science, and can only be understood as an invented concept which has no basis other than agreement between people who have decided to behave as if it actually exists.
- CRPS has been characterized as a mythical concept (in literature from the American Academy of Neurology) because of its lack of scientific validation.
- The overwhelming probability is that whenever the concept of CRPS is applied to a patient, the patient will be filing a legal claim.
- Scientific research has repeatedly failed to identify anything which reliably distinguishes supposed CRPS presentations from clinical scenarios that are known to not involve CRPS.
- There is no known physiological mechanism associated with the concept of CRPS.
- The objective physical signs associated with the concept of CRPS can be created through disuse.
- An extensive differential diagnostic process is required in order to consider this concept as a diagnostic possibility for any one examinee.
- The primary differential diagnostic issues are of a psychological nature (malingering, somatoform disorders, and factitious disorder), and this makes a psychological evaluation necessary in the diagnostic process.
- Apparently, the ability of disuse to create a CRPS-like presentation is a link between pre-existing psychopathology and CRPS-like presentations, and a link between malingering and CRPS-like presentations.

- The original diagnostic protocol for CRPS has been found through scientific research to create false diagnoses of CRPS in the majority of cases.

- The concept of CRPS was constructed so poorly, that it is actually self-contradicting and self-negating:

    - The concept definitionally overlapped with somatoform disorders, to an extent that prevents credibility for attempts to claim that CRPS is something different from a somatoform disorder.

    - Whenever a case of claimed CRPS involves a legal claim, overlap between the protocols for CRPS and malingering automatically causes the claimed presentation to satisfy the requirements of the malingering protocol, which then mandates that doctors should adopt a strong suspicion of malingering.

    - These peculiarities of the CRPS concept create an unavoidable situation in which, according to diagnostic protocol for CRPS, CRPS is actually excluded from diagnostic consideration.

- Differential diagnostic possibilities provide a far more probable explanation for CRPS-like presentations, than the concept of CRPS can provide.

C. 3. Posttraumatic Headache Claims

Reference: Barth, RJ. Obstacles to Claiming Permanence and Injury-Relatedness for "Posttraumatic" Headache. *AMA Guides Newsletter* May/June 2009
American Medical Association

- Outside of those who have a legal claim, persistent headaches occur at the same rates for people who have and have not had head trauma.

- When the possibility of non-injury-related causes was actually investigated, medication was identified as the cause of the persistent "posttraumatic" headaches in the vast majority of the cases. The headaches went away when the medication was eliminated.

- Other than claims context, and medication, the most common risk factor for persistent headache complaints is emotional disturbance (e.g., pathological manifestations of depression and anxiety).

- When posttraumatic headaches have been studied outside of the effects of the American legal system, the longest that any posttraumatic headache was found to last was 20 days.

- In a group of research participants who were not filing lawsuits, but each of whom had experienced thousands of car collisions, not a single person had headache complaints.

- Scientific findings are not supportive of the concept of a persistent posttraumatic headache.

C. 4. Additional facts of relevance to chronic pain and other forms of extended/disproportionate disability:

References:

- Barth, RJ. Chronic Pain: Fundamental Scientific Considerations, Specifically For Legal Claims. *AMA Guides Newsletter*, January/February 2013. American Medical Association.

- Barth RJ. Chronic Pain. In: Melhorn JM. 14th Annual American Academy of Orthopaedic Surgeons Occupational Orthopaedics and Workers Compensation: A Multidisciplinary Perspective. In press, reportedly to be published November 2012. American Academy of Orthopaedic Surgeons.

- Barth RJ. Prescription narcotics: An obstacle to maximum medical improvement. *The Guides Newsletter*, March/April, 2011. American Medical Association.

- Barth, RJ. Undiagnosed Mental Illness as the Cause of General Medical Disability Claims. *The Guides Newsletter*. November/December, 2006. American Medical Association.

- Barth, RJ. Chapter 14 or 18 for pain complaints? Part 4: Summation, Case Example, and Broader Implications. *The Guides Newsletter*. July/August 2005: 4-7. American Medical Association.

- Barth, RJ. Chapter 14 or 18 for pain complaints? Part 3: Guidance from Chapter 18 and Other Pain Resources. *The Guides Newsletter*. May/June 2005: 1-3, 10-12. American Medical Association.

- Barth, RJ. Chapter 14 or 18 for pain complaints? Guidance from Chapter 14 and other mental health resources. *The Guides Newsletter*. March/April 2005: 4-5, 8-9. American Medical Association.

- Barth, RJ, and Brigham, CR. Chapter 14 or 18 for pain complaints? Avoiding the common but mistaken dichotomy of psychological vs. organic. *The Guides Newsletter*. January/February 2005: 1-3, 10-11. American Medical Association.

- Ring D, Barth R, Barsky A. Evidence-based medicine: disproportionate pain and disability. Journal of Hand Surgery. 2010 Aug;35(8):1345-7.
- See also the references listed in the preceding sections on back pain, CRPS, and headache.

- Scientific findings have repeatedly failed to establish a causative link between injury and chronic pain.
- Eligibility for compensation/litigation has repeatedly been found to be a primary risk factor for the development of chronic pain.
- Scientific research of Lithuania, where the type of litigation/compensation incentives that are inherent to the American justice system do not exist, has revealed that the following scenarios simply do not exist:
  - Chronic injury-related neck pain
  - Chronic injury-related temporomandibular (TMJ) pain
  - Chronic posttraumatic headache
- Pre-existing psychopathology has been extremely well-established as a primary risk factor for the development of chronic pain, regardless of whether an injury or accident has occurred.
- Prescription narcotics are reliably detrimental for pain and for health in general. A claim of permanent impairment or permanent damages cannot be credibly endorsed if a plaintiff /claimant is consuming prescription narcotics (the clinical presentation will probably improve if the narcotics are discontinued).

C. 5. Brain Injury Claims

References:

- *Guides to the Evaluation of Permanent Impairment, Sixth Edition*. American Medical Association.
- Carroll LJ, et al. Prognosis for Mild Traumatic Brain Injury: Results of the WHO Collaborating Centre Task Force on Mild Traumatic Brain Injury. *J Rehabil Med* 2004; Suppl. 43: 84–105.

- There is no permanent impairment associated with mild traumatic brain injury, or uncomplicated concussion.

- "Postconcussion syndrome" is not more common among people who have had a concussion, compared to people who have not had a concussion.

- Scientific research of Lithuania, where the type of litigation/compensation incentives that are inherent to the American justice system do not exist, has revealed that prolonged postconcussion complaints simply do not exist.

- The risk factors for a prolonged postconcussion syndrome are:

    - Legal claim (e.g. occupational injury claim, personal injury claim, etc.)

    - Pre-existing psychopathology (including somatoform tendencies)

- Recovery from a severe brain injury continues for at least a decade.

- The probable outcome for severe brain injury is normal-range functioning.

- Doctors are usually incorrect when they offer pessimistic opinions regarding prognosis during the first few years following a severe brain injury.

C. 6. Posttraumatic Stress Disorder Claims and Other Claims of Mental Illness:

References:

- Barth, RJ. Mental Illness, in: Melhorn, Talmage, Ackerman, & Hyman. *Guides to the Evaluation of Disease and Injury Causation, Second Edition.* 2013. American Medical Association.

Note: The prohibition against treating doctors addressing forensic issues (which was discussed in an earlier section of this paper) is especially well-established within mental health care. Publications from the American Psychological Association, the American Psychiatric Association, the American Medical Association, and other health science publishers have all specified that treating mental health clinicians should never engage in forensic work or testimony, and have even specified that it is a violation of professional ethics for treating clinicians to engage in forensic work on behalf of their patients.

- A former chairman of the diagnostic system for mental illness has published discussions of the nature of that system which explain:

- The formally recognized mental disorders are not "real" – they are simply "constructs" that have been created in the absence of scientific rigor.
- We do not have a scientifically credible or reliable mechanism for determining whether someone is mentally ill.

- The manual for the mental illness diagnostic system specifies that this diagnostic system is not capable of satisfying legal/court system requirements for determining whether a disease or illness exists in the case at hand (because of the "construct", rather than "real", nature of recognized mental disorders).
- The scientific knowledge base is not supportive of claims that adult life events (such as injury, accident, traumatic experience, stress, harassment, etc.) can cause mental illness. Scientific findings have actually been contradictory of such claims.
- The syndrome of PTSD is not correlated with whether a person has experienced a traumatic life event:
  - The syndrome is demonstrated by people who have never had a significant injury or traumatic experience. It appears to be a generic manifestation of mental illness.
  - The syndrome is not demonstrated any more frequently among people who have had an injury/trauma, compared to people who have not.
  - Scientific findings have actually indicated that the syndrome is less common among people who have had some traumatic experience.
  - Such findings are consistent with the scientific findings that most people report that traumatic experience has resulted in improved psychological functioning (a phenomenon called posttraumatic growth).

- Risk factors for PTSD:
  - In the short term:
    - Pre-existing psychological disturbance
    - Eligibility for benefits (~70% correlation)
    - Traumatic experience (~10% correlation)

- In the long term:
    - Eligibility for benefits
    - Pre-existing psychological disturbance (the only predictive factor, according to studies that did not look at benefit eligibility)
    - What happened to trauma? Traumatic experiences do not have any predictive value in regard to long-term claims of PTSD (zero correlation between trauma experience and symptoms in the long term).

C. 7. Kernicterus (bilirubin encephalopathy, a commonly claimed basis for malpractice claims):

The scientific knowledge base does not credibly support a claim that kernicterus can be prevented by aggressive screening and treatment.

Reference: Trikalinos TA, Chung M, Lau J, Ip S. Systematic review of screening for bilirubin encephalopathy in neonates. *Pediatrics*. 2009 Oct;124(4):1162-71.

Case Law Update: Negligent Malpractice, Torts, Insurance Laws

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IOWA SUPREME COURT

***Robinson v. Allied Property and Casualty Insurance Co.,* 816 N.W.2d 398 (Iowa 2012) (Waterman) (Hecht, Wiggins, Appel dissenting) (June 29, 2012)**

FACTS: Robinson injured her neck as the result of a car accident on June 15, 2004. The other driver had a policy limit of $100,000. Robinson had a policy with Allied Property and Casualty Insurance Company ("Allied") for underinsured motorist protection ("UIM") for $50,000. Her UIM policy required her to bring her claim within two years of the accident. In March of 2005, despite still having neck pain, Robinson's doctor released her from his care and believed that her pain would eventually dissipate. As of August 2005, Robinson's medical expenses were $5,111. On October 27, 2005, Robinson filed suit against the other driver's insurance company, State Farm. Throughout this time, Robinson continued to seek treatment for her neck pain. In November 2006 (some 2 years and 5 months after the accident), MRIs and x-rays showed bulging and degenerative discs in her spin. In February of 2007, Robinson went to a surgeon, who suggested, for the first time, that surgery was an option. The surgery was successfully performed on April 7, 2007, and the surgeon suggested her future medical expenses would be between $5,000 and $10,000. In July of 2008, State Farm offered Robinson a settlement for the policy limit of $100,000. Robinson filed a UIM claim with Allied, which Allied denied as untimely. In May of 2010 (6 years after the accident and 21 months after her settlement), Robinson filed suit against Allied.

PROCEDURE: The district court granted summary judgment and ruled Allied's 2-year claims limit was reasonable. The court of appeals reversed, finding the 2-year claims limit was unreasonable under the circumstance because Robinson could not determine that her injuries exceed the State Farm policy limit until after the two years. Allied appealed.

HOLDING: A two-year limit on UIM claims is per se reasonable because that is the same amount of time as the statute of limitation for personal injuries.

RATIONALE: First, the court distinguished this case from *Faeth* and *Nicodemus*. In *Faeth*, Plaintiff, because of a statute, could not bring an uninsured claim until the self-insured motorist became insolvent, which did not occur until four years after the accident. Similarly, in *Nicodemus*, the contractual limit required the injured motorist to bring an UIM claim within two years, but only after she had concluded her claim against the other motorist. This court reasoned that the holding in *Faeth* is limited to those unique facts. This court also distinguished *Nicodemus*, because the insurance company gave the injured motorist less than two years to completely investigate her claim, which based on the statute of limitation for personal injuries, is the minimum amount of time an insurance company must provide to bring an UIM claim.

In this case, the court reasoned that since the statute of limitations for personal injuries is two years, a 2-year limit on UIM claims is reasonable because to allow otherwise would give a motorist more rights in an UIM claim than if the accident had involved a fully insured motorist. Additionally, the court disregarded any ethical considerations caused when an attorney files a suit before she knows the injured motorist has a UIM claim. The court stated that because it is commonplace for attorneys to file the tort claim with the UIM claim, an attorney who files a UIM claim that "potentially has merit" should not be sanctioned. Finally, the court found that enforcing the 2-year limit on UIM claims made good policy sense because insurance companies could

trust the 2-year limit when deciding rates, and the limit would prevent endless litigation over when an injured motorist should have learned her claims fell under a UIM claim.

DISSENT: Justice Hecht argues that, based on *Faeth* and *Nicodemus*, the court should only enforce contractual limits on UIM claims when the limits are reasonable. Justice Hecht found the 2-year limit unreasonable in this case because Robinson, although she diligently pursued medical treatment, could not have known her claims exceed State Farm's policy limit until after she met with the surgeon. Additionally, he argues that the majority erroneously used tort based theory when the limitation is a product of a contract. He argues that the purpose of UIM insurance, and remedies in contracts, is to make the injured party whole; the court's ruling, he argues, fails to make Robinson whole. Finally, he states that the court's ruling will lead to greater inefficiencies because it requires attorneys to file UIM claims even when they are not sure the claim is warranted. This, he states, will also lead to ethics issues because the attorney attests that all of the claims are supported by law and fact.

***Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91 (Iowa 2012) (Zager) (Mansfield, Cady and Waterman dissenting) (July 6, 2012)**

FACTS: Tom Pitts, as his divorce decree required, had made his minor daughter the beneficiary of the first $35,000 of his life insurance policy. He named his second wife, Michele, as the beneficiary of the remainder of the policy. After Tom's daughter turned eighteen, in April of 2005, Tom was no longer obligated to have her as the beneficiary. According to Michele, Tom then met with his Farm Bureau Agent, Donald Schiffer, to name Michele as the sole beneficiary of his entire life insurance policy. For reasons no one can explain, Tom's daughter was never removed as the beneficiary. Michele claims that Schiffer had told her on separate occasions that Tom had named her as the sole beneficiary of the claim. When Tom died in November of 2007, Schiffer again told Michele that she would receive the entire $108,000 policy, but after examining the policy, Schiffer had to inform her that Tom's daughter was still entitled to the first $35,000.

PROCEDURE: Michele filed suit against Schiffer and Farm Bureau in November 2009. Her claims against Schiffer were negligence and negligent misrepresentation, and she claimed Farm Bureau was liable under the doctrine of respondeat superior. The district court granted Farm Bureau's motion for summary judgment. The court found that Tom had not given a written request to change his intended beneficiaries; therefore, the daughter was still the intended beneficiary not as a product of negligence, but because Schiffer lacked the authority to change the policy. Michele filed a motion to enlarge the finding of facts and conclusions of law under Iowa Rule of Civil Procedure 1.904(2), claiming that Schiffer owed her a duty of care; the district court denied the motion. The court of appeals affirmed the district court's ruling. Plaintiff appealed.

HOLDING: Insurance agents owe intended beneficiaries, whom the agent knew was an intended beneficiary, a duty of care for foreseeable harm. An insurance agent may be sued for negligent misrepresentation for information he supplies to the insured or for information he knows will be supplied to the intended beneficiary.

RATIONALE: The court found that insurance agents owe intended beneficiaries a duty of care for foreseeable harm when the agent knew that the party was an intended beneficiary. The court found this case analogous to the situation between an attorney and a testator's intended beneficiary, where the attorney is liable for negligence when his direct error caused the intended

beneficiary injury. The court disregarded public policy concerns that agents would have a conflict of interest because the court has allowed intended beneficiaries of testators to sue attorneys without creating a conflict of interest. Next, the court found that summary judgment was inappropriate because there is a factual dispute about who Tom intended to be the beneficiary of the first $35,000. In determining whether Schiffer was liable for negligent misrepresentation, the court first found that insurance agents are in the business of supplying information to their insured and intended beneficiaries; thus an insured or intended beneficiary may bring a claim for negligent misrepresentation against an agent. The court found that Michele could bring a claim of negligent misrepresentation because Schiffer knew Tom, the recipient of the information, would supply that information to Michele, who would rely on it and foreseeably cause her injury. Similarly, Schiffer made statements to Michele that she was the intended beneficiary, upon which she relied to her detriment. Finally, the court refused to dismiss Michele's claim against Farm Bureau as liable for Schiffer's actions under the doctrine of respondeat superior as long as Schiffer's liability remained unclear.

DISSENT: The dissent first states that the court expanded the previously established law that intended beneficiaries could sue only when they were identified in writing. Requiring written proof, the dissent argues, prevents fraudulent claims. Similarly, the dissent believes the court's ruling will lead to conflicts of interest, especially in situations where the insured simply did not want to be honest with the "intended beneficiary." Second, the dissent argues the court's ruling deviates from the well-established economic loss doctrine. The dissent argues that because Michele's injuries are purely economic, and not the result of one of the exemptions to the economic loss rule, Michele's tort claims are too remote and the court should limit her claims to contract theory. Additionally, the court's ruling gave Michele more contract rights than Tom's estate would have had: Tom's estate could not have sued Farm Bureau because he failed to change the intended beneficiary. Third, the dissent argues that because the 2011 legislature limited an insurance agent's duty to his client, the legislature should be the ones to expand the insurance agent's duty to a non-client. Next, the dissent states Schiffer cannot be liable for negligent misrepresentation because Michele could not have designated herself as a beneficiary. At most, Michele could have tried to influence Tom to make her the beneficiary; thus any statements Schiffer made as Tom's agents were not ones intended for guidance in a transaction—an element of negligent misrepresentation. Finally, because Schiffer had to be acting as Tom's agent when he made the statements to Michele, Farm Bureau cannot be liable under respondeat superior because Farm Bureau cannot be liable for Tom's actions.

***Jack v. P and A Farms, Ltd., d/b/a Crooked Creek Shooting Preserve*, 822 N.W.2d 511 (Iowa 2012) (Zager) (Nov. 2, 2012)**

FACTS: Plaintiff employee was employed by defendant employer. The employee sustained a shoulder injury when he slipped on the ice while at work. He filed a negligence action against the employer, who allegedly did not have workers' compensation insurance. On the day of trial, the employee failed to appear, although his counsel was present and able to proceed.

PROCEDURE: The trial court entered a default judgment for the employer when the employee failed to appear personally for trial. The employee appealed. The Supreme Court transferred the case to the Court of Appeals and it affirmed holding that the employee's absence prevented the employer from cross-examining him, which is essential to a fair trial. The Court of Appeals also found it was within the district court's discretion to decline to order a less drastic remedy. The Supreme Court granted further review.

HOLDING: Iowa Rule of Civil Procedure 1.971(3) does not require a party to appear personally for trial. Therefore, it was an abuse of discretion for the district court to enter a default judgment against the employee when his counsel was present and able to proceed with trial on the employee's behalf.

RATIONALE: Even though the employee failed to appear for trial in the negligence action against his employer, his counsel was present and able to take the next step required in the progress of the lawsuit. Therefore, the employee was not in default under Iowa Rule of Civil Procedure 1.971(3) stating that "[a] party shall be in default whenever that party…[f]ails to be present for trial." The employee could have advanced his claim based entirely on admissions by the employer that were already in the record and was entitled to rely on the presumption of negligence due to the employer's alleged lack of workers' compensation liability insurance. The employer would not have been denied a fair trial because no right to cross-examine the employee would have arisen because the employee would not have testified in his case-in-chief, and the employer failed to subpoena the employee to assure his availability as a witness.

***Postell v. American Family Mutual Insurance Co*., 823 N.W.2d 35 (Iowa 2012) (Wiggins) (Nov. 16, 2012)**

FACTS: David and Michelle Postell were married for thirty-one years and owned a home as joint tenants. However, the couple had marital problems and they separated in 2009. Michelle later started divorce proceedings. However, she still considered the house her home and planned to move back in once David moved out. During this time, David became depressed and threatened suicide. On February 14, 2009, David poured gasoline throughout the house and set fire to the home with the intent to commit suicide. He died three days later from his injuries. Michelle had no role in setting the fire.

At the time the couple moved into the home, they purchased a residential fire insurance policy from American Family Mutual Insurance. The policy was in effect the day of the fire. Both David and Michelle were named insureds on the policy. The policy covered replacement coverage for fire damage to the dwelling and personal property as well as loss of use. However, it only covered damage due to "accidental direct physical loss," subject to exclusions. The exclusions provide that coverage does not apply to intentional loss from an act committed by any insured with the intent to cause the loss.

Michelle submitted a claim to American Family to recover under the policy. American Family denied the policy.

PROCEDURE: The district court found Michelle was not entitled to coverage under the policy because the fire was started by David and dismissed the petition. Michelle appealed.

HOLDING: The decision of the district court was affirmed. American Family was not required to pay an innocent coinsured spouse for damage resulting from fire when the policy excludes coverage when any insured causes intentional loss to the insured property.

RATIONALE: The loss was the result of an act of an insured under the plain language of the policy. The Court disagreed with Michelle's argument that David suffered from mental illness which caused an "uncontrollable impulse to commit suicide by fire." When determining intent, the Court considers the insured's objective intent rather than subjective intent. The evidence supported that David was capable of forming intent and did not act under an irresistible impulse.

The act was premeditated and he was aware of the consequences of his actions. David repeatedly acknowledged the threat of property damage prior to setting the fire. He told at least three people that the house was going to "blow." Even though David's primary objective was to commit suicide, this "does not negate the existence of intent to commit intermediate acts necessary to achieve the ultimate objective."

Severability-of-interest clauses have no effect on insurance policy exclusions. The purpose of severability clauses is to spread protection to the limits of coverage among all of the insureds. It is not to negate plainly worded, bargained-for exclusions. These clauses are also a way for the insurance company to communicate that "insured" does not always mean any insured. Sometimes, it means only the insured claiming coverage.

Further, the reasonable expectations doctrine does not apply. Any representations that American Family agents would recommend the policy be paid took place after the fire, not when the parties entered into the insurance contract. The reasonable expectations doctrine only applies to "representations made by the insurer at the time of policy negotiation and issuance." Although Courts have recognized there may be other circumstances attributable to the insurer that could create such expectations, none existed here.

Finally, Iowa Standard Fire Policy (§515.138) was amended in 2005 to narrow the intentional acts compensable under the standard policy and overruled an earlier case (*Sager v. Farm Bureau*) where the Court held an innocent spouse was covered under a policy.

***Bierman v. Weier* et al., 826 N.W.2d 436 (Iowa 2013) (Mansfield) (Hecht and Appel dissenting in part) (Jan. 18, 2013)**

FACTS: Defendant Weier authored a memoir discussing his personal transformation, largely though his relationship with God, following a contentious divorce from his first wife. The book alleges that Weier's ex-wife had been molested by her father and suffered from bipolar disorder or borderline personality disorder as a result. The ex-wife and her father brought claims of libel per se, invasion of privacy and intentional infliction of emotional distress against Weier and ASI, the company Weier paid to publish the book.

PROCEDURE: The district court found there were issues of fact and denied both of Defendants' motion for summary judgment. It further found that Defendant ASI was not a media defendant. Defendants appealed.

HOLDING: The Court upheld the denial of Weier's motion for summary judgment but found ASI was entitled to summary judgment declining to abandon the distinction between media and nonmedia defendants (libel per se).

RATIONALE: Iowa's Constitution does not bar the application of libel per se to private plaintiff/private concern cases brought against nonmedia defendants and does not provide defendants in defamation cases with more protection that the U.S. Constitution. Further, the advent of the internet has given individuals a platform for spreading falsehoods giving nonmedia defendants a greater capacity for harm without corresponding reasons to be accurate with their statements. This is further justification for retaining the media/nonmedia distinction.

When determining whether ASI was a media defendant, the Court held that media defendants do not simply encompass businesses that report news. Book publishers are part of the press

separately recognized by the First Amendment of the U.S. Constitution. Because the press plays a vital role in circulating ideas, to hold the press legally liable for a statement requires more than that the statement be libel per se. Although ASI is not a traditional publisher, it provided Weier several publishing services including design, production and distribution. ASI also ran manuscript scrub software on the book and discussed a problem area with Weier. Therefore, it should be considered a publisher and a media defendant.

The Court disagreed with Defendants' argument that the book involved matters of public concern. The events described in the book would not reasonably be expected to have an impact beyond the parties involved.

Presumed damages are not permitted against a media defendant. The record was devoid of evidence that anyone changed his opinion of Plaintiff after reading the book and the Court refused to infer reputational harm. Therefore, ASI should have been granted summary judgment on Plaintiff's libel claims. On the other hand, stating a person has been molested by their father and suffers from bipolar constitutes libel per se. Therefore, it was correct to deny Weier's motion for summary judgment.

***Boelman v. Grinnell Mutual Reinsurance Company*, 826 N.W.2d 494 (Iowa 2013) (Wiggins) (Feb. 1, 2013)**

FACTS: Plaintiffs are farmers and agreed to raise hogs owned by another farm. Plaintiffs had approximately 1,254 hogs on the farm. Of those, 535 hogs suffocated to death in Plaintiffs' building when Plaintiffs were cleaning the manure basins.

Two years prior to the loss, Plaintiffs purchased an insurance policy from First Maxfield Mutual Insurance Association. Defendants reinsured the policy. The policy was in effect when the hogs died. Plaintiffs filed a claim to recover under the policy. Defendants denied the claim. Plaintiffs compensated the hog owner for the loss and then sued Defendants for breach of contract.

The policy included protection for property damage through five different types of coverage. The appeal concerned Plaintiffs' liability to the public for property damage and liability for damage to other's property pursuant to the contract. The policy precluded recovery for property damage to property in the care, custody or control of the insureds. The policy further excluded coverage for property damage arising out of custom farming if the insured's total gross receipts from custom farming exceeded $2,000 in the prior year. This included activity connected with the care of livestock by an insured for any other person. However, the parties modified the general exclusion relating to custom farming to provide an endorsement that the insurance company does not cover property damage arising out of custom farming if the total gross receipts from all custom farming exceed more than $150,000.

PROCEDURE: The district court overruled the insurance company's motion for summary judgment, granted the insured's motion for summary judgment and entered judgment for the insureds based on the reasonable expectations doctrine. The Court of Appeals affirmed the district court's judgment concluding the insurance policy was ambiguous and interpreting the ambiguity in favor of the insureds finding coverage.

HOLDING: Reversed. The insurance policy was not ambiguous and did not provide coverage as a matter of law. Further, the reasonable expectations doctrine did not apply as a matter of law.

RATIONALE: In construing insurance policies, except in cases of ambiguity, the intent of the parties controls. The court determines the parties' intent by looking at what the policy says. A policy is ambiguous if the language is susceptible to two reasonable interpretations. To make this determination, the contract must be read as a whole including any endorsements. The terms of the endorsement govern if the endorsement conflicts with the body of the policy.

The endorsement must be read carefully because it modifies the policy. The endorsement specifically referred to the provision in the policy's general exclusion section and merely raised the threshold from $2,000 to $150,000. Therefore, it broadened the protection provided to liability to the public set forth in the main policy. If Plaintiffs were liable for damage to property not in their care, control or custody, and their custom farming operation grossed $150,000 or less, they would have been indemnified. Endorsements, including those relating to custom feeding operations, do not alter or superseded care, custody or control exceptions in the main policy, which are there to prevent the insurance company from becoming a guarantor of the insured's work. It does not apply when the damage is merely incidental to the property upon which the work is performed by the insured. The exclusion does apply where the property damaged is under the supervision of the insureds and it is a necessary element of the work performed. Plaintiffs were directly managing the hogs, which was a necessary element of their job of feeding the hogs to market weight.

Regarding Plaintiffs' claim under the reasonable expectations doctrine, the reasonable expectations doctrine does not expand coverage on a solely equitable basis. Rather, it is a "recognition that insurance policies are sold on the basis of the coverage they promise. The doctrine is carefully restricted because insurance coverage is a contractual matter, based on policy provisions. It is used only when there is an exclusion that is (1) bizarre or oppressive; (2) eviscerates terms explicitly agreed to; or (3) eliminates the dominant purpose of the transaction. The only relevant representations are those made at the time the policy was negotiate and issued. Plaintiffs did not prove "circumstances attributable to the insurer that fostered coverage expectations or show that the policy is such that an ordinary layperson would misunderstand its coverage."

***Sallee v. Stewart*, 827 N.W.2d 128 (Iowa 2013) (Appel) (Mansfield and Waterman dissenting) (Feb. 15, 2013)**

FACTS: Plaintiff was acting as a chaperone accompanying kindergarten students on a field trip to Defendant's dairy farm. The tour included riding a horse, feeding a calf, viewing a tractor and playing in the hayloft. While on the tour, Plaintiff fell through a hole in the floor of the hayloft breaking her wrist and leg. She brought a suit for negligence against the owners of the dairy farm.

PROCEDURE: The district court granted Defendant's motion for summary judgment finding that that Iowa's recreational use statute barred Plaintiff's claims. The Court of Appeals affirmed holding that Defendant's property was covered by the recreational use statute and that Plaintiff was engaged in a recreational purpose. However, it also held that recreational use immunity did not extend to Defendants once they undertook responsibility for guiding the field trip. Plaintiff appealed.

HOLDING: The protections of the recreational use statute do not apply to Defendants. Plaintiff failed to raise a material issue of fact regarding whether the Defendants willfully or maliciously failed to guard or warn against the presence of the hold. Therefore, the decision of the Court of

Appeals was vacated, judgment of the district court reversed and the case was remanded for further proceedings.

RATIONALE: There is a wide spectrum of inclusiveness amongst various states' recreational use statutes. Iowa's statute provides a closed definition of "recreational purpose" listing specific activities covered by the statute. It does not include expansive language such as "includes, but not limited to." Therefore, the Court does not add, or subtract, from the legislature's definition.

Three activities included in Iowa's list of recreational activities under the statute are horseback riding, nature study and other summer sports. Plaintiff was not injured while horseback riding nor is frolicking in the hayloft considered a nature study. Further, the Court declined to interpret "other summer sports" to be so expansive as to include playing in a hayloft. To interpret other summer sports to include a pleasurable activity or source of diversion would be inconsistent with the statutory history and purpose of listing specific activities. Therefore, the district court erred in granting summary judgment to Defendants based on the immunity of the recreational use statute.

Finally, Iowa Code §461C.6(1) provides that any immunity under the recreational use statute does not apply to "willful or malicious failure to guard or warn against dangerous condition, use, structure, or activity." Plaintiff did not claim that Defendants acted maliciously and did not provide sufficient evidence that Defendants acted willfully. Therefore, Plaintiff did not raise a triable issue of willful or malicious conduct.

***Crawford v. Yotty*, 828 N.W.2d 295 (Iowa 2013) (Zager) (March 15, 2013)**

FACTS: Plaintiff's son leased an apartment from Defendants who are residential landlords. Plaintiff brought a suit against Defendants after she slipped and fell on the stairs leading down to her son's apartment. Plaintiff's claims included negligence and failure to maintain the premises in accordance with the Iowa Uniform Residential Landlord and Tenant Act (IURLTA) and the rental agreement between the landlords and her son. During trial, Plaintiff's counsel objected to the court's proposed jury instructions and requested additional instructions regarding the landlords' obligations under IURLTA and their contractual obligations under the rental agreement. The district court denied the request.

PROCEDURE: The jury returned a verdict for Defendants. The Court of Appeals reversed and remanded for a new trial after concluding the district court erred in excluding Plaintiff's proposed instructions informing the jury of a landlord's obligations under the lease and Iowa Code §562A.15(1)(a)-(d). Defendants appealed.

HOLDING: The legal principals contained in Plaintiff's proposed instructions were adequately encompassed by the instructions given by the district court.

RATIONALE: Under Iowa law, a court must give a requested instruction when it states a correct rule of law applicable to the facts of the case and is not embodied in other instructions. If the concept behind the requested instruction is embodied in other instructions, the district court may properly reject the proposed instruction. Error in refusing to give a particular instruction does not warrant reversal unless the error is prejudicial. Based on the evidence presented, the Court was confident that the jury reached the merits on the specific aspects of Plaintiff's claims and doubtful that submission of the proposed instruction would have changed the outcome.

***Hoyt v. Gutterz Bowl & Lounge L.L.C*., 829 N.W.2d 772 (Iowa 2013) (Hecht) (Waterman, Cady and Mansfield dissenting) (April 5, 2013)**

FACTS: Defendant is a bowling alley and tavern. Plaintiff and several members of his construction crew finished work and went to Defendant's establishment for drinks. Plaintiff believed that another patron (Knapp) was scowling at him and, after a few drinks, went to confront Knapp with the help of one of his coworkers. The waitress who was serving Plaintiff and his coworker noticed their behavior and was concerned. She threatened to cut them off unless they calmed down. Plaintiff and his coworker ignored the warning. Therefore, the waitress refused to continue serving them. Fearing there may be an altercation, Defendant's owner asked Plaintiff and his coworker to leave the premises.

As Plaintiff was walking through the parking lot, Knapp approached him from behind and hit him in the back of the head, knocking him unconscious. Plaintiff suffered several injuries including a compound fracture in his ankle.

Plaintiff brought a suit against Knapp and Defendant. Defendant moved for summary judgment alleging it owed Plaintiff no duty of reasonable care, that there was no evidence of breach of any duty, and that the assault by Knapp and Plaintiff's resulting injuries were not foreseeable.

PROCEDURE: District court found as a matter of law that the assault in the parking lot and Plaintiff's resulting injury were not foreseeable to Defendant. Therefore, it granted summary judgment for Defendant and dismissed it from the suit. The Supreme Court granted interlocutory appeal and transferred the case to the Court of Appeals. The Court of Appeals reversed concluding questions of fact precluded summary judgment and citing *Thompson v. Kaczinski* (foreseeability of a risk is no longer part of the duty analysis). The Supreme Court granted further review.

HOLDING: The Supreme Court affirmed the decision of the Court of Appeals. The Court held Defendant had a duty of reasonable care and that the issues of reasonableness and scope of liability were jury questions.

RATIONALE: In *Thompson*, the Court joined the drafters of the Restatement (Third) disapproving the use of foreseeability in making no-duty determinations. Rather, foreseeability should be considered when determining the reasonableness of the conduct. No-duty rulings should be limited to exceptional cases where there is "an articulated countervailing principle or policy" that "warrants denying or limiting liability in a particular class of cases." The Court went on to discuss and approve Restatement (Third) §40 regarding special relationships giving rise to a duty including relationships involving business patrons even in cases involving harm caused by a third party. Tavern owners are included in the class of business owners contemplated by §40 and are not exempt from the duty to exercise reasonable care.

The Court then turned to the question of whether Defendant acted reasonably. Although taverns cannot insure against third-party criminal attacks, taverns must make reasonable efforts to maintain order and supervise and control patrons. Primary factors to consider in determining whether a person's conduct lacks reasonable care include the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of the harm and the burden of precautions to eliminate or reduce the risk. Because taverns create an environment where instances of misconduct are likely, there are converging questions of reasonable care and the

appropriate scope of liability. Small changes in the facts can dramatically change how much risk is foreseeable. Therefore, it is for the jury to determine if Defendant acted reasonably.

Finally, with regard to scope of liability, simply because Defendant owned Plaintiff a duty of reasonable care does not necessarily impose liability for all harm. Liability is limited to harms resulting from the risk that make Defendant's conduct tortuous. This is a fact intensive inquiry. Therefore, in this case scope of liability cannot be determined as a matter of law.

***Rivera v. Woodward Resource Center*, 830 N.W.2d 724 (Iowa 2013) (Cady) (Mansfield and Waterman dissenting) (May 10, 2013)**

FACTS: Plaintiff was employed by the Woodward Resource Center, a home for the disabled administered by the Iowa Department of Human Services. Plaintiff reported to her supervisor that another employee was engaged in abusive conduct. She was subsequently terminated. Plaintiff brought a claim for wrongful discharge against the State claiming she was fired in violation of public policy. She did not file an administrative claim prior to filing the lawsuit. She believed she was not required to proceed with an action under the Iowa Tort Claims Act (ITCA) because her claim was not based on personal injury.

PROCEDURE: The district court dismissed Plaintiff's first suit for failure to first exhaust administrative remedies under the ITCA. Plaintiff filed a claim with the state appeals board, which denied her claim. Plaintiff then filed a second action in district court within six months of dismissal of the first action and more than two years from the time the action accrued but within six months of dismissal of the administrative claim. The district court dismissed the second suit finding Plaintiff failed to comply with the statute of limitations. The Court of Appeals reversed finding the savings clause found in §669.13(2) provided Plaintiff six months to file her lawsuit after the state appeals board denied her administrative claim. The State sought further review.

HOLDING: The second lawsuit filed by Plaintiff satisfied the savings clause of the statute of limitations under ITCA.

RATIONALE: The ITCA requires a two-step process in order to bring a suit against the state in tort. First, the plaintiff must submit the claim for administrative consideration. If the administrative process does not resolve the claim, the plaintiff may file a claim in district court. The ITCA requires that a claim is barred if not brought within two years after the claim accrued. However, the time to bring a suit is extended for six months from the date of mailing of notice to the claimant by the attorney general as to the final disposition of the claim or withdrawal of the claim by the claimant. Further, §669.13(2) provides a savings clause for claims not originally brought under the ITCA but when pursued, a state agency or court determined the ITCA provided the exclusive remedy for the claim. The savings clause allows an additional six months from the date of the court order or mailing of administrative notice to bring the claim.

Three requirements must be met before the saving clause will act to extend the statute of limitations: (1) a timely claim must be made or filed; (2) the claim must be made under a law of this state other than under §669; and (3) an agency or court must made a determination that §669 is the exclusive remedy for the claim.

The savings clause applies broadly to any "claim made or filed" against the State regardless of whether it is with an administrative agency or the court. Under the ITCA, the legislature defined the term "claim" in the context of a substantive right, not a designation for relief sought from an

administrative agency. Therefore, the Court determined that "claim" means a legal claim, which is broad enough to include claims brought by a lawsuit.

In this case, Plaintiff did not file her suit under the ITCA. Rather, she brought as a common law action in district court. It does not matter that the claim should have been brought under the ITCA because the claim constituted a tort against the State. In addition, the only reason the first action was dismissed was because the ITCA provided the exclusive remedy. If the first action was dismissed on some other grounds, the savings clause would not save the claim.

The purpose of the savings clause is not to promote the timeliness and efficiency of lawsuits. Rather, it is to give diligent but mistaken litigants an opportunity to have their claims decided on the merits.

***Farm Bureau Life Insurance Co. v. Holmes Murphy & Associates, Inc*., 831 N.W.2d 129 (Iowa 2013) (Hecht) (May 17, 2013)**

FACTS: John and Mary Smith applied for a life insurance policy from Farm Bureau in the state of Wyoming. Their applications were denied when a blood screening revealed they both had HIV. Farm Bureau sent the Smiths a letter notifying them of the denial and requesting authorization to disclose blood profile results to their physician(s). The Smiths did not respond. They did not learn of their HIV status until almost two years later.

The Smiths filed suit in Wyoming alleging Farm Bureau and others were negligent in failing to report their HIV status to the them and the State of Wyoming as well as failing to inform them before they blood was taken that Farm Bureau would not notifying them if their HIV status was positive. The Tenth Circuit held that the insurance company had a duty to disclose sufficient information to cause a reasonable applicant to inquire further. They also brought a claim in Wyoming state court seeking punitive damages. The parties reached a confidential settlement.

Farm Bureau sought indemnity for the settlement amount under an Insurance Company Professional Liability (ICPL) policy with Federal Insurance Company. Farm Bureau notified its insurance broker, Holmes Murphy & Associates of the Smiths' claims. However, Holmes Murphy did not notify Federal until more than two years after the ICPL policy notice period expired. Federal denied coverage due to Farm Bureau's failure to provide timely notice and policy exclusions for bodily injury and underwriting. Farm Bureau filed suit against Federal and Holmes Murphy.

The Iowa Supreme Court affirmed Federal's motion for summary judgment on the ground that Farm Bureau failed to timely notify Federal of the claims. Farm Bureau filed an amended petition against Holmes Murphy claiming breach of contract and negligence for failure to provide Federal with notice of the claims.

PROCEDURE: The district court granted summary judgment for Holmes Murphy concluding that the underwriting and bodily injury exclusions contained in the ICPL policy would preclude coverage even if timely notice had been provided. Farm Bureau appealed.

HOLDING: Affirmed. Although some of the Smiths' damages could be characterized as losses related to bodily injury and would consequently be excluded from coverage under the bodily injury exclusion, the Court did not determine whether that exclusion was dispositive. Rather, the underwriting exclusion precludes coverage for any of the Smiths' claims.

RATIONALE: The ICPL policy does not define the term "underwriting." The Court gives undefined terms their ordinary meaning and look to dictionaries and case law. "Underwriting" is defined as "the process of examining, accepting or rejecting insurance risks, and classifying those selected in order to charge the proper premium for each." As part of underwriting, insurers typically ask questions and gather records regarding the applicant's medical background and medical conditions. Therefore, the Court could not conclude that Farm Bureau's investigation and management of the information that came from it were not within the scope of the underwriting exclusion.

The Smiths' claims arose out of Farm Bureau's alleged breach of duty that arose from Farm Bureau's underwriting activity. Therefore, the Smiths' claims fall within the range of claims contemplated by the underwriting exclusion. In addition, Farm Bureau's investigation and subsequent determination of policy eligibility can be characterized as aspects of its classification and selection of risk. These are specifically enumerated in the language of the underwriting exclusion.

***Iowa Dental Association v. Iowa Insurance Division*, 831 N.W.2d 138 (Iowa 2013) (Mansfield) (May 17, 2013)**

FACTS: Many dentists in Iowa enter into contractual relationships with insurers that provide dental plans. Under these contracts, the insurers reimburse all or a portion of the costs of dental procedures. Generally, the contracts include maximum fee schedules where the insurer sets a maximum charge the dentist can bill for a particular service. There are also certain services that are excluded from the plan or limitations on the frequency of particular services. Dentists agree to follow the maximum fees in exchange for providing services to the insured patients.

Prior to the enactment of Iowa Code §514C.3B, some of these plans dictated maximum fees that dentists could charge for services that were not reimbursable under the insurance plans. In 2010, the legislature adopted §514C.3B prohibiting the imposition of fee schedules for services that were not covered by the plan. However, some insurers continued to impose fee schedules for procedures that were potentially reimbursable but were not actually reimbursed because of some other limitation such as frequency of the procedure claiming they were still technically "covered services" (i.e., "services reimbursed under the dental plan"). The Iowa Dental Association (IDA) requested declaratory order determining regarding the meaning of the statute.

PROCEDURE: The Insurance Commissioner issued a declaratory order stating that covered services include services that can be reimbursed generally, but are not actually reimbursed under certain circumstances due to other policy restrictions. IDA petitioned for judicial review and the district court affirmed the declaratory ruling holding that the Commissioner was vested with interpretive authority and the decision was not irrational, illogical, or wholly unjustified. The IDA appealed.

HOLDING: The decision of the Insurance Commission is reversed. A service is "covered" within the meaning of §514C.3B only if it is actually reimbursed under the dental plan.

RATIONALE: With regards to standard of review, the Court held that interpretive authority concerning the phrase "covered services" is not clearly vested with the Insurance Commissioner. The Commission has power to make rules "not inconsistent with law for the enforcement of this subtitle and for the enforcement of the laws, the administration and

supervision of which are imposed on the division" Iowa Code §505.8(2). This is not the same as authority to make interpretive rules. Therefore, review was for errors at law.

The word "reimbursed" is not defined in the statute. The language of §514C3.3B(3) favors IDA's position that "reimbursed" means services actually reimbursed under the plan. The dictionary definition of "reimbursed" also usually means that the cost has been repaid.

The Court looked to other states to help determine the definition of "covered services." In defining the term, a number of states used the term "reimbursable." None of the states used the term "reimbursed." However, instead of using the language employed by other states, the general assembly chose to define "covered services" to mean "services reimbursed under the dental plan." If the legislature wanted to allow insurers to impose maximum fees on services not actually reimbursed because of a plan limit, it could have said so.

***Iowa Medical Society et al. v. Iowa Board of Nursing et al.*, 831 N.W.2d 826 (Iowa 2013) (Waterman) (Cady dissenting) (May 31, 2013)**

FACTS: The Iowa Medical Society and Iowa Society of Anesthesiologists brought an action challenging the Board of Nursing and Department of Health's promulgation of rules permitting ARNP's to supervise radiologic technologists using fluoroscopy machines.

PROCEDURE: The district court invalidated the rules and concluded the ARNP supervision of fluoroscopy was not recognized by the medical and nursing professions under Iowa Code §152.1(6)(d). Defendants appealed.

HOLDING: The nursing board's application of the law to fact is not irrational, illogical or wholly unjustifiable. Further, the rules at issue fall within the authority of the nursing board and department of health. Therefore, the decision of the district court was reversed and the rules at issue upheld.

RATIONALE: The plain language of §152(6)(d) allows the nursing board to determine whether the medical and nursing professions have recognized a particular practice of nurses. Had the legislature intended to give another agency or organization power to determine recognition by the medical profession, it would have said so in this provision. Therefore, the nursing board could apply §152.1(6)(d) to decide that ARNP supervision of fluoroscopy is recognized by the medical and nursing professions despite the opposition of the board of medicine and physician organizations. Given the differential standard of review, the district court erred when it reversed the nursing board's determination.

It is clear that ARNPs are not licensed to operate fluoroscopy machines. There is nothing in the plan language of the rules or statue that requires ARNPs supervising fluoroscopy to have the ability to operate the equipment. There are many professions that are responsible for supervising work done by others without a license to do the work themselves. Therefore, an ARNP may directly supervise fluoroscopy without acting as an operator of the machine within the meaning of §136C.

Furthermore, the district court erred in second guessing the board of nursing and department of public health on the adequacy of ARNP training to supervise fluoroscopy. There is no record of any report of an injury resulting from an ARNP supervised fluoroscopy. ARNPs are adequately trained to supervise fluoroscopy and have been safely doing so for years.

***Mitchell v. Cedar Rapids Community School District*, No. 12-0794, 2013 WL 3129384 (Iowa 2013) (Hecht) (Waterman and Mansfield dissenting) (June 21, 2013)**

FACTS: D.E. was a 14 year-old special education student at Kennedy High School in Cedar Rapids. Her IQ was 67 and she was rarely without adult supervision due to her diminished capacity. M.F. was a 19 year-old special education student also at Kennedy High School. The special education teacher noticed M.F. and D.E. engaging in physical contact but assumed the relationship was age-appropriate. However, she had concerns that the two students were sexually active and may engage in sex if unsupervised.

D.E. and a friend left school early one day to meet M.F. The three went to another student's house. M.F. raped D.E. in the garage of the house. D.E.'s mother brought a suit against the Cedar Rapids School District claiming it was negligent in failing to adequately supervise D.E.

PROCEDURE: A jury returned a verdict for Plaintiff and the district court denied Defendant's motion notwithstanding the verdict.

HOLDING: Defendant's arguments that 1) it owed no duty to protect a student from a third party outside the school day, off school grounds, and not during a school activity and 2) it's conduct could not fairly be said to have been a but for cause of D.E.'s rape were not preserved for appeal. It also found there was sufficient evidence to generate a jury question on scope-of-liability.

RATIONALE:

Duty: Claimed errors must be raised with some specificity in a directed verdict motion. General averments in a motion for a directed verdict will not typically maintain particular issues for the district court's further consideration in ruling on motions for judgment notwithstanding the verdict. Even though Defendant's motion for directed verdict offered facts supporting its scope-of-liability argument, the motion's reference to foreseeability did not help preserve the duty argument, as foreseeability no longer plays a role in duty determinations under *Thompson v. Kaczinski* (establishing that there is ordinarily a general duty of reasonable care without consideration of foreseeability, absent exceptional circumstances).

Factual Causation: In its motion for directed verdict, Defendant presented a scope-of-liability argument citing several cases. Although these cases did include some analysis of factual causation, Defendant did not raise a factual causation deficit at the directed verdict stage or the jury instruction colloquy. Further, Defendant did not explain in his motion or argument in support of the motion how the cited cases supported its argument on factual causation grounds. Rather, Defendant focused on scope-of-liability.

Scope-of-Liability: There is no bright-line rule when determining the "appropriate level of generality or specificity to employ in characterizing the range of harms relevant to scope-of-liability determination." Here, the parties had different characterizations of the harm to D.E. Defendant suggested the harm was M.F.'s having sex with D.E. Whereas, Plaintiff suggested the harm was the rape of D.E. Where there are competing characterizations of the range of reasonably foreseeable harms that lead to different outcomes, the determination should be left to the fact finder.

***Miranda v. Said*, No. 11-0552, 2013 WL 3794007 (Iowa 2013) (Cady) (Waterman dissenting) (July 19, 2013)**

FACTS: Plaintiffs emigrated to the U.S. without documentation. Their children joined them later. Three years later Plaintiffs had another child in the U.S. Eventually Plaintiffs took action to obtain legal immigration status with the help of an attorney (Defendant). Later, Plaintiffs received a notice of removal order. Defendant advised Plaintiffs to return to their native Ecuador and have their son sponsor them for citizenship once the son obtained citizenship. Defendant allegedly told Plaintiffs that they had a 99% chance of success and did not provide any other options to Plaintiffs. Plaintiffs then returned to Equator after completing the paperwork advised by Defendant.

Plaintiffs' son became a citizen a short time later and filed the necessary documentation to sponsor his parent's return. The applications were denied and Plaintiffs were banned from readmission for ten years because they had left the U.S. voluntarily. They later learned that the sponsorship route advised by Defendant was only available when the sponsoring relative was a spouse or parent of the applicant. Plaintiffs sued Defendant for legal malpractice claiming emotional distress and punitive damages.

At trial, Defendant testified that he knew Plaintiff's son was not a qualifying relative for sponsorship. However, he had been successful 10-15 times in the past using children as qualifying relatives.

PROCEDURE: Prior to submitting the case to the jury, the district court granted Defendant's motion for a directed verdict on the emotional distress and punitive damages claims. The jury found in favor of the Plaintiffs for economic damages. Plaintiffs appealed. The Court of Appeals reversed the district court and found that Plaintiffs' claims for emotional distress and punitive damages should have been submitted to the jury. Defendant sought further review on these issues.

HOLDING: The Supreme Court affirmed the Court of Appeals holding that emotional distress damages are available in legal malpractice stemming from immigration representation and that there was evidence sufficient to warrant submission of punitive damages to the jury.

RATIONALE: In Iowa, the general rule is that emotional distress damages are not recoverable in torts absent intentional conduct by a defendant or some physical injury to the plaintiff. There is no duty in tort to avoid causing emotional harm. However, there are exceptions. An exception to the general rule is recognized where "a party negligently performed an act which was so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owned, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the obligation that such suffering with result from its breach." Here, the transaction undertaken by Defendant involved an emotionally charged situation (separation of family members lasting a decade). It is foreseeable that prolonged separation of a parent and child may cause emotional distress. Plus, Defendant knew Plaintiffs' son was not a qualifying relative for purposes of sponsorship. Therefore, there was no chance of success if the decision maker followed the law.

Because awards of emotional distress damages against attorneys may have a chilling effect on the practice of public interest law, the Court clarified that it was not simply the nature of the

relationship that supported emotional distress damages. Rather, it was the high likelihood of these damages from the negligent acts of the Defendant.

With regard to punitive damages, in order to recover punitive damages the plaintiff must show that the conduct of the defendant constituted "willful and wanton disregard for the rights or safety of another." Here, a reasonable jury could find that a "lawyer acts with willful or wanton conduct by pursuing a course of action with knowledge that it is contrary to the plain language of the governing statute." Defendant failed to make the risks clear and told Plaintiffs they had a good chance of success by pursuing his strategy. This was at least enough to infer that Defendant was reckless and that he may have been lying to Plaintiffs about the probability of success.

COURT OF APPEALS

***Estate of Ayala-Gomez v. Sohn*, No. 11-2017, 2012 WL 4900919 (Iowa Ct. App. Oct. 17, 2012)**

FACTS: Plaintiffs took their one-year-old child to the emergency room. Defendant examined the child and sent him home. The next day, the family returned to the hospital. At that time, the child was unresponsive and died that day.

The child's estate filed a medical malpractice case against Defendant more than three years after the child's death seeking damages for funeral and burial, physical and mental pain and suffering and medical expenses. Defendant sought summary judgment based on the two-year statute of limitations for medical malpractice claims set forth in §614(9)(a). The estate claimed the action was timely under the limitations period for minors provided in §614(9)(b) (the minor tolling provision).

PROCEDURE: The district court concluded the standard two-year statute of limitations was applicable and dismissed the claim.

HOLDING: Affirmed.

RATIONALE: The estate concedes that it did not file the lawsuit within the two-year statute of limitations prescribed by §614(9)(a). Section 614(9)(b) extends the statute of limitations for actions "brought on behalf of a minor." "Minor" is defined elsewhere in the Iowa Code as "a person who is not of full age." Implicit in this definition is a presumption that a minor is a person who is living. The estate of a minor is not a person. Rather, it is the real and person property of a decedent. The estate cannot take advantage of the "minor" tolling provision as it is currently written because it is not a living child.

Regarding the estate's argument that §614(9)(b) refers to actions "on behalf of a minor," the minor child would be required to have a representative raise his cause of action regardless of whether he was dead or alive. The Court acknowledged that the estate was acting as a representative of the minor. However, this does not change the fact that §614(9)(b) only tolls the statute of limitations as to living minors. The representative cannot take advantage of §614(9)(b) to toll the statute of limitations because the disability of minority is terminated by the death of the child.

***Jean v. Hy-Vee, Inc*., No 12-0246, 2012 WL5539738 (Iowa Ct. App. Nov. 15, 2012)**

FACTS: A Hy-Vee customer was struck by a bicycle ridden by 16-year-old, Bryce Lewis, an employee of the grocery store when she was carrying her groceries out of the store. Lewis had reported for work earlier that day when he realized he had forgotten his belt, which was a required part of his work attire. He requested permission to return home to fetch his belt. He retrieved his bike from the bike rack and proceeded to head down the sidewalk from the store when he hit Plaintiff at a relatively high rate of speed. Plaintiff suffered a cut to her forearm and wrist and a broken right ankle. Plaintiff sued Hy-Vee claiming the company was liable, as Lewis was acting in the course and scope of his employment. She also claimed Hy-Vee was negligent in its care, custody and control of the premises. Her claims included damages for medical expenses, loss of full mind and body, loss of earnings and pain and suffering.

Hy-Vee filed a motion for summary judgment on the respondeat superior claim but did not raise an argument on premises liability until it reply brief.

PROCEDURE: The district court granted Hy-Vee's motion for summary judgment for Plaintiff's negligence claim based on respondeat superior and held the claim regarding premises liability was not properly before it.

Plaintiff then filed a motion for leave to amend her petition to add a claim against Hy-Vee for negligent training, supervision and regulation of its employees. The district court denied the motion holding it had already found Lewis' conduct was not a result of any acts within the scope of his employment.

Hy-Vee then brought a second motion for summary judgment seeking dismissal of the premises liability claim. Plaintiff filed a resistance including an expert report regarding the store's dangerous design. The district court grated Hy-Vee's motion for summary judgment and dismissed the claim.

HOLDING: Affirmed in part, reversed in part.

RATIONALE: Lewis' shift had not yet begun when he started on his way home to get his belt. He was not "on the clock." Although, Hy-Vee requires employees to wear a uniform, going home to retrieve his belt was not a task Lewis was employed to perform nor did Hy-Vee control how Lewis obtained his uniform prior to his shift. In addition, his supervisor did not direct him to return home to get his belt. Therefore, the record leaves no doubt that Lewis was acting outside his employment when he rode his bike into Plaintiff.

With regard to Plaintiff's premises liability claim, the Court found that the district court applied the wrong analytical framework and erred by applying the structure of *Brokaw v. Winfield-Mt. Union Community School District* (involving risk from actions by a third party). It does not matter if Hy-Vee was negligent in its control of the premises or whether Lewis engaged in misconduct. Under the Restatement (Third), Hy-Vee as a business open to the public owes a duty of reasonable care to individuals lawfully on the premises within the scope of their special relationship.

Lewis was riding his bike on a sidewalk in front of Hy-Vee. The store did not have any rules against riding bikes on the sidewalk or any signs prohibiting bicycles on the sidewalk. The collision happened on the sidewalk. Furthermore, the design of the entrance includes a "blind" corner where it is impossible to see others until rounding the corner and there were no "fish eye"

mirrors to aid with visualization around the corner. Plaintiff submitted an expert's safety report stating that Hy-Vee failed to exercise OSHA requirements and failed to follow fundamental accident prevention with respect to the area at issue. Therefore, there was a fact question concerning whether Hy-Vee exercised reasonable care.

Finally, on Plaintiff's motion for leave to amend her petition, the district court has considerable discretion. Generally, when it comes to motions for leave to amend, amendments are the rule and denials are the exception. Timing of an attempt to amend is not the determinative factor. Rather, the question is whether the proposed amendment substantially changes the issues before the court.

In this case, the district court abused its discretion. The district court denied the request, finding that it had already determined Lewis' conduct did not occur within the scope of his employment. However, this was not the proper question. The appropriate question was whether Lewis was acting tortiously and, if so, whether Hy-Vee's negligence in training, regulating and supervising him facilitated his wrongful conduct. This claim does not substantially change the issues in the suit. Therefore, it was err for the district court to deny the motion.

***Cruz, et al. v. Central Iowa Hospital Corporation d/b/a Iowa Methodist Medical Center*, No. 12-0347, 2012 WL 6194230 (Iowa Ct. App. Dec. 12, 2012)**

FACTS: In May 2008, two men were in a car accident and thrown from the vehicle, causing them to suffer traumatic brain injuries. They were air-lifted to Iowa Methodist. The patients' families lived in Vera Cruz, Mexico and both men had "undocumented status." Due to the severity of the injuries, both men required long-term rehabilitation services after their release from Methodist. Two facilities refused to accept the men for rehabilitation due to their undocumented status. Therefore, the hospital social worker decided to repatriate (the process of extrajudicially deporting seriously ill immigrants by hospitals) them to their native Mexico. A hospital in Vera Cruz was located and willing to accept the men. This was discussed with the families and the hospital chartered a plane and flew them to Mexico. The men sued the hospital claiming a violation of EMTALA and false imprisonment. The men's wives also sought loss of consortium.

PROCEDURE: The hospital filed a motion for summary judgment arguing that EMTALA was satisfied because it had stabilized the men and claiming it did not detain the men against their will. Plaintiffs dismissed the EMTALA claim and the district court dismissed the remaining claims holding if confinement had occurred it was the severity of the injuries that caused their detention and that plaintiffs were not harmed by any such confinement. Plaintiffs appealed.

HOLDING: Affirmed district court's grant of summary judgment on the false imprisonment and related loss of consortium claims.

RATIONALE: In order to prove the tort of false imprisonment, two factors must be met: 1) detention or restraint against a person's will; and 2) unlawfulness of the detention or restraint. The court held that although the families said they never consented to the patients' transfer to Vera Cruz, they did not object to it. Therefore, they failed to meet the first requirement. The court also found plaintiffs did not meet the second requirement because they could not prove

the men were harmed by their confinement. The men argued that they were harmed because they received inadequate rehabilitative care in Vera Cruz. However, the court found that their poor recovery resulted from the inadequate rehabilitative services in Mexico, not their supposed confinement by the hospital or resulting emotional distress from learning of the confinement.

***Lane v. Spencer Municipal Hospital*, No. 12-1358, 2013 WL 3272265 (Iowa Ct. App June 26, 2013)**

FACTS: Martha and Larry Lane brought a claim against Spencer Municipal Hospital after Martha fell in a hospital bathroom on February 28, 2010. The petition was filed on February 29, 2012. Spencer Hospital moved to dismiss the case claiming the applicable two-year statute of limitations had expired.

Spencer Hospital argued that the Lanes were required to file their lawsuit "by the anniversary date of the injury," February 28, 2012. The Lanes contented the first day was excluded. Therefore, February 29, 2012 was the final day for filing suit.

PROCEDURE: The district court initially granted the motion but reconsidered finding the petition was timely filed. The district court reasoned it was "counting two years, not any particular number of days" and "if we exclude February 28, 2010, begin counting on the next day, March 1, 2010, and go forward two years, we land on February 29, 2012."

HOLDING: Plaintiffs' petition was untimely. Reversed.

RATIONALE: Under the rules for computing time, "the first day shall be excluded and the last included." §4.1(34). However, this rule did not help the Lanes because even if February 28, 2010 is excluded, the last day to file was February 28, 2012. Further, it does not matter whether the reference point is days, months or years. In any event, the last day to file suit is February 28, 2012, not February 29, 2012.

The fact that 2012 is a leap year is immaterial because the statute of limitations expired before February 29, 2012. Even if the statute of limitations had not expired, an intervening leap year would not add a day to the calculation. A year is a year with or without the day added.

The Primacy and Recency Effects: The Secret Weapons of Opening Statements

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THE PRIMACY AND RECENCY EFFECTS are arguably the most misinterpreted psychological constructs in litigation. Most trial attorneys simply understand them as "jurors most remember the first and last things you say to them." However, it is not that simple. By definition, true primacy and recency effects only occur when memory accuracy varies as a function of an *item's position within a list of words in a controlled research setting.* Hence, it is impossible to replicate these memory effects in the courtroom because the information presented to jurors is incredibly different than a word list in a laboratory. Information from the real world, in natural settings, is perceived by the brain and encoded into memory very differently than it is in a laboratory setting.

However, that is not to say that variations of the primacy and recency effects are non-existent in the courtroom. In fact, more sophisticated versions of the primacy and recency effects exist at trial, mainly during opening statement presentation. These effects go far beyond basic memory enhancement, and actually have a significant impact on juror information processing and decision-making. Specifically, the primacy effect plays a very powerful role early in an opening statement presentation, whereas the recency effect plays an important role at the conclusion of the opening statement. It is important for trial attorneys to understand what primacy and recency effects really are and how they can be used as potent weapons in their opening statement.

The Primacy Effect

At trial, jurors perceive information presented early in an opening statement as *more valuable and meaningful* than information presented in the middle or at the end. This not only enhances jurors' memory encoding related to that information, but it also (positively or negatively) affects processing of subsequent information presented to jurors during the opening. Therefore, rather than a true primacy effect (i.e., basic memory enhancement), it is better labeled a "primacy-saliency" effect. For example, people form a more positive impression of someone described as, "intelligent, industrious, impulsive, critical, and stubborn," than when they are given the same characteristics in reverse order because the first two adjectives are automatically valued more by the brain than the middle and later ones. The main distinction between a strict primacy effect vs. a primacy-saliency effect is value vs. recall. If a juror recalls information due to a primacy effect, but doesn't value it, there is little benefit to the trial team. Bottom line: value leads to better recall, but recall doesn't necessarily lead to better value. This is why careful, strategic ordering of information in opening statement is so critical to jury persuasion.

During the "opening" of an opening statement (i.e., the first three minutes), jurors form a working hypothesis that affects how they interpret the rest of the information presented to them. Therefore, attorneys can inadvertently stack the deck against themselves by beginning their opening statement with the wrong information, which will essentially

taint the jury's perceptions from that point forward. Information presented early in an opening statement acts as a cognitive "lens" of sorts that all subsequent information flows through. This cognitive lens can drastically impact how jurors perceive information as the presentation progresses, so one must choose this lens very carefully in order to persuade jurors during opening statement.

For optimal persuasion, a trial attorney needs to begin his opening statement by installing the most effective cognitive "lens," meaning:

- Skip the introduction and ice-breaking small talk with the jury
- Use a passionate, not vengeful, tone
- Reset the playing field immediately by fighting fire with fire
- Start with three to four key "daggers" that attack rather than defend
- Illuminate the apex of the defense story first, rather than working up to it

It is essential to hammer home key themes (i.e., "daggers") related to plaintiff culpability and/or alternative causation immediately, as this is the time when the jurors' brains are most malleable. The defense story should only proceed after the "lens" has been placed, which should significantly influence jurors' perceptions and working hypotheses of the case. This powerful starting strategy was adopted from the cinema big screen and is referred to as the "flash forward" start. Many movies don't begin at the "start" of the story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue within the audience. World-renowned director Martin Scorcese has used this technique on many occasions to create Oscar Award-winning movies, such as *GOODFELLAS* (1990), *CASINO* (1998), and *GANGS OF NEW YORK* (2002). These movies don't start with "once upon a time..." Instead, they start with a brutal murder of a rival gangster, a murder attempt by car explosion, and a violent territorial war on the original streets of lower Manhattan in 1846. The result: the audience is primed and on the edge of their seats, as the director has installed a "lens" that the audience will view the rest of the movie through. The same must happen in the courtroom, as jurors should be oozing curiosity and intrigue during the defense opening statement. The best way to accomplish this effect is to flash-forward to culpability and/or alternative causation immediately, and THEN start the defense story afterwards.

However, many defense attorneys are inclined to start their opening statement by introducing themselves, the legal team, and their client, followed by reminding jurors how important their civic duty is to the judicial system and how much they appreciate the jurors' time. Then, many succumb to the temptation to a) tell the defense story in chronological order or, even worse, b) come out of the gate defending against each of the plaintiff's allegations. Both methodologies are weak and ineffective, and they certainly won't create any intrigue or curiosity. Instead, it represents a monumental missed opportunity as jurors will value that first three minutes of information more than any other part of the opening. Remember, jurors don't care about the identities of the attorneys or defendant. They only care about one thing: assigning blame. Therefore, immediately giving

jurors something else to blame (besides your client) is imperative to derailing the plaintiff's case.

Consider the following "opening" of an opening statement in an employment case:

Ladies and gentleman of the jury, my name is Mr. Smith from Smith and Associates Law, a firm located right here in Small Town, USA. It is my pleasure to represent ABC Company in this law suit. ABC Company has been operating here in Small Town for the last 95 years, and it is an ethical company with high standards and values. Speaking of values, my father taught me many values growing up, and one of them was to be patient before making important decisions. He always told me to take my time, and weigh all the factors before making key life choices, as quick, hasty decisions would lead to misjudgments and carelessness. In this case, I ask you to do the same: be patient. Let all the evidence come out, and listen to both sides of this story. In fact, the judge will tell you the same thing before you enter the deliberation room. It is important for you to know that ABC Company is a company that believes in diversity. We are a company that believes in fairness. We employ people from many different ethnic and cultural backgrounds, and all different age groups. The claim that our management repeatedly punished and eventually fired Mr. Jones because of his race is absurd and just plain not true. The claim that we singled him out is untrue. We intend to show you the many reasons why Mr. Jones had to be punished and then fired, and we believe you will understand that ABC Company did the right thing in this case.

The key weaponry in this opening comes at the middle and the end, which is far too late to have an optimal impact on jurors' decision making. The top strategic mistake in any opening statement is to immediately go on the defensive and address the plaintiff's allegations. After plaintiff's counsel has bludgeoned the defendant in his opening statement, there is a great temptation to stand up, address and deny each allegation one-by-one. This strategy is also known as the *"hey, we didn't do anything wrong and we are a good company"* approach. Addressing each claim immediately is a potentially deadly mistake because it highlights and can even validate the plaintiff's claims. By merely reacting to the plaintiff's story, the defense plays right into the plaintiff's hands. It is foolish to play "follow the leader" with the plaintiff, when the defense has a wonderful opportunity to come out of their corner swinging, rather than dancing and dodging. Remember, plaintiff's counsel wants to put all of the (negative) attention on the defendant and its actions. By systematically denying each claim and stating how the defendant is a good company, the defense can inadvertently reinforce the plaintiff's claims and place the spotlight of blame on itself, rather than the plaintiff. This effect is called the "Availability Bias," meaning jurors tend to blame the party that is most "available" (i.e., in the spotlight).

Therefore, manipulating the "Availability Bias" is essential to a persuasive opening statement for the defense. The way to win in the deliberation room is to arm jurors with weapons, which can only be done by the defense attacking early. Rather than reacting and responding to the plaintiff's story, the defense needs to arm jurors with the "real" story and immediately put the plaintiff or alternative

causation on trial. This strategy accomplishes three critical jury-level goals: a) it arouses jurors' attention, b) it halts the plaintiff's momentum, and c) it makes the trial about the plaintiff or an alternative cause, not the defendant.

Now, consider this "opening" of an opening for the same case:

On June 1, 2010, Mr. Jones' failed to perform his work responsibilities in a safe manner, resulting in a pipe leak that damaged $15,000 of product, and even worse, put his coworkers in danger. Mr. Jones let down the company, his team, and most importantly, himself. This case is not about race, period. This case is about responsibility. About team work. About safety. About accountability. About fairness. Mr. Jones did not take his work responsibilities seriously. You will hear that he was disciplined three times for sleeping on the job, while his co-workers picked up his slack. You will hear that he was disciplined twice for not following safety protocols and procedures, putting himself and his co-workers in unnecessary danger. After several of these instances, did ABC Company fire Mr. Jones? No. We kept him. We provided him with more training. We gave him more supervision. We were fair. We wanted him to grow and develop, but Mr. Jones simply refused. He chose not to grow. He chose not to develop. Instead he continued to sleep on the job and continued to cut corners with safety procedures. These, and only these, are the reasons why Mr. Jones was fired. His race is irrelevant. Today, Mr. Jones is here playing the blame game: blaming everyone else but himself. He refuses to take responsibility for his actions and inactions that resulted in dangerous work environments and substantial loss of product.

This strategy accomplishes several things:

- It immediately illuminates the apex of the defense story (i.e., flash forward)
- It quickly highlights plaintiff culpability issues
- It is proactive, not reactive
- It creates intrigue and curiosity
- It establishes a pro-defense lens for jurors to see the rest of the story through

Does the primacy-saliency effect exist anywhere else during a trial? Yes, the effect is also present during witness testimony, particularly direct examination of key witnesses. Similar to an opening statement, the initial testimony from the witness will be more valuable to jurors than testimony towards the end of the examination. This is why attorneys should not necessarily start their direct examination by covering the witness's education and work history, as that information would be better placed in the middle or end of the testimony. Rather, the most effective way to question a witness during direct examination is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. For example, in a medical malpractice case, defense attorneys usually ask the following question at the end of the direct examination: "Doctor, did you in any way deviate from the standard of care when you were treating Mr. Smith?" Of course, the physician delivers a firm, confident "no" to the jury. However, this is not the best strategic approach, as this question is THE pivotal question in the case. This question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain

why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. Jurors don't care where the physician went to medical school or where he did his residency. Jurors don't care if the physician is board certified and has privileges at four city hospitals. Jurors first and foremost concern is about the defendant's conduct and decision making, and asking those key questions immediately in direct examination takes full advantage of the primacy-saliency effect. Because direct testimony comes well after opening statements, the Availability Bias is not a concern, as jurors have already processed each side's story and are seeing the rest of the case through a cognitive lens.

Should an attorney use the same structure for closing argument? The primacy-saliency effect doesn't surface during closings, as a closing argument is a regurgitation of previously presented information that the jurors' brains have already processed. Decades of jury decision-making research has illustrated that the vast majority of jurors have made their decision on liability prior to closing argument. Additionally, this same research shows a high correlation between which party jurors favor after opening statements and who they favor entering deliberations. Therefore, attorneys should take a "less is more" approach to closing argument, making sure to highlight the key defense evidence clearly and succinctly.

The Recency Effect

The recency effect is far less powerful, as it is a simple enhancement of short-term memory due to the recent exposure to the information. In other words, it is easy to remember information that is presented an hour ago compared to information from a week ago. While recent (i.e., later) information from an opening statement will be remembered well, it will not be as persuasive as information presented early due to the primacy-saliency effect. Therefore, defense attorneys should avoid placing new information towards the end of their opening, as it will be inherently perceived as less valuable by jurors. This is a critical issue, as some of the most important defense information is often located later in the timeline of events. That is precisely why the defense story should not be presented chronologically, as the second half of the story will never be valued as much as the first half. To optimally persuade a jury, one must understand how the juror brain works and in turn order the information in the most strategic way to ensure value.

How can trial attorneys use the recency effect to their advantage in opening statement? Use the "closing" of the opening (i.e., the last three minutes) to repeat and reemphasize the "opening" of the opening, focusing on those key points that highlight plaintiff culpability and/or alternative causation, as well as the apex of the defense story. Strategically using the beginning and end of the opening to focus on these key points will enhance persuasion and increase the odds of a defense verdict. For

example, a more effective "closing" to the opening statement from the employment case is:

Ladies and gentlemen, Mr. Jones was fired because he repeatedly put himself and his coworkers in danger. He was fired because his behavior resulted in valuable product being damaged. He was fired for repeatedly sleeping on the job. He was fired because he refused to take responsibility for his actions. Was Mr. Jones' race part of ABC company's decision to fire him: absolutely not, 100% NO.

The Middle of the Opening Statement

So is the middle of the opening statement useless? No, jurors don't necessarily ignore the middle of an opening; they simply don't remember or value it as much as the start of the opening. Jurors don't value the information in the middle as much as information at the beginning due to the primacy-saliency effect described above. They don't remember as much because as the opening statement progresses, their short term memory becomes saturated and their attention/concentration levels gradually decrease with each minute. Even if the judge allows jurors to take notes, the action of writing tends to distract jurors from what is being presented. In other words, they may write down point X, but they may also totally miss point Y because they were writing instead of listening.

While nothing will improve the value of information more than the primacy-saliency effect, there are tools that defense attorneys can use to improve juror memory recall from information presented in the middle of the opening statement. Specifically, variables such as visual cues, emotion, and repetition can all positively impact a juror's ability to remember information regardless of "where" the information is located or presented. For example:

- Visual Cues: Showing a timeline of events via a board or projected onto a screen can improve jurors' recall of that information as the information input stimulus has doubled (visual + auditory vs. only auditory).
- Emotion: Emotions can create vivid memories. For example, when an attorney expresses emotion (e.g., compassion for plaintiff's injuries, passion and zeal for the defense's themes), it improves juror recall of that information as emotional information is encoded into memory more efficiently by the brain vs. logical information.
- Repetition: Repetition is an effective tool in improving juror recall of information. For example, if a defense attorney repeats that the plaintiff was noncompliant to his medication regimen several times during his presentation of the timeline of events, jurors will tend to remember that information better as repetition improves memory encoding.

Conclusion

The science of psychology can assist defense attorneys design opening statements that will have maximal impact on jurors' perceptions of a case. By properly utilizing the primacy-saliency

effect, defense attorneys can force jurors to assess the legitimacy of the plaintiff's case immediately rather than allowing them to critique the defense's conduct right away. Additionally, using the recency effect to repeat the defense's key themes at the end of opening statement ensures jurors will have a keen understanding of the defense's stance. Regardless of the judge's instructions, jurors enter the courtroom expecting to assign blame. The cognitive process of assigning blame starts very early in the trial, and is completed well before closing arguments. By understanding how jurors' brains function and strategically ordering information in opening statement and direct examination, defense attorneys can significantly increase the odds of a defense verdict.

The Iowa Supreme Court: One Justice's Perspective

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ONE JUSTICE'S PERSPECTIVE: DEVELOPMENTS AT THE IOWA SUPREME COURT

By

Brent Appel

I. FUNCTIONS OF THE SUPREME COURT

A. Adjudicative Term

1. Roughly September through June.

2. Oral Arguments on the road

3. Observations on Advocacy Before the Court

a. Briefs

Eight Amendment of Legal Writing dubbed a law school academic: no sentences shall be cruel or unusual".

"There is no such thing as good legal writing, only good legal rewriting", Frank Brandeis Gilbert, *A Letter from Grandchildren of Justice Louis D Brandeis*, 37 Brandeis L J 173 (1989-90).

Pleas hav smbody poof reed or uyr brf will nt lk profn!

Authority in questions of first impression

* Iowa cases
* out of state cases
* federal cases
* secondary authority, Restatements, etc.

Aristotelian mean

* too little authority
* an avalanche of cases

b. Oral Argument (15-15-5)

Have an outline to abandon upon questioning.

Listen to the question for understanding, and answer directly.

Anticipate toughest questions, develop sharp, concise answers to the,

Avoid jury argument.

Don't pander to individual justices.

Use rebuttal for rebuttal, not restatement of what has already been said.

Remember the words of John W. Davis, when you have completed your argument, "Sit down!"

B. Selected Issues Before the Court During the Past Administrative Term

1. Rules Related to Representation of Parents in Juvenile Proceedings

2. "Fast Track" Civil Litigation

3. Revisions of Rules of Evidence

4. EDMS Update

5. Other

II. NEW RULES REGARDING FURTHER REVIEW PETITIONS (*See* Iowa R. App. Pro. 6.1103, effective May 3, 2013.)

A. Role of Iowa Supreme Court

1. All cases considered en banc

2. Seven sets of independent eyes reviewing cases

3. Cases of first impression and public importance

4. Relationship Between Supreme Court and Iowa Court of Appeals

Difference in Function.

Supreme Court reviews 500 plus further review petitions per year

B. Content of New Rules

1. Further review by the supreme court is not a matter of right, but of judicial discretion. An application for further review will not be granted in normal circumstances. The following, although neither controlling nor fully measuring the supreme court's discretion, indicate the character of the reasons the court considers:

1) the court of appeals has entered a decision in conflict with a decision of this court or the court of appeals **on an important matter**

2) the court of appeals has decided a substantial question of constitutional law or an **important question** of law that has not been, but should be, settled by the supreme court

3) the court of appeals has decided a case where there is an **important question** of changing legal principles

4) the case presents an issue of **broad public importance** that the supreme court should ultimately determine.

See Iowa R. App. Pro. 1103.

2. Questions presented for review

1) The application shall contain questions presented for review on the first page following the cover, with no other information on the page.

* Justice Brennan's commentary re question presented . . .

2) A concise statement as to why further review is warranted . . .

* is the likelihood of a grant inversely related to the length of application?

3) An application is NOT ordinarily mean a cut and paste job from the brief on the merits.

C. Responses to Further Review Petition

1. Same general approach.

III. DEVELOPMENTS REGARDING "FAST TRACK" LITIGATION

A. Concept

B. Details

1. Limitations on amount in controversy

2. Initial disclosures

3. Limitations on discovery

* interrogatories
* admissions
* request for production
* depositions
* experts

4. Trial procedure
   * date certain
   * number of jurors
5. Special evidentiary rules
   * business records
   * health care provider

IV. BUSINESS COURT PILOT PROJECT

A. Concept

B. Status Update

V. EDMS

A. Status Update

Ten Stupid Things Defense Lawyers Do

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STUPID THINGS DEFENSE ATTORNEYS DO:
SUMMARY OF VIEWS OF PLAINTIFFS' ATTORNEYS

PRETRIAL

1. Requesting and objecting to the same discovery.
2. Sending the same discovery in every case.
3. Making boilerplate general objections/objecting to every request.
4. Telling your opponent he/she cannot win a case that likely will be tried.
5. Sending obviously overbroad discovery requests.
6. Insulting or being condescending to plaintiff/plaintiff's counsel.
7. Obsessing over preexisting medical records.
8. Fail to push for appropriate, timely treatment for worker's injuries (workers comp)
9. Sending the plaintiff/claimant to notorious defense experts for treatment, exams, or vocational "assistance" (personal injury/workers comp)
10. Deposing the plaintiff in detail about remote issues (e.g., early life).
11. Adding multiple parties or otherwise complicating a low dollar liability case.
12. Filing comprehensive/marginal summary judgment motions (state court).
13. Filing late summary judgment motions.
14. Refusing to admit liability in written discovery and then complaining about plaintiff's discovery on that issue.
15. Retaining an expert who is not necessary.

SETTLEMENT

16. Agreeing to participate in a mediation knowing that carrier's position has not changed significantly.
17. Failing to consider early reasonable settlement in fee-shifting cases.
18. Delaying settlement of clear liability, low limits, big damages cases.
19. Bringing insureds with no personal exposure but adamant attitudes to mediation.

20. Requesting, at the conclusion of a negotiated settlement, a confidentiality clause or that parties' names be added to the settlement draft.

21. Suggesting to a mediator that he discuss, especially in front of plaintiff, that the plaintiff's attorney reduce his/her fee to get the case settled.

22. Demanding written proof that that subrogation claims are resolved before delivering the settlement draft.

23. Failing to distinguish your judgment from your client's poor judgments.

24. Concealing or delaying disclosure of significant discoverable information - good or bad.

25. Delaying settlement of clear liability, low limits cases with multiple defendants.

26. Refusing to make drafts payable to the plaintiffs' attorney's trust account without good cause.

27. Creating settlement expectations that cannot be met.

28. Waiting to try to settle until the eve of trial.

29. Never discussing settlement/never trying to settle a case.

TRIAL

30. Failing to admit liability when it is clear.

31. Calling an expert when you really don't need one.

32. Calling too many defense experts

33. Calling an expert with many questions but no answers.

34. Calling an economist.

35. Hiring an expert with questions but no answers.

36. Never deposing damages witnesses.

37. Attacking co-defendants.

38. Fixating on minor pre-existing issues in severe injury cases.

GENERAL

39. Underestimating the plaintiff/your opponent.

40. Overestimating your client.
41. Holding a grudge.
42. Never taking a plaintiff's case.

Chronic Pain: Scientific Findings Specifically for Claims

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Chronic Pain:
Fundamental Scientific Considerations, Specifically For Legal Claims

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Previously published versions of this discussion:

- *Barth RJ. Chronic Pain: Fundamental Scientific Considerations, Specifically for Legal Claims. AMA Guides Newsletter, Jan/Feb 2013. American Medical Association.*

  NOTE: The AMA's editorial process involves an unusually extensive review. The unusual thoroughness is exemplified by the AMA's typical recruitment of nine reviewers (in addition to the primary editors). In contrast, other editorial processes (such as the editorial work that I do for the Journal of Bone and Joint Surgery) typically involve only three reviewers. The AMA's extensive review process failed to lead to the identification of any additional scientific findings of relevance to this paper – thereby indicating that this paper summarizes the relevant scientific knowledge base in a relatively comprehensive fashion.

  The AMA version of this project can be purchased by calling the AMA at (800) 621-8335 (the option for purchasing directly off the website is no longer available).

- *Barth RJ. Chronic Pain: How to Make Sense of It Within Orthpaedic Claims. In: Melhorn JM and Carragee E. 14th Annual American*

Academy of Orthopaedic Surgeons Occupational Orthopaedics and Workers Compensation: A Multidisciplinary Perspective. 2012. American Academy of Orthopaedic Surgeons.

- *NOTE – the following planned future publication will be most similar to the version that you are reading now: Barth RJ. Chronic Pain: Fundamental Scientific Considerations, Specifically for Legal Claims. In: Melhorn JM. 15th Annual American Academy of Orthopaedic Surgeons Occupational Orthopaedics and Workers Compensation: A Multidisciplinary Perspective. 2013. American Academy of Orthopaedic Surgeons*

I. Introduction

I. A. Chronic pain is a normal, non-injury-related part of life

Chronic pain is normal. The normal nature of chronic pain was demonstrated by a Gallop poll in 2011 (Brown). Findings from that poll included:

- 31% of U.S. adults have chronic neck or back pain
- 26% have chronic knee or leg pain
- 18% have some other chronic pain
- 47% of the adults had at least one of these chronic pain problems.

The normal nature of chronic pain is often overlooked within legal claims, and the pain is instead misinterpreted as an indication that an injury has occurred (with the corresponding misinterpretation that an injury is the cause of the pain's persistent nature).

I. B. The tendency for legal claims to misrepresent pain as a purely injury-related or general medical issue is inconsistent with the psychological nature of pain.

Apparently because of the misdirected emphasis on injury within legal claims, general medical clinicians (meaning clinicians who do not specialize in psychological issues) are regularly asked to evaluate chronic pain complaints within such claims. Referral to a general medical clinician for such a presentation is often a compounding of the misdirection, in that the definition of pain (Merskey & Bogduk) actually notes that:

- Pain is "always a psychological state"
- Pain is "always" "an emotional experience"
- "Activity induced in the nociceptor and nociceptive pathways by a noxious stimulus is not pain…"

- "Many people report pain in the absence of tissue damage or any likely pathophysiological cause; usually this happens for psychological reasons. There is usually no way to distinguish their experience from that due to tissue damage if we take the subjective report."

Similarly, each of the two most recent editions of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (Rondinelli; Cocchiarella and Andersson) have specified that pain is definitionally an "emotional experience".

The American Medical Association has also published additional definitional considerations (Evans), which have been specifically built on the IASP definition that was discussed above:

- Those AMA materials (Evans) specify that "pain is a perception and not a sensation":
    - Sensation is defined as "the process or experience of perceiving through the senses" (VandenBos)
    - Perception is defined as "the process or result of becoming aware of objects, relationships, and events by means of the senses, which includes such activities as recognizing, observing, and discriminating. These activities enable organisms to organize and interpret the stimuli received into meaningful knowledge." (VandenBos)
    - Consequently, this distinction that is made in the AMA materials (Evans) regarding the nature of pain emphasizes that pain is not an automatic sensory phenomenon, but is instead a process of the individual recognizing, observing, discriminating, organizing, and interpreting the sensation, and is also the result of all of that psychological activity. In other words, pain is inherently psychological.
- These AMA materials (Evans) summarize the significance of the above distinction in the following fashion: "In all cases, the reality that pain is a perception indicates the potential for profound influence of psychological and emotional factors…"
- These AMA materials (Evans) additionally emphasize a hierarchical model which also highlights the primarily psychological nature of pain. The primarily psychological nature of pain is indicated by the strictly psychological nature of two of the three components of that hierarchy ["a motivational–affective component (*e.g.*, depression, anxiety), and a

cognitive-evaluative component (*e.g.*, thoughts concerning the cause and significance of the pain)"]. The third component involves sensation, but indicates that the sensation aspects of pain are inextricably linked to the psychological/perceptual aspects ["a sensory-discriminative component (*e.g.*, location, intensity, quality)"].

- These AMA materials (Evans) additionally specify that there is not an inherent relationship between pain and general medical phenomena. Relevant passages include:

    - "There is an important implication of both the IASP definition and the hierarchical model of pain: As a perception, pain may or may not correlate with an identifiable source of injury."

    - "…pain can develop and be unrelated to any identifiable physical process…"

Consistent with these definitional considerations, scientific findings have indicated that psychological and social factors are the driving forces behind most chronic benign pain presentations (especially when the presentation occurs within a legal claim context). The relevant scientific knowledge base has been discussed in a variety of publications from the American Medical Association. For example, the *Fifth Edition* of the AMA's *Guides to the Evaluation of Permanent Impairment* (Cocchiarella and Andersson) provided a summary of relevant scientific knowledge base which emphasizes that "a variety of nonbiological factors strongly influence" presentations of pain. The "nonbiological" factors that are specified in the associated text include:

- "beliefs, expectations, rewards, attention, and training"

- "social and environmental factors"

- "spouse solicitousness"

- "job dissatisfaction, lack of support at work, stress and perceived inadequacy of income"

- "financial compensation, receipt of work-related sickness benefits, and compensation-related litigation"

- "poor education, language problems, and low income"

- "tendencies to be preoccupied with one's body and symptoms"

- "depression and daily hassles at work"

Discussions of psychological and social factors that have been scientifically indicated as being the dominant driving forces behind legal claims involving a focus on pain are also provided in other publications from the American Medical Association's Guides Library (examples include: Barth November/December, 2006; Barth September/October 2007; Barth May/June 2009; Barth November/December 2009; Barth March/April, 2011; Barth 2013; Melhorn and Ackerman; Melhorn, Talmage, Ackerman, & Hyman).

A more detailed discussion of such scientific findings is provided throughout the remainder of this chapter.

The significance of this scientific knowledge base is highlighted by its relevance for at least three of the AMA Guides:

- *Guides to Evaluation of Disease and Injury Causation* (Melhorn and Ackerman; Melhorn, Talmage, Ackerman, & Hyman): For example, these findings are directly relevant to the fourth step of the causation analysis protocol, which calls for "determining if other risk factors provide a better explanation for the clinical presentation, than that which is provided by the claimed cause" (Barth 2012).

- *AMA Guides to Work Ability and Return to Work* (Talmage 2011): These findings provide direction for determining which scientifically established risk factors for chronic pain are of relevance to the individual case, so that an individualized rehabilitation/treatment plan can be formulated.

- *Guides to the Evaluation of Permanent Impairment* (Rondinelli et al.): These findings provide direction for determining the factors that are driving the claims of impairment, and for apportionment of impairment ratings.

II. The Dominant Role of Financial Compensation

A wide variety of scientific findings have strongly indicated that eligibility for compensation is the dominant factor for chronic pain claims.

II. A. Prospective Research

Prospective research designs provide the most credible and reliable scientific information (Melhorn & Ackerman). Because of the unique value of prospective research, this article begins the review of scientific findings by focusing on Carragee's one-of-a-kind prospective project. The results of that low back pain (LBP) project were first presented at the 2005 Annual Meeting of the North American Spine Society (NASS), and then published in 2006, with discussions in both Spine and The Spine Journal.

The researchers actually recruited 200 participants who denied any history of significant problems with low back pain. For each participant, the researchers:

- Gathered detailed general medical data at baseline (e.g. spine imaging, detailed physical examination with an intense focus on the back)

- Gathered minimal, but significant, psychological data at baseline. This was limited to the Modified Somatic Perception Questionnaire (which addresses somatoform phenomena) and the Zung Depression Inventory. Although this is a minimal set of data, it is significant because scientific findings have indicated that these questionnaires have predictive power for the development of low back pain, and yet they are insensitive to the effects of low back pain (Mannion). Consequently, there is no "chicken or the egg" issue with these questionnaires. The relationship between abnormalities on these questionnaires and the development of pain is largely unidirectional: abnormal responding on these questionnaires is predictive of the development of pain, but the development of pain does not significantly change the response pattern on these questionnaires.

- The researchers then followed each participant for five years. Over the course of the project, the status of each participant was checked every six months.

- The experience of physical trauma was monitored over the course of the project. The project's definition of physical trauma included lifting (as well as falls, road traffic accidents, sports/exercise injuries, and an "other" category). These phenomena were considered traumatic if they were associated with the definitions of "serious low back pain", "minor trauma", or "major injury" provided below.

In order to fully comprehend the findings that are reported below, the following definitions must be understood. The researchers defined "serious low back pain" as "pain intensity defined by a numerical rating scale $\geq$ 6/10 for at least one week". The researchers defined "minor trauma" as "any perceived injury to the low back area with a back pain intensity >2/10 for at least 48 hours but not meeting the major injury definition". The "major injury" definition was "low back pain episodes associated with high energy trauma resulting in serious visceral injury, proximal long bone, or pelvic or spinal fracture or dislocation".

Extensive details of the findings from this project were published in *Spine* and *The Spine Journal* in 2006 (see the Carragee references in the reference list). However, for the purpose of this discussion, the primary author's simplest summary statement regarding the findings was part of a presentation at the Annual Meeting of the North American Spine Society (as documented in *The Back Letter*, Volume 20, No. 11, November 2005). In that presentation, Dr. Carragee explained: "Minor trauma was only associated with serious low back pain in a compensation setting."

In other words, eligibility for compensation was actually a necessary factor for the development of serious low back pain following minor trauma in this research sample. None of the participants who were not eligible for compensation developed serious low back pain following minor trauma.

Consistent with the finding that serious low back pain following minor trauma was limited to participants who were eligible for compensation, the findings revealed a lack of overall association between minor trauma and adverse low back pain events. This was the case in terms of a lack of difference in serious low back pain events between people who reported experiencing any number of minor traumatic events, versus people who reported that they had not experienced any trauma. In contradiction of "cumulative trauma" claims, the findings also included a lack of significant increase in serious low back pain reports for people who reported experiencing more than four minor traumatic events, compared to those who reported experiencing none.

The researchers further reported that, "serious low back pain episodes were most frequently seen arising spontaneously or with usual daily activities rather than involving trauma of any sort".

For motor vehicle accidents, the risk of serious low back pain was significantly greater when the subject perceived others to be at fault for the incident (19%), compared to when the participant perceived the accident to be their own fault, or no one's fault (2.1%, and none of these instances of serious low back pain were associated with disability). When the participant did perceive the accident to be his/her own fault or no one's fault, the episodes of serious low back pain were limited to relatively high-speed accidents (30 and 35 mph). In contrast, for the participants who reported serious low back pain following a motor vehicle accident that they perceived to be caused by someone else, only one was reported as occurring at a speed over 30 mph, the majority were reported as occurring between 20 and 30 mph, several were reported for speeds of less than 20 mph, and two were reported for speeds less than 10 mph. In the report of results that was published in *Spine*, the researchers noted:

- "serious low back pain events were more likely at low speed when others were perceived as responsible for the accident ($P = 0.001$)".

- "It is interesting that traumatic episodes associated with the least relative forces described were highly correlated with compensation claims or the perception of others being at fault for an accident."

In terms of anatomical findings, the researchers' summary statements included:

- "Subjects with advanced structural findings were not more likely to become symptomatic with minor trauma events than with spontaneously evolving low back pain episodes."

- "Follow-up magnetic resonance imaging evaluating new serious low back pain illness rarely revealed new clinically significant findings." Only 3% of the cases of new back pain produced new imaging findings that were clinically relevant.

For the subjects who developed disability lasting more than one month during the course of the study, only 14% had new findings on spine MRI (one subject had new spondylolisthesis, progression of end plate changes and advanced stenosis; one had

extruded disc herniation with root compression; and one had an advance of degenerative disc disease from grade 1 to grade 3-4). The researchers pointed out that the most important of these findings (new disk extrusion, new spondylolisthesis, and progression to severe stenosis) occurred in the absence of any trauma.

In the discussion of results that was published in *Spine*, the researchers explained that, even though subjects with compensation claims were more likely to have a new MRI performed after minor trauma, they were actually less likely to have new or progressive findings on the new MRI. In the discussion of results that was published in *The Spine Journal*, the researchers further explained that: "No patient with a compensation claim had a clear new finding of significant pathology." The researchers further expressed concern in regard to the finding that factors which indicate a lack of need for spine imaging (the filing of a medical-legal claim, pre-pain abnormal responding to psychological questionnaires, pre-existing chronic pain, a history of smoking) were all actually predictive of a higher likelihood of spine imaging being conducted (researchers reference previous scientific findings which indicate that such unjustified use of imaging is predictive of a lesser sense of well-being for the patients).

In regard to specific types of anatomical findings, the researchers reported:

- "Serious low back pain events were not significantly more common in subjects with disc degeneration or annular fissures, whether the subjects had a minor trauma or not".

- 21% of subjects with no disc degeneration had a disability event during the course of the study, compared to 22% with disc degeneration.

- "There was no increased disability in subjects with end plate changes compared to those without."

- Moderate to severe end plate changes were not significantly associated with back pain.

- Moderate to severe spinal canal stenosis was not significantly associated with low back pain.

- Severe loss of disc height was not significantly associated with back pain.

In the discussion of results that was published in *The Spine Journal*, the researchers additionally emphasized the common nature of several spine findings for individuals who are free from pain. They noted that such spine findings are often mistakenly interpreted as an explanation for pain complaints, and even as evidence of injury. They warned that the common nature of these findings among people who do not have any pain causes the premise that there is an association between these findings and pain, other symptoms, or injury to become "untenable". They offered the following examples of spine imaging findings which are common for people who are free from pain:

- disc protrusion or extrusion (50% of their sample of pain-free individuals)
- annular fissures (nearly 30% of their sample of pain-free individuals)
- potential root irritation (22% of their sample of pain-free individuals)

In the discussion of results that was published in *Spine*, the researchers provided a review of previous literature which similarly documented the lack of relationship between spine imaging and back pain. In the discussion of results that was published in *The Spine Journal*, the researchers provided a more extensive literature review, and commented that all of the following have been hypothesized as causes of low back pain, but those hypotheses have been thwarted by scientific findings that all of these issues can be found in subjects with no back pain or only minor problems:

- acute annular tear extending into the enervated outer annulus
- an existing annular fissure may become inflamed and appear as a bright annular signal on MRI
- minor end plate failures causing rapid structural failure of the disc
- disc herniation and distention of the annulus or compression of neural elements

Also in the discussion of results that was published in *The Spine Journal*, the researchers reported that the most common imaging finding (progressive loss of disc signal intensity) has been shown (in the findings from previous scientific investigations) to be primarily an aging phenomenon that is not well correlated with symptoms. Similarly, they reported that their second most common finding (progressive facet arthrosis) is a slowly evolving process that is unlikely to be related to trauma or any other recent event.

In the discussion of results that was published in *The Spine Journal*, the researchers specified that their findings supported both of the following conclusions:

- There is not a causative relationship between structural changes in the spine and serious low back pain.
- There is not a credible basis for an "injury model" for low back pain.

As was reported above, minor trauma was not predictive of the development of serious low back pain. The baseline factors which did predict the development of serious low back pain were (a prediction model utilizing the following four factors correctly predicted 80% of the serious low back pain events):

- previous history of chronic pain complaints for another part of the body
- a history of smoking

- abnormal responding to the psychological questionnaires at baseline

- a previous history of filing medical-legal claims.

Similarly, a prediction model utilizing only abnormal responding on the baseline psychological questionnaires and a previous history of medical-legal claims correctly predicted 93% of the disability events attributed to back pain during the course of the project.

In the report of results that was published in *Spine*, the researchers provided a review of previous projects which had similarly found that pre-existing psychological factors were significant predictors of the development of back pain and work incapacity (while spine imaging did not provide significant predictors in this regard). In the report of results that was published in *The Spine Journal*, the researchers summarized previous scientific findings which indicated that: "Progression of subclinical common backache or acute back pain to serious disabling low back pain illness appears to be associated with various nonstructural issues such as emotional distress, poor coping strategies, compensation disputes, and other chronic pain problems." They also reiterated that previous scientific projects have repeatedly found that psychological and social issues were better predictors of significant low back pain than were general medical findings.

The dominant role of financial factors in these findings is especially noteworthy because of some other features of the research design:

- The researchers recruited participants who were at high risk for the development of significant back pain. Factors that determined this high risk status included previous complaints of chronic pain for other body parts, previous medical-legal claims, and abnormal responding on the somatoform and depression questionnaires that were discussed above.

- The researchers also emphasized the recruitment of participants with spinal degenerative disease, even though such disease is not a risk factor for pain. They recruited such participants specifically for the purpose of addressing the unvalidated premise which they reported has "gained currency in the last century". That premise is that spinal degenerative disease is a significant risk factor for the development of significant back pain.

- Trauma was specifically analyzed for a potential role as a risk factor for the onset of serious back pain.

Because of these design features, this project was especially well-suited for potentially revealing the predictive strength of the non-financial factors (it can be said that the pond was stocked, or the deck was stacked, in favor of validating non-financial issues as risk factors for the development of chronic pain). In spite of these design features, eligibility for compensation still emerged as a necessary condition for the development of chronic

pain in response to minor trauma. None of the other risk factors resulted in the development of chronic pain, unless eligibility for compensation was in place. This finding highlights the dominant role of eligibility for compensation as the primary risk factor for the development of chronic pain claims.

II. B. Meta-Analyses

II. B. 1. Rohling et al. 1995

In 1995, Rohling et al. published a meta-analysis specifically focused on the relationship between financial compensation and chronic pain. They reported that they were able to find 157 relevant published studies, but only 32 contained quantifiable data that was sufficient for purposes of meta-analysis. Those 32 articles led to a sample of 3802 compensated chronic pain patients and 3849 non-compensated chronic pain patients.

Their simplest/broadest finding was: "patients who received compensation also reported greater experience of pain" (effect size equal 0.60, $p < 0.0002$). Details of this broad finding include "receiving financial compensation is associated with a greater experience of pain and reduced treatment efficacy".

Because back pain dominates the general body of scientific research on chronic pain, the next step in their analysis investigated the possibility that the significant effect of compensation on chronic pain presentations is limited to back pain. When back pain projects (effect size 0.62) were considered separately from projects which focused on other types of chronic pain (effect size 0.50), the difference in effect sizes was not statistically significant.

The researchers utilized both liberal and conservative methods of calculation, in order to provide for consideration of "publication bias" (the risk that the effect size is exaggerated by the project's focus on published research, due to non-significant research findings leading to other studies going unpublished). They reported that an overall effect size in the range of 0.50 to 0.60 was obtained regardless of which calculation method was utilized. They additionally explained: "Moreover, it is unlikely that there are a sufficient number of unpublished or unidentified studies in existence to diminish the finding to non-significance."

The researchers conducted several subsequent analyses in order to address the following questions:

"What is the most likely understanding of this association?
Does compensation result in increased pain,
does increased pain result in compensation,
or is a third factor controlling the obtained association?"

Their subsequent analyses produced the following conclusion: "the most likely interpretation of this association is that compensation results in an increase in pain perception and a reduction in the ability to benefit from medical and psychological treatment." The reasons for this conclusion included all of the following considerations:

- For treatment outcome studies, all of the projects which were included in this analysis used a control group of non-compensated chronic pain patients that were either matched to the compensated group on pain and general medical variables, or considered to be sufficiently similar to the compensated group.

- More specifically in regard to injury, one of their subsequent analyses addressed this consideration: "It might be argued that compensated patients were more physically injured, which would justify their need for compensation." In order to address this issue, they conducted a new analysis which only included projects which adjusted for the extent of physical injury, or which matched patients for the extent of physical injury. This analysis included relevant treatment outcome studies (as was discussed above), and also relevant studies which simply contrasted compensated and non-compensated patients with respect to their pain experience. That analysis produced an effect size (0.57) that was almost identical to the original effect size (0.60).

Because being away from work is reliably detrimental for pain complaints, they additionally analyzed the data in a manner that would allow for a determination of whether the association between compensation and pain was an artifact of employment status. That analysis did not eliminate the significance for the effect of compensation, or indicate that employment status had a stronger effect on chronic pain presentations than that which was provided by compensation status.

Additional analyses which failed to justify any modification of the researcher's conclusions included all of the following:

- The effect size did not significantly differ when treatment outcome studies were compared to studies which simply contrasted compensated and non-compensated patients with respect to their pain experience.

- An analysis focused on the duration of the pain complaints did not reduce the significance of the effect size.

- An analysis focused on the quality of the research design for the incorporated projects did not reveal a significant difference in effect size (three levels of study quality were utilized for this analysis).

- A comparison of objective (e.g. number of days missed from work due to the pain) and subjective (e.g. pain severity) measures did not reveal a difference in effect size (although there was a trend for objective measures to be more strongly influenced by compensation than subjective measures).

- The comparison of clinician ratings to patient ratings did not reveal a significant difference in the effect size (although there was a trend toward clinicians' ratings being more strongly impacted by compensation than patients' ratings).

- A comparison of participants who were simply granted benefits without an adversarial process, versus participants had engaged in an adversarial process in an attempt to gain compensation, also failed to significantly impact the effect sizes.

In regard to the significance of their findings, the researchers explained that the effect of compensation can be translated as indicating that the non-compensated chronic pain patients have an experience that averages, across different outcome measures, 24% better than the experience of compensated patients. Depending on which measures are utilized, this could mean pain severity that is 24% less, 24% less lost days of work, a 24% less rate of complete withdrawal from work, a 24% better chance of benefiting from treatment, etc.

The researchers warn that the averaging on which this 24% figure is based can be misleading. For example, referring to a published typology that distinguishes between different chronic pain scenarios, they explained the following:

- The subtype of chronic pain patients who are found to have objective general medical explanations for their pain complaints, and who are competently coping with their pain, may experience no change in their experience of pain as a result of the elimination of financial compensation.

- In contrast, a different subtype involving chronic pain patients who do not have general medical explanations for their pain complaints, and who are coping poorly, would balance the average by experiencing a 48% improvement associated with the elimination of compensation.

II. B. 2. Harris, et al. 2005

In 2005, Harris et al. published a meta-analysis focused on the association between compensation and surgery outcomes. Pain scores were accepted as an outcome measure that would allow a project to be included in Harris's analysis. However, many other outcome measures were also acceptable, and the authors did not separately report the effect of compensation on pain. As an indication of the relative lack of attention that this important issue has received, it can be noted that the only meta-analyses that Harris et al. referenced as relevant predecessors were Rohling's meta-analyses on pain (discussed above) and recovery from brain injury.

For outcome variables as a whole, Harris et al. reported that the summary odds ratio for an unsatisfactory outcome in compensated patients was 3.79. This was based on 129 studies, involving 7244 compensated patients and 13,254 non-compensated patients. All but five of the studies had individually produced results which indicated that compensation leads to worse outcomes (in a larger review of 211 studies which included studies that could not be included in the meta-analysis, 175 reportedly produced results

which indicated that compensation leads to worse outcomes, 30 reported no difference between the groups, and 1 reported a better outcome for compensated patients).

The researchers explained that, for studies which allowed for comparison of compensation to other potential predictors of outcomes, "compensation status was the most significant predictor of outcome" (when compared to all other demographic, diagnostic, and treatment variables).

Most of the surgeries were orthopedic, plastic, or spine. The odds ratios were similar for the five most common surgeries (shoulder acromioplasty, carpal tunnel release, lumbar discectomy, lumbar spine fusion, and lumbar intradiscal injection of chymopapain). Revision surgeries were more strongly affected by compensation than were primary surgeries.

There was not a difference between studies that exclusively focused on workers compensation, versus those that included non-WC personal injury lawsuit participants (no studies were found which looked at non-WC personal injury lawsuit plaintiffs exclusively).

The researchers provided a review of other projects which revealed:

- There is a dose-response relationship between level of compensation and health outcomes (more compensation is associated with worse outcomes).

- Legal systems that discourage compensation for pain produce better health outcomes. This has actually been demonstrated in systems which changed the nature of their legal systems, with better outcomes resulting after the legal system changed in a manner that discouraged compensation for pain (as well as in comparison of stable systems).

II. C. Societal experimentation on a grand scale

In 2000, Cassidy et al. published a report of the results of a large-scale (if unintentional) societal experiment. The experiment was made possible by a radical revision (which took place in 1995) of the compensation system for motor vehicle accidents in Saskatchewan, Canada. As part of that revision, payments for "pain and suffering" were eliminated. The researchers compared whiplash claims from the era when pain could be compensated, to the era when pain would not be compensated.

Findings included all of the following:

- The six month cumulative incidence of claims dropped from 417 per 100,000 persons in the last six months of the pain-compensated era, to 302 in the first six months of the non-compensated era, and 296 in the second six months of the non-compensated era. The researchers noted that this represented a 28% decrease in injury claims, in spite of an increase in accidents associated with the non-compensated time frame.

- The median time from the date of the accident to the closure of a claim decreased from 433 days, to 194 days for the first six months of the non-compensated era, and 203 days for the second six months of the non-compensated era. The researchers reported that this represented a 54% decrease in the length of claims. The researchers conducted analyses which demonstrated that time to case closure was an indication of reported pain severity, and that recovery from complaints of pain was indeed more rapid in the non-compensated era.

The researchers concluded:

- "Our findings confirm that providing compensation for pain and suffering after a whiplash injury increases the frequency of claims for compensation and delays the closure of claims and recovery."

- "We conclude that the type of insurance system has a profound effect on the frequency and duration of whiplash claims and that claimants recover faster if compensation for pain and suffering is not available."

Additional findings from this study included:

- Hiring a lawyer led to worse outcomes, and this factor was as important as any other factor in determining outcome. The researchers reference previous research projects which produced similar results.

- Working with a chiropractor or physical therapist led to worse outcomes (even after controlling for pain severity), and this factor was as important as any other factor in determining outcome.

- Minimizing health care in the acute period after the accident produces better outcomes (consistent with randomized trials referenced by the researchers).

II. D. "Outside the Medical-Legal Context"

Lithuania's judicial and compensation systems provide "minimal possibilities for economic gain" (Mickeviciene et al.). Consequently, Lithuania has provided a natural laboratory for contrasting against the claims of injury-related chronic pain that are prevalent in the USA and other societies which provide ample opportunities for gaining compensation by complaining of pain.

Scientific study of Lithuanian accident and injury survivors has revealed that the following scenarios simply do not exist in circumstances which, as phrased by Obelieniene et al., are "outside the medical-legal context":

- Chronic injury-related neck pain ("whiplash") (Obelieniene et al.; Schrader et al.)
- Chronic injury-related temporomandibular pain (Ferrari et al.)

- Persistent posttraumatic headache (Mickeviciene et al.; Schrader et al.)
- Persistent postconcussion syndrome (Mickeviciene et al.)

II. E. Disability Data from the Official Disability Guidelines

The Official Disability Guidelines (http://www.disabilitydurations.com) allow for a comparison of disability duration datasets of indemnity claimants only, versus all absence data including non-claimants . In almost every instance involving pain, the harmful effect of compensation is evident in the ODG data. Examples of relevant midrange data as of August 13, 2013 include:

- Headache (ICD-9 784.0): 15 days for claimants, versus 1 day for the entire data set
- Cervicalgia (723.1): 20 days, versus 13 days
- Neck sprain (847.0): 25 days, versus 6 days
- Lumbar sprains and strains (847.2): 17 days, versus 10 days
- Sprains and strains of shoulder and upper arm (840): 19 days, versus 10 days
- Ankle sprains (845.0): 22 days, versus 8 days
- Carpal tunnel syndrome (354.0): 42 days, versus 24 days
- Tear of medial cartilage or meniscus of knee (836.0): 37 days, versus 22 days
- Lumbago (724.2): 17 days, versus 10 days
- Myalgia and myositis, unspecified (729.1): 22 days, versus 14 days
- Pain in or around eye (379.91): 14 days, versus 3 days
- Otogenic pain (388.71): 13 days, versus 2 days

II. F. Carpal Tunnel Syndrome

Readers should note that the previous section discussed the tendency for compensation to dramatically extend the length of claims of disability due to carpal tunnel syndrome. This section discusses additional relevant scientific findings.

In 2008, Sperka et al. published the results of a project which studied the impact of workers compensation on outcomes for carpal tunnel syndrome. Claimants had worse outcomes than non-claimants, with an odds ratio of 5.1.

The claimants differed from non-claimants not only in terms of compensation, but also in that the claimants received a higher rate of treatments (e.g. surgery, physical therapy). Consequently, the researchers conducted a follow-up analysis that controlled for treatment history. This actually increased the odds ratio to 9.6.

The researchers summarized their findings in the following terms: the results are suggestive of poorer outcomes among claimants despite greater use of treatment and comparable severity of disease.

II. G. Complex Regional Pain Syndrome (CRPS)

CRPS, and the failed concept of reflex sympathetic dystrophy (RSD) which preceded one type of CRPS, provide especially strong examples of the association between compensation incentives and chronic pain:

- In a large scale epidemiological study, Allen et al. discovered that 71% of cases involved a workers compensation claim or personal injury lawsuit.

- Similarly, Verdugo and Ochoa discovered an 81% rate of workers compensation claims among people who had been given a diagnosis of CRPS.

- In a study of RSD (the failed concept that was replaced by CRPS type 1), Nelson discovered that 67% of the research participants with that diagnosis were receiving workers compensation benefits.

These findings are noteworthy for at least two reasons:

- The concept of CRPS was actually created in a manner that causes it to be inherently non-injury-related (Barth RJ. *The Guides Newsletter*, November/December, 2009). In spite of this definitional lack of injury-relatedness, cases involving this diagnosis are somehow dominated by legal claims of injury-relatedness. This makes the dominant role of litigation/compensation incentives in such presentations especially noteworthy – the effect of litigation/compensation is so powerful that it has actually overwhelmed (within legal systems) a definitional lack of injury-relatedness.

- Less than 10% of all injuries are work-related, and yet scientific findings indicate that the overwhelmingly majority of cases of CRPS involve claims of work-related injury (Talmage et al., 2013). This disparity also highlights the dominant role that compensation incentives play in this diagnosis.

II. H. "Posttraumatic" Headache

In 2009, the American Medical Association published a review of scientific findings of relevance to claims of persistent posttraumatic headache (Barth, May/June 2009). Findings which are reviewed in that publication include:

- Posttraumatic headaches have an excellent prognosis, typically resolving quickly.
- When such complaints persist, the most well-established predictor of such persistence is compensation incentives (aspects of the head trauma are not predictive of persistence).
- When compensation is not available for the headache complaints, there is no dose-response gradient between trauma and headache (neither in terms of severity of trauma or frequency of trauma). This indicates against a causative relationship between trauma and persistent headache.
- When posttraumatic headache was studied "outside the medical-legal context" (see the relevant discussion above), the longest duration for any such complaint was 20 days.
- "The scientific findings … indicate that the phenomenon of permanent (or even persistent) "posttraumatic" headache is best predicted by compensation/litigation incentives, and does not apply to people who are free from those incentives."

II. I. Rotator Cuff studies

Studies of outcomes for rotator cuff surgery patients have repeatedly demonstrated that compensation leads to worse outcomes. This issue has even received coverage in the popular press, in the form of an article published in Time Magazine (Haig), which used rotator cuff tears as an example for the generalized phenomenon of compensation leading to a more severe experience of pain, and worse health outcomes.

Misamore et al. reported the following discrepancies, even though the compensation and non-compensation groups were comparable in terms of age, gender, size of the tear of the rotator cuff, preoperative strength, preoperative pain, and preoperative active range of motion of the shoulder:

- 92% of the non-compensation patients had good/excellent outcomes, compared to only 54% of the compensation patients
- 94% of the non-compensation patients returned to full activity, compared to only 42% of the compensation patients.

Henn et al. controlled for age, sex, comorbidities, smoking, marital status, education, duration of symptoms, work demands, expectations, and tear size. In spite of all of these controls, their results indicated that compensation was predictive of a worse outcome for pain and a variety of other outcome measures.

II. J. Additional findings of relevance to back pain

In a systematic review published by the International Association for the Study of Pain, Sanders reported: "The vast majority of evidence supports the notion that receiving compensation for low back pain or being unemployed is predictive of developing a chronic disability."

In a long-term study focused specifically on sciatica associated with herniated lumbar disc, Atlas et al. (2000, 2006) reported that patients who had been receiving workers' compensation were more likely to be receiving disability benefits (odds ratio 3.5) and were less likely to report relief from symptoms and improvement in quality of life at the time of the four year follow-up, when compared to patients who had not been receiving workers' compensation at baseline. The effect of compensation was significant even after controlling for treatment history and other clinical factors.

In another study focused predominantly on radicular symptoms, this time involving patients who underwent excision of a lumbar disc, Hanley reported that the development of disabling low back pain post-surgery was predicted by coverage under Workmen's Compensation (p less than 0.00001), a history of more than fifteen pack-years of cigarette-smoking (average, one pack a day for fifteen years) (p less than 0.01), and an age of more than forty years (p less than 0.05).

In 2002, Suter published findings from a study that followed 200 chronic back pain patients for two years. His results revealed that litigating patients scored higher on measures of pain and disability than did patients who were not litigating. His conclusions included:

- Involvement in the litigation process is associated with increased pain and disability.

- Litigation is a risk factor for chronicity of pain and disability.

Sutter additionally reported:

- "Litigants scores on all measures (e.g. pain severity, disability associated with pain, etc.) show that the scores of the litigation group decreased after the settlement of litigation".

- On all measures, litigants returned to "much the same level as non-litigants by the final stage (of the research project), namely once litigation was concluded."

Suter's discussion pointed out that various issues that were specific to the non-litigating participants (older age, longer pre-study duration of pain) should have contributed to more severe pain and worse outcomes in that group (compared to the litigating group). However, in spite of the influence of those issues, reported pain severity and disability were greater for the litigant group. This result provides more evidence (over and above the evidence that emerged from the projects discussed above) of the dominant role that litigation/compensation plays in chronic pain claims. The effect of litigation/compensation is so strong that it actually overwhelms risk factors for chronic pain that would normally move the research findings in another direction.

Suter's results also indicated:

- Returning to work/staying at work had beneficial effects on pain.

- Litigation and being away from work are also risk factors for higher levels of claimed depression.

Rainville et al. conducted a prospective controlled long-term study, and found that chronic back pain patients who were being compensated for their pain reported more pain and disability, and less treatment benefit (compared to back pain patients who were not being compensated for their pain). In fact, the long term outcome involved a lack of benefit for the compensated patients in terms of their reports of pain (while the non-compensated patients enrolled in the same rehabilitation program reported a reduction in their pain).

II. K. Additional research findings focused on chronic pain and disability:

Chibnall and Tait discovered, in a sample of over 1000 chronic pain patients, that compensation/litigation claims were associated with more severe claims of disability (relative to chronic pain patients who did not have any legal claims).

II. L. "Non-organic" findings on physical examination

In the Rohling et al. meta-analysis that was discussed above, the researchers conducted an additional analysis as a result of discovering two studies (involving 357 participants) that looked at the relationship between compensation status and "non-organic" physical examination findings (such as non-dermatomal sensory loss). The effect size for compensation from these two studies was 0.50. The researchers explained that these results mean there is "some support" for the premise that compensation is a risk factor for "nonorganic signs".

That meta-analysis did not include consideration of Hayes' study of the relationship between compensation and the Waddell signs. Hayes' project revealed that the Waddell signs were 90% accurate in discriminating between patients who were anticipating compensation, and patients who were not. The researchers explained, "Almost all non-

AFC (not anticipating financial compensation) subjects scored "0" on nonorganics, whereas 83% of AFC (anticipating financial compensation) subjects scored "2 or higher." The project also revealed that a set of 5 Waddell signs was not demonstrated by any of the patients who were not anticipating financial compensation, while compensation-seeking patients demonstrating a set of five Waddell signs were well represented in this research. Consequently, when a claimant/plaintiff demonstrates five Waddell signs, the conclusion should be that the examinee's presentation is not of a health-related nature, but is instead of a uniquely compensation-driven nature.

II. M. Controlling for psychopathology fails to eliminate the detrimental effect of compensation

Given the fact that psychopathology is a risk factor for chronic pain (relevant literature discussed below), and given scientific findings which have revealed that psychopathology is also a risk factor for the filing of a medical-legal claim (e.g., Simon RI; McDonald), there could be concern that the scientifically demonstrated role of compensation is simply an artifact of the effects of psychopathology. At least two scientific projects have addressed this concern.

Talo et al. attempted to control for both psychopathology and general medical pathology. In spite of such efforts, workers compensation claimants failed to experience treatment benefits that were demonstrated strongly by non-claimants (specifically, in response to a multi-disciplinary treatment program).

Rainville et al. similarly compared the effects of compensation on outcome for a chronic pain rehabilitation program (involving aggressive physical conditioning/exercise), and attempted to control for baseline levels of depression, pain, and disability. In spite of such controls, the compensation group reported worse outcomes after treatment, including worse depression, worse disability, and a complete lack of benefit in terms of pain.

III. Personality Disorders

The information that was discussed above indicates that compensation contingencies are the primary risk factor for chronic pain within a legal claim context. Of course, compensation contingencies are not a health issue. Among health issues, personality disorders appear to be the most important risk factor for the development of legal claims involving chronic pain.

Personality disorders are a pervasive form of mental illness (American Psychiatric Association 2000, 2013). By definition, they are pre-existing for the purposes of any adult legal claim (because they are defined as first manifesting in adolescence or, at the latest, early adulthood). Also by definition, they lead to distress or impairment regardless of whether the individual has experienced an injury.

The two most recent editions of the American Psychiatric Association's diagnostic manual (American Psychiatric Association 2000, 2013) formally recognized 10 personality disorders, and expressed open-mindedness to the potential existence of additional personality disorders. The recognized personality disorders are:

- Obsessive-Compulsive Personality Disorder (characterized by perfectionism and preoccupation with orderliness/control)
- Paranoid Personality Disorder (characterized by distrust and suspiciousness)
- Antisocial Personality Disorder (characterized by disregard for and violation of the rights of others)
- Borderline Personality Disorder (characterized by instability in interpersonal relationships, self-image, emotionality, and behavior)
- Histrionic Personality Disorder (characterized by excessive emotionality and attention seeking)
- Avoidant Personality Disorder (characterized by social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation)
- Dependent Personality Disorder (characterized by submissiveness, clinging behavior, and an excessive desire to be taken care of)
- Schizoid Personality Disorder (characterized by detachment from social relationships and restricted emotional range)
- Schizotypal Personality Disorder (characterized by acute discomfort in close relationships, cognitive/perceptual distortions, and eccentric behavior)
- Narcissistic Personality Disorder (characterized by grandiosity, need for admiration, and lack of empathy)

When chronic pain populations have been credibly studied for purposes of determining the extent to which personality disorders are risk factors for the development of chronic pain, the findings have dwarfed all other risk factors, with the exception of compensation contingencies. For example:

- When Dersh et al. evaluated a population of workers compensation claimants who were claiming to be disabled by chronic back pain, they found a 73% rate of personality disorders (compared to reports of 10-13% for the general population; Hales).
- When Monti et al. evaluated a population of people who had been given a diagnosis of complex regional pain syndrome type I, they found a 60% rate of

personality disorders (in the same project, they found a 64% rate among "patients with chronic low back pain from disc pathology").

- For fibromyalgia, Martinez et al. reported a 63.8% rate of personality disorders, and Rose et al. reported a 46.7% rate.

- For temporomandibular pain, Gatchel et al. (1996) reported a 42% rate of personality disorders.

- For 283 consecutive admissions to a chronic pain specialty clinic, Fishbain found a 58% rate of personality disorders.

- A review of research regarding personality disorders among chronic pain patients of all types (published prior to some of the above information) reported rates of 31%-64% (Gatchel et al., 2000).

- Based on a review of relevant scientific findings, First and Tasman reported that approximately 75% of cases which present for medical help with complaints of pain will not lead to any significant or explanatory general medical findings, and at least half of those cases will involve "major personality problems". Of note, their review process was open to all presentations of pain (it was not limited to chronic pain).

Given the prominence of personality disorders as a risk factor for chronic pain, it is noteworthy (and distressing) that scientific findings have indicated that workers compensation claimants are almost never evaluated for the possibility of a personality disorder, even when a mental health specialist provides a direct evaluation (Melhorn & Ackerman; Melhorn, Talmage, Ackerman, and Hyman).

IV. Narcotics

Given the American epidemic of misuse of prescription narcotics for chronic benign pain, the role of narcotics as a risk factor for the development of chronic pain must be emphasized as a primary consideration for relevant legal claims.

A review of relevant considerations was published by the American Medical Association in 2011 (Barth). Aspects of that review that are of most direct relevance to this discussion include:

- The United States is experiencing an increasingly severe epidemic of excessive prescription, overuse, abuse, and death involving prescription narcotics.

- Recent publications have emphasized that this epidemic is of specific relevance to legal claims (such as workers compensation).

- Narcotic medications appear to cause more harm than good for chronic benign pain patients.

- Narcotics reliably cause a worsening of pain, especially for chronic pain presentations.

    - Scientific findings have indicated the narcotics reliably cause an abnormally severe sensitivity to pain, termed hyperalgesia. For example, in what was claimed to be the only prospective study of the effect of narcotic medications on pain sensitivity among chronic low back pain patients, all of the participants demonstrated increased vulnerability to pain after just one month of utilizing prescription narcotics. The participants' pain thresholds reportedly dropped by an average of 16%, and their pain tolerance reportedly dropped by an average of 24%.

    - In subsequent literature, the same researchers warned that the hyperalgesic effects of narcotic medications might be manifested in ways which include some of the common perplexing complaints from chronic pain patients, including unexplained pain reports (which is the essential nature of chronic benign pain), pain complaints which are discrepant from previous complaints, diffuse pain complaints, and allodynia.

    - In a separately published "qualitative systematic review", members of the same research team warned of the obvious risk that the hyperalgesic effects of narcotics will cause a worsening of the specific pain for which the narcotics were originally prescribed as a treatment.

- In a large-scale study involving almost 2000 participants reporting pain, those who were utilizing narcotic medications were more likely to have a current experience of severe pain, were more likely to perceive their health as being poor in general, were more likely to be unemployed, were utilizing the healthcare system more extensively, and reported a worse quality of life in all areas. The researchers noted the remarkable nature of the findings that narcotics do not seem to have even a superficial beneficial effect on any of the key goals of pain treatment – pain reduction, improvement of quality of life, or improvement of function.

- Similarly, other research projects have repeatedly produced results indicating that the prescription of narcotics leads to dramatically higher rates of disability.

- The harmful effects of prescription narcotics do not appear to be permanent. For example, a recent review has emphasized findings which indicate that pain presentations demonstrate improvement subsequent to the discontinuation of narcotics. The benefit that comes from eliminating narcotic prescriptions appears to be very reliable. For example, in one sample, 21 of 23 chronic pain patients reported a significant decrease in pain after they were detoxed from narcotics.

- A claimant/plaintiff who has a prescription for narcotic medication in place cannot credibly be considered to have reached a point of maximum medical improvement (MMI), or to be demonstrating permanent impairment. The medication can actually be creating an artificially severe presentation of pain, and other forms of impairment. The elimination of the medication can lead to an improvement in the pain. Therefore, until the examinee's use of narcotics is eliminated, the permanence (or lack thereof) of the pain, and other forms of impairment, cannot be known.

- Narcotic detoxification should take place prior to an impairment evaluation being conducted, in order for the evaluation results to actually be a reflection of permanent impairment.

The review of scientific findings of relevance to headache that was discussed above (Barth, 2009) also highlighted the detrimental effects of narcotics and other medications prescribed to address pain. Relevant findings include:

- The vast majority of a large sample of chronic refractory headache patients over-utilized the medications that had been prescribed to treat their headaches. The researchers concluded that the majority of persistent headache sufferers were experiencing medication-induced headaches.

- An empirical test was directed at the medication-induced headache hypothesis in a sample of patients who were not over-utilizing (note: the relevant research project was additionally noteworthy because all of the research participants had originally been diagnosed as experiencing chronic posttraumatic headache). They found that discontinuation of even appropriately used medications led to relief from the headaches for the vast majority of the sample.

- Such scientific findings have led to conclusions in published reviews that medication (e.g. narcotics, ergotamine derivatives, NSAIDs, etc.) is the necessary and sufficient cause of chronic daily headache complaints, and that treatment will not be successful unless the patient is detoxified from such medications.

Consistent with the above discussion of the harmful effects of narcotics, previous publications from the American Medical Association and the American Academy of Orthopaedic Surgeons have highlighted scientific findings which reveal that a short trial of narcotic medication is actually capable of producing a CRPS-like presentation (see the Barth and Haralson references).

V. Malingering

There is very little published data regarding empirically established base rates of malingering, specifically for chronic pain presentations. Consequently, the best evidence for this portion of the discussion is the review of scientific findings regarding malingering for all type of claims that was provided by Larrabee. Larrabee's review revealed "base rates of malingering that approach or exceed 50%".

Readers are referred to a recently published review of diagnostic and scientific approaches to the issue of malingering (Patterson).

VI. A focus on one painful part of the body will usually be misdirected

In medical-legal claims focused on chronic pain, it is common for the claim to be focused on a single body part (e.g., chronic headache, chronic back pain, chronic pain for one upper extremity, chronic pain for one lower extremity, chronic neck pain, etc.). Von Baer et al. have speculated that this is an artifact of the narrow focus of various specialties (neurologists tend to limit their focus to headache; gastroenterologists tend to limit their focus to abdominal pain; orthopedists tend to specialize on specific body parts such as the upper extremities, lower extremity, back, neck; etc.). Carnes et al. reported their suspicion that patients tend to prioritize their presenting complaints to accommodate the specialty of the clinician that they happen to be meeting with at any given moment (e.g. limiting their presenting complaints to the hand when meeting with a hand specialist, even if their headaches are more problematic), especially because patients are aware of the tendency for clinicians to spend a very limited amount of time in direct consultation with the patient. Such a focus on anatomically isolated pain complaints is usually going to be misdirected, because chronic pain is seldom limited to one body part for any individual patient.

As was discussed above in section II. A., Carragee's research revealed that a previous history of chronic pain complaints for another part of the body was one of the best predictors for the development of serious low back pain.

Other relevant scientific findings include:

- Carnes et al discovered that 73% of chronic pain patients had pain in multiple sites. Consequently, they emphasized that such multi-site chronic pain was almost three times more common than single-site chronic pain. Only 13% of chronic low back pain sufferers were free from chronic pain in other body parts.

- Von Korff et al. discovered that 68.6% of individuals with chronic "spine" pain were simultaneously experiencing some other form of chronic pain. The comorbid conditions accounted for one third of the disability reported by such individuals.

- Saunders et al. discovered that chronic migraine patients had an elevated rate of

other forms of chronic pain complaints (odds ratio 3.3), as did patients with other types of chronic headache complaints (odds ratio 3.5). Comorbid conditions accounted for 65% of the role disability reported by chronic migraine patients, and all of the role disability reported by patients with other types of chronic headache complaints.

- Raspe et al. discovered that more than 70% of chronic back pain claimants acknowledged simultaneously experiencing chronic extremity pain.

- In a general population sample of over 2000 children and adolescents, Kroner-Herwig et al discovered that a majority (54%) reported recurrent pain associated with at least two anatomical sites. Only 27% reported being free from recurrent pain. The pain reports demonstrated stability when re-assessed after one year.

- Walker et al. (2010) did follow-up research with adults who had experienced functional abdominal pain during childhood. Of the adults who are continuing to experience abdominal pain, 48.1% were also experiencing chronic non-abdominal pain (compared to 13.3% in the control group; $p<0.01$). Even the adults who reportedly had recovered from their childhood abdominal pain reported an elevated rate of chronic non-abdominal pain (24.7%). The researchers provided a literature review of studies which revealed a high comorbidity of functional gastrointestinal disorders with other chronic pain syndromes including fibromyalgia, headache, and back pain.

- Peterlin et al discovered that migraine was a risk factor for the development of complex regional pain syndrome, including being a risk factor for earlier development of CRPS, and the development of more widespread complaints within a presentation of CRPS.

- Kamaleri et al (Pain, 2009) conducted a 14 year prospective population-based study and found that the extent to which any individual reported multiple anatomical sites to be painful at any given moment was a relatively stable phenomenon. Only 13.2% of the participants reported being pain free at the beginning of the project. Only 5.4% of the participants who reported pain at the beginning of the project reported being pain free 14 years later. 599 of the 1644 (36%) participants who were available for the full-length of the project reported that they were experiencing pain in five or more anatomical sites at the beginning of the study; of those, 68.8% were still reporting pain in five or more sites 14 years later. Similarly, of those participants who reported pain in fewer than five sites at the initiation of the project, 75% still reported pain in fewer than five sites 14 years later. Participants who reported no pain at initiation also demonstrated a stable pattern over the 14 year course. 80% of the variance in the number of pain sites reported by an individual at the end of the study was accounted for by the number of pain sites that they reported 14 years earlier. The researchers concluded that a relatively stable pattern of pain experience seems to be established early in life. They concluded that the tendency to experience pain,

including pain in multiple sites, was a reliable individual characteristic (rather than an indication that something external to the individual, such as injury, was causing the pain complaints).

- In a separate publication, Kamaleri et al (European Journal of Pain, 2009) reported that the number of pain sites that an employed individual reported at the beginning of their project was predictive or whether that individual would claim disability 14 years later (participants who reached retirement age by the end of the project were excluded from this analysis). Their analysis revealed a "strong dose-response relationship between number of pain sites (14 years ago) and (current claims of) disability with a 10-fold increase from 0 to 9-10 pain sites".

- This latter Kamaleri analysis was a replication of Andersson's finding that the development of chronic pain was best predicted by the number of pain complaints a participant had endorsed prior to the onset of the chronic pain (odds ratio = 15.8). Andersson's project used a 12 year prospective design.

- Tschudi-Madsen et al. discovered that pains in various musculoskeletal sites were not only associated with one another, but individuals experiencing such pains were also more likely to endorse non-musculoskeletal complaints (e.g. palpitations/extra heartbeats, breathing difficulties, diarrhea, constipation, eczema, tiredness, dizziness, etc.). They concluded that the strong associations between this wide variety of complaints indicated that the complaints could have a common etiology.

- Hestbaek et al. (2006a) discovered that adult-onset chronic back pain was predicted by a history of back pain in adolescence, a history of significant headache complaints during adolescence, and a history of asthma during adolescence. Another discussion of their research (Hestbaek et al. 2006c) demonstrated such a strong relationship between adolescent back pain and a much later onset of adult back pain, that the researchers concluded that the research focused on prevention of adult back pain should focus on the adolescent age frame.

- Verne et al. discovered that irritable bowel syndrome patients commonly demonstrated allodynia/ hyperalgesia for the hands and feet.

- Carragee (Spine, 2006) provides references for other projects which have similarly indicated that it is typical for chronic pain in one body part to develop for people who have a history of chronic pain for other body parts (rates of such comorbidity reported as 60-70%).

In response to such findings, Carnes et al pointed out that it will often be inappropriate to target healthcare or scientific investigation for chronic pain on single anatomical sites. For example, given the finding that only 13% of chronic back pain sufferers were free from chronic pain in other parts of the body, it does not make sense to focus on the spine

or any other part of the back as a pain generator or target of treatment. Patients would instead be more likely to benefit from scientifically validated treatment approaches that are not anatomically specific, such as exercise and cognitive behavioral psychotherapy.

Additionally in response to such findings, Von Baeyer et al. provided a portrayal of functional pain syndromes as not being separate disorders, but as largely comprising various manifestations of an underlying propensity or vulnerability to respond to stressors with the experience and report of pain. They provide a review of scientific findings and theory from diverse sources which point to the possibility that multiple pains cluster together because of an underlying susceptibility of the patient which has been referred to as pain vulnerability or pain sensitivity.

VII. Other forms of mental illness

In addition to the extreme prominence of personality disorders as risk factors for the development of chronic pain, other forms of mental illness have also been established as risk factors. This issue has been discussed extensively in American Medical Association publications (see all of the Barth references provided in the reference list), and are consequently only being addressed in a highly summarized fashion for this chapter.

All of the following categories of mental illness have been scientifically established as significant risk factors for the development of chronic pain:

- personality disorders
- mood disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published (American Psychiatric Association, 2013). That new edition of the manual has done away with the "Mood Disorders" category, in favor of two new categories (at least) – "Depressive Disorders" and " Bipolar and Related Disorders". This will cause significant confusion, because the history of scientific research has been based on a category of mental illness that no longer exists.)
- anxiety disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published (American Psychiatric Association, 2013). That new edition of the manual divides the historical "Anxiety Disorders" category into three new categories (at least) – "Anxiety Disorders", "Obsessive-Compulsive and Related Disorders", and "Trauma- and Stressor-Related Disorders". This will cause significant confusion, because the history of scientific research has been based on a category of mental illness that no longer exists in the form that the research focused upon.)
- substance related disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published

(American Psychiatric Association, 2013). That new edition of the manual renames this category as "Substance-Related and Addictive Disorders". This will cause significant confusion, because the history of scientific research has been based on a category of mental illness that no longer exists in the form that the research focused upon – e.g. the new category includes "disorders" that do not involve substances in any way, such as "Gambling Disorder".)

- psychotic disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published (American Psychiatric Association, 2013). The name for the category in the new edition is "Schizophrenia Spectrum and Other Psychotic Disorders".)

- somatoform disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published (American Psychiatric Association, 2013). That new edition of the manual has done away with the "Somatoform Disorders" category. There is a new category entitled "Somatic Symptom and Related Disorders", but the content of that category is drastically different from the historical "Somatoform Disorders" category. This will cause significant confusion, because the history of scientific research has been based on a category of mental illness that no longer exists.)

- factitious disorders

  (NOTE: While this project was being worked on, a new edition of the American Psychiatric Association's diagnostic manual was published (American Psychiatric Association, 2013). That new edition of the manual has done away with the "Factitious Disorders" category. The construct of factitious disorders is now included in the new category entitled, "Somatic Symptom and Related Disorders". This will cause significant confusion, because the history of scientific research has been based on a category of mental illness that no longer exists, and because the categorical distinction between factitious disorder and somatoform disorders has been lost (consequently, the history of previously relevant science will be irrelevant to the new diagnostic system).

In order to address a common "chicken or the egg" question which involves a premise that the mental illness might be caused by the pain, rather than vice versa, it can be noted that scientific findings have repeatedly indicated that presentations of mental illness are far more likely to manifest prior to complaints of pain, rather than vice versa. For example:

- Arnold et al. discovered that presentations of mood disorders, anxiety disorders, and eating disorders preceded the onset of fibromyalgia presentations in 80% of the co-morbid cases.

- McBeth et al. (2001) discovered, in a prospective study, that pre-existing somatoform tendencies were the necessary and sufficient risk factor for the development of fibromyalgia-like presentations.

- Dersh et al (as was discussed above) found a 73% rate of pre-existing personality disorders among workers compensations claimants who were claiming chronic disabling back pain. The other research findings regarding personality disorder as a risk factor for any type of chronic pain, as were summarized above, are also relevant to this section (given the definitionally pre-existing nature of personality disorders).

- Polatin et al. discovered that, among chronic back pain patients with a positive lifetime history for mental illness, 54% of those with a depressive mental illness, 94% of those with substance abuse, and 95% of those with anxiety disorders acknowledged that manifestations of the mental illness preceded the onset of their pain. The overwhelming probability that an anxiety disorder will have preceded the development of chronic pain, rather than followed it, it especially notable given scientific findings which have indicated that anxiety accounts for 54% of the variance in pain severity report and associated claims of disability (McCraken et al.). While the Polatin results indicated that it is probable that a depressive disorder will precede the onset of chronic pain in any one case, the magnitude of this probability is likely to be substantially larger than the research findings indicated, due to the established strong tendency for depressive mental illness to present with only physical complaints (a tendency that was demonstrated by 95% of the patients who satisfied diagnostic criteria for major depressive disorder in at least one sample), and the tendency for depressed individuals to actually deny any emotional symptoms (Simon GE et al.).

- Mykletun et al. found that pre-existing levels of depression and anxiety were predictive of the reporting of whiplash injury and of associated disability pensions two years later.

The relationship between mental illness and the development of chronic pain is perhaps most easily understood in light of scientific findings which have indicated that mental illness is inherently painful. For example, King discovered that 87% of psychiatric patients endorsed a current experience of physical pain when asked, and 58% reported that their pain was of greater than two years duration. Consequently, it is clear that pain is simply a normal and expected manifestation of mental illness. The inherently painful nature of mental illness has been reflected in formal definitions of mental illness (American Psychiatric Association 2000; Shahrokh), which have repeatedly incorporated pain as a defining issue.

VIII. Chronic pain as a learned phenomenon, which can be un-learned

This section summarizes material from the International Association for the Study of Pain's (IASP) most recent attempt to publish a relatively comprehensive book on the subject of chronic pain (Flor and Turk). That book has some significant limitations, including:

- The emphases of this book take the discussion of psychodynamics to a depth that will not be helpful for most readers.

- The book appears to completely avoid discussion of the dominant role of eligibility for litigation/compensation in legal claims involving chronic pain, and appears to even avoid the topic of legal claims involving chronic pain altogether (e.g. none of the following words are listed in the book's index: litigation, compensation, financial, claim, workers compensation, legal, lawsuit, tort, attorney, lawyer).

Consequently, it appears as if the book has been written from a perspective that is irrelevant to the current article's focus on legal claims involving chronic pain. Therefore, this section presents a highly summarized discussion of the information from that text.

Consistent with the scientific findings discussed above, this IASP book (Flor and Turk) emphasizes:

- "Pain is a multidimensional experience based on psychosocial as well as physiological processes".

- Scientific findings "demonstrate that psychological variables predict disability, doctor visits, and other pain related behaviors of chronic pain patients to a much larger extent than do physiological variables".

However, instead of focusing on the issues that have been highlighted in this paper, the book focuses on the following list of psychodynamic components in the development and maintenance of legitimate chronic benign pain presentations (the following list is an extreme simplification of the extensive discussions that are available in the full text):

- The etiology of chronic pain begins with a predisposition to developing pain. This premise is consistent with the discussions provided above of personality disorders and other forms of mental illness as scientifically established risk factors for the development of chronic pain. This is also consistent with the tendency, discussed above, for chronic pain complaints to manifest in multiple body parts for any one person. The book emphasizes a genetic basis for such predispositions, which is also consistent with the mental illness risk factors, given scientific findings which have indicated that mental illness is primarily a genetic phenomenon (First & Tasman). The book also emphasizes prior learning as a cause of such predispositions – such as parental modeling, during childhood, that

pain is to be paid attention to and responded to in maladaptive ways.

- The next reported step in the development of chronic pain involves some precipitating stimuli for acute pain. The book explains this may or may not actually be an experience that causes pain in most people. It could be some stressor that does not cause pain in most people, but does cause pain for an individual with a relevant predisposition. The book offers the specific example of a disagreement with a family member precipitating pain for an individual who is relevantly predisposed. The book explains further that the precipitating stimuli can be completely internal to the individual (e.g. a thought, an emotion, increased muscle tension, etc.).

- The acute pain can be an unconditioned stimulus which plays a role in a learning experience that leads to the development of chronic pain; or, depending on the person's previous learning experience, such acute pain could already be a conditioned stimuli (e.g. an experience of pain that is already a consequence of conditioning/learning can serve as the beginning of a new round of conditioning/learning).

- The pain has many components (e.g. behavioral, cognitive, physiological). The person who becomes a chronic pain patient develops maladaptive responses in one or more of these components. The book emphasizes that the maladaptive response can involve physiological mechanisms that may not be under voluntary control (such as Pavlov's dogs having no voluntary control of salivation, and yet demonstrating learned/conditioned salivation).

- The maladaptive response is adopted in an attempt to modulate the impact of aversive environmental or internal stimuli. The maladaptive response is reinforced if it successfully modulates such aversive stimuli.

- An especially important role is played by the cognitive components of the pain experience, such as over-interpretation of physical sensations, preoccupation with physical sensations, etc.

- Learning processes contribute significantly to the development and maintenance of the pain.

    - The learning can occur through classical conditioning (e.g. the person learns to experience pain in response to circumstances that were not originally associated with pain). A common example of this phenomenon is a fear of activity and consequent excessive disuse/inactivity (with the disuse/activity consequently contributing to the experience and duration of pain).

    - The learning can occur through operant conditioning: such as the experience of pain, and demonstration of pain-related behaviors, being

reinforced by various forms of reward (e.g. access to narcotics, relief from responsibilities, financial compensation, family supportiveness, etc.).

- The learning can occur through observation (e.g. other people have modeled pain behavior, have been seen being rewarded for their pain behavior, etc.).

- These learning processes contribute to the formation of powerful pain memories "on all levels of the nervous system", which, for chronic pain sufferers, maintain pain in the absence of peripheral nociceptive input.

All of this psychodynamic learning leads to central nervous system "sensitization". The text classifies such "sensitization" as "a behavioral learning factor", and defines it as "an increase in the intensity of a response when an identical stimulus is presented multiple times over an extended period of time". "Sensitization" is a learned phenomenon. As such, it can be un-learned. The treatment discussion from the book is focused on such un-learning (for example, through appropriate utilization of cognitive behavior psychotherapy).

Based on such discussion of the etiology and nature of chronic pain, the book offers direction for general medical evaluation of chronic pain presentations, psychological evaluation, and treatment (the emphasis is on psychological treatment, in accordance with the primarily psychological nature of chronic benign pain).

IX. Smoking

As was discussed above in section II. A., Carragee's research revealed that a history of smoking was one of the best predictors for the development of serious low back pain. Similarly, section II. J. summarized Hanley's finding that smoking was predictive of the development of disabling low back pain following surgery for radicular symptoms (excision of a lumbar disc).

Shiri et al (2010a) discovered, through meta-analysis, that smoking is a risk factor for the development of chronic back pain, and for associated disability. Active smokers were at greatest risk, but former smokers were at higher risk than participants who had never smoked.

Hestbaek et al. (2006b) discovered through a longitudinal study that the relationship between smoking and the onset of low back pain was even significant when the smoking occurred during adolescence, and the onset of back pain occurred during adult years. Their findings satisfied several Bradford Hill criteria for causation analysis, including temporality (smoking preceding the pain).

Viikari-Juntura et al. discovered, through systematic review, that smoking was associated with chronic shoulder pain among workers.

In a review paper, Shi et al. summarized scientific findings which indicated that smoking is a risk factor for chronic pain (e.g. back pain, face pain, fibromyalgia, arm pain, knee pain, etc.), greater intensity of chronic pain, increased number of painful anatomical sites in any one chronic pain patient, more severe claims of functional disability among chronic pain patients, greater depression among chronic pain patients, worse outcomes for chronic pain patients, and longer duration of chronic pain complaints.

In an analysis of over 6000 cases from a community health registry, Mitchell et al. found that smoking was associated with a wide variety of chronic pain presentations, and they also discovered a dose-response gradient for that relationship (daily smokers demonstrated the highest odds ratio, occasional active smokers demonstrated a medium odds ratio, and former smokers demonstrated a lower odds ratio than active smokers – but still elevated compared to individuals who had never smoked).

Hooten et al. found that smoking was predictive of greater consumption of narcotics among chronic pain patients, while increased pain severity was not predictive of greater consumption of narcotics. Potential implications of such findings include: the narcotic consumption is driven by a general vulnerability to substance abuse, which is indicated by the smoking, rather than the narcotic consumption being driven by general medical factors (there is a wealth of additional scientific findings which clarify that narcotic prescriptions and consumption are not driven by general medical factors or by the pain complaints – see Barth March/April, 2011); the pain complaints are a manifestation of the general vulnerability to substance abuse (an association that is strongly supported by scientific findings), in that the complaints provide access to prescription narcotics.

The relationship between smoking and chronic pain has apparently produced an artifact that might lead to a misdirected conclusion that heavy physical labor is a risk factor for chronic pain. Specifically, a relationship between heavy physical labor and chronic pain was discovered in a preliminary analysis, but that relationship disappeared when the effect of smoking was considered (McBeth & Jones, 2007).

X. Obesity

Shiri et al (2010b) discovered, through meta-analysis, that obesity is a risk factor for the development of chronic back pain. They also found a dose-response relationship between body mass index and chronic back pain. They reported that this effect was still significant, even when meta-analysis was limited to studies which attempted to control for confounders.

Obesity has also been scientifically established as a risk factor for the development of chronic shoulder pain (Rechardt et al., 2010) (Viikari-Juntura et al.).

Research findings from Heuch et al. indicated that the relationship between obesity and pain is unidirectional (obesity predicts the development of pain, but pain does not predict the development of obesity).

The relationship between obesity and pain may be an artifact of the relationship between mental illness and obesity. For example, Bruffaerts et al. discovered a relationship between mental illness and obesity, discovered that obesity by itself did not predict lost work days, but mental illness did predict lost work days.

XI. Childhood abuse and neglect

A great deal of research has focused on an association between childhood abuse or neglect and adult-onset chronic pain. Much of that research was summarized in Davis et al.'s 2005 meta-analysis, which demonstrated a reliable association, and a dose response gradient, for childhood abuse or neglect being a risk factor for adult onset chronic pain.

Arnow's 2004 review summarized such findings, including the strong nature of the relationship, and the dose-response gradient, for chronic pain in adult life, and also for mental illness in adult life.

Arnow also commented on the manner in which the effect of childhood abuse/neglect on chronic pain overlaps with the effect on other forms of mental illness. This raises the possibility that the relationship between childhood abuse/neglect and chronic pain is simply an artifact of the role that mental illness plays as a risk factor for chronic pain (e.g. childhood abuse/neglect leads more directly to mental illness, and indirectly, as a consequence of the mental illness, to chronic pain).

Of relevance to this possibility that the relationship between childhood abuse/neglect is reducible to an artifact of the relationship between childhood abuse/neglect and mental illness, some limited research has indicated that childhood neglect/abuse is nine times more likely to lead to adult mental illness which specifically involves a wide variety of pain complaints (and a wide variety of additional physical complaints), rather than mental illness that specifically involves episodes of significant depression (Spitzer et al.). Similarly, fibromyalgia-like presentations are especially strongly associated with severe maltreatment in childhood (Imbierowicz & Egle; Winfield; Walker et al. 1997), and prospective research has indicated that pre-existing somatoform tendencies are the necessary and sufficient risk factors for such presentations (McBeth et al. 2001).

XII. Excessive health care

The scientific findings reviewed above have included indications that better outcomes are obtained for pain complaints when health care is of a relatively minimal nature, and worse outcomes are obtained when relatively extensive healthcare is provided (e.g., see sections II. C. and II. F.).

Such findings are consistent with a larger scientific knowledge base (extending beyond the focus of this chapter), which indicates that excessive health care is a risk factor for disability (Caruso).

XIII. Being away from work as a causative factor for chronic pain

The scientific findings that were reviewed above have included several which revealed that being away from work is a risk factor for the development and continuation of chronic pain (e.g., Rohling, Sanders, Suter).

Such findings are consistent with a larger scientific knowledge base (extending beyond the focus of this chapter), which indicates that being away from work is a risk factor for poor health outcomes and disability (Barth 2003; Waddell & Burton; Talmage 2011; Caruso).

XIV. Recommendations for attempting to make sense out of an individual claim of chronic pain, and for attempting to help

The scientific knowledge base, such as the findings discussed above, indicates general medical (i.e., non-psychological) evaluation will seldom be able to identify an adequate explanation for chronic benign pain. Consistent with this, Frist and Tasman explained (in their textbook review of the subject) that the process of attempting to find a general medical explanation for chronic pain is "exasperating".

It can be said that the recommendations provided below are limited to cases in which general medical investigation fails to provide an explanation for the chronic pain. However, since most cases of chronic benign pain (especially the types of cases that become the focus of legal claims) will not involve explanatory general medical findings, this is not much of a limitation. Consequently, these recommendations will be almost universally applicable.

- The scrutiny of the claim should involve an effort to determine if, by some minimal chance, injury-related findings or other general medical findings actually provide a comprehensive explanation for the chronic pain.
    - Given the low probability relationships between general medical findings and chronic pain, the case should be scrutinized to determine whether any claims that the general medical findings actually provide a comprehensive explanation have been referenced with scientific findings that can be reviewed in order to find independent confirmation of that conclusion.
    - Additionally, any such conclusion should only be accepted if it has arisen through application of the protocol from the AMA's Guides to the Evaluation of Disease and Injury Causation (Barth 2012; Melhorn & Ackerman; Melhorn, Talmage, Ackerman, & Hyman).
- In the typical case where general medical findings do not provide an explanation for the chronic pain, consideration can be given to engaging in a frank discussion that this is not a surprising result, in that the scientific knowledge base indicates psychological and social factors play a more significant role in the development

of chronic pain, while general medical factors are generally not significant. This can help to prevent an iatrogenic search for general medical issues that are unlikely to be found.

- The response to the claim can involve a recommendation that the claimant/plaintiff be provided with education regarding the potential health benefits of extricating himself/herself from the claim/lawsuit as soon as possible.

- The response to the claim can involve a recommendation that the claimant/plaintiff be provided with education regarding the primarily social and psychological nature of chronic pain, and encouraged to seek out credible psychological evaluation. That evaluation should focus on the scientifically established risk factors for chronic pain (as have been discussed above) so a relevant treatment plan can be developed for whatever findings emerge. To ensure a quality evaluation, guidance can be found in the AMA's Guides to the Evaluation of Disease and Injury Causation (mental illness chapter) (Melhorn, Talmage, Ackerman, and Hyman). Because any mental illness is unlikely to be injury-related or work-related, and since involvement in workers' compensation or personal injury claims is reliably detrimental for health outcomes (see the relevant discussion above; see also Caruso), the psychological evaluation and treatment should take place outside of a workers compensation or any other claims context.

- The claimant/plaintiff can also be educated regarding other scientifically established risk factors for chronic pain, such as narcotic medication, smoking, obesity, etc.

- The claimant/plaintiff can be educated about scientifically validated treatments for chronic pain, which have a high probability of success regardless of the risk factors. Examples include the activity paradigm (responding to pain by increasing, instead of withdrawing from, activity), and cognitive-behavior psychotherapy.

- If the claimant/plaintiff is not working, or considering withdrawing from work, consider recommending that the claimant/plaintiff be educated about the health benefits of work, including the benefits for pain (Barth & Roth; Melhorn and Ackerman; Melhorn, Talmage, Ackerman, & Hyman), and advised to vigorously pursue returning to work.

- If the claimant/plaintiff is consuming narcotics or considering beginning narcotics for chronic pain, consider recommending education regarding the reliably detrimental effects of narcotics, and recommending elimination/avoidance of such medications.

- If a case involves a focus on chronic pain in a single body part, consider undertaking a thorough investigation of the claimant's/plaintiff's history, given the improbability of this being their only significant pain complaint. Before a conclusion can be credibly drawn that the current pain is a unique event in this individual's history, records from his/her entire life should be reviewed to

determine whether this case follows the typical pattern of multiple complaints developing over time. A report from the claimant/plaintiff that there is no prior history of pain complaints cannot be credibly relied upon, given the scientific findings that such reports from claimants/plaintiffs are almost always false (Barth September/October 2009).

Readers are additionally referred to Cornerstones of Disability Prevention and Management (Caruso) for a long list of additional relevant recommendations (e.g. avoiding "Aggressive, extensive, or prolonged medical treatment of benign conditions such as non-specific low back pain because it increases the risk of iatrogenic and advocagenic impairment and work disability.")

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Legislative Update

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Legislative Report
Iowa Defense Counsel Association

By IDCA Lobbyists Scott Sundstrom and Brad Epperly of Nyemaster Goode PC

The first session of the 85th Iowa General Assembly ended on May 23, 2013 – 20 days after legislators' per diem expired. The Iowa Defense Counsel Association (IDCA) had a busy session following a number of issues of interest to defense lawyers. The following is a brief discussion of bills of interest to IDCA members. The full text of all bills can be found the General Assembly's website: www.legis.iowa.gov.

I. ENACTED LEGISLATION

A. Judicial Branch Funding

1. General Operations

The IDCA again 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 judicial branch requested a budget increase of approximately $5.1 million for FY 2014 (which begins on July 1, 2013), comprised of the following components:

- Full time Clerk of Court offices in every county – $2.4 million (53 FTEs).
- Juvenile court staff to allow all juvenile offenders to have an in person meeting with a juvenile court officer – $1.7 million (40 FTEs)
- Restore 20 court reporters – $700,000 (20 FTEs)
- Restore law clerks, case schedulers, and court attendants in district court – $280,000 (5 FTEs)

The efforts of the supporters of full funding for the judicial branch were successful this year. The final judicial branch appropriations bill, Senate File 442, appropriates the full requested increase and a total of $167,699,367 for salaries of judicial branch employees. The bill appropriates an additional $3.1 million for witness and jury fees. (The bill appropriates exactly half those amounts for FY 2015, which was the pattern followed in all the various appropriations bills.) The bill also allows, with the consent of all parties, civil trials to take place in a county contiguous to the county where proper jurisdiction lies, even if the contiguous county is in a different judicial district. Senate File 442 has not yet been acted upon by the Governor.

2. Judges' Salaries

In the waning days of the session, Chief Justice Cady called a meeting at the Capitol of IDCA's lobbyists and the lobbyists for the various other lawyer and judges' groups. He stated that the judicial branch was working on a salary bill to increase the salaries of judges and that House and Senate leadership were supportive. He asked that the lobbyists talk to every House Republican to gauge support for such a bill so that he could report the results to House leadership. Within the next 24 hours, every House member had been contacted, and the requisite level of support was demonstrated to House leadership. As a result, Division III of the final version of the standing appropriations bill, Senate File 452, increases judges salaries starting January 3, 2014. The salaries of all justices, judges, and magistrates are increased by 4.5%. The salaries of all non-judge employees of the judicial branch are not increased. The bill appropriates an additional $850,000 to the judicial branch to pay for the judges' salary increases. The judicial branch was very appreciative of the efforts of the IDCA and other groups in lobbying for the judges' salary increase. The Governor has not yet acted on Senate File 452.

3. EDMS

In 2012, the legislature appropriated $4 million from the Rebuild Iowa Infrastructure Fund for continued development of the EDMS electronic filing system, with $1 million in FY 2012 and $3 million in FY 2013. This year, the legislature maintained the $3 million FY 2013 appropriation, but changed the source of funding. House File 638 removed the $3 million from the Rebuild Iowa Infrastructure Fund. House File 648 added the $3 million appropriation back, but funded it from the Iowa's General Fund. The Governor has not yet acted on either House File 638 or House File 648.

B. Farmland Liability

The Iowa Supreme Court's February 2013 decision in Sallee v. Stewart resulted in legislative action. In Sallee, the Court narrowly construed Iowa's recreational use statute, Iowa Code chapter 461C, and caused significant concern among farmers about their liability when they let people onto their land for recreational purposes. House File 649 amends Iowa Code chapter 631C in several respects. Throughout the chapter, the word "owner" (in relation to land) is changed to "holder." The chapter's general statement of purpose is amended to state that the chapter is to be "construed liberally and broadly in favor of private holders of land to accomplish the purposes of this chapter." The definition of "recreational purpose" is broadened to include: engaging in "educational activities" (to specifically address Sallee); accompanying another person engaged in recreational activities; and entry onto, use, and passage over land while engaged in recreational activities. Another provision of the bill states that a landholder does not assume a duty of care merely by guiding, directing, supervising, or participating in a recreational purpose. House File 649 passed both chambers unanimously, but has not yet been acted upon by Governor Branstad.

C. Transmission of Court Records

Senate File 187 concerns the procedures for transmitting court records from the district court to the Supreme Court in an appeal. The bill enacts new Iowa Code section 602.8103A, which specifies that the clerk of the district court shall be solely responsible for transmitting the record on appeal to the clerk of the Supreme Court and requires the clerk of the district court to transmit the record only upon the request of the appellate court or the appellee or appellant

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(or their attorneys). The bill specifies the record on appeal shall consist of the original documents and exhibits filed in district court, transcripts of the proceedings, and a certified copy of the docket and court calendar entries prepared by the clerk of the district court in the case under appeal. Exhibits of unusual size or bulk are not required to be transmitted by the clerk of the district court unless requested by the appellee, appellant, the attorney for the appellee or appellant, or the appellate court. The bill also requires that the clerk of the district court transmit any of the remaining record to the clerk of the Supreme Court within seven days after the final briefs have been filed in the appeal. Senate File 187 was ENACTED.

D. Judicial Fees

Senate File 318 states that the fees collected by the judicial branch for shorthand reporter certification examinations and for the bar examination are to be retained by the judicial branch (rather than deposited in the general fund) and used to offset the costs of the Office of Professional Regulation for administering those examinations. As a result of the bill, the judicial branch will retain a total of approximately $253,000 per year. Senate File 318 was ENACTED.

II. LEGISLATION CONSIDERED, BUT NOT ENACTED

Split control of the House (Republican) and Senate (Democratic), combined with strong opposition from the Iowa State Bar Association and Iowa Association for Justice on a number of bills, resulted in the failure of the vast majority of substantive policy legislation affecting the judicial system. Discussed below are a few bills of note this session that received attention, but were not enacted:

A. Reducing Plaintiffs' Damages for Failing to Wear Seat Belts

The IDCA again had one affirmative legislative proposal this year. House Study Bill 60 would have amended Iowa Code section 321.445 by repealing the arbitrary 5% limit on the amount a plaintiff's damages may be reduced when the plaintiff fails to wear a seatbelt. The bill was approved by the subcommittee to which it was assigned, but did not receive approval by the full House Judiciary Committee and died in the first funnel. Key to the bill's defeat was strong opposition from both the Iowa Association for Justice and the Iowa State Bar Association.

B. Insurance Agent Liability

In response to the Iowa Supreme Court's July 2012 decision in Pitts v. Farm Bureau, House File 398 would have clarified the duties and responsibilities of Iowa insurance agents under Iowa Code chapter 522B. The bill rewrites current Iowa Code section 522B.11(7) and abrogates Pitts. The bill has passed the House and was approved by the Senate Judiciary Committee with a proposed committee amendment that narrowed the scope of the bill significantly. As a result of the Senate Judiciary Committee amendment, insurance agents and some (but not all) insurance companies opposed the bill. Senate Judiciary Chairman Rob Hogg (D-Cedar Rapids) indicated a willingness to compromise, but his efforts at doing so were rebuffed by the Independent Insurance Agents of Iowa. An attempt by the House to put the provisions of House File 398 into the standing appropriations bill, Senate File 452, did not survive the final conference committee negotiations on the bill. As a result, no legislation addressing the Pitts case was enacted this session.

C. Medical Malpractice Reform

In his Condition of the State Address Governor Branstad outlined three major priorities: (1) property tax relief; (2) education reform; and (3) "quality of life" issues. Among the "quality of life" measurers the Governor championed were medical malpractice reforms, including requiring plaintiffs to file a certificate of merit and a cap on non-economic damages. The Governor's proposals, with some substantial modifications, ultimately became House File 618.

House File 618 would have made significant changes to the adjudication of medical malpractice claims. Most significantly, the bill created medical malpractice review panels to evaluate medical malpractice claims. Such panels would have five or six members depending on the type of case: (1) a plaintiffs' personal attorney; (2) a defense personal injury attorney; (3) a health care practitioner who practices in the same specialty or profession as the defendant; (4) a lay person with no connection to any health care provider or insurance company; (5) an attorney appointed by the chief judge of the judicial district; and (6) a person familiar with hospitals or health facilities if a hospital or health facility is a defendant. Parties would have been required to produce all medical records to the review panel, and the chair of the panel could have authorized additional limited discovery. The plaintiff would be required to submit a certificate of merit affidavit to the review panel for each expert witness with information explaining the expert's opinions. The review panel would then conduct a hearing on the claims and defenses in the action with each party presenting evidence and would issue findings about whether the defendant breached the applicable standard of care, whether the breach proximately caused the plaintiff's injuries, and whether any negligence of the plaintiff was equal or greater to the negligence of the defendant. The review panel's findings would be admissible as evidence in any subsequent action between the parties. If the review panel's findings were unanimous in favor of the defendant, then the plaintiff's noneconomic damages would be capped at $250,000 and the defendant would recover all expert witness fees if the defendant prevailed at trial. If the review panel's findings were unanimous in favor of the plaintiff, then the defendant would have to admit liability or enter into settlement negotiations. If the settlement negotiations were not successful and the plaintiff prevailed at trial and recovers more than his or her last formal demand, then the defendant would have to pay all expert witness fees. Finally, the bill allowed for use of evidence-based medical practice guidelines as an affirmative defense.

The Iowa State Bar Association and the Iowa Association for Justice opposed the bill. Health care provider organizations registered in favor of the bill. House File 618 was on the House calendar for many weeks, but was never debated.

The issue did not go away, however. During the debate over Senate File 296, the Medicaid expansion/Governor's Healthy Iowa Plan alternative, the House adopted an amendment that essentially put all of what had been House File 618 into Senate File 296. Senate File 296 then went to a conference committee for several weeks. The bill never emerged from conference committee and was never debated again.

Ultimately, the issue of Medicaid expansion was wrapped into the

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human services appropriations bill, Senate File 446. The final version of Senate File 446 that was passed by the legislature does not contain any substantive medical malpractice reform provisions. Instead, Senate File 446 directs the Legislative Council to appoint an interim study committee composed of members of the Iowa Senate and House to examine "the submission of certificate-of-merit affidavits by plaintiffs and defendants in malpractice actions and limitations on the number of expert witnesses that may be called by both plaintiffs and defendants involving health care providers. The study committee shall present its conclusions and recommendations in a report to the 2014 session of the general assembly." Governor Branstad has not yet acted upon Senate File 446.

D. Statute of Limitations for Building Defect Claims

Iowa currently has a fifteen-year statute of repose for claims alleging building defects, which is among the longest in the nation, but no statute of limitations. House File 572 proposed to create a new three-year statute of limitations for building defect claims, but would have left unchanged the current 15-year statute of repose. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. The bill passed the House but died in the Senate.

E. Insurance Company Subrogation in Criminal Cases

House File 608 would have allowed an insurer to be included in a criminal restitution plan. The theory was to streamline the subrogation process by resolving subrogation issues in criminal restitution proceedings rather than requiring insurers to bring subrogation claims in a separate proceeding. The bill died due to opposition from the Iowa State Bar Association, the Iowa Association for Justice, and the Attorney General's office.

F. "Good Samaritan" Law for Architects

House File 539 would have provided liability protection for architects and professional engineers who provide disaster assistance for no compensation. The bill passed the House, but was not debated on the Senate floor. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association.

G. Sledding Liability

House File 158 would have shielded municipalities from liability for claims arising from sledding if the city operates a sledding park that conforms with applicable national design standards. The bill would have done this by adding sledding to current Iowa Code section 670.4, which currently applies to "a public facility designed for purposes of skateboarding, in-line skating, bicycling, unicycling, scootering, river rafting, canoeing, or kayaking." The bill passed the House but died in the Senate. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association.

H. District Judge Qualifications

House File 357 would have required that a district judge appointee be a resident of the judicial district (or judicial election district, if applicable) where the nomination occurred before assuming office. Current law requires that a nominee for a judgeship be a resident of the district where appointed. The bill passed the House and was amended in the Senate to reinsert the requirement that a nominee be a resident of the judicial district. The House refused to accept the Senate amendment, and the bill was not enacted.

I. Pregnancy Discrimination

Senate File 308 would have amended the Iowa Civil Rights Act by requiring employers to make reasonable accommodations for pregnant employees with pregnancy-related medical conditions. The bill arose out of concerns about two situations concerning the treatment of a pregnant firefighter and a pregnant sheriff's deputy who were taken off duty. The bill was approved by the Senate Local Government Committee, but was never debated in the Senate.

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Tell Your Clients Before They Ask – A Look at Internal Law Firm Metrics

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I. Defining Metrics

A. Identify Key Performance Indicators (KPIs)

B. Capture Data/Benchmarks

C. Analyze Benchmarks

D. Establish Fact-Based Management that Drives Decisions and Action

II. Statistics and Analytics

A. Finance

B. Healthcare

C. Education

D. Business and Industry

E. Professional Sports

F. Legal Services

III. The Role of Metrics in the Legal Industry

A. What Clients are Measuring

1. Total Cost Per Case

a. Fees and Expenses
b. Amount of Indemnity paid
c. Like kind cases
d. Like kind firms
e. Staffing

i. "Effective" rate matters
ii. Lowest competent biller
iii. Substantive expertise
iv. Non Billable Tasks

2. Cycle Time

a. Key component in cost management

i. Case Evaluation
ii. Expenses
iii. Work to appropriate rate/experience
iv. Results Measured in Stages (phasing)
a) Discovery
b) Mediation
c) Trial
d) File Closure

v. Higher Cycle time equals greater cost of claim

3. Guideline Compliance and Budget Compliance

a. Accuracy of litigation budgets
b. Accuracy of compliance with litigation plans
c. Timeliness of reporting/meeting deadlines
d. Accuracy of valuation
e. Quantity of time/expense write downs
f. Satisfaction scoring by claims handlers
g. Audit cuts

B. What Law Firms Should be Measuring

1. By Client

a. Current Active Matters
b. Average/Median Days Open
c. Hours per Matter
d. Litigated v Non-Litigated
e. Total Hours Worked
f. Percentage of hours by Timekeeper Category
g. Guideline and Budget Accuracy
h. Billed Value v. Collected Value
i. Total Indemnity Cost of Portfolio
j. Percentage of Fees to Total Indemnity Cost

2. By Lawyer

a. Active Matters/Lawyer
b. Average/median days open per matter
c. Average/median fees per matter
d. Inactivity
e. Tasks
f. YTD Worked Effective Rate
g. YTD Billed Effective Rate
h. MTD/YTD Billable and non-billable hours worked
i. Hourly WIP (Work in Process)
j. AFA (Alternative Fee Arrangement) WIP

C. Law Firm Value Propositions

IV. Impact of Metrics in The Legal Industry

A. Shift to Centralized Purchasing of Legal Services

1. Less Local/Relationship purchase
2. Commodity
3. Results/Outcome less relevant
4. Decisions Made on Statistical Business Factors
5. Must be able to Measure Performance and Show Results

B. Advantages of Metrics in The Legal Industry

1. Proactive approach to identifying trend
2. Identify problem areas and propose solutions
3. Maintain and grow existing relationships
4. Demonstrate and show client value
5. Gain market share

V. Establishing Metrics for Your Firm

A. What to measure:

1. Fee per Matter
2. Cycle Time
3. Effective Rates
4. Litigated v Settled Matters
5. Guideline Compliance
6. Profit
   a. Client
   b. Matter
   c. Practice Area
   d. Office
   e. Group/Team/Timekeeper

VI. Utilization

A. Internal/External

1. Determine Value of Services (Pricing)
2. Establish Benchmarks
3. Establish Trends
4. Evaluate Performance
5. Identify Inefficiencies
6. Improve Delivery of Services
7. Risk Management

8. Define Marketing Strategy
9. Measure Profitability
10. Strategic Business Decisions

B. External Law Firm Utilization

1. Respond to Client Inquiries
2. Respond to Client Data
3. Supplement Client Data
4. Demonstrate Guideline Compliance
5. Offer creative fee arrangements
6. Differentiate your Firm
7. Show Results

VII. Challenges

A. Identifying Key Performance Indicators
B. Investment in Technology
C. Implementation of Systems and Processes
D. Training and Compliance
E. Data Integrity
F. Strategic Data Analysis
G. Follow Up
H. Industry Input and Participation

VIII. Best Practices

A. Top Level Management Support
B. Systems to Insure Data Integrity
C. Timekeeper Accountability
D. Distribution of Information
E. Standardization and Automation of Processes
F. Commitment to Education and Training
G. Analysis and Strategic Action

IX. Conclusion

A. Industry Consolidation with Key Players using Metrics to Measure Performance and Results
B. Law Departments and Insurance Carriers will do business in the future with Firms that can show compliance and illustrate results
C. Law Firms that can proactively provide data or respond to client inquiries with relevant data will have a competitive advantage over their peers
D. Clients are exploring pricing alternatives and firms without the ability to understand and measure Key Performance Indicators will face significant challenges

Possible Changes in State Court Discovery and Trial Rules

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REPORT OF THE CIVIL JUSTICE ADVISORY COMMITTEE: DISCOVERY REFORMS AND EXPEDITED CIVIL ACTIONS

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Note: This PowerPoint is a slightly revised (for this presentation) version of one prepared by Hon. Edward Mansfield and is used with his permission.

RECAP OF THE COMMITTEE'S WORK

- The committee was formed in the fall of 2012.
- 3 district judges, 5 attorneys in private practice, 1 government attorney, 1 in-house counsel, 2 professors of civil procedure.
- Professor Laurie Dore agreed to serve as reporter.
- The committee met for six full days in Des Moines in November 2012, December 2012, February 2013, April 2013, May 2013, and July 2013.

RECAP OF THE COMMITTEE'S WORK

- The committee's proposals consist of the following:
  - (1) Proposed discovery amendments (to apply to *all* actions).
  - (2) A proposed new rule for expedited civil actions. The plaintiff(s) can opt into this rule in any case where the total claims by or against a party do not exceed $75,000.
  - (3) A proposed care provider statement in lieu of testimony that would be available for expedited civil actions.

RECAP OF THE COMMITTEE'S WORK

- We will start with the expedited civil action rule, including the care provider statement. This is more distinctive (and important).
- The discovery reforms in large part borrow from federal rule changes over the last 20 years.
- FYI: The feds are working on some additional discovery rule changes – *see* Prof. Dore's email in the materials.

EXPEDITED CIVIL ACTIONS

- Eligibility:
  - The sole relief sought must be a money judgment.
  - All claims brought by or against any party (other than counterclaims) must total $75,000 or less.
  - The $75,000 includes everything but costs and post-filing interest.
  - The plaintiff gets to decide whether to opt in. Once in, the plaintiff is bound by the $75,000 limit.
  - Parties may also stipulate to have their case handled as an expedited civil action.
  - If circumstances change substantially, or if a compulsory counterclaim is filed in excess of $75,000, the court may remove a case from the expedited civil action docket.

EXPEDITED CIVIL ACTIONS

- Initial disclosures are required (*see* discovery reforms).
- Limits on discovery per side:
  - No more than 10 interrogatories, 10 requests for production, and 10 requests for admission (except for requests to admit the genuineness of documents).
  - Each party may be deposed.
  - Each side may depose up to 2 nonparties.
- No more than 1 expert per side except by agreement of the parties or for good cause shown.

EXPEDITED CIVIL ACTIONS

- Only 1 summary judgment motion may be filed per party, and only the following grounds are permitted:
  - To collect on a liquidated debt;
  - To establish an immunity.
  - Failure to comply with an expert witness disclosure deadline.
  - To establish an affirmative defense.

EXPEDITED CIVIL ACTIONS

- Trial procedure:
  - The designated trial week is a date certain and may only be bumped by a case with higher priority (e.g., a noncivil case).
  - 6 jurors; 3 strikes per side.
  - After 3 hours, a 5-1 verdict is permissible.
  - 1 set of joint jury instructions must be submitted before trial, with alternatives if there is disagreement.
  - The goal is for the trial to be completed in 2 days: Each side is subject to an overall 6 hour time limit for jury selection, opening statements, presentation of evidence by direct or cross-examination, and closing arguments.

EXPEDITED CIVIL ACTIONS

- Jury or bench trial permitted.
- If the case is being tried without a jury, the court may render a verdict based on the jury instructions and verdict forms that would be used in a jury trial, without the need for preparing findings of fact and conclusions of law.
- No court-ordered ADR.

EXPEDITED CIVIL ACTIONS

- Special evidentiary rules:
  - Business records and like documents may be admitted without the testimony or certification of a custodian, if the party offering the document gave notice at least 90 days before trial and the document on its face appears to be genuine and what it purports to be.
  - A health care provider who treated the claimant may provide a written statement according to a standard form in lieu of testifying in court or by way of deposition. See next slide for more details…

CARE PROVIDER STATEMENT IN LIEU OF TESTIMONY

- Standard questions as to injuries sustained by the claimant in the incident, treatment necessitated by those injuries, restrictions or limitations on the claimant as a result of those injuries, etc.
- The statement must also disclose any communications that have occurred with the claimant's counsel.
- This statement must be provided to all other parties at least 150 days before trial.
- The health care provider may still be deposed at the expense of the party taking the deposition.

PROPOSED DISCOVERY AMENDMENTS

- We would adopt (with some variation) the federal initial disclosures, i.e.:
  - Name, address, phone numbers and email address of all persons with discoverable information that may support the disclosing party's claims or defenses and the subjects of information;
  - Copies of documents (including electronically stored information) that the disclosing party has in its possession or custody and may use to support its claims or defenses;
  - Computation of damages;
  - Insurance information.

PROPOSED DISCOVERY AMENDMENTS

- In addition:
  - For personal injury actions, the initial disclosures would include the claimant's DOB, Medicare claim number, names and addresses of recent health care providers, and executed waivers for health care providers.
  - For cases where lost wages/loss of earning capacity is claimed, the initial disclosures would include recent tax returns, names and addresses of employers, and executed waivers for employment records.
  - The initial disclosures must be served simultaneously within 14 days of the parties' initial discovery conference, which in turn must occur within 14 days of the first answer or appearance by a defendant.

PROPOSED DISCOVERY AMENDMENTS

- Similarly, we have adopted for the most part the federal expert disclosures:
  - Thus, any expert specially retained for the case must provide a signed report containing the detail required by the federal rules.
  - This report would be in lieu of the expert interrogatory answer authorized by our current rules.
  - The timing of expert disclosures will presumably be governed by court order but in no event can they occur less than 90 days before trial.
  - There would be work product protection for draft expert reports and attorney-expert communications except for facts/data/assumptions the expert relied upon.

PROPOSED DISCOVERY AMENDMENTS

- Other matters:
  - The parties must have an initial discovery conference no later than 14 days after the first answer or appearance filed by any defendant.
  - This conference essentially mirrors the federal rule. Following the conference the parties shall submit a discovery plan to the court. However, unlike in the federal system, a court conference would occur only if requested by a party to resolve a disputed issue.
  - There would be a discovery moratorium until after the discovery conference.

PROPOSED DISCOVERY AMENDMENTS

- Other matters:
  - Discovery motions must be accompanied by a certification that "the movant has in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action. The certification shall identify the date and time of the personal conference and any attempts to confer."
  - Discoverable matters include the identity of trial witnesses.
  - The duty to supplement discovery responses would follow the federal rule: A party has to supplement or correct any disclosure or response if the disclosure or response is incomplete or incorrect in some material respect, provided the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

PROPOSED DISCOVERY AMENDMENTS

- Other matters:
  - Parties may rely on responses to discovery requests that were served by another party – but must independently request supplementation once the other serving party has been dismissed from the case.
  - The court *sua sponte* may impose limits on discovery to enforce proportionality principles.
  - All objections at depositions "must be stated concisely and in a nonargumentative manner" (borrowed from federal rule). A deponent may be instructed not to answer only to preserve a privilege, enforce a court-ordered limitation, or present a motion to the court.

MEMBERS OF THE COMMITTEE

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Economic Impact of Ineffective Witness Testimony

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Don't Shoot the Messenger

By Bill Kanasky, Jr.

Exploring *In*effective Witness Testimony

The inherent desire to "shoot the messenger" is a basic human instinct that has survived and evolved over hundreds of years. In ancient times, communications between warring parties were usually delivered by messengers, putting messengers in very precarious, life-threatening situations. In modern usage, the metaphorical expression still connotes negative consequences dished out to a person communicating bad news to others. In litigation, fact witnesses are the "messengers" and jurors' perception of their credibility, believability and honesty is critical to success in the deliberation room. But time and again, attorneys and claims managers want to figuratively "shoot" witnesses when poor deposition and trial testimony increases financial exposure and decreases strategic leverage.

The path to effective witness testimony starts early in a case and remains important at all points in the litigation timeline. During discovery, each deposition has an economic value to a client. Strong, effective depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations. Therefore, the deposition setting is a critical battleground with potentially heavy casualties for a client—a large check to the enemy. Unfortunately, poor witness performance during depositions is quite common, as many attorneys use *actual depositions* to evaluate witness' communication skills, rather than thoroughly assess skills prior to deposition. Some attorneys view it as "just a deposition," and they less rigorously prepare a witness for a deposition compared with a trial. The unfortunate result is that many attorneys learn about the strengths and weaknesses of their witnesses, and often, their cases, *during* depositions, rather than beforehand. By then, the damage is done, it's on the record, and a client has increased vulnerability and financial exposure. During a typical "bad dep," attorneys often report feeling frustrated and helpless when faced with a witness's persistent and careless mistakes. Some attorneys resort to the "kick system," telling a witness, "If I kick you under the table once, you are talking too much; two kicks means you aren't listening to the questions well enough." One can only assume that three kicks under the table means that the witness should fake a seizure in an effort to postpone the deposition, obtaining much needed additional preparation time.

When asked about how poor deposition performance impacts his leverage during litigation, the director of claims and litigation of a large corporation based in the Southeast commented, "I am sick and tired of opposing attorneys using bad depositions against me during mediation and settlement discussions. I end up paying out more on that case than I should, which needs to stop. I hate surprises. I hate being told that a witness will do 'just fine," and then they go bomb the deposition. Those 'bombs' end up costing us an extraordinary amount of money." Clearly, poor deposition testimony greatly widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position when trying to settle.

At trial, no "kick system" exists. Attorneys and clients can only sit back and collectively grind their teeth and wince during poor testimony, as their leverage and money get sucked out of the courtroom. And since jurors *highly* value the testimony of fact witnesses and use it as a primary factor in decision making during deliberations, keeping a poor witness off the stand is often not an option, or at best, is a risky strategy. In fact, most jurors won't accept or trust a company until they first accept and trust the company's fact witnesses. If they don't accept and trust the fact witnesses, the company doesn't have a chance in deliberations. Jurors can, will and *should* shoot the messenger if a witness performs poorly on the stand. Today's jurors do not demand perfection, but they do demand effective verbal and nonverbal communication skills when a witness testifies.

Understandably, many attorneys struggle to assess, understand and teach these communication skills adequately, as they usually have no formal training in the two academic disciplines that comprise the backbone of witness effectiveness and jury decision making: psychology and communication science. Assessing and adjusting a witness's communication style, personality, cognition and behavior are very difficult tasks. For example, there is an enormous difference between *telling* a witness that

- He or she needs to be a "better listener," vs. *teaching* better listening skills;
- He or she needs to be "more patient" when answering, vs. *teaching* patient answering;
- He or she needs to give "more concise" answers, vs. *teaching* him or her how to give concise answers.

The difficulty of effective witness preparation by counsel was highlighted during one recent CLE seminar by a Chicago-based trial attorney who described his latest experience: "Last month at trial, my key witness's testimony was so damaging that I wanted to stand up and throw my legal pad at him in an effort to get him to shut up; then the worst part: I had to face my client and explain why the witness crashed and burned on the stand, despite my preparation efforts the day before."

Whether a deposition or a trial, when witness preparation efforts focus exclusively on substance, rather than *how* a witness will actually convey information in a

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cogent and persuasive manner, a witness will not acquire the skills necessary to be an effective communicator. This results in careless and often devastating mistakes during testimony. The most common and preventable witness blunders include volunteering information, guessing and not listening or thinking effectively. Let's take each in turn.

Volunteering Information: Volunteering information occurs when the scope of a witness' answer exceeds the scope of a question from opposing counsel. This common mistake occurs for three reasons. First, witnesses who are anxious and unfamiliar with the legal environment tend to fall back on their work and social communication skills to help them "survive" the testimony. At work, home or with friends, it is perceived as friendly, helpful and efficient when someone offers extra information following a direct question. Therefore, novice witnesses inadvertently volunteer excessive information, thinking that it will be helpful, unknowingly causing tremendous potential damage. Second, many witnesses purposely try to anticipate the next question or questions, in an effort to bring the testimony to a close more quickly. These individuals erroneously conclude, "The more I say, the faster this uncomfortable process will be over with." Nothing could be further from the truth, as an opposing counsel will actually question a "chatty Cathy" witness longer than a witness who volunteers less information. Third, witnesses experience an intense, internal urge to explain away answers to simple, direct questions. They feel that if they don't, they are letting down the team and hurting the case. The classic, "Yes, that is true, but here is why" type of answer from a witness is particularly damaging, as the unsolicited explanation fuels opposing counsel's attack.

Guessing: Guessing comes in many forms, and witnesses often take educated guesses instead of stating that they "don't know," "don't remember" or "don't have any personal knowledge of that." Why do witnesses so often opt to guess rather than admit not knowing something? Two reasons: embarrassment and intimidation. Many witnesses feel embarrassed if they can't provide an answer to what is perceived as an important question, and attorneys are experts at creating this powerful emotional reaction. The standard trick is to say to a witness, "You've been an employee at Company X for 15 years and you can't answer my important question? My client has a right to an answer. Let me repeat my question, and let me remind you that you are under oath." At this very point, 99 percent of witnesses take an educated guess, simply because they feel compelled to correct the perception that they don't know. They end up feeling obligated to provide "something," regardless of its accuracy or relevance. Intimidation is also a powerful tool. Attorneys can raise their voices, increase the pace of questioning and become sarcastic or aggressive towards witnesses and "bully" them into answers. When this occurs, a witness becomes scared, rattled and very uncomfortable. The witness then provides an educated guess in an effort to give the attorney "something" so that they will back off. Regardless of the cause, guessing is a devastating witness blunder, which leaves an attorney and a client vulnerable. Guesses are rarely accurate, and a savvy attorney can use a witness' guesses against him or her, heavily damaging that witness' credibility and believability.

> Most jurors won't accept or trust a company until they first accept and trust the company's fact witnesses.

Not Listening or Thinking Effectively: In today's high-speed, instant-gratification society, people are now cognitively hardwired to listen and think simultaneously when communicating with others. In other words, when someone asks a question, the respondent *automatically* begins to think about his or her response in the middle of the questioner's inquiry, rather than listening to 100 percent of the question, then thinking 100 percent about his or her response. From a neuropsychological standpoint, a respondent is extremely vulnerable to error, as concentration and attention are split between two activities—listening and thinking—instead of dedicated to one cognitive activity. While this pattern is efficient and friendly in the workplace or social settings, it is extremely dangerous in a legal environment. Listening and thinking simultaneously as a witness results in poor answers, because the witness does not hear the question in its entirety. What happens next is that the witness answers:

- A different question from what was actually asked, which makes the witness appear evasive;
- A question incorrectly, for example, inadvertently accepting the questioner's language and agreeing with a statement that isn't true;
- A question that shouldn't be answered in the first place—questions to which an attorney would raise form or foundation objections; or
- A question beyond the scope of the inquiry, which volunteers information and makes the witness appear defensive.

Regardless of educational attainments or professional achievements, fact witnesses have no chance of out-dueling a skilled, veteran questioner with years of trial experience. The only way to level the playing field is to teach a witness how to use his or her cognitive resources most effectively, which means training him or her to listen first, think second and speak third. This form of communication seems awkward to witnesses, because it is vastly different from work and social communication. However, it protects them against attorneys' tricks and traps, as well as careless mistakes related to inattention and lack of concentration. Many attorneys struggle to manipulate and intimidate witnesses who listen carefully, think patiently and answer concisely. This is exactly why teaching these communication skills to witnesses needs to be a top priority early in the litigation plan.

Needless to say, quality witness testimony, or lack thereof, has a tremendous impact on the outcome of litigation. Despite this, the time, effort and resources dedicated to witness assessment and prepara-

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tion typically pales in comparison to other discovery and pretrial preparation activities. For that reason, when the messenger is "shot" by the jury, it is rarely the messenger's fault. It is important for attorneys to *truly* understand the strategic and economic leverage that can be won or lost with testimony and how that leverage impacts a company's financial exposure. Inadequate witness preparation, even if unintentional, can also raise ethical considerations related to competent representation, because it can increase litigation exposure. The best strategy is to place great emphasis on witness preparation prior to key deposition testimony, giving clients strategic leverage early, minimizing vulnerabilities and obviating the "shoot the messenger" syndrome.

Retaining an expert who specializes in assessing and developing effective witness communication skills is very wise, as the return on this investment is extraordinary. Many attorneys across the nation, even the ones who consider themselves "old school," have acknowledged the strategic and economic benefits of expert consultation for witness preparation. As a veteran trial attorney recently stated, "I'd rather spend a few thousand dollars on expert consultation to help prepare my witnesses than risk millions—or even billions—of dollars of my client's money at deposition or trial."

Case Law Update: Commercial, Contracts, Construction Law Cases

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Iowa Defense Counsel Association Case Law Updated: Commercial, Contract, Construction

By: John Lande of Dickinson, Mackaman, Tyler & Hagen, P.C.

I. CONTRACTS

A. Arbitration

1. State Law

Bartlett Grain Co., LP v. Sheeder, 829 N.W.2d 18 (Iowa April 5, 2013) (Mansfield)

Facts: Farmer entered into oral agreements with grain elevator to sell 155,000 bushels of corn, delivered at various future dates. According to the farmer, "the only terms of the oral contract were price and quantity and anticipated delivery date. No other terms were discussed or agreed upon."

After each of the oral agreements, the grain elevator sent the farmer a two-page "Purchase

Confirmation" for both parties to sign. Each of the forms was identical except for the differing grain quantities, price terms, and delivery dates. Each form included a provision that required any dispute to be resolved pursuant to the arbitration rules of the National Grain Feed Association ("NGFA"). The forms also included an integration clause that provided "[t]his contract represents the final, complete and exclusive statement of agreement between the parties."

In April 2011, the grain elevator claimed it had reasonable grounds for insecurity regarding whether the farmer could perform, and therefore the elevator demanded adequate assurances. The farmer did not provide any assurance. The grain elevator then repudiated the contract with the farmer and initiated arbitration pursuant to NGFA rules to recover damages from the farmer's alleged breach of contract.

NGFA sent the farmer notices of arbitration, all of which the farmer ignored. The NGFA received an award in the arbitration, which the farmer did not participate in. When the grain elevator attempted to confirm the arbitration award in district court, the farmer filed a resistance and argued the arbitration agreement was not binding.

Issue: Whether an arbitration agreement is binding where it is contained in a confirmation form that follows an oral agreement between the parties?

Holding: Yes, the arbitration agreement is valid. Where an oral agreement is followed by a written confirmation of that agreement and evidence supports that the written agreement is "intended by the parties as the final expression of their agreement" then prior oral terms cannot be used to contradict what is express in the written agreement.

Analysis: "Iowa law favors arbitration." The analysis of the validity of an arbitration award always begins with two questions: (1) Whether there is a valid agreement to arbitrate; and (2) Whether the dispute at issue is within the scope of the agreement to arbitrate.

This case involved the sale of grain, which is a good within the meaning of the UCC. Thus, UCC provisions dealing with the sale of goods are relevant to determining whether there is a valid arbitration agreement.

The Court concluded that this case was governed by UCC § 202 (Iowa Code § 554.2202). That section provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . . .

According to the Court, this section means that oral terms cannot be used to contradict terms expressly set forth in a writing "intended by the parties as a final expression of their agreement . . . ." Thus, the Court concluded that the arbitration agreement was binding and governed the

dispute.

The farmer also offered various arguments regarding why the contract was unconscionable, all of which the Court rejected.

2. Federal Law

Nitro-Lift Technologies, LLC v. Howard, 133 S.Ct. 500 (November 26, 2012) (Per Curiam)

Facts: Two employees who signed non-compete agreements that included arbitration clauses quit working for Nitro-Lift Technologies, LLC, and went to work for competitors. Nitro-Lift sought to enforce the arbitration clauses by serving on the employees an arbitration demand. The employees filed suit in Oklahoma state court seeking to have the non-compete agreements declared unenforceable.

Issue: Whether an arbitrator or court should decide whether an underlying agreement is valid when there is a valid arbitration agreement.

Holding: Where the parties have a valid and enforceable arbitration agreement, then it is for the arbitrator, not the court, to decide whether the underlying contract is also valid and enforceable.

Analysis: On appeal before the Oklahoma Supreme Court, Nitro-Lift argued that whether the employment agreements were enforceable was a matter left to the arbitrator. The Oklahoma Supreme Court disagreed and relied on state law to assert that it had jurisdiction to determine whether the underlying employment agreements were valid.

The Supreme Court granted certiorari and reversed the Oklahoma Supreme Court. The Supreme Court explained that the Oklahoma Supreme Court disregarded Supreme Court case law interpreting the Federal Arbitration Act ("FAA"). The Supreme Court pointed out that it is well settled that where there is a valid arbitration clause then the arbitrator must decide all disputes regarding the underlying agreement. The Oklahoma trial court concluded that there was a valid arbitration agreement, and the Oklahoma Supreme Court did not find otherwise. Thus, since the FAA is the supreme law of the land, the Oklahoma Supreme Court erred when it held that it had jurisdiction to determine the validity of the underlying employment agreement.

Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (June 10, 2013) (Kagan)

Facts: A doctor entered into an employment agreement with a health insurance company. Several years later, the doctor filed suit against the insurance company on behalf of himself and other doctors who had contracts with the insurance company in state court. The doctor alleged the insurance company failed to make full and prompt payment to the doctors as required by the employment agreements.

The insurance company moved to compel arbitration pursuant to an arbitration provision:

> No civil action concerning any dispute arising under this Agreement shall be

> instituted before any Court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

The parties all agreed that the arbitrator had to decide whether class-action arbitration was authorized under the arbitration agreement. The arbitrator concluded that the arbitration agreement authorized class-action arbitration. The insurance company disagreed with the arbitrator's conclusion and filed a motion in federal district court seeking to vacate the arbitrator's decision on the grounds that he had exceeded the scope of his authority. The district court and Third Circuit denied the insurance company's motion.

During the arbitration, the Supreme Court decided Stolt-Nielsen, which held there must be some basis for finding that the parties agreed to class arbitration in the arbitration agreement. The arbitrator reconsidered his decision to grant class arbitration, and affirmed his earlier decision permitting it. The insurance company again filed a motion in federal court seeking to vacate the decision pursuant 9 U.S.C. § 10(a)(4), arguing that the arbitrator exceeded the scope of his authority.

Issue: Whether the arbitrator exceeded the scope of his authority when he concluded that the arbitration agreement demonstrated the parties' intent to submit to class arbitration.

Holding: Where an arbitrator concludes that there is a contractual basis for class arbitration then the arbitrator did not exceed the scope of his authority.

Analysis: The arbitrator's decision was an interpretation of the parties' agreement. This was within the arbitrator's province. The Court explained that the holding in Stolt-Nielsen was that class arbitration was precluded where there was no contractual basis for class arbitration. In this case, the arbitrator found support within the agreement for class arbitration. Thus, the arbitrator did not exceed his authority.

American Exp. Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (June 20, 2013) (Scalia)

Facts: Several merchants who accept American Express brought a class action lawsuit against American Express under antitrust laws. According to the merchants, American Express used its monopoly[1] status to force merchants to accept American Express card fees at a rate approximately 30% higher than competitors.

All the merchants' contracts with American Express contained arbitration clauses. These clauses all included a waiver of the ability to bring class action arbitration. American Express moved to have each of the merchants' claims submitted to individual, rather than class action, arbitration. The merchants resisted American Express's motion.

The merchants submitted evidence that the cost of expert analysis would cost a minimum of

[1] American Express holds a near monopoly as a charge card provider. A charge card is distinguished from a credit card because a customer must pay off the entire balance of a charge card at the end of each month.

several hundred thousand dollars, and potentially over one million dollars. The potential recovery for each merchant, in contrast, would be $12,850, or $38,549 when trebled under antitrust laws. The district court dismissed the merchants' case.

The Second Circuit reversed the district court. The court of appeals concluded that the merchants had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver." Thus, the waiver was unenforceable. After several reconsiderations before the court of appeals in light of Supreme Court decisions, the Supreme Court granted certiorari.

Issue: Whether a contractual waiver of class action arbitration is enforceable where the cost of filing for arbitration exceeds the potential recovery for any one particular plaintiff.

Holding: Where parties to a contract agree to arbitration and that arbitration clause includes a class action arbitration waiver, courts must enforce the contract according to its terms.

Analysis: No congressional command required the Supreme Court to set aside the class action waiver contained in the arbitration agreements. Thus, these clauses must be enforced.

The Court analyzed Congress's intention in enacting the Federal Arbitration Act ("FAA") and the antitrust laws. The Court noted the strong congressional and judicial policy in favor of arbitration. The Court also explained that the antitrust laws, while including certain provisions to make litigation easier, do not guarantee plaintiffs an affordable procedural path to vindication.

The antitrust laws certainly do not include any prohibition on waiving the right to bring a class action. Thus, when the antitrust laws are compared to the policy embodied in the FAA, the result is clear: class action arbitration waivers are enforceable.

The Court also rejected application of the "effective vindication" exception to the FAA. After noting that this exception finds no support in the text of the FAA, the Court rejected its application in this case. To the extent that such an exception exists, its only application is in cases where arbitration clauses purport to waive a plaintiff's *right to pursue* statutory remedies. Since the arbitration agreements in this case did not prohibit assertion of statutory rights, there was no need to invalidate the arbitration agreements.

B. Insurance Contracts

Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494 (Iowa February 1, 2013) (Wiggins)

Facts: Two farmers—the Boelmans—operated a contract-feed nursery for hogs in Butler County. The farmers would contract with others to raise hogs until fattened and then sell them for slaughter. One of the farms that the Boelmans raised hogs for was Budke Farms. The contract between the Boelmans and Budke was arranged by Schneider's Milling, Inc.

Under their agreement, the Boelmans cared for and fed the hogs supplied to them. On October 4, 2008, 535 of 1254 nursery hogs suffocated to death while one of the Boelmans was cleaning the manure basin.

The Boelmans previously purchased a Farm-Guard policy from First Maxfield Mutual Insurance Association. Grinnell Mutual Reinsurance Company was the reinsurer. The Boelmans made a claim on the insurance policy for the hog loss. Grinnell Mutual denied the claim. The Boelmans then borrowed funds and settled with Budke farms before filing suit against First Maxfield and Grinnell Mutual.

The insurance policy covered the Boelmans in the event of "property damage" which is defined as: "[T]he physical injury to or destruction of tangible property. 'Property damage' does not include loss of use unless the property has been physically injured or destroyed." However, the policy contained a relevant exclusion:

> "We" do not cover "property damage" to property rented to, leased to, occupied by, used by, or in the *care, custody or control* of any "insured person" or any persons living in the household of an "insured person."

In addition, the policy included an exclusion for loses arising from "custom farming." The Boelmans first filed suit against First Maxfield and then added Grinnell Mutual as a defendant. Grinnell Mutual counterclaimed and sought a declaratory ruling that the cited exclusions prevented the Boelmans from recovering under the Farm-Guard policy. The parties submitted cross motions for summary judgment.

The district court found in favor of the Boelmans, concluding that under the reasonable expectations doctrine the Boelmans reasonably expected to have their farming operation covered by the policy. Grinnell Mutual appealed and the Court of Appeals affirmed the district court. The Supreme Court granted further review.

Issue: Whether the policy provisions cited above were ambiguous and thus the policy was required to be construed in favor of the insured, and whether the reasonable expectations doctrine was applicable to the facts of this case.

Holding: Construction of an insurance policy is a matter of law that is resolved by the Court. In order to properly construe a policy, a Court must view the entire policy and determine whether it is subject to two reasonable interpretations. Only if there are two reasonable interpretations should the Court construe it in favor of the insured.

In addition, the reasonable expectations doctrine only applies where an insured can demonstrated conduct by the insurer that would cause an ordinary layperson to misunderstand coverage.

Analysis: The Court began its analysis by distinguishing between "construction" and "interpretation" of an insurance policy. Interpretation requires the Court to give meaning to the words of the policy. When interpreting a policy, the plain meaning of the words will prevail.

Construction, rather, is giving legal effect to the contract. This is always a question of law for the Court, and the intent of the parties controls unless there are ambiguities. The Court employs an objective test to determine whether there are ambiguities. The objective test asks whether the

policy is subject to two *reasonable* interpretations. If the policy is objectively ambiguous, then the Court adopts the reading that is most favorable to the insured.

Applying these rules, the Court concluded that the policy provisions cited above, in the context of the entire policy, were unambiguous. Thus, the district court and Court of Appeals erred when they held that the Boelmans were covered.

The Court further concluded that a Custom Feeding Endorsement did nothing to change the exclusion contained in the policy for damage to property under the Boelmans' control. The Court relied on the plaint text of the policy, and also decisions from other jurisdictions reaching similar conclusions when interpreting policies. Thus, the "care, custody, or control" exclusion prohibited the Boelmans from recovering for damage to property under their care, custody, or control.

The Court further rejected application of the reasonable expectations doctrine. The Court explained that a prerequisite to the application of that doctrine is that there are circumstances attributable to the insurer that fostered coverage expectations so that an ordinary layperson would misunderstand the coverage. The Boelmans failed to pass this threshold test.

Farm Bureau Life Ins. Co. v. Holmes Murphy & Associates, Inc., 831 N.W.2d 129 (Iowa May 17, 2013) (Hecht)

Facts A husband and wife living in Wyoming applied for life insurance with an insurance company. The insurance company denied their applications after a blood screening revealed they were both infected with HIV. The insurance company sent the couple letters stating that their applications were denied "due to blood profile results" and requesting authorization to disclose the results to their physician(s). The couple did not respond and they did not discover they had HIV until 2001.

Upon realizing they had HIV, the couple sued the insurance company in federal Court alleging negligence by the insurance companies for failing to inform both the couple and the state of Wyoming of their HIV positive status, and in failing to tell the couple up front that the insurance company would not notify them if their blood test results revealed that they were HIV positive. The couple sought damages for loss of present and future income, bodily injury, past and future pain and suffering, mental anguish, loss of enjoyment of life, total disability, inability to care for themselves as their diseases progressed, and other general damages.

The case eventually settled and the insurance company subsequently sought indemnity, for the amounts paid in settling the couples' claims, under an Insurance Company Professional Liability (ICPL) policy issued by another insurance company and in effect at the time the couple filed their lawsuit. Pursuant to the ICPL, the insurance company's insurer was to cover damages resulting from any legal claims arising in "a civil proceeding." This obligation was qualified by one procedural requirement and two substantive exceptions.

First, the policy required written notice to the insurance company's insurer of claims "as soon as practicable, *but in no event later than ninety (90) days after the termination of the policy period*";

Second, pursuant to an exception, the policy denied coverage for claims "for bodily injury" (the "bodily injury exclusion");

> "The Company shall not be liable to make any payment for Loss in connection with any Claim made against the Insureds: . . . for bodily injury, mental or emotional distress, sickness, disease, or death of any person; provided however, this Exclusion shall not apply to a Claim based solely on the Insured's failure to provide Insurance Services."

Third, pursuant to an exception, the policy denied coverage for claims"based upon, arising from, or in consequence of the underwriting of insurance" (the "underwriting exclusion"):

> "The Company shall not be liable to make any payment for Loss in connection with any Claim made against the Insureds: . . . based upon, arising from, or in consequence of the underwriting of insurance, including any decisions involving the classification, selection, or renewal of risks as well as the rates and premiums charged to insure or reinsure risks . . . ."

The insurance company notified its insurance broker of the couples' claims in 2003. The broker did not notify the insurance company's insurer, however, until more than two years after the ICPL policy notice period had expired. In the indemnity proceedings, the insurance company's insurer moved for summary judgment, arguing that the insurance company had failed to comply with the 90 day requirement, thus, the claim for indemnification was barred. That motion was granted and thereafter the insurance company amended its petition to state a claim against its broker for negligence in failing to provide timely notice of the couples' claims to the insurance company's insurer.

Cross motions for summary judgment were filed and the district court granted the broker's motion holding that the bodily injury and underwriting exclusions in the ICPL policy would have precluded coverage even if the insurance company had received timely notice of the couples' claims.

Issue: Whether the trial Court erred in holding that the ICPL policy did not cover the insurance company's indemnification claims, such that had the broker given the insurance company's insurer timely notice the insurance company would still not have been entitled to recovery.

Holding: The ICPL policy's underwriting exclusion would have precluded coverage for the couples' claims even if the insurance company's insurer had been timely notified under the policy's notice requirement.

Analysis: The Court first concluded that it did not need to address the issue of whether the bodily injury exclusion precluded coverage for the couples' claims because the underwriting exclusion did. Thus, the Court did not address the scope of the bodily injury exception.

In construing the underwriting exclusion, consistent with Boelman, the intent of the parties is discerned by the language of the contract. When an ambiguity exists, the words are generally

given their ordinary meaning, as defined in dictionaries, and generally ambiguities are resolved in favor of the insured. However, the fact that two parties disagree over the meaning of a term does not mean an ambiguity exists; rather, the question is "whether the language of a policy is susceptible to more than one *reasonable* interpretation"

The Court focused on the "arising from . . . the underwriting" language, and noted that generally in coverage sections language such as "arising from" or "arising under" is broadly construed; however, when such language appears in an exclusion section, it is to be construed more narrowly. The Court then turned to the ICPL exclusion at hand.

First, the Court turned to the dictionary to ascertain the meaning of "underwriting." Both parties agreed that an appropriate definition was "the process of examining, accepting or rejecting insurance risks, and classifying those selected in order to charge the proper premium for each."

Second, the Court discussed what generally happens during the underwriting process. Insurers typically ask questions regarding an applicant's medical background as part of the underwriting process of determining which persons or risks to insure. They may gather records regarding an applicant's past and current medical condition or require an applicant undergo physical examination and medical testing.

The insurance company argued that despite this definition of underwriting and understanding of the underwriting process that the couples' claims were "factually distinct" from claims that would arise from the underwriting of insurance, in that the couples' claims were not for the insurance companies violation of a duty in its decision not to issue life insurance policies, and thus, the claims could not have arisen from underwriting. Put another way, the claim for which indemnity is sought is not for identification of or failure to identify a risk, but for the unrelated failure to notify.

The Court disagreed, noting that the duty arose from the insurance company's routine eligibility investigation, including analysis of the applicants' blood, which took place both during and because of the risk assessment/underwriting process. The Court reasoned that the couples' claims were not factually distinct because, as was explained by the 10th Circuit, as a matter of Wyoming law the insurance company's duty to notify arose from its "special relationship" with the couple, in that the insurance company had solicited their business and procured from them highly sensitive, personal information. Thus, any duty to notify was part and parcel of the eligibility, risk assessment/underwriting process.

Third, the Court noted that the contract expressly stated that underwriting covered claims relating to the "identification of or failure to identify a risk." Here the claim was a result of the identification of a risk and an adjacent duty. Thus, it was covered by the underwriting exclusion.

Fourth, the Court noted that the policy's definition of insurance services, from which any claim covered by the policy must arise, failed to mention any harms relating to medical expenses, which further evidenced the intent of the parties.

Finally, the Court noted that because the broker had identified a plethora of examples of claims

that would remain covered by the policy in light of the Court's interpretation, it was not worried that its construction would effectively nullify the policy.

Postell v. Am. Family Mut. Ins. Co., 823 N.W.2d 35 (Iowa November 16, 2012) (Wiggins)

Facts: A married couple was experiencing marital difficulties. After 30+ years of marriage they decided to split up. The wife moved out and filed for divorce.

The husband was not happy with this. He threatened to kill himself if they could not work things out and attempted to do so in early February, on Super Bowl Sunday, with a gun. He called the police before his first attempt and told them to come over to clean up the ensuing mess. The police arrived in time to stop his attempt.

Thereafter, on Valentine's Day, the husband called his wife and said "this is a Valentine's day you will remember for the rest of your life." He then detailed how he had poured gasoline throughout the house, how he had turned on the stove, and how he had lit candles. He remarked: "if you do not want me, I am going to take care of this problem and blow myself up."

Sometime thereafter one of the husband's sons called him on the phone. The son reported that his father was strangely jovial, in light of the divorce and his recent, now typical, depressed demeanor. His father told him of the gasoline and his plan to blow himself, and the house, up. The son then overheard his brother's fiancé arrive at the house and heard the husband-father tell the fiancé to leave because the house was going to blow.

The fiancé reported that on that afternoon she arrived at the house, entered it, that it smelled strongly of gasoline, so much so that her eyes began to water, and that she found the husband-father in the living room clenching a lighter. He allegedly yelled at her to get out because he was going to "blow it!"

Thereafter another son and a neighbor arrived at the house. The husband-father told them over the phone that if anyone else entered he would blow himself, and the house, up. The neighbor entered and tried to neutralize the situation. His efforts were fruitless.

The husband-father lit the house on fire. It was reported that 60-70% of his body sustained burns. Nevertheless, he walked himself in to the hospital. Medical records state that at that time was responsive, knew what had happened, and spoke of his desire to die. He refused care, but care was ultimately forced upon him after he was convinced by the staff that he was mentally ill and needed immediate attention. He died three days later.

An agent from the State Fire Marshall's office inspected the house and concluded that the husband-father poured gasoline throughout the house and the cause of the fire was arson.

The couple had a fire insurance policy, which covered the house, and which was effective at the time of the fire. Section I of the insurance policy provided replacement coverage for fire damage caused to the insured dwelling and personal property contained therein, as well as loss of use. However, it only covered damage from "accidental direct physical loss," and not:

> "Intentional Loss, meaning any loss or damage arising out of any act committed:
> A. by or at the direction of *any* insured; and
> B. with the intent to cause a loss."

The policy included two other provisions, relevant to the Court's analysis, pertaining to actions by the insured parties, which result in denial of coverage:

> "Neglect of *any* insured to use all reasonable means to protect covered property at and after the time of loss"; and

> "Fraud. [The insurance company] will not provide coverage for all or any part of a loss if, before or after the loss, *any* insured has committed fraud. Fraud means any concealment, misrepresentation or attempt to defraud by *any* insured either in causing any loss or in presenting any claim under this policy.

The policy also contained a severability clause, which stated: "This insurance applies *separately to each insured*. *This condition will not increase our limit for any one occurrence*."

After the fire the wife submitted a proof of loss claim to the insurance company for recovery under the fire insurance policy, reporting losses for buildings, personal property, and loss of use. The insurance company denied the claim, and the wife filed suit.

The insurance company filed a motion for summary judgment, arguing that since the husband intentionally set fire to the residence, the wife could not recover under the policy's intentional loss exclusion. The wife also filed a cross motion for partial summary judgment, arguing that each person under the policy was a separate insured, and that because she had not intentionally set fire to the residence, she was entitled to recovery.

The district court denied the insurance company's motion. The Court first concluded that there was no genuine issue of material fact regarding whether the husband had intentionally lit the fire or caused the property damage.

The Court concluded, second, that, pursuant to prior Iowa Supreme Court precedent which held that a standard fire insurance policy prohibited an insurance company from applying an intentional loss exclusion to a coinsured who did not participate in the intentional act, see Sager v. Farm Bureau Mutual Insurance Co., 680 N.W.2d 8 (Iowa 2004), despite the policy's language, "any insured," it could not uphold the exclusion. In so holding, it concluded that the legislature had not intended to overrule Sager in 2005 when it amended the Iowa Code. The district court also denied the wife's motion on the grounds that genuine issues of fact existed as it related to damages, breach of contract, and several affirmative defenses.

Though the district court at the summary judgment stage found that the wife was entitled to replacement coverage under the policy, at the trial to resolve the other disputed issues the district court informed counsel that it was not bound by its prior ruling and thereafter reached a different conclusion. The district court held that the 2005 statutory amendments in fact overruled the

precedent upon which the district court had based its ruling, such that the insurance company could deny coverage to an otherwise innocent coinsured. Thus, the intentional loss exclusion applied, and the wife had no coverage for the fire intentionally started by her husband, a coinsured. The wife appealed. The Iowa Supreme Court affirmed.

Issues: First, whether the suicidal coinsured, who set fire to the insured house, possessed the requisite intent to cause a loss within the meaning of the policy's intentional loss exclusion.

Second, whether an innocent coinsured, here the wife, may recover under a policy, which excludes coverage when "any insured" causes an "intentional loss", in light of both Sager and the legislature's 2005 amendments to the Iowa Code.

Holding: Yes, the suicidal coinsured, the husband, who set fire to the insured house, by a substantial evidence standard possessed the requisite intent to cause a loss within the meaning of the policy's intentional loss exclusion;

An innocent coinsured, here the wife, may not recover under a policy, as the policy excludes coverage when "any insured" causes an "intentional loss" and the Iowa legislature's 2005 amendments to the Iowa Code overruled, in terms of outcome but not analysis, Sager which held to the contrary.

Analysis:

Intent to Cause a Loss
The Court began by noting that this issue required construction of the contract, namely the intentional loss exclusion provision. In construing the contract it looked at the contract as a whole. It then turned to the intentional loss exclusion provision which it divided into three parts/prongs.

First, there must be a cognizable loss. The policy defined intentional loss as *any* loss or damage arising out of *any* act. Here this requirement was plainly met as the husband acted to cause extensive damage to the property by pouring gasoline on it and igniting said gasoline.

Second, the loss must be caused by *"any insurer*." The policy defined insurer as "the person or people shown as the named insured." Here the husband was again, plainly, a named insured. This conclusion comported with past precedent which held that where a policy states that actions of "an," "a," or "any" insured's actions trigger an exclusion, the policy refers to *either* party's actions.

Third, there must be specific intent to cause the loss found to exist in the first prong. The Court determined that the question is one of objective intent and that it is immaterial that the actual injury caused is of a different character or magnitude than that intended.

The wife argued the husband was suffering from a mental defect and that he could not have formed the requisite intent to cause the loss to the property. The Court disagreed.

The Court looked for substantial evidence that the district court was wrong. Substantial evidence is a deferential standard. The district court had concluded there was no mental defect and that the requisite intent was present. Evidence demonstrating that he did not have a mental defect and that he could form the intent:

- Acted premeditatedly – he had previously tried to commit suicide, knew what he was doing, and planned/staged an elaborate fire;
- There is no evidence he was hallucinating/deranged;
- The record shows that the husband was alert, knew what he was doing, and understood the consequences of his actions;
- After the event, medical reports show that he walked himself into the hospital and at that time was responsive, knew what had happened, and spoke of his desire to die.

Recovery Under the Policy

The wife made three arguments to support her claim for recovery under the language of the policy exclusion. First, she argued that under the policy, she is an innocent spouse. Second, she asserted that a severability clause in the policy provides coverage. Finally, she argued for recovery under the doctrine of reasonable expectations. The Court rejected all three arguments.

First, the Court noted that whether she was an innocent spouse under the policy was a question of policy/contract interpretation. The Court looked at the wife's rights under the language of the policy. If that policy denied coverage, then the Court considered the coinsured's potential recoverability under the standard policy to determine the statutory minimum protection to which the insured is entitled. Iowa Code § 515.109. The Iowa Code/standard policy establishes a floor – a policy may not provide less protection.

The Court emphasized the "*any* insured" language used throughout the contract and noted that this supported holding that the policy excluded recovery for an innocent coinsured. The Court noted that "it is well settled" that the language "any insured" precludes coverage for all insureds, even innocent co-insureds.

Second, regarding the severability clause, the argument was that this clause, which provides that the policy applies "separately to each insured" meant that an innocent coinsured could still recover. The Court noted that this question is already settled and that the purpose of severability clauses is to spread protection among all of the named insureds. The purpose is not to negate bargained-for exclusions which are plainly worded. Such clauses do not create an ambiguity within exclusion sections as the language serves merely to differentiate between joint and separate obligations and does not override other provisions that specifically excluded liability as it concerns co-insureds.

Finally, the Court rejected the argument under the reasonable expectations doctrine. That doctrine's application is limited to cases where the insurer made representations at the time of negotiation of the policy.

C. Flood Insurance

Bagelmann v. First Nat. Bank, 823 N.W.2d 18 (Iowa November 16, 2012) (Mansfield)

Facts: The events leading to the case began in 2001 when the Bagelmans decided to buy a house near the Cedar River in Waverly, Iowa. The Bagelmans approached First National Bank ("FNB") about financing the purchase. FNB informed the Bagelmans that since the home was so close to the Cedar River it would have to obtain a flood determination pursuant to the National Flood Insurance Act ("NFIA").

FNB hired an outside firm to make the flood determination. The firm reviewed Federal Emergency Management Administration ("FEMA") flood maps of the Waverly area. The firm reviewed the 1990 flood maps and concluded that the Bagelmans' house was in an area that did not require flood insurance. The firm's conclusion was wrong.

As a result of the firm's erroneous conclusion, the Bagelmans were advised that flood insurance was not required for their home purchase. Unbeknownst to the Bagelmans, the home they were about to purchase was actually located in special flood hazard area.

The Bagelmans did do some investigation of the home before purchasing it. They hired an engineer to determine the elevation of the property relative to a nearby bridge. They learned that the bridge was slightly lower than the house. They also inspected the crawlspace and verified the accuracy of the information on the seller's disclosure of property condition form.

The Bagelmans then purchased the house with financing from FNB. At closing, FNB provided the Bagelmans with the erroneous flood determination, and also advised that the home may be close to a hazard zone so the Bagelmans should consider flood insurance.

Two years later, the Bagelmans sought to refinance with FNB in order to remodel the home. FNB obtained another erroneous flood determination from the same firm as before, and again informed the Bagelmans that flood insurance was not required. After refinancing, FNB assigned the loan to Iowa Banker's Mortgage Company ("IBMC"). IBMC sold the loan to Fannie Mae, but remained the loan servicer.

In March 2008, FEMA issued new flood determination maps. The firm that had previously issued the two erroneous determinations advised IBMC that the Bagelmans' house was now located in a special flood hazard area. In late May 2008, the firm sent a list to both FNB and IBMC of the houses that now required flood insurance, including the Bagelmans' house.

On June 10, 2008, the Bagelmans' house flooded as a result of catastrophic flooding of the Cedar River. On June 12, 2008, IBMC mailed a letter dated June 9, 2008, advising the Bagelmans that their home was now considered to be in a flood zone and that they should now obtain flood insurance. The Bagelmans received this letter on June 14, 2008, four days after their home was flooded.

The Bagelmans filed a lawsuit against FNB and IBMC. The Bagelmans had a number of claims,

including a theory of liability premised on FNB and IBMC's alleged violation of NFIA. The primary question the Iowa Supreme Court eventually decided to review was whether FNB and IBMC could be held liable for alleged violations of the NFIA.

The NFIA requires lenders to notify borrowers when the borrowers' homes are in high-risk flood zones. Once borrowers are notified they have 45 days to purchase flood insurance. If the borrower fails to do so then the lender is required to purchase the insurance and charge the cost to the borrower.

The Bagelmans argued that FNB and IBMC failed in their responsibility to advise the Bagelmans that their home was in a flood zone. As a result, the Bagelmans argued that FNB and IBMC were responsible for the damages that arose from the 2008 flood.

Issue: Whether the lender had an affirmative duty to inform the plaintiff that their flood zone classification changed?

Holding: The National Flood Insurance Act does not provide a basis for holding a lender liable.

Analysis: The Iowa Supreme Court explained that the NFIA's purpose was not to give borrowers the ability to pursue claims against lenders. Rather, NFIA is really an effort to shift flood losses from lenders and the government to the private insurance market. It would be inconsistent with the purpose of the statute to provide individual borrowers with the ability to bring claims against lenders. Thus, neither FNB nor IBMC were liable for alleged violations of NFIA.

The case ended there for FNB. However, the Iowa Supreme Court went on to consider whether IBMC may have been liable under state law anyway. The court left open the possibility that IBMC could be liable for failing to disclose the revised flood assessment in a timelier manner.

The Court cited a case where a lender intentionally withheld a flood assessment in an effort to induce a borrower to purchase a property. The court did not indicate whether it thought IBMC had engaged in such conduct in this case. As a result, the case was sent back to the district court for additional proceedings to determine whether IBMC could be liable for failing to disclose the changed flood zone assessment.

II. PROCEDURE

Fry v. Blauvelt, 818 N.W.2d 123 (Iowa July 13, 2012) (Zager)

Facts: Homeowner hired a contractor to remodel her home in Ollie, Iowa. After negotiating, the homeowner and contractor entered into an oral agreement to extend the homeowner's kitchen, add a master bedroom with a bath and closet, add a hallway, and add a garage and basement below. The estimated cost for the work was $101,250. There was no agreement as to the time completion, though the homeowner asked that it be done within six months. The contractor began work in September 2008.

The homeowner became dissatisfied with work on the project by December 2008. The foreman left for a four month vacation, and the homeowner fired the contractor in January 2009. The homeowner brought in a replacement contractor to fix and complete the project. The homeowner then filed a breach of contract claim against the original contractor.

The scheduling order required the parties to exchange exhibits seven days before trial. The homeowner faxed over an exhibit list containing 16 exhibits, many of which were labeled "photographs." The day before the trial, the homeowner faxed over a new exhibit list containing 183 exhibits, including 15 photographs that were not on the previous exhibit list. Some of the new photographs were allegedly evidence of water problems and a "millipede invasion."

The contractor sought to exclude the new exhibits on the morning of trial. The district court reserved judgment and allowed the trial to proceed. The contractor's attorney cross examined the homeowner regarding the recent water problems. During the contractor's attempt to undermine the homeowner, testimony was introduced that the contractor had previously excluded via a motion in limine. The Court instructed the jury to disregard the testimony. The contractor moved for a mistrial but the motion was denied.

The jury ultimately returned a verdict in favor of the homeowner. The contractor moved for a new trial on several grounds but was denied. The Court of Appeals reversed the denial of the motion for a new trial on the grounds that admission of the late-disclosed exhibits prejudiced the defendant.

Issue: Whether the district court properly denied the contractor's request for a new trial.

Holding: (1) Where a party discloses, the day before trial, several new exhibits but no prejudice results to the other side then a district court does not abuse its discretion by admitting the new exhibits; (2) Where a party brings up evidence it excluded via a motion in limine a district court does not abuse its discretion by not declaring a mistrial.

Analysis:
The contractor raised eight issues on appeal:

1. The district court abused its discretion in admitting the untimely disclosed photographs and refusing to grant a mistrial during the cross of the homeowner.
2. The contractor asserted misconduct when the homeowner referenced the contractor's projects in Mississippi and Wellman, Iowa in violation of the district court's order granting the motion in limine.
3. A new trial pursuant to Iowa Rule of Civil Procedure 1.1004(3), which allows a new trial for an "[a]ccident or surprise which ordinary prudence could not have guarded against." Based on the untimely disclosed exhibits, and the testimony regarding the Mississippi and Wellman, Iowa projects.

4-6. The contractor's fourth, fifth, and sixth arguments alleged the jury verdict was excessive and reflected an award based on passion or prejudice.

7. The contractor argued the district court made errors of law during trial, which called for a new trial under rule 1.1004(8).

8. Finally, the contractor asserted the district court erred in failing to grant his motion for directed verdict at the close of the homeowner's case-in-chief. The contractor asserted the jury's verdict finding Bluefield breached the contract was unsupported by the evidence.

The contractor's arguments essentially came down to four points of analysis: (1) admission of the photographs, (2) the remarks that were excluded by the motion in limine, (3) the jury award, and (4) the ruling on the directed verdict. The Court rejected the contractor's arguments on all four points.

First, the Court held the contractor was not deprived of a fair trial. District courts have great discretion regarding the admission of evidence. The Court relied heavily on the district court's conclusion that the contractor was able to adequately address the late-disclosed evidence through cross examination. The Court noted that the testimony on the undisclosed photographs amounted to five pages of transcript in a trial that generated over 580 pages of transcript.

Second, the evidence that was excluded by the motion in limine, but nevertheless came in during trial, did not warrant a new trial. Critical to the Court's ruling was the fact that it was the contractor's own line of questioning that brought the evidence up. In addition, the fact that the district court instructed the jury to disregard was sufficient to avoid prejudice.

Third, the jury awarded $42,000 where the original project cost was $101,250. The homeowner paid the contractor a total of $79,309 before the dispute arose. Based on all of the evidence at trial, the Court did not see that the verdict was influenced by the passion or prejudice of the jurors.

Fourth, the Court concluded that there was substantial evidence to support the homeowner's breach of contract claim. Thus, the district court did not error in not granting the motion for a directed verdict.

Big E little e: Ethics and the Trial Lawyer

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 87-353
April 20, 1987
LAWYER'S RESPONSIBILITY WITH RELATION TO CLIENT PERJURY

If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation.

If the lawyer learns that the client intends to testify falsely before a tribunal, the lawyer must advise the client against such course of action, informing the client of the consequences of giving false testimony, including the lawyer's duty of disclosure to the tribunal. Ordinarily, the lawyer can reasonably believe that such advice will dissuade the client from giving false testimony and, therefore, may examine the client in the normal manner. However, if the lawyer knows, from the client's clearly stated intention, that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client's intention to testify falsely to the tribunal.

The professional obligations of a lawyer relating to client perjury as now defined by the Model Rules of Professional Conduct (1983), particularly in Model Rule 3.3(a) and (b), require a reconsideration of Formal Opinion 287 (1953), which was based upon an interpretation of the earlier Canons of Professional Ethics (1908), and Informal Opinion 1314 (1975), which interpreted the predecessor Model Code of Professional Responsibility (1969, revised 1980). [FN1] Formal Opinion 287 discussed in part the lawyer's responsibility with regard to false statements the lawyer knows that the client has made to the tribunal. Informal Opinion 1314 dealt with the lawyer's duty when the lawyer knows of the client's intention to commit perjury.

Formal Opinion 287

Formal Opinion 287 addressed two situations: one, a civil divorce case; the other, the sentencing procedure in a criminal case. In the civil matter, the client informs his lawyer three months after the court has entered a decree for divorce in his favor that he had testified falsely about the date of his wife's desertion. A truthful statement of the date would not have established under local law any ground for divorce and would have resulted in the dismissal of the action as prematurely brought. Formal Opinion 287 states that under these circumstances, the lawyer must advise the client to inform the court of his false testimony, and that if the client refuses to do so, the lawyer must cease representing the client. [FN2] However, Formal Opinion 287 concluded that Canon 37 of the Canons of Professional Ethics (dealing with the lawyer's duty to not reveal the client's confidences) prohibits the lawyer from disclosing the client's perjury to the court.

In this factual situation, Model Rule 3.3 also does not permit the lawyer to disclose the client's perjury to the court, but for a significantly different reason. Contrary to Formal Opinion 287, Rules 3.3(a) and (b) require a lawyer to disclose the client's perjury to the court if other remedial measures are ineffective, even if the information is otherwise protected under Rule 1.6, which prohibits a lawyer from revealing information relating to representation of a client. However, under Rule 3.3(b), the duty to disclose continues only 'to the conclusion of the proceeding . . .' From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct. [FN3] Therefore, on the facts considered by Formal Opinion 287, where the lawyer learns of the perjury after the

Tab A

conclusion of the proceedings--three months after the entry of the divorce decree [FN4]--the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

In the criminal fact setting, Formal Opinion 287 is directly contrary to the Model Rules with regard to one part of its guidance to lawyers. Briefly, the criminal defense lawyer is presented with the following three situations prior to the sentencing of the lawyer's client: (1) the judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him; (2) the judge asks the defendant whether he has a criminal record and he falsely answers that he has none; (3) the judge asks the defendant's lawyer whether his client has a criminal record.

Formal Opinion 287 concluded that in none of the above situations is the lawyer permitted to disclose to the court the information he has concerning the client's actual criminal record. The opinion stated that such a disclosure would be prohibited by Canon 37, which imposed a paramount duty on the lawyer to preserve the client's confidences. In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited, under Rule 1.6, from disclosing information relating to the representation. [FN5] However, in situation (2), where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 that the lawyer is prohibited from disclosing the client's false statement to the court is contrary trary to the requirement of Model Rule 3.3. [FN6] This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal for the reasons stated in the discussion of Rule 3.3 below. [FN7]

Change in Policy in Model Rule 3.3

Model Rule 3.3(a) and (b) represent a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.

The relevant provisions of Rule 3.3(a) are:

> (a) A lawyer shall not knowingly:
>
> . . .
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Rule 3.3(a)(2) and (4) complement each other. While (a)(4), itself, does not expressly require disclosure by the lawyer to the tribunal of the client's false testimony after the lawyer has offered it and learns of its falsity, such disclosure will be the only 'reasonable remedial [measure]' the lawyer will be able to take if the client is unwilling to rectify the perjury. The Comment to Rule 3.3 states that disclosure of the client's perjury to the tribunal would be required of the lawyer by (a)(4) in this situation.

Although Rule 3.3(a)(2), unlike 3.3(a)(4), does not specifically refer to perjury or false evidence, it would require an irrational reading of the language: 'a criminal or fraudulent act by the client,' to exclude false testimony by the client. While broadly written to cover all crimes or frauds a client may commit during the course of the proceeding, Rule 3.3(a)(2), in the context of the whole of Rule 3.3, certainly includes perjury.

Since 3.3(a)(2) requires disclosure to the tribunal only when it is necessary to 'avoid assisting' client perjury, the important question is what conduct of the lawyer would constitute such assistance. Certainly, the conduct proscribed in Rule 3.3(a)(4)--offering evidence the lawyer knows to be false-- is included. Also, a lawyer's failure to take remedial measures, including disclosure to the court, when the lawyer knows the client has given false testimony, is included. It is apparent to the Committee that as used in Rule 3.3(a)(2), the language 'assisting a criminal or fraudulent act by the client' is not limited to the criminal law concepts of aiding and abetting or subornation. Rather,

it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.

Furthermore, as previously indicated, contrary to Formal Opinions 287 and 341 and the exception provided in DR 7-102(B)(1) of the Model Code, the disclosure requirement of Model Rule 3.3(a)(2) and (4) is not excused because of client confidences. Rule 3.3(b) provides in pertinent part: 'The duties stated in paragraph (a) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.' Thus, the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3(a)(2) and (4) supersedes the lawyer's responsibility to the client under Rule 1.6.

Application To Criminal Cases--Effect of *Nix v. Whiteside*

The Comment to Rule 3.3 makes it clear that this disclosure requirement applies in both civil and criminal cases. However, the Comment states that if such disclosure by a lawyer would constitute a violation of a criminal defendant's constitutional rights to due process and effective assistance of counsel, '[t]he obligation of the advocate under these Rules is subordinate to such a constitutional requirement.' Subsequent to the publishing of this Comment, however, the Supreme Court of the United States held in *Nix v. Whiteside*, ---- U.S. ----, 106 S. Ct. 988, 994-97, 89 L.Ed.2d 123, 134-37 (1986) that a criminal defendant is not entitled to the assistance of counsel in giving false testimony and that a lawyer who refuses such assistance, and who even threatens the client with disclosure of the perjury to the court if the client does testify falsely, has not deprived the client of effective assistance of counsel. Some states, nevertheless, may rely on their own applicable constitutional provisions and may interpret them to prohibit such a disclosure to the tribunal by defense counsel. In a jurisdiction where this kind of ruling is made, the lawyer is obligated, of course, to comply with the constitutional requirement rather than the ethical one.

As stated earlier, the obligation of a lawyer to disclose to the tribunal client perjury committed during the proceeding, which the lawyer learns about prior to the conclusion of the proceeding, represents a reversal of prior opinions of this Committee given under earlier rules of professional conduct. However, the Committee has done nothing more in this opinion than apply the ethical rule approved by the American Bar Association when it adopted Rule 3.3(a) and (b) of the Model Rules of Professional Conduct. Even so, a question may be raised whether this application is incompatible with the adversary system and the development of effective attorney-client relationships. [FN8]

The Committee believes it is not. Without doubt, the vitality of the adversary system, certainly in criminal cases, depends upon the ability of the lawyer to give loyal and zealous service to the client. And this, in turn, requires that the lawyer have the complete confidence of the client and be able to assure the client that the confidence will be protected and honored. However, the ethical rules of the bar which have supported these basic requirements of the adversary system have emphasized from the time they were first reduced to written form that the lawyer's duties to the client in this regard must be performed within the bounds of law.

For example, these ethical rules clearly recognize that a lawyer representing a client who admits guilt in fact, but wants to plead not guilty and put the state to its proof, may assist the client in entering such a plea and vigorously challenge the state's case at trial through cross-examination, legal motions and argument to the jury. However, neither the adversary system nor the ethical rules permit the lawyer to participate in the corruption of the judicial process by assisting the client in the introduction of evidence the lawyer knows is false. A defendant does not have the right, as part of the right to a fair trial and zealous representation by counsel, to commit perjury. And the lawyer owes no duty to the client, in providing the representation to which the client is entitled, to assist the client's perjury.

On the contrary, the lawyer, as an officer of the court, has a duty to prevent the perjury, and if the perjury has already been committed, to prevent its playing any part in the judgment of the court. This duty the lawyer owes the court is not inconsistent with any duty owed to the client. More particularly, it is not inconsistent with the lawyer's duty to preserve the client's confidences. For that duty is based on the lawyer's need for information from the client to obtain for the client all that the law and lawful process provide. Implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.

It must be emphasized that this opinion does not change the professional relationship the lawyer has with the client and require the lawyer now to judge, rather than represent, the client. The lawyer's obligation to disclose client perjury to the tribunal, discussed in this opinion, is strictly limited by Rule 3.3 to the situation where the lawyer *knows* that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. [FN9] The lawyer's suspicions are not enough. *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

Informal Opinion 1314

So far, this opinion has discussed the duty of the lawyer when the lawyer learns that the client has committed perjury. The lawyer is presented with a different dilemma when, prior to trial, the client states an intention to commit perjury at trial. This was the situation addressed in Informal Opinion 1314 (1975). The Committee, in that opinion, stated that the lawyer in that situation must advise the client that the lawyer must take one of two courses of action: withdraw prior to the submission of the false testimony, or, if the client insists on testifying falsely, report to the tribunal the falsity of the testimony.

The Committee distinguished, in Informal Opinion 1314, the situation where the lawyer does not know in advance that the client intends to commit perjury. In that case, the Committee stated that when the client does commit perjury, and the lawyer later learns of it, the lawyer may not disclose the perjury to the tribunal because of the lawyer's primary duty to protect the client's confidential communications. As stated earlier in this opinion, the Committee believes that Model Rule 3.3 calls for a different course of action by the lawyer.

The duty imposed on the lawyer by Informal Opinion 1314--when the lawyer knows in advance that the client intends to commit perjury, to advise the client that if the client insists on testifying falsely, the lawyer must disclose the client's intended perjury to the tribunal--was based on the Committee's reading of DR 7-102(A)(4), (6) and (7). These provisions prohibit a lawyer from: (1) knowingly using perjured testimony or false evidence; (2) participating in the creation or preservation of evidence the lawyer knows to be false; and (3) counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent. However, none of these prohibitions *requires* disclosure to the tribunal of any information otherwise protected by DR 4-101. Although DR 4-101(C)(3) permits a lawyer to reveal a client's stated intention to commit perjury, this exception to the lawyer's duty to preserve the client's confidences and secrets is only discretionary on the part of the lawyer.

Informal Opinion 1314 in this regard is more consistent with Model Rule 3.3(a)(2) than with any provision of the Model Code, upon which the opinion was based. However, the Committee does not believe that the mandatory disclosure requirement of this Model Rule provision is necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in *Nix v. Whiteside*. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).

In the unusual case where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial, and the lawyer is unable to effectively withdraw from the representation, the lawyer cannot examine the client in the usual manner. Under these circumstances, when the client has not yet committed perjury, the Committee believes that the lawyer's conduct should be guided in a way that is consistent, as much as possible, with the confidentiality protections provided in Rule 1.6, and yet not violative of Rule 3.3. This may be accomplished by the lawyer's refraining from calling the client as a witness when the lawyer knows that the only testimony the client would offer is false; or, where there is some testimony, other than the false testimony, the client can offer in the client's defense, by the lawyer's examining the client on only those matters and not on the subject matter which would produce the false testimony. Such conduct on the part of the lawyer would serve as a way for the lawyer to avoid assisting the fraudulent or criminal act of the client without having to disclose the client's confidences to the court. However, if the lawyer does not offer the client's testimony, and, on inquiry by the court into whether the client has been fully advised as to the client's right to testify, the client states a desire to testify, but

is being prevented by the lawyer from testifying, the lawyer may have no other choice than to disclose to the court the client's intention to testify falsely.

This approach must be distinguished from the solution offered in the initially ABA-approved Defense Function Standard 7.7 (1971). This proposal, no longer applicable, [FN10] permitted a lawyer, who could not dissuade the client from committing perjury and who could not withdraw, to call the client solely to give the client's own statement, without being questioned by the lawyer and without the lawyer's arguing to the jury and false testimony presented by the client. This 'narrative' solution was offered as a model by the ABA and supported by a number of courts [FN11] on the assumption that a defense lawyer constitutionally could not prevent the client from testifying falsely on the client's own behalf and, therefore, would not be assisting the perjury if the lawyer did not directly elicit the false testimony and did not use it in argument to the jury.

The Committee believes that under Model Rule 3.3(a)(2) and the recent Supreme Court decision of *Nix v. Whiteside*, ---- U.S. ----, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986), the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury. Despite differences on other issues in *Nix v. Whiteside*, the Justices were unanimous in concluding that a criminal defendant does not have the constitutional right to testify falsely. More recently, this ruling was made the basis of the holding by the Seventh Circuit in *United States v. Henkel*, 799 F.2d 369 (7th Cir. 1986) that the defendant 'had no right to lie' and, therefore, was not deprived of the right to counsel when the defense lawyer refused to present the defendant's testimony which he knew was false.

FN1. The Committee notes that other prior opinions of this Committee relating to client perjury are not consistent with Model Rule 3.3. These include Formal Opinions 341 (1975) and 216 (1941) and Informal Opinions 1318 (1975) and 869 (1965). Lawyers are cautioned to investigate the applicable local ethical rules and opinions governing a lawyer's responsibility with relation to client perjury, since local standards may differ from Rule 3.3 as adopted by the ABA House of Delegates in August, 1983.

FN2. This requirement of withdrawal from the representation stated in Formal Opinion 287 is inconsistent with Model Rule 1.16, which, under the facts posited in the Opinion, provides only for discretionary withdrawal.

FN3. This explanation, at least, is consistent with the distinction between information relating to continuing crime, which is not protected by the attorney-client privilege, and information relating to past crime, which is protected. *See, e.g., In re* Grand Jury Proceedings, 680 F.2d 1026 (5th Cir. 1982) (discussing crime/fraud exception to attorney-client privilege).

FN4. The Committee assumes that there were no further proceedings and that this was a final decree. This is not to say, however, that the judgment could not be set aside by the court if the court subsequently learns of the fraudulent representations of the client.

FN5. Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

FN6. The validity of Formal Opinion 287 in this regard was initially put in question in 1969 when the ABA adopted DR 7-102(B)(1). This provision required a lawyer to reveal to an affected person or tribunal any fraud perpetrated by the client in the course of the representation discovered by the lawyer. Because of its apparent inconsistency with DR 4-101, prohibiting a lawyer from revealing a confidence or secret of the client, DR 7-102(B)(1) was amended in 1974 to provide an exception to the duty to reveal the client's fraud when the information is protected as a privileged communication. Formal Opinion 341 (1975) interpreted the words 'privileged communication' to encompass confidences and secrets under DR 4-101, thereby making the amendment consistent with Formal Opinion 287.

FN7. The Comment to Rule 3.3 suggests that the lawyer may be able to avoid disclosure to the court if the lawyer can effectively withdraw. But the Committee concludes that withdrawal can rarely serve as a remedy for the client's perjury.

FN8. *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

FN9. The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never 'know' that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4- 3.2(a) and (b) (1979) are also applicable.

FN10. This particular Standard was not approved by the ABA House of Delegates during the February, 1979 meeting when the Standards were reconsidered and otherwise approved.

FN11. *See, e.g.*, United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980); State v. Lowery, 111 Ariz. 26, 28-29, 523 P.2d 54, 56-57 (1974).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-376 **August 6, 1993**
The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests

A lawyer in a civil case who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court. In this context, the normal duty of confidentiality in Rule 1.6 is explicitly superseded by the obligation of candor toward the tribunal in Rule 3.3. The lawyer must first attempt to persuade the client to rectify the situation or, if that proves impossible, must herself take whatever steps are necessary to ensure that a fraud is not perpetrated on the tribunal. In some cases this may be accomplished by a withdrawal from the representation; in others it may be enough to disaffirm the work product; still others may require disclosure to opposing counsel; finally, if all else fails, direct disclosure to the court may prove to be the only effective remedial measure for client fraud most likely to be encountered in pretrial proceedings.

The Committee has been asked to address the ethical obligations of a lawyer in a civil case who is informed by her client after the fact that the client lied in responding to interrogatories and deposition questions, and supplied a falsified document in response to a request for production of documents.

The Committee most recently reviewed the professional obligations of a lawyer with regard to client fraud in the context of an adjudicative proceeding in ABA Formal Opinion No. 87-353 (1987). In that opinion, dealing with client perjury, the Committee reconsidered several earlier opinions in light of the Model Rules of Professional Conduct (1983, amended 1993), particularly Rule 3.3 ("Candor Toward the Tribunal").[1] The Committee adopted a comple-

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1. Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered

Tab B

mentary interpretation of Rules 3.3(a)(2) and (4) and concluded that the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3 superseded the lawyer's responsibility to keep client confidences under Rule 1.6.[2] "It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury." The opinion goes on to state that

It is apparent to the Committee that, as used in Rule 3.3(a)(2), the language "assisting a criminal or fraudulent act by the client" is not limited to the criminal law concepts of aiding and abetting or subornation. Rather, it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process.

It is with this overall purpose in mind that the Committee now addresses the application of the Model Rules in the pretrial situation presented by the current inquiry.

A lawyer represents the agent for an insurance company in a contract action filed by an insured against both the company and the agent. The lawsuit was filed on a policy requiring proof of claim within 60 days of loss. The insured alleged that he had put such proof in the regular mail addressed to the agent on the 59th day, thereby providing timely notice under law and complying with the terms of the policy. Unfortunately, the insured did not obtain a

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material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b)The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c)A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

2. Rule 1.6 Confidentiality of Information

(a)A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b)A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer to allegations in any proceeding concerning the lawyer's representation of the client.

mailing receipt or other evidence of posting. Subsequently, the insurance company refused to pay the claim on the ground that the required notice was never received.

Because the defendant agent would not be amenable to a trial subpoena, he was one of the first to be deposed after suit was filed. At the deposition, the plaintiff/insured hoped to prove timely mailing and receipt by the agent, while the defendants hoped to establish a basis for summary judgment in view of the lack of such timely mailing or receipt, as indicated by evidence offered by the agent in pretrial discovery. When asked at the deposition if he had received proof of claim by the 60th day, the agent replied that he had not, and produced a copy of his office mail log confirming this, which was marked as an exhibit in the deposition.

The deposition was transcribed according to local custom and the agent later stopped by the lawyer's office to review and sign it. The next day the lawyer sent a letter to plaintiff's counsel, pointing out plaintiff's serious problem of lack of proof of compliance with the policy requirement of timely notice, and enclosing a draft copy of a motion for summary judgment. She intended to file the motion as soon as she received notice from the court reporter that the deposition had been duly signed, sealed and filed with the court. Failing a favorable ruling on said motion (or reasonable settlement proposal by plaintiff), the lawyer planned to use the deposition at trial pursuant to Federal Rule of Evidence 804(b)(1).

Several days later, on a business trip, the lawyer ran into her client the agent, at the airport. In the course of discussing the status of the case and the upcoming trial, the agent advised the lawyer that he had lied about not receiving insured's notice. In fact, it had arrived in his office on the 60th day and his secretary had entered its receipt in the office mail log with other incoming correspondence before placing the mail on his desk. The agent, however, had shredded the letter and altered the mail log to conceal the fact of receipt.

In circumstances where a lawyer has offered perjured testimony or falsified evidence in an adjudicative proceeding, the Model Rules, like the predecessor Model Code of Professional Responsibility (1969, amended 1980), adopt the view that remedial measures must be taken. See Rule 3.3, Comment. Although Rule 1.6 generally affords protection to client confidences, its confidentiality requirement is qualified by its own provisions, and by the effect of other Rules. Most notably in this context, the duty of confidentiality mandated by Rule 1.6 is explicitly superseded by the duty of disclosure in Rule 3.3. See Rule 3.3(b).[3] Thus, as was made clear in Formal Opinion No. 87-353, disclosure of a client's perjury is required by Rule 3.3 where a lawyer has offered material evidence to a tribunal and comes to know of its falsity, or when disclosure of a material fact is necessary to avoid assisting a criminal or

3. See Note 1 supra.

fraudulent act by the client.

In the case at hand, there is no issue as to knowledge on the lawyer's part of the client's fraud; the client has made a direct admission to the lawyer after the fact. Similarly, there is no doubt that the perjury and other fraudulent acts of the client relate to a material fact, in that a necessary element of plaintiff's case is at issue. However, because the client's misrepresentations took place during pretrial discovery and none occurred in open court, the question arises whether the applicable rule of conduct is Rule 3.3 or Rule 4.1 ("Truthfulness in Statement to Others"). [FN4] The issue is whether perjury or fraud in pretrial discovery should be regarded as a lack of candor toward the tribunal, governed by Rule 3.3, or untruthfulness toward the opposing party and counsel, as to which Rule 4.1 is the applicable provision. Unlike the duty of candor toward a "tribunal" in Rule 3.3, the duty of truthfulness toward "others" in Rule 4.1 does not expressly trump the duty to keep client confidences in Rule 1.6. If it is Rule 4.1 rather than Rule 3.3(a) that applies in this context, the prohibition on disclosure of client confidences in Rule 1.6 must be given full effect.

It is clear that once the deposition is signed and filed and the motion for summary judgment submitted to the court, a fraud has been committed upon the tribunal which would trigger application of Rule 3.3(a). Indeed, we think that even before these documents are filed there is potential ongoing reliance upon their content which would be outcome-determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement. Support for this view is found in case law holding that the duty of a lawyer under Rule 3.3(a)(2) to disclose material facts to the tribunal implies a duty to make such disclosure to opposing counsel in pretrial settlement negotiations. See, e.g., Kath v. Western Media, Inc., 684 P.2d 98, 101 (Wyo.1984) (letter contradicting testimony of a key witness should have been disclosed to opposing counsel in connection with settlement negotiations, under Rule 3.3 and DR 7-102(A)); Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507, 509 (1983) (fact that client had died should have been disclosed to opposing counsel in pretrial settlement negotiations.)

Further supporting the applicability of Rules 3.3(a)(2) and (4) to pretrial discovery situations is the fact that while paragraphs (a)(1) and (3) presuppose false or incomplete statements made to the tribunal, neither paragraph (a)(2) nor (a)(4) expresses any such condition precedent that the tribunal must have been aware of the crime, fraud, or false evidence.

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4. Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Committee is therefore of the view that, in the pretrial situation described above, the lawyer's duty of candor toward the tribunal under Rule 3.3 qualifies her duty to keep client confidences under Rule 1.6. Continued participation by the lawyer in the matter without rectification or disclosure would assist the client in committing a crime or fraud in violation of Rule 3.3(a)(2).[5] Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer's duty to take reasonable remedial measures under Rule 3.3(a)(4), including disclosure if necessary, according to the complementary interpretation of paragraphs (a)(2) and (a)(4) in ABA Formal Opinion No. 87-353.

It is important to note, however, that the Committee does not assert, nor should it be inferred from its analysis of Rule 3.3(a) in Opinion No. 87-353, that disclosure to the tribunal is the first and only appropriate remedial measure to be taken in situations arising under Rule 3.3(a)(4). As the Comment to Rule 3.3 makes clear, the duties of loyalty and confidentiality owed to her client require a lawyer to explore options short of outright disclosure in order to rectify the situation. Thus, the lawyer's first step should be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client's wrongdoing or breaching the client's confidences, depending upon the rules of the jurisdiction and the nature of the false evidence. For example, incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal. Although this approach would not appear to be feasible in the case at hand, it is nevertheless the type of reasonable remedial measure that should be explored initially by a lawyer when confronted by a situation in which she realizes that evidence she has offered or elicited in good faith is false.

In this case, if efforts to persuade the client to rectify fail, the lawyer must herself act to see that a fraud is not perpetrated on the tribunal. At a minimum she must withdraw from the representation, so as to avoid assisting the client's fraud in violation of Rules 3.3 and 1.2(d). See Rule 1.16(a)(1) (withdrawal mandatory where continued representation would result in a violation of rules of professional conduct). However, the Committee observed in Opinion No. 87-353, "withdrawal can rarely serve as a remedy for the client's

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5. The more general prohibition against assisting client fraud contained in Rule 1.2(d) would also be violated were the lawyer to continue to represent the client in the matter without taking steps to rectify the fraud, up to and including giving notice of withdrawal and disaffirmance of her work product. See ABA Formal Opinion No. 92-366 (August 8, 1992).

perjury." While withdrawal may enable the lawyer to avoid knowing participation in the commission of perjury, Rule 3.3(a)(4) specifically requires the lawyer to do more than simply distance herself from the client's fraud when she has offered evidence that she learns was false; she must take "reasonable remedial measures" to alert the court to it. Moreover, under paragraph (b) of Rule 3.3, the lawyer's duties in this regard "continue to the conclusion of the proceeding," presumably even if the lawyer has withdrawn from the representation before this time.

It is possible that so-called "noisy withdrawal" procedures could be effective in the instant case, albeit in a way that is tantamount to disclosure. See ABA Formal Opinion No. 92-366 (August 8, 1992). Utilization of the withdrawal/disaffirmance approach suggested by Opinion No. 92-366 is appealing as a remedial measure because it is less intrusive on the confidential relationship between lawyer and client than outright disclosure to the tribunal under Rule 3.3(a). It may also have the advantage of directly and expeditiously rectifying the fraud in a way that does not compromise the tribunal and prevent the case from proceeding. On the other hand, "noisy withdrawal" may not be an entirely effective means of dealing with the type of client fraud likely to occur in the pretrial stages of a case. For instance, withdrawal would not be sufficient to correct the fraud's impact on the case if the plaintiff decided to drop his or her lawsuit because of a perceived lack of proof prior to or notwithstanding the "noisy withdrawal." Also, a "noisy withdrawal" does not necessarily put either successor counsel or the opposing party on notice as to why the documents are being disaffirmed. Thus, notwithstanding withdrawal and disaffirmance, the fraud could continue to adversely affect the proceedings and ultimate disposition of the case. Direct disclosure under Rule 3.3, to the opposing party or if need be to the court, may prove to be the only reasonable remedial measure in the client fraud situations most likely to be encountered in pretrial proceedings.

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 741
Date Issued: March 1, 2010

TOPIC: Lawyer learns after the fact that a client has lied about a material issue in a civil deposition.

DIGEST:

A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics Opinion 712.

RULES:

RPC 3.3, 1.6

QUESTION:

What are a lawyer's duties and obligations when the lawyer learns after the fact that the client has lied about a material issue in a civil deposition?

OPINION:

This opinion provides guidance under the newly promulgated New York Rules of Professional Conduct, 22 NYCRR 1200 et seq. (April 1, 2009) (RPC), for a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case. As explained in detail below, this opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially.

Lawyers are ethically obliged to represent their clients competently and diligently and to preserve their confidential information. At the same time, lawyers, as officers of the court, are ethically and professionally obliged not to assist their clients in perpetrating frauds on tribunals or testifying falsely. Balancing the duties of competent representation, client confidentiality and candor to the tribunal requires careful and thoughtful analysis.

Tab C

Rules of Professional Conduct

Effective April 1, 2009, the New York Rules of Professional Conduct, in RPC 3.3 (a)(3), forbid a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client false testimony:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Two other provisions of RPC 3.3 are also relevant here. RPC 3.3 (b) provides that a lawyer who "represents a client before a tribunal and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In addition, a lawyer is duty bound to "correct a false statement of material fact previously made to the tribunal by the lawyer." RPC 3.3 (a) (1).

RPC 3.3 (c) requires a lawyer to remedy client false testimony "even if compliance requires disclosure of information otherwise protected by Rule. 1.6." The lawyer's duty of confidentiality is contained in RPC 1.6, which states that a lawyer shall not knowingly reveal confidential information, including information protected by the attorney-client privilege, except in six enumerated circumstances. One of those circumstances is "when permitted or required under these Rules or to comply with other law or court order." (RPC 1.6(b)(6).) Under the explicit language of RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court or known client false testimony or to correct prior false statements offered by the lawyer supersedes the lawyer's duty to maintain a client's confidential information under RPC 1.6.[1]

NYCLA Ethics Opinion 712 Is Superseded Because It Was Based upon the Old Code

The lawyer's duty to remedy false statements by disclosure of confidential information if necessary represents a change in the ethics rules, and requires us to revisit and withdraw our prior opinion on client false testimony in depositions.

In a prior opinion on this issue, we stated that a lawyer who learns of a client's past false testimony at a deposition must maintain the confidentiality of that information but cannot use it in settlement or trial of the case. The former Code's protection of client confidences formed the basis for NYCLA Ethics Opinion 712, www.NYCLA.org, 1996 WL 592653 (1996), which addressed the issue of admitted past client false testimony in a civil deposition. That opinion

[1] The Committee notes that Section 4503 of the New York Civil Practice Law and Rules ("C.P.L.R.") provides that unless the client waives the privilege, an attorney...shall not disclose or be allowed to disclose such communication. RPC 3.3 thus seemingly contradicts the C.P.L.R. The apparent contradiction between Section 4503 of the C.P.L.R. and the RPC 3.3 has not been addressed by any court thus far. Resolution of the contradiction is a matter of law, and Committee opinions do not address matters of law.

analyzed the conflict between the lawyer's duty to preserve client confidences under former DR 4-101, and the lawyer's competing duty to avoid using perjured testimony or false evidence under former DR 7-102. We concluded, in Ethics Opinion 712, that the lawyer may not use the admitted false testimony, but also may not reveal it: "The information that the testimony was false may not be disclosed by the lawyer." The lawyer could ethically argue or settle the case, provided that the lawyer refrained from using the false testimony.

NYCLA Ethics Opinion 712 was based upon the prior Code of Professional Responsibility, which was superseded by the Rules of Professional Conduct on April 1, 2009. In light of the adoption of RPC 3.3 on April 1, 2009, N.Y. County 712 is no longer valid, and accordingly does not provide guidance for conduct occurring after April 2009.[2]

Is a Deposition Tantamount to Testimony before a Tribunal?

An important question under the new rules is whether deposition testimony is considered to be different from trial testimony.

The text of the rules does not explicitly refer to depositions and other pretrial proceedings in civil cases. RPC 3.3 (a) (3) applies when a witness, the client or the lawyer "has offered material evidence" that the lawyer learns to be false, and RPC 3.3 (b) applies to "criminal or fraudulent conduct related to the proceeding." RPC 1.0 (w) defines "Tribunal" as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." RPC 1.0 (w).

The literal language of the RPC 3.3 (a) (3) applies when a lawyer "has offered material evidence," which the lawyer later comes to learn was false. While the phrase is not defined in the rules, the taking of a deposition is no different from calling a witness at a trial. Under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial.

While not formally adopted as part of the Rules, the comments to the New York Rules of Professional Conduct explicitly contemplate the applicability of Rule 3.3 to depositions:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. ... It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

Rules of Professional Conduct 3.3 comment [1].

[2] The New York State Bar Association has opined (Opinion 831) that if client fraud occurred before the effective date of the New York Rules of Professional Conduct, April 1, 2009, and the fraud is protected as a client confidence or secret (DR 4-101(A)), then an attorney may not reveal the fraud.

We conclude that testimony at a deposition is governed by RPC 3.3, and is subject to the disclosure provisions of RPC 3.3 (c). False testimony at a deposition may be perjury, punishable as a crime. The victim of the perjury is the adversary party, which may rely on the false testimony, and the justice system as a whole even if the deposition is not submitted to a court, or not submitted to the court for months or even years after the testimony is reduced to transcript form.

Remediation of False Testimony at a Deposition

A lawyer's duty under RPC 3.3 comes into effect immediately upon learning of the prior testimony's falsity, and requires a lawyer to remedy the false testimony. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony.

Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the court.

Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See RPC 1.13 (organization as client).

Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

When faced with the necessity to remedy false deposition testimony, a lawyer no longer has the option to simply withdraw from representation while maintaining the client confidential information.[3] Prior to the adoption of the New York Rules of Professional conduct in April 2009, when remonstration failed, the attorney was presented with a dilemma. The attorney could not reveal a client confidence, and yet could not stand by and allow false testimony to be relied on by others. Withdrawal was the only option. The Committee now concludes that withdrawal from representation is not a sufficient method of handling false testimony by a client where prior remonstration has failed to correct the false deposition testimony. Withdrawal, without more, does not correct the false statement, and indeed increases the likelihood that the false statement, if unknown by a substituting attorney, will be presented to a tribunal or relied upon by the adverse party. Unless in withdrawing, the lawyer also communicates the problem sufficiently to enable the false testimony to be corrected, withdrawal from representation is no remedy.

Accordingly, a lawyer is required to remedy the false testimony. Depending on the circumstances a lawyer may be able to correct the false testimony or withdraw the false statement. RPC 3.4 directs a lawyer to abstain from preserving known false testimony. A lawyer may not "participate in the creation or preservation of evidence when the lawyer knows

[3] Pursuant to RPC 1.6, confidential information includes the definition of confidences and secrets contained in former DR 4-101(A).

or it is obvious that the evidence is false." RPC 3.4 (a) (5). Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement.

Ultimately the false testimony cannot be perpetuated. If remonstration is not effective, the attorney must disclose the false testimony. However, disclosure of client confidential information should be limited to the extent necessary to correct the false testimony.

Knowledge of Falsity under RPC 3.3 and 1.0

New York lawyers should note that the duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer "comes to know of its falsity. . .." RPC 3.3 (a) (3). The lawyer may refuse to introduce, in a civil case, evidence "that the lawyer reasonably believes is false." RPC 3.3 (a) (3), (emphasis added). Thus, it is only when the lawyer knows that the prior testimony is false that the rules trigger a duty to take corrective action.

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) defines knowledge as "actual knowledge of the fact in question," which "may be inferred from circumstances."

While there is no known precedent under the 2009 Rules, some guidance is provided by authorities decided under the prior rules. In *In re Doe*, the Second Circuit Court of Appeals articulated the standard of knowledge required to trigger reporting to the tribunal under former DR 7-102:

> [T]he drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.
>
> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

In re Doe, 847 F.2d 57, 63 (2d Cir. 1988). While the Court's discussion of a lawyer's duty to report a fraud on the tribunal dealt with a non-client's fraud, the Court's cogent analysis of the "knowledge" standard also applies to a lawyer's duty with respect to a client's fraud on a tribunal. It is clear that only actual knowledge triggers the duty to report the fraud on the tribunal. In *In re Doe*, the Court held that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report.

While the following case does not directly address the ethics rules, it may, nevertheless, provide further guidance by way of analogy, and illustrates the notion that actual knowledge may be gleaned from the circumstances. In *Patsy's Brand Inc. v. I.O.B. Realty et al.*,2002 U.S. Dist. LEXIS 491, (vacated by *In re Pennie & Edmonds LLP*, 2003 U.S. app LEXIS 4529 (2d Cir. 2003)) the United States District Court for the Southern District of New York sanctioned defense counsel for F. R.Civ. P. Rule 11 violations. There, a law firm having substituted as counsel for defendant offered an affidavit that prior counsel had disavowed in withdrawing. The Court stated that "rather than risk offending and possibly losing a client, counsel simply closed their eyes to the overwhelming evidence that statements in the client's affidavit were not true." The Court found that by the time the law firm substituted as counsel, the affidavit had been conclusively proven to be false in very material respects. Counsel was aware that their client had made prior false statements under oath. Although the law firm discussed the false statements and the affidavit with their client, and relied on the client's explanation, the Court determined that all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on (their client's) statements.[4]

While *Patsy's Brands* was decided under Rule 11, a lawyer confronting the question of what may constitute actual knowledge may find some guidance in that opinion and in *Doe*, above.

Conclusion

A lawyer who comes to know that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer does disclose the client's false statement to the tribunal, the lawyer must minimize the disclosure of client confidential information.

[4] The finding was reversed on appeal because the law firm had not been given an opportunity to withdraw the false affidavit before sanctions were levied.

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 837 (3/16/10)

Topic:	Confronting false evidence and false testimony
Digest:	Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidence or secret" no longer exists.
Rules and Code:	Rule 1.0(k); Rule 1.6; Rule 1.16; Rule 3.3; DR 4-101; DR 7-102
Comments:	Comment 3 to Rule 1.6, Comments 7, 8, 10 & 11 to Rule 3.3

QUESTION

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document and some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

(1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

(2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

Tab D

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information is protected as a confidence or secret.*

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

> If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

> A lawyer who represents a client before a tribunal and who knows that a person . . . 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.

Rule 3.3(c) provides:

> The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7-102(B) (1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" -- which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1) . . . .

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known,"

[1] Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).

"know," or "knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[2]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

> The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C.

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[2] To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require re-analysis in light of the existing Rules.

Sisk, *Rule 1.6: Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics § 5:6(d)(4)(E) (2009 ed.).

13. As elaborated by Professor Sisk, *Rule 3.3: Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3) (2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. *See* Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in

[3] The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied in situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g., United States v. Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y. 2009) (quoting *U.S. v. Richard Roe, Inc.* for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in future court decisions and ethics opinions.

criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See, e.g., People v. Andrades*, 4 N.Y.3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) – (8)); *People v. DePallo*, 96 N.Y.2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding ...." The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n.4 (2009).

Application to the facts on this inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.*, N.Y. County 732 (2004) at p.5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, e.g.*, N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding -- he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation .... not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunalas is reasonably necessary to remedy the situation ....

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR § 4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5.

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b) (1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

(41-09, 46-09)

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-370 **Februrary 5, 1993**
Judicial Participatatin in
Pretrial Settlement Negotiations

A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. A judge participating in pretrial settlement discussions may inquire as to a lawyer's settlement authority or advice to the client concerning settlement terms, but should not require a lawyer to make such disclosures where the information is subject to Rule 1.6 and the lawyer does not have authority to disclose them.

With the increasing and salutary initiatives in the areas of alternative dispute resolution and pretrial settlement, a process sponsored and supported by the courts and the Bar, certain issues concerning the responsibilities of both attorneys and those conducting such proceedings have become apparent and should be addressed.

In this instance the Committee has been asked whether the Model Rules of Professional Conduct (1983, amended 1993), prohibit a lawyer from disclosing to a judge conducting pretrial settlement discussions the limits of settlement authority given by the client. Further, the Committee is asked whether a lawyer may properly be required to disclose to a judge in a settlement conference the lawyer's advice to the client regarding settlement.

The specific facts presented to the Committee are as follows: During pretrial settlement negotiations the judge meets separately with each counsel in chambers, all counsel having notice of the meeting. The judge, without prior notice, asks the lawyer to reveal the limits of settlement authority conferred on the lawyer by the client.[1] The judge also asks the lawyer to disclose the settlement terms the lawyer will recommend to the client.

As a preliminary matter, we note that in many states, and in the federal system, a judge has the discretion to mandate participation of counsel in a pretrial settlement conference. In addition, Model Rule 3.2 imposes on a lawyer the duty to seek expeditious resolution of a matter consistent with the interests of the client. Reasonable settlement is often better for the client than the fortuities of a trial. A lawyer should therefore cooperate to the fullest extent

1. The phrase "limits of settlement authority" is understood to mean the minimum amount the plaintiff will accept or the maximum amount the defendant will offer.

Tab E

possible in a pretrial settlement conference.

A Lawyer's Authority and Advice Regarding Settlement are Confidential Matters

Protected by Model Rule 1.6

Model Rule 1.6.[2] prohibits the disclosure of information relating to the representation without the client's informed consent. Both the limits of settlement authority and the lawyer's advice to the client regarding settlement are clearly "information relating to the representation" within the meaning of Rule 1.6. Therefore, disclosure of this confidential information is prohibited in the absence of consent by the client after consultation,[3] unless the disclosure (1) falls within one of the exceptions specified by Rule 1.6(b), or (2) is "impliedly authorized to carry out the representation."

Neither of the Rule 1.6(b) exceptions applies to the information sought by the judge in the instances here under consideration. The requested disclosures also cannot ordinarily be considered as "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 discusses the nature of the "impliedly authorized" exception, defining it as a "disclosure that facilitates a satisfactory conclusion."[4] The ethical propriety of the requested disclosures turns on whether these disclosures would facilitate a conclusion satisfactory to the client.

While a lawyer normally has implied authority to enter into routine stip-

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2. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1)to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2)to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The meaning of "consultation" is given in the Terminology Section of the Model Rules:

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

4. The Comment to Rule 1.6 states in relevant part:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

ulations and to admit matters not in dispute, the settlement parameters sought by the judge are neither routine nor uncontested. The potential for adversely affecting the client's position, or leading to a disposition of the case that is not satisfactory to the client, will ordinarily be significantly increased by disclosure of the client's ultimate settlement position. Such information is confidential and its disclosure cannot be said to be impliedly authorized simply by reason of the lawyer's representation of the client. Although there will be occasions when a lawyer's authority to reveal a client's settlement position may be implied from the circumstances, no such implication arises simply because the inquiry is made by a judge. Such information should not be disclosed even to a judicial mediator without informed client consent. [5]

While a Judge, During Settlement Discussions, May Inquire as to a Lawyer's Settlement Authority or Advice to the Client Concerning Settlement Terms, a Judge Should Not Require a Lawyer to Make Such Disclosures Where the Information is Subject to Rule 1.6 and the Lawyer Does Not Have Authority to Disclose Them

We turn to the question of whether a judge is precluded from asking such questions of counsel, or from requiring counsel to answer them, by the Model Code of Judicial Conduct (1990) ("MCJC") or the predecessor Code of Judicial Conduct (1972) ("CJC"). While MCJC Canon 3B(7)(d) permits judges to participate in settlement conferences, [FN6] it does not override, nor permit an exception, either explicit or implicit, to the obligation of confidentiality imposed on a lawyer by Rule 1.6.

The predecessor Code of Judicial Conduct (1972) did not contain a counterpart to MCJC 3B(7)(d). Neither did it contain an express prohibition against a judge's participation in voluntary pretrial settlement conferences with the parties and their counsel. If, however, the judge participated in settlement discussions to such an extent that the judge became a witness to crucial fact issues, disqualification would be enforced under Canon 3C(1)(a). See, e.g., Collins v. Dixie Transportation, Inc., 543 So.2d 160 (Miss.1989).

In the pretrial settlement process, the judge's role is to "encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." MCJC, from the Commentary to Canon 3B(8). It is not appropriate for the judge to compel

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5. The disclosure of settlement limits or recommendations by an attorney where settlement authority is contractually retained by an insurance carrier or other third party is not addressed in this opinion.

6. "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." MCJC Canon 3B(7)(d).

lawyers to make confidential admissions which may be against their clients' interests.[7]

In Kothe v. Smith, 771 F.2d 667 (2d Cir.1985), the court criticized a judge's "excessive zeal" in imposing sanctions on a party who did not settle a case prior to trial within the range recommended by the court, stating "Offers to settle a claim are not made in a vacuum.... [T]he process of settlement is a two-way street, and a defendant should not be expected to bid against himself." Kothe, at 669-670; see also Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937) ("The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged.").

Thus we conclude a judge may not require a lawyer to disclose settlement limits authorized by the lawyer's client, nor the lawyer's advice to the client regarding settlement terms. This is not to suggest, however, that a judge may not, in seeking to facilitate a settlement, and in an appropriate manner, make inquiry of a lawyer as to those matters. For example, while attempting to settle a case a judge may well feel it appropriate and helpful to inquire of counsel the limits of his settlement authority or whether counsel will recommend to the client the terms of settlement the judge recommends. Such an inquiry, if exercised within limits, is proper. Those limitations are formed by the ethical constraints imposed upon lawyers by Rule 1.6 not to disclose information relating to the representation without prior client consent or other expressly-permitted excuse.

The judge should be sensitive to these ethical constraints on counsel and sensitive as well to the superior position of authority the judge enjoys with respect to the lawyer and the effect an inquiry from one in the judge's position may have upon lawyers who must appear before him, particularly those who appear before the judge frequently. Accordingly, a judge making such an inquiry should acknowledge the lawyer's ethical duties and assure the lawyer that the inquiry is not intended to pressure the lawyer to violate them. Properly phrased and sincerely expressed, such prefatory remarks will help strike the balance between the perceived need of the judge to inquire and the ethical duty of the lawyer to comply with relevant confidentiality rules.

If the lawyer, in response to the inquiry, expresses a reticence to disclose

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7. The Advisory Committee's Notes to the 1983 amendment to Fed.R.Civ.P. 16(c) state in relevant part:

> The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rules be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

such information on ethical grounds, the judge should not pursue the inquiry further.

The question may also arise whether a lawyer is justified in lying or misrepresenting in response to questions about the limits of settlement authority on the basis that the judge is behaving improperly and has no right to the information or a truthful answer. Model Rule 4.1 states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." The Comment to Rule 4.1 states in relevant part:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category....

While as explained in the Comment, supra, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Conclusion

Despite the benefits of pretrial settlement of litigated matters, the Committee is of the opinion that, absent informed client consent, a lawyer should not reveal to a judge, and a judge conducting pretrial settlement discussions should not require a lawyer to disclose, the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439 **April 12, 2006**

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules[1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

Tab F

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).[2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

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2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client . . . ." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.[3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.[4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.[5] Still others have suggested that lawyers should strive to balance the

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HODES, THE LAW OF LAWYERING § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.[7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370[8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,[9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

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6. *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,[10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397[11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.[12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.[13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

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10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.[14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,[15] and the setting aside of settlement agreements,[16] as well as civil lawsuits against the lawyers themselves.[17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.[18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.[19]

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14. In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004)

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.[21]

(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are "the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential informa-

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

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tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-02
(March 2009)

The inquirer deposed an 18 year old woman (the "witness"). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer's client.

During the course of the deposition, the witness revealed that she has "Facebook" and "Myspace" accounts. Having such accounts permits a user like the witness to create personal "pages" on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user's permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness's testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness's permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to "friend" her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

Tab G

The inquirer asks the Committee's view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the "Rules") are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally "ordering" the conduct that would be done by the third person. That might depend on whether the inquirer's relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer's firm, then that lawyer's conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party's conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; ...

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a. [1]

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

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[1] The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person,** which provides in part that

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . .
>
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

"Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so. " The opinion can be found at http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2

The Oregon Supreme Court in *In Re Gatti*, 8 P3d 966 (Ore 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

"The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania's Rule 8.4], and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree." The opinion can be found at http://www.publications.ojd.state.or.us/S45801.htm

Following the *Gatti* ruling, Oregon's Rule 8.4 was changed. It now provides:

"(a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See *Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis*, 32 Seattle Univ. L. Rev.123 (2008), and *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential

[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

Tab H

benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[4] While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies,

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[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in

most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

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[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 843 (9/10/10)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York

Tab I

Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's

[1] One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* – and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"[1] request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

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[1] Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

Similarly, ABA Model Rule 4.2 says: **"**In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.

In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory status and the power to enforce corporate policy are not enough. (*Id*. at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id*. at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, my send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party

to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id*. at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id*. at *6.) "Rather, the facts show and the court finds that he was *attempting to obtain information for use in the litigation* that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid*., emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . .

the very policy purpose for the no contact rule." (*Ibid*.) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id*. at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.

The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

a) Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.[2]

[2] *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid*.) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id*. at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by

[Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id*. at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b) Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference .[3]

[3] The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

c) Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the

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with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id*. at pp. 453-454.)

[4] There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. "[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

d) Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id*. at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary,

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(Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.

suggest support for our conclusion that there was no ethical violation to begin with." (*Id.* at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports, supra*.))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports*, *supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports*, *supra*, 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id*., at 698-699.)[5]

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

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[5] The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id*. at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id*. at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id*. at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id*. at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were $100,000 when he knew they were $300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id*. at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid*., citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id*. at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id*., emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id*.)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

> omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id*. at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York

Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

SHARE

Formal Opinion 2012-2: JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (*see* American Bar Association Formal Opinion 319 ("ABA 319")), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (*see WSJ Law Blog* (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual

assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (*Juror's Tweets Upend Trials,* Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See* New York Pattern Jury Instructions, Section III, *infra*.)However, 79% of judges who responded to a Federal Judicial Center survey admitted that "they had no way of knowing whether jurors had violated a social-media ban." (*Juror's Tweets, supra*.) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal "communication." Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the "Rules"), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.[1]

The Committee believes that the principal interpretive issue is what constitutes a "communication" under Rule 3.5. We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror's social media activities, the lawyer must promptly reveal the improper conduct to the court.

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney's Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for *not* conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff's counsel investigated the juror's civil litigation history using Missouri's automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.[2] Although the court upheld plaintiff's request for a new trial based on juror nondisclosure, the court noted that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that "litigants should endeavor to prevent retrials by completing an early investigation." *Id.*at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff's counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court's ruling was not prejudicial, the Superior Court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel." *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).[3]

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a "friend request" to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to "friend" a party, even if the "friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication" and is therefore *prohibited* by the rule against *ex parte* communications with represented parties.[4] In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party's social networking personal webpage, which is accessible to all website users, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly *permitted*." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers' Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not 'friend' the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." *Id.* NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and

general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.[5]

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a "Communication"?

Any research conducted by an attorney into a juror or member of the venire's background or behavior is governed in part by Rule 3.5(a)(4), which states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order." The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney's purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for

the very purpose of communication, and automatic features or user settings may cause a "communication" to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror's social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of "communicate" and "communication," which are not defined either in the Rule or the American Bar Association Model Rules.[6]

Black's Law Dictionary (9th Ed.) defines "communication" as: "1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The information so expressed or exchanged." The Oxford English Dictionary defines "communicate" as: "To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across." Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines "communication" (for the purposes of discovery requests) as: "the transmittal of information (in the form of facts, ideas, inquiries or otherwise)."

Under the above definitions, whether the communicator intends to "impart" a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the "transmission of," "exchange of" or "process of bringing" information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her

profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably "communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), *infra.*

Although the text of Rule 3.5(a)(4) would appear to make any "communication"—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee's current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney's research or actions. However, other services may be more difficult to navigate depending on their functionality and each user's particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites' social functionality. An attorney may not, for example, send a chat, message or "friend request" to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a "communication" would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her

knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation.[7] In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney's associations or membership in a network or group in order to access a juror's information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating *any* Rule "through the acts of another." Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney's benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 ("PBA 2009-02") concluded that if an attorney uses a third party to "friend" a witness in order to access information, she is guilty of deception because "[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit." (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to "friend" an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys *may not* shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no "communication" occurs, the Committee notes the potential

impact of jury research on potential jurors' perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee's view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, *infra*, great benefit that can be derived from detecting instances when jurors are not following a court's instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge." Although the Committee concludes that an attorney may conduct jury research on social media websites as long as "communication" is avoided, if an attorney learns of juror misconduct through such research,

she *must* promptly[8] notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney.[9]

On this issue, the Committee notes that New York Pattern Jury Instructions ("PJI") now include suggested jury charges that expressly prohibit *juror* use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: "please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom." Moreover, PJI 1:10 states, in part, "in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . ." New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney's 2002).

The law requires jurors to comply with the judge's charge[10] and courts are increasingly called upon to determine whether jurors' social media postings require a new trial. *See, e.g., Smead v. CL Financial Corp.,* No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror's conduct is *mis*conduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a "conversation," it may not always be obvious whether a particular post is "connected with" the trial. Moreover, a juror may be permitted to post a comment "about the fact [of] service on jury duty."[11]

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that "lawyers may communicate with jurors concerning the verdict and case." (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via

social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that "it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror" to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. "Communication," in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another's perception*—including the fact that they have been researched.In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

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1. Rule 3.5(a)(4) states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order."

2. Missouri Rule of Professional Conduct 3.5 states: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order."

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that "if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court's supervisory control over the jury selection process would, as a practical matter, be obliterated." (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court's ruling from the public file.

4. California Rule of Profession Conduct 2-100 states, in part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 ("NYCBA 2010-2") and SDCBA 2011-2 (both addressing social media "communication" in the context of the "No Contact" rule) were helpful precedent for the Committee's analysis, the Committee is unaware of any opinion setting forth a definition of "communicate" as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," and also states "a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another." (Rule 8.4(c),(a).)

8. New York City Bar Association Formal Opinion 2012-1 defined "promptly" to mean "as soon as reasonably possible."

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee's purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. *People v. Clarke*, 168 A.D.2d 686 (2d Dep't 1990) (holding that jurors must comply with the jury charge).

11. *US v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) *aff'd*, 655 F.3d 288 (3d Cir. 2011) ("[The juror's] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing

more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.") (internal citations omitted).

iPad in Trial

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iPad Survey & Tutorial

Overview

The purpose of this presentation is to: 1) survey iPad and App usage and scope; 2) provide novice-level tutorial on loading documents; and 3) provide advanced-level tutorial on trial presentation. This is not a sales presentation. The speaker uses iPad without any opinion about competing tablets. The content is limited to the iPad and Apple Apps.

App Survey: This audience

Total audience	
Total iPad users	
Total iPad users for law	
Mail or Calendar	
PDF viewer	
Word processing	
Legal research	
Document display	
Deposition transcript	
Dictation	
Document scanning	
Cloud computing	

According to the ABA, in 2012, 33% of attorneys use a tablet for law related tasks:

91% of the 33% are using an iPad;

80% of the 91% use the iPad for Mail and Internet;

50% of the 91% use the iPad for contacts and calendars;

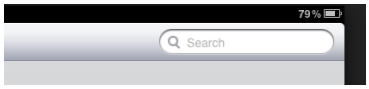
33% of the 91% use iPad research Apps

21% of the 91% use the iPad to regularly create documents.

App Store

App Store Icon

Search box



On August 1, 2013:

Legal Research = 41 search results.
Contract law = 37 search results.
Depositions = 51 search results.
Litigation = 102 search results.
Trial law = 66 search results.
Lease = 223 search results.
Divorce = 115 search results.
Rule against perpetuities = 0

Prices varies

From Black's Law ($54.99) to The Law Guide (Free)
Free trial samples

Resources

Blog Sites:

iPhoneJD.com
Tablet Legal.com
iPad4lawyers.squarespace.com
cogentlegal.com

Articles on iPad Apps for Lawyers:

Research: Google "*Apps for Lawyers*" yields:

rocketmatter.com "Manage your law firm in the palm of your hand."
mycase.com "Cloud-based software to manage your legal practice."
cobblestonesystems.com "Make contract management simple."

Kevin Caster's recommended Apps:

Mail, Calendar, Contacts: Preloaded apple Apps

PDF viewer & document display: GoodReader

Slide presenter: Keynote

Cloud service: Dropbox & iCloud

Legal research: Fastcase

Dictation: Hugo and Apple App built-in.

WordProcessing: Pages

Apps recommended by others:

Dropbox, Readdle Docs, GoodReader, FastCase, Penultimate, Circus Ponies, Notebook, Square, Trialpad, Dragon Dictation, iJuror, iTrackMail, Benot 4 for iPad, PDF expert, Transcript Pad, LogMeIn, NotesPlus, Keynote, Above The Law, BoxCryptor, Ilaro, Bloomberg Law Reports, ABA Journal, HeinOnlilne, IScotusNow, Law Stacks, SignNow, Presentation Clock, iTimeKeep, WordLens, KeyNote Remote, Bill 4 Time.

Apps recommended by this audience:

Document Load Tutorial

Level: Novice

Requirements: USB Cable, iTunes installed on Windows or Mac Desktop.

Purpose: Moving common types of electronic documents onto the iPad for use in an assigned App.

App: iTunes, File Sharing
Advantage: Speed, Volume, Reliability
Disadvantage: Not mobile, requires advance planning

Wireless Alternatives
Advantages: Mobility, spontaneity
Disadvantages: Requires wireless connection

a. Email attachments
Word and PDF documents can be opened, but not edited, in the iOS Mail App. Tap and hold to "Open in" an installed App.

b. Cloud service Apps
Dropbox
Hightail (formerly YouSendit)
Spider Oak
iCloud
Many others

c. Private server access
There are many ways to access a private server as a remote client, including remote desktop apps and connection interface built into other apps.

Loading documents (novice)

1. Plug

2. iTunes

Free download.
iTunes may launch automatically.
Respond to pop-up menus relating to set-up.

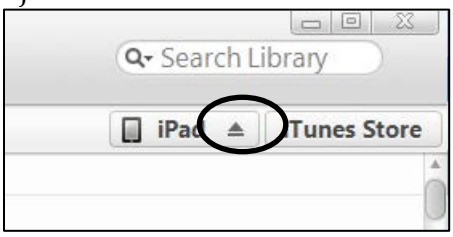
3. iPad

4. Apps

5. File Sharing

Choose App, then Add, and then browse to select files.

6. Eject



Document Display Tutorial

Level: Intermediate

Requirements: Correct cable adapter(s), cable, display (projector or monitor), switchbox (if shared); GoodReader App, PDF files.

Purpose: Display common digital documents for an audience to see.

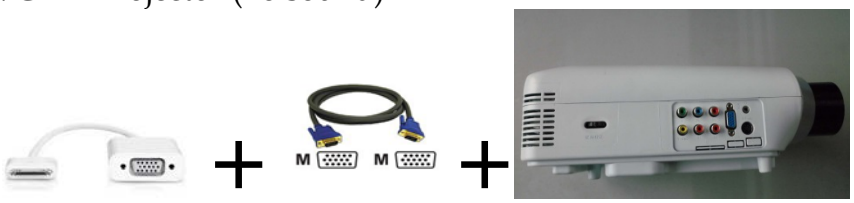
App: GoodReader
- Advantages: Low cost, flexibility, screen control
- Disadvantages: Moderately complex, limited annotations

Alternatives
- Mirroring (requires iPad 2 or newer)
- AirPlay (requires WiFi)
  - Photos
  - Video
- PDF Readers
  - Adobe Reader
  - PDF Reader Pro
  - iAnnotate
  - Many more
- Slide Presentations
  - Power Point
  - Keynote
- Trial Apps
  - Trial Director
  - Trial Pad
  - Exhibit View
  - Many more

Displaying Documents (intermediate)

1. Load Documents

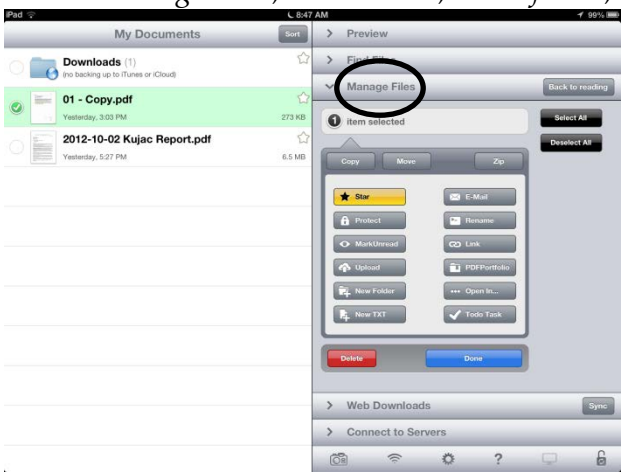
2. Connect
   These are examples only. <u>All devices and cables should be tested for compatibility</u>.
   VGA – Projector (no sound)



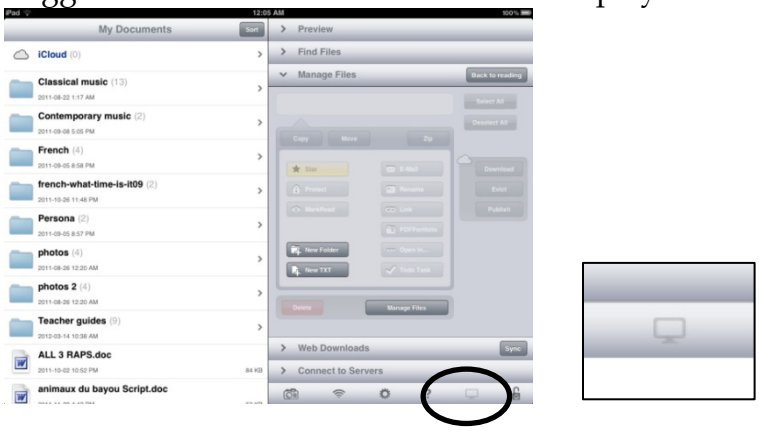
   HDMI - TV Monitor

3. GoodReader

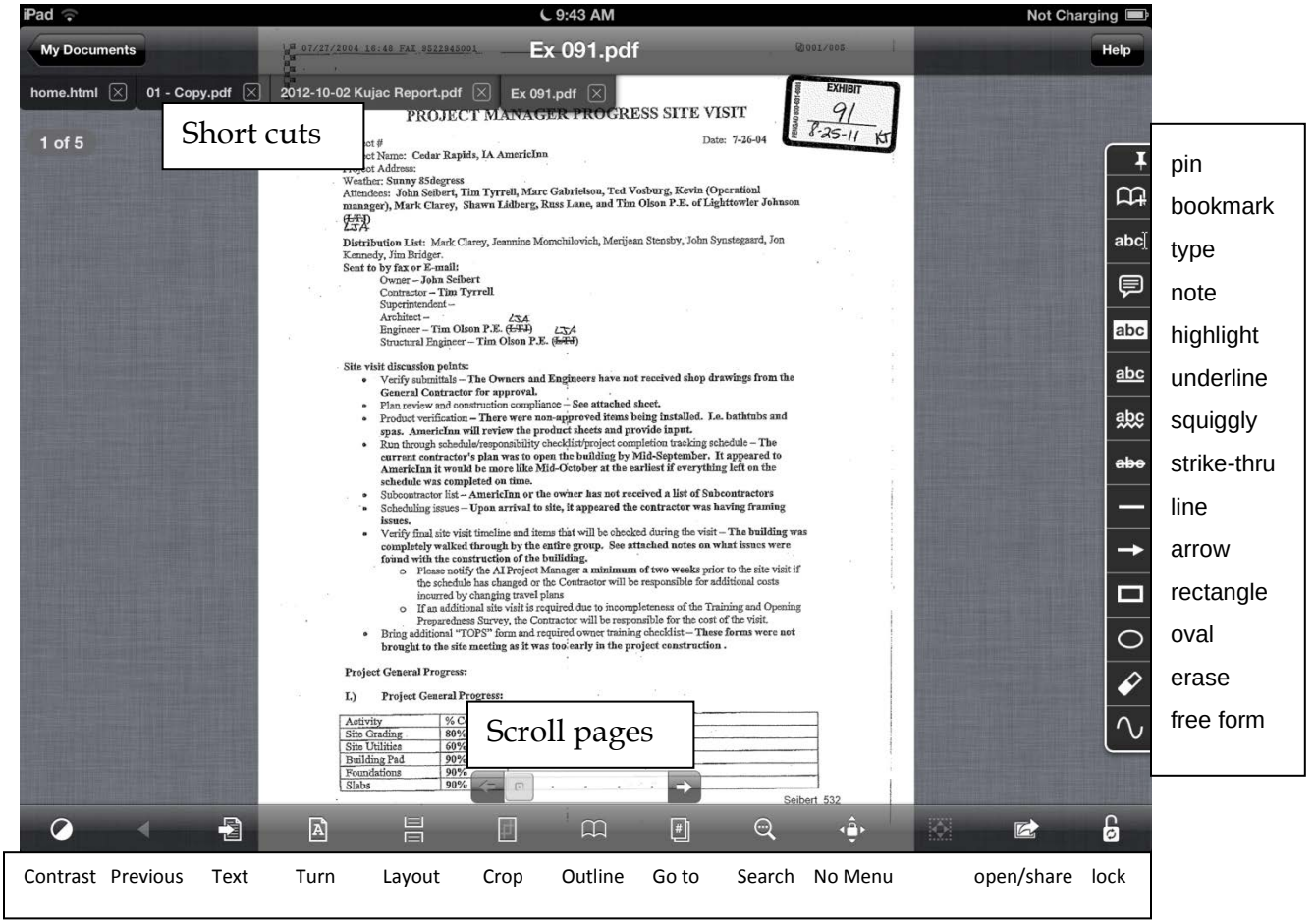
4. Manage Files
   Manage Files, New Folder, name folder, select document, Move.



5. Toggle Monitor & Select Document to Display



6. Annotation



Zoom: touch control – pinch & spread
Tip: For highlighting without OCR, use line tool set to yellow, 25% opacity, 9 point line.

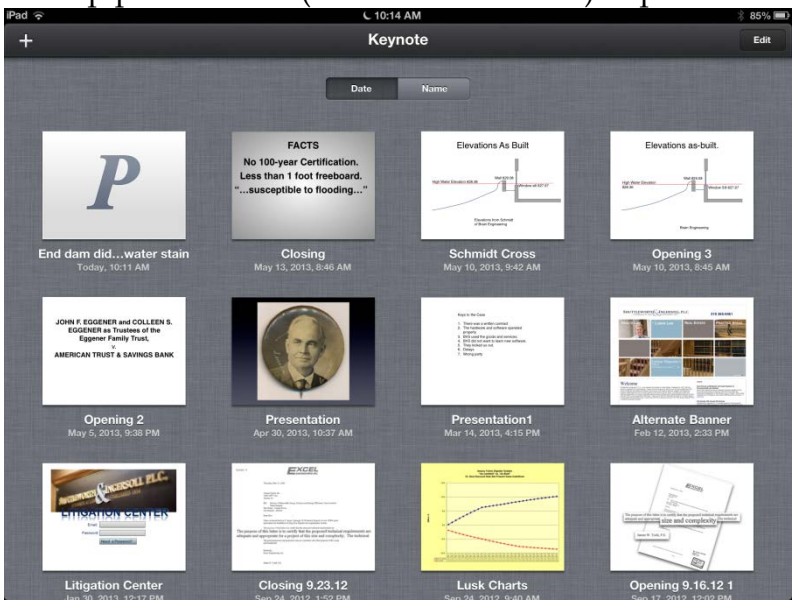
Slide Show Tutorial

1. Draft in Power Point at desktop

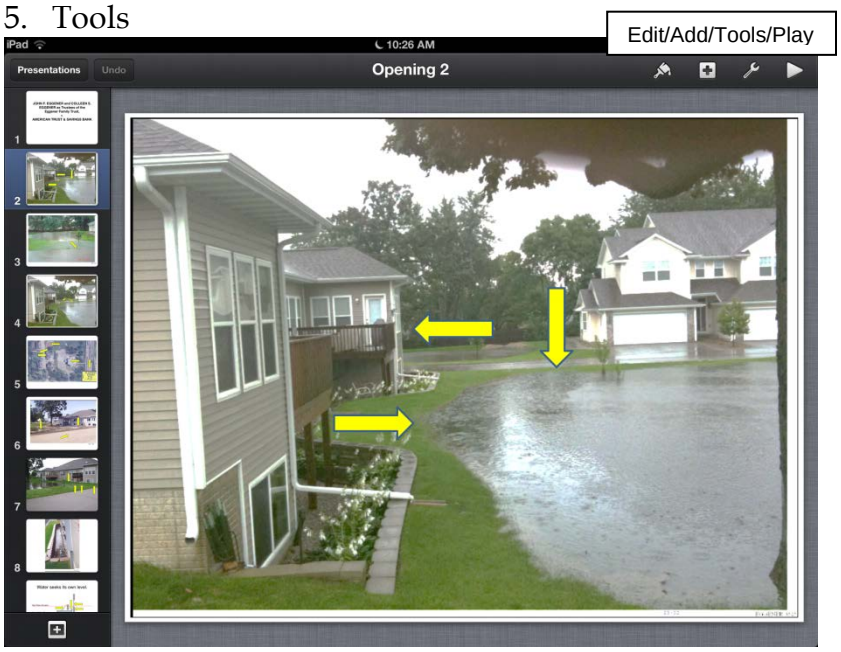
2. Export via iCloud to iPad (drag and drop from explorer to iCloud page in web browser.)

3. iPad – launch Keynote

4. Tap presentation (or create a new one) - open.

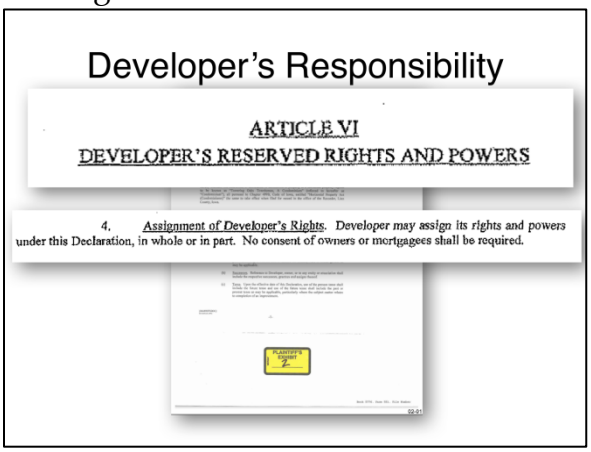


5. Tools



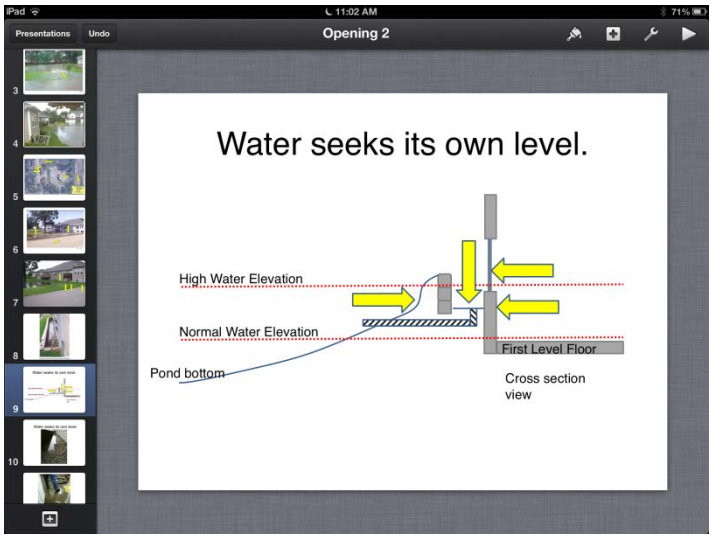
Object: Select object, choose cut, copy, delete, lock animate, etc.
Edit: Select object, select Brush, choose from style, text, arrange.
Add: Select Plus, choose from media, tables, charts, shapes.
Tools: Select Wrench, choose transitions, share, print, find, notes, etc.
Play: Choose play arrow and tap through presentation.

6. Making a call-out

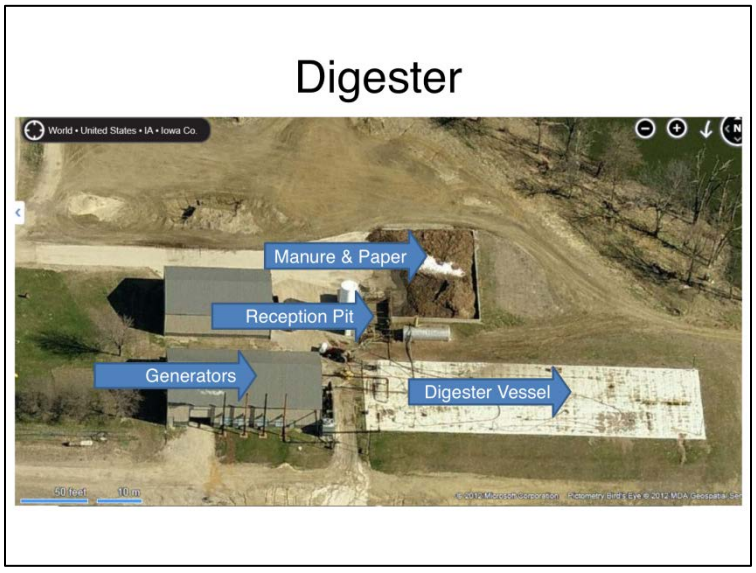


A. Copy Page(s) (e.g., from iAnnotate PDF, using image capture)
B. Switch to Keynote (double-click home button and choose)
C. Tap to Paste – adjust size & orientation, select style to add depth
D. Switch back to iAnnotate PDF
E. Zoom in and copy excerpt
F. Switch to Keynote
G. Tap to Paste – size, style and animate

7. Making a diagram



8. Annotating a photograph



9. Importing Jury Instructions
   Photo the final instruction with Camera App
   Open Keynote and add blank slide
   Add media – choose Camera Roll

Depositions

Apps:
- GoodReader
- Transcript reader
  - iCVNet
  - E-Transcript
  - e-depo
  - Transcript Pad
  - Many others
- Pages

Load Documents
- Document Production
- Deposition Exhibits

Follow Real Time
- May require different wireless network

Type outline
- Open Pages
- Use Keyboard
- Auto sync

Limits to the iPad
1. Copies of deposition exhibits
2. One screen

Case Law Update: Employment and Civil Procedure

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EMPLOYMENT LAW
Iowa Supreme Court

Nelson v. Knight: (sexual harassment)

- Facts: Plaintiff ("Assistant") was a dental assistant at the Defendant's ("Dentist") dental office. The Dentist had always hired female dental assistants. He said Assistant "was the best dental assistant he ever had."

  Assistant and Dentist had discussed the tight clothes Assistant wore, and Dentist told her she would know if her clothes were too tight "if she saw his pants bulging." When he learned the Assistant had not had sex recently, he said that it was "like having a Lamborghini in the garage and never driving it." The parties had exchanged other messages and had other conversations of a sexual nature. When the Dentist's wife learned of the communications, she was upset. The Dentist, after speaking with his wife and pastor, worried he would "try to have an affair with her down the road if he did not fire her."

  He fired the Assistant because he (like his wife) was concerned about his attraction to Assistant.

- Holding: On rehearing, the Court clarified that the issue was not whether a jury could find the dentist treated his assistant badly or unfairly, but whether the facts created a sex discrimination claim. The Court wrote that there was no evidence the dentist fired the assistant because of her sex or gender. Instead, he fired her because of their personal relationship—specifically, his individualized feelings toward her were causing trouble in his marriage and he was worried he would pursue a sexual relationship at a later date.

  The Court emphasized the limits of its decision, including a specific reference to the fact that Assistant did not file a sexual harassment or hostile work environment lawsuit. Instead, she alleged sex discrimination and the Court held the facts in the record did not support her allegations.

Dorshkind v. Oak Park Place of Dubuque II, L.L.C.: (wrongful discharge)

- Facts: Defendant was an assisted-living facility that was "certified as a dementia-specific assisted living program." As a facility providing care to dementia patients, it is subject to administrative regulations governing continuing education requirements for medical professionals on staff. The Department of Inspections and Appeals ("DIA") provides the oversight necessary to enforce those regulations. It does this through regular inspections of facilities like Defendant.

During one such inspection, the head of the facility worked with his assistant to falsify the state-mandated training documents, for delivery to the DIA. Plaintiff witnessed the head of the facility (her direct supervisor) engaged in falsifying documents, and reported the incident to her former supervisor, who worked at company headquarters in Madison, Wisconsin. Plaintiff was terminated for "spreading rumors regarding a false relationship between two employees, malicious statements regarding forging of documents, and false statement to a Regional Director about move in numbers."

The District Court determined that there was a clearly defined public policy "to protect residents in assisted living facilities, particularly those who suffer from dementia." He permitted the case to go to the jury and permitted the jury to consider punitive damages. The jury awarded $178,500 in compensatory damages, and $178,500 in punitive damages.

- Holding 1: Because the Iowa Code and related administrative regulations demonstrate a clearly defined public policy to protect "the health, safety, and welfare of dementia patients in an assisted living facility," there was a clearly defined public policy sufficient to sustain a wrongful discharge claim. Furthermore, the termination jeopardized or undermined that public policy, because the termination prevented Plaintiff and similarly situated employees from reporting "infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare are properly reported."

- Holding 2: The Court decided *Jasper v. Nizam, Inc.*, the first Iowa Supreme Court case to recognize a public policy derived from an administrative regulation, after the facts of this case took place. Because "an employer cannot willfully and wantonly disregard the rights of an employee based upon a violation of an administrative rule when at the time of the discharge, [the Court] did not recognize administrative rules as a source of public policy," punitive damages were not appropriate to submit to the jury.

Iowa Court of Appeals

Eastman v. Homeland Energy Solutions, LLC: (wrongful discharge)

- Court of Appeals declined to recognize a clearly defined public policy protecting private employees, where the statute the employee relied upon protected public-employee whistleblowers.

Knudsen v. Tiger Tots: (disability discrimination under the Iowa Civil Rights Act ("ICRA"))

- Defendant, a daycare provider, declined to enroll Plaintiff's child because of "staffing and liability issues" related to the child's tree nut allergy. Specifically, Defendant wrote to Plaintiff that it did not have appropriate staff to accommodate the health needs of the child.

  Plaintiff sued, "alleging the defendants' refusal to admit the child to the center amounted to disability discrimination under the [ICRA]."

- Holding: The majority noted that the ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more major life activities of such individual." *Citing* 42 U.S.C. §12102(1)(A). Using the federal ADA definition of disability, the majority remanded the case for further proceedings, because the district court failed to consider the question of "whether [the child's] allergy would substantially limit a major life activity when active." (internal quotations omitted).

- Dissent: Judge Vogel dissented, arguing that the only reason Iowa courts have historically followed federal law related to disability claims is because the federal law mirrored the ICRA. But, in 2008 amendments to the ADA, Congress vastly expanded the definition of disability. "The Iowa legislature has not correspondingly expanded Iowa's law in this area, and thus, our statute no longer mirrors the federal statute." Because Iowa law does not mirror federal law, Judge Vogel would have affirmed the district court's grant of summary judgment, finding that Plaintiff does not have a disability under Iowa Code.

<u>United States Supreme Court</u>

University of Texas Southwestern Medical Center v. Nassar: (Title VII standard of proof)

- Facts: The University of Texas Southwestern Medical Center ("University") had an agreement with Hospital, where Hospital would "offer vacant staff physician posts to University faculty members."

  Nassar worked for both the University and the Hospital. Nassar complained to executives at the University that his supervisor had discriminated against him on the basis of religion. He hoped to leave his position at the University, to work only at the Hospital. The Hospital made him an offer.

But, when Nassar upset University officials in the way he resigned, the University officials convinced the Hospital officials to rescind their offer to Nassar.

As a result, Nassar brought a Title VII retaliation claim against the University.

- Issue: Whether Title VII's retaliation provision requires a showing that discrimination was "a motivating factor" or that discrimination was "the but-for cause" of the employment decision.

- Holding: Because both the clear language of the statute and prior SCOTUS cases interpreting identical language hold that "but-for causation" is required, the Court held that Title VII retaliation claims, under 42 U.S.C. §2000e-3(a), require plaintiffs to show that discrimination was the "but-for" cause of the retaliation.

United States Court of Appeals, Eighth Circuit

Abshire v. Redland Energy Services, LLC: (FLSA—work week adjustments to avoid overtime)

- Facts: Defendant originally defined its workweek to run Tuesdays through Mondays.

  When it realized that redefining the workweek could result in a lower obligation for overtime pay, it permanently changed its definition of the work week from Tuesday-to-Monday, to Sunday-to-Saturday.

  Several employees filed suit, alleging they were "only paid twenty (20) hours overtime within the same workweek, even though [they] actually worked eighty-four (84) or more hours in each workweek."

- Analysis: The FLSA defines workweek to mean:

  > A fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but *may begin on any day and at any hour of the day*. . . . Once the beginning time of an employee's workweek is established, it remains fixed *regardless of the schedule of hours worked by him*.

The Court noted that "numerous federal and state courts have concluded that an employer does not violate the FLSA merely because, under a consistently-designated workweek, its employees are in fewer hours of overtime pay than they would if the workweek was more favorably aligned with their work schedules." Even after an employer has designated its definition of the workweek, that definition "may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act."

The plaintiffs in the case argued that the employer acted explicitly "to evade the overtime requirements" of the FLSA.

- Holding: Consistent with other courts, the Court held for the employer, writing that "an employer's effort to reduce its payroll expense is not contrary to the FLSA's purpose." Rather, "[s]o long as the change is intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are relevant."

Rules of Civil and Appellate Procedure

Iowa Supreme Court

Rucker v. Taylor: (service of process)

- Facts: Plaintiff filed a lawsuit, but continued to engage in settlement negotiations. Before the 90 days for service had passed, Plaintiff sent the insurance carrier a letter indicating that Plaintiff would wait to serve the lawsuit "until our negotiations break down." The insurance carrier never responded to the letter, and continued negotiations.

  When court administration notified Plaintiff the 90 days had run, Plaintiff served Defendant. Defendant filed a motion to dismiss for failure to serve within 90 days.

- Holding: For Plaintiff. Good cause existed to extend the 90 day limit for service, because "the action by the insurance representative . . . in continuing to negotiate . . . with the knowledge that [plaintiff's counsel] did not plan to timely serve the petition made it inequitable for the [defendants] to subsequently seek dismissal of the case . . . ."

Sierra Club v. IDOT: (timeliness of appeal/tolling of appeal period)

- Facts: Sierra Club brought an action fighting the Iowa Department of Transportation's (DOT) decision to place a "highway adjacent to and through two nature preserves."

  The DOT filed a motion to dismiss, arguing the Sierra Club had failed to exhaust administrative remedies. On October 17, the District Court granted the Motion.

  Sierra Club filed a Rule 1.904(2) motion to enlarge/expand findings, asking the District Court to expand on its ruling. The District Court denied Sierra Club's 1.904(2) motion on November 22. The Sierra Club filed its notice of appeal on December 5.

- Analysis: While a party typically has only 30 days to take an appeal from a final order or judgment, the appeal period is tolled when a party properly files a rule 1.904(2) motion to amend/enlarge findings. But a motion to amend/enlarge must be filed for the proper reason. "When using a rule 1.904(2) motion to preserve error, it is proper for the motion to address purely legal issues presented to the district court prior to its ruling but not decided by it." (internal quotations omitted).

  In this case, "the district court summarily concluded section 171.9(1)(a) applies, requiring the Sierra Club to obtain a declaratory order before seeking judicial review." But the District Court failed to distinguish conflicting Iowa Supreme Court precedent that, on its face, could have altered the outcome based on the underlying facts of the lawsuit. The District Court also failed to identify the appropriate standard of review in its initial ruling, an issue the Sierra Club raised in its rule 1.904 motion.

- Holding: Because the Sierra Club's rule 1.904 motion asked the District Court to explain why seeking declaratory review at the administrative level was necessary, and to decide an issue not addressed in its original ruling (standard of review), the Sierra Club's rule 1.904 motion was proper and its appeal was timely.

- BUT: The Sierra Club lost the war. The Court went on to hold that the Sierra Club had not exhausted its administrative remedies, affirming the ultimate decision of the District Court.

Sham v. Hassan: (personal jurisdiction)

- Facts: Father went to Iraq and asked his Maryland-based Sister to take charge of his checking account, to write checks for his children, two of

whom lived (and still live) in Iowa. The checking account was based in Iowa. Father went to Iraq and Sister, instead of taking care of the kids, took hundreds of thousands of dollars from the checking account. When he sued in Iowa, she claimed Iowa lacked personal jurisdiction.

- Holding: Even though Sister continues to live in Maryland, Iowa has special personal jurisdiction over Sister because Iowa is the primary place of injury: (1) the bank account is located in Iowa and (2) two of the three children who were to benefit from the funds in the account are residents of Iowa. No other issues of fairness sufficiently mitigated against exercising Iowa personal jurisdiction.

Iowa Court of Appeals

Deibler v. Iowa Board of Regents: (timeliness of appeal)

- Facts: Plaintiffs sought review of the Board's decision to close the Malcolm Price Laboratory School. The Parties agreed there were no issues of fact, and the District Court held a hearing.

  When the District Court found in favor of the Board, Plaintiffs filed a Motion to Enlarge/Expand its June 25, 2012 Ruling. The District Court denied that Motion on July 31, 2012, and Plaintiffs filed a Notice of Appeal on August 14, 2012.

  The Board filed a Motion to Dismiss the Appeal, arguing that the Plaintiffs' Motion for Enlarged/Expanded Findings of Fact was improper, and the 30 days Plaintiffs had to file their Notice of Appeal started on June 25, 2012.

- Holding: The Court of Appeals held that Plaintiffs' 1.904(2) Motion to Enlarge/Expand Findings of Fact was inappropriate where the Parties agreed there were no underlying fact issues, sustaining the Board's motion to dismiss the appeal as untimely.

Woodhurst v. Manny's Incorporated: (personal jurisdiction)

- Facts: Manny's is an Illinois restaurant. One of its affiliates ("Manny's Too!") had advertised in Iowa, but Manny's had not. A patron of Manny's consumed alcohol at Manny's, then drove into Iowa to visit another bar. While in the other bar, he shot Plaintiff at close range. In the resulting lawsuit, Manny's filed a motion to dismiss, arguing the Iowa court did not have personal jurisdiction over Manny's. The District Court dismissed the lawsuit.

- Holding: Affirmed. Iowa courts lack personal jurisdiction over Manny's. While advertisements can form the basis for establishing special personal jurisdiction, the advertisements "should actively solicit and target out-of-state residents." Here, while a Manny's affiliate sold advertisements in Iowa, Manny's did not. Also, "while Manny's conceded it marketed its businesses to Iowans, that admission falls short of establishing the type of 'purposeful activity' that has been found to confer personal jurisdiction."

How to Object and Persuade Your Way to a Better Jury

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HOW TO OBJECT AND PERSUADE YOUR WAY TO BETTER JURY INSTRUCTIONS

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"It is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer in the seclusion and quiet of his office with a dictionary at his elbow cannot extract therefrom some legal heresy of more or less startling character." *Law v. Bryant Asphaltic Paving Co.*, 175 Iowa 747, Weaver, J.

"But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect. Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence." *Time, Inc. v. Hill*, 385 U.S. 374, Fortas, J., dissenting.

THE LAW AND CASES

In civil cases, the requirements for instructing juries and for preserving error are set out in Rule 1.924. Rule 2.19(5)(f) provides that the civil rules relating to the instruction of juries also apply to the trial of criminal cases. BUT, Rule 2.24(2)(b)(5), regarding motions for new trial, provides that a new trial may be granted for error in misdirecting the jury in a material matter of law.

It is presumed that the jury obeys and understands instructions of the court. *Giltner v. Stark*, 219 N.W.2d 700, (Iowa 1974). If instructions are erroneous, they must also be prejudicial before a reviewing court will order reversal. *Grefe & Sidney v. Watters*, 525 N.W.2d 821 (Iowa 1994). But if the court fails to instruct properly, or instructs improperly, it provides "an elevator giving ready access to the justices upstairs." *Godwin v. LaTurco*, 272 Cal.App.2d 475, 77 Cal.Rptr. 305, 307 (1969).

Rule 1.924

The court shall instruct the jury as to the law applicable to all material issues in the case and such instructions shall be in writing, in consecutively numbered paragraphs, and shall be read to the jury without comment or explanation; provided, however, that in any action where the parties so agree, the instructions may be oral.

> The purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a defendant in his weakness, as well as in his strength, and to preserve inviolable the priceless right of trial by jury. The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the

judge, even with bare feet and uncovered head. The judge should sit on the bench the calm and impartial incarnation of law, as silent as the Sphinx on contested questions of facts. *Taylor v. State,* 2 Ga.App. 723, 59 S.E. 12 (Ga.App. 1907).

If the evidence supports consideration and determination of an issue, the court has the duty to accurately instruct the jury, whether or not requested to do so. *State v. Tomlinson,* 243 N.W.2d 551, 553 (Iowa 1976).

It is the trial court's duty to instruct a jury fully and fairly, even without request, but our adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, in this factual circumstance by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused. *State v. Overmann,* 220 N.W.2d 914, 918 (Iowa 1974).

As long as the issues are covered by instructions, the trial court is free to choose its own language and need not couch instructions in terms suggested by the parties. *Moser v. Brown,* 249 N.W.2d 612 (Iowa 1977); *State v. Yates,* 243 N.W.2d 645 (Iowa 1976).

The Supreme Court is reluctant to disagree with one of the uniform instructions. *Ness v. H. M. Iltis Lumber Co.,* 256 Iowa 588, 128 N.W.2d 237 (1964).

Trial courts have discretion to modify or rephrase Uniform Jury Instructions to meet precise demands of each case as long as instructions fully and fairly embody issues and applicable law. *Dudley v. GMT Corp.,* 541 N.W.2d 259 (Iowa App. 1995).

Although the court is required to instruct jury as to the law applicable to all material issues in the case, instructions should not marshal the evidence or give undue prominence to any particular aspect of case. *Bride v. Heckart,* 556 N.W.2d 449 (Iowa 1996), rehearing denied.

Even jury instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence. *Olson v. Prosoco, Inc.,* 522 N.W.2d 284 (Iowa 1994); *Vachon v. Broadlawns Medical Foundation,* 490 N.W.2d 820 (Iowa 1992), rehearing denied.

Instructions should not give undue emphasis to some phase of the case favorable to either side, and even correct statements of the law, if repeated to point of such undue emphasis, may constitute reversible error. *Wagaman v. Ryan,* 258 Iowa 1352, 142 N.W.2d 413 (1966).

Merely quoting a statute without relating it to issues in the case is insufficient in instructions. *McCoy v. Miller,* 257 Iowa 1151, 136 N.W.2d 332 (1965).

The trial court has a duty to instruct with reasonable fullness on the issues, and a mere abstract definition of a term, having no application to the particular controversy, is insufficient. *Gibbs v. Wilmeth,* 157 N.W.2d 93 (Iowa 1968).

At the close of the evidence, or such prior time as the court may reasonably fix, any party may file written requests that the jury be instructed as set forth in such requests.

The court is required to give a requested instruction when it states correct rule of law having application to the facts of the case if the concept is not otherwise embodied in other instructions. *Morrison v. Mahaska Bottling Co.,* 1994, 39 F.3d 839 (C.A.8, 1994).

Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart,* 556 N.W.2d 449 (Iowa 1996), rehearing denied.

Sufficiency of the evidence to warrant submission of a plead or properly litigated issue to the jury is determined by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. *Miller v. International Harvester Co.,* 246 N.W.2d 298 (Iowa 1976).

A defendant who fails to request jury an instruction on his theory of affirmative defense is in no position to complain when the court does not instruct on such theory. *State v. Mattingly*, 220 N.W.2d 865 (Iowa 1974).

Before argument to the jury begins, the court shall furnish counsel with a preliminary draft of instructions which it expects to give on all controversial issues, which shall not be part of the record.

Objections, in the absence of agreement of counsel otherwise, must be made to the instructions in their final form if they are to be considered on appeal. Rule 196. They must be in writing or dictated into the record. Objections or exceptions to the preliminary draft of instructions are not sufficient to support an assignment of error upon appeal. *State v. Schmidt,* 259 Iowa 972, 979, 145 N.W.2d 631, 636 (1966).

The defense could not predicate error on failure of the court to submit a preliminary draft of instruction prior to argument where there was no request for such draft and counsel proceeded to argument without protest. *State v. Miller,* 254 Iowa 545, 117 N.W.2d 447 (1962).

Exceptions or objections to the preliminary draft of instructions will not support an assignment of error on appeal. *State v. Baskin,* 220 N.W.2d 882 (Iowa 1974).

Where instructions were presented to defense counsel only once and, when so presented, were identified as "proposed instructions" and where the proposed instructions made available to defense counsel were the identical final instructions submitted to jury, defendant's objections to the proposed instructions were sufficient to preserve for review alleged errors in instructions. *State v. Watts,* 223 N.W.2d 234 (Iowa 1974).

Before jury arguments, the court shall give to each counsel a copy of its instructions in their final form, noting this fact of record and granting reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury. Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

Objections should be made to instructions in their final form if they are to be considered on appeal and such objections must be made in writing or dictated into the record. *In re Soderland's Estate,* 239 Iowa 569, 30 N.W.2d 128 (1948).

Where the record disclosed only plaintiff's request for instructions, but no objection was lodged to the court's refusal to give them, the error, if any, was waived. *Wong v. Waterloo Community School Dist.,* 232 N.W.2d 865 (Iowa 1975).

The rule under which a party must specify the matter to which objection is made, and grounds for the objection, requires an objection sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist, court may correct it before placing the case in the hands of the jury. *Boham v. City of Sioux City, Iowa,* 567 N.W.2d 431 (Iowa 1997).

Despite the peremptory ruling of the court telling counsel a sudden emergency instruction would not be given, it is nevertheless the duty of counsel to make a further record as required by rule. *Anderson v. Wilcox,* 189 N.W.2d 541 (Iowa 1971).

Appellant failed to preserve error of objection to instruction where the specific objection made on appeal was not the basis for objection at trial, and the objection that was made at trial was not sufficiently definite to have alerted the trial court of the error claimed so as to have given the court a chance to correct it. *Grefe & Sidney v. Watters,* 525 N.W.2d 821 (Iowa 1994).

Plaintiff's characterization of jury instructions as "confusing, unfairly defense-oriented and improperly presenting nearly impossible burdens of proof to plaintiff", were too vague and generalized to preserve error. *Sievers v. Iowa Mut. Ins. Co.,* 581 N.W.2d 633 (Iowa 1998).

In prosecution for interstate transportation of football parlay cards, in instruction of Iowa gambling law, 726.1 et seq., the phrase "bona fide social relationship" did not require further definition inasmuch as it is a term which is within common understanding of a juror. *U.S. v. Cartano,* 534 F.2d 788 (C.A. 1976), cert. den. 97 S.Ct. 121, 429 U.S. 843, 50 L.Ed.2d 113.

That no objection was taken to the failure to submit the charge of negligence did not prevent the reviewing court's consideration of such failure in determining whether the grant of a new trial in the interest of justice was an abuse of discretion. *Coulthard v. Keenan,* 256 Iowa 890, 129 N.W.2d 597 (1964).

But if the court thereafter revises or adds to the instructions, similar specific objection to the revision or addition may be made in the motion for new trial, and if not so made shall be deemed waived.

Procedures involved in giving additional instructions must take place in the presence of the defendant and his attorney unless such presence is waived. *State v. McKee*, 312 N.W.2d 907 (Iowa 1981).

The trial court's error in giving a supplemental instruction requested by prosecutor on alternative means of committing first-degree robbery, i.e., by assault, after jury had been deliberating for over two hours prejudiced defendant by denying him the opportunity to address the issue in his closing argument, and thus, error was not harmless. *State v. Watkins,* 463 N.W.2d 15 (Iowa 1990).

The *Allen*, or "dynamite" charge:

This court has addressed itself to the question of the propriety of the giving of verdict-urging instructions heretofore. We have said the trial court has considerable discretion in determining whether it should be given and that each case must be decided on its own circumstances. *State v. Kelley*, 161 N.W.2d 123, 126 (Iowa 1968). We have also said the ultimate test is whether the giving of a verdict-urging instruction forced or helped to force an agreement, or merely started a new train of real deliberation which ended the disagreement. *State v. Quitt,* 204 N.W.2d 913 (Iowa 1973).

All instructions and objections, except as above provided, shall be part of the record. Nothing in the rules in this chapter shall prohibit the court from reading to the jury one or more of the final instructions at any stage of the trial, provided that counsel for all parties has been given an opportunity to review the instructions being read and to make objections as provided in this rule.

Any instructions read prior to conclusion of the evidence shall also be included in the instructions read to the jury following conclusion of the evidence.

Criminal Cases – Rule 2.24(2)(b)(5) New trial.

a. Procedural steps in seeking or ordering new trial. The application for a new trial can be made only by the defendant and shall be made not later than 45 days after verdict of guilty or special verdict upon which a judgment of conviction may be rendered.

b. Grounds. The court may grant a new trial for any or all of the following causes:
****
(5) When the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial, or when the prosecuting attorney has been guilty of prejudicial misconduct during the trial thereof before a jury.

Objections to instructions in criminal case need not be made before instructions are read to jury. *State v. Franklin,* 163 N.W.2d 437 (Iowa 1968); *State v. Hochmuth,* 256 Iowa 442, 127 N.W.2d 658 1964).

Where trial court has misdirected jury in a material matter of law, or has refused properly to instruct jury, either or both grounds may be raised for first time in motion for new trial and still properly present issue for review. *State v. Brown,* 172 N.W.2d 152 (Iowa 1969).

Under the rule relating to instruction of juries in civil cases, and the rule making that rule applicable to trial of criminal prosecutions, the trial court must submit instructions to counsel in a criminal case in accordance with the appropriate rule, but the defendant is not required to make objections to instructions in the manner and within time provided by such rule, and may raise such objections on motion for new trial. *State v. Holder,* 237 Iowa 72, 20 N.W.2d 909 (1946).

The right of a defendant in a criminal case to attack the court's instructions for the first time in a motion for new trial is subject to two exceptions: (1) a party may expressly waive the right or (2) if the instruction was correct as given but not as explicit as a party may have desired he must request an additional instruction before the jury is charged. *State v. Blyth,* 226 N.W.2d 250 (Iowa 1975).

Defendant, in prosecution for breaking and entering, expressly waived his right to challenge, in motion for new trial, an erroneous instruction permitting the jury to consider defendant's failure to produce evidence in deciding if there was reasonable doubt where defense counsel stated in open court that he had no objections to court's proposed instructions. *State v. Hillman,* 238 N.W.2d 793 (Iowa 1976).

When a defendant undertakes to except to instructions at trial, as here, he must rest on those exceptions. He cannot in a post-verdict motion amplify or add new ones since it avails a trial court nothing for a defendant to save part of his exceptions for a motion for new trial when the court can no longer change its

instructions before reading them to the jury. *State v. Buchanan*, 207 N.W.2d 784, 787 (Iowa 1973).

Although misdirection of jury in a material matter of law and refusal to properly instruct jury are among grounds for new trial, defendant must request additional or more specific instructions before instructions are given. *State v. Kimball,* 176 N.W.2d 864 (Iowa 1970).

Where court submitted final draft of proposed instructions to defendant before argument, and instructions did not include offenses of larceny, larceny from the person, assault and battery, and assault with intent to inflict great bodily harm, but defendant requested no further instructions, pointed out that his requested instructions were included in the draft, and did not object to given instructions relative to robbery and robbery with aggravation, and where defendant did not claim a misdirection in a material matter of law or a refusal of a requested instruction, defendant could not raise contention that court erred in failing to instruct jury on lesser included offenses for first time in motion for new trial. *State v. Youngbear*, 203 N.W.2d 274 (Iowa 1972).

Rule 1.905. Exceptions unnecessary

Exceptions to rulings or orders of court are unnecessary whenever a matter has been called to the attention of the court, by objection, motion or otherwise and the court has ruled thereon.

We have repeatedly held that this rule means what it says. Exceptions must be taken, both to instructions given and failure to give requested instructions, and the reasons must be specifically stated. *Olson v. Truax,* 250 Iowa 1040, 1050, 1051, 97 N.W.2d 900, 906, 907; *Jurgens v. Davenport, R. I. & N. W. Ry. Co.,* 249 Iowa 711, 718, 88 N.W.2d 797, 801. Many other cases might be cited to the same effect. The defendant's failure to take proper and specific exceptions leaves nothing for review as to requested instructions or those actually given. The defendant urges that in *Redfield v. Iowa State Highway Commission,* 251 Iowa 332, 338, 99 N.W.2d 413, 417, 85 A.L.R.2d 96, we held that when the court had repeatedly ruled against a litigant, further objection or exceptions would be useless and failure to make them might be waived. Without analyzing further the *Redfield* case or what was actually held, it is sufficient to say we were there dealing with rulings on evidence. We are not inclined to abrogate Rule 196 by extending the claimed holding in that case to giving or refusing to give instructions. The rule is definite, has been often interpreted and must be followed according to its terms. *Crist v. Iowa State Highway Commission,* 255 Iowa 615, 628-29, 123 N.W.2d 424 (1963).

> While acknowledging that defendant objected to the instruction defining great bodily injury and requested an instruction adopting the serious injury definition of s 702.18, Code Supp.1977, [the State] insists that *State v. Sallis*, 262 N.W.2d 240, 248 (Iowa 1978), requires that defendant also except to trial court's ruling. This reading of *Sallis* is incorrect. The reference in that case to exceptions was as an alternative to objections; the two words were treated as synonymous. Iowa R.Civ.P. 196 governs instructions to the jury both under the new criminal code, Iowa R.Crim.P. 18(5)(f), and under prior law. Section 780.35, The Code 1977. Rule 196 requires that objections be made to the giving of an instruction or the refusal to give a requested instruction. Exceptions to rulings on those objections are not required. *State v. Bousman*, 276 N.W.2d 421 (Iowa 1979).

PREPARATION AND PRACTICE

Drafting Your Own Instructions

The Federal Judicial Center offers several suggestions for drafting comprehensible instructions:

> • Avoid using words that are uncommon in everyday speech and writing ("accomplice, admonish, applicable, corroborate, credence, deliberation, demeanor, discredit, impeach, improbability, insofar, misrecollection, pertain, scrutinize, trait, transaction, unsupported, veracity").
>
> • Avoid using words to convey their less common meanings ("burden of proof, incompetent, court [to refer to the judge rather than the building or institution], disregard evidence, find a fact, material matter, sustain objections").
>
> • Avoid using legal terms not in common use unless it is really necessary to do so.
>
> • Avoid sentences with multiple subordinate clauses. Particularly avoid placing multiple subordinate clauses before or within the main clause, so that the listener must wait for the end of the sentence to learn what it is all about. Complex grammatical structures, rather than sentence length per se, is the problem to be avoided.
>
> • Do not omit relative pronouns ("consider only the evidence that I have admitted") or auxiliary verbs ("any act that was not alleged in the complaint"). They signal the grammatical structure of what is coming.
>
> • Avoid double negations ("the defendant is charged only with … and not with …").
>
> • Use a concrete style rather than an abstract one. Speak to the jury in the second person rather than in abstract generalizations.

• Do not instruct the jury about things that they don't need to know (e.g. do not distinguish direct and circumstantial evidence at length before telling the jury that the distinction is irrelevant to their consideration of the evidence).

Appendix A, "Suggestions for Improving Juror Understanding of Instructions" in Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988). One staffer from the Federal Judicial Center offers even blunter advice:

• Don't deliver a jury instruction that you don't understand yourself.

• Don't deliver an instruction that you wouldn't have understood before you went to law school.

• Don't use vocabulary that your teenage children wouldn't understand—or better yet, the teenage children of friends who aren't lawyers.

• Don't use sentence structures that you wouldn't use in talking about day-to-day affairs with your family and friends.

• Find a way to return to the language you spoke before you began the study of law.

Prior to Trial

1. Prepare requested jury instructions and objections to expected jury instructions early.

2. File requested instructions and objections early.

3. If you are requesting uniform instructions, list them simply by number and topic, i.e., "200.7 – Future Medical Expenses". Uniform instructions which require insertion of case specific terms, such as marshaling instructions, should be submitted in completed form.

4. If you are proposing a modified uniform instruction, include citations to supporting statutes or cases.

The Charging Conference

1. Cross-reference your instruction to opposing counsel's instruction (i.e., note that your item three instruction for legal cause is similar to opposing counsel's item seven instruction). This makes it easier to go back and forth between different sets of instructions.

2. Make notes of every objection right on the instruction so you will always have your objection handy, even if the judge jumps between instructions.

3. Cross-reference on opposing counsel's instructions why your instruction is different or better.

4. Bring clean sets of instructions, unstapled, so you can merge your instructions with those of opposing counsel according to the court's rulings. Additionally, bring your instructions on a disk or flash drive in Word format.

5. Bring copies of cases or statutes that support your objections or requested instructions.

The Record on Final Instructions

1. Either file written requested instructions and objections, dictate them into the record, or both.

2. Make the objection to an instruction specific and inclusive.

3. Point out how a requested instruction is not only correct, but addresses an issue in the case not otherwise addressed by another instruction.

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An *Allen* Charge

You have informed the court of your inability to reach a unanimous verdict to this point. At the outset, the court wishes you to know that although you have a duty to reach a verdict, if that is not possible, the court has neither the power nor the desire to compel agreement upon a verdict.

The purpose of these remarks is to point out to you the importance and the desirability of reaching a verdict in this case, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. The oath places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your opinion, and not merely upon acquiescence in the conclusions of your fellow jurors. However, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by consideration of the proofs with your fellow jurors. Each juror should listen to the arguments of other jurors with a disposition to be convinced by them; and if the members of the jury differ in their views of the evidence, such difference of opinion should cause them all to scrutinize the evidence more closely and to re-examine the grounds for their own position. Your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so. In conferring you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for espousing and maintaining either side of a cause in a spirit of controversy. The aim always to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the court.

Should this jury find itself unable to arrive at a unanimous verdict, the charges in this case will still be pending. You should consider that this case must at some time be terminated, and it is reasonable to assume that this case will be tried again before another jury at some future time. Any such jury will be impaneled in the same way this jury has been impaneled, and will likely hear the same evidence which has been presented to this jury. The questions to be determined by that jury will likely be the same questions confronting you, and there is no reason to hope that another jury will find those questions any easier to decide than you have found them.

You will again retire to your jury room and examine your differences in a spirit of fairness and candor and try to arrive at a verdict.

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Iowa Defense Counsel Association

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Copies of specific presentations may be obtained by contacting:

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