IOWA DEFENSE COUNSEL ASSOCIATION

50th ANNUAL MEETING & SEMINAR

IOWA DEFENSE COUNSEL ASSOCIATION

IDCA's GOLDEN ANNIVERSARY CELEBRATION

Celebrating 50 Years of Education and Collaboration.

September 18 – 19, 2014

West Des Moines Marriott

1250 Jordan Creek Parkway

West Des Moines, IA

FIFTY 50 YEARS

IOWA DEFENSE COUNSEL ASSOCIATION

TABLE OF CONTENTS

CONTENT	PAGE
Agenda	4 – 10
IDCA Officers and Directors	11
IDCA Past Presidents	12
Iowa Defense Counsel Founders and Officers	12
IDCA Award Recipient History	13
New Members	14 – 19
IDCA Committees	20 – 33
IDCA Annual Meeting Sponsors	34 – 42
IDCA Annual Meeting Exhibitors	43 – 46
Speaker Biographies	47 – 52
Annual Meeting Program	
Thursday, September 18, 2014	
Ethics Pitfalls: Forewarned is Forearmed – *Todd Scott*	No Outline
Anatomy of a Hoax – *Jim Cooney*	53 – 184
Local Counsel and Young Lawyers: The Ins and Outs of Being Second Chair – *Connie Alt*	185 – 253
Orthopedics 101 – *Kary Schulte, M.D.*	No Outline
Understanding the Process of Further Review – *Justice Mansfield*	254 – 278
Looking Forward, Looking Back: Past Presidents Panel – *Robert Allbee (1972 – 1973); Allan Fredregill (1990 – 1991); Sharon Greer (2004 – 2005); Greg Lederer (1994 – 1995); Jaki Samuelson (1997 – 1998). Moderator: Ben Weston*	No Outline
Case Law Updates Contracts/Commercial Case Law Update – *John Lande* Employment/Civil Procedure Case Law Update – *Joshua J. McIntyre* Torts/Negligence Case Law Update – *Abhay Nadipuram*	 279 – 294 295 – 306 307 – 332
Lawyers Don't Retire, Do They? A Strategic Look at Law Firm Succession Planning and Law Practice Management – *Alan Olson*	333 – 346
Jury Selection Tips for Young (and Not-so-Young) Lawyers – *William Kanasky, Ph.D.*	347 – 366
Corporate Representative Depositions: Planning and Practice Makes Perfect – *Marlo Orlin Leach*	367 – 402
Thompson v. Kaczynski: A Five-Year Report Card – *Kevin Reynolds*	403 – 461
Friday, September 19, 2014	
Legislative Update & Annual Meeting – *Scott Sundstrom*	462 – 466
Ethics: It's What You Do When No One Is Looking – *Justice Michael Streit*	No Outline
It Can Happen, Even in Iowa: Current Trends in Bad Faith Litigation – *Michael Aylward*	467 – 489
Successfully Challenging the Plaintiff Reptile Theory – *William Kanasky, Ph.D*	490 – 506
Workers' Compensation: An Update on Current Trends – *Theresa Davis and Paul McAndrew*	507 – 527
Employment Law Update: What is New, What is Interesting – *Magistrate Judge Adams*	528 – 547
Leveraging Technology for Optimal Outcomes in Discovery – *Connie Martin and Phil Burian*	548 – 597
Social Media: Perils and Pitfalls – *Marie Trimble*	No Outline

TABLE OF CONTENTS

What Can Iowa Lawyers and Law Firms do to Recruit and Retain Diverse Attorneys? Meeting the Challenge is Easier Than You Think – *Douglas Burrell*	598 – 616
Unraveling Technical Problems: Some Practical Solutions – *Sam Perlmutter*	617 – 618
Iowa Defense Counsel Association Annual Meeting Index – 1965 – 2013	619 – 678

Iowa Defense Counsel Association
50th Annual Meeting & Seminar
September 18 – 19, 2014
West Des Moines Marriott • West Des Moines, Iowa
Approval for 14.0 State CLE Hours (Includes 2.0 Ethics Hours) Activity Number 148269
Approval for 5.50 Federal CLE Hours

Time	Wednesday, September 17, 2014	Location
3:00 – 4:00 p.m.	IDCA Executive Committee Meeting	Boardroom A
4:00 – 6:00 p.m.	IDCA Board of Directors Meeting	Boardroom A
6:00 – 7:30 p.m.	IDCA Board Dinner	Concord D
8:00 p.m.	IDCA Hospitality Suite Open, *Hosted by Young Lawyers Committee.* *Sponsored by Nyemaster Goode, PC*	West Des Moines Marriott Room 917

Time	Thursday, September 18, 2014	Location
7:00 a.m. – 5:15 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. – 5:15 p.m.	Exhibits Open	Concord Foyer
8:00 – 8:15 a.m.	Welcome & Opening Remarks	Grand Ballroom
8:15 – 9:15 a.m.	**Session**: **Ethics Pitfalls: Forewarned is Forearmed** *Todd Scott*, *Minnesota Lawyers Mutual Insurance Co., Minneapolis, MN* **1.0 Ethics hours** **1.0 State CLE** **1.0 Federal CLE**	Grand Ballroom
9:15 – 10:00 a.m.	**Session**: **Anatomy of a Hoax** *Jim Cooney, Womble Carlyle Sandbridge & Rice, LLP, Charlotte, NC* **0.75 State CLE**	Grand Ballroom
10:00 – 10:30 a.m.	**Session**: **Local Counsel and Young Lawyers: The Ins and Outs of Being Second Chair**, *Connie Alt, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA* **0.5 State CLE** **0.5 Federal CLE**	Grand Ballroom
10:30 – 10:45 a.m.	Networking Break with Exhibitors, *Sponsored by Thomson Rueters and Hopkins and Huebner, P.C.*	Concord Foyer

10:45 – 11:30 a.m.	**Session**: **Orthopedics 101** *Kary Schulte, M.D., Des Moines Orthopedic Surgeons, P.C., West Des Moines, IA* **0.75 State CLE**	Grand Ballroom
11:30 a.m. – 12:00 p.m.	**Session**: **Understanding the Process of Further Review** *Justice Mansfield, Iowa Supreme Court, Des Moines, IA* **0.5 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**: **Looking Back, Looking Forward: Past Presidents Panel** *Robert Allbee, Ahlers & Cooney, P.C., West Des Moines, IA;* *Allan Fredregill, Heidman Law Firm, Sioux City, IA;* *Sharon Greer, Cartwright Druker & Ryden, Marshalltown, IA;* *Greg Lederer, Lederer Weston Craig, P.L.C., Cedar Rapids, IA; and* *Jaki Samuelson, Whitfield & Eddy, PLC, Des Moines, IA.* *Moderator: Ben Weston, Lederer Weston Craig, P.L.C., West Des Moines, IA* **0.75 State CLE**	Grand Ballroom
1:45 – 2:15 p.m.	**CASE LAW UPDATES** **Contracts/Commercial Case Law Update** *John Lande, John Lande, Dickinson, Mackaman, Tyler & Hagen, Des Moines, IA* **Employment/Civil Procedure Case Law Update** Joshua J. McIntyre, Lane & Waterman LLP, Davenport, IA **Torts/Negligence Case Law Update** Abhay Nadipuram, Lederer Weston Craig PLC, Cedar Rapids, IA **0.5 State CLE**	Grand Ballroom

CONCURRENT SESSIONS		
2:15 – 3:15 p.m.	**Session**: **Lawyers Don't Retire, Do They? A Strategic Look at Law Firm Succession Planning and Law Practice Management** *Alan Olson, Altman Weil, Inc., Milwaukee, WI* **1.0 State CLE**	Grand Ballroom
2:15 – 3:15 p.m.	**Session**: **Jury Selection Tips for Young (and Not-So-Young) Lawyers** *William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, Texas* **1.0 State CLE** **1.0 Federal CLE**	Boardroom A
3:15 – 3:30 p.m.	Networking Break with Exhibitors, *Sponsored by Courtroom Sciences, Inc.*	Concord Foyer
3:30 – 4:15 p.m.	**Session**: **Corporate Representative Depositions: Planning and Practice Makes Perfect** *Marlo Orlin Leach, Gonzalez Saggio & Harlan LLP, Atlanta, GA* **0.75 State CLE** **0.75 Federal CLE**	Grand Ballroom
4:15 – 5:15 p.m.	**Session**: **Thompson v. Kaczynski: A Five-Year Report Card** *Kevin Reynolds, Whitfield & Eddy, PLC, Des Moines, IA* **1.0 State CLE**	Grand Ballroom
5:30 p.m.	Board Shuttle Transportation to Jasper Winery *Shuttles depart at 5:40 p.m.*	Hotel Lobby

6:00 – 8:45 p.m.	**IDCA 50th Anniversary Celebration Dinner**	Jasper Winery
8:45 p.m.	Board shuttles for transportation back to the West Des Moines Marriott *Shuttles depart at 8:55 p.m.*	
9:15 p.m.	IDCA Hospitality Suite Open, *Hosted by Young Lawyers Committee and Sponsored by Exponent*	West Des Moines Marriott Room 917
Time	**Friday, September 19, 2014**	**Location**
7:00 a.m. – 3:00 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, Nyemaster Goode, PC, Des Moines, IA* **0.5 State CLE**	Grand Ballroom
8:30 – 9:30 a.m.	**Session**: **Ethics: It's What You Do When No One Is Looking** *Justice Michael Streit, Ahlers & Cooney, P.C., Des Moines, IA* **1.0 Ethics** **1.0 State CLE** **1.0 Federal CLE**	Grand Ballroom

9:30 – 10:15 a.m.	**Session**: **It *Can* Happen, Even In Iowa: Current Trends in Bad Faith Litigation** *Michael Aylward, Morrison Mahoney LLP, Boston, MA* **0.75 State CLE**	Grand Ballroom
10:15 – 10:30 a.m.	Networking Break with Exhibitors, *Sponsored by EMC Insurance Companies*	Concord Foyer
CONCURRENT SESSIONS		
10:30 a.m. – 12:00 p.m.	**Session**: **Successfully Challenging the Plaintiff Reptile Theory** *William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, Texas* **1.5 State CLE**	Grand Ballroom
10:30 – 11:15 a.m.	**Session**: **Workers' Compensation: An Update on Current Trends** *Theresa Davis, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA;* *Paul McAndrew, Paul McAndrew Law Firm, PLLC, Coralville, IA* **0.75 State CLE**	Boardroom A
11:15 a.m. – 12:00 p.m.	**Session: Employment Law Update: What is New, What is Interesting** *Magistrate Judge Adams, Southern Iowa District, Davenport, IA* **0.75 State CLE** **0.75 Federal CLE**	Boardroom A
12:00 – 1:00 p.m.	Exhibits Open Lunch on Own New Members and Young Lawyers Lunch *Defense Update* Board of Editors Lunch Meeting	Concord Foyer Restaurant in Hotel Salon C Boardroom B
1:00 – 1:15 p.m.	**Session**: **DRI Update** *Philip Willman, DRI Mid-Region Representative;* *J. Michael Weston, DRI President; and* *Sharon Greer, DRI State Representative* **0.25 State CLE**	Grand Ballroom

1:15 – 1:45 p.m.	**Session**: **Leveraging Technology for Optimal Outcomes in Discovery** *Connie Martin, Advantage Litigation, Minneapolis, MN; and* *Phil Burian, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA* **0.5 State CLE** **0.5 Federal CLE**	Grand Ballroom
1:15 p.m.	Exhibitor Tear-Down	Concord Foyer
1:45 – 2:30 p.m.	**Session**: **Social Media: Perils and Pitfalls** *Marie Trimble, Gordon & Rees LLP, San Francisco, CA* **0.75 State CLE**	Grand Ballroom
2:30 – 3:15 p.m.	**Session**: **What Can Iowa Lawyers and Law Firms do to Recruit and Retain Diverse Attorneys?: Meeting the Challenge is Easier Than You Think** *Douglas Burrell, Drew Eckl & Farnham, LLP, Atlanta, GA* **0.75 State CLE**	Grand Ballroom
3:15 – 3:45 p.m.	**Session**: **Unraveling Technical Problems: Some Practical Solutions** *Sam Perlmutter, Exponent, Inc., Chicago, IL* **0.5 State CLE**	Grand Ballroom

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*D.J. Goode, 1966 – 1967
*Harry Druker, 1967 – 1968
*Philip H. Cless, 1968 – 1969
*Philip J. Willson, 1969 – 1970
*Dudley J. Weible, 1970 – 1971
Kenneth L. Keith, 1971 – 1972
Robert G. Allbee, 1972 – 1973
*Craig H. Mosier, 1973 – 1974
*Ralph W. Gearhart, 1974 – 1975
*Robert V.P. Waterman, 1975 – 1976
*Stewart H.M. Lund, 1976 – 1977
*Edward J. Kelly, 1977 – 1978
*Don N. Kersten, 1978 – 1979
Marvin F. Heidman, 1979 – 1980
*Herbert S. Selby, 1980 – 1981
L.R. Voigts, 1981 – 1982
Alanson K. Elgar (Hon.), 1982 – 1983
*Albert D. Vasey (Hon.), 1983
*Harold R. Grigg, 1983 – 1984
*Raymond R. Stefani, 1984 – 1985
Claire F. Carlson, 1985 – 1986
David L. Phipps, 1986 – 1987
Thomas D. Hanson, 1987 – 1988
Patrick M. Roby, 1988 – 1989
*Craig D. Warner, 1989 – 1990
Alan E. Fredregill, 1990 – 1991
David L. Hammer, 1991 – 1992
John B. Grier, 1992 – 1993
Richard J. Sapp, 1993 – 1994
Gregory M. Lederer, 1994 – 1995
Charles E. Miller, 1995 – 1996
Robert A. Engberg, 1996 – 1997
Jaki K. Samuelson, 1997 – 1998
Mark L. Tripp, 1998 – 1999
Robert D. Houghton, 1999– 2000
Marion L. Beatty, 2000 – 2001
Michael W. Ellwanger, 2001 – 2002
J. Michael Weston, 2002 – 2003
Richard G. Santi, 2003 – 2004
Sharon Greer, 2004 – 2005
Michael W. Thrall, 2005 – 2006
Mark S. Brownlee, 2006– 2007
Martha L. Shaff, 2007 – 2008
*Megan M. Antenucci, 2008 – 2009
James A. Pugh, 2009 – 2010
Stephen J. Powell, 2010 – 2011
Gregory G. Barntsen, 2011 – 2012
Bruce L. Walker, 2012 – 2013

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

* Edward F. Seitzinger, President

* D.J. Fairgrave, Vice President

*Frank W. Davis, Secretary

Mike McCrary, Treasurer

William J. Hancock

* Edward J. Kelly

*Paul D. Wilson

* Deceased

EDWARD F. SEITZINGER AWARD RECIPIENTS

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

1989	John (Jack) B. Grier	2001	James Pugh
1990	Richard J. Sapp	2002	Michael Thrall
1991	Eugene B. Marlett	2003	Brent Ruther
1992	Herbert S. Selby	2004	Michael Thrall
*1992	Edward F. Seitzinger	2005	Christine Conover
1993	DeWayne E. Stroud	2006	Megan M. Antenucci
1994	Marion L. Beatty	2007	Michael Thrall
1995	Robert D. Houghton	2008	Noel K. McKibben
1996	Mark. L. Tripp	2009	Martha L. Shaff
1997	David L. Phipps	2010	Gerald D. Goddard
1998	Gregory M. Lederer	2011	Gregory A. Witke
1999	J. Michael Weston	2012	Kevin M. Reynolds
2000	Sharon Soorholtz Greer	2013	Gregory G. Barntsen

*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
2013	Rep. Chip Baltimore

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
2013	Alan E. Fredregill

NEW MEMBERS

Please welcome the following new members admitted to the Iowa Defense Counsel Association since September 2013.

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2013 – 2014 IDCA Committees

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2013 – 2014 IDCA Committees

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2013 – 2014 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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2013 – 2014 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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2013 – 2014 IDCA Committees

Membership & Marketing Committee

Review and process membership applications and communications with new Association members. Responsible for membership roster. Provide assistance with public relation efforts for the organization including media information. Involvement with the website planning and with the jury verdict reporting service. Monitoring the District Representative reporting of jury verdicts in Iowa.

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2013 – 2014 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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2013 – 2014 IDCA Committees

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(35 yrs old & younger or 10 yrs & under in practice)
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2013 – 2014 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:

Annual Meeting & Seminar Committee
Purpose – Assists in organizing annual meeting events and CLE programs.

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.

Webinar Committee
Purpose –Develop CLE webinars four times per year.

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.

2013 – 2014 IDCA Committees

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

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COMMITTEE INTEREST FORM

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☐ ***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.

☐ ***Webinar***
Develop CLE webinars four times per year.

☐ ***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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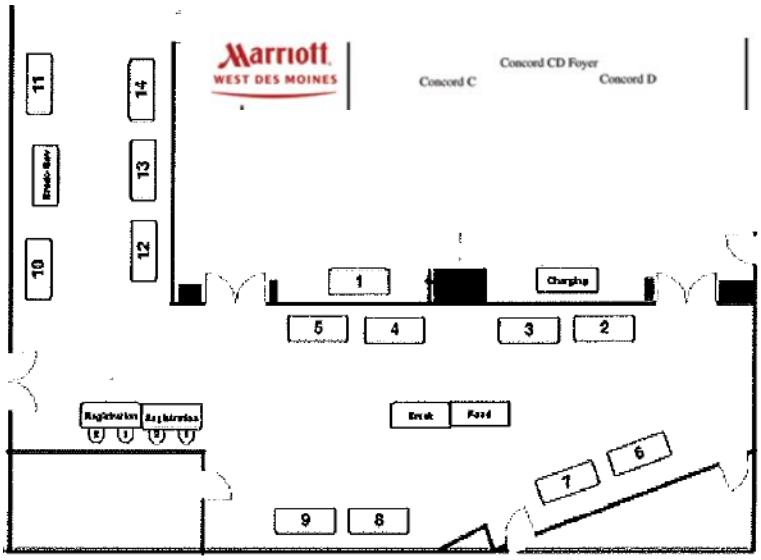

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SPEAKER BIOGRAPHIES

Magistrate Judge Helen Adams, Southern Iowa District, Davenport, IA
Magistrate Judge Helen C. Adams is a federal magistrate judge for the United States District Court for the Southern District of Iowa. Adams joined the court on February, 13, 2014. She earned her B.S. and J.D. from the University of Iowa in 1985 and 1988, respectively. Career highlights include: attorney at Pioneer Hi-Bred International (2009 – 2014), attorney at Dickinson, Mackaman, Tyler & Hagen (1990 – 2009), and law clerk for Hon. Harold Vietor, Southern District of Iowa (1988 – 1990). Award include: Inaugural winner, DuPont Legal Excellence in Ethics Award (2013), YMCA Woman of Achievement (2006).

Connie M. Alt, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA
Connie Alt is a partner at Shuttleworth & Ingersoll in Cedar Rapids where she has practiced since 1986. She has an active trial practice, primarily in the areas of professional liability and commercial litigation. She is a fellow of the American College of Trial Attorneys, and is currently the State Chair of the College. She has served as President of the Iowa Academy of Trial Lawyers, the Iowa chapter of the American Board of Trial Advocates, the Mason Ladd Inn of Court, and the Linn County Bar Assn. She is a frequent speaker on issues regarding Trial practice, commercial litigation and Medical Malpractice.

Michael F. Aylward, Morrison Mahoney, LLP, Boston, MA
Michael F. Aylward is a senior partner in the Boston office of Morrison Mahoney LLP where he chairs the firm's Complex Insurance Coverage Practice group. For the past three decades, Mr. Aylward has represented insurers and reinsurers in coverage disputes around the country concerning the application of liability insurance policies to commercial claims involving intellectual property disputes, environmental and mass tort claims and construction defect litigation. He has served as lead counsel in major coverage cases around the country and has successfully argued several landmark appeals on issues such as the pollution exclusion, "known loss" the meaning of "occurrence" and the scope of CGL coverage for cybernet and intellectual property claims. He has also advised various medical malpractice insurers concerning professional liability claims and consults frequently on bad faith and ethics disputes. He has also served as an arbitrator in numerous insurance coverage matters and has testified as an expert in matters involving coverage and reinsurance issues arising out of such claims. Mr. Aylward has taken a leading role in the defense bar over the years, including a term on the DRI Board of Directors (2000-2003) and service as the chair of its Insurance Law Committee (1999-2001). Since 2004, he has served on DRI's Law Institute, which he has chaired since 2012. In 2012, Aylward among the 12 founding members of the American College of Extra-Contractual and Coverage Counsel, which now has over two hundred members. He has also served in leadership roles for the American Bar Association (Insurance CLE); Federation of Defense and Corporate Counsel (past chair, Reinsurance and Excess Committee) and the International Association of Defense Counsel (Reinsurance and Excess Committee Chair). He is a frequent lecturer on insurance, ethics and bad faith issues and has published numerous articles on these topics, including a chapter on Understanding Bad Faith in the 2012 Appleman insurance treatise. Michael is a graduate of Dartmouth College, where he received his B.A. with Honors (History) in 1976 and the Boston College Law School (J.D. Cum Laude, 1981).

Philip A. Burian, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA
Philip Burian has been practicing in Iowa for 18 years and is a partner in the litigation section of Simmons Perrine Moyer Bergman PLC practicing primarily in the area of commercial, personal injury, and product liability. His practice frequently involves ESI discovery; sometimes the cases involve large volumes, other times the issue may relate to only a few specific electronic documents of critical importance.

SPEAKER BIOGRAPHIES

Douglas K. Burrell, Drew Eckl & Farnham, LLP, Atlanta, GA
Mr. Burrell has been a practicing trial lawyer for 18 years. He developed comprehensive experience while serving as first chair on more than 40 jury trials and more than 100 bench trials. He has also taken and defended hundreds of depositions. His practice consists of civil defense litigation with an emphasis on wrongful death and catastrophic injury, construction law, premises liability, transportation and trucking law and product liability. Mr. Burrell uses his substantial trial experience to counsel companies in evaluating the options and strategies for trial, including the use of pre-trial mediation. He has developed particular experience with national retailers, manufacturers, companies in the food & beverage industry, commercial trucking and transportation companies, furniture and construction companies. Mr. Burrell began his legal career in Cedar Rapids, Iowa, practicing in a distinguished civil litigation firm. He later became a Prosecutor where he obtained extensive jury trial experience. Prior to joining the Firm, Mr. Burrell worked in the Macon, Georgia City Attorney's office where he assisted in resolving various issues involving federal and state legislation and local ordinances. He also participated in negotiations with the National Basketball Association to place one of the first NBA Developmental League teams in Macon, Georgia. While an undergraduate student, Mr. Burrell was a two-time letter winner on the University of Iowa football team and played in the 1986 Rose Bowl. In addition to his role as co-chair of the Firm's Diversity Committee, Mr. Burrell serves the legal profession in a variety of capacities. For several years he has been an active member of DRI, a national membership organization for civil defense attorneys, in-house counsel, and insurance companies. In 2013, Mr. Burrell was elected to DRI's National Board of Directors. Prior to that, he served for two years as Chair of DRI's Diversity Steering Committee and has been active on the planning committee for DRI's Diversity for Success Seminar and Corporate Expo since 2007. He continues to serve as Faculty and in 2014 and 2015 will serve as Chair for the Georgia Defense Lawyers Association's Trial and Mediation Academy. Since 2011, he has served as Faculty for NITA's Deposition Skills Program and, in 2013, Mr. Burrell was accepted as a member of the Association of Defense Trial Attorneys, an organization of trial attorneys that limits its membership to one prime member per one million in population for each city, town, or municipality across the United States, Canada and Puerto Rico.

James P. Cooney, III, Womble Carlyle Sandridge & Rice, LLP, Charlotte, NC
Jim has tried more than 60 jury cases to verdict in civil and criminal cases and argued more than 45 appeals in the State and Federal courts. He is a Fellow in the American College of Trial Lawyers and a Permanent Member of the Fourth Circuit Judicial Conference. Jim has been selected as one of the "Best Lawyers in America" since 2000 in both civil and criminal litigation. He is the only attorney selected as one of the top trial lawyers in North Carolina in civil and criminal work; in 2006, 2007, 2008, 2009 and 2010 he was selected as one of the top 10 civil attorneys in North Carolina. In 2007 he was the top vote recipient for criminal attorneys in North Carolina and in 2010 was voted the best attorney for "Bet Your Company" cases. In 2004 he received the N.C. Bar Association's William Thorp Pro Bono Award and in 2010 the N.C. Bar Association's Wade Smith Professionalism Award for Criminal Defense. Jim graduated from Duke University in 1979 with a B.A. in History and Political Science, summa cum laude with distinction in History. He was a member of Phi Beta Kappa. He graduated from the University of Virginia School of Law in 1982 where he was a member of the Order of the Coif and the Research and Projects Editor of the Virginia Law Review. From 1982 to 1983, he was a Law Clerk to the Hon. John D. Butzner, Jr., of the U.S. Court of Appeals for the Fourth Circuit. Jim practiced law with Kennedy Covington Lobdell & Hickman in Charlotte from 1983 through 2000 before joining Womble Carlyle.

Theresa C. Davis, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA
Terri Davis, Esq. is a Senior Vice President at Shuttleworth & Ingersoll, PLC, and is the Chair of the Employment Law Practice Group. She is a frequent presenter on workers compensation topics in Iowa. She has been listed in The Best Lawyers in America – Workers' Compensation Law – Employers, Litigation and Labor & Employment (2007-Present). She is also listed as a Great Plain Super Lawyer in Employment & Labor and Workers' Compensation (21012-2013).

William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, TX
Dr. Bill Kanasky is recognized as a national expert, author and speaker in the areas of advanced witness training and jury psychology. Dr. Kanasky has distinct expertise in health litigation matters, as he consults on more than 175 cases annually in the areas of defendant witness training, jury decision-making research, and jury selection strategy. Importantly, his empirically-based consulting methods are specially designed to defeat plaintiff "Reptile" strategies, which have resulted in billions of dollars of damage awards across the nation. He earned his B.A. in Psychology from the University of North Carolina at Chapel Hill, and his Ph.D. in Clinical and Health Psychology from the University of Florida.

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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.

Justice Edward Mansfield, Iowa Supreme Court, Des Moines, IA
Justice Mansfield, Des Moines, was appointed to the Supreme Court in 2011. Justice Mansfield was born and raised in Massachusetts. He received his undergraduate degree from Harvard in 1978, and his law degree from Yale in 1982. After law school he clerked for the U.S. Court of Appeals, Fifth Circuit. Justice Mansfield worked as an attorney in private practice until his appointment to the Iowa Court of Appeals in 2009. Justice Mansfield also has been an adjunct professor of law at Drake University since 1997. Justice Mansfield is a member of the Iowa State Bar Association, having served as Chair of the Trade Regulation Section from 2004-2006. He is a member of the Polk County Bar Association and the Iowa Judges Association. Justice Mansfield also serves on the board of directors of Goodwill Industries of Central Iowa, and is a past Chairperson of this organization. Justice Mansfield is married and has three children. His current term expires December 31, 2020.

Connie Martin, Advantage Litigation, Minneapolis, MN
Ms. Martin has practiced in the field of litigation support for over 20 years. Having had her beginnings in the field while employed as a litigation support manager for a large Minneapolis insurance defense firm, she now consults and advises her clients in many areas of litigation support. She has specialized in the application of technology to the practice of litigation and is a pioneer in the field of automated litigation support. From the implementation of a records management center supported by a database for tracking movement of files in and out of the facility to a centralized dictation system to standalone word processing systems, Ms. Martin has applied evolving technologies to ensure cost-effective and reliable support systems. Ms. Martin spent the first 8-10 years of her professional life educating lawyers on the appropriate uses of technology, and worked extremely hard to help bring this technology to life in the courtroom. Now, 20+ years later, and after serving as consultant and trial technician to over 255 trial teams, Ms. Martin is considered an authority in the field of trial technology and evidence presentation in the courtroom. She travels widely to assist trial teams in the courtroom – and to prepare their cases for trial – and is a frequent speaker at Bar Association and industry specific conferences on the subject area of effective presentation techniques and utilization of technology in the courtroom. In the early 2000's, Ms. Martin began to follow the evolution from paper based litigation to electronically based litigation. Cases that used to consist of 250 - 500 boxes of paper evolved slowly to incorporate not only paper documents, but electronic data as well. The evolution of computers and electronic mail systems has created a situation for litigators that takes them out of their comfort zone of paper and drags them into the oft-referred to "back room" operations of a company – the IT infrastructure that supports the primary business efforts of the company. Ms. Martin provides assistance, guidance and consultative services to litigation teams across the nation which produces cost-effective, reliable, and most important of all, defensible electronic evidence processes and systems into the daily practice of litigation. Ms. Martin assists litigation teams to recognize the value of electronic evidence, together with proper processing of paper-based evidence and utilize appropriate technologies to move your case from inception to resolution deploying appropriate technologies throughout the process. Connie Martin is the Director of Consulting Services for Advantage Litigation, a subsidiary of The Advantage Companies.

Joshua J. McIntyre, Lane & Waterman LLP, Davenport, IA
Josh McIntyre is an associate at Lane & Waterman LLP in Davenport. His practice includes legal malpractice defense, intellectual property, and commercial litigation. He serves as an assistant coach to the mock trial team at Saint Ambrose University and is the author of *Miranda v. Said – A Small Window for Emotional Distress Damages in Legal Malpractice Actions*, which was published in the Spring 2014 edition of the *Defense Update*.

Abhay Nadipuram, Lederer Weston Craig PLC, Cedar Rapids, IA
Abhay M. Nadipuram is an associate at Lederer Weston Craig PLC in Cedar Rapids and Des Moines. Abhay practices in the areas of civil and commercial litigation, insurance defense, personal injury, and municipal law. He serves on the board of the Iowa Volunteer Lawyers for the Arts and is a member of Chorale Midwest, a community choir in Cedar Rapids. He is the author of *Is the OECD the Answer? It's Only Part of the Solution*, 38 J. Corp. L. 635. Abhay is a graduate of Wartburg College and the University of Iowa College of Law.

SPEAKER BIOGRAPHIES

Alan R. Olson, Altman Weil, Inc., Milwaukee, WI
Alan R. Olson is a principal of Altman Weil, Inc., serving clients from the firm's Midwest office in Milwaukee, Wisconsin. For over 25 years, he has advised law firms across the country on strategic planning and practice management. Mr. Olson's broad experience with law firms also encompasses projects involving law firm compensation systems, law firm mergers, professional services marketing, organization effectiveness and implementation strategies. He is a thought-leader in the emerging discipline of succession planning for law firms, including leadership and management transitions, practice transitions, compensation systems and key client retention strategies. Prior to joining Altman Weil, Mr. Olson was a practicing lawyer and held executive positions for two prominent corporations. As a national manager and corporate vice president, he was responsible for divisions and products that spanned at least twelve different industries. Mr. Olson is a frequent lecturer at national and regional programs for groups such as the American Bar Association, Association of Legal Administrators and many other legal organizations. He has spoken at and facilitated numerous educational panels, seminars and law firm retreats. He has authored articles for legal publications including ABA Law Practice, Of Counsel, Law Firm Partnership and Benefits Report, among others. He is an active member of the American Bar Association, including past-chair of the ABA Law Practice Management Section's Curriculum and Training Committee. He is a member of the Wisconsin Bar and Beta Gamma Sigma. Mr. Olson graduated with distinction from the University of Wisconsin in Madison. He received his Juris Doctor from the University of Wisconsin Law School and his M.B.A., with honors, from the University of Wisconsin in Milwaukee.

Marlo Orlin Leach, Gonzalez Saggio & Harlan LLP, Atlanta, GA
Marlo Orlin Leach focuses her legal practice on tort, commercial, and environmental litigation. She defends premises and product liability actions involving property damage and personal injury, including claims based on toxic torts, indoor air quality, and the manufacture and use of tools, machinery, and chemicals. Ms. Leach also has represented a number of clients involved in mold and lead paint litigation, and she has represented builders and developers in cases involving claims arising from stormwater discharge. She also has spoken at seminars on defending mold litigation and stormwater runoff cases. She also handles a variety of complex commercial cases, including warranty, contract and business disputes arising out of construction projects, product manufacturing, service agreements, health care services, employment relationships, and real estate ventures. She has spoken at national seminars on terms and conditions in purchase agreements and on warranties under Article 2 of the UCC. Active in the legal community, Ms. Leach is a Member, American Bar Association (Tort Trial and Insurance Practice Section; Membership Committee, Chair; Alternative Dispute Resolution Committee, Vice Chair; Products General Liability and Consumer Law Committee, Vice Chair, 2004-2009; Trial Techniques Committee, Vice Chair, 2004-2006, Chair, 2007-2008); Atlanta Bar Association (Law School Outreach Committee, Chair, 1998-2000; Community Outreach Committee, Chair, 2004-2008; Litigation Section; Member, Law School Outreach Committee, 1995-2000); and State Bar of Georgia (General Practice & Trial Section; Product Liability Law Section; Member, Law School Outreach Committee, 1995-2000). She is a Fellow, American Bar Foundation and Editor-in-Chief of The Brief, a Tort Trial & Insurance Practice Section Publication. She is also a member of the East Cobb Kiwanis Club, Board of Directors (2002-2009) and Moving in the Spirit, Board of Directors. Ms. Leach earned her J.D., magna cum laude, at Georgia State University College of Law and received her B.A. from Emory University. She is admitted to practice in the State of Georgia; U.S. District Courts, Middle and Northern Districts of Georgia; Georgia Supreme Court; Georgia Court of Appeals; and the U.S. Court of Appeals, Eleventh Circuit.

Sam Perlmutter, Exponent, Inc., Chicago, IL
Dr. Sam Perlmutter is a Scientist in Exponent's Human Factors practice. Dr. Perlmutter recently completed a Ph.D. in Neuroscience from Northwestern University in 2013 with a focus on movement and rehabilitation science. He has worked with clinicians and stroke survivors to design and fabricate a novel multi-directional electromechanical device to measure trunk dysfunction post-stroke. The device assisted in the development of suggested alternative clinical methods for delivering a more targeted intervention. Dr. Perlmutter has extensive experience in electromechanical design and fabrication, instrumentation, biophysical signal processing, data acquisition and motion analysis of human movement. He has previously instrumented fresh-frozen cadaveric elbow specimens to demonstrate the protective role of forearm flexors in preventing repetitive strain injuries to elbow ligaments during throwing. He has retrofitted toy tricycles with a portable CPU and sensors to compare the riding strategies of children across various tricycle designs. He has also used force platform and motion analysis technology to identify disrupted sitting balance and forward reaching in individuals who have survived a stroke. Dr. Perlmutter has also investigated how the pause-time between movements mediates the motor preparation of single vs. multiple movements using a startling acoustic stimulus. He has also used motion analysis technology to assist in analyzing gait patterns of individuals who had total hip replacement surgery. Prior to joining Exponent, Dr. Perlmutter worked in the Neuroimaging and Motor Control Laboratory at Northwestern University where he investigated trunk dysfunction post-stroke.

SPEAKER BIOGRAPHIES

Kevin M. Reynolds, Whitfield & Eddy, PLC, Des Moines, IA
Kevin M. Reynolds is a member in the Des Moines law firm of Whitfield & Eddy, P.L.C. Kevin has a B.A. in Political Science from Iowa State University (1978), and a J.D. from the University of Iowa College of Law (1981). He has been in the trial practice for over 30 years, and his practice has concentrated on the defense and trial of product liability cases. Kevin is a past national Chair of the Product Liability Committee of the Defense Research Institute (DRI). He co-authored an article entitled, *The Ten Myths= of Products Liability,@ 27 Wm. Mitchell L. Rev. 551 (2000)*. He is a member of the Iowa Defense Counsel Association, Polk County Bar Association, DRI, the Product Liability Advisory Council and the International Association of Defense Counsel.

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

Justice Michael Streit, Ahlers & Cooney, P.C., Des Moines, IA
In April 2011, former Iowa Supreme Court Justice Michael Streit joined Ahlers & Cooney in its Litigation, Dispute Resolution and Investigations practice area, where he is involved with complex mediations and arbitrations. In 2001, Governor Thomas Vilsack appointed Judge Streit to the Iowa Supreme Court, where he served through 2010. While serving on the Supreme Court, Judge Streit authored over 170 opinions. He served as Chair of the Rules committee, and on the Bar Admissions and Administrative committees. He enjoyed serving as liaison to the Fifth, Seventh and Eighth Judicial districts. In May of 2012, Judge Streit was awarded the Profiles in Courage Award by Caroline Kennedy on behalf of the John F. Kennedy Foundation. The award was presented to Judge Streit for conscientious and courageous leadership while he served on the Iowa Supreme Court. Born in Sheldon, Iowa, he received his bachelor's degree from the University of Iowa in 1972. In 1975, he graduated from the University of San Diego School of Law, where he served on the law review and was editor-in-chief of the monthly law journal. While a member of the law review, Streit authored articles on the Investment Advisers Act of 1935 and Section 16b of the Securities Exchange Act. Licensed in the Iowa, California and Nebraska courts, he began practicing law with the Morr and Shelton law firm in Chariton, Iowa until 1983, where he served farmers, businessmen and every day Iowans. He also served as assistant Lucas County attorney and Lucas County attorney before being appointed as a district court judge in 1983, where he served in all 16 counties of the Fifth Judicial District. He presided over cases dealing with crime, families, business, farm debt, juveniles, and probate. Judge Streit was appointed by Governor Terry Branstad to the Court of Appeals in 1996. In the five years on the Court of Appeals, he wrote over 600 decisions. Judge Streit, as a member of the Blackstone Inn of Court, served for two months in the British courts in London, Oxford and Birmingham. As part of the experience, he sat both on the bench with judges and with the barristers in court. He has met with and taught groups of lawyers and judges from Bosnia, Moldova, Russia, Ukraine, Germany, China, Turkey, Romania, Hungary, and students from over 30 countries.

Scott Sundstrom, 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.

SPEAKER BIOGRAPHIES

Marie Trimble Holvick, Gordon & Rees, LLP, San Francisco, CA
Marie Trimble Holvick is Senior Counsel in the Employment practice group of the San Francisco office of Gordon & Rees. Ms. Holvick's experience includes assisting with employment matters involving allegations of age, gender, and race discrimination, sexual harassment, wrongful termination, whistleblower claims, violations of the FMLA, the FEHA, and the ADA, and "wage and hour" violations. Ms. Holvick's employment law work has involved clients from a wide range of industries, including restaurants, wineries, the hospitality industry, health care, manufacturing, non-profit organizations, and insurance. In addition to appearances in state and federal court, Ms. Holvick has assisted in matters involving the Department of Labor, the Division of Labor Standards Enforcement, the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, the Workers Compensation Appeals Board, and the National Labor Relations Board. Ms. Holvick also assists with class action litigation. In addition to litigation, Ms. Holvick regularly provides employment counseling advice to employers and conducts workplace investigations. Ms. Holvick also coordinates legal work in other areas of practice, including real estate, intellectual property, and commercial litigation.

Anatomy of a Hoax

James P. Cooney, III
Womble Carlyle Sandridge & Rice, LLP
One Wells Fargo Center, Suite 3500
301 S. College Street
Charlotte, NC 28202
Phone: (704) 444-2980
JCooney@wcsr.com

INA BEFORE THE DISCIPLINARY OF THE

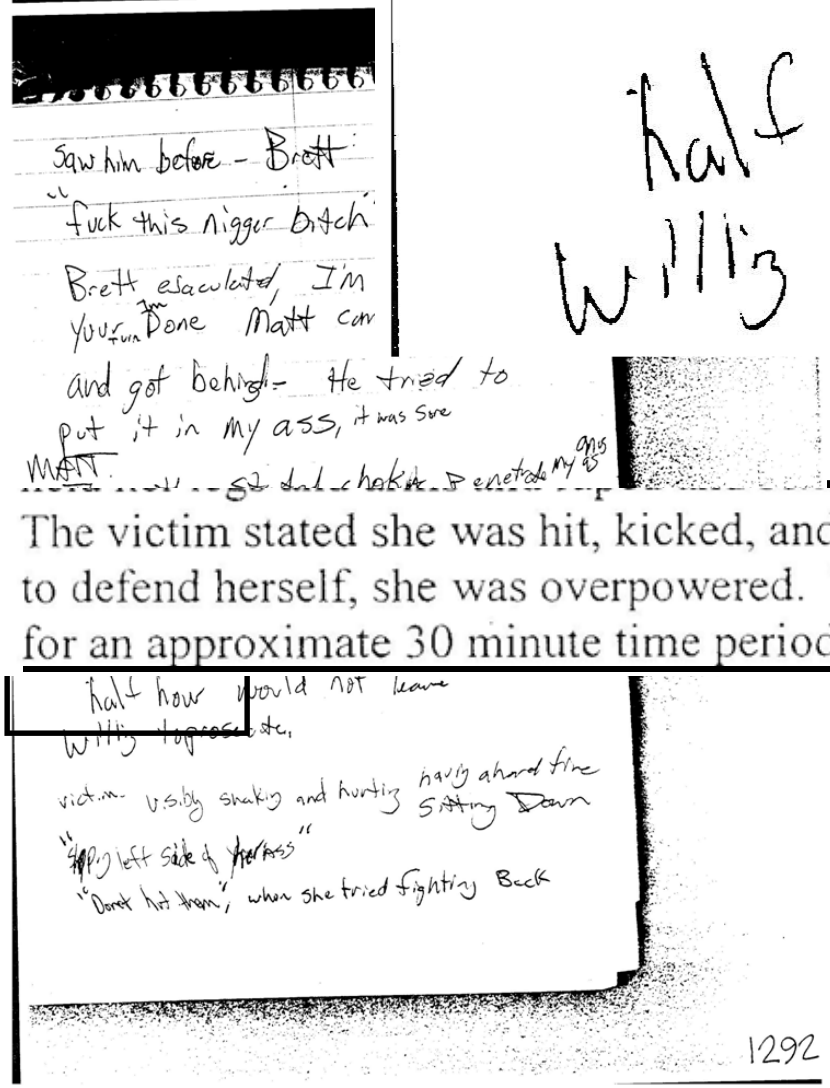
A. I came to the conclusion that she -- she had made up -- that she was not telling the truth about anything. That she was improvising everything that she had said. That everything she was contradicted with, she would make up improvisation of what actually happened of why this happened, why this didn't happen.

sexually assaulted on March 13th and 14th at 610 Buchanan?

that stuff with her, was that before or after the indictments occurred?

Reported by:
Margaret M. Po
Certified Verbatim R
6212 Splitrock T
Apex, North Carolina
(919) 779-032

Opportunity



saw him before - Brett
" fuck this nigger bitch"
Brett esaculated, I'm
your turn Done Matt can
and got behind- He tried to
put it in my ass, it was sore
MATT

half hour would
willing to prosecute,

victim visibly shaking and hurting having ahard time
Sitting Down
"stepping left side of her ass"
"Don't hit them", when she tried fighting Back

1292

GENERAL COURT OF JUSTICE
CT/ SUPERIOR COURT DIVISION

L IDENTIFICATION ORDER

re called to the Kroger on
nale reported to the officers that
Buchanan Blvd. The
ad an appointment to dance at
sidence and joined the other
im reported that they began to
w minutes, the males watching
ated to the women "I'm gonna
shove this up you" while holding a broom stick up in the air so they could see it. The victim and her fellow dancer decided to leave because they were concerned for their safety. After the two women exited the residence and got into a vehicle, they were approached by one of the suspects. He apologized and requested they go back inside and continue to dance. Shortly after going back into the dwelling the two women were separated. Two males, Adam and Matt pulled the victim into the bathroom. Someone closed the door to the bathroom where she was, and said "sweet heart you can't leave."

The victim stated she was hit, kicked, and strangled during the assault. As she attempted to defend herself, she was overpowered. The victim reported she was sexually assaulted for an approximate 30 minute time period by the three males. During a search warrant at

dollar bills were recovered inside the residence totaling $160.00 consistent with the victim claiming $400.00 cash in all twenty dollar bills was taken from her purse immediately after the rape. The victim was treated and evaluated at Duke University Medical Center Emergency Room shortly after the attack took place. A Forensic Sexual Assault Nurse (SANE) and Physician conducted the examination. Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally. Furthermore, the SANE nurse stated the injuries and her behavior were consistent with a traumatic experience.

JUDGE
DATE: 23 MAR. 2006

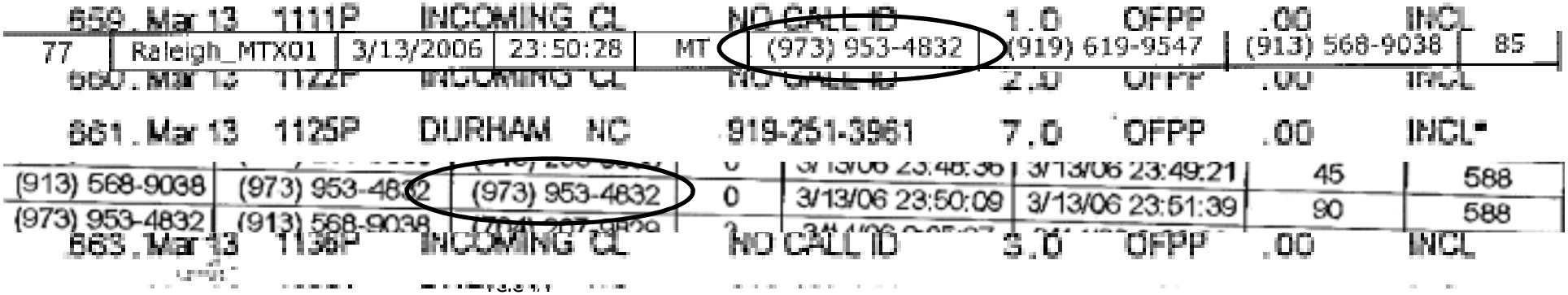
Assistant District Attorney
DATE: 3/23/16

460

March 13-14, 2006

659. Mar 13	1111P	INCOMING	CL	NO CALL ID	1.0	OFPP	.00	INCL
660. Mar 13	1122P	INCOMING	CL	NO CALL ID	2.0	OFPP	.00	INCL
661. Mar 13	1125P	DURHAM	NC	919-251-3961	7.0	OFPP	.00	INCL*
662. Mar 13	1133P	INCOMING	CL	NO CALL ID	1.0	OFPP	.00	INCL
663. Mar 13	1136P	INCOMING	CL	NO CALL ID	3.0	OFPP	.00	INCL

March 13-14, 2006



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77	Raleigh_MTX01	3/13/2006	23:50:28	MT	(973) 953-4832		(919) 619-9547	(913) 568-9038	85	
660	Mar 13	1122P	INCOMING CL		NO CALL ID		2.0	OFPP	.00	INCL
661	Mar 13	1125P	DURHAM	NC	919-251-3961		7.0	OFPP	.00	INCL*
(913) 568-9038	(973) 953-4832	(973) 953-4832		0	3/13/06 23:48:36		3/13/06 23:49:21	45	588	
(973) 953-4832	(913) 568-9038				3/13/06 23:50:09		3/13/06 23:51:39	90	588	
663	Mar 13	1136P	INCOMING CL		NO CALL ID		3.0	OFPP	.00	INCL

March 13-14, 2006

Friday, March
608 N. Buchar
Durham, NC

This is my acc
morning hours

At the approxi
men were playi
Buchanan as I
wearing a sort
My roommate,
on this day.

I returned to a

Friday, March 31, 2006

something to the effect that they would "be right there," or "just give us a minute."

I saw the women enter 610 together. After a moment, I remember quite specifically noting that it was Midnight. At approximately 12:05 on Tuesday, I re-entered my house and took a quick shower. As I was getting re-dressed in my bedroom, which is on the opposite side of the building from 610, I heard loud voices from outside. I had left my front door open, and the voices were carrying from in front of my residence, as well as open windows along the alley between 608 and 610.

sort of couching, as if she was preparing her for something that she herself was comfortable with, but needed to talk the woman with the short skirt though. I did not overhear any specific words at that time. Twice that I noticed during this conversation, a man or two different men opened the back door of 610 and spoke to the women, and the more conservatively dressed woman responded both times something to the effect that they would "be right there," or "just give us a minute."

I saw the women enter 610 together. After a moment, I remember quite specifically noting that it was Midnight. At approximately 12:05 on Tuesday, I re-entered my house and took a quick shower. As I was getting re-dressed in my bedroom, which is on the opposite side of the building from 610, I heard loud voices from outside. I had left my front door open, and the voices were carrying from in front of my residence, as well as open windows along the alley between 608 and 610.

bed.

Jason Alexander Bissey.

March 13-14, 2006

79	Raleigh_MTX01	3/14/2006	0:05:49	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	32
80	Raleigh_MTX01	3/14/2006	0:06:24	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	33
81	Raleigh_MTX01	3/14/2006	0:07:03	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	36
82	Raleigh_MTX01	3/14/2006	0:09:14	MO	(973) 953-4832	(1908) 337-1009	(973) 953-4832	23
83	Raleigh_MTX01	3/14/2006	0:09:57	MO	(973) 953-4832	(1908) 337-1009	(973) 953-4832	13
84	Raleigh_MTX01	3/14/2006	0:10:14	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	26
85	Raleigh_MTX01	3/14/2006	0:12:16	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	20
86	Raleigh_MTX01	3/14/2006	0:13:33	MO	(973) 953-4832	(913) 568-9038	(973) 953-4832	33
87	Raleigh_MTX01	3/14/2006	0:14:46	MO	(973) 953-4832	(1919) 730-5337	(973) 953-4832	58

Cell Cell Cell Cell Cell Jason Bissey 8 Cell Calls by

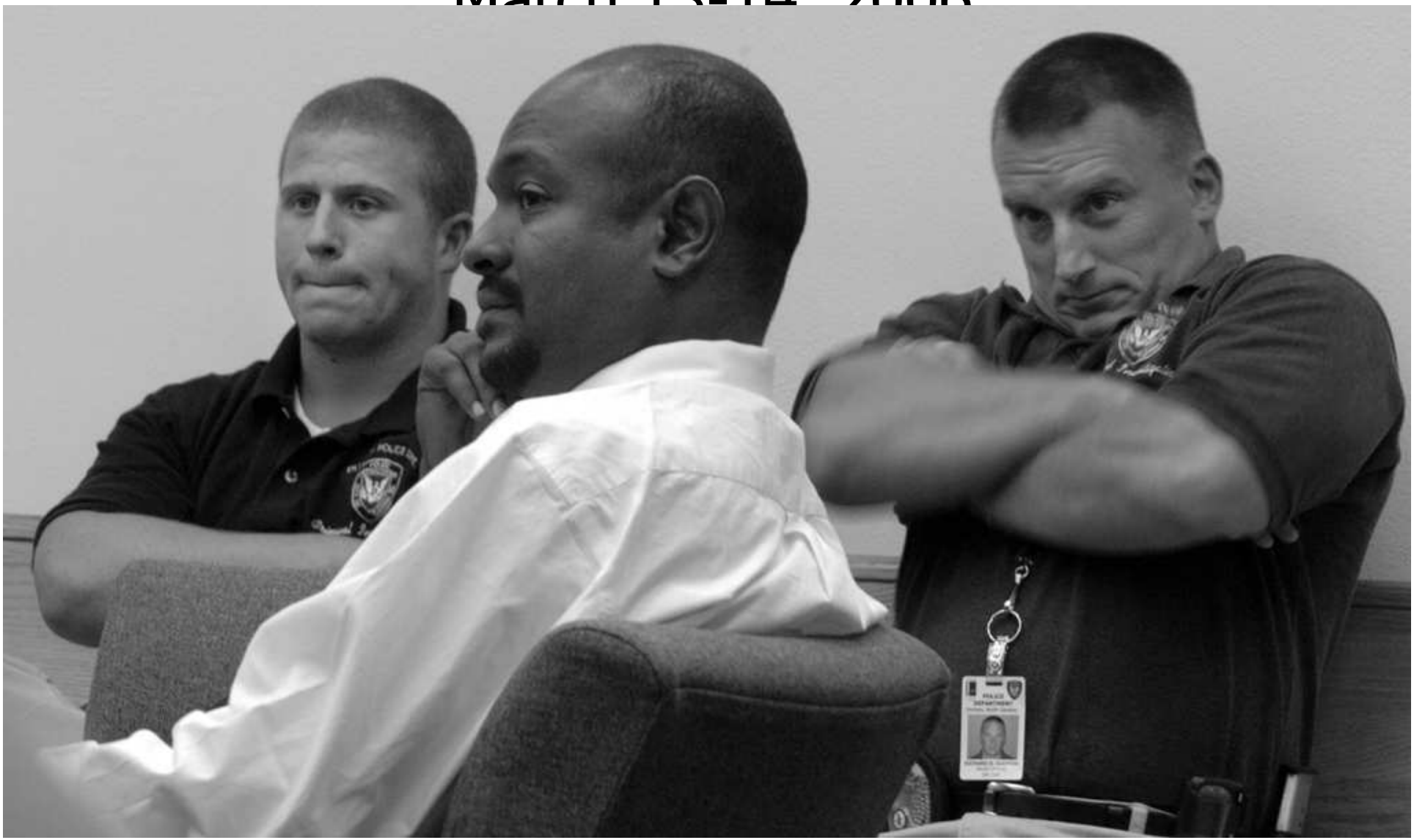
DETAILS for 919-730-5337, 1 6 continued

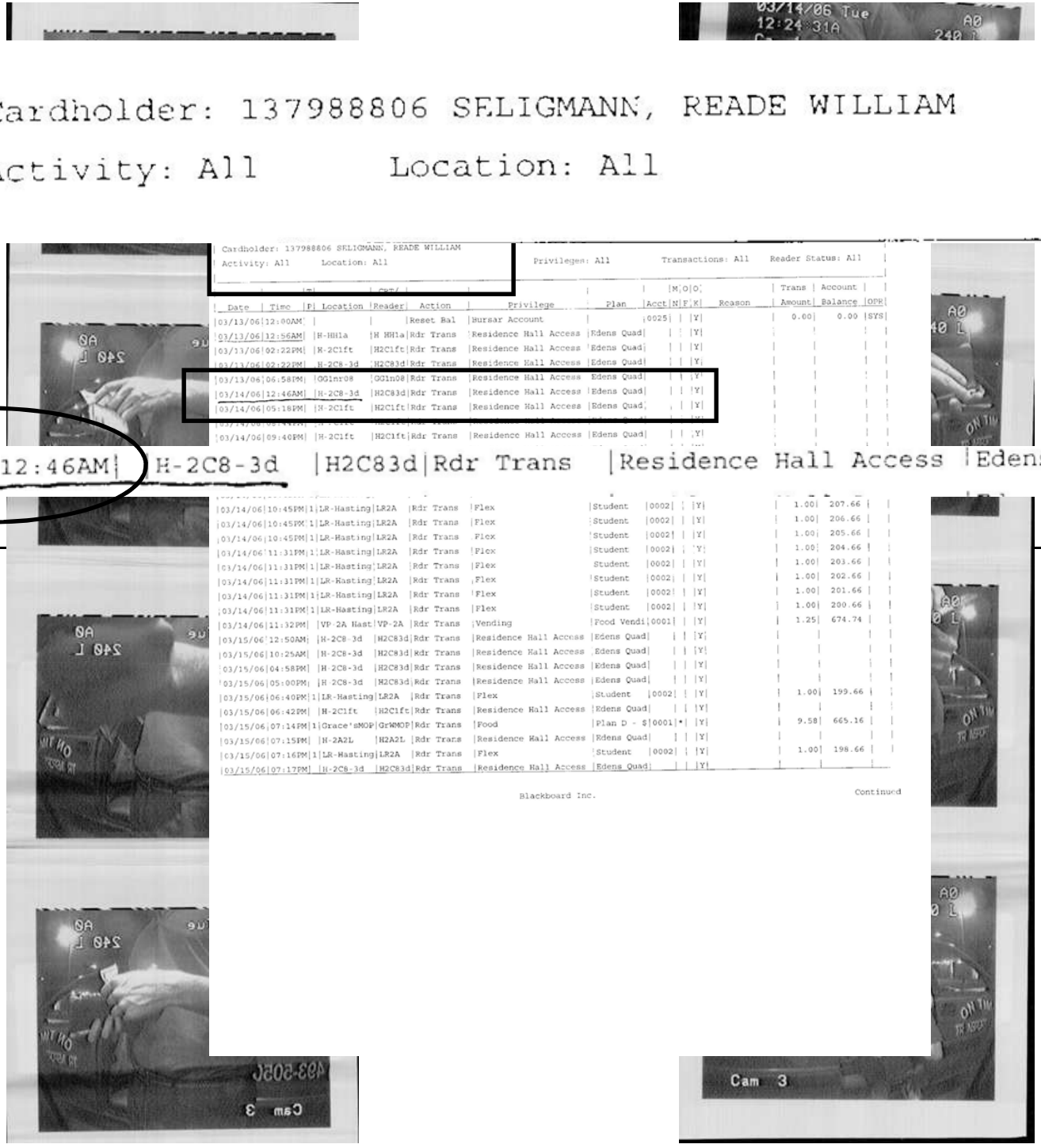
> SUBSCRIBER ACTIVITY DETAIL

527 03/14 12:04A	Toll Free	800-915-1210 OP/PU	8:00	0.00	0.00	0.00
528 03/14 12:14A	Incoming	973-953-4832 OP	1:00	0.00	0.00	0.00
529 03/14 12:20A	Incoming	919-493-5050 OP	1:00	0.00	0.00	0.00

518 03/13 11:01P	Toll Free	800-915-1210 OP/PU	15:00	0.00	0.00	0.00
519 03/13 11:14P	Incoming	312-771-8500 OP/CW	1:00	0.00	0.00	0.00
520 03/13 11:21P	Incoming	919-493-5050 OP	1:00	0.00	0.00	0.00
521 03/13 11:44P	Incoming	919-493-5050 OP	1:00	0.00	0.00	0.00
522 03/13 11:46P	Incoming	919-493-5050 OP	1:00	0.00	0.00	0.00
523 03/13 11:51P	Incoming	919-493-5050 OP	4:00	0.00	0.00	0.00
524 03/13 11:59P	Toll Free	800-915-1210 OP/PU	1:00	0.00	0.00	0.00
525 03/13 11:59P	Toll Free	800-915-1210 OP/PU	1:00	0.00	0.00	0.00
526 03/14 12:00A	Toll Free	800-915-1210 OP/PU	3:00	0.00	0.00	0.00
527 03/14 12:04A	Toll Free	800-915-1210 OP/PU	8:00	0.00	0.00	0.00
528 03/14 12:14A	Incoming	973-953-4832 OP	1:00	0.00	0.00	0.00
529 03/14 12:20A	Incoming	919-493-5050 OP	1:00	0.00	0.00	0.00

March 13-14, 2006





Cardholder: 137988806 SELIGMANN, READE WILLIAM

Activity: All Location: All

Privileges: All Transactions: All Reader Status: All

Date	Time	P	Location	Reader	Action	Privilege	Plan	Acct	M	O	O	X	Reason	Trans Amount	Account Balance	OPR
03/13/06	12:00AM				Reset Bal	Bursar Account		0025				Y		0.00	0.00	SYS
03/13/06	12:56AM		H-HH1a	H HH1a	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/13/06	02:22PM		H-2C1ft	H2C1ft	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/13/06	02:22PM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/13/06	06:58PM		GG1nr08	GG1n08	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/14/06	12:46AM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/14/06	05:18PM		H-2C1ft	H2C1ft	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/14/06	09:40PM		H-2C1ft	H2C1ft	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/14/06	10:45PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	207.66	
03/14/06	10:45PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	206.66	
03/14/06	10:45PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	205.66	
03/14/06	11:31PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	204.66	
03/14/06	11:31PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	203.66	
03/14/06	11:31PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	202.66	
03/14/06	11:31PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	201.66	
03/14/06	11:31PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	200.66	
03/14/06	11:32PM		VP-2A Hast	VP-2A	Rdr Trans	Vending	Food Vendi	0001				Y		1.25	674.74	
03/15/06	12:50AM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	10:25AM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	04:58PM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	05:00PM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	06:40PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	199.66	
03/15/06	06:42PM		H-2C1ft	H2C1ft	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	07:14PM	1	Grace'sMOP	GrWMOP	Rdr Trans	Food	Plan D - $	0001	*			Y		9.58	665.16	
03/15/06	07:15PM		H-2A2L	H2A2L	Rdr Trans	Residence Hall Access	Edens Quad					Y				
03/15/06	07:16PM	1	LR-Hasting	LR2A	Rdr Trans	Flex	Student	0002				Y		1.00	198.66	
03/15/06	07:17PM		H-2C8-3d	H2C83d	Rdr Trans	Residence Hall Access	Edens Quad					Y				

Blackboard Inc.

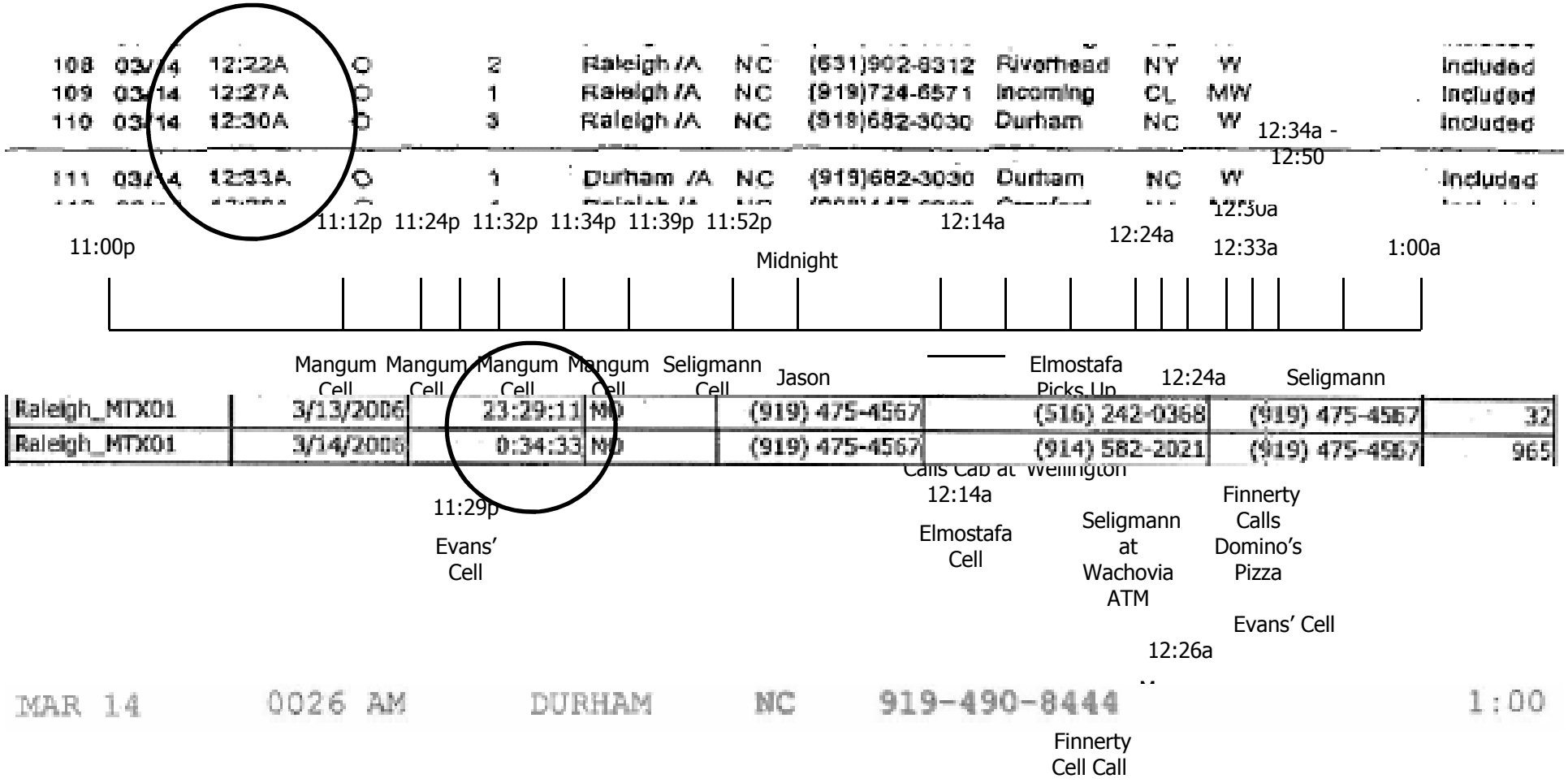
Continued

|03/14/06|12:46AM| H-2C8-3d |H2C83d|Rdr Trans |Residence Hall Access |Edens Quad| | | |Y|

12:46a

Seligmann Reenters Dorm

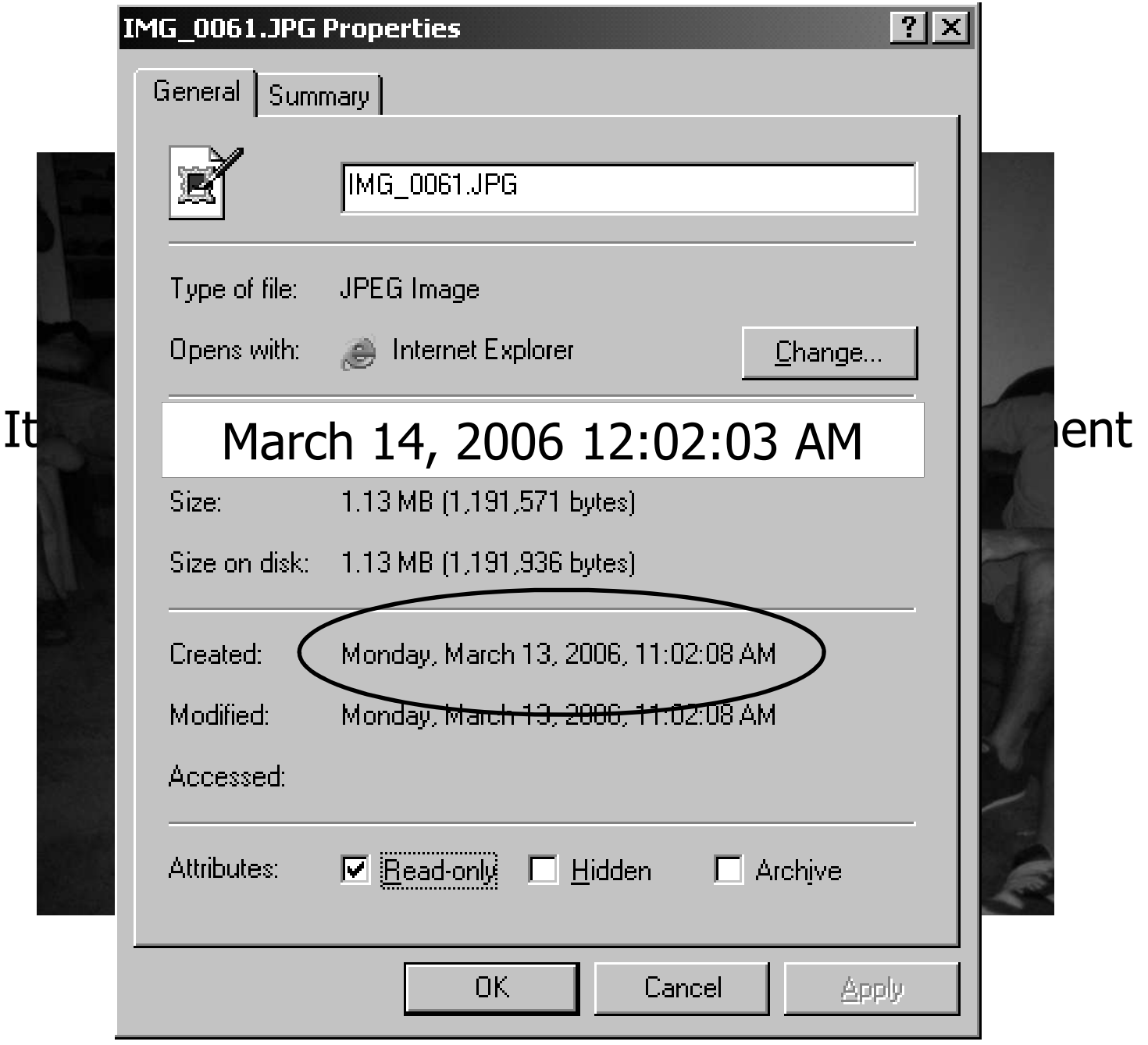
March 13-14, 2006



A Picture Story

Dave Evans' Camera


13 Hours Difference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General
Summary
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Opens with: Internet Explorer
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Size on disk: 1.13 MB (1,191,936 bytes)
Created: Monday, March 13, 2006, 11:02:08 AM
Modified: Monday, March 13, 2006, 11:02:08 AM
Accessed:
Attributes: Read-only Hidden Archive
OK
Cancel
Apply

Kevin Coleman (Camera with black stripper passed out
↳ Also going to car.

Tom Clute
Brck Archer
Chris loftus (Before strippers came, went w girlfriend)
Dan loftus
Erik Hewkelman
Colin Finnerty
Kyle Dawd
Zack Gacer
Gibbs Fogarty

Hispanic — Age
Black, Girl — Was messed up,
speed

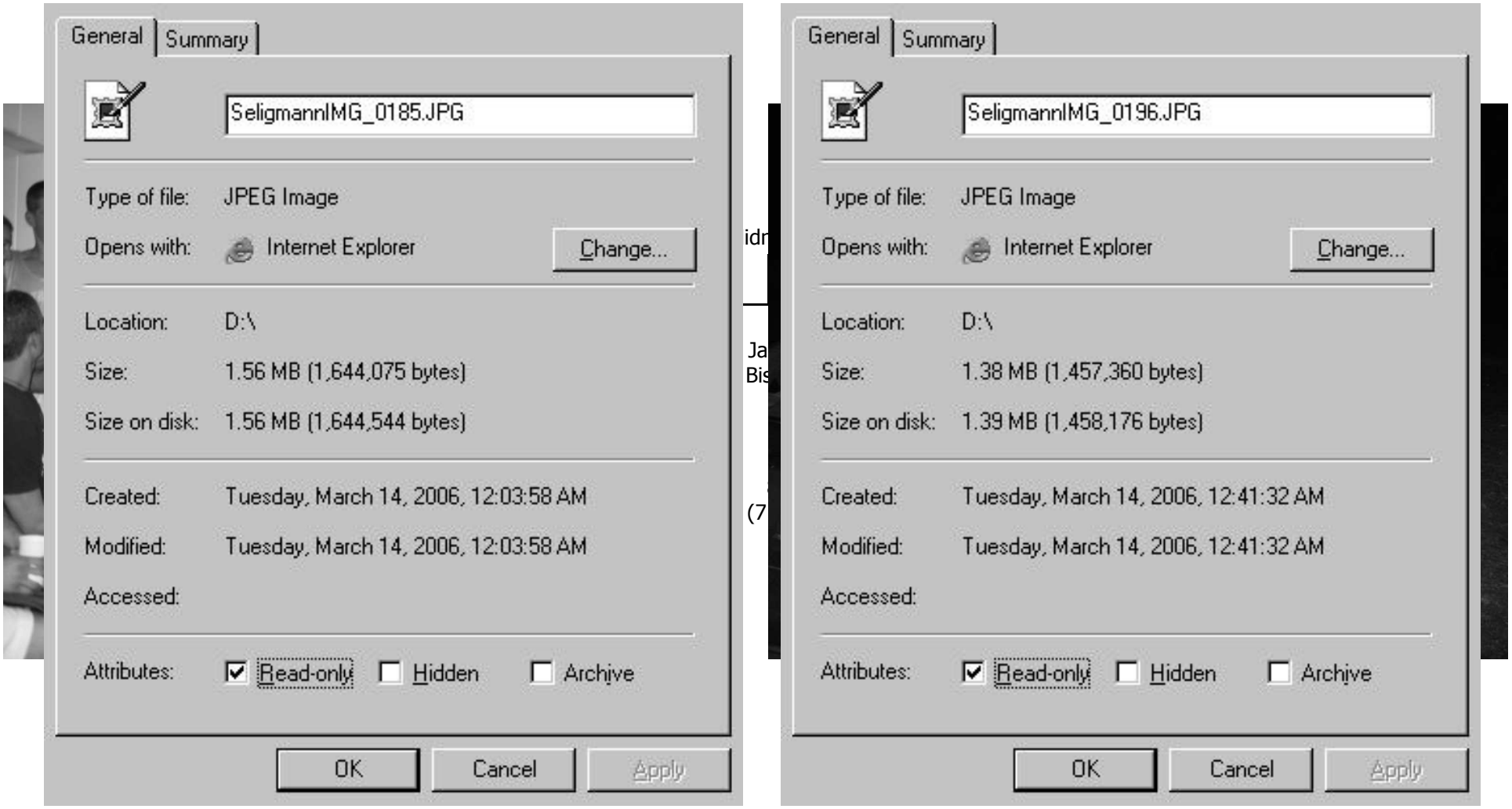
March 16, 2006

Matt Zash

Kevin Coleman — has picture of girl

- Dancer

March 13-14, 2006



Trying to Change Time

HAN-DEE HUGO #77
1203 W. CLUB BLVD.
DURHAM, N.C. 27701

800000021419-001-2
HAN-DEE HUGO:S 77
1203 W CLUB BLVD
DURHAM NC 27701
919-286-2276

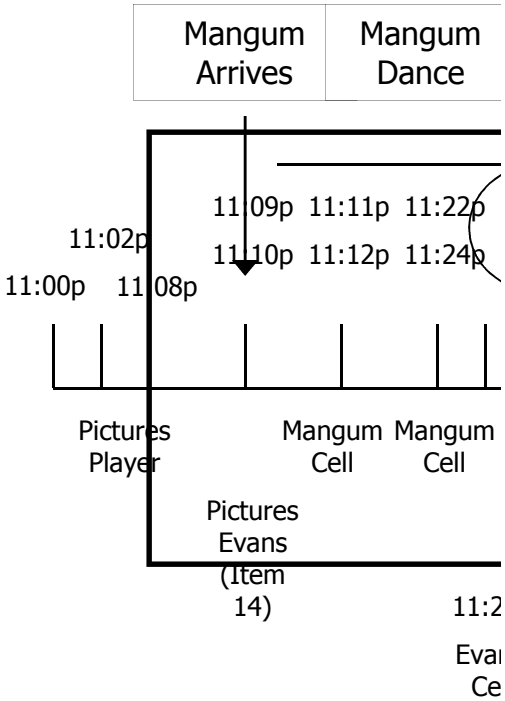
Descr.	qty	amount
T GATOR XFAC EACH	1	1.39
Sub Total		1.39
Tax		0.10
TOTAL		1.49
CREDIT $		1.49

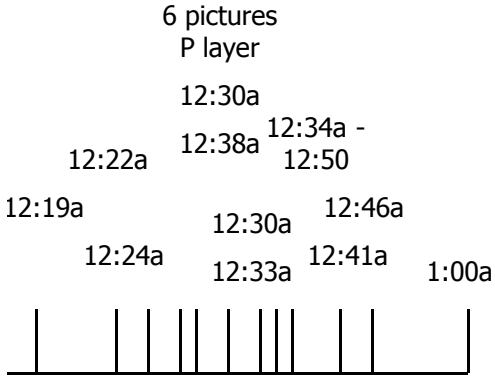
CARD TYPE: VISA
CARD NAME: BRIAN W TAYLOR
ACCT NUMBER: **********0512
EXP. DATE: TRANS TYPE: SALE
SEQ# 0014 REFERENCE# 072000021000026
AUTH# 420731 APPROVED
BATCH# 57

I AGREE TO PAY TOTAL AMOUNT ACCORDING TO CARD ISSUER AGREEMENT. _____INITIALS

REG# 0002 CSH# 009 DRW# 01 TRN# 24705
03/13/06 23:43:56 ST# 77

6





mostafa
icks Up
eligmann
and
ellington

12:24a
Finnerty Cell Call

Seligmann Reenters Dorm

Seligmann at Wachovia ATM

Finnerty Calls Domino's Pizza

Evans' Cell

12:26a

Mangum Cell

Mangum Leaves Player Picture

Finnerty Cell Call

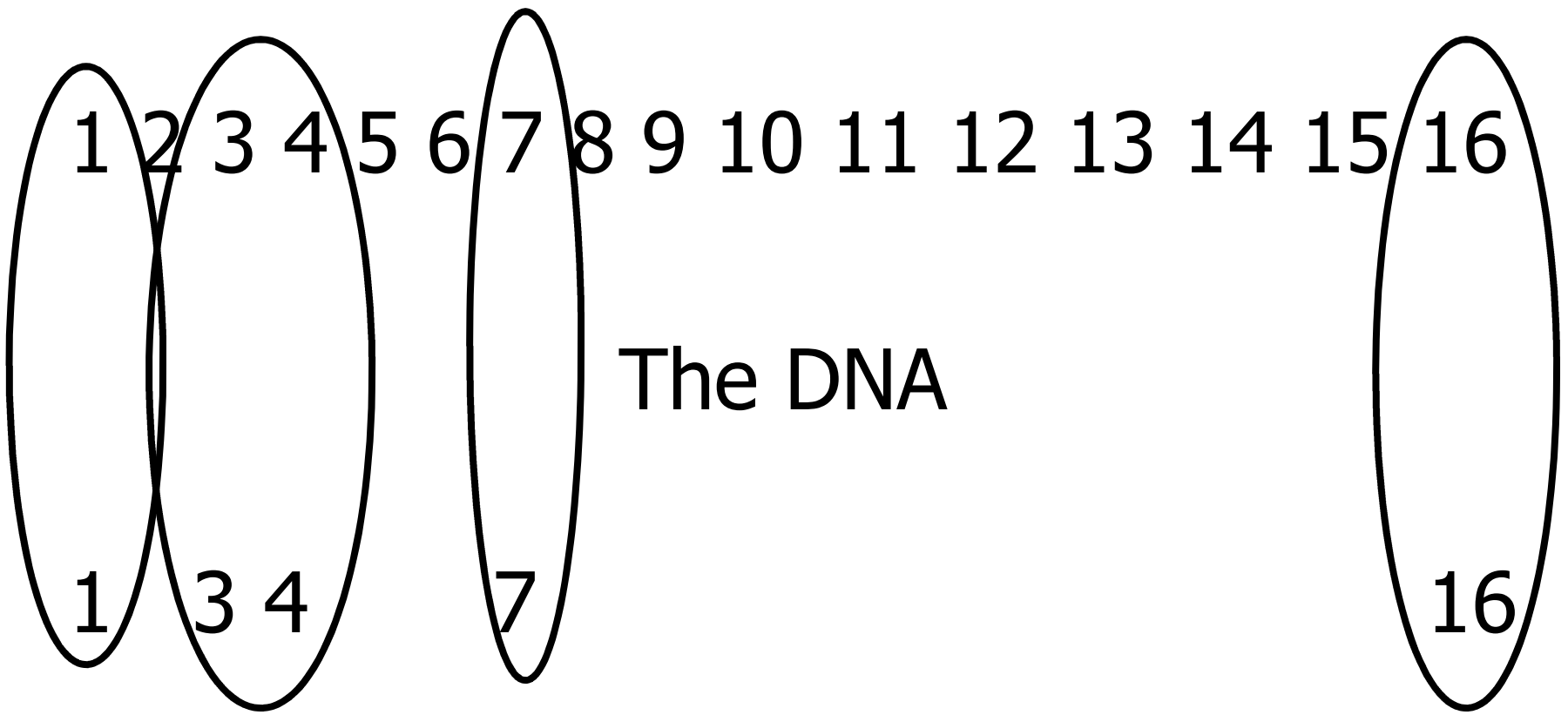
December 2006 Ve

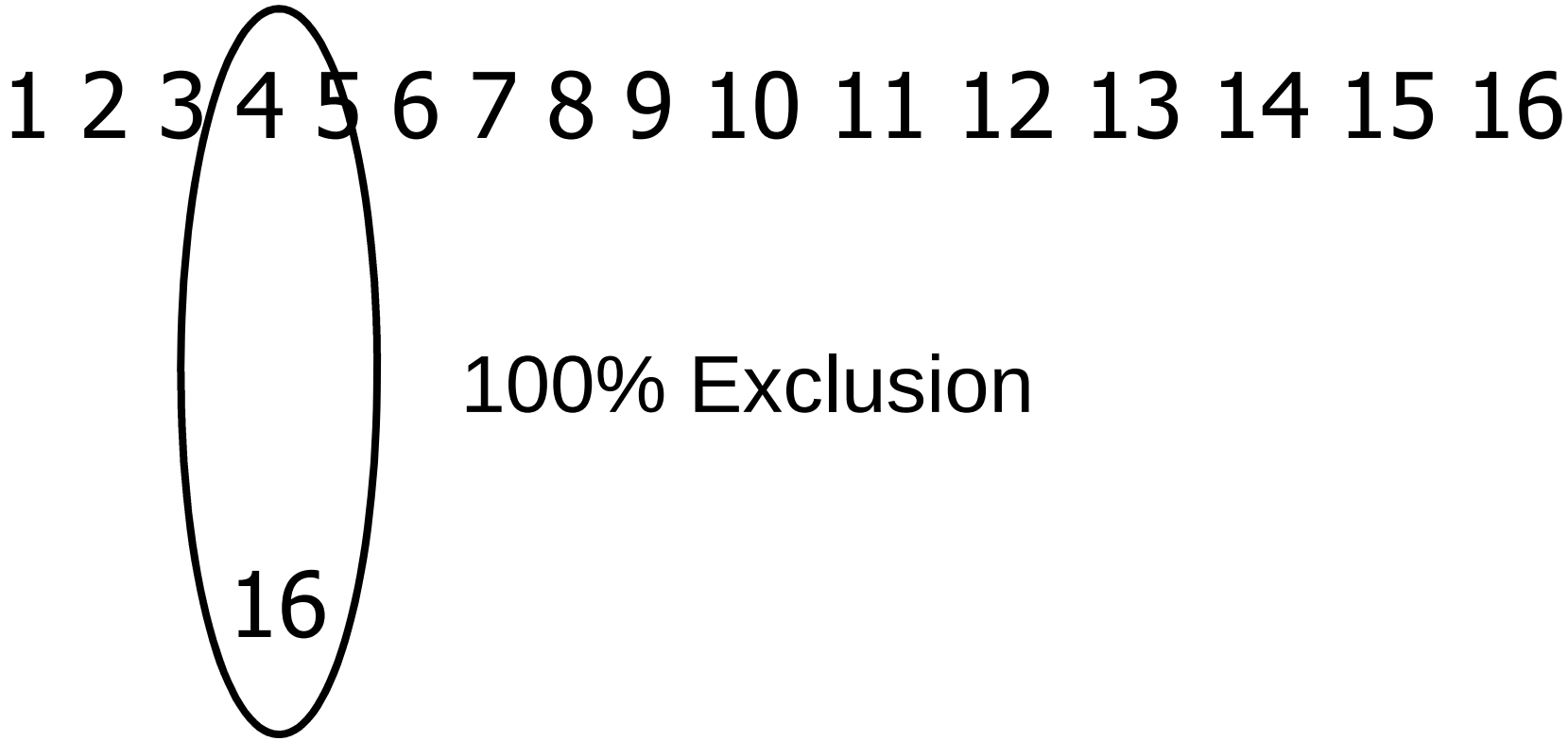
Q. What was your reaction when you saw the substance of the statements made in the Linwood Wilson's Investigative Report from the December 21st interview?

A. When I actually saw the report I was reading it and I said it didn't make any sense, she had changed her story completely. And there was -- the sexual positions she had of the suspects weren't even close to what she had told me. They had it underneath them and everything like that. And it didn't -- it wasn't making any sense.

Reported by:
Margaret M. Powell
Certified Verbatim Reporter
6212 Splitrock Trail
Apex, North Carolina 27539
(919) 779-0322

11:0
11:00p
Pict
Pla
Da
Decel
2006
n
Mangum
Leaves Player
Picture


1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
The DNA
1 3 4
7
16


1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
100% Exclusion
16

Results of DNA analysis:

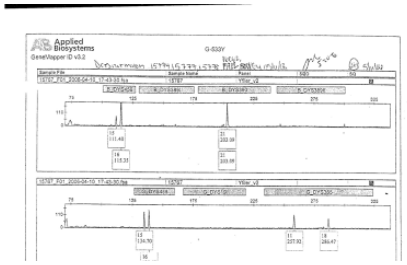
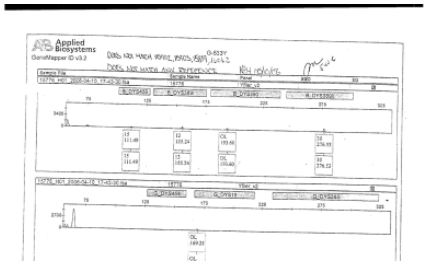
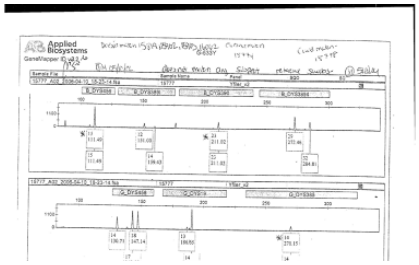
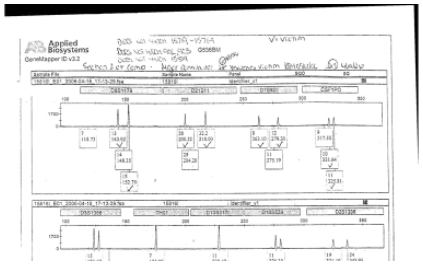
Individual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below.

Analysis I - Numbers in bold indicate a match with the suspect reference specimen. Numbers enclosed in brackets [ ], indicate a match coincident with a stutter fragment or a fragment of low intensity. The "INC" indicates that results for that locus are inconclusive and cannot be reported.

Results of DNA analysis:

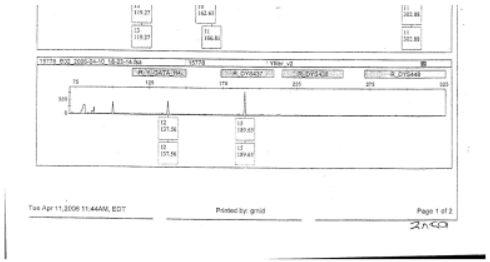
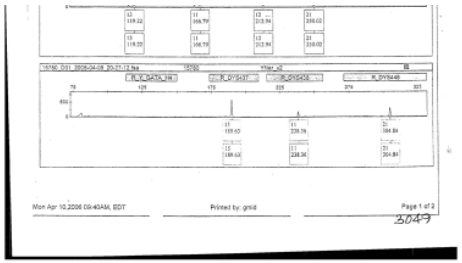
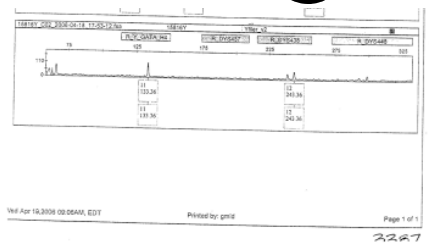
Individual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below.

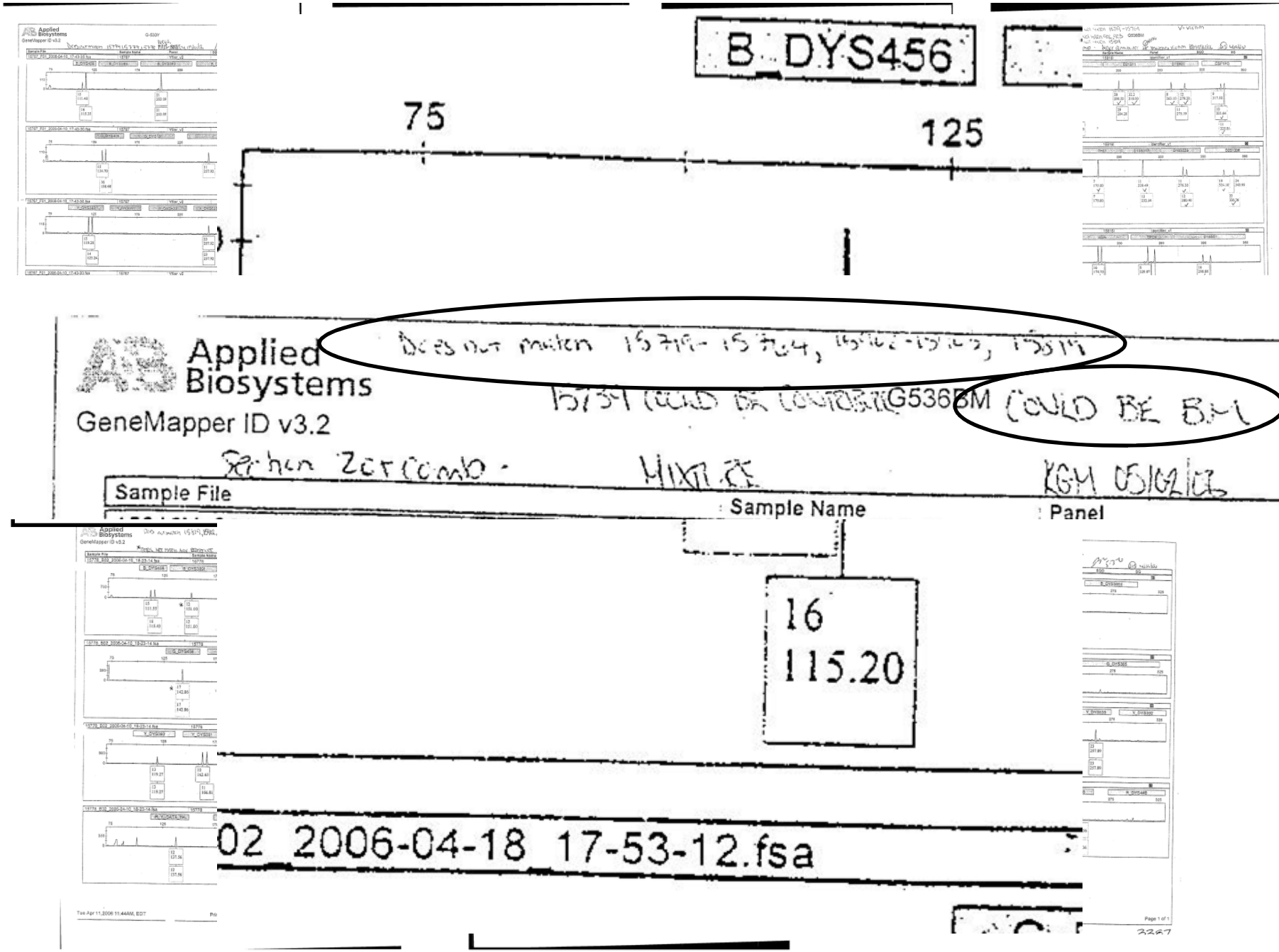
CSF1PO	10, 12	INC	10, 11	DYS456	16	15, 17, 18
D3S1358	14, 16	14, 15, 16	15, 16	DYS19	14	13, 14
TH01	6, 9.3	[6], 7, 8, 9, 9.3	7	DYS385	13, 14	11, 13, 14
D13S317	10, 11	[10], 11	11	DYS389I	13	13
D16S539	9, 11	9, 10, 11, 12	11, 12	DYS390	10	10, 11
D2S1338	23, 25	INC	19, 22	DYS439	12	12
D19S433	13, 15.2	13.2, [13], 13.2, 14, 15, 15.2	13.2, 15	DYS635	23	22, 23, 25
vWA	17, 18	16, 16, 17, 18	15, 17	DYS392	13	13, 12
TPOX	8	8, 9, 11	9, 11	YGATAH4	12	10, 11, 12
D18S51	12, 14	INC	15, 16	DYS437	15	14, 15, 16
D5S818	11, 12	10, 11, 12, 13	11, 12	DYS438	12	10, 11, 12
FGA	20, 22	[20], 21, [22], 24	21, 24	DYS448	19	19

Y-STR (MALE) DNA CHARACTERISTICS DISCOVERED BY DNA SECURITY ON THE RAPE KIT ITEMS

	15767 Panties Stain A Sperm	15777 Panties Stain A Epithelial	15778 Panties Stain B Epithelial	15780 Panties Stain D Epithelial	15816 Pubic Comb Section 2	15817 Pubic Comb Section 3	15818 Pubic Comb Section 4	15776 Rectal Swab Sperm	15785 Rectal Swab Epithelia	15774 Oral Swab Sperm	15775 Vaginal Swab Sperm
DYS456	15, 16	15	15, 16	15	14, 16			15			13
DYS389I		12, 14	12	13				13	14		14
DYS390	21	23		21	24			(OL)			24
DYS389II		29, 32	29					30	31		32
DYS458	15, 16	14, 18, 17	17	17, 18						16, 17	17
DYS19		13, 14						(OL)			15
DYS385	11, 18	14		14, 15					12, 14		11
DYS393	13, 14	9, 13, (OL), 14, 15	13	13	13	13	13		13	13	14
DYS391		11	10, 11	11	10, 11			(OL)		11	10
DYS439		12, (OL)		12				8	12		13
DYS635	23	23		21	23		23	23			
DYS392	11	11, 12, 13	11								11
YGATAH4		11, 12, 13	12		11		11		11		12
DYS437		14	15	15		15	15			15	15
DYS438	11	(OL), 12		11	12				12		10
DYS448		19		21							22
Electropherogram Discovery Page	3053	3057-3058	3059	3049	3387	3388	3389	3056	3042, 3050	3025, 3055	3026, 3037, 3039

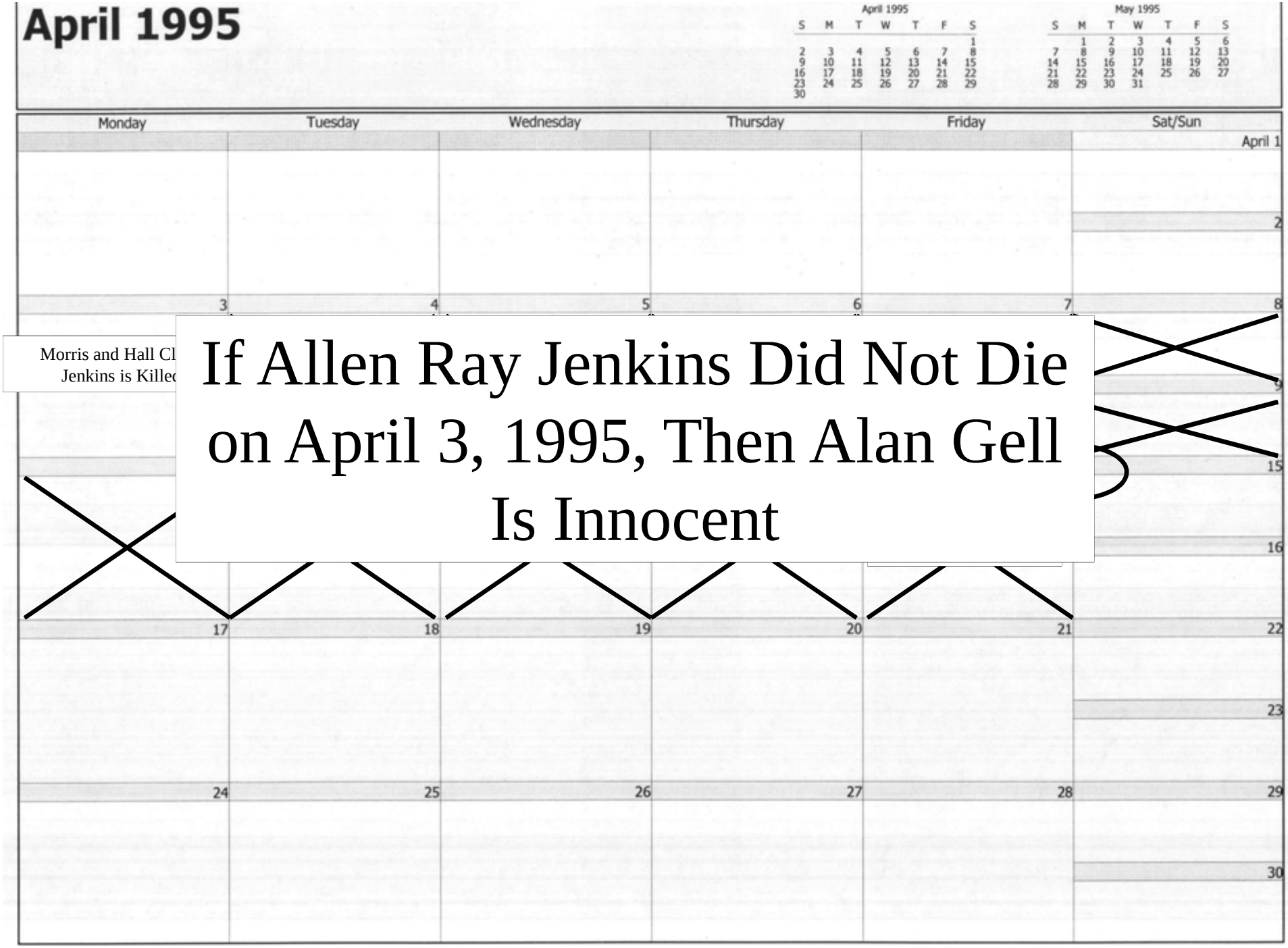

B DYS456
75
125
Applied Biosystems
GeneMapper ID v3.2
Sample File
Sample Name
Panel
16
115.20
02 2006-04-18 17-53-12.fsa

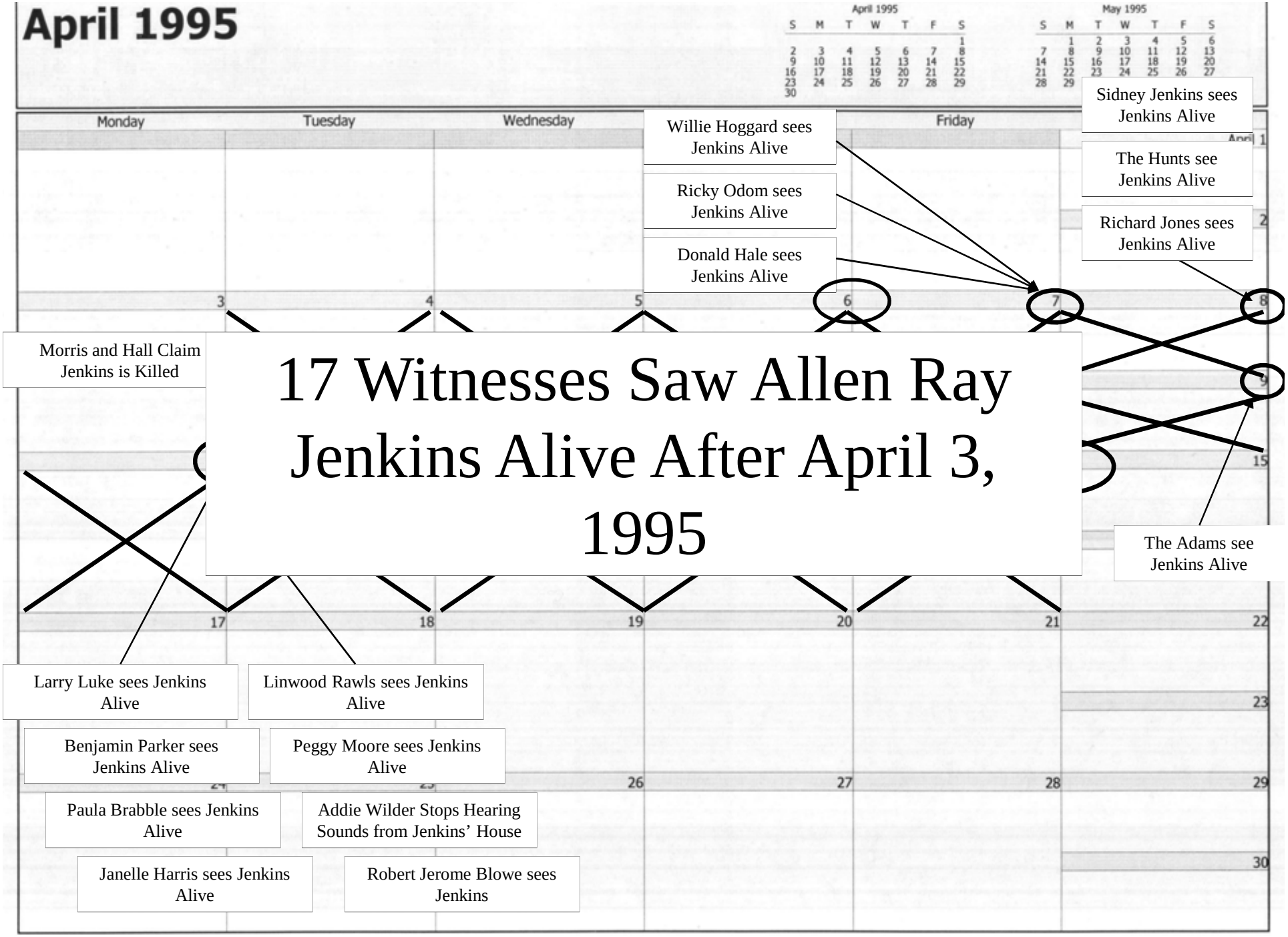
How Close Was This?

How Close Was This?

Alan Gell was Sentenced to Death in February 1997

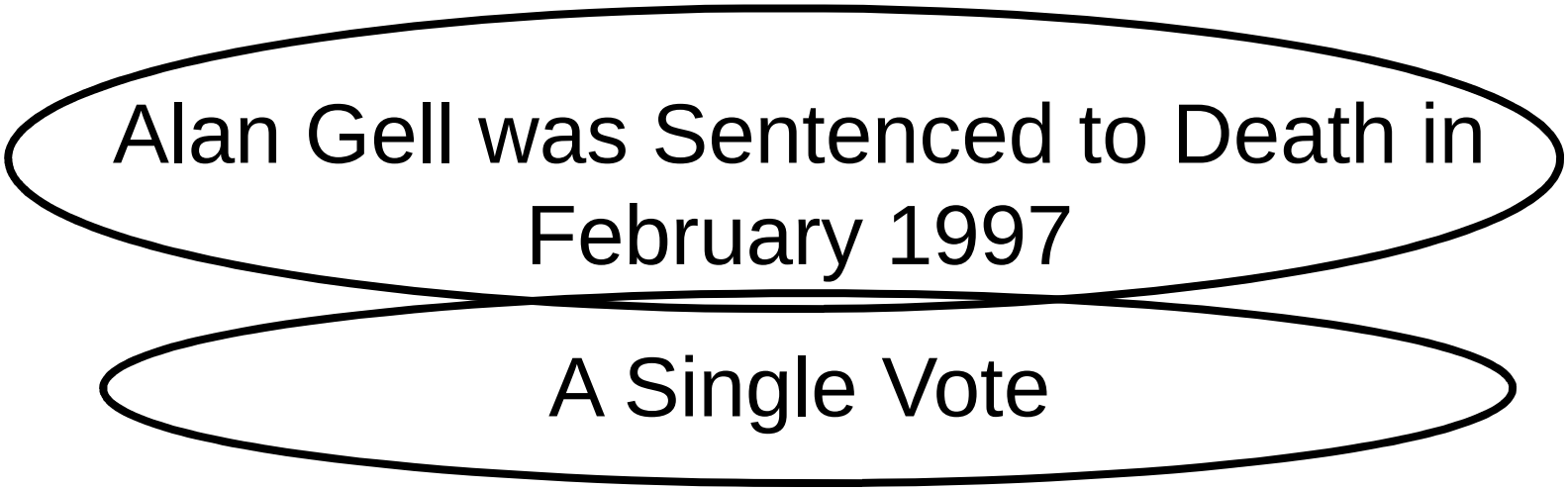
A Single Vote

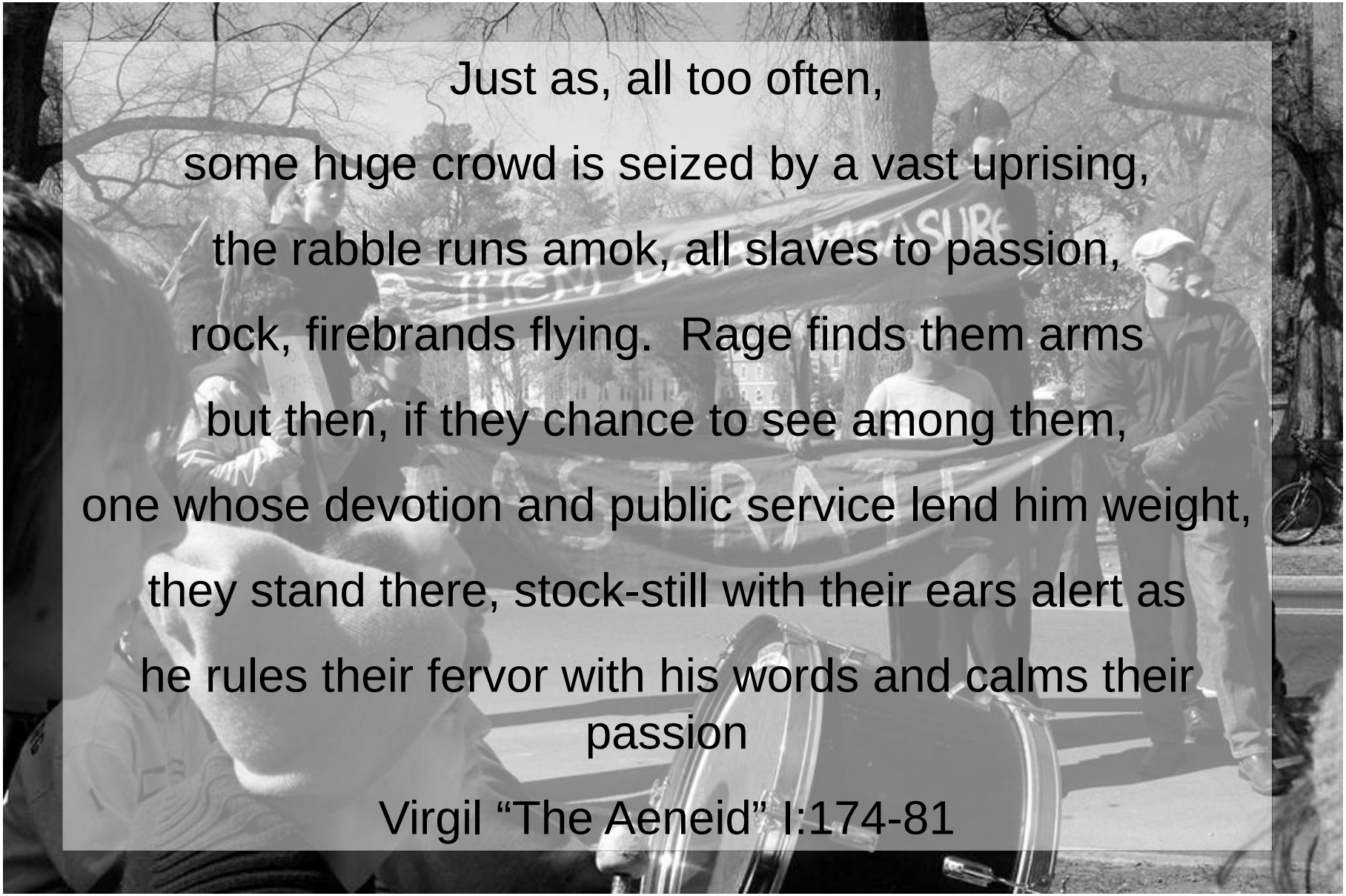

April 1995
April 1995
May 1995
Monday
Tuesday
Wednesday
Thursday
Friday
Sat/Sun
April 1
Morris and Hall Cl
Jenkins is Kille
If Allen Ray Jenkins Did Not Die on April 3, 1995, Then Alan Gell Is Innocent


April 1995
Monday
Tuesday
Wednesday
Friday
Willie Hoggard sees Jenkins Alive
Ricky Odom sees Jenkins Alive
Donald Hale sees Jenkins Alive
Sidney Jenkins sees Jenkins Alive
The Hunts see Jenkins Alive
Richard Jones sees Jenkins Alive
Morris and Hall Claim Jenkins is Killed
17 Witnesses Saw Allen Ray Jenkins Alive After April 3, 1995
The Adams see Jenkins Alive
Larry Luke sees Jenkins Alive
Linwood Rawls sees Jenkins Alive
Benjamin Parker sees Jenkins Alive
Peggy Moore sees Jenkins Alive
Paula Brabble sees Jenkins Alive
Addie Wilder Stops Hearing Sounds from Jenkins' House
Janelle Harris sees Jenkins Alive
Robert Jerome Blowe sees Jenkins

Open File Discovery

How Close Was This?





Just as, all too often,

some huge crowd is seized by a vast uprising,

the rabble runs amok, all slaves to passion,

rock, firebrands flying. Rage finds them arms

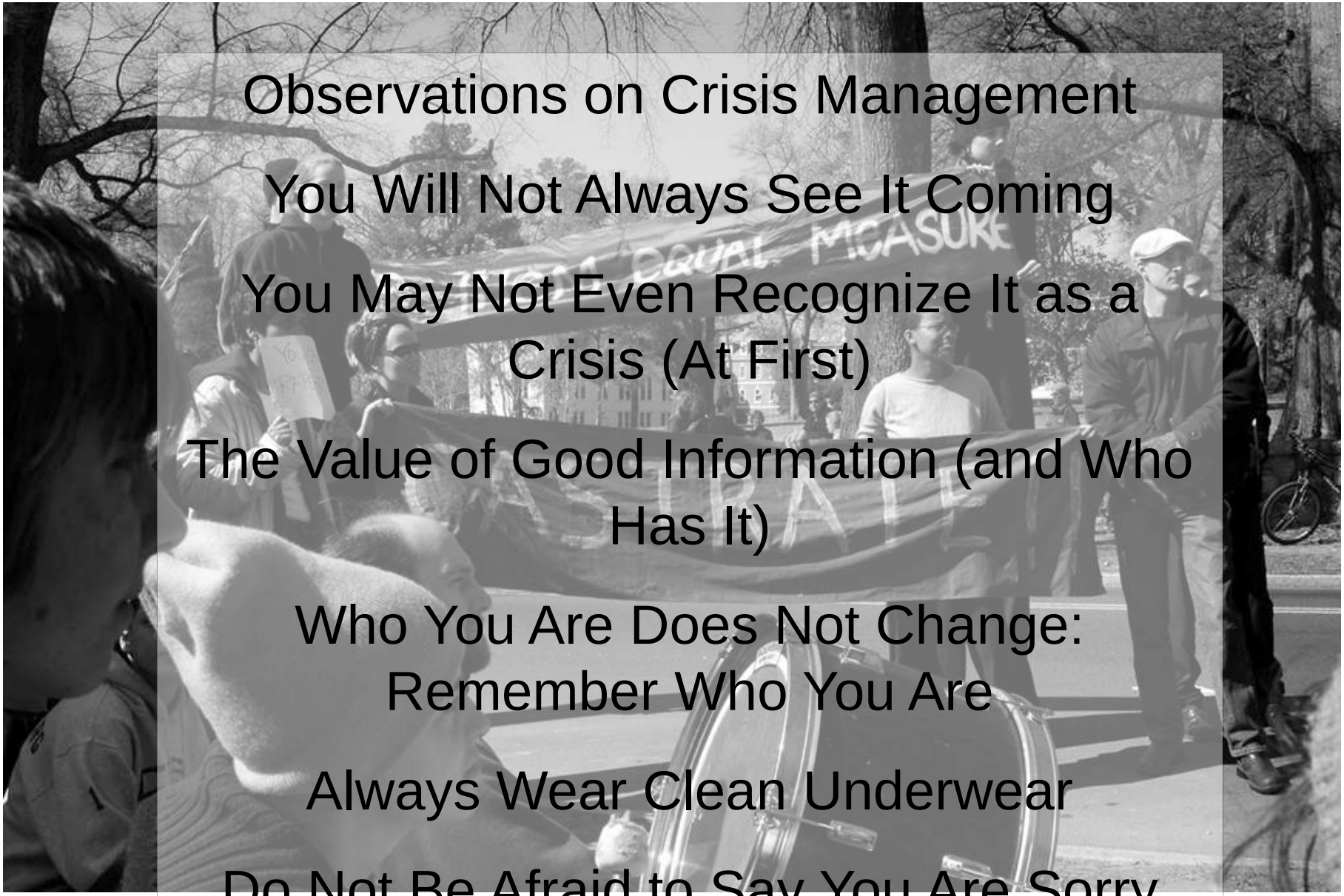
but then, if they chance to see among them,

one whose devotion and public service lend him weight,

they stand there, stock-still with their ears alert as

he rules their fervor with his words and calms their passion

Virgil “The Aeneid” I:174-81



Observations on Crisis Management

You Will Not Always See It Coming

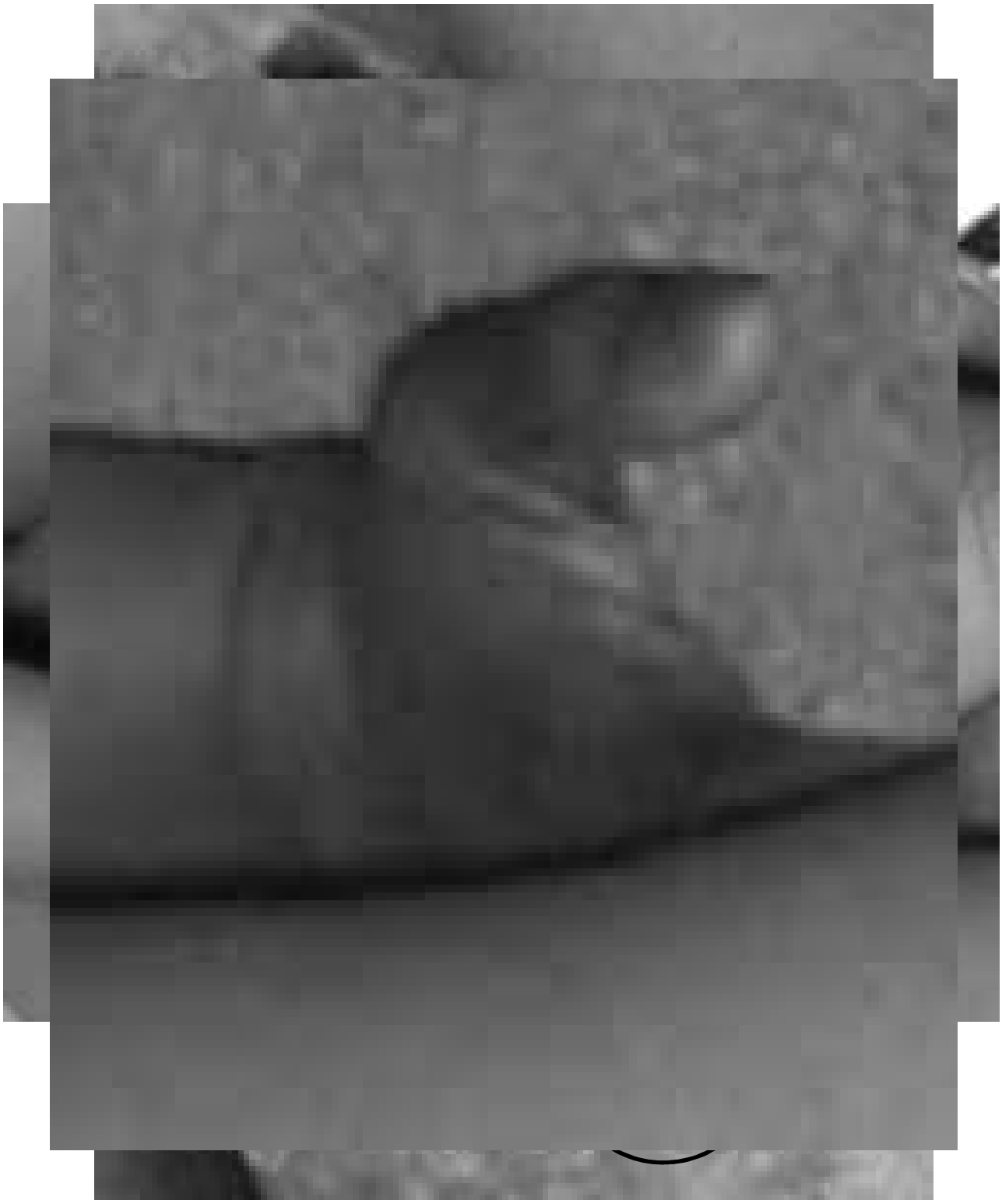
You May Not Even Recognize It as a Crisis (At First)

The Value of Good Information (and Who Has It)

Who You Are Does Not Change: Remember Who You Are

Always Wear Clean Underwear

Do Not Be Afraid to Say You Are Sorry



How Close Was This?

Alan Gell was Sentenced to Death in February 1997

A Fingernail (and an obsession)

A Single Vote

A Pawn in Their Game

•No fingerprints linking Reade Seligmann or Collin Finnerty to bathroom

•No hairs linking Reade Seligmann or Collin Finnerty to bathroom

•No fibers linking Reade Seligmann or Collin Finnerty to bathroom

•No

•No

•Crystal Mangum's saliva/DNA not found in bathroom

•No obvious physical injuries consistent with beating and gang rape

In most cases, the minimum peak height threshold will be 150 RFU for STR alleles; however, the analyst may use a lower threshold. A lower threshold can be used if the following criteria are met:

1. Each electropherogram is analyzed independently of other electropherograms.
2. Evidence electropherograms are analyzed independently of reference electropherograms.
3. A peak has the correct shape.
4. The peak is at least three times the approximate average RFU of the noise.
5. The peak is higher than any reproducible artifacts in the analysis range.
6. If criteria 1-5 are met, the analyst can use 125, 100, 75, or 50 RFU as the minimum peak height to include any and all peaks that the analyst considers true.
7. Peaks below 50 RFU are not interpreted.

In most cases, the minimum peak height threshold will be 150 RFU for STR alleles; however, the analyst may use a lower threshold. A lower threshold can be used if the following criteria are met:

1. Each electropherogram is analyzed independently of other electropherograms.
2. Evidence electropherograms are analyzed independently of reference electropherograms.

ratios to make artifacts appear as true alleles and make true alleles appear as artifacts.

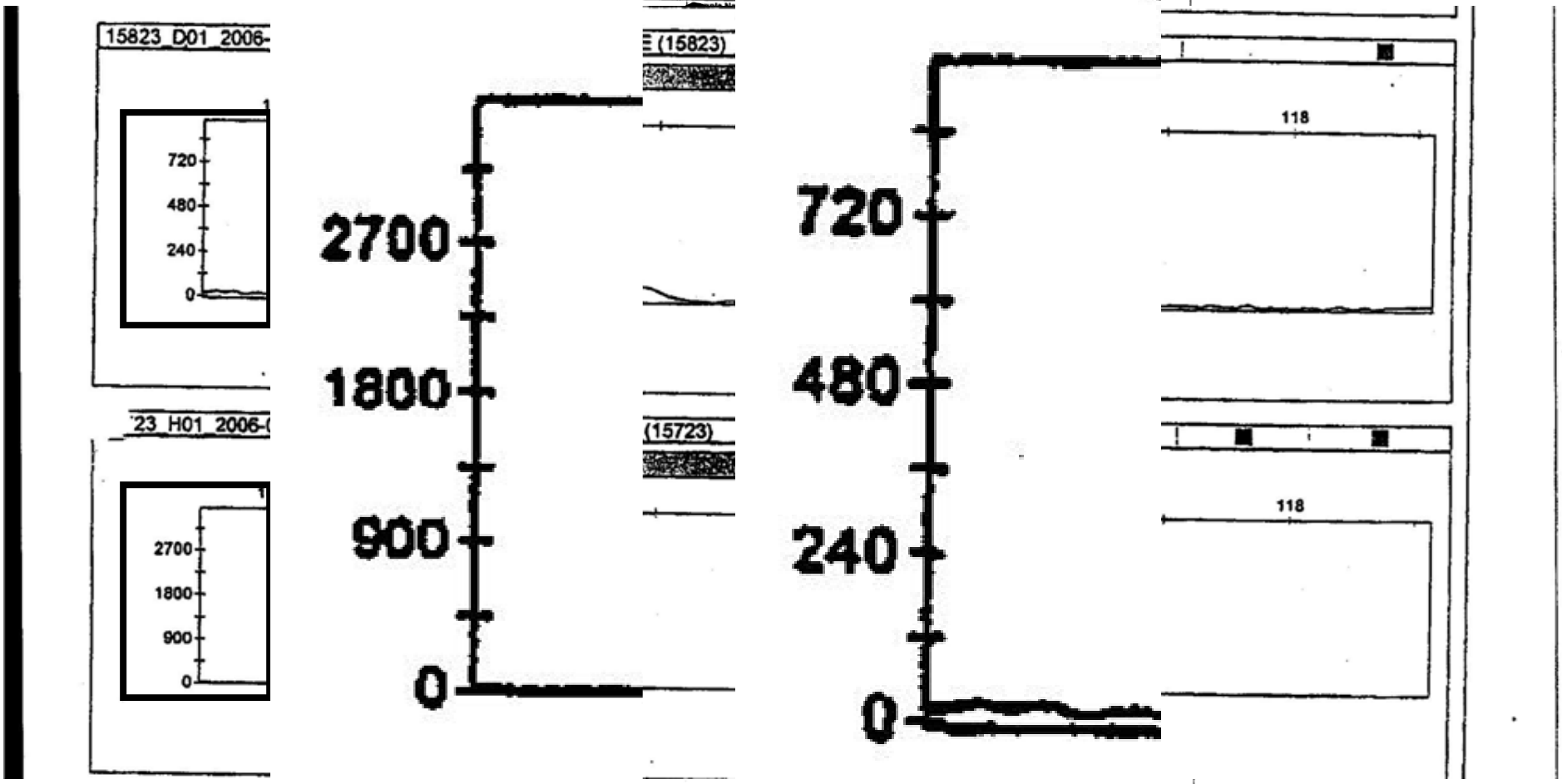
Alleles and loci are determined from the diagnostic peaks (allelic ladder) of the appropriate dye color and size range (bases) for a particular STR marker system.

Homozygote allele peak heights are approximately twice that of heterozygotes as a result of doubling signal from two alleles of the same size. The expected peak height ratio[1] for heterozygote alleles is 70-100%.

Peaks not aligning with those in the allelic ladders have been detected both within and outside the range of the ladders (off-ladder alleles). Some peaks may represent variant alleles containing incomplete repeats. The analyzer software will accurately label many of the alleles not present in the allelic ladders. If a sample has an off-ladder allele, the peak should be viewed under magnification to determine its position relative to the nearest bin. If the sample does not appear to be a true off-ladder allele, then the sample should be re-run. If the sample appears to be a true off-ladder allele, then the base designation must be noted. The sample must be re-amplified or another sample from a different tissue type from the same individual must be extracted and amplified. The two samples should then be run separately in the same electrophoresis run and the base designation must be within ±0.5 bp. The off-ladder allele can be reported using ISFH nomenclature if the variant is listed in peer-reviewed literature or in the off-ladder allele database in STRbase. If it is a new variant, then the base designation will be listed when reporting out the data.

[1] [lower peak height] ÷ [higher peak height] x 100% = peak ratio

'3813

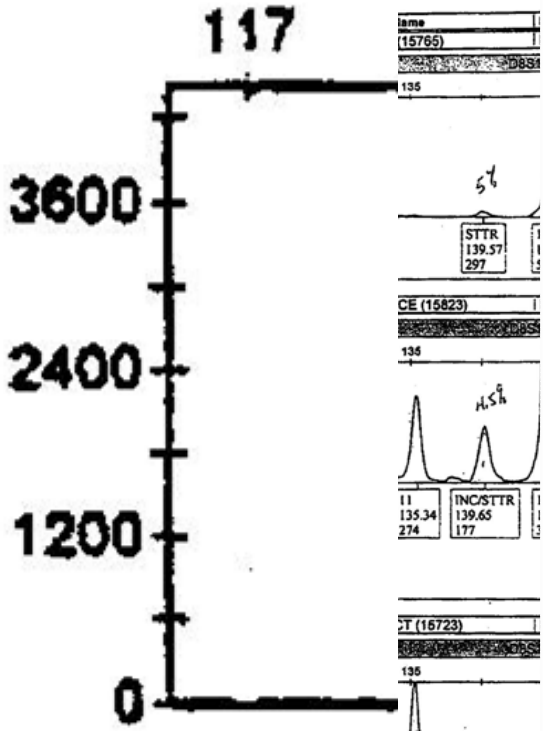


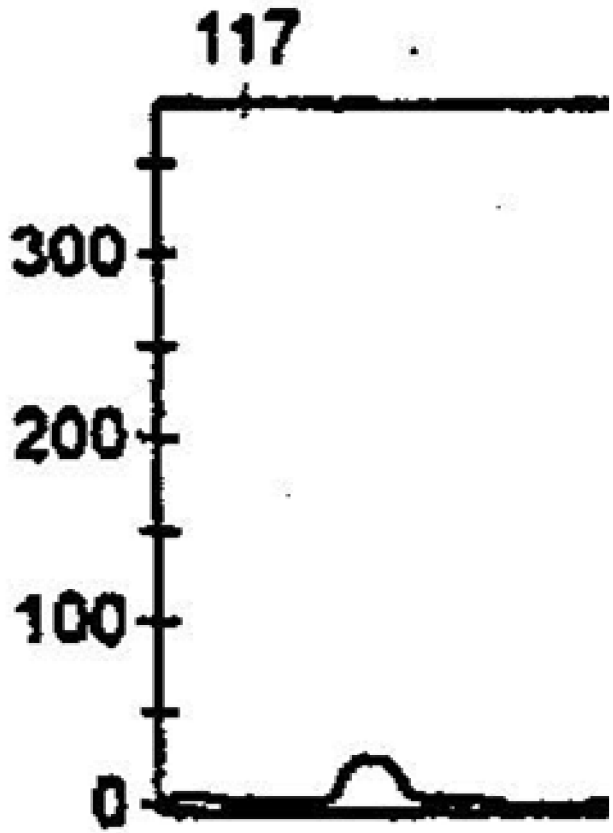
Applied Biosystems
GeneMapper ID v3.2

Mixture Analysis I

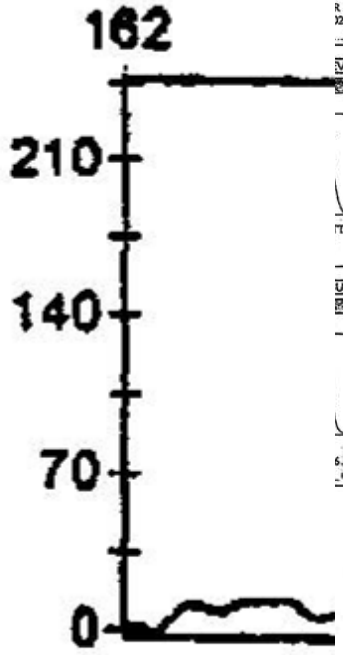
hu May 04,2006 03:05PM, EDT Printed by: gmid Page 1 of 1

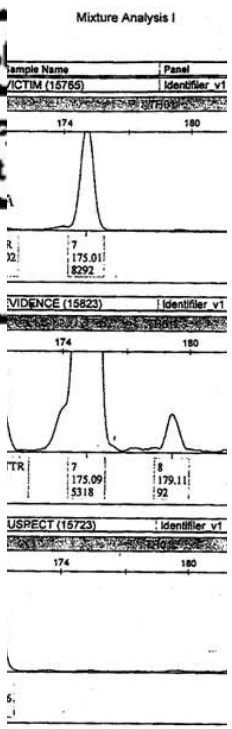
3128


117
3600
2400
1200
0
(15765)
135
5%
STTR
139.57
297
CE (15823)
135
11.5%
INC/STTR
139.65
177
135.34
274
T (16723)
135
5.4
135.21
4435
STTR
139.60
201

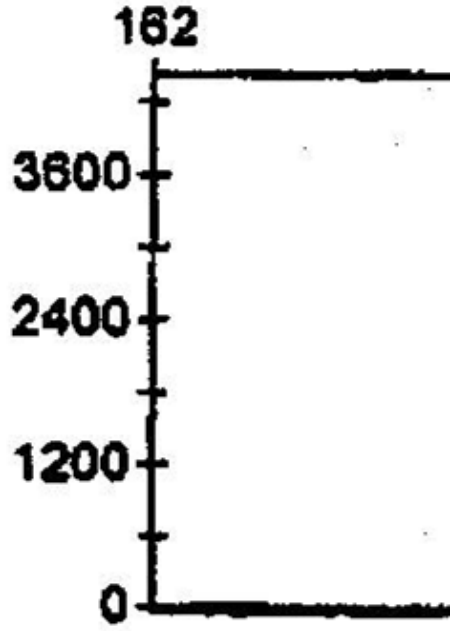

117
300
200
100
0

15823 D01 2006-





23 H01 2006-04-



hu May 04,2006 02:49PM, EDT Printed by: gmid Page 1 of 1

3135

Something Must Have Happened

A Checklist

A Checklist

March 14, 2006

	Oral	Anal	Vaginal	Married
Matt				
Brett				
Adam				

A Checklist

March 14, 2006

	Oral	Anal	Vaginal	Married
Matt	X			
Brett				
Adam				

A Checklist

March 14, 2006

	Oral	Anal	Vaginal	Married
Matt	X		X	
Brett				
Adam				

A Checklist

March 14, 2006

	Oral	Anal	Vaginal	Married
Matt	X		X	X
Brett				
Adam				

A Checklist

March 14, 2006

	Oral	Anal	Vaginal	Married
Matt	X		X	X
Brett				
Adam		X		

A Checklist

March 16, 2006

	Oral	Anal	Vaginal	Married
Matt	X		X	X
Brett				
Adam		X		

A Checklist

March 16, 2006

	Oral	Anal	Vaginal	Married
Matt	X	X	X	X
Brett				
Adam		X		

A Checklist

March 16, 2006

	Oral	Anal	Vaginal	Married
Matt	X	X	X	X
Brett		X		
Adam		X		

A Checklist

March 16, 2006

	Oral	Anal	Vaginal	Married
Matt	X	X	X	X
Brett		X	X	
Adam		X		

A Checklist

March 16, 2006

	Oral	Anal	Vaginal	Married
Matt	X	X	X	X
Brett		X	X	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	X	X	X
Brett		X	X	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	XX	X	X
Brett		X	X	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	XX	XX	X
Brett		X	X	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	XX	XX	X
Brett		XX	X	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	XX	XX	X
Brett		XX	XX	
Adam	X	X		

A Checklist

April 6, 2006

	Oral	Anal	Vaginal	Married
Matt	X	XX	XX	X
Brett		XX	XX	
Adam	XX	X		

A Checklist

April 6, 2006

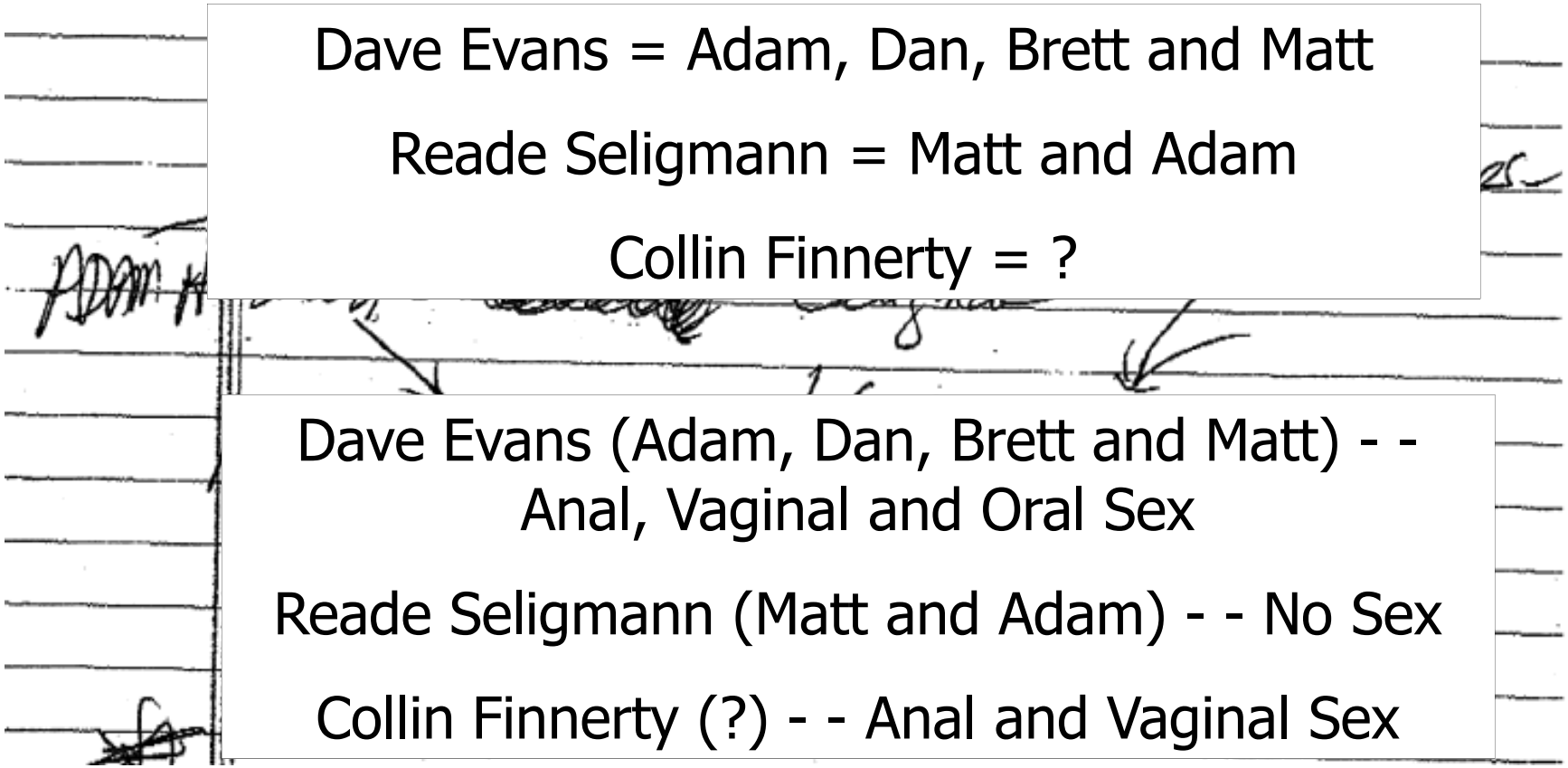
	Oral	Anal	Vaginal	Married
Matt	X	XX	XX	X
Brett		XX	XX	
Adam	XX	X		X

Who’s Who


Reade S
m") is Not

Who's Who

December 21st



Dave Evans = Adam, Dan, Brett and Matt

Reade Seligmann = Matt and Adam

Collin Finnerty = ?

Dave Evans (Adam, Dan, Brett and Matt) - - Anal, Vaginal and Oral Sex

Reade Seligmann (Matt and Adam) - - No Sex

Collin Finnerty (?) - - Anal and Vaginal Sex

A Checklist

April 6, 2006

	X	X		X

Brett Penetrates Anally and Vaginally

Adam Performs Sex Act in Her Face

Brett Finishes at Same Time as Adam

December 21 - - Dave Evans Does Sex Act in Face

Dave Evans = Brett and Adam

Therefore - - Dave Evans Has Sex with Her from Behind and in Front of Her All at the Same Time


EQUAL MEASURE
CASTRATE

The Identification Process

The Identification Process

Use an Independent Administrator

Use Minimum of 5 Fillers per Suspect

Fillers Must Resemble Description

When Showing New Suspect Avoid Reusing Fillers

Administrators Give Identical Instructions

Do Not Give Witness Feedback

Tell Witness Suspect May Not Be In Photos

The Identification Process

The Photo Arrays

March 16, 2006

1905HRS - IN PHOTO ARRAY (A) SHE STATED THAT THE PEOPLE IN THE PHOTOS LOOKED ALIKE. SHE WAS ABLE TO SELECT PHOTO # 5 (7 – 10) 70%. SHE COULD NOT REMEMBER WHERE EXACTLY SHE SAW #7 AT THE PARTY.

March 21, 2006

TWO MORE ARRAYS (E-F) WERE SHOWN TO THE VICTIM ON 03/21/2006. SHE COULD NOT IDENTIFY ANY OF THE PICTURES IN THE PHOTO ARRAYS. SHE AGAIN STATED THE PHOTOS LOOKED THE SAME. SHE REQUESTED TO LOOK AT BOTH OF THE PHOTO ARRAYS AGAIN. I SHOWED THE PHOTOS AGAIN IN THE SAME ORDER. AGAIN, SHE WAS UNABLE TO IDENTIFY ANY OF THE PHOTOS. E WAS SHOWN AT 1808HRS AND F WAS SHOWN AT 1813HRS.

March 16, 2006

March 21, 2006

Collin Finnerty's Picture Was Never Shown in a Photo Array

Collin Finnerty Did Not Resemble Any of the Descriptions Given by Crystal Mangum

The Identification Process

The Investigation Was Dead

She Had Not Identified Anyone

She Had Not Given Descriptions That Were Useful

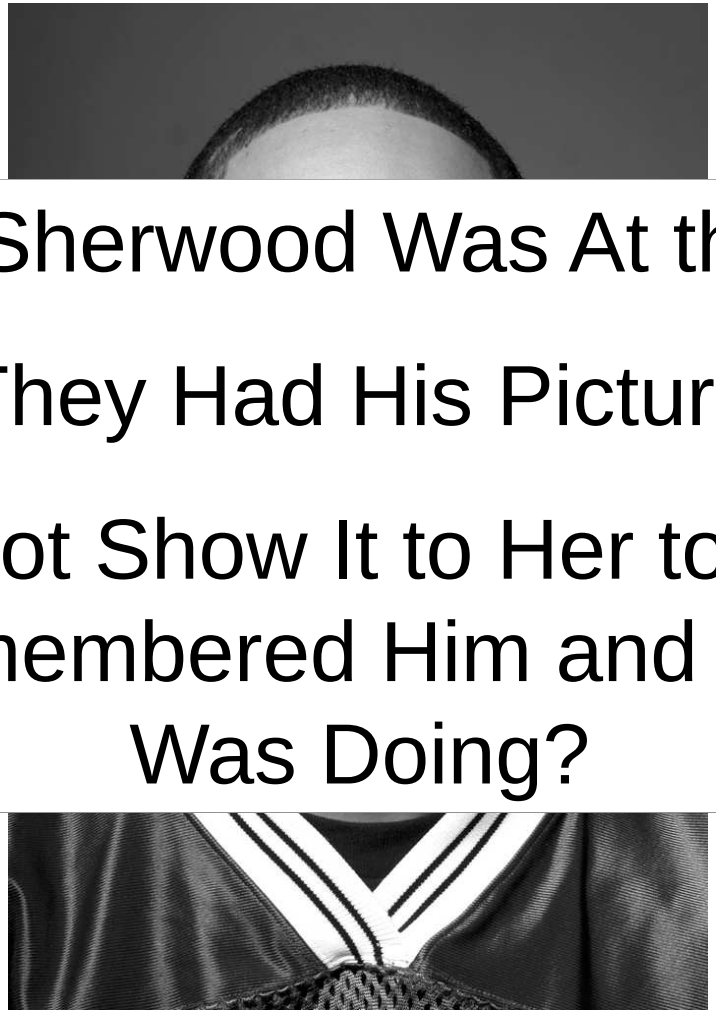
She Could not Remember Anything Further

There Was No Semen

There Was No DNA from the SBI

The Other Dancer Said It was a “Crock”

The Identification Process



Devon Sherwood Was At the Party

They Had His Picture

Why Not Show It to Her to See If She Remembered Him and What He Was Doing?

The Identification Process

Was It an Identification Process?

The Identification Process

3/28/06 1720HRS - WENT TO THE APARTMENT OF WILLIAM BLAKE BOEHMLER 731-445-1441 8/7/84, HE AGREED TO COME TO THE STATION TO TALK ABOUT WHAT HAPPENED ON 3/13/06. MR. BOEHMLER SIGNED A NON-CUSTODIAL FORM AND WAS

BRENT F

FRIEN ND

WHO H 225-

8658) 10/9/86 116 PEGRAM DORM.

GIRLS STARTED TO DANCE HE STATED THAT NONE OF THEM LOOKED IMPAIRED AND THAT HE STATED THAT THERE WAS AN ARGUMENT AND SOMEONE MENTIONED SOMETHING ABOUT A PIMP. MR. BOHEMLER STATED HE GOT SCARED AND DECIDED TO LEAVE

Where Are the Pictures of Blake Boehmler and Brent Saeli?

The Identification Process

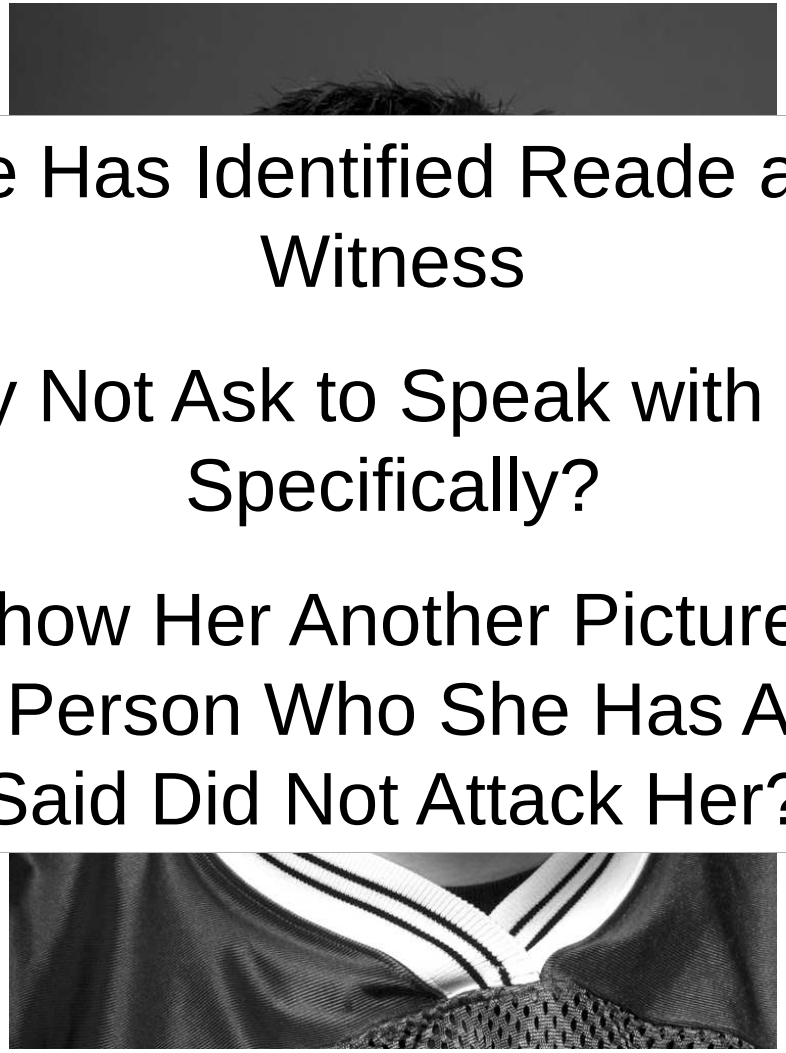
Was It an Identification Process?

The Identification Process

Why Is This Videotaped?

Why Were the Photo Arrays Not Videotaped?

The Identification Process



She Has Identified Reade as a Witness

Why Not Ask to Speak with Him Specifically?

Why Show Her Another Picture of the Same Person Who She Has Already Said Did Not Attack Her?

1905HRS - IN I
ALIKE. SHE V
WHERE EXAC

TOS LOOKED
REMEMBER

IMAGE 7 (Reade Seligmann)

Victim:
He looks like one of the guys who assaulted me.

Sgt:
How sure of that are you?

Victim:
100%

Sgt:
You're a 100% sure. Ok.

Victim:
Yes.

Sgt:
How did he assault you? Which one was he?

Victim:
He was the one that was standing in front of me… um… that made me perform oral sex on him.

Sgt:
What else did he do?

Victim:
That was it.

NOTE: Inv. Clayton motioned for me to repeat that for him.

Sgt:
He was the one that was standing in front of her that made her perform oral sex. 100% sure that would have been IMAGE #7.

December 21, 2006

point she started feeling sharp pains in her ass and vagina, while Finnerty was behind her. Both Finnerty and Evans were trying to get Seligman to "do it" but he kept saying NO. Then Seligman got behind her, Finnerty got on the floor under her and Evans got in front of her. Dave Evans started jacking his penis and ejaculating on her face and she (Crystal) started spitting. Someone

March 16th

70% sure at party

Does not remember exactly where saw him

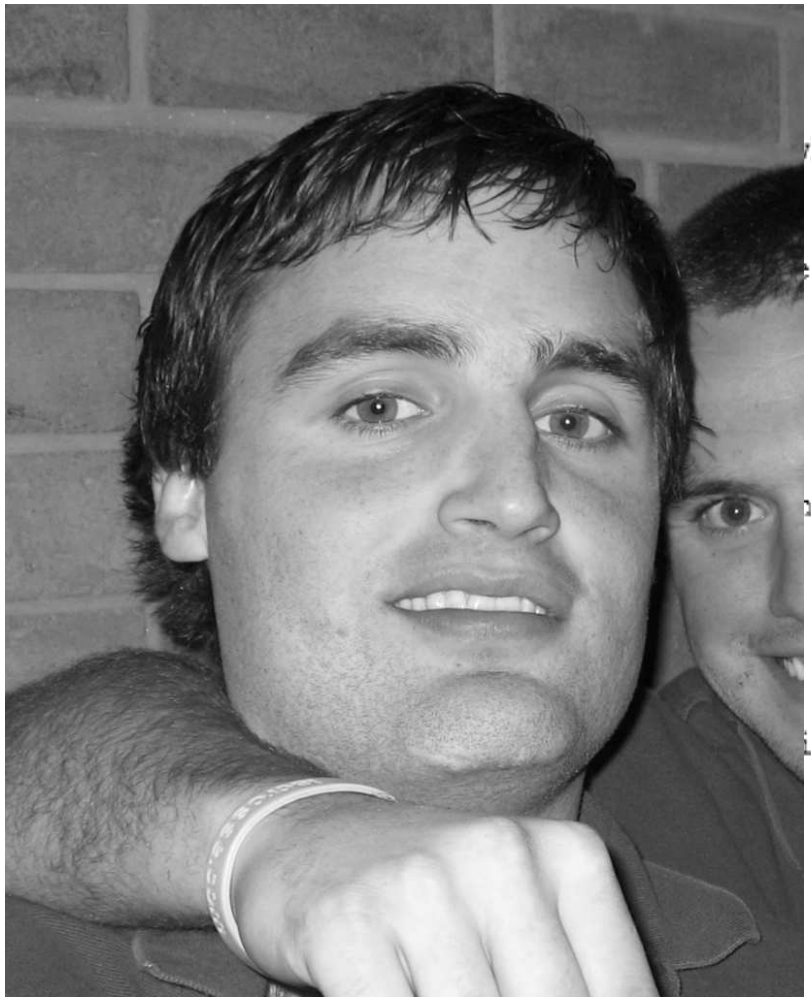
March 16th	April 4th
70% sure at party Does not remember exactly where saw him	100% sure he was the one who made her perform oral sex

March 16th	April 4th	December 21st
70% sure at party Does not remember exactly where saw him	100% sure he was the one who made her perform oral sex	Seligmann refuses to have sex Dave Evans performs oral sex

March 21, 2006

TWO MORE ARRAYS (E-F) WERE SHOWN TO THE VICTIM ON 03/21/2006. SHE COULD NOT IDENTIFY ANY OF THE PICTURES IN THE PHOTO ARRAYS. SHE AGAIN STATED THE PHOTOS LOOKED THE SAME. SHE REQUESTED TO LOOK AT BOTH OF THE PHOTO ARRAYS AGAIN. I SHOWED THE PHOTOS AGAIN IN THE SAME ORDER. AGAIN, SHE WAS UNABLE TO IDENTIFY ANY OF THE PHOTOS. E WAS SHOWN AT 1808HRS AND F WAS SHOWN AT 1813HRS.

April 4, 2006



who assaulted me sort.

you on this image?

the mustache.

he?

likelihood this is one of the gentleman who

December 21, 2006

Inv. Wilson asked Crystal Mangum to describe the mustache on Dave Evans. Crystal Mangum stated, "it wasn't a real mustache like yours, it was like stubble or a shadow." Inv. Wilson said "Like a 5 o'clock shadow? Crystal Mangum stated, "Yes like that."

March 16th

Does Not Recognize Dave Evans

March 16th	April 4th
Does Not Recognize Dave Evans	Looks just like him without the mustache 90% sure he was the one who attacked if he had a mustache

March 16th	April 4th	December 21st
Does Not Recognize Dave Evans	Looks just like him without the mustache	He did not have a mustache
	90% sure he was the one who attacked if he had a mustache	He had a “five o’clock shadow”

March 16, 2006

March 21, 2006

Collin Finnerty's Picture Was Never Shown in a Photo Array

Collin Finnerty Did Not Resemble Any of the Descriptions Given by Crystal Mangum

April 4, 2006

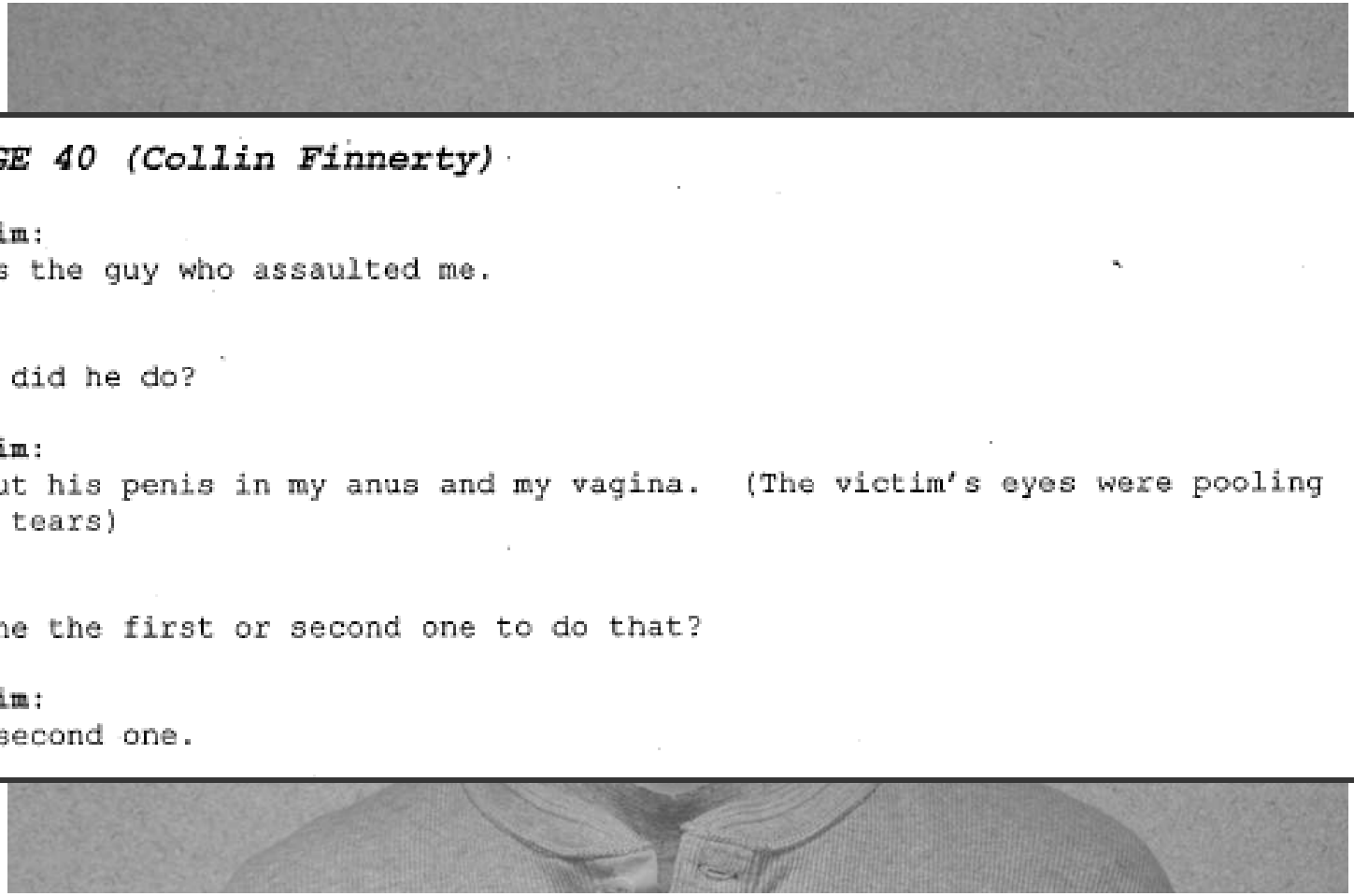


IMAGE 40 (Collin Finnerty)

Victim:
He is the guy who assaulted me.

Sgt:
What did he do?

Victim:
He put his penis in my anus and my vagina. (The victim's eyes were pooling with tears)

Sgt:
Was he the first or second one to do that?

Victim:
The second one.

December 21, 2006

12. Are you certain that they used their penis to rape you?
Answer: I can't say 100% that it was a penis that was used because I couldn't see it. They had me bent over and my face pushed down to the floor so I couldn't see what they were using but I believe it was their penis. It felt like a penis, but it was a sharp pain. I couldn't say 100% that I saw them use their penis but it was certainly something.

March 16th

March 21st

Finnerty Matches
No Description of
Her Attackers

March 16th March 21st Finnerty Matches No Description of Her Attackers	April 4th He is the “second one” who put his penis in her vagina Her eyes “pool” with tears

March 16th March 21st Finnerty Matches No Description of Her Attackers	April 4th He is the “second one” who put his penis in her vagina Her eyes “pool” with tears	December 21st Can’t remember whether penis was put in her vagina

Who Else Did She Identify?

IMAGE 4 (Matthew Wilson)

Sgt:
Did you recognize that person?

Victim:
He looked like Bret but I'm not sure.

IMAGE 5 (David Evans)

Victim:
He looks like one of the guys who assaulted me sort.

One of the guys that assaulted me.

Sgt:
One of the guys that assaulted you? Ok.

Victim:
Um hum.

March 16, 2006

1923HRS - PHOTO ARRAY (D) SHE SELECTED #1 (10-10) 100% AS BEING AT THE PARTY. SHE COULD NOT REMEMBER EXACTLY WERE SHE SAW #1 AT THE PARTY.

April 4, 2006

IMAGE 9 (John B. Ross)

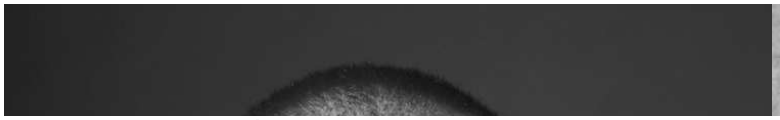
Victim:
He was there.

Sgt:
In the bathroom, or at the party?

Victim:
At the party.

Sgt:
Ok, so he was not the person who assaulted you. Do you remember what he was doing at the party?

Victim:
He was standing outside talking to the other dancer.

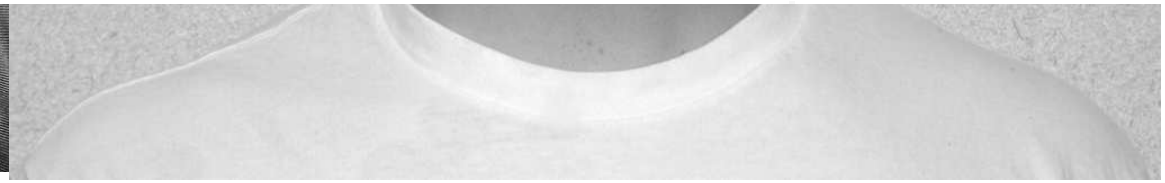


Consistent with our telephone conversation yesterday, I propose that you review the enclosed do 10
Buchanan I n Raleigh,
visiting his Suite
303c in Me ade
telephone c The
following it

1)
2)
3)
4) The Statements of All Three of the Lessees of the Home Given to Police During Interrogations Conducted by Your District's Investigators
5) SBI Laboratory Reports of Tests Conducted on Mr. Ross's DNA

She Identifies Brad Ross with Certainty as Being at the Party in both the Photo Array and the Powerpoint Identification

Brad Ross was in Raleigh When She was at the Party



April 4, 2006

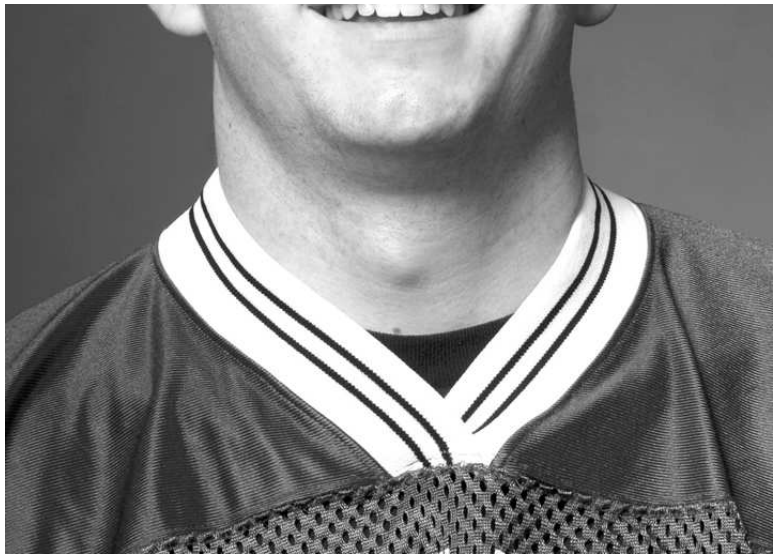
That she and the others aforementioned went inside the house where the party or gathering was taking place. That she was the only female there at the time and she encountered no problems with anyone there. That after staying at this location for approximately fifteen to twenty minutes she and Chris Loftus opted to leave and return to Chris's dorm room on campus. That they called and were picked up by a cab at the house which took them back to the dorm on campus. That she did not remember the name of the cab company or even the description of the cab or driver at this point in time. That she had asked Chris about this before speaking with me but he didn't recall either.

That during the time she and Chris were at the party no other females were present that she saw, although she understood or heard that some strippers might be coming to the party after 11:00PM that evening.

That the cab picked she and Chris up and carried them back to campus dropping the two of them back at the dorm. That she knew this was somewhere around 11:00PM in that Chris used his student / id card to "swipe" the entrance door which was locked and per what he had learned this occurred at 10:59PM. That as they

March 16, 2006

1909HRS - IN PHOTO ARRAY (B) SHE SELECTED #1 (10-10) 100%. AGAIN SHE COULD NOT REMEMBER WHERE EXACTLY SHE SAW #1 AT THE PARTY. SHE HESITATED ON #4, BUT



April 4, 2006

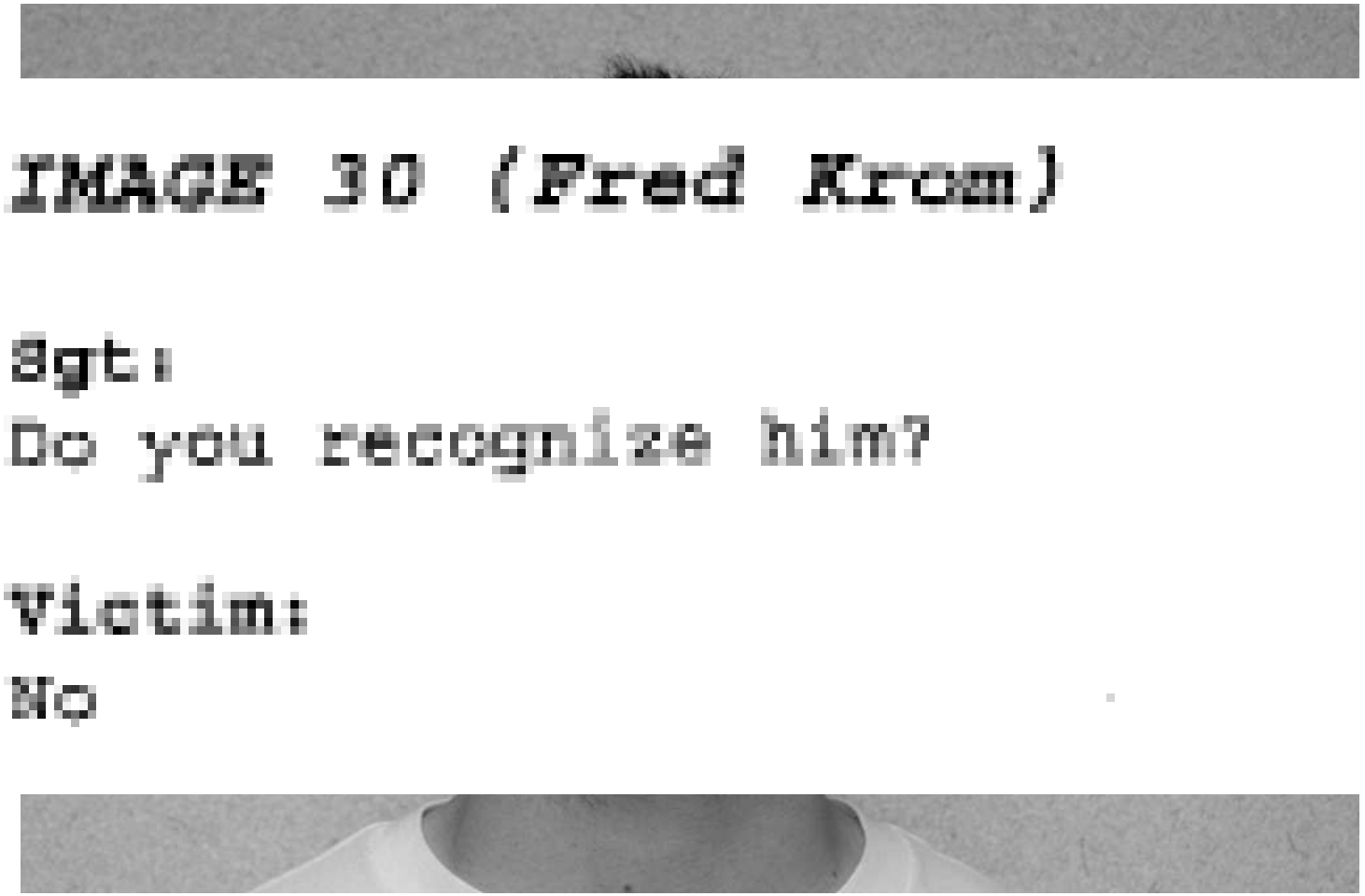
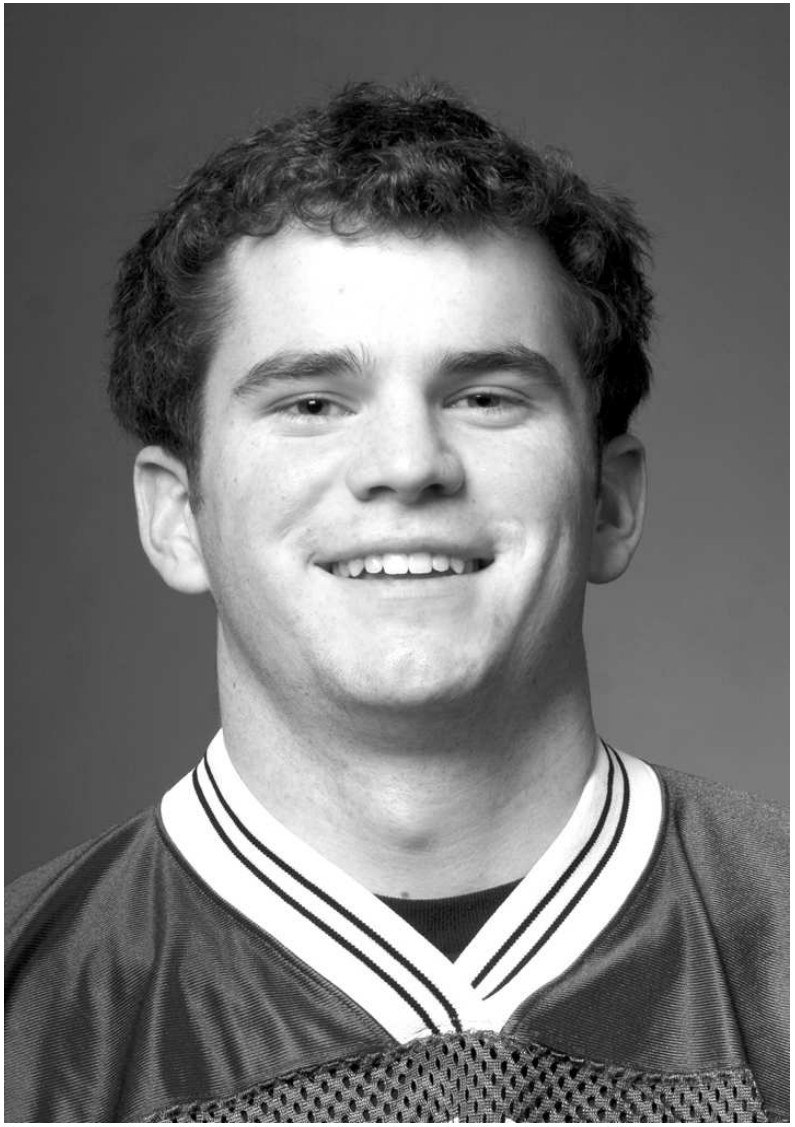


IMAGE 30 (Fred Krom)

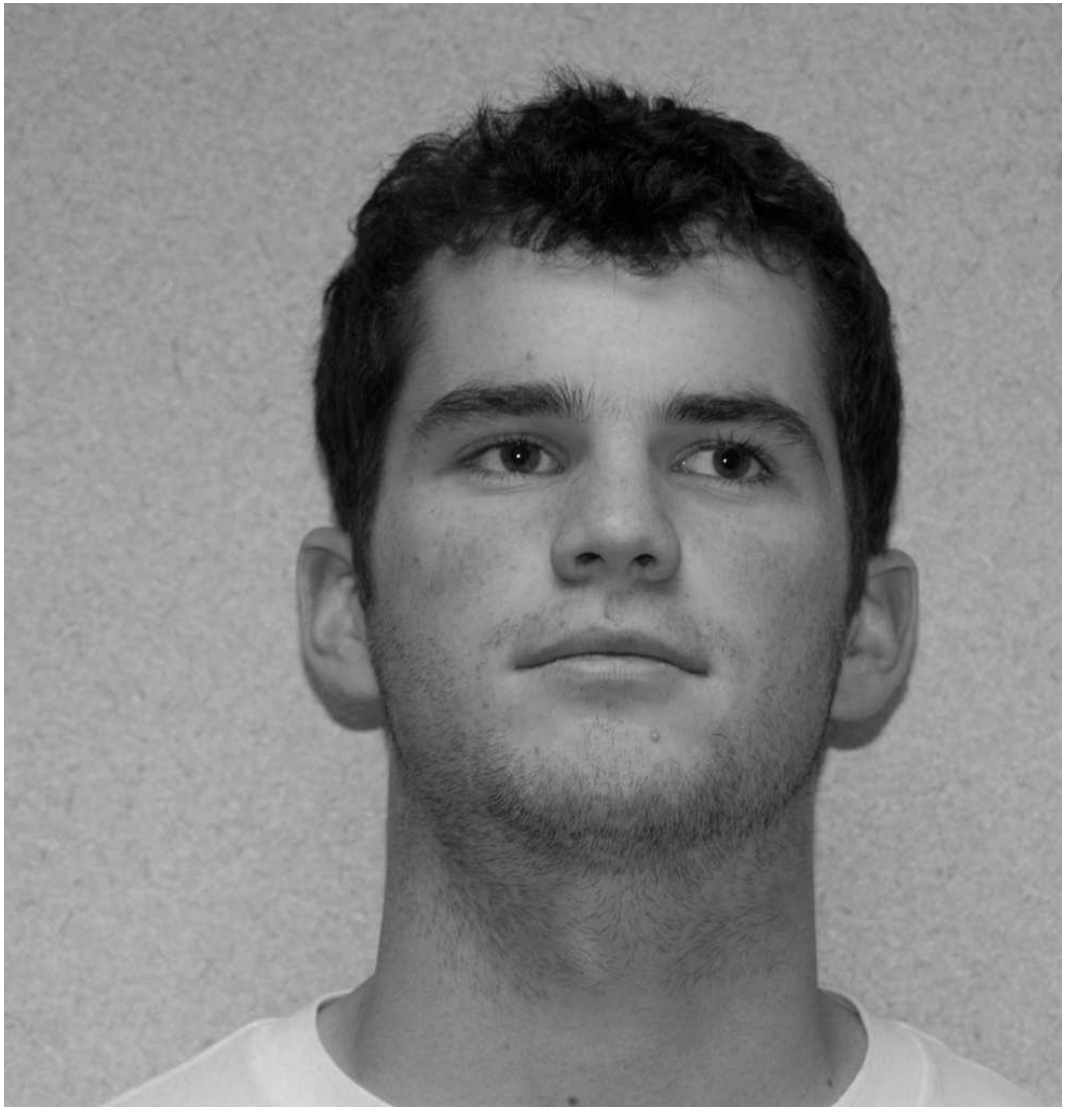
Sgt:
Do you recognize him?

Victim:
No

100%



Does Not Recognize



March 16, 2006

1919HRS - IN PHOTO ARRAY (C) SHE SELECTED #5 AND #6 (10-10) 100% AS BEING AT THE PARTY. SHE COULD NOT REMEMBER EXACTLY WHERE SHE SAW #5 AND #6 AT THE PARTY. SHE HESITATED ON #2, BUT SHE COULD NOT IDENTIFY THE PERSON FROM THAT

April 4, 2006

[redacted]

IMAGE 27 (Nicholas O'Hara)

Sgt:
Do you recognize him?

Victim:
No.

March 16, 2006

1919HRS - IN PHOTO ARRAY (C) SHE SELECTED #5 AND #6 (10-10) 100% AS BEING AT THE PARTY. SHE COULD NOT REMEMBER EXACTLY WHERE SHE SAW #5 AND #6 AT THE PARTY. SHE HESITATED ON #2, BUT SHE COULD NOT IDENTIFY THE PERSON FROM THAT

April 4, 2006

IMAGE 41 (Kevin Mayer)

Sgt:
Do you recognize him?

Victim:
No.

CASE SUPPLEMENTAL REPORT

NOT SUPERVISOR APPROVED

Printed: 06/14/2006 10:54

Durham Police Department

OCA: ***06008310***

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Status: *CLOSED/CBA-ADULT (CASE* **Case Mng Status:** *CBA* **Occured:** *03/13/2006*

Offense: *RAPE - FORCIBLE*

Investigator: *REID, R. A. (6781)*

Supervisor: *(0)*

Contact:

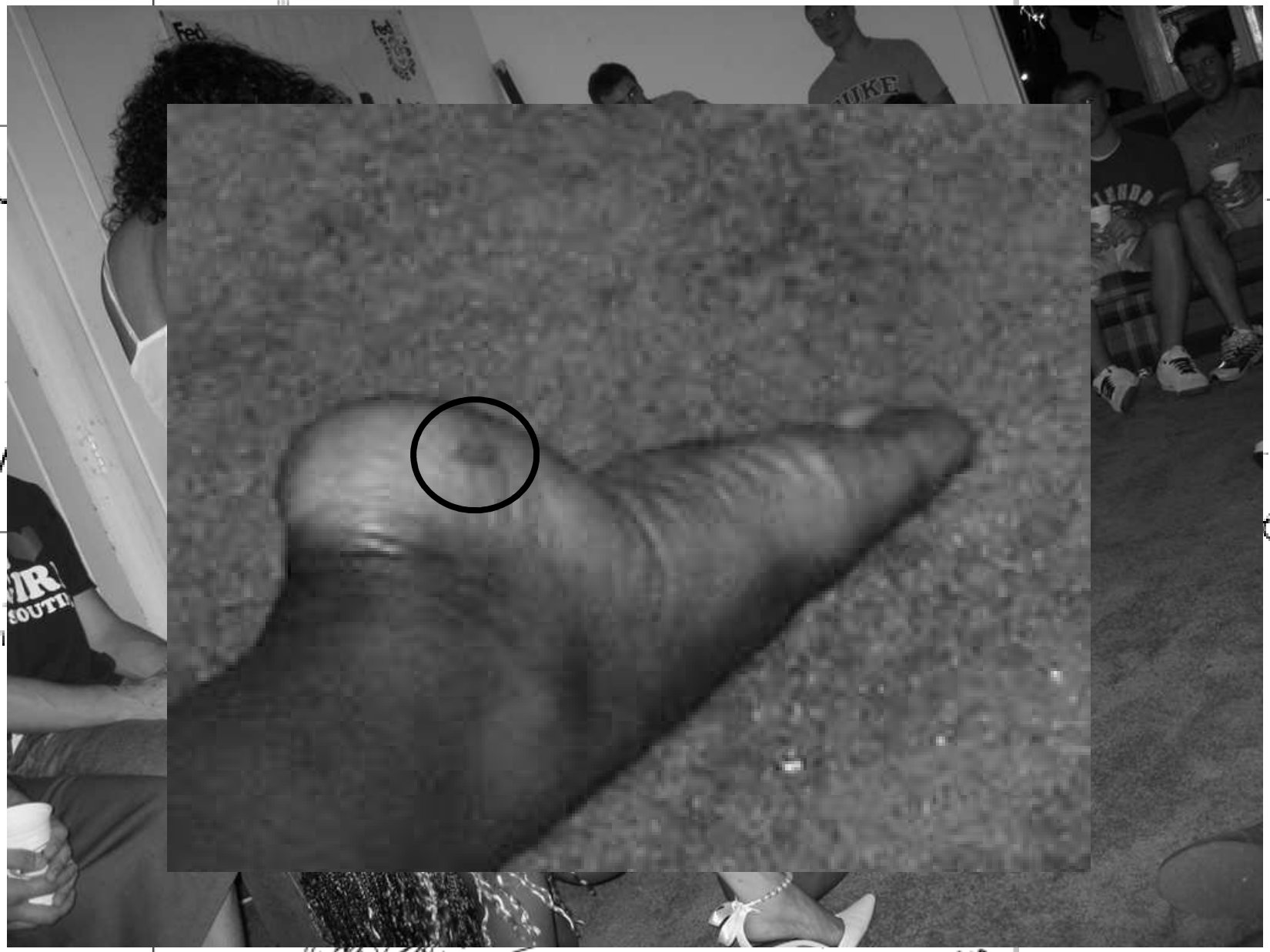
Date / Time: *03/16/2006 08:00:00, Thursday*

Supervisor Review Date / Time: *NOT REVIEWED*

Reference: *Investigator Notes*

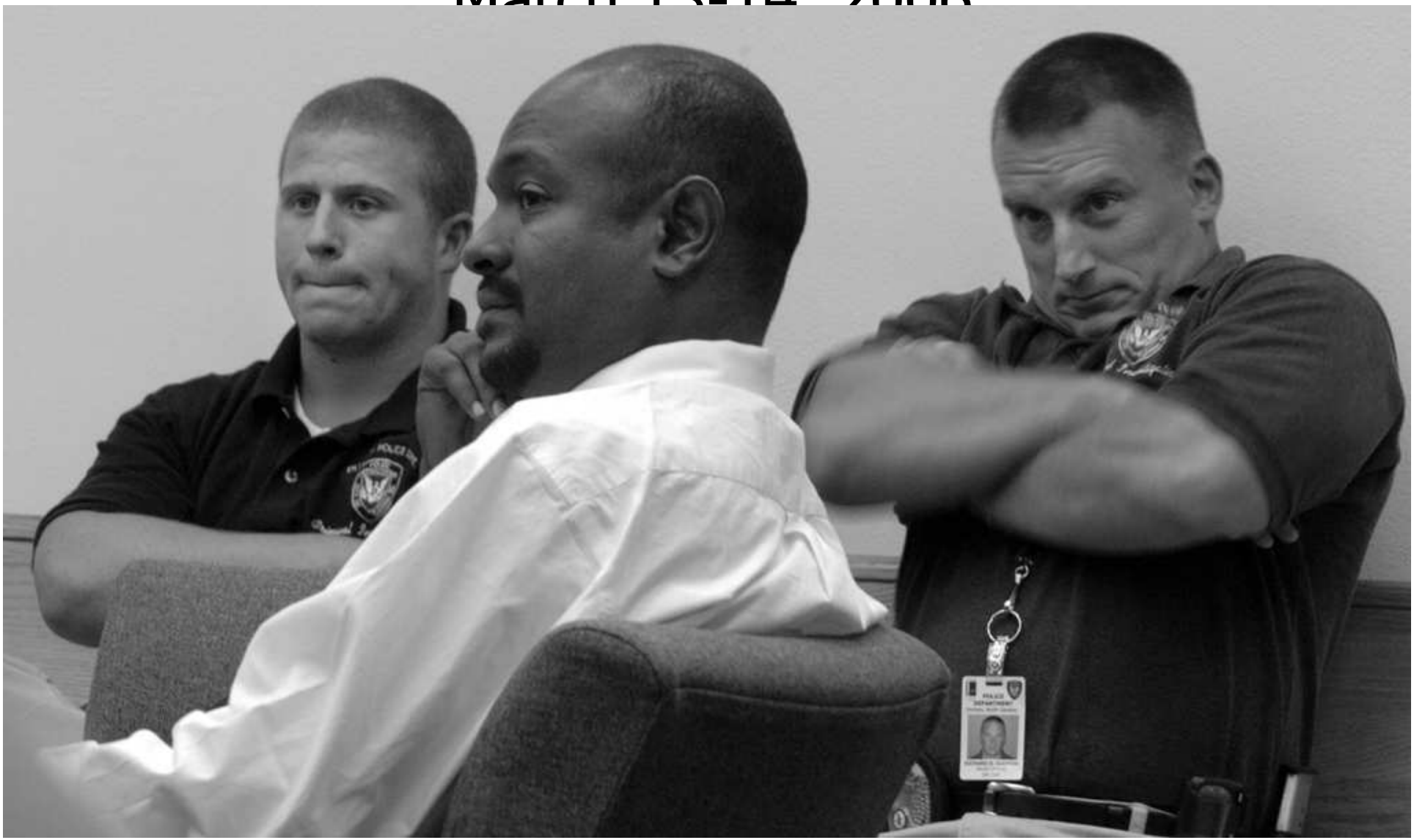
FSU REPORT

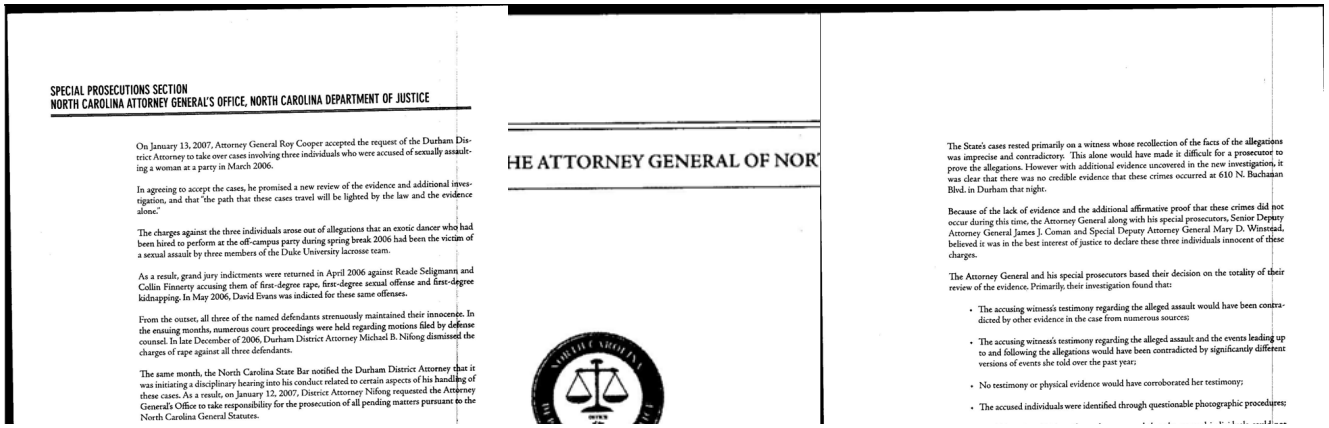
I responded at 909 Davinci Street and spoke with Inv. Himan. He reques ted photographs to be taken of the female victim who had been assaulte d at another location. Photographs were taken of Crystal Gail Mangum B/F DOB:7/16/78. Ms. Man gun had both knees banadge, cut on heel of one foot and big toe. RECV:1228 ARR:1243



Moez Elmostafa

March 13-14, 2006





SPECIAL PROSECUTIONS SECTION
NORTH CAROLINA ATTORNEY GENERAL'S OFFICE, NORTH CAROLINA DEPARTMENT OF JUSTICE

On January 13, 2007, Attorney General Roy Cooper accepted the request of the Durham District Attorney to take over cases involving three individuals who were accused of sexually assaulting a woman at a party in March 2006.

In agreeing to accept the cases, he promised a new review of the evidence and additional investigation, and that "the path that these cases travel will be lighted by the law and the evidence alone."

The charges against the three individuals arose out of allegations that an exotic dancer who had been hired to perform at the off-campus party during spring break 2006 had been the victim of a sexual assault by three members of the Duke University lacrosse team.

As a result, grand jury indictments were returned in April 2006 against Reade Seligmann and Collin Finnerty accusing them of first-degree rape, first-degree sexual offense and first-degree kidnapping. In May 2006, David Evans was indicted for these same offenses.

From the outset, all three of the named defendants strenuously maintained their innocence. In the ensuing months, numerous court proceedings were held regarding motions filed by defense counsel. In late December of 2006, Durham District Attorney Michael B. Nifong dismissed the charges of rape against all three defendants.

The same month, the North Carolina State Bar notified the Durham District Attorney that it was initiating a disciplinary hearing into his conduct related to certain aspects of his handling of these cases. As a result, on January 12, 2007, District Attorney Nifong requested the Attorney General's Office to take responsibility for the prosecution of all pending matters pursuant to the North Carolina General Statutes.

HE ATTORNEY GENERAL OF NOR

The State's cases rested primarily on a witness whose recollection of the facts of the allegations was imprecise and contradictory. This alone would have made it difficult for a prosecutor to prove the allegations. However with additional evidence uncovered in the new investigation, it was clear that there was no credible evidence that these crimes occurred at 610 N. Buchanan Blvd. in Durham that night.

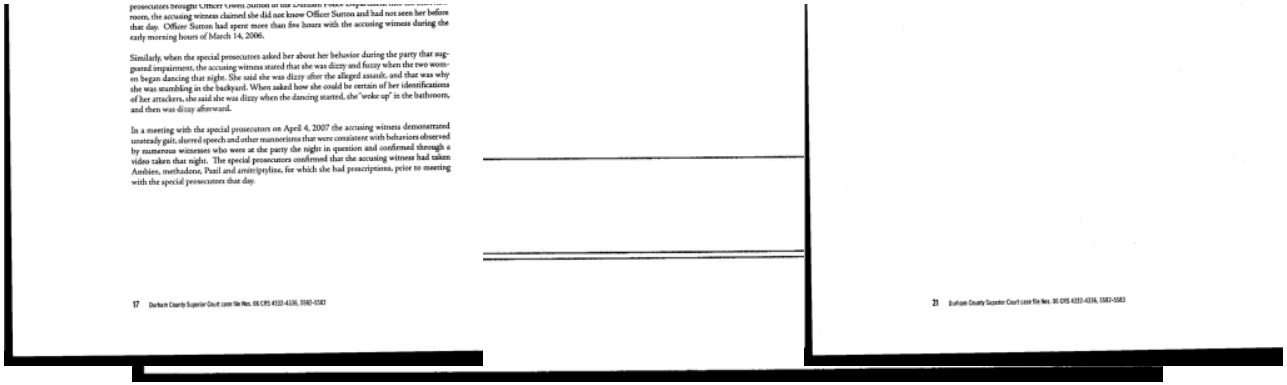
Because of the lack of evidence and the additional affirmative proof that these crimes did not occur during this time, the Attorney General along with his special prosecutors, Senior Deputy Attorney General James J. Coman and Special Deputy Attorney General Mary D. Winstead, believed it was in the best interest of justice to declare these three individuals innocent of these charges.

The Attorney General and his special prosecutors based their decision on the totality of their review of the evidence. Primarily, their investigation found that:

- The accusing witness's testimony regarding the alleged assault would have been contradicted by other evidence in the case from numerous sources;
- The accusing witness's testimony regarding the alleged assault and the events leading up to and following the allegations would have been contradicted by significantly different versions of events she told over the past year;
- No testimony or physical evidence would have corroborated her testimony;
- The accused individuals were identified through questionable photographic procedures;

While prosecutors acknowledge that rape and sexual assault victims often have some inconsistencies in their accounts of a traumatic event, in this case, the inconsistencies were so significant and so contrary to the evidence that the State had no credible evidence that an attack occurred in that house that night.

Based on the significant inconsistencies between the evidence and the various accounts given by the accusing witness, the Attorney General and his prosecutors determined that the three individuals were innocent of the criminal charges and dismissed the cases April 11, 2007.



prosecutors brought Officer Gwen Sutton of the Durham Police Department into the room, the accusing witness claimed she did not know Officer Sutton and had not seen her before that day. Officer Sutton had spent more than five hours with the accusing witness during the early morning hours of March 14, 2006.

Similarly, when the special prosecutors asked her about her behavior during the party that suggested impairment, the accusing witness stated that she was dizzy and fuzzy when the two women began dancing that night. She said she was dizzy after the alleged assault, and that was why she was stumbling in the backyard. When asked how she could be certain of her identifications of her attackers, she said she was dizzy when the dancing started, she "woke up" in the bathroom, and then was dizzy afterward.

In a meeting with the special prosecutors on April 4, 2007 the accusing witness demonstrated unsteady gait, slurred speech and other mannerisms that were consistent with behaviors observed by numerous witnesses who were at the party the night in question and confirmed through a video taken that night. The special prosecutors confirmed that the accusing witness had taken Ambien, methadone, Paxil and amitriptyline, for which she had prescriptions, prior to meeting with the special prosecutors that day.

17 Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583

21 Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583

DNA SECURITY INC.
Solving the Mysteries of Identity

Results of DNA analysis:

Individual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client. Those of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below.

Analysis I - Numbers in bold indicate a match with the suspect reference specimen. Numbers enclosed in brackets [ ], indicate a match coincident with a stutter fragment or a fragment of low intensity. The "INC" indicates that results for that locus are inconclusive and cannot be reported.

Autosomal STR Analysis				Y-Chromosome STR Analysis		
Locus	Specimen 15723 Reference specimen from David Evans	Specimen 15823 DNA from crime scene fingernail (provided by NCSBI)	Specimen 15765 Reference specimen from Crystal Mangum	Locus	Specimen 15723 Reference specimen from David Evans	Specimen 15823 DNA from crime scene fingernail (provided by NCSBI)
Amel	X, Y	X, Y	X, X	DYS456	17	15, 16, 17
D8S1179	11, 13	10, 11, 13, 14, 15	13, 15	DYS389I	13	12, 13, 14
D21S11	30.2, 31.2	28, 29, 30, 30.2, [31.2], 32.2	29, 30.2	DYS390	24	21, 22, 24
D7S820	11, 12	8, [11], 12	8, 12	DYS389II	29	28, 29, 31
CSF1PO	10, 12	INC	10, 11	DYS458	18	15, 17, 18
D3S1358	14, 18	16, [illegible], 18	15, 16	DYS19	14	13, 14
TH01	6, 9.3	[6], 7, 8, 9, 9.3	7	DYS385	12, 14	11, 13, 14
D13S317	10, 11	[10], 11	11	DYS393	13	13
D16S539	9, 11	9, 10, 11, 12	11, 12	DYS391	10	10, 11
D2S1338	23, 25	INC	19, 22	DYS439	12	12
D19S433	13, 15.2	13.2, [13], 15.2, 14, 15, 16.2	13.2, 15	DYS635	23	22, 23, 25
vWA	17, 18	15, 16, 17, 18	15, 17	DYS392	13	13, 12
TPOX	8	8, 9, 11	9, 11	Y GATA H4	12	10, 11, 12
D18S51	13, 14	INC	15, 16	DYS437	16	14, 15, 16
D5S818	11, 13	10, 11, 12, 13	11, 12	DYS438	12	10, 11, 12
FGA	20, 23	[20], 21, [23], 24	21, 24	DYS448	19	19

analyst may use a lower threshold. A lower threshold can be used if the following criteria are met:

1. Each electropherogram is analyzed independently of other electropherograms.
2. Evidence electropherograms are analyzed independently of reference electropherograms.
3. A peak has the correct shape.
4. The peak is at least three times the approximate average RFU of the noise.
5. The peak is higher than any reproducible artifacts in the analysis range.
6. If criteria 1-5 are met, the analyst can use 125, 100, 75, or 50 RFU as the minimum peak height to include any and all peaks that the analyst considers true.
7. Peaks below 50 RFU are not interpreted.

If true peaks below the threshold are suspected, then the following steps can be taken:

1. A larger quantity of amplified DNA can be added to the formamide/size standard mix.
2. A greater amount of template DNA can be re-amplified if the remaining sample is sufficient.

Each electropherogram shall be analyzed independently of other electropherograms

aware that stochastic effects on small amounts of template DNA can alter peak height ratios to make artifacts appear as true alleles and make true alleles appear as artifacts.

Alleles and loci are determined from the diagnostic peaks (allelic ladder) of the appropriate dye color and size range (bases) for a particular STR marker system.

Homozygote allele peak heights are approximately twice that of heterozygotes as a result of doubling signal from two alleles of the same size. The expected peak height ratio[1] for heterozygote alleles is 75-100%.

Peaks not aligning with those in the allelic ladders have been detected both within and outside the range of the ladders (off-ladder alleles). Some peaks may represent variant alleles containing incomplete repeats. The analyzer software will accurately label many of the alleles not present in the allelic ladders. If a sample has an off-ladder allele, the peak should be viewed under magnification to determine its position relative to the nearest bin. If the sample does not appear to be a true off-ladder allele, then the sample should be re-run. If the sample appears to be a true off-ladder allele, then the base designation must be noted. The sample must be re-amplified or another sample from a different tissue type from the same individual must be extracted and amplified. The two samples should then be run separately in the same electrophoresis run and the base designation must be within ±0.5 bp. The off-ladder allele can be reported using ISFH nomenclature if the variant is listed in peer-reviewed literature or in the off-ladder allele database in STRbase. If it is a new variant, then the base designation will be listed when reporting out the data.

[1] [lower peak height] ÷ [higher peak height] x 100% = peak ratio

3813

In most cases, the minimum peak height threshold will be 150 RFU for STR alleles; however, the analyst may use a lower threshold. A lower threshold can be used if the following criteria are met:

1. Each electropherogram is analyzed independently of other electropherograms.
2. Evidence electropherograms are analyzed independently of reference electropherograms.
3. A peak has the correct shape.
4. The peak is at least three times the [illegible] RFU of the noise.
5. The peak is higher than any reproducible artifacts in the analysis range.
6. If criteria 1-5 are met, the analyst can use 125, 100, 75, or 50 RFU as the minimum peak height to include any and all peaks that the analyst considers true.
7. Peaks below 50 RFU are not interpreted.

If true peaks below the threshold are suspected, then the following steps can be taken:

1. A larger quantity of amplified DNA can be added to the formamide/size standard mix.
2. [illegible]

Evidence electropherograms shall be analyzed independently of reference electropherograms

aware that stochastic effects on small amounts of template DNA can alter peak height ratios to make artifacts appear as true alleles and make true alleles appear as artifacts.

Alleles and loci are determined from the diagnostic peaks (allelic ladder) of the appropriate dye color and size range (bases) for a particular STR marker system.

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Peaks not aligning with those in the allelic ladders have been detected both within and outside the range of the ladders (off-ladder alleles). Some peaks may represent variant alleles containing incomplete repeats. The analyzer software will accurately label many of the alleles not present in the allelic ladders. If a sample has an off-ladder allele, the peak should be viewed under magnification to determine its position relative to the nearest bin. If the sample does not appear to be a true off-ladder allele, then the sample should be re-run. If the sample appears to be a true off-ladder allele, then the base designation must be noted. The sample must be re-amplified or another sample from a different tissue type from the same individual must be extracted and amplified. The two samples should then be run separately in the same electrophoresis run and the base designation must be within ±0.5 bp. The off-ladder allele can be reported using ISFH nomenclature if the variant is listed in peer-reviewed literature or in the off-ladder allele database in STRbase. If it is a new variant, then the base designation will be listed when reporting out the data.

[1] [lower peak height] ÷ [higher peak height] x 100% = peak ratio

3813

Applied Biosystems

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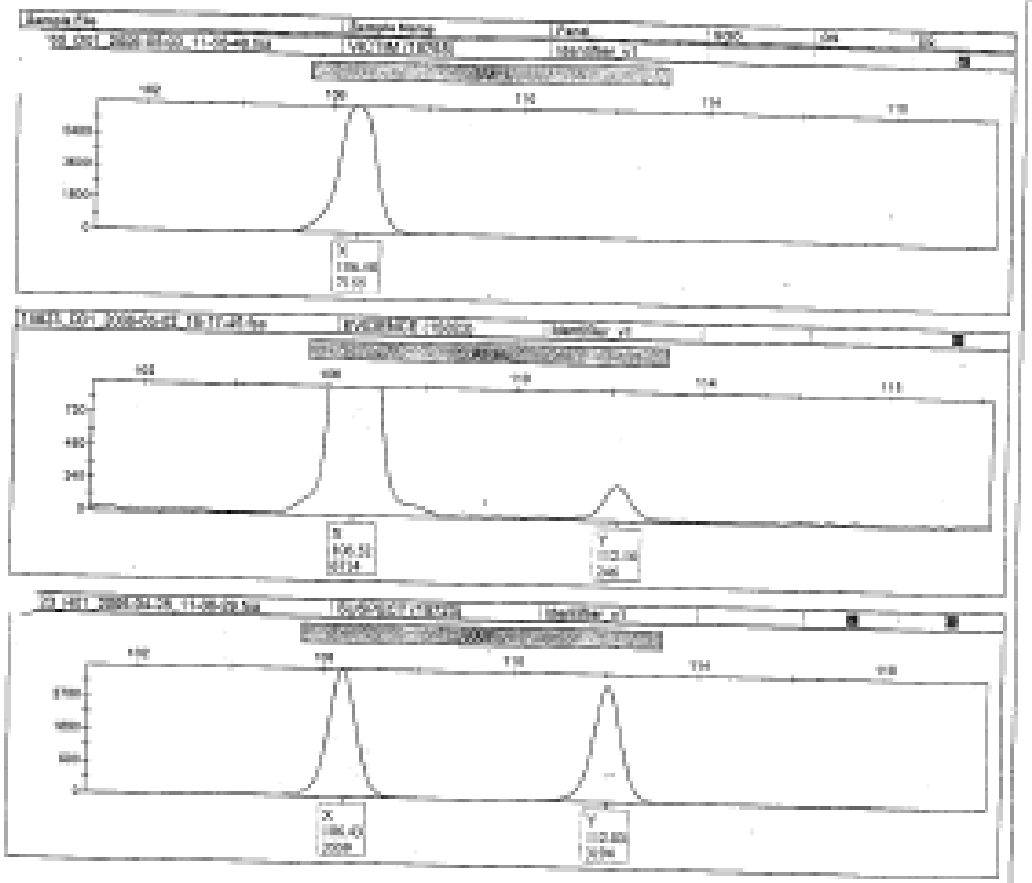

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Applied Biosystems

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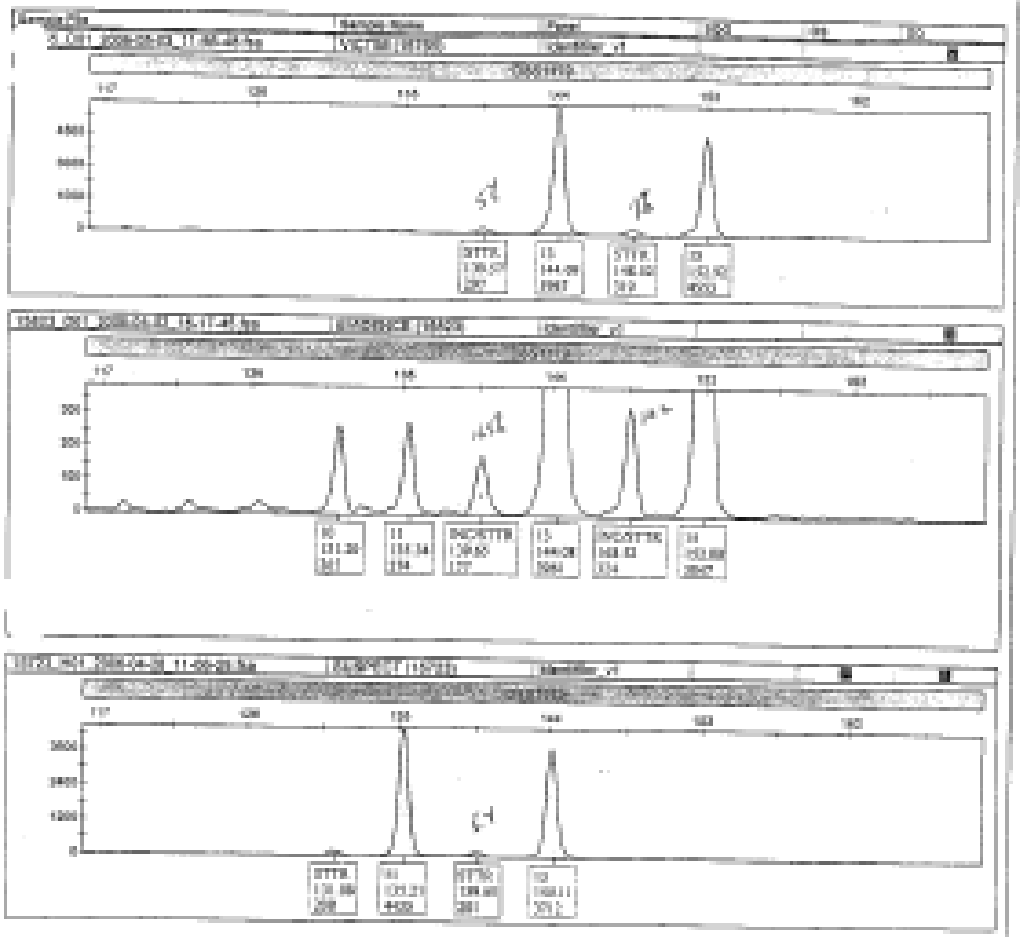

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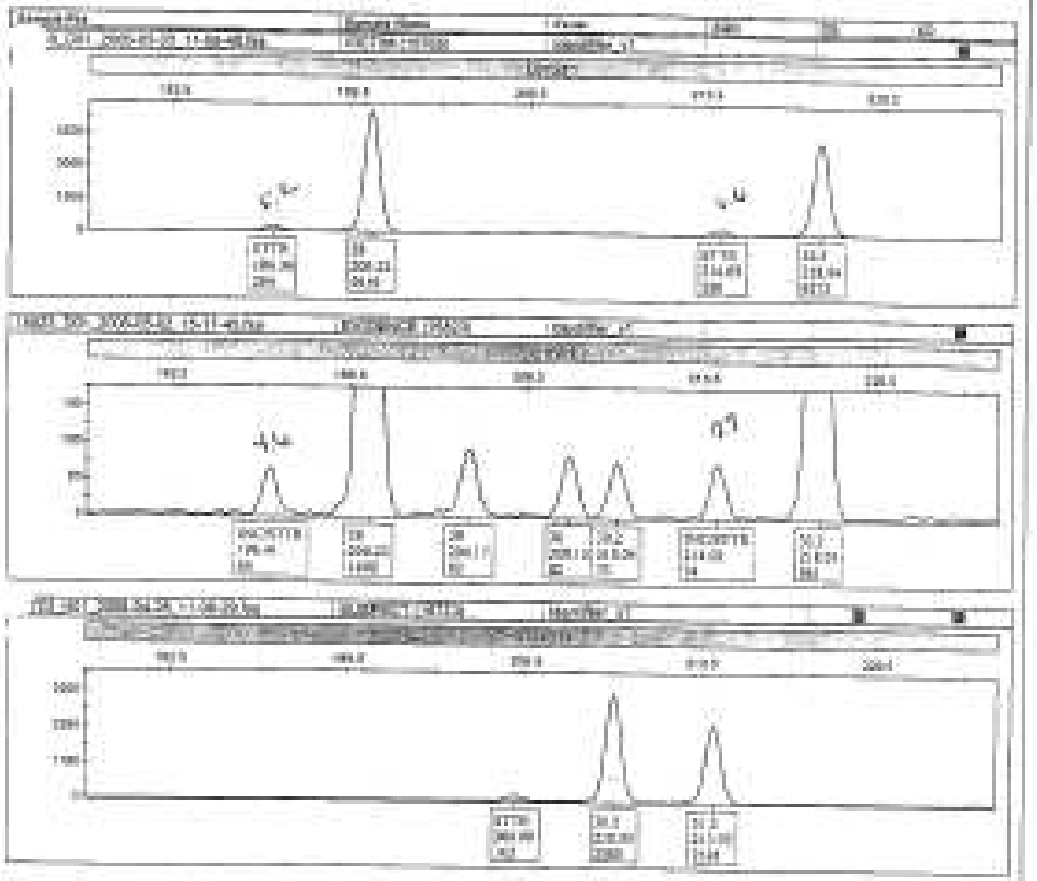

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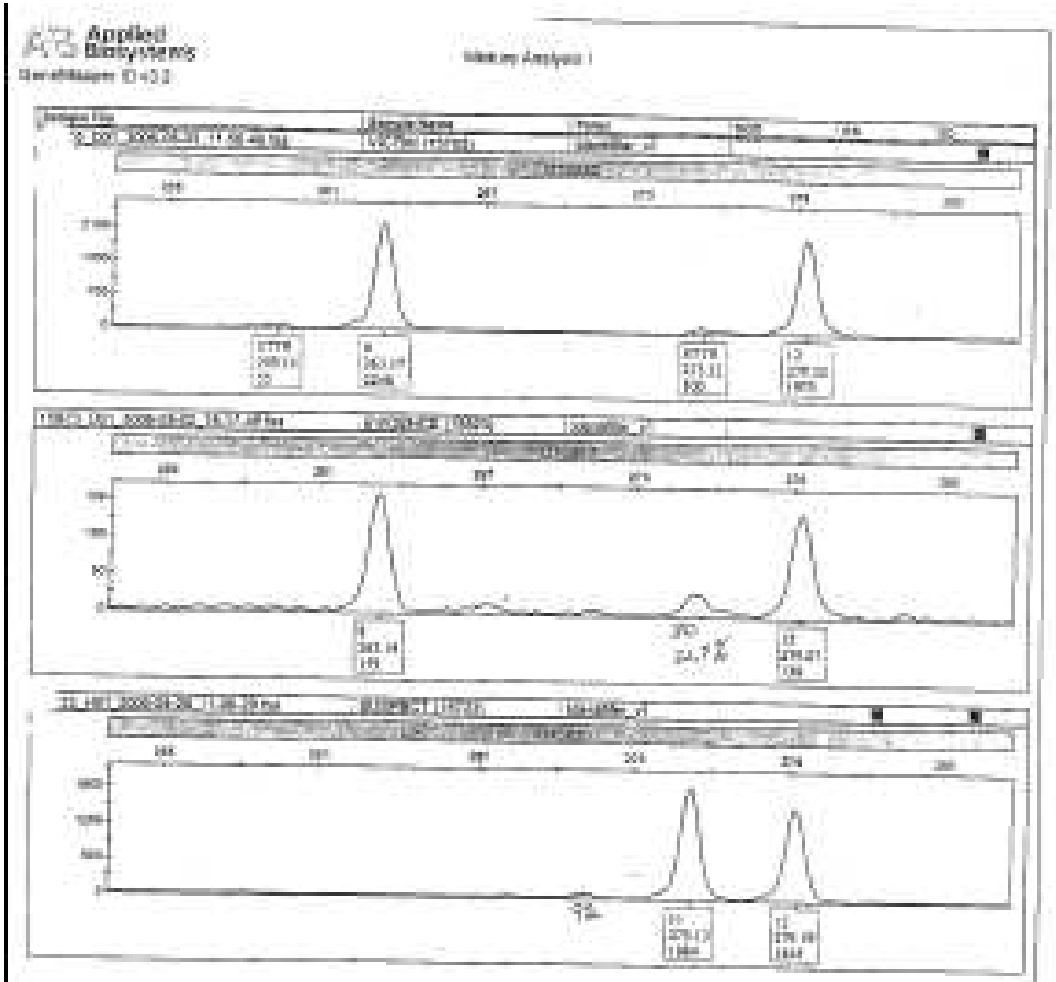

Applied Biosystems

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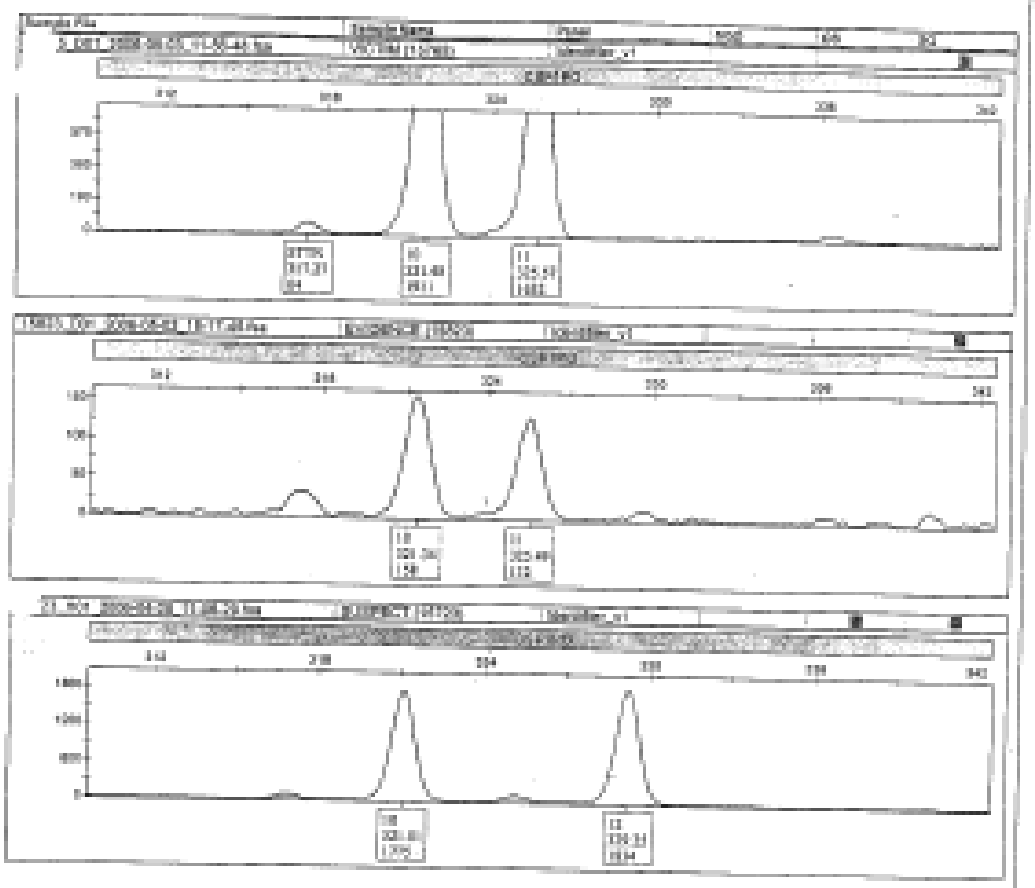

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Applied Biosystems

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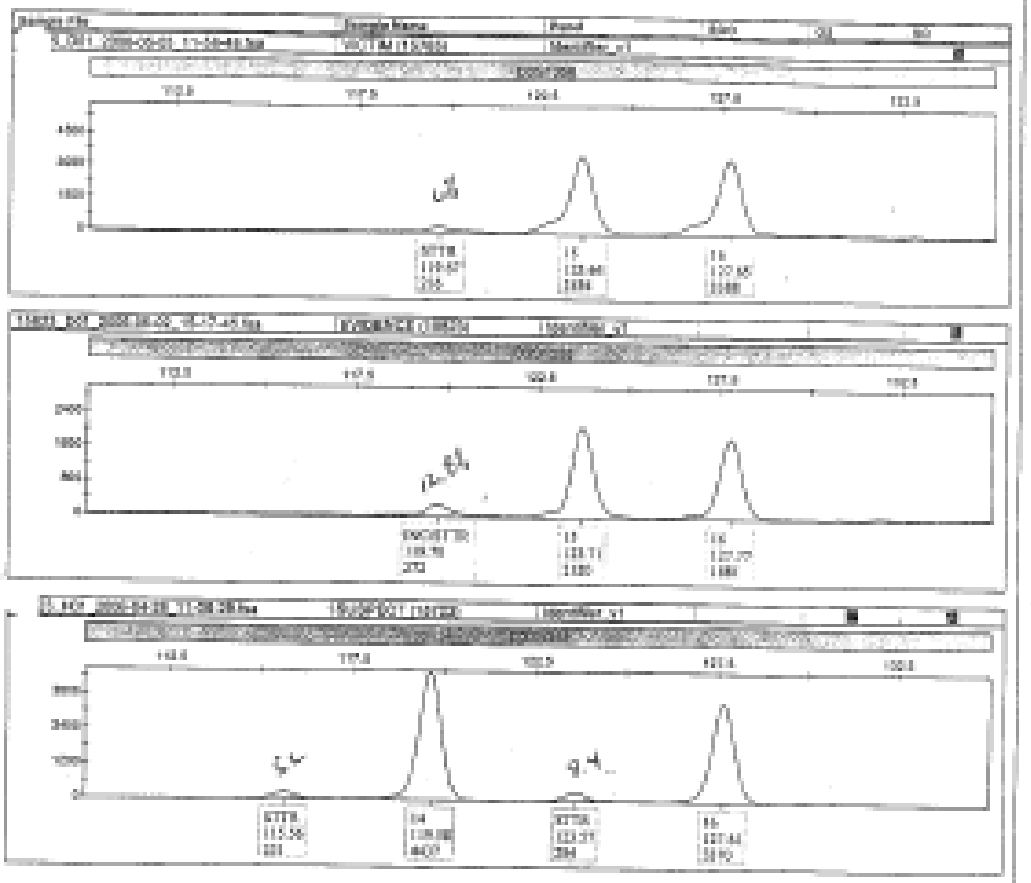

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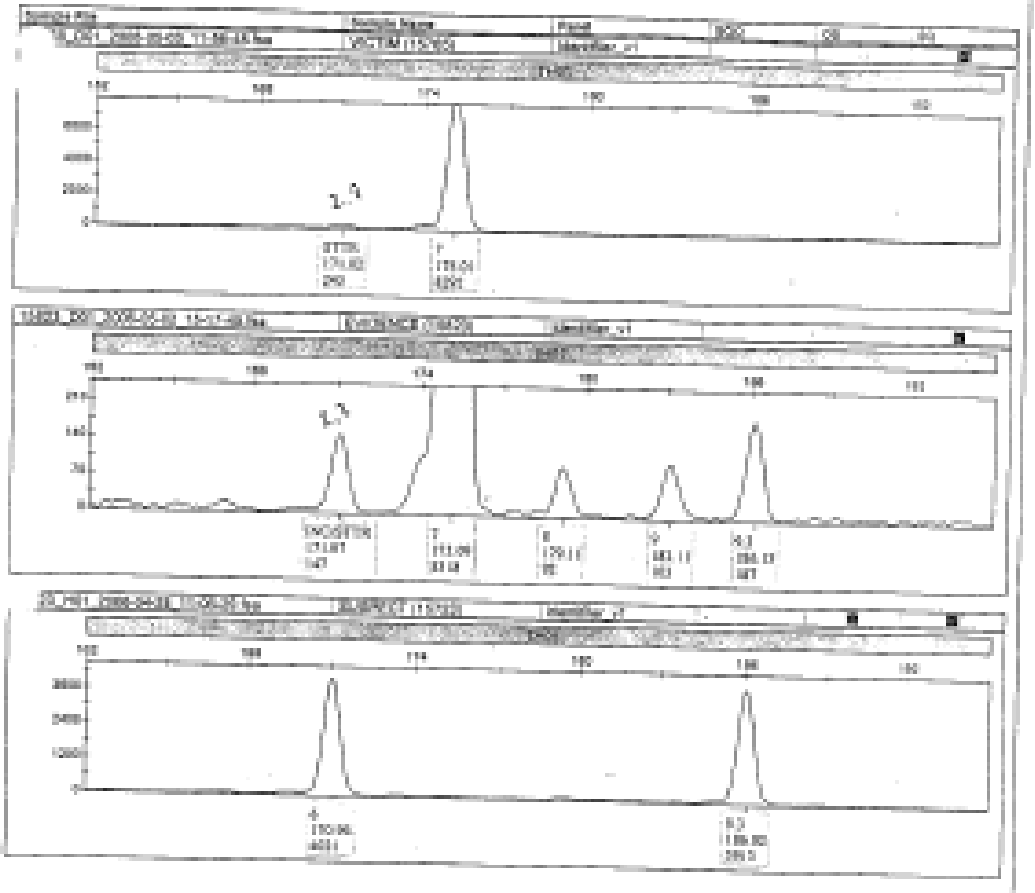

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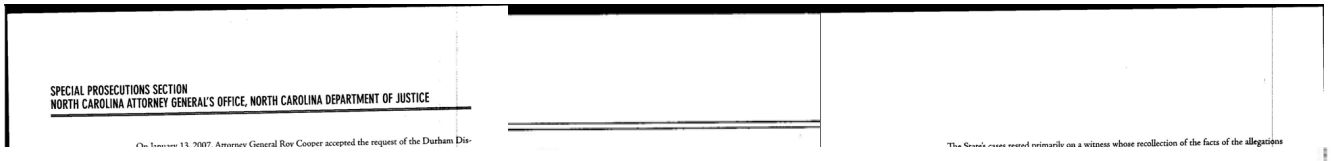
MEMORANDUM

At the outset, let me acknowledge the City's concurrence with Attorney General Roy Cooper's decision to dismiss all of the charges against Evans, Seligman and Finnerty as well as his declaration that these young men are innocent of the charges for which they were indicted. While



- The accusing witness's testimony regarding the alleged assault would have been contradicted by other evidence in the case from numerous sources;

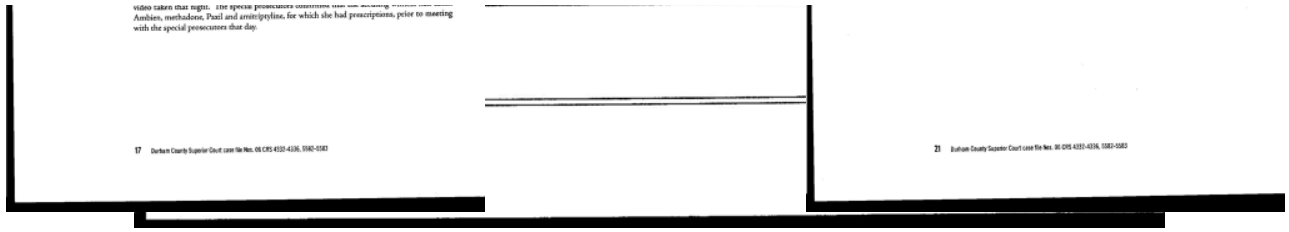
- The accusing witness's testimony regarding the alleged assault and the events leading up to and following the allegations would have been contradicted by significantly different versions of events she told over the past year;

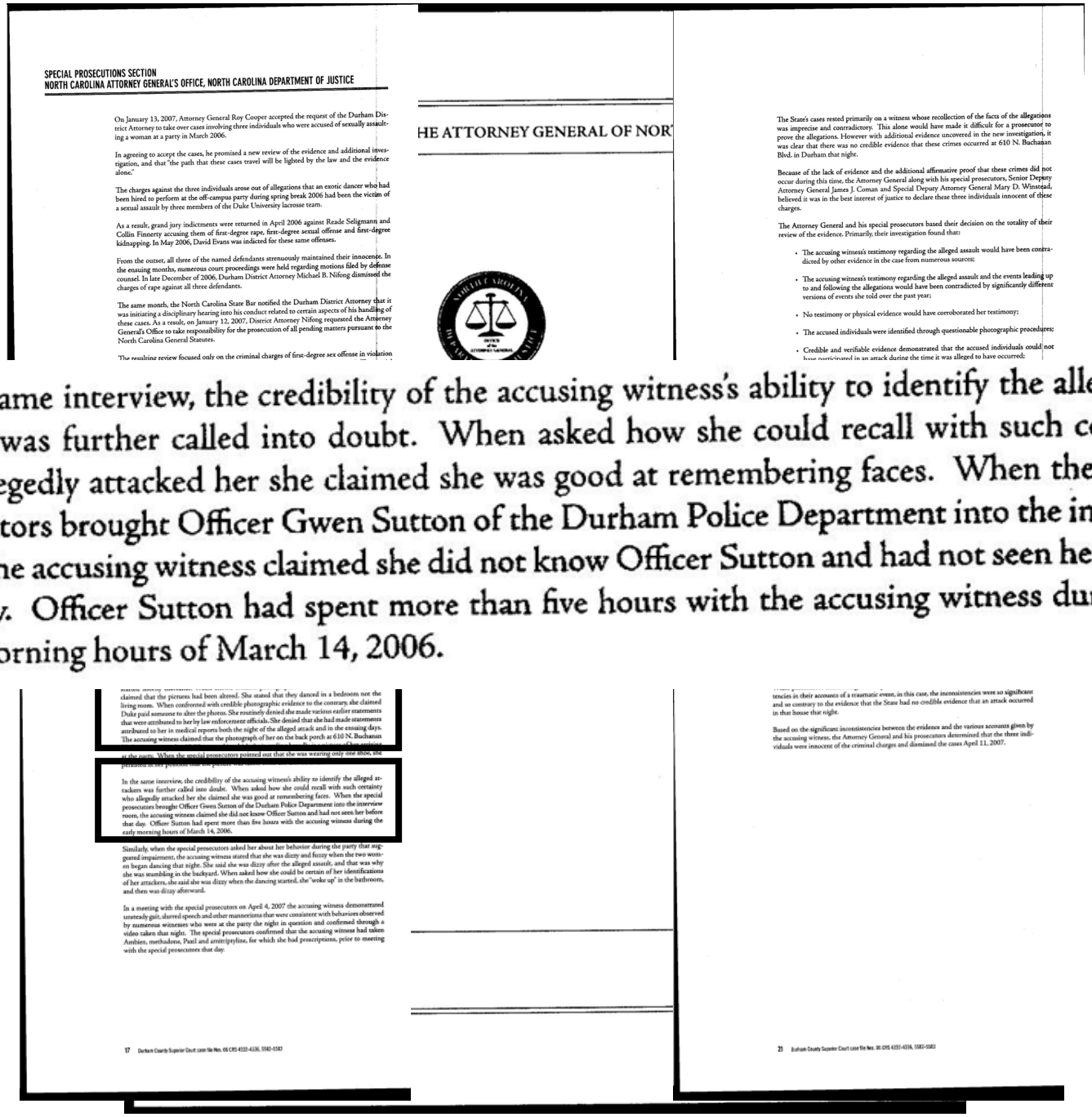
- No testimony or physical evidence would have corroborated her testimony;

- The accused individuals were identified through questionable photographic procedures;

- Credible and verifiable evidence demonstrated that the accused individuals could not have participated in an attack during the time it was alleged to have occurred;

- The accusing witness's credibility would have been suspect based on previous encounters with law enforcement, her medical history and inconsistencies within her statements.





SPECIAL PROSECUTIONS SECTION
NORTH CAROLINA ATTORNEY GENERAL'S OFFICE, NORTH CAROLINA DEPARTMENT OF JUSTICE

On January 13, 2007, Attorney General Roy Cooper accepted the request of the Durham District Attorney to take over cases involving three individuals who were accused of sexually assaulting a woman at a party in March 2006.

In agreeing to accept the cases, he promised a new review of the evidence and additional investigation, and that "the path that these cases travel will be lighted by the law and the evidence alone."

The charges against the three individuals arose out of allegations that an exotic dancer who had been hired to perform at the off-campus party during spring break 2006 had been the victim of a sexual assault by three members of the Duke University lacrosse team.

As a result, grand jury indictments were returned in April 2006 against Reade Seligmann and Collin Finnerty accusing them of first-degree rape, first-degree sexual offense and first-degree kidnapping. In May 2006, David Evans was indicted for these same offenses.

From the outset, all three of the named defendants strenuously maintained their innocence. In the ensuing months, numerous court proceedings were held regarding motions filed by defense counsel. In late December of 2006, Durham District Attorney Michael B. Nifong dismissed the charges of rape against all three defendants.

The same month, the North Carolina State Bar notified the Durham District Attorney that it was initiating a disciplinary hearing into his conduct related to certain aspects of his handling of these cases. As a result, on January 12, 2007, District Attorney Nifong requested the Attorney General's Office to take responsibility for the prosecution of all pending matters pursuant to the North Carolina General Statutes.

The resulting review focused only on the criminal charges of first-degree sex offense in violation

HE ATTORNEY GENERAL OF NOR

The State's cases rested primarily on a witness whose recollection of the facts of the allegations was imprecise and contradictory. This alone would have made it difficult for a prosecutor to prove the allegations. However with additional evidence uncovered in the new investigation, it was clear that there was no credible evidence that these crimes occurred at 610 N. Buchanan Blvd. in Durham that night.

Because of the lack of evidence and the additional affirmative proof that these crimes did not occur during this time, the Attorney General along with his special prosecutors, Senior Deputy Attorney General James J. Coman and Special Deputy Attorney General Mary D. Winstead, believed it was in the best interest of justice to declare these three individuals innocent of these charges.

The Attorney General and his special prosecutors based their decision on the totality of their review of the evidence. Primarily, their investigation found that:

- The accusing witness's testimony regarding the alleged assault would have been contradicted by other evidence in the case from numerous sources;
- The accusing witness's testimony regarding the alleged assault and the events leading up to and following the allegations would have been contradicted by significantly different versions of events she told over the past year;
- No testimony or physical evidence would have corroborated her testimony;
- The accused individuals were identified through questionable photographic procedures;
- Credible and verifiable evidence demonstrated that the accused individuals could not

claimed that the pictures had been altered. She stated that they danced in a bedroom not the living room. When confronted with credible photographic evidence to the contrary, she claimed Duke paid someone to alter the photos. She routinely denied she made various earlier statements that were attributed to her by law enforcement officials. She denied that she had made statements attributed to her in medical reports both the night of the alleged attack and in the ensuing days. The accusing witness claimed that the photograph of her on the back porch at 610 N. Buchanan

at the party. When the special prosecutors pointed out that she was wearing only one shoe, she

In the same interview, the credibility of the accusing witness's ability to identify the alleged attackers was further called into doubt. When asked how she could recall with such certainty who allegedly attacked her she claimed she was good at remembering faces. When the special prosecutors brought Officer Gwen Sutton of the Durham Police Department into the interview room, the accusing witness claimed she did not know Officer Sutton and had not seen her before that day. Officer Sutton had spent more than five hours with the accusing witness during the early morning hours of March 14, 2006.

Similarly, when the special prosecutors asked her about her behavior during the party that suggested impairment, the accusing witness stated that she was dizzy and fuzzy when the two women began dancing that night. She said she was dizzy after the alleged assault, and that was why she was stumbling in the backyard. When asked how she could be certain of her identifications of her attackers, she said she was dizzy when the dancing started, she "woke up" in the bathroom, and then was dizzy afterward.

In a meeting with the special prosecutors on April 4, 2007 the accusing witness demonstrated unsteady gait, slurred speech and other mannerisms that were consistent with behaviors observed by numerous witnesses who were at the party the night in question and confirmed through a video taken that night. The special prosecutors confirmed that the accusing witness had taken Ambien, methadone, Paxil and amitriptyline, for which she had prescriptions, prior to meeting with the special prosecutors that day.

17 Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583

tencies in their accounts of a traumatic event, in this case, the inconsistencies were so significant and so contrary to the evidence that the State had no credible evidence that an attack occurred in that house that night.

Based on the significant inconsistencies between the evidence and the various accounts given by the accusing witness, the Attorney General and his prosecutors determined that the three individuals were innocent of the criminal charges and dismissed the cases April 11, 2007.

21 Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583

In the same interview, the credibility of the accusing witness's ability to identify the alleged attackers was further called into doubt. When asked how she could recall with such certainty who allegedly attacked her she claimed she was good at remembering faces. When the special prosecutors brought Officer Gwen Sutton of the Durham Police Department into the interview room, the accusing witness claimed she did not know Officer Sutton and had not seen her before that day. Officer Sutton had spent more than five hours with the accusing witness during the early morning hours of March 14, 2006.

Applied Biosystems

GeneMapper ID v3.2

Mixture Analysis I

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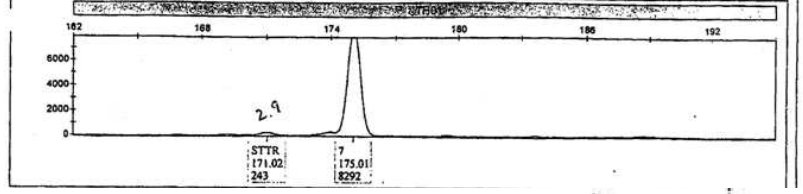

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Local Counsel and Young Lawyers: The Ins and Outs of Being Second Chair

Connie M. Alt
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Local Counsel and Young Lawyers: The Ins and Outs of Being Second Chair
Connie Alt
10 a.m. Thursday September 18th

1. Local Counsel
    a. What are the rules? - Bennett decision
    b. Scope of representation - what is your role?
        i. Find out what is expected of you
        ii. Get it in writing
    c. Conflicts – did a small gig keep you from catching the big fish?
    d. Payment – who is paying your bill, and do you need a retainer?

2. Young lawyers
    a. Take every opportunity to go to court – always say yes
    b. Note taking – why and how
    c. Put the coffee on
    d. Take advantage of the opportunity to talk to the court and other counsel

198 F.R.D. 508
United States District Court,
N.D. Iowa,
Western Division.

ST. PAUL REINSURANCE COMPANY, LTD., CNA Reinsurance Company, Ltd., and Zurich Reinsurance (London) Limited, Plaintiffs,
v.
COMMERCIAL FINANCIAL CORP., Defendant,
Commercial Financial Corp. and Security State Bank, Counterclaim Plaintiffs,
v.
St. Paul Reinsurance Company, Ltd., CNA Reinsurance Company, Ltd., Zurich Reinsurance (London) Limited, Professional Claims Managers, Inc., and U.S. Risk Underwriters, Inc., Counterclaim Defendants.

No. C00–4080. | Nov. 22, 2000.

Reinsurance companies brought action against financial corporation. Financial corporation filed motion for expedited relief, which revealed discovery abuses by reinsurance companies. On its own motion, the District Court, Bennett, Chief Judge, held that: (1) plaintiffs' boilerplate, unsubstantiated objections to discovery requests were insufficient to satisfy their burden of demonstrating that discovery was outside of scope allowed by Federal Rules of Civil Procedure, and (2) sanction of requiring plaintiffs' attorney to write an article regarding why his objections were improper, and submit such article to bar journals, was warranted.

Ordered accordingly.

Opinion

***510 MEMORANDUM OPINION AND ORDER REGARDING COURT'S *SUA SPONTE* IMPOSITION OF SANCTIONS**

TABLE OF CONTENTS

I. INTRODUCTION 544

II. LEGAL ANALYSIS 545

A. Scope of Discovery 545

B. Sanctions Under Rule 26(g) 549

III. CONCLUSION 552

BENNETT, Chief Judge.

Anatole France, a late 19th and early 20th century French writer, urbane critic and Nobel Prize winner penned: “It is human nature to think wisely and to act in an absurd fashion.” [1] Little could France foresee that he would decades later capture the essence of plaintiffs' counsel's “Rambo” style discovery tactics in this litigation.

I. INTRODUCTION

This matter is before court on its own initiative. On October 4, 2000, defendant Commercial Financial Corp. (“CFC”) filed a Motion for Expedited Relief Pursuant to Federal Rule of Civil Procedure 57. In support of its motion and request that trial be set for an available day immediately after the court rules on its motion for summary judgment, CFC recounted a discovery objection asserted by plaintiffs St. Paul Reinsurance Company, Ltd., CNA Reinsurance Company, ***511** Ltd., and Zurich Reinsurance (London)

Limited ("plaintiffs") in this case to demonstrate to the court that plaintiffs intend to make every issue as burdensome as possible for CFC, thus justifying CFC's Motion for Expedited Relief. As a result, the court became aware of the objections to the discovery requests asserted by the plaintiffs in this case. In almost every respect, as will be demonstrated below, each objection asserted by the plaintiffs is boilerplate, obstructionist, frivolous, overbroad, and, significantly, contrary to well-established and long standing federal law. This court will not tolerate such an egregious abuse of the discovery process. Therefore, in order to curb the abuse of discovery in this case, the court has taken up this matter *sua sponte* pursuant to Rule 26(g) of the Federal Rules of Civil Procedure.

II. LEGAL ANALYSIS

A. Scope of Discovery

[1] **[2]** The scope of discoverable information is delineated in Rule 26 of the Federal Rules of Civil Procedure. Rule 26(b)(1) provides in relevant part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED.R.CIV.P. 26(b)(1). In order to fulfill discovery's purposes of providing both parties with "information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement," the discovery rules mandate a liberality in the scope of discoverable material. *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 507, 509 (S.D.Iowa 1992) (citing *In re Hawaii Corp.*, 88 F.R.D. 518, 524 (D.Haw.1980)); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978); *SDI Operating Partnership, L.P. v. Neuwirth*, 973 F.2d 652 (8th Cir.1992); *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2d Cir.1985); *Miller v. Pancucci*, 141 F.R.D. 292, 298 (C.D.Cal.1992) (stating that the federal policy of discovery is a liberal one). Thus, as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed. *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D.Mass.1984).

[3] **[4]** **[5]** The party resisting production bears the burden of establishing lack of relevancy or undue burden. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D.Kan.1997) ("The objecting party has the burden to substantiate its objections.") (citing *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir.1984), *cert. dismissed*, 469 U.S. 1199, 105 S.Ct. 983, 83 L.Ed.2d 984 (1985)); *accord G–69 v. Degnan*, 130 F.R.D. 326, 331 (D.N.J.1990); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C.1978). The party must demonstrate to the court "that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed.R.Civ.P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure...." *Burke v. New York City Police Department*, 115 F.R.D. 220, 224 (S.D.N.Y.1987). Further, the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection." *Josephs v.* ***512** *Harris Corp.*, 677 F.2d 985, 992 (3d Cir.1982) (quoting *Roesberg v. Johns–Manville Corp.*, 85 F.R.D. 292, 296–97 (E.D.Pa.1980)); *see also Oleson*, 175 F.R.D. 560, 565 ("The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request.") (citation omitted). "On the contrary, the party resisting discovery 'must show specifically how ... each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or

oppressive.' " *Id.* at 992 (quoting *Roesberg,* 85 F.R.D. at 296–97); *see also Oleson,* 175 F.R.D. 560, 565 ("The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden."); *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir.1986) (holding that it is not sufficient to merely state a generalized objection, but, rather, objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it); *Degnan,* 130 F.R.D. at 331 (D.N.J.1990) (same).

In this case, the plaintiffs have failed to sustain their burden of demonstrating that the discovery sought is outside the scope of Rule 26(b)(1). Rather, they have merely asserted boilerplate objections that the discovery sought is vague, ambiguous, overbroad, unduly burdensome, etc ... without specifying how each request for production is deficient and without articulating the particular harm that would accrue if they were required to respond to CFC's discovery requests. The following objections asserted by plaintiffs in response to one of CFC's discovery requests is illustrative:

> DOCUMENT REQUEST NO 1: All documents identified, or relied on, in your answers to Counterclaim Plaintiff's First Set of Interrogatories Directed to Counterclaim Defendant.
>
> OBJECTIONS TO DOCUMENT REQUEST NO. 1: St. Paul objects to this request on the ground that the request is oppressive, burdensome and harassing. St. Paul further objects to this request on the ground that it is vague, ambiguous and unintelligible. St. Paul further objects that the request is overbroad and without reasonable limitation in scope or time frame. St. Paul further objects that the request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine and/or the joint interest or joint defense privilege. St. Paul further objects to this request on the ground that the request seeks information and documents equally available to the propounding parties from their own records or from records which are equally available to the propounding parties. St. Paul further objects that this request fails to designate the documents to be produced with reasonable particularity. [2]

[6] In every respect these objections are text-book examples of what federal courts have routinely deemed to be improper objections. Indeed, an individual examination of the above-mentioned objections is instructive. ***513** The first objection asserted by the plaintiffs to CFC's "Document Request No. 1" is that it is oppressive, burdensome and harassing. Plaintiffs assert these objections, however, without explaining, much less substantiating, how CFC's request is oppressive, burdensome and harassing. *See Redland Soccer Club, Inc. v. Department of the Army,* 55 F.3d 827, 856 (3d Cir.1995) (stating that the mere statement by a party that the interrogatory was overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection to an interrogatory and that instead, the party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive) (citation omitted); *see also McLeod, Alexander, Powel & Apffel, P.C. v. Quarles,* 894 F.2d 1482, 1485 (5th Cir.1990) (stating that the "party resisting discovery must show specifically how ... each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive" and then stating that "[w]e see no reason to distinguish the standards governing responses to interrogatories from those that govern responses to production requests.") (citation omitted). Plaintiffs next object that CFC's document request is vague, ambiguous and unintelligible. Similarly, plaintiffs assert these boilerplate objections and fail to substantiate how CFC's request is vague, ambiguous and unintelligible. *Paulsen v. Case Corp.,* 168 F.R.D. 285, 289 (C.D.Cal.1996); *see also Burns v. Imagine Films Entertainment, Inc.,* 164 F.R.D. 589, 592–93 (W.D.N.Y.1996) (general objections that discovery request was overbroad, vague and unduly burdensome were not sufficiently specific to allow court to ascertain objectionable character of discovery request and were improper); *Chubb Integrated Sys. Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 58 (D.D.C.1984) ("General objections are not useful to the court ruling on a discovery motion. Nor does a general objection fulfill [a party's] burden to explain its objections."). The plaintiffs' third objection to CFC's request is based on the ground that it is overbroad and without reasonable limitation in scope or time frame. Once again, plaintiffs fail to offer any evidence or affidavits in support of these objections. *See Etienne v. Wolverine Tube, Inc.,* 185 F.R.D. 653, 656 (D.Kan.1999) (stating that a party resisting discovery on the grounds that a request is overly broad, including any objection to the temporal scope of the request, has the burden to support its objection, unless the request is overly broad on its face); *accord Hilt v. SFC Inc.,* 170 F.R.D. 182, 186 (D.Kan.1997).

[7] **[8]** The plaintiffs' fourth objection to CFC's request is based on the ground that it seeks information that is protected

from disclosure by the attorney-client privilege, the attorney work product doctrine and/or the joint interest or joint defense privilege. Initially, the court notes that FED.R.CIV.P. 26(b)(5) requires:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The plaintiffs' objections fail to satisfy the requirements of Rule 26(b)(5). Specifically, the plaintiffs' boilerplate objections fail to identify the lawyers involved in the conversations, the people present during the conversation, and a description of the nature of the communication sufficient to enable CFC to assess the applicability of the claimed privilege. *See Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D.Colo.2000); *see also MMAR Group Inc. v. Dow Jones & Co. Inc.*, 187 F.R.D. 282, 292 n. 6 (S.D.Tex.1999) (describing the assertion of attorney-client privilege and work product doctrine as boilerplate objections); *Athridge v. Aetna Casualty & Surety Co.*, 184 F.R.D. 181, 190 (D.D.C.1998) (stating that such general objections such as attorney-client privilege and work product privilege are disfavored); *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D.Cal.1992) (stating that to properly claim attorney-client privilege, the claimant must specifically designate and describe the documents claimed to be ***514** within the scope of the privilege and to be reasonably precise in stating the reasons for preserving their confidentiality) (citing *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir.1977)). Moreover, as indicated previously, boilerplate objections are improper. *Miller v. Pancucci*, 141 F.R.D. 292 at 302 (citation omitted). The plaintiffs' fifth objection to CFC's request is based on the ground that it seeks information and documents equally available to the propounding parties from their own records or from records which are equally available to the propounding parties. However, with respect to this objection, courts have unambiguously stated that this exact objection is insufficient to resist a discovery request. *See, e.g., City Consumer Services v. Horne*, 100 F.R.D. 740, 747 (D.Utah 1983) (stating that it is "not usually a ground for objection that the information is equally available to the interrogator or is a matter of public record.") (citing *Petruska v. Johns–Manville*, 83 F.R.D. 32, 35 (E.D.Pa.1979)); *Associated Wholesale Grocers, Inc. v. U.S.*, 1989 WL 110300, *3 (D.Kan. June 7, 1989) (stating that defendant's argument of equal accessibility is not sufficient to resist discovery) (citing *City Consumer Services*). Nevertheless, plaintiffs assert this meritless ground as a basis for their objection.

[9] [10] [11] [12] The plaintiffs' sixth and final objection to CFC's document request is on the ground that it fails to designate the documents to be produced with reasonable particularity. The court agrees that a request for production of documents must describe the documents requested with "reasonable particularity." *See* FED.R.CIV.P. 34(b) (stating that the request shall be set forth with "reasonable particularity."); *see also Parsons v. Jefferson–Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C.1992) ("Document requests ... must be described with 'reasonable particularity.' "). The test for reasonable particularity is whether the request places the party upon "reasonable notice of what is called for and what is not." *Parsons*, 141 F.R.D. at 412. Therefore, the party requesting the production of documents must provide "sufficient information to enable [the party to whom the request is directed] to identify responsive documents." *Kidwiler v. Progressive Paloverde Insurance Co.*, 192 F.R.D. 193, 202 (N.D.W.Va.2000); *accord Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 11, 20 (D.Mass.1999). Courts have interpreted the "particularity" requirement to mandate that a responding party be given sufficient information to enable it to identify responsive documents. *See Mallinckrodt Chem. Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348 (S.D.N.Y.1973). Broad and undirected requests for all documents which relate in any way to the complaint are regularly stricken as too ambiguous. *See, e.g., Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 50 (D.N.J.1985); *Gaison v. Scott*, 59 F.R.D. 347, 353 (D.Haw.1973); *see also Holland v. Muscatine General Hospital*, 971 F.Supp. 385, 392 (S.D.Iowa 1997) (stating that "all papers" relied on in answering an entire set of interrogatories does not describe the documents with the required "reasonable particularity"). Here, however, CFC's document request does not fail the "reasonable particularity" test. CFC's request places the plaintiffs on reasonable notice of what is called for and what is not. Specifically, CFC requested the following from the plaintiffs: "All documents identified, or relied on, in your answers to counterclaim

plaintiff's first set of interrogatories directed to counterclaim defendant." While not a model of specificity, this request does place the plaintiffs upon reasonable notice of what is called for and, thus, is not so open-ended as to call simply for documents related to a claim or defense in this action.

As demonstrated, the litany of plaintiffs' boilerplate objections are unsubstantiated because they fail to show specifically how each discovery request is burdensome, oppressive or any of the other grounds upon which they base their objections by submitting affidavits or offering evidence revealing the nature of the objections. Moreover, this is not a case where one, or even two, of the six objections asserted by plaintiffs are obstructionist, boilerplate and improper. Rather, every single objection is obstructionist, boilerplate, frivolous and contrary to federal law. This court will not countenance such abusive discovery tactics.

515 *B. Sanctions Under Rule 26(g)

Rule 26(g) of the Federal Rules of Civil Procedure imposes on counsel and parties an affirmative duty to conduct pretrial discovery in a responsible manner. *See* FED.R.CIV.P. 26(g), Advisory Committee Notes to 1983 Amendments. Improper discovery requests, responses and objections are governed by Rule 26(g). Specifically, this rule provides, in pertinent part, that:

> (2) The signature of the attorney or party constitutes a certification that to the best of the signor's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:
>
> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

* * * * * *

[13] (3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose on the person who made the certification, the party upon whose behalf the request ... is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FED. R. CIV. P. 26(g); *Perkins v. General Motors Corp.*, 965 F.2d 597 600 (8th Cir.1992). This Rule allows the court to impose sanctions on the signer of a discovery response when the signing of the response is incomplete, evasive or objectively unreasonable under the circumstances. *Poole v. Textron, Inc.*, 192 F.R.D. 494, 498 (D.Md.2000); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1372 (11th Cir.1997) (stating that the signature certifies that the filing conforms to the discovery rules is made for proper purpose, and does not impose undue burdens on the opposing party in light of the circumstances of the case); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1545 (11th Cir.1993), *aff'g Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 374 (S.D.Ga.1991) (upholding Rule 26(g) sanctions for a "pattern of conduct" manifesting improper purpose that consisted of meritless objections to requests as irrelevant or overly burdensome, and partial answers to discovery questions that were evasive and misleading); *accord Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 84 (E.D.Pa.1992). It is the responses themselves that are the proper object of Rule 26(g) sanctions. *See, e.g., Legault v. Zambarano*, 105 F.3d 24, 28 (1st Cir.1997) (imposing monetary sanction on client and counsel under Rule 26(g) for failure to produce documents responsive to legitimate discovery requests); *Gonsalves v. City of New Bedford*, 168 F.R.D. 102, 114–15 (D.Mass.1996) (imposing $15,000 sanction on counsel for causing client to respond falsely to interrogatories). Moreover, even though defendant CFC in this case did not seek sanctions pursuant to FED. R. CIV. P. 26(g), the court has authority to make a *sua sponte* determination as to whether Rule 26(g) sanctions should be imposed. FED. R. CIV. P. 26(g) ("If a certification is made in violation of the rule, the court, upon motion or upon its own initiative,...."); *see also Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 407 (7th Cir.1998) (stating that Rule 26(g)(3) provides that the court either on its own motion or the motion of a party shall impose an appropriate sanction upon the counsel who made the certification and/or the party he or she represents); *Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 84 n. 9 (E.D.Pa.1992) ("Even though the parties did not seek sanctions pursuant to FED.R.CIV.P. 26(g) in

their Motions, the court has the authority to make a *sua sponte* determination as to whether Rule 26(g) sanctions should be imposed.") (citing *Apex Oil Co. v. Belcher Co. of New York,* 855 F.2d 1009, 1014 (2nd Cir.1988)).

The Advisory Committee Notes explain that "Rule 26(g) imposes an affirmative duty ***516** to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26–37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to ... evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection...." FED.R.CIV.P. 26(g), Advisory Committee Notes to the 1983 Amendments. Under Rule 26(g), a "signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Id.* "What is reasonable is a matter for the Court to decide on the totality of the circumstances." *Id.* "[U]nder Rule 26(g)(2) ... [the subject of the inquiry] is the thoroughness, accuracy and honesty (as far as counsel can reasonably tell) of the responses and the process through which they have been assembled." *Poole,* 192 F.R.D. 494, 503 (citation omitted). Moreover, Rule 26(g) "mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of 26(g)." *Id.*

[14] **[15]** **[16]** **[17]** Rule 26(g) explicitly permits a court to require one who violates the Rule to pay the opponent's attorney's fees and costs. Such an order is not, however, the only possible sanction. The Advisory Committee's Notes indicate that the "nature of sanctions is a matter of judicial discretion to be exercised in light of the particular circumstances." FED.R.CIV.P. 26(g), Advisory Committee Notes to the 1983 Amendments. The standard for imposing Rule 26(g) sanctions is objective.[3] The court tests the signer's certification under an objective standard of reasonableness, except that it may inquire into the signer's actual knowledge and motivation to determine whether a discovery request, response or objection was interposed for an improper purpose. *Oregon RSA No. 6 v. Castle Rock Cellular,* 76 F.3d 1003, 1007 (9th Cir.1996); *accord Zimmerman v. Bishop Estate,* 25 F.3d 784, 790 (9th Cir.), *cert. denied,* 513 U.S. 1043, 115 S.Ct. 637, 130 L.Ed.2d 543 (1994). While there is no requirement that the court find bad faith to find improper purpose, *see Oregon RSA No. 6,* 76 F.3d at 1008, outward behavior that manifests improper purpose may be considered in determining objective improper purpose deserving sanction. *See Townsend v. Holman Consulting Corp.,* 929 F.2d 1358, 1366 (9th Cir.1990) (Rule 11 sanctions).[4] The certification by the signer is tested as of the time the discovery paper is signed. The court must strive to avoid the wisdom of hindsight in determining whether the certification was valid at the time of the signature, and all doubts are to be resolved in favor of the signer. *See, e.g., Bergeson v. Dilworth,* 749 F.Supp. 1555, 1566 (D.Kan.1990). However, each signing of a new discovery request, response, or objection must be evaluated in light of the totality of the circumstances known at the time of signing. Therefore, the practical import of Rule 26(g) is to require vigilance by counsel throughout the course of the proceeding. *Chapman & Cole v. Itel Container Int'l, B.V.,* 865 F.2d 676 (5th Cir.), *cert. denied,* 493 U.S. 872, 110 S.Ct. 201, 107 L.Ed.2d 155 (1989).

[18] In this case, the principal signer and sole drafter of the discovery responses is out-of-state counsel.[5] The court finds that under ***517** an objective standard of reasonableness, counsel's certification of the objections he asserted on behalf of the plaintiffs plummet far below any objective standard of reasonableness. Indeed, every single objection is not only obstructionist and frivolous, but, as demonstrated above, is contrary to the Federal Rules of Evidence and well-established federal law. Under an objective standard, therefore, these objections unequivocally demonstrate plaintiffs' obstructionist attitude towards discovery in this case and further indicate to the court that they were interposed for an improper purpose. *See* FED.R.CIV.P. 26(g) (providing that the signature of the attorney certifies that the objection is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation); *see also United States v. Kouri–Perez,* 187 F.3d 1, 6 (1st Cir.1999) (stating that Rule 26(g) forbids the interposition of a discovery request by counsel "for any improper purpose, such as to harass," FED.R.CIV.P. 26(g), and empowers the court to impose an "appropriate sanction" for its violation). In delving into counsel's motivation for asserting these objections, however, the court understands that frustration prompted him to assert these objections. Counsel explained in a hearing held on October 16, 2000, that he raised these objections "purely to reserve our positions," and further explained:

> What occurred was that once we saw how contentious the case was, how difficult the case was, we knew we had to get counsel who was right there in Sioux City. We went ahead and contacted [local counsel] at that point. We were in a bit of a tizzy, and we saw how very broad these requests were. We were sort of caught between counsel, and in some jurisdictions, Your Honor—I'm not saying that you think it's correct—but in some jurisdictions putting in general objections is something that's okay if you intend to amend those responses once you get yourself set. We were having some difficulty on agreeing on deadlines and extensions at that point.
>
> Tr. 32–33. While the court finds the objections asserted by counsel to be obstructionist, frivolous and deplorable, the court finds counsel's explanation for asserting these objections believable, but not justifiable. This is so, notwithstanding that several of the discovery requests propounded by CFC were, themselves, unreasonably broad and vague. *See Etienne,* 185 F.R.D. 653, 656 (stating that a party resisting discovery on the grounds that a request is overly broad has the burden to support its objection, unless the request is overly broad on its face). CFC's broad based requests did not give counsel carte blanche to assert such boilerplate and obstructionist objections. This court will not tolerate these type of objections because not only do they disrespect the judicial process, but such objections thwart discovery's purpose of providing both parties with "information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement". *Jochims,* 145 F.R.D. 507, 509. The ability to conduct full, fair and thorough discovery goes to the heart and soul of our civil justice system. "Rambo" style obstructionist discovery tactics like those employed here, if not stopped dead in their tracks by appropriate sanctions, have a virus like potential to corrupt the fairness of our civil justice system.

In this light, abuse of the discovery process is a very serious matter. Indeed, these objections are some of the most obstructionist, frivolous objections to discovery that the undersigned has seen either in the practice of law, as a United States Magistrate Judge or as a United States District Court Judge. Because of the obstructionist nature of these objections, the court is obligated to impose sanctions. *See* FED.R.CIV.P. 26(g)(3) (providing that if without substantial justification a certification is made in violation of Rule 26, the court *shall* impose an appropriate sanction) (emphasis added). The court, however, will not impose a monetary fine on counsel; rather, the court understands that counsel asserted these objections in large part due to frustration, and, consequently, the court will craft its own, less severe, sanction. *See* FED.R.CIV.P. 26(g), Advisory Committee Notes to the 1983 Amendments (providing ***518** that the nature of sanctions is a matter of judicial discretion to be exercised in light of the particular circumstances). Accordingly, counsel shall be required to write an article explaining why it is improper to assert the objections that he asserted in this case. Counsel shall submit the article to both a New York and Iowa bar journal (as distinguished from a law review), however, he is not required to mention in the article that it was written pursuant to a sanction order. Counsel shall have 120 days from December 1, 2000, in which to comply with this order. In addition, counsel shall submit an affidavit stating that he alone researched, wrote, and submitted the article for publication, indicating which journals he submitted the article to, as well as submitting a copy of the article to this court. Failure to comply with this order, by no later than April 9, 2001, may result in further sanctions.

III. CONCLUSION

The question of whether plaintiffs' counsel's action in filing obstructionist discovery responses warrants sanctions pursuant to Federal Rule of Civil Procedure 26(g) is before the court *sua sponte*. Based on the foregoing reasons, the court concludes that an appropriate non-monetary sanction, as outlined above, is warranted.

IT IS SO ORDERED.

Parallel Citations

48 Fed.R.Serv.3d 1232

Footnotes

1 Anatole France (1844–1924)—pseudonym for Jacques Anatole Francois Thibault—was one of the major figures of French literature in the late 19th and early 20th centuries. He was awarded the Nobel Prize for Literature in 1921. *See* <http://www.kirjasto.sci.fi/afrance.htm>. Other variations of the aphorism include: "It is human nature to think wisely and act foolishly;" and "It is in human nature to think wisely and to act in an absurd fashion."

2 Other examples of the same boilerplate, unsubstantiated, objections asserted by the plaintiffs in response to CFC's document requests include:

DOCUMENT REQUEST NO. 4: All contracts, agreements, or communications of any kind by and/or between you and Iowa Banker's Insurance and Services, Inc.

OBJECTIONS TO DOCUMENT REQUEST NO. 4: St. Paul objects to this request on the ground that the information and documents requested are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. St. Paul further objects that the request is oppressive, burdensome and harassing. St. Paul further objects [to] this request on the ground that it is vague, ambiguous and unintelligible. St. Paul further objects that the request is overbroad and without reasonable limitation in scope of time frame. St. Paul further objects that this request fails to designate the documents to be produced with reasonable particularity.

DOCUMENT REQUEST NO. 5: All contracts or agreements between you and U.S. Risk Underwriters, Inc.

OBJECTIONS TO DOCUMENT REQUEST NO. 5: St. Paul objects to this request on the ground that the information and documents requested are neither relevant to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence. St. Paul further objects that the request is oppressive, burdensome and harassing. St. Paul further objects that the request is overbroad and without reasonable limitation in scope or time frame. St. Paul further objects that this request fails to designate the documents to be produced with reasonable particularity.

3 The objective standard requires that the attorney signing the discovery documents under Rule 26(g)(2) make only a reasonable inquiry into the facts of the case. Counsel need not conduct an exhaustive investigation, but only one that is reasonable under the circumstances. Relevant circumstances may include: (1) the number and complexity of the issues; (2) the location, nature, number and availability of potentially relevant witnesses or documents; (3) the extent of past working relationships between the attorney and the client, particularly in related or similar litigation; and (4) the time available to conduct an investigation. *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 691 (D.Kan.1996).

4 "The standards for granting a Motion for Rule 26(g) sanctions are the same as the standards for granting a Motion for sanctions pursuant to Rule 11." *Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 84 (E.D.Pa.1992).

5 Although local counsel is not being sanctioned, the court notes that, as a signer of the discovery responses, he had an equal obligation to prevent the assertion of such boilerplate, obstructionist, frivolous, and overbroad objections, which are contrary to well-established federal law.

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AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
REPORT OF THE TASK FORCE ON TRAINING THE TRIAL LAWYER

June 2003

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AMERICAN BAR ASSOCIATION SECTION OF LITIGATION
REPORT OF THE TASK FORCE ON TRAINING THE TRIAL LAWYER

JUNE 2003

INTRODUCTION

Scott Atlas, Chair of the Section of Litigation[1]

According to several dictionaries, "litigation" is defined essentially as "the act or process of carrying on a lawsuit." That process eventually ends in a dismissal, a settlement, or a trial. Most litigators have participated in numerous dismissals and settlements. Many older litigators have conducted numerous trials. But as I talk to Litigation Section members around the country, especially young ones, I hear a common complaint: It is becoming increasingly difficult to take cases to trial. This is unhealthy for litigators who want trial experience, for clients seeking experienced trial counsel, and for the justice system.

I began practicing law in 1976. During my first few years of law practice, when I was what we used to call a "baby lawyer," my law firm (and most others with litigators I knew well) had literally hundreds of lawsuits with at least a realistic likelihood of going to trial. Although the vast majority settled, it was easy to build a sizable docket of cases that virtually guaranteed a trial every few months – and sometimes every few weeks, or even every week for a while. The cases ranged from workers' compensation and

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[1] An earlier version of this Introduction was published as: Scott J. Atlas, *Where Have All the Trials Gone?*, 28 *Litigation* No. 4, at 1 (Summer 2002).

relatively minor personal injury matters to small commercial disputes. I remember during my first few months of law practice methodically notifying most of the firm's litigation partners and senior associates that I would willingly – in fact, gratefully – accept any "dog" case they had, even the sure losers, if there was some chance of going to trial. My colleagues were only too happy to oblige.

For several years, I tried cases regularly. I lost many of the sure losers, which cured me of an oversized ego as well as any concern about maintaining a perfect record. But occasionally I won one, which usually shocked the client (and, on occasion, even surprised me). More important, I learned the basics of how to pick a jury, introduce documents and other evidence, cross-examine hostile witnesses, and give closing argument. In addition, I improved my storytelling ability, became quicker on my feet in fashioning and articulating cogent and persuasive arguments on legal and factual points, developed a working knowledge of evidence and the applicable law, better understood the significance of careful deposition taking and preparation, and enhanced my appreciation of the importance of dealing with opponents honorably and accurately. I also developed my own "trial personality," one not much different from the one seen by my family and friends. And I learned the importance of identifying and remaining focused on my ultimate objective, so that I could avoid the mistake about which Casey Stengel once warned, "If you don't know where you're going, you might end up someplace else."

I believe that these skills and others important for trying cases can be mastered only by sitting first chair in numerous trials. Talented trial advocates are rarely born.

They are a product of observation and experience: watching other lawyers try cases and trying their own. The great Judge Harold Medina, now deceased, had it right when he said, more than 40 years ago:

> Only the most arduous application and much practice will suffice to develop proficiency in the formulations of questions to witnesses, and the planning of the involutions, suggestions and hints by which the minds of judges and jurors are guided to a certain conclusion. How close the analogy is between this phase of the trial lawyer's work and that of the skilled and experienced surgeon is all too seldom perceived.

Harold R. Medina, *Introduction* to Lloyd Paul Stryker, *The Art of Advocacy*, at x (1954).

The trial advocacy skills described by Judge Medina are much easier to acquire as a baby lawyer. I could admit my inexperience, join in others' amusement at my awkwardness, and accept constructive criticism more easily in my first few years of practice. Not surprisingly, we can most easily laugh at ourselves making new-lawyer mistakes when we are still new lawyers. It is undoubtedly much more difficult – and more embarrassing – to make those same mistakes after five or 10 years in practice, when your client, opposing counsel, and the judge all assume you are experienced.

But something significant has happened during the last 25 years. All but a handful of law firms have many fewer small cases available for the young lawyer to try. It is now quite possible, and at some law firms almost the norm, for a young litigator to practice for many years without trying a case. Moreover, although the number of civil lawsuits being filed each year has increased, the number of civil cases being tried has steadily declined since the 1970s. In the federal court system, for example, according to the Administrative Office of the U.S. Courts, since 1976 the number of original civil case

filings in the federal court system increased by almost 75 percent (from 117,061 to 203,931), while the number of civil trials **dropped** almost 45 percent, from 11,656 trials to 6,513, a 40-year low. *Compare* Annual Report of the Director of the Administrative Office of the U.S. Courts, 2001, tables S-7, C-7, at www.uscourts.gov/judbus2001/contents.html, *with* Annual Report of the Director of the Administrative Office of the U.S. Courts, 1976, table 16 at 245; *id*. table 56 at 245.

In the state court system, where national totals of case filings and trials are more difficult to obtain due to the large number of independent jurisdictions involved, a recent publication of the Court Statistics Project (a joint project of the Conference of State Court Administrators and the National Center for State Courts ("NCSC")) entitled "Examining the Work of State Courts, 2001," indicates that since 1984, civil filings in the state trial courts have grown by 30 percent (at 10, 14, 16). I could not obtain data on the number of trials in state courts, except that the same publication estimates that in 1999 (the only year, according to NCSC officials, that they have attempted the calculation), the number of general civil cases tried in the state court system was 33,125 (at 102).

Even if many of these approximately 40,000 federal and state court trials annually involved multiple attorneys, and even if the Section of Litigation with its more than 50,000 practicing lawyers included every litigator in the country, the unmistakable message sent by these statistics is clear: There simply are not enough trials each year to give the average litigator many trial opportunities.

This phenomenon – experienced litigators with little trial experience – raises several troubling questions. First, how did this happen? Second, what is the likelihood

that this trend will be reversed? Finally, how can young litigators get trial experience without trying cases?

The reasons for the decline in trials are many and varied. The most significant reason is the overall cost of litigation, which has several components. First, hourly rates at most law firms have increased dramatically in recent decades. My recollection is that when I started at the law firm 25 years ago, my going rate was $50 an hour. Now it is not unusual to see firms billing their new lawyers at several times that.

Second, the amount of time spent in pretrial discovery has skyrocketed. In both federal and state courts, despite scattered experiments to "reform" the process, the courts by and large have not succeeded in managing discovery in ways that keep costs either manageable or predictable. Clients have made many efforts to enhance predictability in their legal costs, but hourly rate litigation defies rational mathematical calculation. The difficulty of predicting the extent of an opponent's willingness to cooperate in the discovery process and the amount of discovery each side will want are but two of the characteristics of modern litigation that make litigation budget estimates seem like rank speculation. It remains to be seen whether recent changes in the Rule 26 standard for discovery at the federal level and various experiments with limiting deposition time and other discovery in the state courts will make a meaningful dent in this process. But new technology both facilitates and complicates efforts to find a solution. E-mail and voicemail, neither of which existed 25 years ago, have multiplied exponentially the volume and cost of potential discovery.

Third, the loss of professionalism in some parts of the profession, including an increase in Rambo tactics, has increased the cost of litigating while making the practice of law less enjoyable. The Litigation Section and many other groups have adopted codes of behavior and taken other laudable steps in recent years to discourage unprofessional conduct. Many judges have joined in this effort. But the fact remains that litigation in the new millennium is simply more contentious – and thus more time-consuming – than in the "good old days."

Finally, there is a widespread belief that jury verdicts have become increasingly unpredictable. Tort-reform groups constantly complain of what they claim are runaway punitive damages awards. Respected federal appeals court judge Patrick Higginbotham, in a speech last year to the American Law Institute ("ALI"), argued that punitive damages have become "more loosely defined in practice: whatever somebody says they ought to be given to punish that defendant." Patrick E. Higginbotham, Address at the ALI Luncheon Honoring New Life Members, at 27 (May 15, 2001). Former Chief Justice of the United States Warren Burger once said, "Our litigation system is too costly, too painful, too destructive, too inefficient for a civilized people." Quoted in Rob Hoffman, "Reduce Legal Costs by 40 Percent: A Cure for Every Company's "'Common Cold,'" 65 Tex. B.J. 216 (Mar. 2002). Whether or not these complaints are accurate, the belief that they are legitimate often spooks clients into either accepting early settlements or opting out of the court system altogether and embracing alternative dispute resolution. In the last decade, for example, the American Arbitration Association has seen the number of arbitrations it handles more than triple, from 60,808 in 1990 to 218,032 in 2001.

American Arbitration Association, Total Case Filings 1990-2001, e-mail from Kersten Norlin, vice president of corporate communications (Apr. 1, 2002) (on file with author). The number of mediators and cases mediated has experienced similarly explosive growth during that same period.

The result of these and other factors is predictable. Small cases that a client years ago would have readily delegated to a young lawyer charging $50 per hour are now handled by the client's in-house staff, sent directly to mediation or binding arbitration, or assigned to a firm that bills at a fixed rate or a below-market hourly rate. Many mediated cases settle not because a defendant believes its conduct is blameworthy or even questionable but because the cost of settling is often less than the cost of litigating through pretrial, trial, and appeals. Businesses are inserting arbitration clauses in their agreements with increasing frequency, so business disputes that regularly appeared on court dockets just a few years ago now just as commonly proceed directly to arbitration.

These increased costs have another impact that is detrimental to young litigators. The greater emphasis on the billable hour in law firms, combined with cost controls imposed by clients, makes it more difficult for a young lawyer to second chair a trial with a more senior litigator or for a more experienced lawyer to observe and critique a young litigator trying a small case. This deprives the young lawyer of the mentoring and advice that is invaluable to the learning process. As a result, litigators not only participate in fewer trials, both as first-chair and second-chair lawyers, in their early years of practice, but they also receive less feedback and thus find the experience less valuable.

Clients can suffer as well. They may have to pay much more in legal fees today to receive the same quality of service that they received just a decade ago. Additionally, they may pay more in settlement negotiations when they are represented by litigators who feel an inordinate need to settle because they dread going to trial.

The system of justice is also affected by a reduction in the number of experienced trial lawyers. Legal rights of all types are only as valuable as the quality of the advocates who defend those rights in court. As trial opportunities dwindle, the overall quality of advocacy inevitably suffers. This, in turn, detrimentally affects the ability of lawyers to try cases that involve protecting those rights.

Can this trend toward fewer trials be reversed? Unfortunately, some are asking a different question: Should it? Some people argue that the jury is an imperfect tool for defining appropriate conduct. A college acquaintance, Phil Howard, recently published a book entitled *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2002). In it he argues that the last several decades have seen a fundamental shift in legal philosophy from traditional notions of common law, under which courts typically set standards of care and often took cases away from juries, to a view of "individual rights" that seems to recognize the right to be protected from all risk and compensated for any injury. As a result, he claims, a single individual can bring a lawsuit that sets standards for everyone, and even the threat of a legal claim can "bully the rest of society." As examples of the impact of this "legal fear," he cites doctors who prescribe expensive but unnecessary medical procedures to avoid being second-guessed, principals and teachers who feel constrained from disciplining unruly students, and

employers reluctant to give accurate evaluations of former employees. *Compare* Michael Barone, "The Common Good," at http://www.usnews.com/usnews/issue/020325/opinion/25pol.htm, *with* Stuart Taylor, Jr., "How More Rights Have Made Us Less Free," at http://www.theatlantic.com/politics/nj/taylor2002-02-12.htm. While it is not my purpose to address the competing arguments on this issue, suffice it to say that it seems unlikely we will see a dramatic increase in the number of jury trials anytime in the foreseeable future.

So what is a young litigator to do? Many lawyers who choose litigation do so in large part because they are eager to try cases. As Chicago trial lawyer (and former Section leader) Manny Sanchez was quoted saying in a recent issue of the *ABA Journal*, explaining why he loves the law: "The practice of law [litigation] is not about depositions or summary judgment motions, it's about putting yourself in front of 12 people.... It starts as soon as the venire comes in the courtroom, and it doesn't end until the last word in closing." William C. Smith, "Challenges of Jury Selection," A.B.A.J., Apr. 2002, at 35, 39. Think about lawyers just starting practice who aspire to be trial lawyers and want to learn Manny's love of getting in front of those 12 people. How can they learn to try cases if the number of cases likely to be tried is small and still shrinking? And how can we continue to attract the best and the brightest lawyers to the practice of litigation if the prospect of trying cases is becoming increasingly dim?

Firms have developed many approaches to providing trial experience. First, some actively solicit certain kinds of pro bono cases that seem likely to go to trial. For example, administrative proceedings involving political asylum seekers and those denied

social security benefits offer the equivalent of a nonjury trial after little discovery. Representing someone in a family law dispute and accepting a criminal appointment in felony or misdemeanor court can lead to a jury trial. Second, others offer to discount heavily for a docket of collection, construction, or personal injury cases. Third, many firms send lawyers to courses offered by the National Institute of Trial Advocacy ("NITA") or similar organizations. Fourth, a few firms even conduct mock trial training in-house. No doubt there are countless other approaches to this problem.

Recognizing the widespread concern in the profession about the increasing difficulty of providing trial experience for the young litigator, the Section called on some of its most accomplished and renowned litigators to examine this issue. Steve Susman and former Section Chair Greg Joseph agreed to co-chair a Section task force that has examined how young lawyers receive trial training. They assembled a group of some of the most experienced and talented trial lawyers in the United States. This group examined how litigators are being trained now, which programs work, what new programs are needed, and whether we are using the best approaches to train new advocates. This Task Force has produced a report that is a must-read for anyone who cares about the best ways of preparing young litigators to become first-rate trial lawyers and effective courtroom advocates for their clients.

REPORT OF THE TASK FORCE ON TRAINING THE TRIAL LAWYER

I. DESCRIPTION OF THE TASK FORCE'S METHODOLOGY

The Task Force canvassed scores of firms differing in size, region and practice area. Members of the Task Force solicited survey responses from law firms in thirty cities spanning twenty-one states. In addition, the National Institute of Trial Advocacy solicited input from hundreds of recent NITA enrollees, generating numerous responses. The Task Force was also the subject of an article in the January 2003 issue of the Section's bimonthly periodical, LITIGATION NEWS, through which readers were invited to — and many did — submit their firm experience and ideas to the Task Force.

Firms were asked to describe the methods on which they rely to train junior trial lawyers. The Task Force received responses from more than seventy-five firms and feedback from dozens of individual practitioners. The responding firms varied in size, from fewer than ten lawyers to more than one thousand. The responses reflected several common approaches to training as well as many unique ideas.

The firms' responses were compiled into a chart showing their size and geographic location and which of eleven shared approaches firms reported that they utilize, including: professional trial advocacy programs; professional deposition workshop programs; in-house trial advocacy programs; in-house deposition or other workshops; local continuing legal education courses; outside internships; pro bono work; appointing mentors for training purposes; formal trial skills development benchmarks; and the creation of an in-house position to supervise training of junior lawyers. That chart is

included as Exhibit A to this Report.[2] In addition, a brief summary of each firm's response was prepared, providing additional details regarding the training approaches used. Those summaries are included as Exhibit B to this Report.

II. THE SURVEY RESULTS

The responses the Task Force received reflect several common approaches to training new trial lawyers, and many original ideas. Highlighted below are the approaches that stand out as innovative, followed by a description of some of the more universally popular methods.

A. Uncommon Training Approaches

1. Internships with Local Prosecutors' Offices

Sending junior lawyers to intern on a part or full time basis in local district attorneys offices provides opportunities to try actual cases before juries. In addition, local district attorneys' offices can often benefit from pro bono assistance.

In Dallas, several firms participate in the "Lawyers on Loan" program whereby associates spend a period of weeks or months part or full time in the local district attorneys' office, trying bench and jury trials in misdemeanor cases. Among the Dallas firms that participate are Fulbright & Jaworski, Haynes & Boone, Locke Liddell & Sapp and Thompson & Knight.

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[2] Because the firms were not informed that their responses would be made public and because survey responses were not intended to be exhaustive, the responding firms' names have been omitted from the attached exhibits, with only their size and location provided.

Other cities have similar programs. For example, Shook Hardy & Bacon in Kansas City offers a program whereby incoming associates can work for Legal Aid during the summer that they are studying for the bar exam. In Boston, Hale & Dorr works with the Middlesex County District Attorney's Office, where four associates or junior partners spend six months full time in the office as a special Assistant District Attorney, conducting bench and jury trials. Through a program that has been in place for 25 twenty-five years, Dorsey & Whitney in Minneapolis stations associates in the City Attorney's Office to prosecute misdemeanors for three-month terms. In Los Angeles, Kirkland & Ellis and O'Melveny & Myers, in conjunction with district attorneys' offices in Redondo Beach and Torrance, co-founded the Trial Advocacy Prosecutor's Program, through which associates volunteer to prosecute misdemeanor jury or bench trials. Quinn Emanuel of Los Angeles participates in a similar program through the district attorney's office in Pasadena.

2. <u>Accepting Engagements for Training Purposes</u>

Understanding that there is no substitute for actual trial experience, several firms accept engagements of either a smaller size and/or a less complex nature for the express purpose of providing training to newer lawyers. The particular type of trial is less important than the experience itself: the skills translate, even if the subject matter varies. This often entails a special fee arrangement with one or more clients, to allow matters to be handled by associates on a reduced rate basis. Examples of firms that follow this approach:

- Berskowitz, Stanton, Brandt, Williams & Shaw, a thirty-one lawyer trial firm in Kansas City, handles smaller employment and consumer complaint matters that afford their junior lawyers with trial opportunities.
- Drinker, Biddle & Reath in Philadelphia accepts certain smaller cases, expressly to afford training opportunities.
- The Solomon Tropp Law Group of Tampa relies on a stream of minor collections cases in county court, handled on a contingency fee basis, that can be tried to a great extent by junior lawyers.
- Wildman, Harrold, Allen & Dixon in Chicago has a small case training program whereby the firm takes on a set amount of smaller matters to be handled exclusively by associates on a reduced fee basis.

3. Alternative Dispute Resolution

Advocate. Forms of alternative dispute resolution, including mediation or arbitration, can provide excellent training opportunities. Mediation sessions typically require the presentation of argument or portions of the evidence, while arbitrations share many of the features of actual trials. Particularly in mediation, where the alternative dispute resolution is non-binding, clients are often willing to permit newer lawyers to make some or all of the presentations.

Arbitrator/Mediator. Junior lawyers can also gain experience by serving as arbitrators or mediators. Many courts have programs where pro bono lawyers are appointed to serve as mediators for mandatory settlement procedures. In addition, associates can complete training to become private or volunteer arbitrators. In these

roles, newer lawyers are exposed to presentations by more seasoned lawyers, and gain experience with factfinding and advocacy from a decision-maker's perspective.

4. Mock Juries

When preparing large cases for trial, clients often retain jury consultants to assemble mock juries before whom the case, or some variation on it, can be tried. Frequently, it is important to separate the themes that the jury is to focus on from the advocate who will make the presentation at trial. Allowing junior lawyers to present some or all of the mock case offers a source of training that entails no risk and real benefit. This can be a very effective way to observe the mock jury's reaction to the case's themes.

5. Pro Bono Representations

Pro bono matters provide a good opportunity for junior lawyers to obtain advocacy experience while performing community service and gaining mentoring from the senior colleague who supervises the representation. Among the many types of pro bono matters that firms handle, some stand out as affording particularly valuable trial experience.

Asylum Hearings. Matters before the Bureau of Citizenship and Immigration Services ("BCIS") involve proceedings that are similar to trials in many respects. Heard by administrative law judges, asylum hearings include trial-like features such as opening and closing statements and direct and cross-examination of witnesses.

There is a pressing need for pro bono assistance in this field, particularly in the area of representing unaccompanied minors. Each year, approximately 5,000 unaccompanied children enter the custody of the BCIS. The ABA Section of Litigation's

Children's Rights Litigation Committee has developed a set of written and videotaped materials to efficiently train volunteer lawyers to handle these cases.

Abuse/Neglect and Delinquency Proceedings. Volunteer lawyers are needed to represent children in abuse and neglect, delinquency and adoption proceedings, all of which can also provide valuable training. These proceedings share several features that make them particularly well-suited to training junior lawyers: they are short-lived, and they typically involve contested hearings, including lay and expert witness examinations and the presentation of evidence.

There are pro bono projects that focus on abuse/neglect proceedings, which are cases where the state is attempting to remove children from their parents' custody based upon allegations of abuse or neglect. The cases involve federal constitutional law issues, state law and factual disputes, and are decided by a judge, or in some states, by a jury. The Rocky Mountain Children's Law Center in Denver, Colorado is one example of such a program, and it has enlisted more than 500 pro bono attorneys since 1994.

Delinquency proceedings, which involve the representation of children charged with crimes, are civil cases that resemble criminal trials. In Chicago, associates from Piper Rudnick and Baker & McKenzie participate in a juvenile justice clinic run by Northwestern University School of Law, representing children in delinquency proceedings. Junior lawyers interview clients, prepare witnesses, negotiate with prosecutors, and make decisions in the context of litigation. These cases each involve a hearing, and many go to trial before a judge or jury.

Adoptions. Adoption proceedings can similarly provide valuable training opportunities. At Piper Rudnick in Washington D.C., for example, every first-year associate handles at least one adoption matter, which typically involves an evidentiary hearing and/or an oral argument.

6. ***Pro Se* Panels**

Federal district courts around the country appoint volunteer attorneys to both civil and criminal *pro se* matters, often through a *pro se* panel. The civil cases tend to be civil rights actions on behalf of prisoners or on behalf of plaintiffs in employment discrimination cases, while the criminal cases involve representing indigent defendants. Similar programs exist in many state trial courts.

In the Central District of California, for example, lawyers are appointed through the Federal Indigent Defense Panel to represent defendants in criminal cases where the public defender is not available. In some cases, junior lawyers can volunteer on an ad hoc basis to take on such *pro se* matters themselves; in other instances, experienced lawyers are appointed to the panel on an ongoing basis, where they can try cases with assistance from junior lawyers from their firms.

Newer lawyers can also gain experience through similar panels at the circuit court level. For example, in the Ninth Circuit, O'Melveny & Myers participates in a program in which associates handle *pro se* appeals that are pre-selected to be appointed pro bono counsel. Associates draft supplemental briefs and conduct oral argument in each case.

7. Learning by Observing

Observing trials conducted by more experienced lawyers can be an invaluable source of training for junior lawyers. This can include not only cases on which associates have worked, but also cases of particular interest for training purposes. Often firms will target particularly key aspects of trial, such as cross-examination and closing argument, or particular issues in the trial on which an associate has worked.

In a variation on this approach, some firms send newer trial lawyers to observe when a particularly skilled advocate – from any firm – is trying a case in the local courthouse. Local judges can often provide an informal resource to find out when particularly noteworthy trials are set to go forward. Observing and critiquing a multiplicity of approaches to the key stages of trial allows junior lawyers to develop styles of their own on an informal basis.

Part of firms' success in using these methods depends on the ability to allow associates to attend trials when their time is not billable to any client. Quarles & Brady Streich Lang in Phoenix, for example, explicitly allots each associate fifty hours per year to accompany experienced attorneys to trials and hearings. Associates are permitted to treat the hours as billable, even though they are not billable to a client. Other firms have similar policies that operate informally.

8. Public Speaking

Though not direct trial experience, public speaking opportunities – such as appearing on panels and giving presentations – can provide training that translates before judges and juries. These exercises not only build junior lawyers' confidence in speaking

before an audience, but have collateral benefits in terms of both client relations and business development.

In recognition of the importance of public speaking to the development of trial skills, the University of Tulsa College of Law offers a course on Oral Communication and Persuasion.

9. Judicial Outreach Programs

Many courts sponsor mock trial programs for students in their communities, often in conjunction with local bar associations, to educate students about the judicial system and to stimulate interest in the law as a potential career. These programs can allow associates to perform valuable community service with the local bar and bench, while gaining experience appearing in front of an audience.

10. Acting Techniques

On the theory that every trial is a story, and stories are best told in the theater, several firms hire trained professionals to provide acting lessons as a means of training junior lawyers. Videotaping participants' performances for critique is a useful part of this exercise. For example, Jenkens & Gilchrist in Dallas offers a one-day course, taught by actors, that focuses on posture, breathing, voice exercises, voice projection, stage presence, stage movement and storytelling.

11. Training to Train Others

Encouraging associates to volunteer as faculty members of professional training programs can also provide valuable training. Through teaching others, associates gain insight to the advocacy process and practice speaking before an audience. Jackson &

Campbell of Washington D.C. reports that most of its associates who have participated in the NITA national trial skills program have gone on to become faculty.

B. Common Training Approaches

1. Professional Trial Advocacy Programs

Firms overwhelmingly reported that they send young lawyers to trial advocacy programs such as those sponsored by NITA. Many firms offer all lawyers the opportunity to attend, while others select associates based on either their level of experience or merit. Some firms find such programs to have the greatest value for associates with five to six years of litigation experience and/or with some previous trial experience, while others send associates as early as in their first year of practice.

Other trial advocacy programs mentioned include those offered by the International Academy of Defense Counsel, the Litvin-Haines Academy of Advocacy in Philadelphia, and the National Criminal Defense College.

Some universities also run trial institutes. For example, the University of Virginia, George Washington University, and Tulane sponsor trial advocacy training programs. Many firms invite faculty from either professional trial advocacy programs or local law schools to teach at in-house continuing legal education programs.

2. In-House Trial Advocacy Programs

Many firms run in-house advocacy programs, ranging from one- or two-day deposition workshops to week-long mock trials. Some creative suggestions here include the use of actual court reporters; the use of professional actors to play the parts of witnesses; videotaping; conducting parts of the programs in courthouses; and asking local

judiciary to participate as judges. In addition to trial and deposition workshops, firms conduct workshops on motion practice, evidence, the use of experts and negotiation.

Highlights of some of the programs include:

- Bingham McCutcheon in Boston runs an in-house program for first and second year associates where each associate argues a mock motion and conducts a mock bench trial before a member of the local bench, in an actual courtroom.
- Fulbright & Jaworski in Dallas conducts a one-week trial advocacy program for new litigators, culminating in a mock trial before a retired judge and senior partner, with local high school students serving as the jury.
- Hale & Dorr in Boston conducts an in-house mock trial program where personnel from accounting firms serve as expert witnesses, paralegals or assistants as lay witnesses, and summer associates as jurors.
- Jenner & Block in Chicago has a three-day "academy" for new associates in each office, that follows a uniform national curriculum. The firm also conducts a four-day national academy for more experienced litigation associates, co-taught by firm partners and NITA faculty.
- Jenkens & Gilchrist in Dallas conducts an in-house mock trial program which culminates in a trial at the Dallas County courthouse, using secretaries and paralegals as jurors and partners as judges.

- Kirkland & Ellis of Chicago sponsors the Kirkland Institute for Trial Advocacy, once for associates and once for summer associates each year.
- Latham & Watkins of Los Angeles conducts an annual mock trial competition for junior litigators from across the firm.
- Piper Rudnick in Washington D.C. runs an annual in-house mock trial program, where sitting and retired state and federal judges preside over the trials, and four to six partners provide immediate feedback on associates' performance.

3. Bar Association Seminars

Many firms send associates to continuing legal education seminars sponsored by local, state and national bar associations, as well as by private providers such as the Practicing Law Institute.

Local bar associations often sponsor excellent programs that include members of the local judiciary. For example, many local bar associations sponsor advocacy sessions where members of the state and federal judiciary lecture on trial and appellate procedure.

4. Mentoring

Mentoring is key to training junior trial lawyers. Part of mentoring is ensuring that advocacy opportunities are being distributed equally among associates through the work assignment process. Many larger firms, for example Dorsey & Whitney in Minneapolis, Foley & Lardner in Milwaukee, Hale & Dorr in Boston, Hughes Luce in Dallas, Lane Powell Spears & Lubersky in Seattle, Shearman & Sterling in New York, Shook, Hardy & Bacon in Kansas City, and Vedder, Price, Kaufman & Kammholz in

Chicago, have appointed directors of professional development to supervise – in some cases full-time – the training of newer attorneys.

Jones Day in Chicago has appointed a partner to be in charge of training firmwide and a partner in charge of litigation training in each office. Similarly, Gibson Dunn & Crutcher has appointed a training partner in each office to administer a firmwide training curriculum.

Stoel Rives in Portland has appointed one of its experienced partners to be an "Associate Coach," who will work one-on-one with associates, attending depositions and hearings that they conduct and providing feedback and mentoring.

As another example of targeted mentoring, O'Melveny & Myers' New York office has instituted a series of training sessions specifically addressed towards developing women's trial skills. As part of this program, women attorneys view and discuss the ABA Section of Litigation Woman Advocate Committee video entitled, "The Best of Both Worlds: Strategies for Balancing the Home Court and the Trial Court," in which judges and practitioners share the strategies that have helped them balance work and parenting.

To improve partners' mentoring skills, Thompson & Knight in Dallas requires partner mentors to attend a training program on how to be a better mentor. Banner & Witcoff of Chicago established an Education Committee within firm management to review annually the success of its in-house training and mentoring programs. To encourage partners to excel at mentoring, Dorsey & Whitney of Minneapolis bestows annual "Partner-of-the-Year" awards to commend leadership in training and mentoring.

Another mechanism is the creation of formalized benchmarks for advocacy experiences that junior lawyers should attain by different stages in their careers. For example, Foley & Lardner in Milwaukee publishes a Professional Development Manual that sets forth a checklist of progressively more complex litigation skills associates should acquire.

III. CONCLUSION

The best trial training is trying cases. Failing that, the best trial-training program for a particular law firm is a function of many factors. This Report is intended to supply firms with alternative approaches in use around the country, to make an informed selection possible.

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TASK FORCE ON TRAINING THE TRIAL LAWYER

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EXHIBIT A

ABA TASK FORCE ON TRAINING THE TRIAL LAWYER: SURVEY RESPONSES

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
1.	1,800-lawyer firm in Chicago, Illinois	✓		✓	✓	✓		✓	✓			✓
2.	1,704-lawyer firm in Chicago, Illinois	✓	✓		✓	✓						
3.	1,125-lawyer firm in New York, New York	✓	✓		✓	✓			✓			
4.	1,000-lawyer firm in Milwaukee, Wisconsin	✓	✓	✓	✓	✓		✓	✓		✓	✓
5.	950-lawyer firm in Washington, D.C.	✓	✓						✓			✓
6.	942-lawyer firm in San Francisco, California	✓	✓							✓		

No.	Description of Firm by Size of Firm and Location of Responding Office	NITA Trial Course	NITA Deposition Course	In-House Trial Course	In-House Deposition or Other Workshops	Local CLE Courses	Outside Internships	Pro Bono	Outside Faculty	Training Mentors	Formal Benchmarks	In-House Training Position
7.	900-lawyer firm in Chicago, Illinois	✓	✓	✓	✓			✓				
8.	900-lawyer firm in Chicago, Illinois	✓	✓	✓	✓	✓		✓	✓			✓
9.	900-lawyer firm in Los Angeles, California	✓	✓		✓			✓				
10.	816-lawyer firm in Washington, D.C.	✓	✓		✓			✓				
11.	800-lawyer firm in San Francisco, California			✓	✓				✓			
12.	800-lawyer firm in Dallas, Texas			✓			✓		✓	✓	✓	
13.	800-lawyer firm in Dallas, Texas	✓	✓		✓	✓					✓	
14.	719-lawyer firm in New York, New York				✓				✓			
15.	700-lawyer firm in Richmond, Virginia			✓	✓							

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
16.	700-lawyer firm in Minneapolis, Minnesota			✓	✓	✓	✓	✓	✓	✓		
17.	687-lawyer firm in Pittsburgh, Pennsylvania and Oakland, California			✓	✓				✓			
18.	666-lawyer firm in New York, New York	✓			✓	✓			✓			
19.	592-lawyer firm in New York, New York	✓	✓	✓					✓			
20.	568-lawyer firm in Kansas City, Missouri				✓		✓	✓				
21.	501-lawyer firm in New York, New York				✓	✓		✓				
22.	490-lawyer firm in Boston, Massachusetts			✓	✓				✓		✓	✓

No.	Description of Firm by Size of Firm and Location of Responding Office	NITA Trial Course	NITA Deposition Course	In-House Trial Course	In-House Deposition or Other Workshops	Local CLE Courses	Outside Internships	Pro Bono	Outside Faculty	Training Mentors	Formal Benchmarks	In-House Training Position
23.	487-lawyer firm in New York, New York			✓				✓				
24.	457-lawyer firm in Philadelphia, Pennsylvania			✓	✓			✓	✓			
25.	450-lawyer firm in Philadelphia, Pennsylvania			✓	✓			✓	✓			
26.	450-lawyer firm in Dallas, Texas	✓	✓				✓					
27.	447-lawyer firm in Phoenix, Arizona			✓	✓			✓		✓		
28.	425-lawyer firm in Dallas, Texas			✓	✓				✓			
29.	400-lawyer firm in Chicago, Illinois	✓	✓		✓			✓				
30.	400-lawyer firm in Atlanta, Georgia	✓	✓	✓	✓							
31.	400-lawyer firm in Dallas, Texas	✓	✓		✓		✓					

No.	Description of Firm by Size of Firm and Location of Responding Office	NITA Trial Course	NITA Deposition Course	In-House Trial Course	In-House Deposition or Other Workshops	Local CLE Courses	Outside Internships	Pro Bono	Outside Faculty	Training Mentors	Formal Benchmarks	In-House Training Position
32.	350-lawyer firm in New York, New York				✓							
33.	350-lawyer firm in Detroit, Michigan	✓	✓				✓	✓				
34.	345-lawyer firm in Portland, Oregon	✓		✓	✓	✓				✓		✓
35.	341-lawyer firm in Atlanta, Georgia	✓	✓	✓	✓							
36.	324-lawyer firm in Dallas, Texas	✓			✓		✓					
37.	320-lawyer firm in Chicago, Illinois	✓	✓		✓	✓			✓			
38.	307-lawyer firm in Washington D.C.	✓	✓	✓	✓			✓				
39.	300-lawyer firm in Reston, Virginia	✓						✓				✓
40.	300-lawyer firm in Los Angeles, California	✓	✓	✓				✓				

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
41.	281-lawyer firm in Chicago, Illinois	✓	✓	✓	✓							
42.	271-lawyer firm in Philadelphia, Pennsylvania			✓	✓			✓	✓			✓
43.	250-lawyer firm in Dallas, Texas			✓	✓							
44.	223-lawyer firm in Minneapolis, Minnesota	✓	✓	✓	✓				✓	✓		
45.	221-lawyer firm in Baton Rouge, Louisiana	✓	✓									
46.	217-lawyer firm in Chicago, Illinois			✓				✓				
47.	204-lawyer firm in Chicago, Illinois	✓	✓	✓	✓					✓		✓
48.	200-lawyer firm in Chicago, Illinois									✓	✓	

No.	Description of Firm by Size of Firm and Location of Responding Office	NITA Trial Course	NITA Deposition Course	In-House Trial Course	In-House Deposition or Other Workshops	Local CLE Courses	Outside Internships	Pro Bono	Outside Faculty	Training Mentors	Formal Benchmarks	In-House Training Position
49.	200-lawyer firm in Los Angeles, California				✓							
50.	200-lawyer firm in Seattle, Washington	✓	✓		✓	✓		✓		✓		✓
51.	161-lawyer firm in Boston, Massachusetts			✓		✓		✓	✓			
52.	150-lawyer firm in Dallas, Texas	✓	✓	✓	✓	✓		✓		✓	✓	✓
53.	150-lawyer firm in New York, New York			✓					✓			
54.	150-lawyer firm in San Francisco, California			✓			✓					
55.	150-lawyer firm in Stamford, Connecticut			✓	✓							
56.	125-lawyer firm in Chicago, Illinois	✓			✓				✓			

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
57.	90-lawyer firm in Dallas, Texas	✓	✓		✓				✓			
58.	85-lawyer firm in Houston, Texas	✓			✓	✓			✓	✓	✓	
59.	84-lawyer firm in Chicago, Illinois			✓	✓					✓		
60.	60-lawyer firm in Atlantic City, New Jersey				✓							
61.	55-lawyer firm in New Orleans, Louisiana	✓	✓					✓	✓			
62.	50-lawyer firm in Minneapolis, Minnesota	✓	✓		✓				✓			
63.	45-lawyer firm in New York, New York			✓	✓							
64.	43-lawyer firm in Orlando, Florida	✓	✓						✓			

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
65.	43-lawyer firm in Washington D.C.	✓		✓	✓							
66.	39-lawyer firm in Philadelphia, Pennsylvania	✓								✓		
67.	33-lawyer firm in Newark, New Jersey									✓		
68.	30-lawyer firm in Kansas City, Kansas									✓		
69.	29-lawyer firm in Houston, Texas	✓		✓	✓		✓			✓		
70.	27-lawyer firm in Alexandria, Louisiana									✓		
71.	20-lawyer firm in Lafayette, Louisiana	✓			✓	✓				✓		
72.	19-lawyer firm in Chicago, Illinois				✓	✓				✓	✓	
73.	18-lawyer firm in Jacksonville, Florida	✓				✓				✓		

NO.	DESCRIPTION OF FIRM BY SIZE OF FIRM AND LOCATION OF RESPONDING OFFICE	NITA TRIAL COURSE	NITA DEPO-SITION COURSE	IN-HOUSE TRIAL COURSE	IN-HOUSE DEPOSITION OR OTHER WORKSHOPS	LOCAL CLE COURSES	OUTSIDE INTERN-SHIPS	PRO BONO	OUTSIDE FACULTY	TRAINING MENTORS	FORMAL BENCH-MARKS	IN-HOUSE TRAINING POSITION
74.	16-lawyer firm in Dallas, Texas	✓	✓							✓		
75.	12-lawyer firm in Tampa, Florida	✓	✓									
76.	9-lawyer firm in Richmond, Virginia					✓				✓		
77.	8-lawyer firm in Indianapolis, Indiana	✓			✓	✓				✓		

EXHIBIT B

ABA TASK FORCE ON TRAINING THE TRIAL LAWYER:

SUMMARIES OF SURVEY RESPONSES

1,800-lawyer firm in Chicago, Illinois

Partner assigned to be responsible for training firmwide, and one partner per office responsible for training.

Series of mandatory in-house skills-building workshops for new associates covering litigation basics.

Three-day Academy for new associates covering litigation and other topics, taught by firm attorneys, based on a firmwide curriculum.

Associates encouraged to attend local CLE programs.

Four-day Litigation Academy trial advocacy program, taught by NITA faculty and firm attorneys, includes advanced training for more senior associates.

National firmwide training curriculum includes two- to three-day NITA style workshops taught by firm attorneys and NITA faculty on selected topics such as depositions and evidence.

Selected fifth and sixth year associates attend NITA trial course.

Pro bono matters encouraged, including INS asylum hearings.

Special fee arrangement with one client allows junior lawyers to try small, non-complex matters.

1,704-lawyer firm in Chicago, Illinois

Junior litigators attend NITA deposition workshop; mid-level and senior litigators attend NITA trial workshop.

Outside CLE programs on litigation-related topics.

Several-day in-house training course for new associates.

Regular lunch presentations on CLE topics.

1,125-lawyer firm in New York, New York

Yearlong in-house litigation training curriculum taught by firm attorneys and outside faculty covering litigation basics such as legal writing, document production, depositions, motion practice, trial preparation and negotiations, as well as substantive topics including bankruptcy, antitrust, securities and white collar criminal defense.

Associates encouraged to attend NITA and other outside CLE programs.

1,000-lawyer firm in Milwaukee, Wisconsin

Annual in-house national and regional fundamental trial skills programs taught by firm attorneys, NITA, and other visiting faculty, including programs on motion practice, fact investigation, depositions and experts, as well as a four-day trial advocacy workshop culminating in a mock jury trial.

Associates encouraged to attend NITA or equivalent and other CLE programs.

Firm employs director of professional development.

New associates' orientation weekend includes substantive litigation topics.

Associates encouraged to take pro bono matters.

Benchmarks for associates' skills development.

950-lawyer firm in Washington, D.C.

Firm recently hired a Professional Development Manager to formalize and coordinate a comprehensive firmwide professional development program.

Associates attend NITA programs and firm brings in outside consultants to lecture on trial-related topics.

942-lawyer firm in San Francisco, California

Lets associates choose whether to come to training so there is a large self-selection present.

NITA deposition and trial training.

Individual mentoring sessions.

900-lawyer firm in Chicago, Illinois

Pro bono and small matters staffed with junior associates.

In-house NITA-style trial training program offered twice each year. Training sessions leading up to videotaped mock trials, taught by firm attorneys. Offered to associates and summer associates.

Associates encouraged to attend NITA.

900-lawyer firm in Chicago, Illinois

Yearly training program for new associates coving litigation basics.

In-house deposition and trial workshops taught by NITA and firm faculty.

Firm purchases tickets for CLE programs at a volume discount from the local bar association.

Encourage associates to work on pro bono matters.

Firm has a national director of professional development and a professional development intranet listing available in-house and external CLE programs.

900-lawyer firm in Los Angeles, California

Three-day seminar for new associates covering litigation basics.

Weekly training classes for junior litigators on areas including in-house deposition workshop alternating between fact and expert witness depositions and periodic negotiation workshop.

Firm co-founded the Trial Advocacy Prosecutors' Program ("TAPP") whereby associates try misdemeanor cases pro bono with the local district attorney's office (Southern California).

Encourage associates to take on pro bono matters.

Encourage associates to attend NITA trial and deposition workshops.

816-lawyer firm in Washington, D.C.

Three-day workshop session for new litigators on the basics of trial practice taught by firm attorneys.

Annual trial lawyer retreat where associates try one-day mock cases before firm partners and sitting and retired state and federal judges.

Periodic in-house training courses.

Associates encouraged to take on pro bono matters, including adoption hearings with the Children's Law Center (D.C.); a juvenile justice clinic in conjunction with Northwestern University (Chicago); the Federal Indigent Defense Panel (L.A.); and disability and asylum hearings.

Selected associates attend NITA deposition and trial programs.

800-lawyer firm in San Francisco, California

In-house NITA-style training program taught by local law professors covering motion hearings, depositions and trials. Course is videotaped and mock juries deliberate.

Firm also conducts separate in-house one-week trial courses for junior and senior associates.

800-lawyer firm in Dallas, Texas

Pre-trial training class for new litigation associates.

In-house week-long NITA-style workshop taught by firm attorneys and visiting faculty, culminating in a mock trial.

Associates spend six weeks in the local district attorney's office.

Associates are assigned partner-mentors to monitor their achievement of skills-related benchmarks.

800-lawyer firm in Dallas, Texas

Associates encouraged to attend NITA and local CLE programs.

Firmwide litigation training curriculum covering discovery, evidence, depositions, experts, etc.

One partner in each office designated to administer curriculum.

719-lawyer firm in New York, New York

Year-long litigation in-house CLE training curriculum for new associates and midlevel or senior associates, taught by firm attorneys and visiting faculty.

Program addresses discovery, depositions, trial prep, experts and internal investigations, as well as specialized areas including employment, securities, bankruptcy, appellate, and product liability.

700-lawyer firm in Richmond, Virginia

Multi-day "Litigation School" for first- through third-year litigators, including lectures and interactive demonstrations taught by firm faculty. Associates prepare and argue a summary judgment motion and receive individualized feedback.

Multi-day "Trial School" for third- through sixth-year litigators, including lectures and interactive demonstrations by firm faculty, oral argument exercises and a hearing in the local courthouse.

700-lawyer firm in Minneapolis, Minnesota

Five-day training program for new lawyers covering trial and other litigation skills, as well as year-long curriculum of basics and more specialized topics.

Four-day trial skills workshop offered annually in conjunction with state bar, taught by judges and firm faculty.

Firm provides a "Partner of the Year" award to partners who provide leadership and excellence in training.

Formal training mentors monitor trial skills development, including seeking out appropriate work assignments.

Joint program with the city attorney's office where associates prosecute misdemeanors for a three month stint.

687-lawyer firm in Pittsburgh, Pennsylvania and Oakland, California

In-house trial workshop.

Periodic in-house seminars on trial skills.

Outside faculty brought in for seminars.

666-lawyer firm in New York, New York

Second year litigators attend an in-house two- and one-half day deposition training workshop taught by firm attorneys and visiting NITA faculty.

Fifth year litigators attend NITA's trial workshop.

Lecture series for incoming associates on litigation basics.

Associates encouraged to attend local CLE programs.

592-lawyer firm in New York, New York

Associates attend a two and one-half day in-house mock trial program taught by firm attorneys and visiting faculty.

Associates are encouraged to attend NITA programs.

568-lawyer firm in Kansas City, Missouri

Yearlong in-house litigation training curriculum spanning all aspects of litigation.

Associates encouraged to take local internships and pro bono cases, including through billable credit for pro bono hours.

501-lawyer firm in New York, New York

Questions whether you can train trial lawyers in a big firm context.

In-house CLE programs and deposition training.

Encourages recruits to do clerkships and to go off and try cases somewhere else, then return to the firm.

Large pro bono department.

490-lawyer firm in Boston, Massachusetts

Firm has a full-time director of professional development.

Four-month in-house training program for new litigators taught by firm attorneys, covering all aspects of a case and including mock depositions and oral argument.

Monthly department educational meetings, occasionally taught by visiting faculty.

In-house annual skills workshop taught by firm attorneys, and periodic mini-deposition workshops.

In-house mock trial program for first and second year associates taught by firm attorneys.

Six-month internships for associates at the local district attorney's office.

Formal benchmarks for associates' trial skills.

487-lawyer firm in New York, New York

In-house NITA-style workshops.

Associates encouraged to take on pro bono trial work.

457-lawyer firm in Philadelphia, Pennsylvania

Annual two-day in-house NITA-style CLE deposition workshop taught by firm attorneys and outside faculty from local law school, geared towards first through third year associates.

Annual one-day in-house evidence workshop taught by outside faculty from local law school, also geared to first through third year associates.

Bi-annual in-house NITA-style motion practice workshop, half-day session.

Bi-annual in-house negotiation workshop taught by outside faculty.

Four-day in-house NITA-style trial advocacy workshop every several years for fourth year associates and up orientation lectures for new associates on practical litigation skills.

Pro bono matters.

450-lawyer firm in Philadelphia, Pennsylvania

Litigation basics monthly lunchtime CLE programs, mandatory for first years.

Topical CLE curriculum for more advanced litigators.

Best and worst videotaped depositions highlights shown in-house.

Send senior associates to Litvin Haines Academy of Advocacy.

450-lawyer firm in Dallas, Texas

Sends two lawyers per year to local district attorney's office.

Encourages associates to give speeches and develop public speaking skills. Firm has considered a public speaking coach.

Sends associates to NITA deposition and trial programs.

447-lawyer firm in Phoenix, Arizona

In-house lecture series for first and second year associates covering litigation basics.

In-house multi-day NITA-style deposition and trial workshops.

Pro bono organized through local bar association.

"Side by side" program affording associates fifty hours per year, counted toward billable hours but not billable to the client, to attend depositions, hearings and trials.

425-lawyer firm in Dallas, Texas

Associates attend an in-house trial training program as well as in-house programs on depositions, ethics, and various substantive areas.

The in-house trial training meets twice a week for eight weeks in an associate's first year at the firm, and covers voir dire, opening, direct, cross, experts, evidence and closing. The program culminates in a mock trial held in a local court.

The firm also provides a one-day course taught by actors on public speaking.

400-lawyer firm in Chicago, Illinois

In-house CLE classes.

NITA deposition and trial programs.

Pro-bono program where associates take on political asylum cases.

400-lawyer firm in Atlanta, Georgia

Eight-hour litigation "boot camp" for first year associates.

Weekly in-house CLE lectures.

NITA programs.

400-lawyer firm in Dallas, Texas

Several month in-house training program culminating in two mock trials per lawyer, taught by firm attorneys. Other topics covered include depositions, voir dire, and evidence.

Associates encouraged to attend NITA deposition and trial workshops.

Six week internships with local district attorney's office.

New associate training program covering research, writing, ethics, client interaction and practical tips.

350-lawyer firm in New York, New York

Yearlong in-house CLE litigation training curriculum spanning topics from drafting pleadings, briefs and discovery to depositions, working with experts, and oral advocacy. Also covers substantive areas of law including ethics, accounting, intellectual property and cybercrime.

350-lawyer firm in Detroit, Michigan

NITA trial and deposition workshops.

Pro bono matters.

Creating program with local district attorney's office where associates will spend several months full-time on staff as prosecutors.

Associates deputized as city attorneys to prosecute traffic and other misdemeanors in local courts.

345-lawyer firm in Portland, Oregon

In-house two-day workshop covering litigation basics, including discovery and motion practice.

All associates attend the NITA trial workshop.

NITA faculty conduct in-house seminar on trial practice.

Each associate assigned a partner "mentor/coach."

Associate coach (a senior trial lawyer) works one-on-one with associates to provide mentoring and feedback.

Associates encouraged to attend local CLE programs.

341-lawyer firm in Atlanta, Georgia

Associates encouraged to attend NITA.

In-house training program consisting of one to two hour sessions covering litigation basics such as privilege, evidence, depositions, negotiation and discovery.

Firmwide CLE seminars on substantive topics.

Planning in-house NITA-style oral advocacy workshop.

324-lawyer firm in Dallas, Texas

In-house associate basic training program regarding litigation basics.

Annual training workshop on particular litigation skills, *e.g.* depositions.

Third, fourth and fifth year associates required to attend NITA trial workshop or an equivalent.

Permit associate attendance at trials or hearings though time is non-billable.

Local district attorney's office internships.

Required mentoring training for partner mentors.

320-lawyer firm in Chicago, Illinois

Second year associates attend NITA deposition training.

Fifth year associates attend NITA trial course.

Associates encouraged to attend local CLE programs.

In-house writing and motion practice workshops taught by outside faculty.

307-lawyer firm in Washington, D.C.

Periodic in-house deposition and trial workshops.

Associates encouraged to attend NITA and undertake pro bono representations.

Able to involve associates in more arbitrations and trials because of firm size.

300-lawyer firm in Reston, Virginia

Sends junior associates to trial advocacy programs by NITA or the University of Virginia.

Pro bono civil and criminal law cases. Pro bono programs run in-house by former legal-aid attorney

Firm has some smaller matters that provide training.

300-lawyer firm in Los Angeles, California

Sends first and second-year lawyers to NITA.

Three day in-house mock trial program taught by firm faculty.

Encourage newer lawyers to watch trials by firm attorneys, though non-billable.

281-lawyer firm in Chicago, Illinois

In-house NITA-style training programs first year devoted to trial preparation and second year to trial skills, culminating in a mock jury trial.

Associates encouraged to attend NITA.

271-lawyer firm in Philadelphia, Pennsylvania

Firm employs a director of litigation training and pro bono.

Monthly or bimonthly in-house seminars and workshops on litigation basics, including privilege, document production, witness preparation and depositions, and evidence.

In-house mock trial workshops before sitting judges.

Annual litigation retreats feature topical programs taught by outside faculty.

Associates encouraged to take on pro bono matters.

250-lawyer firm in Dallas, Texas

Extensive in-house training program modeled on NITA.

Week-long seminar for new litigation associates.

223-lawyer firm in Minneapolis, Minnesota

Bring in NITA professors to meet in small groups or individually with associates to develop as to specific cases: (a) succinct statement of the case, (b) formulating direct and cross, (c) practice cross examination.

Well developed classroom programs on Civil Procedure and Evidence.

Mock cases in front of local judges.

Send associates to NITA programs.

Small cases for trial, with direct mentoring relationships to enhance skills.

221-lawyer firm in Baton Rouge, Louisiana

Associates encouraged to attend NITA or its equivalent.

217-lawyer firm in Chicago, Illinois

Small case training program whereby associates try non-complex matters.

Associates given billable credit for pro bono work.

In-house mock trial workshops taught by firm attorneys.

204-lawyer firm in Chicago, Illinois

Training program for new litigators including motion practice seminar.

In-house monthly training workshop covering initial client contact through trial.

Associates encouraged to attend NITA trial and deposition programs.

Firm employs a full-time director of associate development and assigns senior associates to mentor junior associates.

200-lawyer firm in Chicago, Illinois

Associates attend NITA trial program.

Partners mentor associates and monitor their progress against loose benchmarks.

200-lawyer firm in Los Angeles, California

Finds great deal of self-selection among associates interested in trial work.

Three-day program for new associates, focusing on litigation-orientated educational materials.

Two-day fall program for new litigators and laterals, and two-day spring deposition program that includes one day of lectures and one day of taking and defending mock depositions.

Summer associates participate in a "Trial of Wyatt Earp" mock trial program, which may be extended to first-years. Associates given only three or four days' advance notice.

200-lawyer firm in Seattle, Washington

NITA deposition program for first and second year associates.

NITA trial program for third and fourth year associates.

161-lawyer firm in Boston, Massachusetts

NITA-style in-house trial practice workshop for fifth through seventh year associates, taught by firm faculty, culminating in mock trial, with staff and junior associates as jurors and a retired jurist as the judge.

Pro bono cases and outside CLE courses encouraged.

150-lawyer firm in Dallas, Texas

Full-time in-house attorney devoted to training.

In-house biannual trial and pretrial advocacy seminars.

Formal benchmarks for associates' trial skills development.

Mentor partner assigned to each associate.

Associates encouraged to attend local CLE programs, as well as NITA trial and deposition skills workshops.

Ten-week in-house NITA-style basic skills course for new associates.

Associates encouraged to take on pro bono matters.

150-lawyer firm in New York, New York

Third and fourth year associates attend an in-house five day Trial Advocacy Institute taught by firm attorneys and NITA faculty. The program culminates in competitive mock trials.

150-lawyer firm in San Francisco, California

Trial firm, handles only litigation matters.

Selectively hire associates who want to try cases; most have moot court, trial advocacy, clinical or prosecutorial experience.

Give junior lawyers roles in mock jury trials for actual cases.

Participate in volunteer prosecutor program in Pasadena.

In-house trial program conducted in actual courtrooms.

Handle smaller cases at reduced rates for training purposes.

150-lawyer firm in Stamford, Connecticut

Weekly in-house sessions for junior litigators on pre-trial and trial skills.

In-house NITA-style trial training program taught by firm attorneys for mid-level and senior associates.

125-lawyer firm in Chicago, Illinois

Associates required to attend NITA trial workshop.

Periodic in-house programs taught by NITA faculty and firm attorneys.

90-lawyer firm in Dallas, Texas

Six-month in-house litigation training curriculum offered to first and second year litigators (attached). Taught by firm attorneys, and covering such topics as ethics, drafting pleadings, motions and discovery, depositions, experts, settlements, ADR and appeal.

Offsite multi-day litigation training program for new associates.

Periodic lunchtime CLE presentations by outside faculty.

Third year litigators encouraged to attend NITA.

85-lawyer firm in Houston, Texas

Annual calendar of weekly lunch programs on trial-related topics, taught by senior attorneys and outside speakers, such as jury consultants.

Development of trial skills monitored by list of formal benchmarks, and written and oral reviews given every year, except for new attorneys, who are reviewed every six months.

Formal mentoring program.

NITA trial program.

At least one associate attends and has a minor speaking role in every arbitration or trial, even if the billed time must be reduced.

Some cases taken on a reduced-fees basis to obtain trial experience for junior lawyers.

84-lawyer firm in Chicago, Illinois

Multi-day in-house trial "boot camp" covering all aspects of trial. Includes lectures and workshops taught by firm faculty.

In-house Education Committee annually reviews firm's training programs. At periodic firm seminars, major trials are given in a post-mortem.

Encourage associates to attend trials by firm lawyers.

60-lawyer firm in Atlantic City, New Jersey

Monthly training session for all litigators, with topics suggested by members of the department.

Lectures and interactive sessions taught by partners in the department.

55-lawyer firm in New Orleans, Louisiana

55-lawyer firm of which two-thirds are in litigation.

Associates encouraged to take on pro bono matters, although they often do not result in trials either.

Herb Stern's in-house videos.

NITA deposition and trial training.

Firm has certain smaller cases – insurance defense and products liability – that younger associates can try.

50-lawyer firm in Minneapolis, Minnesota

NITA trial and deposition workshops.

In-house lectures and workshops conducted by firm attorneys, including seminars by members of the local judiciary.

45-lawyer firm in New York, New York

In-house trial and pretrial advocacy workshops.

43-lawyer firm in Orlando, Florida

NITA courses.

"Fundamentals of Trial Technique" by Thomas Mauet.

43-lawyer firm in Washington, D.C.

Associates encouraged to attend NITA trial program, and to serve as NITA faculty.

Some in-house training.

39-lawyer firm in Philadelphia, Pennsylvania

Partner works directly with junior associates and tries to train them as "trial dramatists."

Sends associates to the Trial Academy in Philadelphia.

33-lawyer firm in Newark, New Jersey

All litigation firm, uses apprentice-model of on-the-case training.

Bring associates to hearings, depositions and trials.

30-lawyer firm in Kansas City, Kansas

Firm's practice consists primarily of trials, allowing associates to gain trial experience.

Associates work with experienced trial lawyers as mentors until they are prepared to first-chair.

29-lawyer firm in Houston, Texas

In-house curriculum covering aspects of trial practice taught by firm attorneys and outside faculty.

Each associate assigned a partner mentor.

Associates sent to two-week NITA trial course.

Considering allowing associates to intern with district attorney's office.

27-lawyer firm in Alexandria, Louisiana

Experienced litigators actively mentor newer trial lawyers.

Bring new lawyers to watch court hearings and trials at firm's expense.

20-lawyer firm in Lafayette, Louisiana

Allow associates to participate in trials even if time is not billable.

Encourage associates to attend NITA or the equivalent.

In-house training program and partner mentor system.

Local CLE programs.

19-lawyer firm in Chicago, Illinois

Business litigation boutique.

In-house seminars on topics in litigation and business development, taught by firm members.

NITA and local CLE courses.

Emphasis on one-on-one mentoring; efforts are made to carefully monitor the assignments process.

Periodic "skills inventories" of associates.

18-lawyer firm in Jacksonville, Florida

Associates attend local CLE programs and a multi-week AIDC trial workshop.

Firm emphasizes mentoring of junior litigators in-house and through local bar associations.

16-lawyer firm in Dallas, Texas

Small firm with niche trial practice.

Hire junior lawyers who have gained good experience.

Frequently use mock argument as part of interview process.

Assign junior lawyers speaking parts in trials, more of an apprentice model.

12-lawyer firm in Tampa, Florida

Litigators attend NITA programs after several years at the firm.

Minor collections practice staffed by junior associates. Cases taken on a contingency fee basis; associates are responsible for all aspects of trial and collecting any judgment awarded.

9-lawyer firm in Richmond, Virginia

Boutique trial firm, hires lawyers with 2-3 years of experience.

Involve junior lawyers in all aspects of trial, including strategy and a role at trial.

Emphasis on individual feedback and mentoring.

8-lawyer firm in Indianapolis, Indiana

Eight-person firm, holds monthly in-house training program.

Associates encouraged to attend local CLE programs and NITA trial training program.

Size of firm permits significant mentoring.

Understanding the Process of Further Review

Justice Mansfield
Iowa Supereme Court
Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, IA 50319
Edward.Mansfield@iowacourts.gov

AGENDA

- I want to give you:
  - An insider's view of the further review process.
  - Go over some recent FR rule changes.
  - Provide some statistics.
  - Try to offer a few pointers.

AN INSIDER'S VIEW

- The court of appeals decides approximately 1,200 appeals a year, releasing about 40-50 opinions every other week.
- Further review is sought in about ½ of those cases.
- So every other week, we get a batch of about 20-25 applications for further review, some with resistances.
- These are read directly by the justices. We do not have a "cert pool" or rely on our law clerks to read FR applications.
- Often, they are our weekend reading.
- As of a few months ago, we have to read them on our iPads or other mobile readers.

AN INSIDER'S VIEW

- We have a voting sheet on Sharepoint for each application. A justice can vote "N" (no discussion necessary) or "Y" (the justice would like to discuss the case at conference). Often, when voting "Y," the justice includes a short note for the other justices explaining why the justice thinks the case might merit further review. Sometimes an "N" voter will respond and explain why the case doesn't merit FR.
- If an application is marked with an "N" from everyone, it is automatically denied and not considered at conference. This happens to at least half the applications.

AN INSIDER'S VIEW

- We have FR conferences approximately once a month.
- At the conferences any case that someone has marked with a "Y" will be discussed and then voted on.
- It takes 4 votes to grant FR (3 votes if there is a recusal).
- Often, a case will be held over to the next conference so a justice can study it.
- Sometimes, a case will be held over because it presents a similar legal issue to a case under submission.
- Also, we have a "clerk at large." Sometimes the clerk at large will be asked to review the record of a case where FR is being considered and prepare a recommendation. For example, we may decide not to grant FR on what seems like a nice legal issue if it appears that resolution of that issue would not affect the outcome of the case.

AN INSIDER'S VIEW

- Typically, when reviewing FR applications, the justices read the court of appeals opinion *first*, then the application, then the resistance (if any).
- A dissent or a special concurrence in the C of A may be a red flag for FR purposes.
- In 2012, 493 applications for FR were filed and 41 were granted. In 2013, 533 applications for FR were filed and 39 were granted. The number of grants may be a little lower than previous years. I believe a 10% grant rate remains a reasonable benchmark.
- Overall, the supreme court gets about half of its regular caseload out of the FR process and about half out of cases it retains and does not transfer. Attorney disciplinary cases are in addition to that.

RECENT RULE AMENDMENTS ON FURTHER REVIEW

- **Rule 6.1103(1)(*b*):**
- *Grounds*. 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.

RECENT RULE AMENDMENTS ON FURTHER REVIEW

- Don't argue in an application for further review: "The court of appeals made an error of law." "The court of appeals decided a case that should have been retained by the supreme court."
- These are in the old rule – which has now been changed.

RECENT RULE AMENDMENTS ON FURTHER REVIEW

- **Rule 6.1103(1)(*c*):**
- *Form*. (1) The application shall contain questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. The questions shall be set out on the first page following the cover, and no other information may appear on that page.
- (2) A table of contents. The application shall contain a table of contents including page references.
- (3) Statement supporting further review. The application shall contain a direct and concise statement of the reasons why the case warrants further review.
- (4) Brief. The application shall contain a brief in support of the request for review including all contentions and legal authorities in support of the application. No authorities or argument may be incorporated into the application by reference to another document; however, citations to the appendix are permitted.

RECENT RULE AMENDMENTS ON FURTHER REVIEW

- Make sure you include "questions presented." The clerk will reject the filing if you don't.
- The questions can't be argumentative but they can be suggestive or leading… Look at some successful US Supreme Court cert petitions.
- Remember that if the supreme court takes the case, it generally takes all questions that were properly presented on appeal. However, there is a caveat: The supreme court may in its discretion let the court of appeals decision stand as the final decision on certain issues, especially if further review has not been sought on them. *State v. Becker*, 818 N.W.2d 135, 140 (Iowa 2012); *Broadlawns Medical Center v. Sanders*, 792 N.W.2d 302, 303 (Iowa 2010).

RECENT RULE AMENDMENTS ON FURTHER REVIEW

- These changes to rule 6.1103 are self-consciously patterned after the United States Supreme Court's certiorari rules.
- Note that chapter 21 has been changed so that if there is a recusal, only 3 votes are needed to take a case on further review.
- In any case before the supreme court, if the voting on the final decision ends up 3-3, the court of appeals decision (if there is one) is automatically vacated and the district court judgment is affirmed by operation of law.

2011-12 TERM – CASES WHERE FURTHER REVIEW WAS GRANTED

- 63 cases (not counting duplicates) were decided on further review.
- We reversed the court of appeals in 40 (63%).
- Affirmed in 23 (37%).
- This is some arbitrariness in defining an affirmance or a reversal.
- Remember that this is skewed because in the vast majority of cases, we have no problems with the C of A decision *so we don't take the case*.

SUBJECT AREA (2011-12 TERM)

- Out of the 63:
- 30 criminal cases
  - 17 out of 30 reversed the C of A
- 6 tort/malpractice cases
  - 5 out of 6 reversed the C of A
- 4 civil procedure cases
  - 1 out of 4 reversed the C of A
- 4 workers comp cases
  - 3 out of 4 reversed the C of A
- 4 local government cases (e.g., open records)
  - 1 out of 4 reversed the C of A
- 3 probate cases
  - 1 out of 3 reversed the C of A
- 3 construction/contract law cases
  - 3 out of 3 reversed the C of A

SUBJECT AREA (2011-12 TERM)

- 2 state administrative law cases
  - 2 out of 2 reversed the C of A
- 2 employment law cases
  - 2 out of 2 reversed the C of A
- 2 family law cases
  - 2 out of 2 reversed the C of A
- 2 juvenile cases
  - 2 out of 2 reversed the C of A
- 1 insurance law case
  - 1 out of 1 reversed the C of A

2012-13 TERM – OVERALL FURTHER REVIEW STATISTICS

- 36 cases (not counting duplicates) were decided on further review.
- This is down from the 2011-12 term when we were catching up on a backlog.
- The court of appeals was reversed in 23 out of 36 or 64%.
- The supreme court affirmed the C of A in 13. Again, some arbitrariness in how you define affirmance/reversal. Also, you could argue that in a couple of those cases, the supreme court overrode the court of appeals' reasoning on the point for which it took the case.

SUBJECT AREA (2012-13 TERM)

- Out of the 36:
- 12 criminal cases
  - 8 of 12 reversed the C of A
- 5 state administrative law cases
  - 3 of 5 reversed the C of A
- 5 tort/malpractice cases
  - 2 of 5 reversed the C of A
- 4 family law cases
  - 4 of 4 reversed the C of A
- 3 civil procedure cases
  - 2 of 3 reversed the C of A

SUBJECT AREA (2012-13 TERM)

- 2 employment cases
  - 1 of 2 reversed the C of A
- 2 local government cases
  - 1 of 2 reversed the C of A
- 1 probate case
  - 1 of 1 reversed the C of A
- 1 insurance law case
  - 1 of 1 reversed the C of A
- 1 juvenile case
  - 0 of 1 reversed the C of A

2013-14 TERM – OVERALL FURTHER REVIEW STATISTICS

- 38 cases (not counting duplicates) were decided on further review.
- Comparable to 2012-13 term.
- The court of appeals was reversed in 26 out of 38 or 69%.
- The supreme court affirmed the C of A in 12.
- As before, some subjectivity in how you define affirmance/reversal.

SUBJECT AREA (2013-14 TERM)

- Out of the 38:
- 19 criminal cases (significant increase)
  - 12 of 19 reversed the C of A
- 3 tort/malpractice cases
  - 3 of 3 reversed the C of A
- 3 family law cases
  - 2 of 3 reversed the C of A
- 3 juvenile cases
  - 2 of 3 reversed the C of A

SUBJECT AREA (2013-14 TERM)

- 2 contract/construction cases
  - 1 of 2 reversed the C of A
- 2 probate cases
  - 2 of 2 reversed the C of A
- 2 other statutory cases
  - 2 of 2 reversed the C of A
- 1 local government cases
  - 0 of 1 reversed the C of A
- 1 insurance law case
  - 1 of 1 reversed the C of A
- 1 employment law case
  - 0 of 1 reversed the C of A
- 1 workers compensation case
  - 1 of 1 reversed the C of A

THE SIGNIFICANCE OF THESE STATISTICS

- They confirm the sense most people have that when we take a case, the odds favor reversal of the court of appeals.
- But remember – as they say during spring training – "it's a small sample size."

THE SIGNIFICANCE OF THESE STATISTICS

- The court gets asked to take and does take a lot of criminal cases on further review. Seemingly an increasing number.
- Other popular categories: tort law (R3 recently adopted by ALI), statutory interpretation (not noted as a separate category above, but many of the cases involving statutory interpretation).
- Some ebbs and flows.

FURTHER REVIEW POINTERS

- A case that involves an unresolved legal question will have better prospects for a granting of FR than one which presents only a substantial evidence question.
- Another question to ask yourself before seeking FR: Does the court of appeals opinion "make bad law" on a recurring, important issue? How will your case affect other cases?

FURTHER REVIEW POINTERS

- The FR rules allow you to include an evidentiary exhibit in the application not exceeding 10 pages. *See* 6.1103(1)(c). This is underutilized in my view. Remember, the justices do *not* have the appendix as part of their regular review.
- Also, if the court of appeals decided the case with a memorandum opinion, then the district court order must be included in the application. *See* 6.1103(1)(c). This rule is often violated.
- There is no need for the further review application to be as long as possible (i.e., 2/5 of an appellant's brief). Short and punchy can be very effective. Think "screen-reading."

FURTHER REVIEW POINTERS

- A resistance to the FR application is not mandatory, especially if you think the C of A opinion answers everything the application is complaining about.
- If you file a resistance, talk about *both* (1) why the C of A decision is not FR-worthy *and* (2) why it is right.
- Make the resistance short.

Contracts/Commercial Case Law Update

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Iowa Defense Counsel Association Case Law Update: Commercial and Contract Law

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I. ARBITRATION 1

Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas 1

BG Group, PLC v. Republic of Argentina 3

Brown v. Brown-Thill 5

Reyco Granning LLC v. International Borth. of Teamsters, Local Union No. 245 6

II. CONSTRUCTION 6

Star Equipment, Ltd. v. State, Iowa Dept. of Transp. 6

III. CONTRACT INTERPRETATION 7

A. Supplementing Written Contract 7

Murr v. Midland Nat. Life Ins. Co. 7

BVS, Inc. v. CDW Direct, LLC 8

B. Ratification 10

Life Investors Ins. Co. of America v. Estate of Corrado 10

IV. PROCEDURE 12

A. Personal Jurisdiction 12

Fastpath, Inc. v. Arbela Technologies Corp. 12

Ostrem v. Prideco Secure Loan Fund, LP 13

B. Statute of Limitation 14

Osmic v. Nationwide Agribusiness Ins. Co. 14

I. ARBITRATION

Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas, --- U.S. ---, 134 S.Ct. 568 (December 3, 2013) (Alito)

Facts: Virginia based Atlantic Marine entered into a contract with the U.S. Army Corps of Engineers to build a child-development center in Fort Hood, Texas. Atlantic Marine subcontracted with Texas based J-Crew Management to work on the project.

The subcontract between Atlantic Marine and J-Crew management included a forum selection clause that provided disputes between parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."

When a dispute arose between Atlantic Marine and J-Crew Management, J-Crew sued Atlantic Marine in the United States District Court for the Western District of Texas. Atlantic Marine moved to dismiss the case based on the contract's forum selection clause. More specifically, Atlantic Marine claimed that the forum-selection clause rendered jurisdiction "wrong" under 28 U.S.C. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Alternatively, Atlantic Marine moved to transfer the case to Virginia pursuant to 28 U.S.C. § 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

The Texas district court denied both motions. Atlantic Marine appealed to the Fifth Circuit and sought a writ of mandamus. The Fifth Circuit denied Atlantic Marine's appeal on the grounds it had not established a "clear and indisputable" right to relief.

Issue: Whether the proper mechanism for enforcing a forum selection clause is to seek dismissal pursuant to 28 U.S.C. § 1406(a) and Rule 12(b)(3), or seek transfer pursuant to 28 U.S.C. § 1404(a).

Holding: Where the parties to a contract have included a valid forum-selection clause, and the case is brought in venue other than the one selected in the contract, then the proper remedy to enforce the forum-selection clause is to seek transfer pursuant to 28 U.S.C. § 1404(a).

Analysis: The Court first explained that a forum-selection clause does not render venue "wrong" or "improper" under 28 U.S.C. § 1406(a). Generally, venue will be "wrong" or "improper" if there is legal reason that venue is wrong. For example, 28 U.S.C. § 1391(b)(1) provides that a civil action may be brought in a judicial district where any defendant resides. If there is no basis for bringing a case in a particular venue pursuant to § 1391 then venue will be "wrong" or "improper." Whether there is a valid forum-selection clause has no bearing on this analysis.

However, a valid forum-selection clause does have bearing for the analysis under § 1404(a). The appropriate way to enforce a forum-selection clause is to seek to have the case transferred on the grounds of *forum non conveniens*, which is the common law origin of § 1404(a).

Where there is a valid forum-selection clause, the traditional analysis under § 1404(a) is altered. Typically, when a court determines whether a case should be transferred for convenience, the court weighs the interests of the parties and the public interest.

The analysis changes where there is a valid forum-selection clause in three ways. First, the plaintiff's choice of venue merits no weight. Since the plaintiff is the party defying the forum-selection clause, the plaintiff bears the burden of proving that transfer to the bargained-for forum is unwarranted. The plaintiff had one opportunity to select the forum—during negotiation of the contract—so that initial selection is owed deference.

Second, where parties agree to a particular forum they waive the right to challenge the preselected forum as inconvenient or less convenient. Courts are thus bound to consider the private-interest factors in § 1404(a) to weigh entirely of the contract-selected forum.

Third, when a case is transferred to the contract forum, the traditional choice-of-law rules will not apply. Ordinarily, where a case is transferred to a different venue under § 1404(a), the original venue's law will apply in the new venue. This rule avoids problems caused by defendants who may try to transfer a case to a more "convenient" venue solely for the purpose of taking advantage of different substantive law. However, where the parties have agreed by contract to a particular venue, there is no such risk. Thus, where a case is transferred then the law of the contractually selected forum will apply.

The Court then noted that there did not appear to be any public interest factors that weighed against enforcing the forum-selection clause. However, the Court noted that the record had not been developed on that issue, so it remanded to the district court to determine whether any public interest factors weighed against enforcement of the forum-selection clause.

BG Group, PLC v. Republic of Argentina, --- U.S. ---, 134 S.Ct. 1198 (March 5, 2014) (Breyer)

Facts: This case turned on the interpretation of an investment treaty between a British firm and Argentina. The British firm was part of a consortium that purchased a majority interest in an Argentine entity—MetroGAS. This entity was created in 1992 when Argentina privatized its utility.

MetroGAS had a 35 year exclusive license to distribute gas to Buenos Aires. Argentina also passed a law in 1992 setting "tariffs" to ensure that MetroGAS made a profit.

In 2001 and 2002 Argentina faced an economic crisis. Argentina changed the basis of the tariff laws from a calculation in dollars to pesos, and then set the rate of exchange at one peso per dollar. At the time, the exchange rate was three pesos per dollar. As a result, MetroGAS began to experience significant financial losses.

BG Group commenced arbitration pursuant to Article 8 of the investment treat, which provides for arbitration:

> (i) where, after a period of eighteen months has elapsed from the moment when

> the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or]
> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute." Art. 8(2)(a).

The parties agreed to appoint arbitrators in Washington D.C., and between 2004 and 2006 the arbitrators decided motions and received evidence. Argentina resisted the jurisdiction of the arbitration panel on, among other grounds, the ground that BG Group failed to exhaust its claims in Argentine courts. The treaty required BG Group to bring its claims to Argentine courts for 18 months before resorting to arbitration.

The arbitration panel, sitting in Washington D.C., decided that it did have jurisdiction over the cases because Argentina had taken measures to render the courts effectively inaccessible. For example, the president of Argentina issued a decree prohibiting cases from being brought under the new law for 180 days. Moreover, the "re-negotiation process" setup by Argentina prohibited BG Group from participating. Both parties appealed the arbitration award to the United States District Court for the District of Columbia.

Issue: Whether the arbitration panel had the authority to decide whether a condition precedent to arbitration had been satisfied.

Holding: Yes, the arbitration panel had authority under the Federal Arbitration Act to decide whether a condition precedent for arbitration was satisfied.

Analysis: The Court broke its analysis into two parts. First, it considered whether the treaty, if treated as any other contract, would allow the arbitration panel to decide the condition precedent question. Second, the Court looked at whether the fact that the document was a treaty had any impact on its conclusion.

The Court noted that there is a presumption that questions of "arbitrability" are for arbitrators to decide. More specifically, courts generally consider questions of "substantive" arbitrability whereas arbitrators decide questions of "procedural" arbitrability. Substantive arbitrability addresses questions such as whether the parties are bound by an arbitration clause.

The Court concluded that the treaty provision at issue was a question of procedural arbitrability. The question of whether the condition precedent was satisfied was a question akin to consideration of "waiver, delay, or a like defense . . . ." The Court noted that "[t]he text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration."

The Court then moved to a consideration of whether a treaty should receive different treatment. The Court explained that "a treaty is a contract, though between nations." The Court explained that it is interpreted as any other contract. The Court rejected the Solicitor General's request to treat the provision as a "condition of consent" which required the parties to agree to arbitration.

The Court also rejected Argentina's claims that the arbitrators exceeded their power. The Court

noted that review of arbitration decisions is "highly deferential."

Justice Sotomayor concurred in part, and wrote separately to avoid adopting the Court's "dictum." Specifically, she wants to make clear that the Court has not issued a ruling regarding "treaties that refer to 'conditions of consent' . . . ."

In a dissent by Chief Justice Roberts, and joined by Justice Kennedy, the Chief Justice notes that the "arbitration clause" in the treaty was a permissive form of dispute resolution, and that Argentina did not agree to subject itself to that form of dispute resolution.

Brown v. Brown-Thill, --- F.3d ---, 2014 WL 3892962 (8th Cir. August 11, 2014) (Loken)

Facts: Eugene and Saurine Brown created several trusts to hold and manage assets. These included the EDB Trust, SLB Trust, Brown Bear LLC, 7219 Metcalf Partnership, L.P. ("FLP I"), and 7219 Metcalf Partnership II, L.P. ("FLP II").

Richard Brown and Susan Brown-Thill were the co-trustees of the EDB Trust. Attorney James Cooper was the sole trustee of the SLB Trust. Brown Bear LLC was the general partner of FLP I and FLP II. The EDB Trust and SLB Trust each owned 50% of Brown Bear.

The net effect of this web of relationships was that for either FLP I or FLP II to take any action such as making a distribution of income to other family entities, Richard Brown, Susan Brown-Thill, and attorney James Cooper all had to agree.

Richard Brown and Susan Brown-Thill did not get along. This led to paralysis of the various entities. The case arose as a result of two arbitration awards.

As a result of Richard Brown and Susan Brown-Thill's animus, FLP I and FLP II had issued no partnership distribution from 2008 to 2011. The attorney emailed the parties on February 22, 2011, with a proposal for distributions. The email stated that if no agreement could be reached it may be necessary to submit the issue to arbitration. Richard Brown did not receive the proposal, and it was submitted to an arbitrator who issued an award on March 14, 2011. Richard Brown filed an action in court to vacate the award.

The second arbitration occurred after Richard Brown attempted to resign as co-trustee and appoint a successor. The second arbitration thus involved three issues: "(i) whether Brown's conditional resignation and unilateral appointment of Rubenstein were ineffective, (ii) whether Brown should be removed as co-trustee, and (iii) whether an employee of FLP I should be given an employment contract that Brown opposed." The same arbitrator issued a second award on December 12, 2011.

Issue: Whether the arbitrator violated his procedural and substantive limitations when he issued the two arbitration awards on March 14 and December 12.

Holding: Great deference is given to arbitration awards, and courts will rarely disturb an award.

Analysis: The arbitration clause at issue provided:

> All existing and future disputes and controversies between the parties, whether in their individual capacities, their capacities as co-beneficiaries and/or co-trustees of [the EDB and SLB trusts], or in their capacities as co-owners, partners, or members of any business entity, including [Brown Bear, FLP I, and FLP II] ... which arise out of or relate to the administration and investment of the trusts, partnerships and assets of the [EDB and SLB] estates, the payment of estate taxes of such estates, or the division of assets of such estates, shall be submitted to binding arbitration pursuant to the following procedures.

Richard Brown first argued that the Court should apply a de novo standard of review to the arbitrator's two awards because they address questions of substantive arbitrability. The Court rejected Richard Brown's argument in light of the broad language of the arbitration clause above. Thus, the Court's analysis would be limited to the more deferential standard of review in sections 10 and 11 of the Federal Arbitration Act ("FAA").

Section 10 provides vacatur of an arbitrator's award is only appropriate where the award is obtained by corruption or fraud, where the arbitrator is guilty of misconduct, or where the arbitrator exceeded the scope of his powers. Section 11 limits vacatur to cases where there was a material miscalculation, where the arbitrator decided a matter not submitted, or where the award is imperfect in matter of form not affecting the merits of the controversy.

Citing these deferential standards of review, the Court upheld the arbitrator's award with only a slight modification.

Reyco Granning LLC v. International Borth. of Teamsters, Local Union No. 245, 735 F.3d 1018 (8th Cir. November 5, 2013)

Panel of the Eighth Circuit vacated an arbitrator's award on the grounds that the arbitrator exceeded his authority by considering extrinsic evidence of negotiation regarding the terms of a collective bargaining agreement. The arbitrator used evidence of the negotiations to conclude that even though the company had discretion to decline to pay holiday pay, the parties' negotiations had contemplated that the employer would not deny pay under the circumstances of this case.

The Eighth Circuit vacated the panel decision and granted en banc review. The case was argued on April 15, 2014. No decision has been issued yet.

II. CONSTRUCTION

Star Equipment, Ltd. v. State, Iowa Dept. of Transp., 843 N.W.2d 446 (Iowa January 31, 2014) (Waterman)

Facts: Star Equipment performed supplied materials and performed construction work on an Iowa Department of Transportation ("IDOT") project. Star Equipment was a subcontractor of

Universal Concrete, and did not have a direct contractual relationship with IDOT.

Based on Iowa Code § 573.2, Universal Concrete was not required to have a performance bond because it qualified as a "Targeted Small Business" ("TSB"). Ordinarily, under Chapter 573, contractors working on public improvements must obtain a performance bond.

At the conclusion of the project, Star Equipment sought payment from Universal Concrete for unpaid amounts. Universal Concrete was unable to pay.

Star Equipment sought to obtain funds retained by IDOT. However, Star Equipment's outstanding balance exceeded the amount of retained funds, so Star Equipment sought to recover from IDOT the portion of its outstanding claims not covered by the retained funds.

IDOT denied liability for the excess amounts on the grounds of sovereign immunity. The district court granted IDOT's motion to dismiss on the grounds that sovereign immunity precluded liability for any excess claims.

Issue: Whether Iowa Code § 573.2 waives sovereign immunity and allows the state to be held liable for payments where no performance bond was required.

Holding: Iowa Code § 573.2 represents a waiver of the state's sovereign immunity for claims and allows contractors to pursue the state for relief for non-payment.

Analysis: The Court concludes that § 573.2 provides additional remedies to subcontractors of a TSB who are owed money. The Court explained that where the legislature amends a statute there is a presumption that the legislature intended to change the law.

In this case, it is clear that by including the TSB provision waiving the bond requirement, the legislature intended to extend the remedies available under Chapter 573 to entities contracting with TSBs. Thus, IDOT was liable to the extent of Star Equipment's claim for amounts unpaid by Universal Concrete.

III. CONTRACT INTERPRETATION

A. Supplementing Written Contract

Murr v. Midland Nat. Life Ins. Co., --- F.3d ---, 2014 WL 3408665 (8th Cir. July 15, 2014)

Facts: The dispute in this case centered on the interest rate adjustment formula contained in an annuity certificate sold by Midland National Life Insurance Company ("Midland"). According to the terms of the annuity certificate, it was possible to surrender the certificate prior to maturity of the annuity. The surrender value of the certificate depended on an interest adjustment.

The Court outlined the interest adjustment as follows:

> The formula for the interest adjustment is represented mathematically as [$(1 + i_o - .005)/(1 + i)]^{(T)}$. The value of "$i_o$" is the current interest rate offered on the annuity certificate on the certificate's issue date. The value of "i_t" is the current interest rate offered on new annuity certificates as of the date of surrendered. If $i_o - .005$ is greater than i_t, the formula will generally result in a positive interest adjustment, which will increase the surrender value. Conversely, if $i_o - .005$ is less than i_t, the formula will generally result in a negative interest adjustment, which will decrease the surrender value.

Murr purchased one of Midland's annuity certificates in 2004. In 2009, Murr requested full surrender of the certificate. In 2009, Midland no longer offered the particular annuity certificate, so it had no value of "i_t" as set forth in the annuity certificate. Instead, Midland used the current new money rate. Midland's decision resulted in a decrease in the surrender value of the annuity.

Murr filed a lawsuit based on breach of contract and unjust enrichment. The district court, on cross motions for summary judgment, ruled in favor of Midland on the basis that since the contract did not address this situation, the court could substitute a reasonable term.

Issue: Where a contract is unambiguous, but is missing a material term, can a court supply a reasonable replacement for the missing term.

Holding: Where a valid contract exists that is missing a material term, a court may rely on extrinsic evidence to supplement the contract.

Analysis: The Court explained that where the four corners of a contract do not supply a missing term then it is up to the court to supply the missing term.

The Court first noted that the contract is completely silent as to the value of "i_t" when Midland is not offering the same annuity product. The Court found that the agreement between Murr and Midland was sufficiently bargained to be a contract. Based upon the existence of the contract, and the absence of a material term, the Restatement (Second) of Contracts § 204 gives the Court the authority to supplement with a reasonable term.

The Court then turned to how the missing term should be supplied. When supplying a missing term, the Court is not interpreting the contract. However, the same evidence that is relevant to interpretation is also relevant to supplementing the contract.

The Court then found that Murr had failed to produce sufficient evidence to raise a genuine issue of material fact as to whether the rate Midland selected was unreasonable. Thus, the Court affirmed judgment in favor of Midland.

BVS, Inc. v. CDW Direct, LLC, --- F.3d ---, 2014 WL 351778 (8th Cir. July 17, 2014)

Facts: BVS provides training to banks and credit unions online, and uses a computer system located in Cedar Rapids. In late 2010, BVS sought to update its systems, including its storage area network ("SAN").

CDW resells various technology products online. BVS had previously placed several orders with CDW through CDW's online ordering systems, or by contacting a CDW account representative and placing an order.

CDW and BVS engaged in hundreds of transactions. When the account manager at CDW responsible for BVS learned that BVS wanted to upgrade its SAN, the account manager wished to further the CDW-BVS relationship. BVS was skeptical that CDW could deliver on a complicated project like upgrading the SAN.

Due to the project's complexity, CDW had to bring in two third parties to develop and install the SAN solution. BVS repeatedly informed the account manager at CDW that BVS desired a "total SAN solution" and not just hardware and software. BVS wanted the product to be fully installed and tested to ensure it met BVS's needs. However, the CDW account manager did not have a technical background. For example, the account manager had to have another CDW engineer draft an email with questions. Had BVS known the limitations of the account manager's expertise, BVS would have asked to deal with someone else at CDW.

After CDW delivered a quote, BVS again expressed skepticism that CDW and the account manager could deliver. The account manager spoke to BVS and explained that CDW had "data center expertise," which BVS understood to mean SAN expertise.

BVS sent a purchase order to CDW for the hardware, software, training, support services, and six third party services that were all identified in CDW's quote. CDW then sent a purchase order to the third party vendor. In CDW's view, a contract had been formed with BVS because CDW would have never sent a purchase order to a third party otherwise. One month later, CDW sent BVS an invoice.

The back of the invoice contained terms and conditions, including warranty disclaimers. The terms and conditions limited BVS's remedies to either having CDW perform, or seeking a refund. There were other statements that limited CDW's liability. These conditions were on every CDW invoice sent to BVS for all other transactions, however the SAN transaction was not negotiated in the same manner as the other BVS-CDW transactions.

When the equipment and software arrived it didn't work. CDW worked for two months past the initial deadline and was unable to correct the problems. Eventually, BVS asked to send the equipment and software back to CDW but CDW refused.

BVS sued CDW for breach of contract, unjust enrichment, and fraud. The district court granted CDW's motion for summary judgment. The court concluded that CDW made an offer which BVS accepted as evidenced by the order sent to the third party. The court further found that the parties' course of dealing supplemented the agreement, and the invoice integrated it. Thus, CDW's warranty disclaimers meant that CDW performed its obligations to deliver the hardware and software.

Issue: Whether the invoice that contained the terms and conditions was an integration of the

agreement between CDW and BVS.

Holding: Where the parties engage in a transaction that is qualitatively different from prior transactions, there is a genuine issue of material fact as to whether the parties' prior course of dealing supplemented the terms of the contract.

Analysis: The Court explained that under Iowa law, an agreement is integrated when the parties adopt a writing as the final and complete expression of the agreement. Extrinsic evidence may not contradict a fully integrated written agreement. Whether an agreement is integrated is a question of fact to be determined based on the totality of the circumstances.

The district court relied on the prior course of dealing as part of the totality of the circumstances. Since the invoice always came last, it contained "proposals for addition to the contract." If the course of dealing did indeed supplement the terms, then BVS is bound by the late-included provisions.

The Court noted that BVS and CDW had extensive history. BVS ordered products from CDW by (1) placing an order online, (2) requesting a quote from the account manager and then ordering online, or (3) requesting a quote from the account manager and then order by phone. The transaction at issue in this case did not bear any of the markings of these prior transactions.

Thus, the Court concluded that there needed to be additional factual inquiry into whether the qualitatively different nature of this transaction superseded any previous agreement. This is an issue of fact to be determined by the fact finder.

B. Ratification

Life Investors Ins. Co. of America v. Estate of Corrado, 838 N.W.2d 640 (Iowa October 18, 2013) (Wiggins)

Facts: This case presented two certified questions to the Iowa Supreme Court from the United States District Court for the Northern District of Iowa. The Court relied on the facts as summarized by the district court.

John Corrado and his company ("Corrado") marketed life insurance products underwritten by Life Investors Insurance Company of American ("Life Investors"). Corrado received advances from Life Investors and in exchange executed promissory notes in favor of Life Investors and gave Life Investors certain liens.

A dispute arose between Corrado and Life Investors over the amount Corrado owed. In June 1993, Life Investors provided a settlement agreement to Corrado and requested that Corrado sign it and return it to Life Investors. Later in June 1993, Life Investors came into possession of a signed copy of the settlement agreement. Life Investors sent a copy of the executed agreement to Corrado.

The settlement agreement provided for a resolution of the dispute between Corrado and Life

Investors over Corrado's debts. The settlement reduced Corrado's debt to $993,010, and provided for payments and credits to resolve the debt.

From 1993 to 2000 payments and credits were made consistent with the terms of the settlement agreement without objection by any party. In 2001, the settlement agreement required Corrado to begin increasing the size of payments to Life Investors. Corrado objected and alleged that he never signed the agreement on behalf of himself or his company.

Issue: Whether a party can ratify a contract even though there is no evidence to show who signed the contract on the party's behalf.

Holding: The Court adopted the Restatement (Third) of Agency approach to ratification and concluded that a principal may ratify the unauthorized act of an agent.

Analysis: This case arose from two certified questions from the United States District Court for the Northern District of Iowa:

> 1. If a party receives a copy of an executed contract with that party's signature thereon, even where it is not known who applied the party's signature to the contract or whether the signature was authorized, and the party (a) does not challenge the signature or otherwise object to the contract, and (b) accepts benefits and obligations under the contract for at least six years, then has the party ratified the contract and is the party, therefore, bound by the terms of the contract?
>
> 2. If a party receives a copy of an executed contract with that party's signature thereon, even where it is not known who applied the party's signature thereto, and the party (a) does not challenge the signature and (b) accepts benefits and obligations under the contract for at least six years, then is the party estopped from challenging the signature as a basis for asserting that he is not bound by the contract?

Since the Court's answer to the first question was dispositive, it did not reach the second question.

The Court first explained that whether Corrado implicitly or explicitly authorized someone to sign the agreement is irrelevant to determining whether the agreement was ratified.

Next, the Court explained that there are two types of ratification: (1) ratification by the principal of the signature of an agent, and (2) ratification by an individual who had the power to avoid the contract but affirmed the contract. The Court only considered the first kind of ratification.

The Court then reviewed its case law and the Restatement (Second) of Agency. The Court noted that the Restatement (Second), and prior Iowa case law "requires that an actor may only ratify an act if the actor purported to act as an agent."

In contrast, the Restatement (Third) permits ratification if the "actor *acted* or purported to act as

an agent on the person's behalf." Restatement (Third) explained that the new standard brings the Restatement into consistency with court rulings that have consistently held that it is no longer necessary for an actor to have purported to act as an agent. One of the reasons for this requirement had been that under the Restatement (Second), a party could not ratify a forgery.

However, in Iowa § 554.3403(1) provides that, in the context of negotiable instruments, a party can ratify a forgery. Thus, the Court took the view that Iowa law is consistent with the Restatement (Third) of Agency.

Corrado, therefore, could not accept the benefits of the settlement agreement and then attempt to avoid any of the duties by arguing that the signer's signature was unauthorized. Corrado was liable under the terms of the settlement agreement.

IV. PROCEDURE

A. Personal Jurisdiction

Fastpath, Inc. v. Arbela Technologies Corp., --- F.3d ---, 2014 WL 2685908 (8th Cir. July 25, 2014)

Facts: Fastpath entered into a confidentiality agreement with Arbela for the purpose of discussing a potential partnership between the two companies. The agreement contained confidentiality and non-compete provisions. The agreement also contained an Iowa law choice-of-law provision, but no forum selection provision. Representatives from Arbela never came to Iowa, nor did Arbela conduct any business in Iowa.

Fastpath later believed that Arbela was violating the non-compete. Fastpath filed a lawsuit in Iowa state district court, and Arbela removed the case to the United States District Court for the Southern District of Iowa and moved to dismiss for lack of personal jurisdiction. The district court dismissed the case on the ground that it lacked personal jurisdiction over Arbela.

Issue: Whether a choice-of-law provision in a contract is sufficient contact with Iowa to subject a foreign party to jurisdiction in Iowa.

Holding: Where a party's sole connection to a jurisdiction is a choice-of-law provision that identifies a particular jurisdiction's law as governing interpretation of the agreement, there are insufficient contacts with the jurisdiction to support personal jurisdiction.

Analysis: The Court began by reciting well-established principles of personal jurisdiction. Most importantly, a party must have minimum contacts with a jurisdiction in order to be subject to personal jurisdiction. These contacts must be sufficient so that a party can reasonably anticipate being haled into court there.

To structure the analysis, courts have adopted a five factor analysis: "1) the nature and quality of contacts with the forum state; 2) the quantity of the contacts; 3) the relation of the cause of action

to the contacts; 4) the interest of the forum state in providing a forum for its residents; and 5) convenience of the parties."

The Court then explained that a contract, by itself, is not sufficient to establish minimum contacts. The Court explained that the district court properly disregarded the choice-of-law provision as determinative of the court's personal jurisdiction over Arbela. Relevant to the analysis are the facts that Arbela had no employees in Iowa, no offices in Iowa, never travelled to Iowa, and the alleged breach occurred outside of Iowa.

Arbela's knowledge that Fastpath is an Iowa corporation is insufficient to establish personal jurisdiction. The agreement at issue imposed no obligations on Arbela in Iowa. Moreover, all of the discussions about business between the parties occurred at conferences outside of Iowa. Based on Arbela's complete lack of any connection to Iowa, the Court affirmed the district court's conclusion that it could not exercise personal jurisdiction over Arbela.

Ostrem v. Prideco Secure Loan Fund, LP, 841 N.W.2d 882 (Iowa January 10, 2014) (Zager)

Facts: Ostrem lives in Iowa and Florida, but spends most of his time in Florida. He was in Florida at the time he entered into the contract that is the subject of this case. He wished to obtain a "no-cost" life insurance policy.

The premiums for this policy were financed by a Florida based company called Imperial. The insurance policy was purchased in Iowa.

Imperial later assigned its rights to the insurance policy, and turned over responsibility for making the premium payments, to Prideco, a California entity having no contact with Iowa.

Issue: The question relevant here is whether the jurisdictional contacts of an assignor impute to the assignee.

Holding: Where an out of state party negotiates for a clause in a contract selecting an Iowa forum, and where the assignee receives that documentation that contemplates continued performance in Iowa, then the assignee is subject to personal jurisdiction in Iowa courts.

Analysis: The Court reviewed an extensive body of case law regarding personal jurisdiction and minimum contacts. The Court noted that a corporate predecessor's contacts are imputed to its successor entity for the purpose of establishing minimum contacts. This is true in Iowa as it is in other jurisdictions.

The Court then explained that the relationship between assignor and assignee does not bear the same relationship as a corporate successor to its predecessor. There is a meaningful distinction between corporate successors and assignees, and this affects personal jurisdiction. However, this did not resolve the issue.

Upon assignment, Prideco received documents disclosing that Ostrem resided in Iowa. Moreover, Prideco must have contemplated "future consequences" of the funding agreement

with Ostrem would occur in Iowa. The documents also contained forum selection clauses, and were the subject of extensive negotiations between parties in Iowa and Imperial. The parties agreed that Iowa courts would have jurisdiction. Based on Imperials' minimum contacts, and that Prideco should have anticipated future contact with Iowa, Iowa courts can exercise personal jurisdiction over Prideco.

The Court held that "when an out-of-state party . . . insists on the right to sue someone in our courts by contract, it 'should reasonably anticipate being haled into court' in Iowa."

B. Statute of Limitation

Osmic v. Nationwide Agribusiness Ins. Co., 841 N.W.2d 853 (Iowa January 10, 2014) (Mansfield)

Facts: The plaintiff and his family were passengers in a vehicle operated by plaintiff's brother. While driving in Waterloo, another vehicle entered the highway and forced plaintiff's brother to take evasive action. Plaintiff's brother lost control of the vehicle and it flipped and ejected plaintiff's brother from the vehicle.

The negligent driver had insurance through Progressive with coverage limits of $50,000 per claim and $100,000 per occurrence. Plaintiff's brother had coverage through Nationwide Agribusiness, which included UIM coverage.

Progressive notified Nationwide that it settled with plaintiff's brother for $65,000, which left only $35,000 of coverage for plaintiff's injuries to his shoulder. After a series of demands and correspondence with Nationwide, plaintiff filed suit against Nationwide and his own auto-insurance company, Westfield. Nationwide moved for summary judgment on the grounds that by the time plaintiff filed suit against Nationwide, the two-year limitations period in the Nationwide policy had expired.

The district court denied Nationwide's motion on the grounds that plaintiff was not a party to Nationwide's policy with plaintiff's brother. The district court could see no reason why plaintiff should be bound by the same terms as plaintiff's brother.

Nationwide sought interlocutory appeal, which was granted. The case was transferred to the Court of Appeals, which issued a "lively" opinion upholding the district court's decision. The Supreme Court granted further review and reversed.

Issue: Whether a two-year limit on filing suit in an insurance policy is reasonable and applicable to a third-party beneficiary.

Holding: Where the plaintiff knew the full extent of his injuries prior to the expiration of the contractually-provided two-year limitation period for UIM claims, and the insurance policy provided no barrier to filing suit, then the two-year limitations period provided by the insurance policy was reasonable, even as applied to a third-party beneficiary.

Analysis: Underinsured motorist ("UIM") claims are contractual, and thus presumptively subject to the ten-year statute of limitations. However, the parties to the policy may agree to a shorter time so long as that period is "reasonable."

The Court concluded that there was "no question" that the contractual period in this case was reasonable. The plaintiff was represented by counsel, and made contact with the insurance carrier a year before the two-year period expired. The plaintiff could have sued for UIM benefits in that period as the insurance policy provided no bar for doing so.

The Court also noted this was not even a case where the insured failed to appreciate the scope of his injuries. The plaintiff knew the full extent of his injuries prior to the expiration of the two-year limitation period.

Turning to the question of the applicability to plaintiff, the Court concluded that third-party beneficiaries are bound by the same terms of the policy as the parties to the policy. Relying on principles of contract law, the Court explained that the rights of third-party beneficiaries are controlled by the terms of the contract.

The Court also held that Nationwide had no duty to disclose the contractual deadline to plaintiff. Relying on a prior decision, the Court first noted that there is no affirmative duty to disclose limitations deadlines to policyholders. Thus, by extension, there is no duty to disclose those deadlines to third-party beneficiaries. Any other rule would undermine the principle that a third-party beneficiary's rights under a contract do not exceed those of a party to the contract.

Finally, the Court held that Nationwide was not equitably estopped from asserting the limitations period as a defense when it failed to provide a copy of the policy to plaintiff. The Court noted that the record does not show any concealment or misrepresentation by Nationwide. Plaintiff's counsel never requested a copy of the policy, so equitable estoppel was inappropriate.

Justices Wiggins, Hecht, and Appel joined in a special concurrence written by Justice Wiggins. Justice Wiggins' asserts that it is unclear that a third-party beneficiary's rights are the same as an insured's under Iowa law.

2014 Case Update:
Employment and Civil Procedure

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2014 Case Update: Employment and Civil Procedure

Jones v. University of Iowa, 836 N.W.2d 127 (Iowa August 23, 2013) – Wrongful Termination

Facts: Phillip E. Jones, Dean of Students at the University of Iowa, was terminated from employment after allegations that he mishandled the investigation of an alleged sexual assault committed by two University of Iowa football players. The assault victim was another University of Iowa student athlete. University President Sally Mason hired a law firm to investigate the handling of the incident and to provide a report examining university policy shortcomings and the administration's use of university policy. The report indicated that Jones had not complied with the "spirit" of the policy and was critical of Jones' handling of the situation.

Mason sent Jones a termination letter due to "loss of confidence and trust in [him] based upon [his] failure to perform the duties and responsibilities of [his] position on behalf of the University of Iowa in response to the [October] 2007 sexual assault."

Holding: The court found that Mason had a legitimate reason to terminate Jones' employment at the University of Iowa. The Iowa Supreme Court also found that Mason was immune from the invasion of privacy claim and the defamation claim because she was acting within the scope of her duties as an employer in terminating Jones' employment.

Lee v. State & Polk County Clerk of Court, 844 N.W.2d 668 (Iowa March 28, 2014) – Wrongful Termination

Facts: After taking FMLA leave, Tina Lee was terminated from employment at the Polk County Clerk of Court's office. The issue on appeal was whether she was entitled to *Ex Parte Young* injunctive relief, an exception to state sovereign immunity that requires a state official to comply with federal law. Lee sued to compel the defendant to reinstate her to her previous employment position. The defendants argued that *Ex Parte Young* did not apply, and even if it did, it was not properly requested in the plaintiff's petition.

Holding: The Iowa Supreme Court disagreed with the defendants' argument that *Ex Parte Young* only applies to federal court suits. The court found that *Ex Parte Young* applies to state court suits and held that Lee was entitled to prospective injunctive relief of reinstatement and lost wages under the doctrine. The court found the plaintiff's petition sufficient to request *Ex Parte Young* relief when she requested equitable relief under FMLA.

Goodpaster v. Schwan's Home Service, Inc., No. 13-0010 (Iowa June 27, 2014) – Disabilities

Facts: Plaintiff Goodpaster was a former customer service manager for Defendant Schwan's food delivery. Goodpaster's main job duty was to deliver products to customers. In late 2008, Goodpaster was diagnosed with multiple sclerosis, which caused between five and ten "flare-ups" during working hours. Goodpaster subsequently became the Des Moines branch's lowest performing sales manager, and after several written warnings he was terminated for poor performance. Goodpaster brought suit against Schwan's for wrongful termination under the Iowa Civil Rights Act (ICRA).

Holding: Summary judgment in favor of Defendant REVERSED. Multiple sclerosis can be a "disability" within the meaning of the ICRA. The fighting issue in this case, however, was whether Goodpaster's occasion "flare-ups" constituted a substantial limitation of a major life activity. Distancing itself from federal law under the Americans with Disabilities Act, the Court observed that it had never contemplated whether a disability could not be intermittent or episodic. The Court reasoned that, "A person may be disabled under the ICRA, even during the intermissions of their symptoms, so long as their symptoms constitute a substantial limitation when active," and held that Goodpaster had generated a genuine issue of material fact regarding whether his multiple sclerosis impaired his major life activities. On the issues of whether Goodpaster was qualified or could become qualified to perform the essential functions of his job with reasonable accommodation, the Court held that fact issues remained.

Pippen v. State, No. 12-0913 (Iowa July 18, 2014) – Disparate Impact

Facts: Plaintiffs were a certified class of more than 5000 African American applicants and employees with one of Iowa's thirty-seven executive agencies. The class brought disparate impact racial discrimination claims under Title VII of the Civil Rights Act of 1964 and the Iowa Civil Rights Act. Plaintiffs alleged that the State's overall merit hiring system discriminated on the basis of race. The hiring system involved three steps: (1) the Iowa Department of Administrative Services reviewed applications for basic eligibility and referred applicants to the hiring department for the corresponding executive agency; (2) the hiring department screened applications and determined which applicants to interview; and (3) the hiring department interviewed applicants and decided to whom to offer employment. Although the Plaintiffs presented some statistical data that the overall hiring process provided minimally qualified white applicants a forty percent greater chance of being hired than minimally qualified African American applicants, the Plaintiffs did not present any statistical analysis of specific employment practices. Instead, the Plaintiffs argued that the available data was not capable of separation for analysis because documents explaining the employment decisions were missing, incomplete, or did not use objective criteria. The State's expert testified that the data was capable of separation for analysis

and presented data showing that there was no statistically significant difference between races after taking into account experience and pay grade.

Holding: Bench trial judgment in favor of the defendants AFFIRMED. A disparate impact plaintiff must prove that a particular employment practice caused the disparate impact, unless the plaintiff proves the challenged hiring process was incapable of separation for analysis. A decision-making process may be incapable of separation if: (a) the process includes ill-defined subjective criteria rather than measurable objective criteria; (b) measurable criteria are so intertwined that they cannot be separately analyzed; or (c) the employer failed to maintain adequate records. Here, the State's expert demonstrated that the plaintiffs could not rely upon the exception because the data could be separately analyzed.

Impact: The majority opinion discusses several distinctions between the Iowa Civil Rights Act (ICRA) and federal law. First, while the federal civil rights laws are narrowly construed, the ICRA is to be interpreted broadly to effectuate its purposes. Second, while the federal law had been altered by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and the subsequent passage of the Civil Rights Act of 1991 that codified earlier interpretations of the business necessity defense, Iowa has experienced no such amendment. The majority invited the plaintiffs to argue that Iowa "should embark on a different path." A concurrence noted that Iowa has a long history of using federal authorities to guide interpretation of the ICRA and that after this case, "it is at best unclear what weight litigant and district court judges or the court of appeals should give federal cases when divining how our court will construe equivalent provisions in the ICRA."

Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927 (8th Cir. July 29, 2013) – Fair Labor Standards Act

Facts: Noncitizens without employment authorization worked for the defendant restaurant, occasionally receiving less than minimum wage and without being paid overtime wages. The workers sued under the Fair Labor Standards Act (FLSA). A jury found for the workers and the district court rejected the argument that the workers, as undocumented noncitizens, lacked standing to sue. The employer appealed.

Analysis: The language of the FLSA does not indicate that Congress intended to exclude unauthorized noncitizens from its application. The FLSA is interpreted broadly and "by its plain terms protects aliens working without authorization." Precluding unauthorized noncitizens from gaining the protections of the FLSA would potentially depress the wages and working conditions of citizens and legally admitted noncitizens. "The FLSA does not allow employers to exploit any employee's immigration status or to profit from hiring unauthorized aliens in violation of federal law."

Holding: Noncitizens without employment authorization may sue under the FLSA to recover statutory damages; workers without employment authorization have standing to sue under FLSA. District court's conclusion that reference to workers' immigration status would be more substantially more prejudicial than probative UPHELD.

AuBuchon v. Geithner, 743 F.3d 638 (8th Cir. February 26, 2014) – Unlawful Retaliation

Facts: Employee sued the Secretary of the Treasury for retaliation under Title VII of the Civil Rights Act of 1964. Employee worked as an international examiner and sought promotion to the position of senior international examiner. He did not receive the promotion despite having performed work comparable to that of a senior examiner.

Employee filed a complaint with the EEOC. He then filed suit alleging that his employer, Geithner, retaliated against him over the next two years for his filing of the EEOC complaint. Employee claimed the failure to promote was a material adverse employment action and, this with other retaliatory actions, constituted a constructive discharge from employment. The district court granted summary judgment for the employer.

Analysis: Under Title VII, a failure to promote can constitute an adverse employment action. Employee alleged that the cases he worked on should have received senior positions. According to the employer, because those cases never qualified for the assignment of senior examiners, there were no positions to which the employee could have been promoted.

Employee claimed that he was subject to other unlawful retaliatory acts such as allegations of sexual harassment and that these acts were materially adverse employment actions. The allegations were never noted in the employee's file and the employee was never threatened or disciplined due to those allegations, thus they did not cause "sufficient injury or other employment-related harm."

Holding: While a failure to promote can constitute an adverse employment action, employer need not create a position to which to promote an employee. The failure to promote employee did not amount to material adverse employment action; allegations of sexual harassment that did not harm the employee were not retaliatory acts.

2014 Case Update: Employment and Civil Procedure

Madden v. Lumber One Home Center, Inc., 745 F.3d 899 (8th Cir. March 17, 2014) – Overtime Pay

Facts: Employer classified several employees as executive employees who were exempt from overtime pay under the Fair Labor Standards Act (FLSA). The employees worked in shipping and receiving, in the lumberyard, did data entry, and loaded trucks. The Department of Labor investigated the employer and notified the employees that the employer may have wrongfully withheld overtime pay. Employees sued to recover overtime wages, claiming that the employer had misclassified them as exempt employees.

Analysis: The burden to prove that an employee is exempt from overtime pay rests with the employer. Executive employees are those who are compensated by salary, primarily responsible for management of the business, direct the work of others, and have the authority to hire or fire employees. The employer provided information that it solicited informal recommendations from its employees on personnel decisions in order to meet the hiring and firing element. The employer also claimed that because the business was not hiring much, there was not much opportunity to participate in personnel decisions. The court responded that the FLSA exemptions are based on "actual job functions, not intended responsibilities."

Holding: Employer failed to establish that all of the employees it had classified as executives had the hiring and firing power necessary for the classification.

Petroski v. H & R Block Enterprises, LLC, 750 F.3d 976 (8th Cir. May 2, 2014) – Compensation for Training Time

Facts: Plaintiffs were tax professionals who sued a tax preparation service provider. The plaintiffs worked for the provider during tax season, or four months of the year. Each year when tax professionals returned for rehire, the provider required them to complete training courses offered by the provider. The provider charged a fee for the courses and did not compensate tax professionals for the time they spent meeting the training requirement. The plaintiffs filed a claim under the Fair Labor Standards Act (FLSA) and the district court granted summary judgment in favor of the tax provider.

Analysis: The FLSA mandates that employees must be paid at least minimum wage for the hours they work. "Employees" are "individuals employed by an employer" and "employ" means "suffer or permit to work." At the time the plaintiffs were reapplying for work with the provider, they were doing no work for the employer. They were not "suffered or permitted" to work because they had to resubmit job applications and go through the interview process. After hiring and during the training time, they were not employees under the FLSA—they were trainees.

Holding: The Eighth Circuit held that tax professionals were not "employees" for purposes of the FLSA when they completed rehire training.

Sandifer v. U.S. Steel Corp., 134 S.Ct. 870 (January 27, 2014) – Donning / Doffing

Facts: Steelworkers sued their employer for backpay for time spent putting on and taking off protective gear that employer required them to wear for work. Due to the many hazards of the steel working profession, workers must wear several types of protective gear. The aggregate amount of time putting on this gear at the beginning of the day and removing it at the end is quite large. The district court granted summary judgment in favor of the employer and the Seventh Circuit affirmed.

Analysis: The Fair Labor Standards Act provides that whether time spent changing clothes is compensable is to be decided through collective bargaining. Employees argued that time spent putting on and removing protective gear does not qualify as "changing clothes." Using the common meaning of the words, the Court found that donning and doffing protective gear constitutes "changing clothes."

Holding: The Court held that time spent putting on and removing protective gear was "changing clothes" under the FLSA meaning that parties can collectively bargain over whether such time at the beginning and end of the workday is compensable.

Fifth Third Bancorp v. Dudenhoeffer, No. 12-751, 2014 WL 2864481 (U.S. June 25, 2014)

Facts: Employer maintained a retirement savings plan for its employees. Former employees brought suit against employer as fiduciary of its employee stock ownership plan. They alleged that employer breached fiduciary duty of prudence under the Employee Retirement Income Security Act. Employees claimed that employer should have known its stock price was inflated and overly risky.

Analysis: ERISA imposes duty of prudence on pension plan fiduciaries. However, Congress acknowledges "that ESOPs are designed to invest primarily in the stock of the participants' employer," which means that they are not diversified. Employer claimed that it was entitled to a presumption of prudence because the investments were in employer stock.

Holding: 1) ESOP fiduciaries were not entitled to presumption of prudence through investments in employer stock; but 2) ERISA fiduciaries could prudently rely on market price of stock as assessment of its value in light of all public information; and 3) claim for breach of duty of prudence based on inside information was required to allege alternative action that fiduciary could have taken consistent with securities laws, which prudent fiduciary in same circumstances would not have viewed as more likely to harm plan than to help it.

N.L.R.B. v. Noel Canning, No. 12-1281, 2014 WL 2882090 (U.S. June 26, 2014)

Facts: The President appointed three of five members of the National Labor Relations Board during a three-day period between two *pro forma* sessions of Congress. A soda distributor, subject to an NLRB order that it had unlawfully refused to execute a collective bargaining agreement, petitioned the D.C. Circuit to set aside the order. The distributor argued that the order was invalid because three of the Board members' appointments were invalid. The D.C. Circuit held that the appointments were not valid under the Recess Appointments Clause.

Analysis: The Recess Appointments Clause is a subsidiary mode of appointing officers of the United States. The Clause allows the President to appoint officers during recesses but is not to be used to routinely circumvent the Senate confirmation process. The Clause allows the President to appoint during "the recess of the Senate," which includes inter- and intra- session breaks of "substantial length." Three days is not a period of substantial length.

Holding: The Court held that the recess appointments were invalid within the meaning of the Recess Appointments Clause and the order in question issued by the Board was also invalid.

Harris v. Quinn, No. 11-681, 2014 WL 2921708 (U.S. June 30, 2014)

Facts: Medicaid funds state-run programs to provide at-home care to individuals who are unable to live in their homes without assistance. Section 6 of the Illinois Public Labor Relations Act allows state employees to join unions and collectively bargain for terms of employment. The Act also provides that members of a bargaining unit who choose not to join the union are still required to pay a fee to the union. Personal assistants sought an injunction against the enforcement of the fee requirement and a declaratory judgment that the Act violated the First Amendment by requiring them to monetarily support a union that they chose not to join. The district court dismissed and the Seventh Circuit affirmed.

Analysis: The Seventh Circuit relied upon the Supreme Court decision in *Abood v. Detroit Board of Education* that allowed states to compel non-union state employees to pay a fee to support collective bargaining union work. *Abood* was based on "the desirability of labor peace and the problem of free ridership." Because unions must represent all employees irrespective of union membership, the Court allowed the compelling of fees from non-union members to prevent employees from obtaining the benefits without contributing to union efforts. Personal assistants are public employees with respect only to collective bargaining and Illinois withholds from personal assistants many of the benefits of being state employees. The bargaining that may be performed on their behalf is thus limited. The Court found that the provision allowing the state to compel fees from personal assistants was compelled speech, forcing them to support a party with whom they had chosen not to be associated. The state's claims that this promoted

"labor peace" and promoted the welfare of personal assistants were not "compelling government interests" and as such, violated the First Amendment.

Holding: The decision in *Abood v. Detroit Board of Education*, allowing states to compel state employees who opt out of unions to pay agency fees to support union work related to collective bargaining does not include personal assistants; and, Illinois statute requiring non-union home-care personal assistants to pay fees violated the First Amendment.

Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 WL 2921709 (U.S. June 30, 2014)

Facts: The Patient Protection and Affordable Care Act requires employers' heath plans to cover "preventive care and screenings" for women. The Act does not specify what qualifies as "preventive care" but allows for the Department of Health and Human Services to decide. For-profit corporations brought action against the Secretary of Health and Human Services seeking an injunction to prevent the enforcement of the preventive services coverage mandate, alleging that such enforcement violated constitutional and statutory protections of the free exercise of religion.

Analysis: The Religious Freedom Restoration Act of 1993 prohibits the "Government [from] substantially burden[ing] a person's exercise of religion" unless the government can show that such burden furthers a compelling government interest and is the least restrictive means of furthering that government interest. The corporate owners have Christian beliefs that life begins at conception and that facilitating access to contraception would violate those beliefs. Although they assert their rights on behalf of their businesses, "protecting the free exercise rights of closely held corporations protects the religious liberty of the humans who own and control them." RFRA was intended by Congress to broadly protect religious freedom and nothing in the Act prevents its application to for-profit corporations.

Holding: The Court held that: 1) "person," within meaning of RFRA's protection includes for-profit corporations; 2) the HHS contraceptives mandate, as applied to for-profit closely held corporations, substantially burdened the exercise of religion; and 3) the HHS contraceptives mandate did not satisfy RFRA's least-restrictive-means requirement.

Smith v. Iowa State University of Science & Technology, No. 12-1182 (Iowa July 18, 2014)

Facts: Plaintiff Smith was a Communication Specialist for the ISU College of Engineering. Over nearly six years, Plaintiff experienced numerous conflicts with the department director Pamela Reinig, a co-worker Eric Dieterle, and the College Dean. In July 2002, Reinig promised Smith a promotion but failed to submit the necessary paperwork for three years. In late 2006, Reinig hired Dieterle despite numerous violations of hiring policy and installed Dieterle as Smith's supervisor.

Smith challenged the hire and Reinig issued a verbal warning. Smith then wrote a grievance to the Dean in which Smith complained of Reinig's conduct and also disclosed his belief that Reinig was not properly billing for some work performed by the department. After Reinig learned of the grievance, she began reporting to the head of campus police her concerns that Smith would become violent in the workplace. Meanwhile, Reinig altered Smith's job duties and changed the funding of his position to create a risk that Smith's position would be eliminated. Reinig resigned after an internal audit determined she had personally received funds owed to the department. Smith filed additional grievances, however, alleging that Dieterle and others had made false accusations that Smith had made threats of violence. When the College of Engineering experienced budget cuts several years later, the department was reorganized and Smith was not rehired. Smith filed suit, and a Story County jury found for Smith on claims for intentional infliction of emotional distress and whisteblower unlawful retaliation.

Holding: Jury verdict of $500,000 for intentional infliction of emotional distress UPHELD, $110,732.22 in reputational harm damages UPHELD, and $634,027.40 in loss of income VACATED. The Court held that the IIED claim was not subject to the State's immunity under the Iowa Tort Claims Act because Smith had alleged conduct beyond a mere defamation claim, including Reinig's failure to submit Smith for a promotion and the changes Reinig made to Smith's job functions. Reinig's conduct was sufficiently outrageous and constituted "unremitting psychological warfare against Smith" as a way to "cover up what basically amounted to her theft from ISU." Under his whistleblower claim, Smith failed to establish a causal connection between his grievance reports and his eventually job loss, although the reputational harm damages would stand because the defendants failed to preserve error whether the statute permitted such damages.

Phillips v. Chicago Central & Pacific Railroad Co., No. 13-0729 (Iowa June 27, 2014)

Facts: Plaintiff was a former employee of the defendant railroad who was awarded a $188,000 judgment under the Federal Employers' Liability Act for the railroad's negligence in failing to provide a safe workplace. The jury had been instructed to consider whether Plaintiff was entitled to recover for medical expenses, lost wages, future earning capacity, loss of bodily functions, and pain and suffering, but the jury returned only a general verdict. The railroad paid the judgment but withheld $10,546.92 for payment to the IRS under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§ 3201-3241. Plaintiff refused to sign a satisfaction of judgment and argued that the railroad should not have withheld any amount for tax purposes. The district court concluded that payments for time lost are taxable under the RRTA and that a general verdict must be considered pay for time lost in its entirety unless part of the award is specifically allocated to other damage classes.

Holding: AFFIRMED. The RRTA funds the Railroad Retirement Act, which awards pensions and benefits to the railroad industry in a manner similar to the Social Security Act. Although the RRTA's definition of "compensation" does not include payments for time lost, the Railroad Retirement Act explicitly included time lost, IRS regulations required taxation of time lost payments, and the RRTA's legislative history did not support that it had intended to exclude taxation on time lost payments. Further, the RRTA should be interpreted consist with the Railroad Retirement Act, which expressly provides that personal injury awards that include damages for time lost will be deemed to be taxable as time lost in their entirety unless the award has been allocated otherwise. Because the jury had been instructed on damages for time lost, the award was presumed to contain some damages for time lost and was therefore taxable under the RRTA in its entirety.

Civil Procedure

Ostrem v. Prideco Secure Loan Fund, LP, 841 N.W.2d 882 (Iowa 2014) - Personal Jurisdiction

Issue: Whether for purposes of personal jurisdiction a contractual assignor's contacts with the State of Iowa can be imputed to its assignee for claims relating to the contract?

Facts: Life insurance policy holder filed petition for declaratory judgment against assignee of insurance premium that financed arrangement on personal guaranty. Policy holder allegedly took responsibility for the loan that financed premiums, claiming that the guaranty was not a valid contract, that assignee was precluded from enforcing guaranty, and that guaranty was procured through conspiracy to defraud. District court granted assignee's motion to dismiss for lack of personal jurisdiction. Policy holder appealed.

Holding: (1) Assignee is not liable as corporate successor to assignor, precluding assignor's jurisdictional contacts from being mechanically imputed to assignee to permit exercise of personal jurisdiction over assignee in policy holder's petition; (2) assignee assumed assignor's contacts with forum state based on contractual relationships it agreed to accept, permitting exercise of personal jurisdiction over assignee; (3) assertion of personal jurisdiction in forum state over assignee comports with fair play and substantial justice because the state had a legitimate interest in adjudicating dispute between policy holder and assignee and exercising personal jurisdiction over assignee provided effective and convenient means of relief from parties named in policy holder's petition.

Bank of America, N.A. v. Schulte, 843 N.W.2d 876 (Iowa 2014) - Vacating Judgment

Issue: Whether an action to vacate a foreclosure decree, for the purpose of the foreclosure statute's requirement that a decree be rescinded before a mortgagee's

rights become unenforceable by operation of the statute of limitations, must be brought within the two-year limitations period for execution of a judgment on a real estate mortgage, or within one year, as required by the Iowa Rules of Civil Procedure § 1.1013 for vacating a final judgment?

Facts: On June 29, 2009, Schulte executed a promissory note for $228,759 in favor of Liberty Bank. Schulte executed a mortgage on real property in favor of Mortgage Electronic Registration Systems, Inc., Liberty Bank's nominee. The note and mortgage were later assigned to BAC Home Loans Servicing, L.P. (BAC) In May 2010, BAC filed a foreclosure petition for Schulte's default. On August 17, 2010, the district court entered a decree of foreclosure. For reasons unknown, the sheriff sale scheduled for February 2011 did not occur. In March 2012, the court scheduled another sheriff sale for May 2012. Again, for reasons unknown, this sheriff sale did not occur. On July 24, 2012, Bank of America filed a "Notice of Recession of Foreclosure." On July 26, 2012, the district court granted the motion and entered an order setting aside the foreclosure decree. On August 10, Schulte filed a motion requesting the court reconsider and amend its July 26th order setting aside the foreclosure decree in part because Bank of America's motion was not filed within one year of the entry of the judgment as required by Iowa Rules of Civil Procedure 1.1012 and 1.1013, so it was time barred.

Holding: An action to vacate a foreclosure decree must be brought within the two-year limitations period for execution of a judgment on a real estate mortgage.

Schaefer v. Putnam, 841 N.W.2d 68 (Iowa 2013) - Compulsory Counterclaims

Issue: Whether a creditor's foreclosure action is a compulsory counterclaim where the debtor brings an action to declare the mortgage invalid?

Facts: Mortgagors brought action against their sons, their former attorney, farm creditor, and others regarding validity of mortgages issued by farm creditor. Farm creditor brought counterclaim to foreclosure the mortgages without first obtaining a mediation release. The district court foreclosed the mortgages and denied mortgagors' motion to quash or stay the sheriff's sale. Mortgagors appealed. The Court of Appeals reversed. Mortgagors sought further review.

Holding: Farm creditor's counterclaim seeking to foreclose on its mortgages constituted a compulsory counterclaim, where mortgagors sought to have mortgages declared unenforceable due to alleged breach of fiduciary duty, foreclosure claim was mature as mortgagors were in default on the mortgage and promissory note, foreclosure action was not pending at the time the mortgagors filed their petition, foreclosure claim was held by farm creditor against mortgagors, and the foreclosure claim did not require the presence of parties over whom the trial court could not acquire jurisdiction.

Torts/Negligence Case Law Update

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2014 IDCA CASE LAW UPDATE: Torts, Malpractice, and Insurance

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IOWA COURT OF APPEALS

TORT

Floyd Valley Grain, LLC v. CTB, Inc., No. 3-451 / 12-1832, July 10, 2013

FACTS: Beard Industries, Inc. ("Beard") sold a grain dryer to Floyd Valley Grain ("Floyd") in 1998. Beard was an Indiana company. In 2002, it sold its assets to CTB, Inc. ("CTB"). CTB continued to manufacture dryers in the same factory that Beard used. Beard's owners worked for CTB for one year after they sold the company; however, none of the previous owners were officers of the company or board members. CTB assumed certain operating liabilities; however, it did not assume product liability claims relating to products sold or manufactured by Beard prior to closing. In March 2002, Beard wound-up its business. In 2009, a grain dryer that Beard sold to Floyd caught fire and caused damage.

Floyd sued both Beard and CTB for failure to warn, design defect, manufacturing defect, and breach of implied warranty. The district court granted CTB's motion for summary judgment, which stated that under Iowa law, a corporation purchasing the assets of another corporation does not assume liability for the transferring corporation's debts and liabilities unless one of four exceptions applies. CTB argued that none of the exceptions applied in the case, and Floyd conceded to that point. However, Floyd countered and moved for partial motion for summary judgment by arguing that Indiana law should apply, and both Indiana and Iowa law recognize the "product line" exception to the general rule of non-liability. The district court denied its partial motion for summary judgment, and Floyd appealed. The product line exception states that "a party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired."

ISSUES: Do Iowa courts recognize the product line exception?

HOLDINGS: No. The Iowa Supreme Court in *Pancratz v. Monsanto Co.*, 547 N.W.2d 198 (Iowa 1996) declined to adopt the exception.

Veatch v. City of Waverly and Jason Leonard, No. 3-845 / 13-0417, November 6, 2013

FACTS: Maxine Veatch visited her mother at Bartels Nursing Home in Waverly and was seen shoving her mother into a wheelchair. After the staff found bruises on Veatch's mother, they notified Officer Leonard of the Waverly Police Department, who investigated the matter. Leonard spoke with the witnesses and Bartels staff, and the next day, he contacted Veatch and asked her to meet him at the Waverly Law Center to discuss the matter. During their conversation, Veatch asked for an attorney, at which point Leonard left the room to retrieve a complaint form. When he returned, he placed Veatch under arrest for assault. The State of Iowa charged

her with simple misdemeanor assault, and after a jury trial, the jury returned a verdict of not guilty.

Veatch then filed two suits, one in federal district court and one in state district court. She sued the City and Leonard for false imprisonment, negligence, and malicious prosecution. The federal case eventually went to the Eighth Circuit Court of Appeals to determine whether Leonard had probable cause to arrest Veatch. It decided that he did. Leonard and the City then filed a motion for summary judgment in the state action based on issue preclusion, claiming that the Eighth Circuit decided Leonard had probable cause, and therefore, Veatch was precluded from continuing the action in state court. The state district court granted their motion, stating that she was precluded from bringing her claim due to the Eighth Circuit's decision. Veatch appealed, and raised several issues. The Court of Appeals affirmed the district court's granting of summary judgment on the malicious prosecution, negligence, and punitive damages claims; however, it engaged in a lengthy discussion and remanded Veatch's false imprisonment claim.

ISSUES:

1) Was Veatch precluded from raising the issue of probable cause, despite Iowa Code § 804.7[1] governing when a detention is lawful whether or not an arresting officer has a warrant?

2) Under the second prong of Iowa's 2-prong test[2] for false imprisonment, is probable cause alone sufficient for a warrantless arrest for a public offense?

3) Pursuant to Sections 807.4(1), (2), and (3), must an arresting officer have reasonable grounds for believing the offense has been committed at the time of the arrest?

HOLDINGS:

1) No. Veatch claimed that even though the Eighth Circuit and federal district court found probable cause, it did not decide whether Leonard had the authority to detain her under Iowa Code § 804.7, which governs when detention is lawful whether or not an arresting officer has a warrant. The Iowa Court of Appeals agreed with Veatch that although the 8th Circuit held that Leonard had probably cause, Veatch was not precluded

[1] Iowa Code § 807.4 reads, in part:

> A peace officer may make an arrest in obedience to a warrant delivered to the peace officer; and without a warrant:
>
> 1. For a public offense committed or attempted in the peace officer's presence.
> 2. Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it.
> 3. Where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it.

[2] To prove false imprisonment, one must show 1) detention or restraint against one's will; and 2) unlawfulness of the detention or restraint.

by the decision because it did not apply Section 804.7 to the facts of this case.

2) No. Veatch claimed that her detention was unlawful not because Leonard lacked probable cause, but because it violated Iowa Code § 804.7(2), which states that a police officer may make a warrantless arrest "Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it." Specifically, she argued whether a public offense had "in fact" been committed. The Court of Appeals held that Section 804.7(2) requires there to be no genuine issue of material fact that the offense was committed. This can be shown by 1) the officer having probable cause that a public offense has in fact been committed by reliance on something more than third party reports; and 2) the officer having "reasonable grounds for believing the person to be arrested committed it" pursuant to Section 804.7(2).

3) Yes. Pursuant to all subsections of Section 807.4, the officer must have reasonable grounds for believing the offense has been committed and these reasonable grounds and the officer's belief must exist at the time of the arrest. Thus, a newly discovered crime cannot justify the arrest after-the-fact.

Elick v. Garrett, No. 3-840 / 13-0285, November 6, 2013

FACTS: Elick was rear-ended by a garbage truck owned by Environmental Services, Inc. (ESI), driven by ESI's employee, Jerry Garrett. Elick suffered injuries and she and her family sued defendants. A jury returned a jury verdict in favor of the Elicks, granting her damages for, among other things, future loss of body and function. Defendants moved for a new trial, claiming that plaintiff did not suffer loss of function of body, and that the jury's award for such was excessive. The district court denied the motion, and defendants appealed.

ISSUES: 1) Did the district court err in allowing evidence concerning 1) the types of vehicles, 2) the empty and loaded weight of the truck, 3) the speeds of the vehicles, 4) the vehicles' post-impact points of rest, and 5) the damage sustained by Elick's SUV?

2) Was there sufficient evidence to support a jury's verdict for future loss of function of body sustained by Elick?

HOLDINGS: 1) No. Defendants argued that any evidence of the force of the collision is irrelevant and unfairly prejudicial because he disputed the severity of Elick's neck injury. However, citing to the Supreme Court's decision in *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565 (Iowa 1997), the Court of Appeals noted that the evidence was relevant because it allows the jury to determine how severe the accident was.

2) Yes. The Court of Appeals affirmed the $150,000 jury verdict for loss of use of function of body. Elick underwent a permanent fusion of cervical vertebrae, held in place by a titanium plate and three screws. She was restricted physically, had to use special bedding, and affected her work as a 911 operator. Further, the Court of Appeals rejected defendants' argument that the jury award was duplicative of the jury's award for future pain and suffering.

Lancaster v. Craven, No. 3-945 / 13-0191, November 6, 2013

FACTS: Brian Craven loaned his son a vehicle. Craven's son then later allowed his friend, Megan, to borrow the vehicle. Megan struck Lancaster's vehicle and Lancaster was injured. He sued. The accident was Megan's fault. Craven filed a motion for summary judgment, denying that he authorized anyone but his son to borrow the vehicle, and thus, he was not liable pursuant to Iowa Code § 321.493(2)(a). He provided an affidavit stating that he allowed his son to drive his car, but told him not to allow others to drive it. Lancaster resisted, stating that there was a genuine issue of material fact as to the issue of consent. The district court granted Craven's motion, finding that the son's testimony that it was the long-standing rule in their family not to let others drive their cars was sufficient to show that the son did not let Megan borrow the car. Lancaster appealed.

ISSUE: Was there a genuine issue of material fact as to whether Megan was a consented driver?

HOLDING: Yes. The Court of Appeals reversed the district court and remanded, finding that the Craven's deposition testimony contradicted his affidavit, creating a genuine issue of material fact. In his deposition, contrary to his affidavit, Craven testified that that he did not tell his son to not allow Megan to drive the car. This was not sufficient to overcome the weak presumption that Craven consented to Megan's operation of the vehicle.

Barrett v. Swank and Aeropostale, Inc., No. 3-917 / 13-0493, December 18, 2013

FACTS: Plaintiff Barrett was driving his motorcycle on a frontage road entering Jordan Creek Mall, and Defendant Swank was stopped a stop sign at a three-way stop at the same intersection. Swank looked both directions and then drove through the intersection. She saw Barrett passing through and stopped. Barrett swerved to avoid Swank, briefly regained control, and then set his motorcycle down on its side. He suffered physical injuries as a result. Barrett sued Swank and Aeropostale, alleging negligence for failing to keep a proper lookout and failing to yield the right-of-way. Barrett also alleged that Swank was operating her car in the course of her employment at Aeropostale, a clothing store. Barrett requested a sudden emergency instruction at the close of evidence, but the district court denied it. The jury returned a verdict for Swank, and Barrett moved the district court for a

judgment notwithstanding the verdict and a new trial, claiming that all the evidence indicated that Swank was negligent in failing to keep a proper lookout and failing to yield the right-of-way. The court denied both of Barrett's motions.

ISSUES: 1) Did the district court err in denying plaintiff's motion for a directed verdict and new trial?

2) Did the district court err in declining to instruct the jury on sudden emergency?

HOLDING: 1) No. The evidence indicated that defendant did not breach her duty to keep a proper lookout nor did she fail to yield. She looked forward, right, and left before proceeding through the intersection. The circumstances did not require her to be aware of vehicles—such as plaintiff's—that were behind her, to the side, and another road. Defendant applied her brakes as soon she saw plaintiff and stopped well before entering plaintiff's path. A reasonable jury could conclude that plaintiff did not breach her duty, and thus, she was not negligent. Furthermore, a reasonable jury could have determined that defendant properly yielded to plaintiff, based on defendant's testimony. A directed verdict or new trial is not necessary if two alternative and reasonable possibilities exist.

2) No. A sudden stop in a parking lot due to pedestrians, or a sudden stop in traffic on a busy roadway are common and foreseeable occurrences. Thus, the sudden emergency doctrine does not apply in such accidents. Likewise, a driver pulling out into traffic at a stop sign in a busy mall parking lot is foreseeable. For fear of over-extending the sudden emergency doctrine, the Court found that it had no application to this case.

Luana Savings Bank v. Pro-Build Holdings, No. 3-1052 / 13-0060, January 9, 2014

FACTS: Luana Savings Bank secured a line of credit to developers to purchase farmland to develop. The developers contracted with Pro-Build to build apartment buildings on the land. The developer then assigned its payments to another developer. The second developer defaulted and eventually transferred the property with the apartment buildings to Luana to avoid foreclosure. Luana found mold and other problems with the apartments and sued Pro-Build for negligence, breach of implied warranty of workmanlike construction, and breach of contract. The district court granted Pro-Build's motion for summary judgment for all claims except the breach of contract claim. Luana then sought interlocutory appeal to determine whether there was a genuine issue of material fact that precludes summary judgment. The appeal was transferred to the Court of Appeals.

ISSUE: Does the implied warranty of workmanlike construction extend to lenders?

HOLDING: No. *Kirk v. Ridgway*, 373 N.W.2d 491 (Iowa 1985) and *Speight v. Walters Dev. Co.*, 744 N.W.2d 108 (Iowa 2008) allow purchasers and subsequent purchasers of a home to bring a claim of breach of implied warranty of workmanlike construction. However, the Iowa Supreme Court has not extended such right to lenders.

Rochford and Rochford v. G.K. Development, Inc., No. 3-1117 / 13-0691, February 5, 2014

FACTS: Plaintiffs Karen and Jude Rochford sued G.K. Development ("GK"), the owners of College Square Mall in Cedar Falls after Karen fell on an icy sidewalk outside the mall. GK filed a motion for summary judgment claiming that it was entitled to await the end of the storm before it attempted to remove the ice from the sidewalk. The district court agreed and granted the motion. The Rochfords appealed stating that there was a fact issue as to whether the weather was sufficiently a "storm" that would excuse GK from removing the ice pursuant to the continuing storm doctrine.

ISSUE: Did the district court err in finding that the weather conditions were severe enough to excuse GK from not removing the ice from the sidewalk pursuant to the continuing storm doctrine?

HOLDING: No. The Court of Appeals held that the continuing storm doctrine "is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement winter weather." Plaintiffs fell around 4:00pm, and on the day of the fall, freezing rain was falling and continued falling until around 10:30pm when the temperature rose above freezing. Thus, GK was not yet under a duty to take steps to remove the ice. The Court found the "weather event" was sufficient to invoke the continuing storm doctrine and obtain summary judgment.

Smith v. Wright and Angus Indus., Inc., No. 14-0752, May 29, 2014

FACTS: Wright and Smith were both driving on Highway 18, a 4-lane highway. Wright attempted to pass Smith on Smith's left. As Wright drove past Smith in the left lane, he checked his blind spot and just before he switched into the right lane, he hit a deer. Wright's vehicle spun around and stopped on the doorway, and Smith's vehicle veered into the south ditch and rolled several times. Smith sued Wright for negligence. Wright answered and asserted the sudden emergency defense. Smith filed a motion in limine objecting to the sudden emergency defense, which the trial court denied. At trial, both parties put on testimony from reconstruction experts. Smith objected to Wright's reconstruction expert's testimony because he allegedly testified to legal conclusions. Wright's expert testified stated that Wright was faced with a "sudden emergency," acted "as a reasonably driver," and testified to whether Wright had "any fault." Smith objected to this testimony; however, the district court admitted the testimony anyway. The jury returned a verdict in favor of Wright and answered special verdict questions: 1) Was the defendant at fault? Answer: No; 2) Have the defendants proven their legal defense of sudden emergency? Answer: Yes. The court denied Smith's motion for a new trial, and Smith appealed.

ISSUES: 1) Did the district court improperly admit Wright's expert's testimony?

2) Did the testimony prejudice Smith?

3) Did the court err in granting Wright the sudden emergency instruction?

HOLDINGS: 1) Yes. The Court of Appeals found that the expert's testimony was filled with legal opinions and conclusions. Smith argued that those terms were used only in their ordinary meaning. However, the Court disagreed and found that the expert's opinions were on legal standards as applied to the facts of the collision in this case, and thus, impermissible.

2) Yes. The Court held that the jury may have relied on the expert's opinion that Wright was faced with a "sudden emergency" not of his own making and "there was no evidence" that Wright acted "unreasonably." The jury may have also relied on the expert's testimony that Wright had "no fault" with regard to his driving actions. Therefore, the Court held that Smith was prejudiced by the improper opinion testimony.

3) No. Wright was checking his rearview mirror and blind pot before returning to the right lane after passing Smith, before seeing the deer. Smith never saw the deer, and neither did the key witness, who was behind both Wright and Smith. The Court found that a reasonable jury could conclude the deer was not observable in advance and unpredictably started across the highway while Wright was checking his clearance. Therefore, the district court did not err by giving the sudden emergency instruction.

Actually Clean Floor & Furniture, L.L.C. v. Action Restoration, Inc., No. 13-1811, July 16, 2014

FACTS: Actually Clean (Actually) leased equipment to Action Restoration (Action), and the equipment was subsequently damaged or lost in a semi-truck accident. Action's insurance company compensated Actually for the damaged or lost equipment. Action claimed there was not an oral promise to pay loss of use damages related to the equipment. Actually sued Action, *inter alia*, loss of use of damages and breach of contract for breaching an oral promise to pay loss of use damages. Action filed a motion for partial summary judgment, stating, *inter alia*, that Actually was not entitled to loss of use damages because Action's insurance company paid for the damaged equipment and Actually was unable to provide any proof in discovery that it would have rented out the equipment during the time the equipment was unavailable. It also argued that the timeframe that it allegedly could not use the equipment was too vague. The district court agreed and granted Action's motion. Actually appealed.

ISSUE: Did the district court err in granting Action's partial motion for summary judgment on the basis that 1) Actually was unable provide proof in discovery that it would

have rented out the equipment; and 2) for what specific timeframe Actually would have rented out such equipment?

HOLDING: Yes. The Iowa Court of Appeals held that there was a genuine issue of material fact as to whether Actually suffered loss of use damages. It held that a plaintiff need not prove the property would have been used in order to recover damages for loss of use. The mere fact that it was unable to possess it is sufficient for loss of use damages. Further, it found a genuine issue of material fact as to the timeframe of when the loss of use occurred. In its answers interrogatories, Actually stated that it was unable to use the equipment from the date of the accident until the insurance company issued a check, which the plaintiff could have then used to buy new equipment.

INSURANCE

Amish Connection, Inc. v. State Farm Fire and Casualty Co., No. 4-047 / 13-0672, March 12, 2014

FACTS: Amish Connection leased space in Crossroads Mall in Waterloo. One night, it rained heavily in Waterloo, causing a drain pipe above Amish's ceiling to burst, flooding portions of Amish' storage space and causing damage to the unit and the property within. Approximately 1-2 days after the incident, Amish contacted State Farm, who held Amish's business policy. State Farm denied coverage because it contended that Amish's loss was excluded because the damage was caused by "rain," which was specifically excluded from coverage in the policy. Amish sued State Farm for breach of contract. The district court granted State Farm's motion to summary judgment. State Farm argued that the property damage was caused by rain and thus fell within the policy exclusion. Amish appealed.

ISSUE: Did the district court err in finding that the property damage was in fact caused by "rain"?

HOLDING: Yes. Applying the rules of insurance contract interpretation, the Court of Appeals held that "rain" did not mean "rainwater," as State Farm argued. Rain is "water falling from the sky." Here, the rain was not what caused the property damage; it was the bursting of a drain pipe. Thus, the rain exclusion in the policy was not applicable to these facts.

IOWA SUPREME COURT

TORT

Hagenow v. Schmidt, 834 N.W.2d 661 (Iowa 2014), February 7, 2014.

FACTS: Schmidt rear-ended Mr. Hagenow. Mr. and Mrs. Hagenow sued Schmidt. Schmidt answered and alleged the sudden emergency defense, claiming that while she was driving, she suffered from an acute ischemic infarct (a stroke), causing her to lose vision. The neurologist that read Schmidt's CT scan after the accident testified to those facts. The district court submitted a sudden emergency instruction to the jury, modeled after Iowa Civil Jury Instruction 600.74. The jury returned a verdict in Schmidt's favor, stating that she was not at fault. The Hagenows moved for a JNOV, stating that Schmidt failed to prove that she suffered a stroke prior to the collision, and that the stroke impaired her. The district court denied the motion, and the Hagenows appealed on the basis that there was not sufficient evidence to warrant the sudden emergency instruction. The case was transferred to the Court of Appeals, which reversed the district court. The Court of Appeals found that although the instruction was supported by evidence, the sudden emergency defense does not apply to situations where the defendant cannot recognize the call for "immediate action or a sudden or unexpected occasion for action." Because Schmidt was not able to see at the time of the accident, she could not recognize that there was a call for sudden action. Therefore, the instruction was not supported by evidence. Schmidt sought further review, *inter alia*, on the issue of whether the district court erred in instructing the jury on the sudden emergency defense.

ISSUE: Did the district court err in instructing the jury on the sudden emergency defense when the evidence supported the fact that Schmidt lost consciousness prior to the accident?

HOLDING: No. Upon deciding that the neurologist's testimony was in fact properly admitted, the Court found that the district court properly instructed the jury on sudden emergency. Referring to—but not adopting—Section 11(b) of the disability section of the Restatement (Third) of Torts: Liability for Physical and Emotion Harm, the Court held that the sudden emergency defense "does not require advanced awareness or a rapid response." By instructing the jury to determine whether Schmidt was faced with an "unforeseen combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action," the district court did not prejudice the Hagenows, and the Hagenows did not provide any proof that the omission of the wording would have led to a different verdict. Therefore, the Court vacated the decision of the Court of Appeals, and affirmed the district court's judgment.

Garr v. City of Ottumwa, 846 N.W.2d 865 (Iowa 2014), May 2, 2014, Rehearing denied June 4, 2014.

FACTS: The Garrs bought a home in the City of Ottumwa (City) in 1997. In 1980, the City had declared the Garr home to be within a 100-year floodplain. The home was located about 64 feet from Little Cedar Creek (Creek). The Creek also flows behind the Quail Creek Addition (Addition), which the City approved the development of in 1995, 2 years before the Garrs bought their home. The Addition is by a golf course.

Water from the Addition and golf course drain into the Creek. Water from the Garrs' property also drains into the same creek. According to the Garrs, from 1997 to 2002, water rose above the Creek banks a couple of times each year, and some water would occasionally trickle into the basement. In 2002, they waterproofed and remodeled their basements. Two years after that, the flooding from the Creek would get worse, and water eventually permeated the ground and put pressure on the basement wall.

The Garrs' home suffered severe flooding over the course of several years. The Garrs estimated that between 2004 and 2010 water was in their basement at least 100 times. In 2008, a flood caused $5,000 of damage.

Larry Seals, the public works director, went to the Garr property in 2010. He examined the area to determine whether Mr. Garr's suggestion to straighten and clear the Creek would be a viable option. Seals noted that this would only increase the peak water level and cause more flooding because the water would reach a culvert under the highway that was downstream quicker. Seals also stated that he would have to ask the Iowa Department of Transportations (DOT) to clear the culvert because the City did not have the authority to do so.

In August 2010, a flood caused major damage to the Garr home. The home was within a FEMA disaster area, and FEMA gave the Garrs $30,000. The total amount of damage to their home was around $145,000. In October 2011, the Garrs sued the City claiming that it negligently managed storm water by approving the Addition; by failing to establish storm water detention projects near the Addition and golf course; and by failing to comply with storm water management policies. The district court denied the City's motion for summary judgment, and at trial, the city moved for a directed verdict, but the court reserved its ruling. The jury awarded the Garrs $84,400 in damages. The City's motion for JNOV and a new trial was denied. The City appealed, and the Supreme Court retained the case.

ISSUES: Was the Garrs' expert's testimony sufficient to establish a causal connection between the City's allegedly negligent conduct and the Garrs' damages?

HOLDING: No. The Garrs alleged the City was negligent by failing to: 1) protect downstream property owners from increased water flow due to development approved by the City that led to the Garrs' flooding and property damage; 2) establish storm water detention projects to protect the Garrs and other downstream property owners from increased water flow caused by development approved and managed by the City; and 3) comply with its policies regarding storm water management and flooding.

The Court held that to establish a causal link between topographical changes and flooding requires expert testimony. To establish causation, the Garrs hired Dr. Melvin, a former college professor of hydrology. He testified that the Addition's water discharges into the creek had "some" effect on the creek, but he couldn't "tell exactly how much right now." On cross-exam, Melvin testified that he had not performed exact calculations to support his conclusion that the Addition had an affect; rather, he relied on his estimates of water depths and flow in the area. Furthermore, Melvin's estimates made in his expert report did not coincide with the facts of the day of the flood. Melvin's testified that he heard reports of up to 10 inches of rain falling the day of the flood. On cross-examination, he testified that if there was 10 inches of rain that day, the Garr home would have flooded, regardless of the creek. While the Court acknowledged there can be more than one proximate cause, it found that there was no evidence that the city's negligence is what caused Garrs' damages. The Court ultimately held that there was not substantial evidence to show that the city's negligence caused the flooding in the Garr home. The Court reversed the judgment entered by the district court and remanded for entry of judgment in favor of the City.

Bertrand v. Mullin, 846 N.W.2d 884 (Iowa 2014), May 16, 2014.

FACTS: Bertrand and Mullin were both candidates for the Iowa Senate. Bertrand is a Republican and Mullin is a Democrat. For several years, Bertrand worked Takeda Pharmaceuticals (Takeda). He neither owned stock in the company nor had any other type of ownership interest. Two of the drugs Takeda manufactured were Actos and Rozerem. Bertrand primarily marketed Actos, and never sold Rozerem. Actos was a diabetes drug; Rozerem, a sleep aid. Actos and Rozerem were highly criticized around the world as dangerous drugs. The FDA found that Actos caused heart failure, and Takeda was marketing Rozerem to children. An article from an Australian news source reported that Takeda was the most unethical drug company in the world. The Iowa Democratic Party (IDP) and Mullins' staff wrote a TV ad stating that "Bertrand was a sales agent for a big drug company that was rated the most unethical company in the world. The FDA singled out Bertrand's company for marketing a dangerous sleep drug to children." At the bottom of the screen read, "BERTRAND'S COMPANY MARKETED SLEEP DRUG TO CHILDREN." Evidence showed that Mullin did not want to run a negative ad and that he wanted to keep his campaign positive. After an October 2010 debate, where Bertrand told Mullin that the ad was not accurate, Mullins continued to run the ad. Bertrand sued Mullin for damages and injunctive relief on the basis of defamation.

Mullin kept running the ad after the suit was filed. Bertrand won the election and the action proceeded to trial.

The trial court found that 8 out of the 10 statements Bertrand submitted were not defamatory as a matter of law. However, the two statements in the above paragraph were both submitted to the jury. The jury returned a verdict against Mullin and the IDP. Mullin moved for a JNOV. The trial court found that no reasonable juror could find that Bertrand actually owned Takata. However, the trial court concluded that a reasonable juror could have believed that Bertrand personally sold Rozerem. Further, it found a showing of actual malice because Mulling continued to air the ad despite Bertrand's public denial of the claims and filing of the lawsuit. It found that Mullin purposefully avoided the false implication and recklessly disregarded the truth by continuing to show the ad. Mullin appealed, contending that the district court erred in denying his motion for JNOV.

ISSUES: Did the district court err by finding that Mullin acted with malice by acting with reckless disregard for the truth with regard to the two statements?

HOLDING: Yes. First, the Supreme Court found that there was not any evidence to show Malice. There was no evidence that Mullin and the IDP *knew* that the implication that Bertrand sold Rozerem was false. The Court found that Mullins' distaste was aimed at the overall political tenor the ad, not the falsity of the statements. Therefore, his negative attitude did not relate to the truthfulness of the statements, and thus did not show actual malice.

Additionally, the implication was not made with reckless disregard. Although the ad implied that Bertrand was associated with an unethical company, it was not false. Thus, the defamatory statement "was not built on a totally fabricated story as the Court [has] opined might support a finding of actual malice in other cases." The sources that Mullin and the IDP relied on were not "so unreliable as to be unworthy of credence and indicative of reckless disregard for the truth."

Finally, the Court also noted that actual malice was not established that evidence that Mullin continued to air the commercial after Bertrand publically told him the implication was false for two reasons. First, the false implication did not undermine or eliminate the political relevance of the non-defamatory implication from the ad intended by Mullin. This was legitimate political speech that remained within the "breathing room" of the First Amendment. Second, the political forum Bertrand used to denounce the implication was not an environment suited to alert Mullin or the IDP of the likelihood of the error. By doing so in front of an audience in a public forum, he was attempting to score political points. "A candidate does not purposely avoid the truth if the truth is buried in political grandstanding and rhetoric."

Godfrey v. State, 847 N.W.2d 578 (Iowa 2014), June 6, 2014.

FACTS: Godfrey, the Iowa Workers Compensation Commissioner, sued the State of Iowa and various individuals, including the Governor and Lt. Governor alleging various common law claims, and alleging that those individuals were acting outside the scope of their employment. The Iowa attorney general certified that individual defendants were acting within the scope of their employment pursuant to Iowa Code § 669.5(2)(a)—which is a provision under the Iowa Tort Claims Act (ITCA)—at the time of the allegations contained in Godfrey's amended petition. Defendants moved to substitute the State of Iowa in place of the individual defendants for counts 6 through 16 in the petition. Godfrey resisted on two grounds. He first argued that the defendants were not acting within the scope of their employment and therefore not subject to the attorney general's certification. Second, he argued that the State's substitution for the named defendants in the counts at issue did not automatically require dismissal of other counts.

The district court held a hearing. As the Supreme Court stated, after the hearing "the parties agreed the district court should dismiss counts X through XV in their entirety if (1) the district court granted the defendants' motion to substitute the State of Iowa, (2) the district court found against Godfrey on his claim that substitution of the State for the named defendants did not lead to the automatic dismissal of those counts, and (3) the district court decided the certification did not allow Godfrey to pursue his actions against the individual defendants who were not acting within the scope of their employment." The district court granted the motion to substitute on counts 6 through 16 and dismissed counts 10 through 15 as per the parties' agreement. Godfrey sought interlocutory appeal, asking the Supreme Court to review the district court's ruling to allow the substitution and its dismissal of counts 10 through 15 in reliance on the attorney general's certification. The Supreme Court retained the appeal.

ISSUE: Was the attorney general's certification applicable to Godfrey's common law claims alleging the individual defendants acted outside the scope of their employment?

HOLDING: No. The attorney general's certification that the employees were acting within the scope of their employment is inapplicable to common law claims against employees in individual capacities. The certification can only apply to actions brought under the ITCA and not those brought against employees acting outside the scope of employment. If an action is brought against a state employee under the ITCA, then the attorney general can certify that the employee was acting within the scope of her employment. If the attorney general does not certify that she was, then the lawsuit proceedings as a normal tort claim. The Supreme Court reversed the district court's judgment substituting the State of Iowa in counts 6 through 16 and dismissing counts 10 through 15, and remanded the case back to the district court to allow the fact finder to decide whether the individual defendants' actions were within the scope of their employment for those counts.

Madden v. City of Iowa City, 848 N.W.2d 40 (Iowa 2014), June 13, 2014.

FACTS: Madden fell off her bike in Iowa City and sued the City of Iowa City (City) for damages alleging that defects in the sidewalk caused her fall. The City Code of Iowa City has an ordinance—as allowed by Iowa Code § 364.12(2)(c)—requiring abutting landowners to maintain the sidewalk—in this case the University of Iowa. The City filed a cross-claim against the State—because the landowner was the University of Iowa—for contribution, and the State moved to dismiss the claim. The State's motion was based on three arguments. First, Section 364.12(2)(c) does not expressly waive sovereign immunity. Second, the City's cross-claim did not allege a claim under the Iowa Tort Claims Act (ITCA), because the cross-petition was based on a theory of statutory liability, not negligence, and therefore immunity is not waived. Finally, the State asserted that the City's claim was flawed because Section 364.12(2)(c) imposes a duty on an abutting property owner to maintain a sidewalk, but does not impose liability for failure to do so. The district court denied the motion. The State sought interlocutory appeal, and the Supreme Court retained the appeal.

ISSUES:

1) Does a city have authority to impose liability by ordinance on an abutting landowner for sidewalk maintenance or repair?

2) Is the imposition of liability against the State an unlawful tax?

3) Is the City's cause of action a claim under the ITCA?

HOLDINGS:

1) Yes. The Court found that the ordinance was not preempted by Iowa Code § 364.12(2). Specifically, the Court determined that the city ordinance was not preempted by conflict preemption. The Court agreed with the City's argument that although the state statute did not specifically create liability, the statute does not prohibit a city from imposing liability on an abutting landowner for maintenance or repair of a sidewalk.

2) No. The Court found that a tax is a general revenue measure without benefits conferred. That is not the case here. Taxpayers are not being charged for services that have no benefit to them. Rather, the ordinance is a police regulation similar to building or housing codes or protections against public and private nuisances.

3) No. First, the Court noted that the State did not claim any of the exceptions to the waiver of sovereign immunity listed in Iowa Code § 669.14. Second, the ITCA allows the State to be sued "under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death." The Court found that if the abutting landowner in this case was a private entity, the City could have sued it. therefore, the case was not a claim under the ITCA.

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014), June 13, 2014.

FACTS: Grain Processing Corporation (GPC) conducts corn wet milling operations at its Muscatine facility. Eight individual plaintiffs who live within 1.5 miles of the facility sought to represent a class of "All Muscatine residents (other than Defendant and its affiliates, parents, or subsidiaries) who have resided during the damages period within 1.5 [miles] of the perimeter of Defendant's facility located at 1600 Oregon St., Muscatine, Muscatine County, Iowa" in a suit against GPC. They claimed that GPC's facility created hazardous byproducts and harmful chemicals that were visible on properties, yards, and the ground. The plaintiffs' general claims were for nuisance, negligence, and trespass. Prior to the class certification, GPC filed a motion for summary judgment. First, GPC claimed that that the Federal Clean Air Act (CAA) preempted plaintiffs' claim. Second, GPC claimed that Iowa Code Chapter 455B, which regulated emissions, preempted the common claims, and statutory nuisance. Finally, GPC argued that the case presented a non-justiciable political question because a lawsuit impacting facility emissions lacks judicially discoverable and manageable standards for resolving the issues. The district court agreed with GPC and granted its motion. Plaintiffs appealed and the Supreme Court retained the case.

ISSUES:

1) Are the claims preempted by the CAA?

2) Are the claims preempted by Iowa Code Chapter 455B?

3) Are the claims political questions and thus non-justiciable?

HOLDINGS:

1) No. The CAA promotes "cooperative federalism," where states are authorized to impose stricter standards on air pollution than what the CAA imposes. Furthermore, the Court noted that state common law actions such as nuisance are to protect the use and enjoyment of specific property, while the regulatory framework created by the CAA was to achieve a general regulatory purpose.

2) No. Chapter 455B does not conflict with statutory nuisance in Iowa Code Chapter 657, or the common law claims of nuisance, trespass, and negligence. While Chapter 455B was created as the state counterpart to the CAA, and apparently conflict, they should be construed to harmonize with each other. Furthermore, Chapter 455B does not impliedly repeal application of Chapter 657's nuisance claim, nor common law claims for nuisance, trespass, and negligence.

3) No. Pursuant to *Baker v. Carr*, 369 U.S. 691 (1962), the Court held that the case is not subject to dismissal under the political question doctrine.

Huck v. Wyeth, 850 N.W.2d 353 (Iowa 2014), July 11, 2014.

FACTS: Reglan is the brand-name of metoclopramide, which is designed to treat digestive tract problems, including acid reflux. This drug was approved by the FDA in 1980. Wyeth came to own Reglan around 1989, and then sold it to Schwarz Pharma in December 2001. A generic form of Reglan was also manufactured and distributed by PLIVA. In 2004, Huck was prescribed Reglan. Huck's pharmacy filled the prescription with the PLIVA generic. At the time, the FDA-approved label stated "Therapy longer than 12 weeks has not been evaluated and cannot be recommended." The warning also included the possible side effect, including tardive dyskinesia (TD). TD is a neurological disorder. In July 2004, 5 months after Huck started taking the drug, the FDA approved additional label warning language requested by Schwarz. The new language read "Therapy should not exceed 12 weeks in duration." It was on the label for Reglan, but not in the Physicians' Desk Reference (PDR), which is used by physicians regularly to obtain facts about a given drug. PLIVA did not update the generic drug packaging, as required by federal regulations. None of the defendants in this case communicated the new label information to Huck or her physician. Huck testified that she would have never taken the drug had she known about TD.

Huck was eventually diagnosed with TD in June 2006. She filed suit in May 2008. In February 2009, the FDA imposed heightened warnings on the drug's packaging. Huck asserted 13 claims against the defendants named in this suit, as well as several that were no longer part of the suit at the time of the appeal. She filed a "Notice of Product Identification" stating that she only ingested the generic version of the drug. In response, all brand defendants filed a motion for summary judgment, which was unresisted. The court granted the motion, and the brand name defendants were dismissed.

Huck pursued her claim against PLIVA for several years. In February 2010, PLIVA filed two motions for summary judgment. Huck filed a "motion for relief" from the 2009 summary judgment dismissing the brand defendants. In one motion, PLIVA argued that there was not a genuine issue of material fact, and in the other, it argued that Huck's claims were preempted by federal law. The district court granted both. It granted the latter based on *PLIVA, Inc. v. Mensing*, __ U.S. __ , 131 S.Ct. 2567 (2011). In *Mensing*, the U.S. Supreme Court held that federal law categorically preempts state-law failure to warn claims against generic manufacturers. The district court denied Huck's motion, however, stating that the plaintiff has the burden to prove that the defendant manufactured or supplied the product that caused the injury. Huck appealed and the Court of Appeals held that Huck's claims fell within the *Mensing* "sphere." It held that PLIVA cannot be held liable because federal law prohibits private attempts to enforce a generic manufacturer's obligation to match the brand manufacturer's label. Further, it held that *Mensing* did not alter state-law principles requiring the dismissal of a claim brought against a defendant whose product the plaintiff never used. Huck sought further review.

ISSUES: 1) Was Huck's failure to warn claims preempted by *Mensing*?

2) Did the brand defendants owe any duty to Huck for her consumption of the generic drug manufactured by PLIVA?

HOLDINGS: 1) No. The Supreme Court adopted the 6th Circuit Court of Appeals' reasoning in *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578 (6th Cir. 2013), which held that *Mensing* does not preempt state law claims based on a generic manufacturer's failure to update its label warning with the language the FDA approved in 2004.

2) No. The Court held that because the brand name defendant-manufacturers did not have any control over the product that Huck ingested. Further, a brand manufacturer cannot ensure that a generic manufacturer is complying with federal law. Therefore, they did not owe a duty to Huck under Iowa law.

Smith v. Iowa State University of Science and Technology, __ N.W.2d __, WL3537031, July 14, 2014

FACTS: Smith, a former employee at Iowa State University (ISU), sued ISU for intentional infliction of emotional distress (IIED) and violations of the state whistleblower statute. The claim arose out of incidents that occurred after Smith reported his supervisor's mismanagement of department funds in the department of engineering to President Geoffrey. After he reported her to President Geoffrey, Smith was continuously faced with harassment that exceeded—as the Court of Appeals stated—"all bounds usually tolerated by decent society." A jury awarded Smith $500,000 on the emotional distress claim, and $784,027 on the whistleblower claim. The district court overruled ISU's motion for a directed verdict. ISU appealed and the case was transferred to the Court of Appeals. The Court of Appeals upheld the IIED award, but set aside the whistleblower award. In setting it aside, the Court found that Smith failed to prove that his report to President Geoffrey is what caused the retaliatory behavior. Smith and ISU sought further review.

ISSUE: Was the whistleblower award excessive?

HOLDING: Yes. The Supreme Court affirmed the emotional distress award, but found that the award for the violation of the whistle blower statute excessive and reduced it. The Court found an important distinction within the whistleblowing statute. Iowa Code § 70A.28(2) requires a person to report misconduct to a "public official." Initially, Smith reported the misconduct to President Geoffery's assistant, who is not a "public official" under Iowa Code Chapter 70A. After this initial report, Smith experienced harassment; however, the Supreme Court held that that particular harassment was not specifically caused by a report to a public official because

Smith had only reported the conduct to the assistant. Therefore, that particular harassment should not be considered in calculating the award. Therefore, the Supreme Court remanded the case to the district court to re-determine the award for the whistleblower violation claim.

MALPRACTICE

Hook v. Trevino, 839 N.W.2d 434 (Iowa 2013), November 8, 2013

FACTS: This legal malpractice action originated when Trevino, a Fort Dodge attorney, represented Hook in a personal injury action against Lippolt, a volunteer driver for the Iowa Department of Human Services (DHS). The accident occurred in June 2000. In July 2001, Trevino and Hook agreed to a contingent fee agreement for Trevino to represent Hook against Lippolt. In March 2002, with three months remaining on the 2-year statute of limitations, Trevino filed Hook's civil action against Lippolt. Lippolt filed an answer on April 2, 2002. Trevino served interrogatories in July 2002, which Lippolt answered in September 2002, disclosing for the first time that he was a volunteer driver for the DHS, and was driving a patient for treatment at the time of the accident. In May 2003, Lippolt amended his answer to plead affirmative defenses under the Iowa Tort Claims Act (ITCA), Iowa Code § 669.24, which provides immunity to state volunteers from personal liability, and Iowa Code § 669.13, which requires a plaintiff to submit her tort claim to the State Appeal Board (Board) within 2 years.

In June 2003, Trevino filed an administrative claim on behalf of Hook with the Board and dismissed without prejudice Hook's lawsuit against Lippolt. After waiting 6 months without a response, Trevino withdrew the administrative claim and filed a second civil suit against Lippolt, this time naming the State of Iowa as a co-defendant. Lippolt and the State moved for summary judgment claiming the statute of limitations had run. In addition, Lippolt argued that he was immune. Hook resisted, stating that her claims were timely under the discovery rule, and only Lippolt's personal assets were immune, not his liability insurance. The district court denied the defendants' motion, and the Supreme Court granted interlocutory appeal. *Hook v. Lippolt*, 755 N.W.2d 514 (Iowa 2008). The Supreme Court held that Lippolt was immune, and the 2-year statute of limitations was not tolled by the discovery rule. Thus, both defendants were entitled to summary judgment. In that ruling, the Supreme Court stated that

> an injured party who knows of her injury and its cause must conduct a reasonable investigation of the nature and extent of her legal rights that includes inquiry into the identity of any vicariously liable parties. An injured party's duty to investigate the identity of persons liable of her injury is not a seriatim process that stops upon the discovery of one defendant and arises again only when the defendant's liability is questioned.

Lippolt, 755 N.W.2d at 523.

After the *Lippolt* decision, Hook hired new counsel and sued Trevino for malpractice, alleging that Trevino failed to properly investigate the proper identity of those who should have been sued. Trevino moved for summary judgment arguing that because Lippolt was immune, Hook's respondeat superior claim against the state failed as a matter of law. The district court denied the motion, and denied his motion for a directed verdict at trial.

Trevino filed a motion in limine before trial to prevent Hook from arguing that interest should accrue from the time of a jury verdict in the underlying case. The district court agreed and granted his motion, but said that it would reconsider the motion if Hook made an offer of proof. Hook did not make an offer. The jury returned a verdict in favor of Hook, and awarded Hook $473,000. The district court entered judgment against Trevino in that amount with interest running from June 23, 2010, the date the malpractice action was filed. Trevino field a post-trial motion to offset the verdict by the contingent fee agreement with Hook, or, alternatively, by the reasonable value of his legal services. The district court denied the motion. Hooked moved to seek interest running from the time her original personal injury action would have been tried. The district court also denied that motion. The Supreme Court considered both Trevino's appeal and Hook's cross-appeal.

ISSUES:

1) Does a state volunteer's immunity preclude the State's respondeat superior liability for his negligence?

2) Is Trevino entitled to have the award reduced by the contingent fee he would have taken if the underlying action had been successful or the reasonable value of his Trevino's legal services?

3) What interest is recoverable?

HOLDING:

1) No. The immunity defense under the ITCA is personal to the volunteer and does not apply to the state. The State may be held liable under the ITCA if the plaintiff establishes that the agent—the State volunteer—was negligent.

2) No. To set-off Hook's award by the amount in contingent fees that Trevino would have earned had he been successful in the underlying action, or the reasonable value of his medical services, would make Hook suffer a double deduction in fees: first, a deduction for Trevino's "fictional" fee; and second, for fees paid to her malpractice counsel. Such deduction does not make the plaintiff whole. Trevino argued that the fees should be set-off under the theory of quantum meruit: that Hook's award should be deducted for the work that he did. The Court considered allowing a quantum meruit set-off for legal malpractice actions in different circumstances; however, here, Hook did not benefit from Trevino's work in anyway. Therefore, the Court declined to reduce the award under that theory.

3) The district court awarded damages on the entire judgment, including future damages from the date Hook filed her malpractice action. Hook argued that the district court erred by denying her post-trial motion for additional interest. She argued that she should have also received interest on her underlying tort claim. Trevino argued that under Iowa Code § 669.4, interest is only awarded on "judgments." Because a judgment was not entered in the underlying tort action, Hook is not entitled to any interest on that action. Furthermore, Trevino argued that pursuant to Iowa Code § 668.13, interest should only apply from the "commencement" of the malpractice action. The Supreme Court disagreed. The Court stated that the damages from the malpractice action was intended to make her whole, and she is less than whole without an award of interest that should have been recovered from the state in the underlying tort action. Thus, the Court found that that interest should accrue from December 9, 2004, which was the last day the case could have been tried. It arrived at this date by making this analysis: The last day a timely claim could have been filed was June 9, 2002. Under the statute in effect at the time of the accident, if the Board did not make final disposition of the claim within 6 months, the claimant could withdraw the claim from consideration and begin suit. Section 669.13 gave the litigants 6 months to file in district court after receiving a final disposition from the Board or withdrawing of the claim. Because civil actions are to be tried within 18 months, the last day the case could have been tried was December 9, 2004.

Sabin v. Ackerman, 846 N.W.2d 835 (Iowa 2014), March 28, 2014.

FACTS: Sabin was one of 3 children who was a beneficiary to her father's will. She was named the administrator and named Ackerman as the attorney for the estate. One of the other children, James, exercised his option under the will to the buy the father's farm. Ackerman prepared the documents to convey title, and Sabin, and the other sibling, Steven, conveyed their share of the farm to James. Ackerman never advised Sabin on the validity of James' option or to seek independent counsel. Likewise, Sabin never sought Ackerman's legal advice regarding the option.

Sabin and Steven sued James, claiming the option under the lease was invalid. The parties eventually settled. Sabin then sued Ackerman claiming that he failed to advise her about the legal challenges to the enforcement of the option during the administration of the estate. Ackerman moved for summary judgment, stating that he did not have a duty to protect Sabin's personal interest relating to the enforceability of the option because he only represented her in her capacity as the administrator of the estate. Sabin argued that he had a duty to represent her personally, and as the administrator. The district court granted Ackerman's motion by finding that advising her about the legality of the option was outside his scope as an estate attorney. The Court of Appeals reversed, holding that there was a

factual dispute as to whether Sabin had a reasonable expectation that Ackerman was representing her personally. Ackerman sought further review.

ISSUE: 1) Did the district court err in finding that Ackerman did not have a duty to represent Sabin's personal interest as a beneficiary in the will when he was hired by her in her capacity as administrator of the will?

2) Was Sabin's subjective expectation that Ackerman was to represent her personal interests with regard to the option sufficient to raise a genuine issue of material fact as to whether Ackerman owed her such a duty?

HOLDING: 1) No. An attorney hired by an administrator undertakes to perform the fiduciary obligations of the administrator to properly oversee the administration of the estate. This requires an attorney to render all services needed in the administration of the *estate*. Further, an attorney also has a duty to a beneficiary of the estate to make sure the estate is governed by the intent of the testator. The Supreme Court found that Sabin's claim does not fall under either theory of liability. The Court found that an estate attorney does not have a duty to the administrator's personal interests by virtue of the attorney-fiduciary relationship with the administrator.

2) No. Distinguishing from its holding in *Ruden v. Jenk*, 543 N.W.2d 605 (Iowa 1996), the Court found that a reasonable fact finder could not find that Ackerman was "reasonably alerted" that Sabin was relying on him to advise her on her personal interests with regard to the option.

Asher v. OB-GYN Specialists, P.C. and Anthony A. Onuigbo, M.D., 846 N.W.2d 492 (Iowa 2014), May 9, 2014.

FACTS: Asher sued defendants for complications arising out of the delivery of Asher's baby. At trial, defendants objected to two jury instructions. The first, jury instruction 12, asserted that Asher had to prove Onuigbo was negligent in at least one of 6 ways. Further, it instructed the jury it could only award damages if it found that Onuigbo's negligence was a proximate cause of the damage. Onuigbo objected to the instruction, arguing that Asher failed to present substantial evidence of a causal link between any failure to document and the alleged harm or the use of a vacuum extractor and the alleged harm.

Onuigbo also objected to instruction 13, which instructed the jury on causation. Instead of instructing the parties pursuant to *Thompson v. Kaczinkski*, 774 N.W.2d 829 (Iowa 2009), the court instructed the jury as follows:

> The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damages and when the damage would not have happened except for the conduct.

> "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

The jury found in favor or Asher and Onuigbo appealed stating that instruction 13 did not accurately reflect current state law. He also appealed on the basis that there was insufficient evidence to support a finding of negligence.

ISSUES: 1) Did the district court err in giving instruction 13 rather than the instruction based on *Thompson*?

2) Was there substantial evidence to support a finding of negligence of Onuigbo's use of the vacuum extractor to warrant an instruction specifying negligence based upon Onuigbo's use of the vacuum extractor.

HOLDINGS: 1) Yes, however, the error was harmless. Pursuant to *Thompson*, the instruction should have been to instruct the jury separately on factual cause and what was formerly called proximate cause, now called "scope of liability." This analysis applies to malpractice actions. However, the error was not prejudicial. The Court held that the substantial factor instruction was more demanding than the scope of liability instruction.

2) Yes. Based on the facts, while a reasonable jury could find that the use of the vacuum itself did not lead to the injury, the doctor failed to diagnose the child's shoulder condition, and when the doctor subsequently applied traction to deliver the child, the injury occurred. Quoting the Restatement (Third), the Court noted that "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." There can be multiple causes of injury in a chain of events. Thus, based on the expert testimony, the district court did not err in submitting a negligence instruction based on the doctor's use of the vacuum.

INSURANCE LAW

Osmic v. Nationwide Agribusiness Ins. Co., 841 N.W.2d 853 (Iowa 2014), January 10, 2014

FACTS: Esad Osmic, his wife, and children were passengers in Esad's brother's vehicle on May 23, 2009. Esad's brother is Selim. Selim was insured by a Nationwide policy, which included underinsured motorist (UIM) coverage. Their vehicle was involved in an accident with a car driven by Rochelle Heasley, and several people in the car were injured including Esad, Selim, and their family members. Heasley was cited for a traffic violation. She was insured by Progressive with limits of $50,000 per person and $100,000 per occurrence. Esad sought treatment for the injuries from

the accident. In the meantime, Esad's counsel sent Nationwide a letter approximately 13 months after the accident, stating his representation. Nationwide attempted to call Esad's counsel once a month for the next 8 months asking for Esad's medical records. Nationwide also tried sending a letter to Esad's counsel on December 3, 2010.

In September 2010, Progressive told Nationwide that Progressive had settled with Selim and his family for $65,000, leaving only $35,000 in remaining coverage for the accident. In March 2011, Esad's attorney submitted a demand to Progressive for $178,500 on behalf of Esad and $13,000 on behalf of Esad's two children. At that time, approximately 10 weeks remained to bring a claim under the applicable statute of limitations. Progressive wrote back to Esad's counsel stating that only $35,000 remained, and they would settle the matter for that amount for all three individuals. On March 25, 2011, for the first time, Esad's counsel called Nationwide. Nationwide requested a copy of the demand letter he wrote to Progressive and copies of medical records for Esad and his children. Esad's counsel sent a copy of the letter to Nationwide on March 28, 2011, medical records, and medical bills. Esad's counsel also requested a copy of the declaration page and requested to settle the claims with Progressive. Nationwide responded and said that the children were adequately compensated at $5,000 each and it would look into whether Esad could settle with Progressive. It also noted that it could not provide the declaration page because it did not have permission from Selim to do so. On May 27, after receiving more medical records and bills from Esad's counsel, Nationwide wrote Esad's counsel and said that the time to seek UIM coverage under Selim's policy had expired since the 2-year contractual limit had run and Esad was barred from bringing a UIM claim.

Esad then sued Nationwide and Westfield (his own insurance carrier) alleging his damages had exceeded the Progressive limits and was seeking damages. Nationwide moved for summary judgment stating that Esad's claims were untimely. The district court denied the motion for several reasons. First, it noted that Esad was not a party for the Nationwide contract, and thus, he was not bound by the contractual time limits to bring a UIM claim. Second, even though Nationwide had not waived his statute of limitations defense, it intentionally failed to provide plaintiff with a copy of the Nationwide policy which would have revealed the 2-year limit. Finally, it noted that Nationwide could have completed its claims investigation and responded to Esad's UIM claim before the contractual limitations period expired.

Nationwide appealed and the Supreme Court granted interlocutory appeal and transferred the case to the Court of Appeals. The Court of Appeals upheld the district court's ruling because even though the 2-year period of limitation in the Nationwide policy was valid, Nationwide had a duty to under these facts to tell Esad's counsel about the contractual deadline. The Supreme Court granted further review.

ISSUES: 1) Is the 2-year statute of limitation to file an action to recover UIM coverage binding on Esad or any other passenger who was injured while riding in the named insured's vehicle?

2) Did Nationwide have an affirmative duty to advise Esad's counsel of the policy limitations period?

3) Was Nationwide equitably estopped from raising the statute of limitations defense?

HOLDING: 1) Yes. The Supreme Court found that under the contract, Esad was an insured for the purposes of seeking UIM coverage. Thus, he was a third-party beneficiary. Third-party beneficiaries are controlled by the terms of the contract. Therefore, the 2-year statute of limitations period applied to Esad, and any other passenger seeking UIM coverage.

2) No. The Supreme Court noted that the Court has previously held that insurers do not have a duty to affirmatively disclose the limitations deadlines to policyholders. Thus, insurers do not have an affirmative duty to disclose limitations deadlines to additional insureds. Esad was represented and his counsel failed to respond to several inquiries by Nationwide over the course of several months. When counsel resumed contact with Nationwide, he never asked about the policy provisions or asked for a copy of the policy itself.

3) No. The Court of Appeals held that a reasonable jury could find that Nationwide intentionally withheld the insurance policy until the statute of limitations expired, barring Esad's claim. The Court of Appeals specifically noted that in a letter to Nationwide, Esad's counsel's phrase "If you need anything further, please advise" could have trigged a duty to disclose the contractual limitations period. The Supreme Court disagreed, stating that the phrase came in the context of a medical records request. The Court of Appeals also relied on a part of a letter from Nationwide acknowledging that the statute expiration date is fast approaching. In relying on that statement, the Court of Appeals noted that a reasonable jury could find that Nationwide intentionally withheld the policy. The Supreme Court agreed with the inference; however, it found that the inference was not enough to overcome the contractual limitations period.

Hagenow v. American Family Mut. Ins. Co., 846 N.W.2d 373 (Iowa 2014), May, 2, 2014

FACTS: This case arises from the same basic facts as in *Hagenow v. Schmidt*, 834 N.W.2d 661 (Iowa 2014), above. The Hagenows also sued their insurer, American Family, for uninsured motorist (UM) coverage. The insurance policy read that American Family would "pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured

motor vehicle." American Family filed a motion for summary judgment claiming that the Hagenows were not "legally entitled to recover" from Schmidt because the jury found that Schmidt was not at fault. American family also argued that Schmidt was not an "uninsured motorist" as defined by the policy. The district court denied American Family's motion. The Supreme Court granted American Family's interlocutory appeal.

ISSUES: 1) Did the district court err in concluding that the Hagenows were "legally entitled to recover" under the Hagenows' UM provision?

2) Was Schmidt's vehicle an "uninsured motor vehicle" under the Hagenows' UM policy?

HOLDINGS: 1) Yes. The Court noted that in cases where the Supreme Court has rejected insurers attempts to avoid paying *underinsured motorist* benefits when interpreting the "legally entitled to recover language," it has always recognized that the insured's entitlement to recovery depended on establishing the underinsured motorist's liability. A civil jury found Schmidt not at fault. Awarding the Hagenows UM benefits when the underlying tortfeasor was found not to be at fault would go against the policy and the purpose of UM insurance. Thus, the Hagenows were not "legally entitled to recover."

2) No. The Hagenows argued that under all the definitions of "uninsured" motor vehicle, only one could have applied: A vehicle that is "insured by a bodily injury liability bond or policy at the time of the accident but the company denies coverage." American Family insured both the Hagenows and Schmidt. The Hagenows argued that American Family denied Schmidt coverage, and therefore, Schmidt's vehicle was uninsured. The Court disagreed. It found that American Family denied that Schmidt was *liable* for the accident; they did not deny her coverage. American Family in fact paid for Schmidt's defense in the lawsuit. Furthermore, American Family denying that Schmidt was driving an uninsured motor vehicle transformed Schmidt into an uninsured motorist.

Lawyers Don't Retire, Do They?

A Strategic Look at Law Firm Succession Planning and Law Practice Management

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Lawyers Don't Retire, Do They? A Strategic Look at Law Firm Succession Planning and Law Practice Management

Iowa Defense Counsel Association

50th Annual Meeting & Seminar

Presented by Alan R. Olson

September 18, 2014

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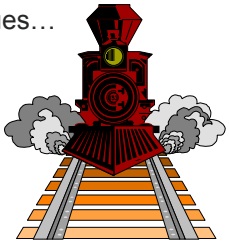
2014 Legal Market

- The Revolution Continues…



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Long-Term Trends

- Major changes in the last three decades
- Supply and demand
  - Perceived surplus of lawyers in many niches…
  - Until "Baby Boomer" generation retires!
- Less litigation; fewer trials
- Consolidation
- Increased competition
- Profit squeeze
- Shakeout of law firms

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Consolidation

Mergers

- Strasburger & Price/Griggs & Harrison
- D'Ancona & Pflaum/Seyfarth Shaw
- Reboul MacMurray/Ropes & Gray
- Ross & Hardies/McGuireWoods
- Riordan McKinzie/Bingham McCutchen
- Strasburger & Price/Oppenheimer Blend
- Gouldens/Jones Day
- Crosby Heafey/Reed Smith
- Dyer Ellis/Blank Rome
- Kirkpatrick & Lockart/Nicholson Graham
- Shaw Pittman/Pillsbury Winthrop
- DLA Piper
- Strasburger & Price/Harrison & Tate

Failures

- Brobeck, Phleger & Harrison
- Altheimer & Gray
- Arter & Hadden
- Peterson & Ross
- Pennie & Edmonds
- Hill & Barlow
- Venture Law Group/Heller Ehrman
- Howrey
- Dewey & LeBoeuf

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Profit Squeeze in Law Firms

- Downward pressure on fees
- Upward pressure on expenses

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Budget Squeeze in Corporations

- Predictability in fees second only to amount
- Increase in Alternative Fee Arrangements (AFAs)
- Electronic billing
- Increasing management of outside counsel
- Decline in client loyalty

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Post-Recession Financial Realities

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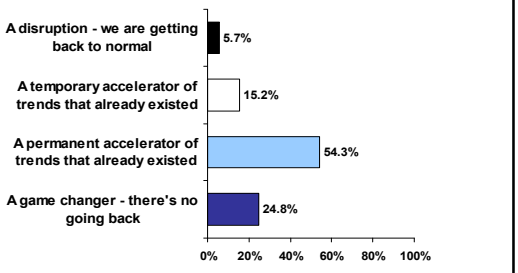
Now that the dust has settled on the Recession, do you see its events as:



Source: Altman Weil *2013 Law Firms in Transition* Survey

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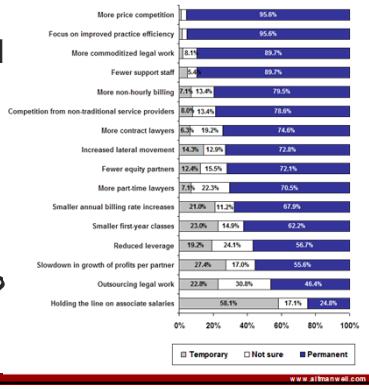
Which legal market trends are temporary and which will be permanent?



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The Future
What's Most Important?

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Critical Conclusions

- Legal market is increasingly challenging
- Recession intensified long-term trends
- There will continue to be winners and losers in this market
  - Including mega, large, mid-size and small law firms
- Changes can also represent opportunities

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Keys to Success

- Profit Planning and Management
  - Plus Adapting to the New Legal Economy
- Even More Focus on Clients
- Marketing and Business Development
- Building a Team Environment
- Strategic Planning
- Succession Planning

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Law Firm Succession Planning

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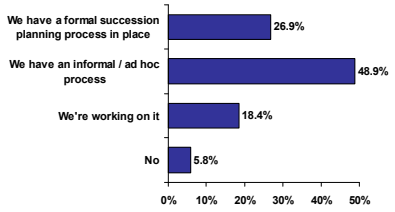
Does your law firm have a succession planning process for lawyers approaching retirement?



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Why is Succession Planning Difficult?

- It's a widespread—and daunting—issue
- Baby boomer attributes and attitudes
- Pressures on law firms and lawyers

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Baby Boomers

- Comprise one-third to 40% of active bar
- In general, baby boomer generation was central to law firm era of:
  - Dramatic growth in number of lawyers
  - Increasing number/percentage of women lawyers
  - Growth in law firm size
  - Heightened production and productivity: increases in billable hours
- Not likely to "go quietly into the night"

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Trends/Pressures in Society

- Individuals desiring to work longer
  - Good health into older ages
  - Technology adds flexibility
- Individuals *feel compelled* to work longer
  - Concerns over individual portfolios
- Individuals' *ability* to retire

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Trends/Pressures in Society

- At the same time, there are many who want to retire early

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In Summary:

- Succession planning is a difficult subject
  - Individuals often avoid
  - Firms often avoid

Nearly one-half of law firms responding to *2013 Altman Weil Law Firms in Transition Survey* cited succession planning as:

"Awkward to discuss."

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First
Identify if you have succession issues

If yes, how extensive?

Getting started is critical

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Analyze Your Demographics

- A key concept and tool
- Use demographics for analysis and planning
- Improves:
  - Understanding of firm's functionality
  - Overall planning and results
  - Strategic planning
  - Succession planning

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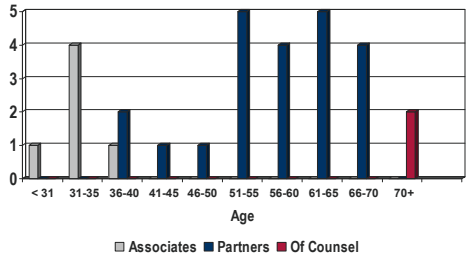
Analyze Your Demographics: Illustration One



Note: 6 associates; 22 partners; 2 of counsel; 30 lawyers

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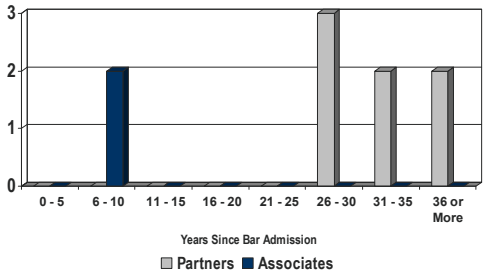
Demographic Analysis: Illustration Two



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What's Most Important in Law Firm Succession Planning?

- Ultimate goal: To achieve a win-win-win, for:
  - The clients
  - The firm
  - The individual lawyers
- To achieve this, planning, and a program, are a necessity
- Is unlikely to "just happen!"

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An Expanded View of Succession Planning

- Substantive legal expertise
- Range/blend of specialties; subspecialties
- Client retention and transition
- New business development
- Firm management and leadership
- Practice management and leadership
- Profitability and cash flow
- Compensation

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Develop a Program

- Succession Planning Program
  - Or Transition Program
- Establish a policy and a process
  - Provides a framework
  - An expectation it will be discussed with every lawyer
- Case-by-case within framework

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Establish Transition Program Goals

- Retain and motivate the valued senior lawyer to remain with the firm
- Fair and remunerative economic relationship between the senior lawyer and the firm
- Continued high-quality work and service levels for clients
- Avoiding service gaps or hurried “hand-offs”
- Identification of lawyers to begin working with clients, and to assume client relationship management
- Improved identification of potential hand-off problems, expertise/training needs
- Retention of clients by the firm, and sometimes, future expansion of client work
- Avoiding surprises—Plan A and Contingency Plan B for the unexpected

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Recognize the Options

- Seniors who can and want to work don't have to be "sprinting for a brick wall"—
  - Working 2000 billable hours one year
  - Retirement the next
- Senior lawyers can help provide critical contributions
  - Expertise and experience
  - Production and revenues
  - Client service
  - Other skills and contributions

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Recognize the Options

- With planning and management, law firms can structure phase-down or step-down programs
- Phase-down programs for seniors can serve the clients, the firm and the individuals

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Five Key Concepts

- Getting started is critical
  - Use Demographic Analysis
  - Firm level and possibly, practice group level
- Take an expanded view—not just retirement
  - Consider all the elements presented here—many are opportunities (or potential hindrances)
- Develop an institutional program
- Focus on the successors
- Focus on the clients—most important!

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Focus on the Successors

- Retention
- Identify demographic gaps
- Identify specific successors for seniors and clients, based on:
  - Expertise
  - Client relationship skills
  - Client contacts
  - Chemistry with the seniors
- Do so in advance—five years, whenever possible

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Focus on the Clients—Key Clients

- All clients are important, but key clients defined based on:
  - Current revenues
  - Potential revenues, or
  - Value as referral source

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Key Client Transitions

- Can take many years
- Categories:
  - Clients that can be transitioned relatively easily
  - Clients perceived as amenable to transition—but will take time, planning and comfort zone
  - Clients that might not be transition-able

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In Conclusion— Keys to Success

- Advance planning is critical
  - Firm level
  - Practice group/specialty level
  - Sometimes, office level
  - By individual

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In Conclusion— Keys to Success

- Keep in mind throughout the win-win-win
- Much more achievable with planning and management!

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Thank You

- Questions?

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Jury Selection Tips for Young (and Not-So-Young) Lawyers

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Juror Confirmation Bias: Powerful, Perilous, Preventable

By Bill Kanasky, Jr.

People tend to interpret new information in a way that confirms their existing beliefs. This is called "confirmation bias." Psychologist Bill Kanasky explains here that confirmation bias affects both potential jurors and trial attorneys, and suggests some strategies for minimizing its effect.

Introduction

In science, you move closer to the truth by seeking evidence contrary to a hypothesis. A general rule among scientists is called "empirical criticism," which means focusing on seeking data that disprove a hypothesis rather than seeking supportive, confirmatory data. In civil litigation, jurors are instructed to find the truth by impartially evaluating the evidence and coming to an unbiased conclusion. Unfortunately, what actually takes place is a far cry from impartial and unbiased. Here's how it generally works:

- Jurors come up with a hypothesis early in a trial;
- They immediately begin working to prove it right instead of working to prove it wrong;
- They give preferential treatment to evidence and testimony supporting their existing belief;
- They tend to better recall evidence and testimony supporting the side they favor;
- They entrench themselves deeply into their stance, before the trial is complete.

At this point, jurors simply stop working. They stop listening. They stop thinking. Jurors do this unintentionally and automatically, without intending to treat evidence or testimony in a biased way or even being aware of doing so. Importantly, this is not just a "juror thing." Rather, it is a "human thing," and we are all guilty of it. No one is immune from it, and it transcends all demographic categories. This important phenomenon is called "Confirmation Bias."

Powerful

Simply stated, confirmation biases are errors in jurors' information processing and decision making. There is a tendency for jurors to search for, interpret, or remember information in a way that "confirms" their preconceptions, biases or beliefs. In other words, jurors selectively collect (or omit) new evidence, interpret evidence in a biased way, or selectively recall information from memory. Throughout a trial, most jurors *seek* information that confirms their existing attitudes and beliefs rather than keeping an open mind until deliberations begin, as they are instructed to do. Many are reluctant to consider alternative stances and views, and instead set higher standards for arguments that go against their current expectations. Confirmation bias is perhaps more dangerous than other biases because it *actively* keeps jurors from arriving at the truth and allows them to wallow in comforting prejudice and partiality.

Confirmation bias is powerful. So powerful, that psychology research shows that many people tend to stick to a position even after the evidence had shown it was false. Psychology researchers Ross and Anderson (1982) say it best: "Beliefs can survive potent logical or empirical challenges. They can survive and even be bolstered by evidence that most uncommitted observers would agree logically demands some weakening of such beliefs. They can even survive the total destruction of their original evidential bases." The problem is how jurors' brains instinctively examine and evaluate contrasting positions.

ABOUT THE AUTHOR...

DR. BILL KANASKY, an expert in litigation psychology, consults on more than 175 cases annually in the areas of defendant witness training, jury decision-making research, and jury selection strategy. His empirically-based consulting methods are specially designed to defeat plaintiff "Reptile" strategies, which have resulted in billions of dollars of damage awards across the nation. Dr. Kanasky is recognized as a national expert, author and speaker in the areas of witness preparation and jury psychology. He earned his B.A. in Psychology from the University of North Carolina at Chapel Hill, and his Ph.D. in Clinical and Health Psychology from the University of Florida.

The brain is hard-wired or "programmed" to confirm propositions and arguments rather than falsify them; compared to data that falsifies a position, confirmatory information is easier for the brain to process. In other words, it is much easier for a juror to see how a piece of data supports a position than it is to see how it refutes the position. Therefore, people give an excessive amount of value to confirmatory information, i.e. positive or supportive data.

To see confirmation bias at work on a large scale, one only need review the conspiracy theories offered for the JFK assassination and the 9/11 attacks. These theorists see the evidence in a one-sided way, searching only for evidence consistent with the theory they hold at the time. They also look for the consequences they would expect if their theory were true, rather than what would happen if it were false. Another real-world example is that Republicans tend to watch Fox News and Democrats tend to watch MSNBC or CNN, with both groups ignoring and avoiding views that contradict their own. On a smaller scale, a common example is that people notice when they get a phone call from a person they were just thinking about, but don't remember how often they didn't get such a call when thinking about a person. This tendency can have serious consequences in many aspects of daily life:

- Medicine: A family physician may quickly form a diagnosis in his mind during a brief discussion with a patient, and then convince himself that the other complaints and physical exam fit that initial diagnosis.

- Media: A reporter who is writing an article on an important issue may only interview experts that support her or his personal views on the issue.

- Employment: An employer who believes that a job applicant is highly intelligent may pay attention to only information that is consistent with the belief that the job applicant is highly intelligent, and ignore clear flaws.

- Science: Scientists can set up experiments or frame their data in ways that will tend to confirm their hypotheses, and then proceed in ways that avoid dealing with data that would contradict their hypotheses.

- Health: A person reads about a particular medical condition on the internet, and then looks for those symptoms in one's own body, thereby increasing the chances of detecting them.

Confirmation bias is a powerful, ubiquitous phenomenon: it's everywhere, like it or not. It is a good lesson to observe how easily intelligent people can see intricate connections and patterns that support their viewpoint and how easily they can see the faults in viewpoints contrary to their own.

Perilous

Decades of jury decision-making research has repeatedly shown that demographic variables do not accurately predict verdict outcomes or damage awards in civil litigation. This is because demographic factors such as intelligence, education, income, and race are not relevant when it comes to confirmation bias, as it is simply a natural aspect of our personal biases and its appearance is not a sign that a juror is dumb. In situations involving numerous variables and in which the cause-effect relationships are unclear (i.e., evidence and testimony in a civil trial), data tend to be open to many interpretations. In these instances, confirmation bias can have a profound effect. Attorneys should not be surprised to see intelligent, well-intentioned people draw support for diametrically opposed views from the same evidence and testimony.

Confirmation biases are stronger and more prevalent for issues that are emotionally significant to jurors and for established beliefs which shape a juror's identity. For example, cases involving significant injury, suffering and/or death (especially with infants, children, adolescents and/or mothers) can fuel confirmation bias. Additionally, cases that relate to jurors' lives and work roles (i.e., employment matters, divorce, religion, politics, gender, etc.) can lead to higher levels of confirmation bias in the courtroom. The more emotionally and personally involved jurors are with a belief, the more likely it is that jurors will ignore whatever facts or arguments undermine that belief.

Ironically, trial attorneys are extremely susceptible to confirmation bias as well. For example, defense attorneys are often reluctant to strike educated, intelligent people in higher income brackets during jury selection, incorrectly assuming those potential jurors are less biased than less educated people. They assume that "smart" people are rational and level-headed, will be able to better understand their case arguments, and therefore will be more logical and fair in their decision making during deliberations. On the flip side, they assume jurors with less education and lower income status are not smart enough to understand their case, are more sympathetic to plaintiff themes, and tend to award high damages because they don't understand economics. As a result, during the *voir dire* and jury selection process, a defense attorney will actively seek out data to satisfy his working hypothesis (related to the above demographics) and ignore or avoid data that goes against it (i.e., a less-educated juror who expresses pro-defense characteristics). In the end, this heavy reliance on demographic variables can be costly, as analysis of pro-plaintiff oriented juries who award high damages often have a significant percentage of educated, intelligent individuals in higher income brackets.

A second example of how trial attorneys fall victim to confirmation bias is the process of early case assessment. Trial attorneys are required to generate "case assessment reports" for their clients very early in a case, and then send updates to the client as discovery progresses. These initial assessments frequently

act as a cognitive anchor that prevents the trial attorney from considering alternative views of liability and damages as the case progresses. This can result in a trial attorney sticking with ineffective themes and arguments because he deemphasized or even ignored subsequent information (e.g., expert witness opinion, liability and damages data from mock trial research) in an effort to confirm his original assessment. This cognitive blunder can lead to an adverse verdict with high damages, which can negatively impact the trial attorney's self-confidence, as well as the confidence that his client has in his abilities. Again, it's not the attorney's "fault" *per se*, as confirmation bias is unintentional and unplanned. It's powerful. It's perilous. But is it preventable?

Preventable

At the jury level, it is impossible to completely prevent confirmation bias from occurring. It is a natural and powerful cognitive tendency that cannot be totally extinguished. However, it is indeed possible to interrupt it and perhaps even weaken it. Trial attorneys can use the jury selection process and the opening statement to educate jurors about this inadvertent, automatic cognitive error that results in faulty thinking. Helping jurors understand cognitive bias generally, and challenging them to see the evidence presented at trial in a different way (i.e., resisting the temptation to confirm their hypotheses and instead giving equal weight to all of evidence) is the very best way to control confirmation bias. Making jurors aware of their cognitive errors before the trial starts and providing them with a new methodology to assess evidence and testimony can at least interrupt or slow down confirmation bias. In other words, it is important to challenge jurors to "rethink how they think." Ideally, this can create juror "cognitive dissonance," an uncomfortable mental state that results from conflicting thoughts and feelings that surface when bias and impartiality mix with this new burden being placed on them. Specifically, you want to pre-program jurors during jury selection and opening statements to be aware of confirmation bias and to essentially "feel bad" about becoming biased and impartial during the trial. This won't completely prevent juror confirmation bias, but it may result in at least some of the jurors evaluating the evidence and testimony differently.

However, it is clear that education will not completely solve the problem of confirmation bias. Therefore, it is critical to identify those jurors with the strongest biases during jury selection and strike them from the panel. This requires the trial attorney to focus *voir dire* on jurors' attitudes and beliefs, rather than other variables that are poor predictors of verdict and damages. Some of the worst *voir dire* questions ever written (but are frequently used by trial attorneys and judges) are: "Can you be fair in this trial?"; "Can you follow the Judge's instructions?"; and "Can you keep an open mind, and wait until the end of the trial to make judgments?" These questions elicit information that is useless in determining true bias and impartiality, as the vast majority of jurors quickly and obediently respond with a simple "yes." Instead, trial attorneys need to tap into jurors' attitudes and beliefs to truly figure out how they tick. This requires both a) a deep understanding of psychology, specifically human attitudinal and belief systems, and b) painstaking levels of work to construct the appropriate *voir dire* questions that will elicit meaningful information that one can use to make wise strikes. Since the vast majority of trial attorneys have little to no training in psychology, it is important that they receive the appropriate training and/or expert consultation to ensure that they can construct the most useful and effective *voir dire* questions.

At the trial attorney level, confirmation bias can be contained by developing a new system of case assessment and reassessment. While cognitively difficult, trial attorneys need to learn to not drop the anchor so fast when assessing liability and damages. They need to take a step back, maintain an open mind, and give *full* weight to subsequent information that becomes available as the case progresses. After getting "hammered" in a mock trial (i.e., a plaintiff verdict with high damages), a defense attorney recently commented: "*Many cases are lost in the conference room, not the deliberation room. We (trial attorneys) can't see the case like a jury would see it…we start thinking things that REAL people do not think …we get wrapped up in our case, tending to believe only the things WE want to believe… people with law degrees don't think like real people*."

Conclusion

Confirmation bias is a potentially devastating element of litigation psychology that can affect both jurors and trial attorneys alike. Confirmation bias can prevent jurors from hearing both sides of a case, as it causes them to selectively perceive and recall evidence and testimony presented at trial. Additionally, confirmation bias can inhibit trial attorneys from making key strategic adjustments during discovery and trial, potentially leading to expensive settlements at mediation or high damage awards at trial. One way to avoid falling prey to confirmation bias is to partner with litigation psychology experts who can provide strategies to inhibit juror confirmation bias and eliminate attorney confirmation bias.

Identifying the Plaintiff Juror:

A Psychological Analysis

(Published in *For the Defense*, 2000)

George R. Speckart, Ph.D.

The amount of pre-trial effort, preparation and thought that litigators devote to jury selection typically pales in comparison to the amount devoted to other trial preparation activities. Yet the importance of having the right – or avoiding the wrong – people in the jury box is difficult to overestimate. One or two intractable jurors who are adversely predisposed can nullify millions in expenses and thousands of hours of work devoted to preparing for trial.

Repeated observations from mock trials and actual jury panels reveal commonalities in psychological characteristics among plaintiff jurors that are robust and persist across case types and venues throughout the country. Identification of these general traits and commonalities can assist defense counsel in making determinations of desirable and undesirable jurors during selection in many, if not most, types of civil cases.

The optimal strategy to prepare for trial is to design research to investigate particular experiences, lifestyles, and other specific characteristics associated with verdict preferences. Nonetheless, awareness of general personality and temperament characteristics associated with a plaintiff verdict can aid defense counsel when more explicit indicators are vague, controvertible, or unavailable. This inquiry therefore addresses the general questions of "What are plaintiff jurors like? What are they made of? How are they different?" After we consider the traits of plaintiff jurors that help answer these questions, techniques for inferring such traits in the courtroom environment are considered in detail.

Personality:

Personality psychology investigates the stable individual differences that account for consistency in behavior across situations. At the most fundamental level, the search for the marker characteristics of the plaintiff juror may be targeted at the level of basic personality dimensions that differentiate this juror from others. Reviews of databases for mock trials and actual post-trial interviews have implicated the following personality constructs or traits as "markers" for the plaintiff juror:

- Cynicism – A generalized tendency to view the world as sinister, oppressive, or malevolent.

- Vulnerability – A characteristic associated with heightened sensitivity, for example, sensitivity to rejection.

- Arousability – A predisposition toward nervousness, distractibility, jitters, hysteria, mania, and other excessively aroused states.

- Depression – This trait may manifest as ranging from mild dysphoria ("the blues") to clinical depression. In the general population, it is usually observed as a sluggish, withdrawn, or sullen demeanor.

These personality traits are often intercorrelated, and indeed may present as a syndrome of interrelated psychological characteristics. Obviously, for example, a correlation between cynicism and depression would appear to be self-evident in many individuals. The present analysis concentrates chiefly on the traits of *cynicism* and *arousability*, although others are considered where appropriate.

One way of looking at the psychological make-up of the plaintiff juror is to consider the question, "What is it that makes one receptive to a complaint?" After all, the juror who "resonates" strongly with the

plaintiff's message is in fact, responding to a complaint. Clinical assessment instruments (i.e. psychological personality inventories) that measure *cynicism* as a construct utilize statements such as the following, for which strong agreement translates to a high score:

- "People pretend to care about one another more than they really do."
- "Most people make friends only because friends are likely to be useful to them."
- "Given the chance, most people will take advantage of you."

As stated previously, strong endorsement of these clinical assessment items is indicative of high degrees of cynicism. Obviously, then, it is not surprising that individuals characterized by this temperament dimension would be biased toward the plaintiff in cases for which claims include fraud, unfair competition, tortious interference, misappropriation, unjust enrichment, sexual harassment, or even product liability in which corporate misconduct is alleged. So, it is more or less self-evident that *cynicism* would be one pivotal characteristic that causes a juror to "resonate," or be sympathetic to, a complaint by an allegedly victimized party.

Working with trial counsel in actual jury selection settings, it is apparent that many litigators confuse *skepticism* with *cynicism*. Skepticism is, in many respects, the opposite of cynicism. A *skeptical* individual is

hesitant to accept a given proposition and demands proof before adopting a belief or premise. This type of person is typically a defendant juror in a civil case. A *cynical* person, on the other hand, readily accepts the notion that someone has been victimized, since he already views the world as being inherently predatory, and sides quickly with the plaintiff.

Cognitive Meltdown

Another noteworthy characteristic of many plaintiff jurors is connected with the psychological trait of *arousability*. In the courtroom, a high degree of arousability is often linked to a cognitive or information–processing style in which large amounts of evidence are stored during the plaintiff's case-in-chief, with less and less information being assimilated later when the defendant has a chance to put on evidence. In essence, this juror becomes excessively "heated up" by the plaintiff's case to the point where the juror's cognitive (information-storing) facilities "melt down." Post-trial interviews of such jurors reveal that they have retained only traces of evidence from the defense, later in the case, although their recall of information from early in the case is quite vivid, thorough, and accurate.

A good example of this type of juror can be identified from the antitrust case of *ETSI v. Burlington Northern et al.*, in which the plaintiffs were

suing various railroad companies for preventing the construction of a coal slurry pipeline. The defendants sought to demonstrate that there was no causation between their actions and the failure to construct the pipeline, since ETSI (Energy Transportation Systems, Inc.) had not even obtained approval for the project from the Interstate Commerce Commission. The former head of the ICC was the last witness in the trial, and spent the entire day on the stand. Notably, however, a handful of jurors - - all comparatively energetic and arousable individuals - - could not even describe, during the post-trial interviews, what the ICC was. By contrast, these jurors recalled, with great clarity, the videotaped depositions of railroad executives that the plaintiffs had presented during their case-in-chief, weeks earlier.

The overt characteristics of the highly arousable juror resemble very closely those of a less sophisticated person with limited information-processing abilities. However, closer examination reveals an individual who is of at least average intelligence, yet fails to store and assimilate later-presented information that would provide alternative explanations or a more refined and detailed fact scenario benefiting the defense.

In short, the propensity of being highly arousable controls the information-processing style of this special class of plaintiff juror. To illuminate the relationship between arousability and "cognitive

meltdown," it is helpful to consider research on perception and sensory stimulation conducted by Russian psychologists (Nebylitsyn, 1972) who identified "strong" versus "weak" nervous systems in different individuals. Those with "strong" nervous systems react less intensely to sensory input, and are therefore able to withstand greater amounts of impinging stimulation over long periods of time. A "weak" nervous system, on the other hand, responds more energetically at the outset, but then quickly exceeds its capacity to absorb or process new information – the pattern of the plaintiff juror who is subject to "cognitive meltdown."

Later research (Mehrabian, 1995) further established the connection between arousability as a stable temperament dimension and "strong" versus "weak" nervous systems. To summarize this body of research, persons with "strong" nervous systems are *less* arousable; they tend to remain calm and continue to process incoming information longer. By contrast, those with "weak" nervous systems (highly arousable people) become excited quickly, have more extreme reactions, and block subsequent input – engage in "cognitive meltdown" – after a comparatively short time.

Related research even more clearly demonstrates the functional significance of arousability to the litigator faced with the task of selecting

a jury. For example, Mehrabian and Epstein (1972) established the relationship between arousability and "emotional empathic tendency" – the predisposition to empathize on an emotional level with another person. More arousable people are more likely to react in kind to an emotional appeal.

Similarly, Andrews (1990) has demonstrated that highly arousable individuals are more likely to store in memory and recall only the emotional portion of a message or communication. As a result, it is clear that the plaintiff message will stand out in the memory of an arousable juror not only as a result of "cognitive meltdown," but also because of a generalized bias toward emotional messages.

Other research has established positive correlations between arousability and distractibility, which is in turn positively correlated with neurotic tendencies (Siddle and Mangan, 1971). High levels of arousability have also been linked to impulsivity, lack of endurance, anxiety, mood disturbance, and sensitivity (Rubio and Lubin, 1986).

Traits such as neuroticism, anxiety, mood disturbance, impulsivity, and the tendency to be emotionally empathic are not the types of characteristics that a litigator for a defendant typically hopes to find in a panel of jurors. Research demonstrating that these traits are

intercorrelated, and that explains why plaintiff jurors frequently do not even recall evidence from the defense, is strongly consistent with anecdotal observations from mock trial and real trials which suggest that plaintiff jurors are often more unstable, emotional, sensitive, and selective in their memories than their more defense-oriented counterparts.

Given that empirical research in personality identifies clusters of traits that should raise a red flag in jury selection for defense litigators, how can this information be utilized? Obviously, one cannot generally administer clinical personality assessment instruments during voir dire. How does one move from theory into practice, and put this information to use, such that a tactical advantage can be realized in the courtroom?

Observable behavior and plaintiff traits

The traits that have been considered presently tend to surface in behaviors that are identifiable and detectable in many situations during voir dire and selection, particularly when a Supplemental Juror Questionnaire is utilized. Certainly, it makes intuitive sense that the temperament characteristics under discussion would manifest in observable conduct. Formal academic research, mock trial research, and

trial experience again converge to definite conclusions about the overt markers that can be used to identify a risky juror for the defense.

With regard to the construct of arousability, there is abundant research indicating a clear association between high levels of this trait and various stress-related illnesses, including cardiovascular disease and myocardial infarction (Uherik, 1985). More broadly, Mehrabian and Ross (1979) found that trait arousability was associated with a variety of physical, psychosomatic, and psychological illnesses and symptoms. They also found that this trait was associated with an increased prevalence of accidents. Illnesses and accidents are certainly events that are detectable during voir dire, and research with mock jurors has demonstrated clearly that reports of poor health and/or frequent accidents are generally predictive of a plaintiff orientation.

Moreover, the connection between these types of unfortunate life events and verdict preferences is not restricted to cases that are substantively related to the type of life event in question. For example, poor health as a marker for a plaintiff juror does not hold only for medical malpractice, pharmaceutical product liability, or toxic torts. Similarly, an accident-prone history does not simply mean that the individual will only vote against automotive and other similar defendants in personal injury cases involving accidents. These life events stem from enduring, generalized

personality traits that point to deeper psychological organizing principles operating across situations. Hence, poor health and frequent accidents can indicate the presence of the "archetypal" plaintiff juror –- that is, a juror who votes for the plaintiff in virtually any type of case -- because they tend to signify the existence of latent, unobservable traits such as arousability and its correlates (impulsivity, sensitivity, and anxiety).

Indeed, the use of fundamental personality dimensions as a starting point for discerning the plaintiff juror means that generalization is then possible to a diverse array of overt indicators across varied types of cases, making it possible to identify other useful "markers" during voir dire. Accordingly, the following types of information may also identify a plaintiff juror: recent or frequent hospitalizations; whether one is currently under the care of a physician; or the continuous taking of prescription medications. (Often, justification for such questions can be made on the basis that they are needed to ensure that the juror can comfortably sit, concentrate, and assimilate complex evidence over an extended period of time. Again, however, the most unobtrusive means of collecting such information is typically a well-designed juror questionnaire.)

There is a substantial body of research to suggest that problematic life events in general are connected to personality syndromes represented by

the traits of arousability, cynicism, impulsivity, anxiety, and others. In many instances, these life events are evident as arrests or incarcerations; financial problems, including bankruptcy and foreclosures; and job and marital instability. To probe many of these areas during voir dire – or even within a juror questionnaire – can be a delicate matter. However, one can formulate innocuous questions that tend to elicit this type of information spontaneously from many jurors. For example, the query "Does anyone here have any kind of experience or dealings with the legal system?" often brings forth reports of bankruptcies, arrests and similar types of events. Of course, asking more specific questions outright can be justified when the case fact scenario provides a reasonable basis.

One of the most fertile areas of probing for problematic life events during voir dire is in the employment arena. Research reveals a reliable connection between arousability and lowered performance in the workplace (Oldham, Kulik and Stepina, 1991). Moreover, the "track record" supporting the value of employment-related questions in mock trials and real trials is overwhelming. Studying mock jurors and real jurors through trial to verdict reveals that the following types of questions sharply discriminate plaintiff versus defendant jurors:

- "Have you ever been harassed, discriminated against, or otherwise treated unfairly by a supervisor or manager?"

- "Have you ever witnessed a cover-up of unethical conduct by a senior employee?"
- "Have you ever been defrauded or lied to by an employer?"
- "Have you ever filed a grievance related to working conditions?"
- "Have you ever been unfairly passed over for a promotion or bonus?"

It makes intuitive sense as well that individuals who are anxious, arousable, cynical, or who have mood disturbances would show instability and problems in the work place. Many employment-related questions can be comfortably be asked in voir dire settings, particularly if the juror is saved from potential embarrassment by being provided with the opportunity to blame the employer or uncontrollable (e.g. economic) events for the problem(s).

Conclusions

How deeply one can "dig" in voir dire is always a sensitive issue, and depends on many factors, including the judge; whether one is in state versus federal court; and one's own comfort level and skill in phrasing questions and producing a non-threatening, unobtrusive context. However, the use of a Supplemental Juror Questionnaire to reveal subtleties in jurors' personalities yields substantial tactical advantages, particularly when one side takes the initiative and formats tactful but

revealing questions with response options that are designed to expose only the most risky jurors for one's side (Speckart and McLennan, 1999).

Formulation of effective voir dire interrogatories requires deep and painstaking consideration of the mind of the plaintiff juror. Asking jurors to promise that they will "wait and hear our side of the case" is not enough. It is vital that the juror who does not have the temperament to perform this task be revealed using psychological insight and removed from the panel before opening statements are delivered.

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Corporate Representative Depositions: Planning and Practice Make Perfect

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OVERVIEW

- Review topics in notice carefully
- Review document requests carefully
- Review deposition logistics
- Identify the representative(s)
- Duty of the corporation
- Prepare the representative(s)
- The deposition

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30B6 Deposition Topics: Overview

- Review the topics carefully
- Treat them as any other discovery
- Make sure the notice complies with the rules
  - Iowa R.C.P. 1.707(5)
    - Notice must "describe with **reasonable particularity** the matters on which examination is requested . . . "
    - This is the same standard under the FRCP

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30B6 Deposition Topics: overview

- "the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the dispute." *Lipsari v. U.S. Bancorp, N.A.*, 2008 WL 4642618 (D. Kan., Oct. 16, 2008)
- "an overbroad [notice] subjects the noticed party to an impossible task."
  - *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442 (D. Kan. 2000)
- Relevant to the issues in the lawsuit
- Reasonably limited in time and scope

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30B6 Deposition Topics: examples

- In *Steil,* the insured sued his insurer seeking a determination as to whether he was entitled to benefits for a certain medical procedure under his health policy
  - Topic on the plan issued to the plaintiff through his employer (which identified the policy number) was appropriate
  - Topics on the defendant's corporate structure, group health plans issued by certain other entities and insurance policy approval and filing with the state insurance commissioner were irrelevant

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30B6 Deposition Topics: overview

- Be mindful of topics that call for confidential/proprietary information
- Is there a protective order
- Does the notice ask for information related to names, addresses and phone numbers
  - "Rule 30(b)(6) is not designed to be a memory contest." *Great American Ins. Co . of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 539 (D. Nev. 2008).
- Does the notice ask the witness to be prepared to do something, such as diagram, illustrate, etc.

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30B6 Deposition Topics: examples

- Topics related to the "complaint" or "this action" are typically not proper
  - *Monge v. Maya Magazines, Inc.*, 2010 WL 2776328 (D. Nev., July 14, 2010)
- Notice that says the topics "include but are not limited to" is overly broad and "defeats the purpose of having categories at all."
  - *Whiting v. Hogan*, 2013 WL 1047012 (D. Ariz., March 14, 2013)

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30B6 Deposition Topics: examples

- Topics generally asking about a company's policies and procedures, or employee retention process, or employment manuals are too broad
  - W*hiting v. Hogan*

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30B6 Deposition Topics: examples

- Facts supporting denials and defenses can be objectionable (*In re Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651 (D. Kan. 1996))
  - While a party can discover such information, to do so "through a Rule 30(b)(6) deposition is overbroad, inefficient, and unreasonable. It also implicates serious privilege concerns."

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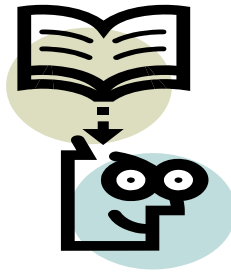
30B6 Deposition Topics: Use Interrogatories Instead?



- Topics re: a party's responses to interrogatories and document requests can be objectionable on scope and privilege (*Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082, N.D. Ill., Jan. 24, 2000)
  - Typically done with the assistance of counsel, and therefore invades WP and ACP
  - The same information can be obtained more efficiently through interrogatories
  - Topic regarding factual basis for claim of patent infringement was duplicative as the plaintiff sought the same information in an interrogatory

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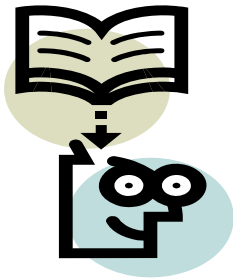
30B6 DEPOSITION TOPICS: USE INTERROGATORIES INSTEAD?



- *But see Great American Ins. Co . of New York v. Vegas Const. Co., Inc.*
  - A party served with a 30b6 notice cannot elect to provide answers in an interrogatory nor take the position that the documents set forth the company's position
- *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012)
  - Corporation cannot point to interrogatory responses instead of producing a corporate representative

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30B6 Deposition Topics: What to do if the topics are too broad

- Serve objections well before the deposition
- Explain the basis for the objections, avoid boiler plate objections
- Indicate what, if anything, the representative will testify about at the deposition
- Try to compromise/negotiate
- File a MPO if necessary or appropriate

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30B6 Deposition Topics: What to do if the topics are too broad

- The rule does not address objections to scope, but it is a good place to start
  - *Brown v. West Corp.*, 287 F.R.D. 494 (D. Neb. 2012)
    - *"initial objections lodged by the opposing party serve as a means of communication between the parties over the appropriate scope of a deposition."*
- Always take the high road and a reasonable approach
- Courts expect an effort to resolve issues before the deposition takes place, simply objecting at the deposition is ill-advised

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30B6 Deposition Topics: What to do if the topics are too broad

- *Waste Connections, Inc. v. Appleton Elec., LLC,* 2014 WL 1281918 (D. Neb., March 27, 2014)
  - *Noting that the "plaintiff's objections to the scope of the matters for examination should have been made prior to [the] deposition . . . the plaintiff should have, as obligated under the rules, filed objections with the court or requested a protective order if the parties were unable to reach a resolution."*

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30B6 Deposition Topics: What to do if the topics are too broad

- Remember, the burden is on the requesting party to meet the "reasonable particularity" standard, it is not the deponent's burden to interpret the request based on the allegations in the lawsuit
  - *Murphy v. Kmart Corp.*, 255 F.R.D. 497 (D. S.D. 2009)

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30B6 Deposition Duces Tecum

- Same approach to document categories
- Object where appropriate
  - Be sure to compare with earlier document requests for consistency
- All documents "relating to" or "concerning" or "pertaining" to are overly broad and unduly burdensome
  - Particularly if they do not modify a specific document or event, or discrete/narrow categories of documents
    - *Lipsari v. U.S. Bancorp, N.A*

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30B6 DEPOSITION DUCES TECUM

- If the requests are identical to document requests, repeat or incorporate the prior responses and indicate that as plaintiff is in possession of the documents, they will not be produced a second time at the deposition
- If the requests are different, check timing to make sure you have the full amount of time to respond
- 30b6 notices are not a tool to circumvent the discovery rules

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DEPOSITION VENUE

- Plaintiff's counsel's office, defense counsel's office, store, corporate hq, principal place of business of defendant
- Generally, the representative is deposed where he/she works or principal place of business
- While the deposition is ordinarily taken at the company's principal place of business, the court has the power to determine a more appropriate place
  - *Meyer v. Photofax,* 2009 WL 1850609 (E.D. Ky, June 26, 2009)

DEPOSITION VENUE

- *Sheehy v. Ridge Tool*, 2007 WL 1548976 (D. Conn., May 24, 2007)
  - General presumption is that non-resident corporate defendant is deposed at its ppb
  - If a plaintiff seeks to depose the corporate representative elsewhere, he /she has the burden of demonstrating "peculiar circumstances"
    - Costs were not sufficient
    - Potential discovery disputes arising out of the depositions were not sufficient

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DEPOSITION VENUE

- Courts consider a number of factors
- *Asevedo v. NBCUniversal Media, LLC,* 2013 WL 3155206 (E.D. La., June 19, 2013)
  - Location of counsel of record
    - Less compelling than any hardship on the witness
  - If only one corporate representative is to be deposed
    - Where there were 2 reps, court noted the company had no choice as they had no agent in the district and both were at the ppb
  - The corporation chose a representative that resides outside the company's ppb

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DEPOSITION VENUE

- Significant discovery disputes may arise and the forum court will need to resolve the disputes
  - Noting a telephone call to the court is possible
- The nature of the claims and the parties' relationship is such that the equities favor the forum district

- Never allow the deposition to take place in the store or the company's business office.
  - *Kroger Co. v. Walters,* 735 S.E.2d 99 (Ga. App. 2012)

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DETERMINING THE APPROPRIATE REP

- Knowledge of the issues/subject matter
- Must they be the person "most knowledgeable"
  - What does the statute say
  - "[T]here is no provision in the Federal Rules of Civil Procedure for noticing the deposition of a 'corporate representative most knowledgeable' of an organization." *Monge v.Maya Magazines,* 2010 WL 2776328 (D. Nev., July 14, 2010)

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DETERMINING THE APPROPRIATE REP

- Knowledge of privileged information
- Length of time with company
- Position with company
- Deposition experience
- Ability to not chat
- Ability to focus

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DETERMINING THE APPROPRIATE REP

- Knowledge of where the bodies are buried
- Litigation savvy
- Appearance/presentation
- Can be anyone, not necessarily a current employee
- Can be corporate counsel
- Corporation can "create" a witness
  - *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235 (D. Md. 2010)

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DUTY OF THE CORPORATION

- Designate the representative(s) who can testify about information known or reasonably available to the organization
- That employees with knowledge no longer work for the company is insufficient
  - Must be educated by reviewing documents, reviewing other depositions and exhibits and other materials (*QBE Ins. Corp.* at 689)
    - Same court said "if necessary, interviews of former employees or others with knowledge." *Id.*

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DUTY OF THE CORPORATION

- It does not matter that the representative has no personal knowledge, the deponent "must be woodshedded with information that was never known to the witness prior to deposition preparation."
  - *Brunet v. Quizno's Franchise Co., LLC*, 2008 WL 5378140 (D. Co., Dec. 23, 2008)

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DUTY OF THE CORPORATION

- That preparation may be onerous is irrelevant, as is the fact that the representative has no personal knowledge of the subject matter at issue
- Corporation chooses the representative, but if facts are conveyed to the representative, those facts are discoverable
  - *Sprint Communications Co. v. Theglobe.com, Inc.*, 236 F.R.D. 524 (D. Kan. 2006)

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DUTY OF THE CORPORATION

- Take the duty seriously or risk sanctions
- "The corporation must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by the interrogator and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by the interrogator as to the relevant subject matters."
  - *Waste Connections*, at *3 (citations omitted)

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MUST THE REP KNOW ALL ANSWERS

- Company must make a good faith effort to prepare the witness, and if "substantial testimony" is given regarding the topics, despite arguably inadequate preparation, sanctions may not be appropriate
- But if the unanswered questions are significant enough, the deposition may be reconvened at the company's expense
  - *Coryn Group II, LLC v. O.C. Seacrets, Inc.*

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MUST THE REP KNOW ALL ANSWERS

- "Absolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation."
  - *QBE Ins. Corp. v. Jorda Enterprises, Inc.* at 691
- If the rep does not know the answer, and the company has done and no other education/preparation can be done, the company is bound by the "we do not know" position." *Id. at 691*

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MUST THE REP KNOW ALL ANSWERS

- If the company does not have the information and cannot reasonably obtain it, and still lacks knowledge based on the information it does have, then the company's obligations under the rule cease
  - *QBE Ins. Corp.* at 690
- Be sure the witness is thoroughly prepared to explain why he/she cannot respond to questions and what has been done in preparation

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MUST THE REP KNOW ALL ANSWERS

- A company can adopt the testimony or position of another witness but that must be indicated during the 30b6 deposition
  - *Id.*

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PREPARE EARLY AND OFTEN

- Begin immediately upon receipt of notice
- Try to have 2 to 3 prep sessions well before the deposition
- Do not wait until a day or two before to start prepping
- The day before should be nothing more than refresher
- The witness should do more talking than the attorney

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WHAT ABOUT ?? OUTSIDE THE SCOPE OF THE NOTICE

- The minority view is that the questions must be limited to the notice, and if they are not, an immediate protective order should be obtained pursuant to FRCP 30
  - *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727 (D. Mass. 1985)
- **Follow Paparelli at your own risk**

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WHAT ABOUT ?? OUTSIDE THE SCOPE OF THE NOTICE

- The vast majority of courts have held that a 30b6 rep is required to answer questions that may be outside of the scope of the deposition notice
  - *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995)
- Objections should be made on the record, but the witness should not be instructed not to answer
  - *American General Life Ins. Co. v. Billard*, 2010 WL 4367052 (N.D. Iowa, Oct. 28, 2010)
    - If an attorney feels the deposition is being taken in bad faith or that the questions are harassing, the remedy is to suspend the deposition and immediately seek relief from the court. *Id.* at *7

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WHAT ABOUT ?? OUTSIDE THE SCOPE OF THE NOTICE

- Be clear during the deposition which testimony is given as the corporate representative as opposed to personal knowledge
- The obligation to educate and prepare, however, extends only to the 30b6 topics, therefore answers outside the scope are not binding nor can the company be sanctioned if the deponent cannot answer questions outside of the notice
  - *EEOC v. Freeman*, 288 F.R.D. 92 (D. Md. 2012)

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Thompson v. Kaczynski: A Five-Year Report Card

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Liability for Physical and Emotional Harm

The "New" Duty and Causation Analysis

By Kevin M. Reynolds and William C. Scales

Any defense trial lawyer handling tort cases should learn the new calculus and develop techniques accordingly.

All defense counsel working on tort cases should take note of significant sections in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010). Several jurisdictions, including Arizona, Iowa, Nebraska and Wisconsin, have adopted or cited important sections of the *Restatement Third* addressing analyses of duty and causation. The American Association for Justice's (AAJ) flagship publication, *Trial* magazine, featured an article on the new *Restatement*, touting its potential advantages to the plaintiffs' trial bar. Michael D. Green & Larry S. Stewart, *The New Restatement's Top Ten Tort Tools*, 46 TRIAL 44–48 (Apr. 2010). This article will analyze the practice changes brought about by the *Restatement (Third)* and present various strategic considerations for defense counsel going forward.

Section 7 of the Restatement (Third): Liability for Physical and Emotional Harm states:

> Section 7. Duty
>
> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Sections 6, 26 and 29 of the *Restatement (Third)* provide as follows:

> Section 6. Liability for Negligence Causing Physical Harm
>
> An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.
>
> Section 26. Factual Cause
>
> Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under Section 27.

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Section 29. Limitations on Liability for Tortious Conduct

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

The *Restatement Third* has significantly changed the "duty" and "causation" analyses in every tort case. The *Restatement Third* has broadened the scope of duty by creating a presumption of a generalized duty to exercise reasonable care. This duty will always apply, except in an "exceptional case" with an "articulated countervailing principle or policy" that warrants limiting the presumption. *See Restatement (Third) of Torts: Liability for Physical and Emotional Harm* §7(b) (2010). Additionally, the causation analysis has been redefined by using two elements: (1) factual cause, and (2) scope of liability. *See id.* §6. The terms "proximate cause," and other terms, such as "substantial factor," depending upon the law in the particular state, have started to disappear from the traditional legal landscape. "Scope of liability" is used instead of proximate or legal cause to provide a limit to an actor's liability *solely* to those risks created by the actor's tortious conduct. *See id.* §29.

Several cases have adopted the *Restatement Third*'s new duty and causation analyses, and there appears to be a trend in that direction. *See A.W. v. Lancaster County Sch. Dist. 0001*, 280 Neb. 205, 2010 Neb. LEXIS 88, at * 23 (July 16, 2010) (Nebraska adopts §7 of the *Restatement (Third)*); *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) ("duty" and "causation" analysis adopted; summary judgment for defendant reversed on appeal); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568 (Wis. 2009) (foreseeability not relevant to the "no duty" determination). At least two cases have cited the *Restatement Third* as persuasive authority. *See Gipson v. Kasey*, 150 P.3d 228 (Ariz. 2007) (incorporating "foreseeability" into the duty analysis expands the judge's function at the expense of the jury's); and *Diaz v. Phoenix Lubrication Service, Inc.*, 230 P.3d 718 (Ariz. App. 2010) (summary judgment for defendant affirmed based on "no duty").

Wholesale adoption has not been unanimous, however. One case has flatly rejected the *Restatement Third*, stating that its invitation to courts to "articulate general social norms of responsibility" is "simply too wide a leap for this Court to take." *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 21 (Del. 2009) ("the General Assembly decides these matters of social policy, not the courts"). The Tennessee Supreme Court has declined to accept the *Restatement Third*'s invitation to remove the concept of "foreseeability" from its duty analysis. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

Iowa has applied the *Thompson* case in at least two subsequent cases of significance. One, *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), was filed the same day as *Thompson*. In *Van Fossen* the court actually found *no duty* using the new analysis. Two other "no duty" cases citing the *Restatement Third* for support are *Gipson*, 150 P.3d 228 (Ariz. 2007), and *Diaz*, 230 P.3d 718 (Ariz. App. 2010). But *Van Fossen* provides insight into what a court will consider when determining whether an exception to the "duty presumption" exits. In *Van Fossen*, the issue was whether the owners of a power plant should have tort liability for the wrongful death of the spouse of an employee of an independent contractor. The plaintiff alleged that he routinely encountered asbestos in the course of his employment and asserted that his late wife contracted mesothelioma as a consequence of her regular exposure to asbestos dust while laundering his work clothes. The court in *Van Fossen* concluded that this scenario "presents an instance in which the general duty to exercise reasonable care is appropriately modified." 777 N.W.2d at 696. In reaching this determination, the court found that the prevailing case law in other jurisdictions supported this result, as well as the public policy concept that employers of independent contractors have little, if any, control over the employees of a subcontractor, let alone their family members at home.

Royal Indemnity Co. v. Factory Mutual Insurance Co., 2010 Iowa Sup. LEXIS 55 (June 11, 2010, as amended Aug. 5, 2010), also cited and discussed the *Thompson* formula at length. *Royal Indemnity* arose from a warehouse fire that destroyed property, basically new product inventory awaiting shipment, stored by Deere & Company. The plaintiff claimed that the defendant's negligent inspection of the premises either resulted in a subsequent fire, or left the water pressure in the building's extinguishing system so low that it could not extinguish or limit the fire. In *Royal Indemnity*, there were two contexts in which the "scope of liability" inquiry could have been applied. First, the court noted that "[u]nder the *Restatement (Third)* analysis, to impose liability, something FM [the defendant] did or did not do must have increased the risk to Deere's product." *Id.* at *30. Second, the court analyzed "...whether merely moving in increased the risk or created the harm that destroyed Deere's product." *Id.* at *31. Deere, the plaintiff, claimed that had it known the true facts, it would not have moved its product into the building. In both contexts, the plaintiff's case failed because there was no evidence to demonstrate that FM *caused* the damages suffered by Deere. The ultimate result was that a very large, $39.5 million verdict and judgment for the plaintiff was reversed on appeal, and the case was dismissed.

Several cases have adopted the *Restatement Third*'s new duty and causation analyses, and there appears to be a trend in that direction.

Thompson was also cited and discussed in a federal district court decision, *Nationwide Agribusiness v. Structural Restoration, Inc.*, 2010 U.S. Dist. LEXIS 36305, at *36 (S.D. Iowa 2010) (recognizing and applying *Thompson* to a claim based on negligent misrepresentation; collapse of a tank found to be "among the range of harms that [the defendant] risked" when it sent an inspection report to the plaintiff).

The rules set forth in the *Restatement Third* are clear. What is less clear is what the impact of this change will be, and how defense practitioners will react to this development. Do these changes "favor" plaintiffs or defendants? Will it be more difficult for defendants to obtain summary dismissals based on "no duty" or lack of

causation arguments? How does this development affect strategic or procedural considerations in defending tort cases? How will they change jury instructions on the causation element? These are just a few of the questions that the authors will attempt to address.

Are the *Restatement Third*'s "Duty" and "Causation" Analyses Substantive Changes, or Do They Merely Clarify Existing Law?

On the one hand, the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) appears to clarify existing law, rather than change or reverse wholesale existing doctrines. Some courts have taken this view. Accord *A.W. v. Lancaster County Sch. Dist. 0001*, 280 Neb. 205, 2010 Neb. LEXIS 88, at * 20 (July 16, 2010) (adopting §7 but noting, "we do not view our endorsement of the Restatement (Third) as a fundamental change in our law"); *Thompson v. Kaczinski*, 774 N.W.2d 829, at 835 (Iowa 2009) ("we find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it"); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 576 (Wis. 2009) ("though some language in prior Wisconsin cases invokes foreseeability inquiries in connection with duty... the approach set forth in Section 7, comments i and j, is most consistent with the approach we have taken on the issue of duty in the vast majority of our cases"); *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007) (citing §7 of the *Restatement Third* as supporting prior state substantive law); *Diaz v. Phoenix Lubrication Service, Inc.*, 230 P.3d 718, 723 (Ariz. App. 2010) ("we derive guidance from the proposed Restatement regarding the scope of the undertaking by the defendant and the distinction between creating a risk and failing to discover a risk").

However, on the other hand, some courts or some judges within courts have taken another view. *See, e.g., Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009) ("The drafters of the Restatement (Third) of Torts redefined the concept of duty in a way that is inconsistent with this Court's precedent and traditions"); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) (retaining the foreseeability test for the "duty" analysis, despite a strong dissent to the contrary, based on the Third Restatement). But to claim that the law has significantly changed is to assume that the law was previously clear, well known and understood, a dubious proposition at best.

The law of "duty" in most jurisdictions has been somewhat disorganized and unpredictable. Trying to forecast when a court would find a legal duty, and when it would not, depended more on who a particular judge hearing the dispositive motion was, as opposed to an established body of legal doctrine. Except in the clearest of cases, when a court would find that some result was "unforeseeable as a matter of law," someone could not help but think that a *factual* determination, better reserved for a *jury's* determination, had been made. The foreseeability "test" was of limited assistance as well, except in its most simple applications. The law was consistent that if a particular result from conduct was not foreseeable, then "duty," and thus, legal liability, would not follow. But knowing this did not make it any easier to predict when and under which circumstances a court would find that some eventuality was "not foreseeable." In addition, the courts have not adopted a common definition of "foreseeable," and many jurisdictions do not have a jury instruction that defines that term. Plaintiffs argue that if something is merely possible, then it is foreseeable. Defense lawyers typically take a more restrictive view, arguing that an event should be reasonably *predictable* to qualify as foreseeable. Defendants also prefer to add the adjective "reasonable" to the term "foreseeable" in an attempt to limit the concept even further. Even in the *Restatement Third*, the most infamous "F" word in the law, "foreseeability," remains essentially undefined. At least under the *Restatement Third*, foreseeability has been removed from the duty analysis.

The law of proximate cause in many jurisdictions has been no less confusing and muddled. "Proximate cause" had different meanings, depending upon the context. Proximate cause has been both a prima facie element of every tort case, and also a subpart of the proximate cause element itself. Defining "legal cause" in terms of a "substantial factor without which the injury or damage would not have occurred" mixed factual—that is, "but for" causation concepts with the policy considerations at the core of legal cause. If using the new terms "factual cause" and "scope of liability" helps to eliminate confusion from sloppy use of the term "proximate cause," then defense lawyers might welcome these changes.

Section 7's generalized duty on the part of every person to exercise reasonable care whenever a risk of harm to another is present tends to create an almost visceral reaction among defense lawyers. Imposing a general duty seemingly without limits is problematic. The "no legal duty" defense was always a potent weapon. This was one strategy that defense lawyers could use to avoid the legal rubric that "questions of negligence and proximate cause are normally reserved for the jury's determination." "Duty" was always a *legal* issue for a court, which meant that a court could decide it on a motion to dismiss or a motion for summary judgment. Although duty is still a legal determination, it appears as though the "no duty" defense strategy has been eroded by the *Restatement Third*. "Duty" was always a prima facie element of every tort action. It was just as much a sine qua non as "breach of duty," "proximate cause" and "damages." Now, it exists in every case unless the *defendant* proves otherwise. It seems as though the *Restatement Third* has eliminated one element, or fully 25 percent, of the burden of proof of every plaintiff in every tort case.

A further concern is that duty was an issue for which *the plaintiff always had the burden of proof.* This made sense: if duty was not established, then the plaintiff would suffer and bear the loss. However, under the *Restatement Third* approach, duty is now *presumed* and will stand as established in a case *unless the defendant, in a so-called "exceptional case," can rebut and overcome the presumption.* This 180-degree shift in the burden of proof and reversal of decades of established law should be of serious concern to all defense counsel and their clients.

Do the New Analyses "Favor" Plaintiffs or Defendants?

In the *Thompson* case in Iowa, a summary judgment in favor of the defendant was granted in the trial court, and this was affirmed by the Iowa Court of Appeals. On further review, the Iowa Supreme Court reversed the summary dismissal and re-

manded the case to the district court for trial. *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In *Thompson* it seems clear that the "new" analysis favored the plaintiff. Under the old law, the case was dismissed for two reasons: (1) there was no "duty" because the result, a dismantled trampoline blown into a road by a thunderstorm, subsequently causing a car accident, was not foreseeable as a matter of law; and (2) nothing the defendants did or did not do was a "proximate cause" of the plaintiff's injury.

Yet, two subsequent Iowa cases, *Van Fossen* and *Royal Indemnity*, actually found in favor of *defendants* by using the *Restatement Third*'s analyses. In *Royal Indemnity* a $39.5 million verdict for the plaintiff at trial was reversed on appeal. In another case applying *Thompson* that is unpublished, *Rossiter v. Evans*, 2009 Iowa App. LEXIS 1720 (Dec. 30, 2009), the appellate court affirmed a plaintiff's verdict of $1.5 million, $800,000 of which was for punitive damages. Yet, in *Rossiter* someone could argue that even under the old law the plaintiff's verdict would have been upheld, since the defendant knew or should have known of a risk, which, in turn, was "foreseeable," and, therefore, gave rise to a duty to warn the plaintiff. In *Royal Indemnity* someone could also argue that even under the old analysis, a reversal of the plaintiff's verdict was justified. This is because the plaintiff failed to carry its burden of proof to show what caused a fire in a warehouse, or what caused the building's extinguishing system to fail once the fire had started.

In the Nebraska case, *A.W. v. Lancaster County Sch. Dist. 0001*, the court took care to note that "our disposition of this appeal would have been the same regardless [of the adoption of the *Restatement Third*]"). 2010 Neb. LEXIS 88, at * 23. In *Behrendt v. Gulf Underwriters Ins. Co.*, the Supreme Court of Wisconsin wrote that its decision "clarifies" the law in this area. 768 N.W.2d at 578. In *Gipson v. Kasey*, the Arizona court merely cited Section 7 as supporting preexisting tort law in that state, "rejecting foreseeability as a factor in determining duty." 150 P.3d at 231. Finally, in *Diaz v. Phoenix Lubrication Service, Inc.*, the court affirmed a summary judgment for the defendant, finding that "no duty" existed on the part of a mechanic to check a person's tires, when the only thing the defendant was hired to do was an oil change. In *Diaz* the "actor's conduct did not create the risk of physical harm." 230 P.3d at 723; *see also* §7(a) of the *Restatement Third*.

The legal presumption in favor of a duty to exercise reasonable care probably means courts will less frequently dismiss cases than before because the courts find that, as a matter of law, no duty existed. This result will favor plaintiffs, as will the resulting shift in the burden of proof. Defendants will file and courts will grant fewer motions to dismiss, and courts will grant few, if any, motions for summary judgment on "no duty" grounds. Defense lawyers should expect that courts will sparingly employ the "countervailing principle or policy" exception to override the duty that would otherwise be present. Since courts will dismiss fewer cases on motions, more cases will proceed to mediation, and absent resolution, they will proceed to trial.

Another view is that cases that would not have survived under the old law will also not survive under the new analysis, albeit for different reasons. For example, instead of arguing that defendants had "no duty," based on lack of foreseeability, movants will change the focus, to identifiable, "articulated countervailing principles or policies" in favor of legal immunity under the facts. Yet, this "new" analysis will inject unpredictability into the process. In addition, typically a trial court will not dismiss a case as a matter of law based on the argument that there was *no breach of duty*, unless the facts are undisputed, and no rational fact finder could come to a different conclusion, which will happen in a very rare case, indeed. In the vast majority of cases, a jury, rather than a court, will properly decide the "no breach" issue. If a court denies a pretrial dispositive motion, even under the new regime, a defense lawyer can always argue to the jury that no failure to exercise reasonable care occurred, and thus no "breach" of duty occurred, since the ultimate result in the particular case was not reasonably foreseeable.

Do the *Restatement Third*'s Analyses Apply to Breach of Contract or Other Actions Not Based in Tort?

This issue was discussed briefly in *Royal Indemnity* in Iowa. 2010 Iowa Sup. LEXIS 55 (June 11, 2010, as amended Aug. 5, 2010). In that case the plaintiff pled its claims under alternative tort and contract theories based on the same underlying facts. The plaintiff argued that the defendant was liable for a negligent inspection, and also argued that the defendant breached its contract to inspect the premises. Under Iowa law, "proximate cause" is not an element of a breach of contract action, but rather, the plaintiff must have shown that "the damages resulted from FM's breach and were in the contemplation of the parties." *Royal Indemnity*, 2010 Iowa Sup. LEXIS 55, at * 17 (emphasis added). The contract claim was ultimately dismissed since "it was not in the contemplation of the parties that FM would be called upon to answer for any conceivable fire loss." *Id.* at * 21. Although the plaintiff in *Royal Indemnity* mixed the tort theory with the contract theory in presenting its claim, the *Restatement Third* only governs "causation" in the context of a *tort* case. Also, the *Restatement Third*, by its very title, pertains only to "torts" and to circumstances giving rise to liability for "physical and emotional harm." For these reasons the authors believe that breach of contract actions should remain unaffected by the *Restatement Third* changes.

Will it be more difficult for defendants to obtain summary dismissals based on "no duty" or lack of causation arguments?

Does the *Restatement Third*'s Analysis Apply to Tort Claims for Pure Economic Damage or Reputational Harm?

Although the *Thompson* case in Iowa was a negligence case and its holding could apply to negligence cases only, its analysis would appear to apply to *all* tort actions. *Thompson* does not contain any language that purports to limit its application. *Royal Indemnity*, cites *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726 (Iowa 2009), a fraud

case, in which the Iowa Supreme Court essentially applied a scope of liability analysis to limit the damages recoverable in a fraud action for economic losses. *Royal Indemnity*, 2010 Iowa Sup. LEXIS 55, at *20. *Royal Indemnity*, in applying the scope of liability analysis to the negligence claims, also relies on *Movitz v. First National Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998), which rejected a recovery for a failed investment in a hotel property because the plaintiff suffered pure economic losses. *Id.* at *21–22. No language in *Thompson* or *Royal Indemnity* provides that the causation analysis is limited *only* to cases involving "physical or emotional harm," although those terms are admittedly a part of the *Restatement*'s title. On this question the *Restatement Third* states that it "does not address protection of reputation or privacy, economic loss, or domestic relations." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm.*)

Under the *Restatement Third*, foreseeability has been removed from the duty analysis.

Finally, in any event the "economic loss doctrine" bars many tort claims for pure economic or monetary losses. *See, e.g., Van Sickle Construction Co. v. Wachovia Commercial Mortgage, Inc.*, 2010 Iowa Sup. LEXIS 60 (June 25, 2010) (allowing recovery of economic losses in negligent misrepresentation claims).

What Will the New Jury Instructions on Causation Say?

If the *Restatement Third*'s causation analysis is adopted in a state jurisdiction, it is likely that the uniform jury instructions on causation will need modifying. The Iowa State Bar Association on September 9, 2010, approved new uniform causation jury instructions for use in Iowa tort cases after *Thompson*. The causation element is presented to the jury in two separate instructions. They are set forth below:

700.3 Cause—Defined.

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

700.3A Scope of Liability—Defined.

You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiff's claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.

Consider whether repetition of the defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Explanatory notes and authorities are also provided with each instruction.

In summary, in jurisdictions adopting the *Restatement Third*'s causation analysis the jury instructions formerly addressing "proximate cause" will change in three ways. First, the jurisdictions will eliminate the term "proximate cause." Second, jurisdictions will use two different instructions, if applicable: one for "factual cause" and the other for "scope of liability," and the instructions will have to include definitions of both terms. Finally, if formerly present in instructions, a jurisdiction will eliminate the "substantial factor" language.

How Can Defense Counsel Use the *Restatement Third* to Best Advantage?

Although the April 2010 article in *Trial* magazine emphasized the advantages of these changes to plaintiff's attorneys, these changes present an opportunity for defense counsel as well. Here are some "practice pointers" for defense counsel to keep in mind when confronting these issues in future cases.

Learn the New Analysis and Use the Proper Terminology

"Duty" remains an element of every tort case and is a question of law for a court to decide. A general duty to exercise reasonable care exists in every situation as a "default," unless there is an "articulated countervailing rule or policy." If a defendant can identify an appropriate countervailing policy, such as a statute of repose, then it is possible to achieve dismissal of the case on a "no duty" basis. *Foreseeability* is no longer a consideration in the "duty" inquiry, although it is relevant to the "scope of liability" determination of causation. Foreseeability is also a proper consideration in determining whether a defendant has *breached* the generalized duty to exercise reasonable care. Foreseeability is a jury issue.

"Proximate cause" in tort cases is replaced by the term "causation," which consists of two elements: (1) factual cause, and (2) scope of liability. The "substantial factor" test, if previously applicable, is discarded.

Do Not Argue That No "Duty" Exists Because an Injury or Result Was Not Foreseeable

Reframe "no duty" motions to dismiss or for summary judgment to initially presume that a generalized duty of "reasonable care" exists, and then to identify "articulated countervailing principles or policies" to override and countermand that duty. This is the only remaining circumstance under which a court can conclude that, as a matter of law, no "duty" exists. Alternative strategies that defense counsel can employ to achieve the same result include: (1) arguing that factual causation is absent, discussed in more detail below; or (2) arguing that causation is absent under the "scope of liability" element, since the result was not foreseeable.

Do Not Forget the "Lack of Factual Cause" Defense

Although it might appear that "but-for" causation is easy to prove, defense counsel should not assume that factual cause exists in every case. In many cases and claims this element may be absent and that absence can be case dispositive. Take, for example, a common situation: a product liability case in which a plaintiff has sued a defendant for failure to warn. Assume further that the evidence shows that the plaintiff did not read or look at the warning signs or instructions, for instance, in an operator's manual, that were provided with the product. The plaintiff's expert's testimony criticizes the warnings and instructions in the manual. Since the plaintiff did not read what was provided, there is no proof

that any *different or additional* warning or instruction in the manual would have been read, let alone heeded. As a result, the failure to warn claim fails for lack of factual causation. The "but-for" test is not met as a matter of law. *See, e.g., Alfano v. BRP Inc.*, 2010 U.S. Dist. LEXIS 64182 (E.D. Cal. 2010) (since the plaintiff did not read warning that was provided, there could be no proximate cause); *Henry v. General Motors Corp.*, 60 F.3d 1545 (11th Cir. 1995) (the plaintiff's failure to read a warning negated the causation element of the plaintiff's failure to warn claim). Failure to warn is not a proximate cause of injury when it is clear that warning would have made no difference. *Kauffman v. Manchester Tank & Equip. Co.*, 1999 U.S. App. LEXIS 32173, at *10 (9th Cir. 1999) (citing *Anderson v. Weslo, Inc.*, 906 P.2d 336, 341 (Wash. Ct. App. 1995) (failure to warn did not cause injury because the plaintiff "paid so little attention to the warnings that were given, [that] it is unlikely that he would have changed his behavior in response to even more detailed warnings").

A recent example adhering to the *Restatement Third* is *Royal Indemnity*, previously discussed. *See* 2010 Iowa Sup. LEXIS 55. In *Royal Indemnity*, a large plaintiff's verdict was reversed on appeal because the plaintiff did not prove at trial what caused a warehouse fire, or its eventual spread. *See id.* Since cause was undetermined, there was no way of knowing whether the defendant's allegedly negligent inspection was a *factual cause* of the damages. *See id.*

Search For and Create Countervailing Principles or Policies

The generalized duty on the part of everyone to exercise reasonable care is not boundless. The *Thompson* case in Iowa noted that "an actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages. Whether a duty arises out of a given relationship is a matter of law for a court's determination." 774 N.W.2d at 834. "Duty" remains a prima facie element of every tort case. However, §7(b) of the *Restatement Third* acknowledges that a duty will not exist if an "articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Id.* In that event a trial court can dismiss a case as a matter of law based on lack of "duty."

The *Van Fossen* case in Iowa provides a good illustration of the §7(b) analysis. In *Van Fossen*, the spouse of an employee of a subcontractor developed asbestosis allegedly as a result of exposure to her husband's work clothes. The court in that case concluded that no duty existed, because a "countervailing policy or principle" existed: employers have limited control over the work performed by subcontractors. The court also was persuaded that other jurisdictions had considered this precise scenario, a family member of a worker contracting asbestosis by virtue of doing the worker's laundry, and the majority had concluded that "no duty" existed. *Id.* at 697.

Many other potential "countervailing principles or policies" exist, and this is a place where defense counsel can use their creativity. We can think of a couple: (1) statutes that provide immunity from liability (*e.g.*, the workers' compensation exclusive remedy bar; because of this an injured worker cannot argue that an employer has a "generalized duty" to exercise reasonable care; and (2) common law doctrines entrenched in the law (*e.g.*, immunity from liability accorded to social hosts).

In the *Thompson* case, Justice Cady of the Iowa Supreme Court provided another example in his concurring opinion. He opined that the result in that case might well have been different, had a recycling container, left on the end of the driveway near the road for pickup on garbage day, instead of a dismantled trampoline, blown into the road and caused an accident. 774 N.W.2d at 840. Someone could argue that since the practice of recycling is to be fostered, a court might well choose to limit or deny liability in such a situation.

Notwithstanding the above, predicting exactly when, where, and under which circumstances a court might find an "articulated countervailing principle or policy" that will vitiate a duty to exercise reasonable care that would otherwise exist, may prove difficult in a particular case.

The General "Duty" Is to Merely Exercise *Ordinary* or *Reasonable* Care, Not "Extraordinary" Care

Defense counsel should work on enhancing their advocacy skills and techniques with juries in arguing what type of conduct constitutes negligence. Negligence is nothing more than the absence of *ordinary* or *reasonable* care. This is a relatively low and very basic, *minimal* standard of conduct. It may be effective to discuss real-life, factual situations to help flesh out these terms in a manner that is helpful to the defense. For example, a driver's failure to inspect a vehicle before driving it is not an act of negligence, unless there is some good reason to believe that something is wrong with the vehicle that would be found by a reasonable inspection. On the other hand, if the car is making loud noises and operating in a strange manner, a decision to continue driving it until an accident occurs might very well be negligent. The law merely requires *reasonable* or *ordinary* care, not *extraordinary* care. Since the *Restatement Third* now imposes a general duty of reasonable care in most situations, defense counsel should invest some effort in developing effective advocacy techniques for arguing to a jury that a "duty" was or was not breached in the particular circumstances.

Although it might appear that "but-for" causation is easy to prove, defense counsel should not assume that factual cause exists in every case.

Study the New Causation Jury Instructions and Develop Techniques to Argue Those Instructions

Both the "factual cause" and "scope of liability" elements of causation under §6 of the *Restatement Third* present opportunities to persuasively argue a defense. As previously noted, factual cause can be a fighting issue in many cases. Especially in product liability, failure to warn cases,

Restatement, continued on page 74

Moot Courts, from page 48

Judge Lewis

Counsel should be prepared to make a significant investment in a moot court experience if it is going to be done right. This is very important because often millions or even hundreds of millions of dollars are on the line. The fee for most former judges is relatively high, but there are obvious reasons why that is so. In engaging former judges, counsel draws upon a very special sort of expertise that is difficult to find elsewhere. Very few people have sat as federal or state appellate judges, left the bench, and are available to serve as moot court judges for private clients.

Countervailing Considerations

Ms. Winkelman

Moot courts are not for everyone. There are some highly skilled, highly effective appellate advocates who eschew moot courts. Some say that moot courts detract from the spontaneity and authenticity of actual arguments. To that I say, there is a difference between mere spontaneity and effective spontaneity. The latter only comes with thorough preparation.

I accept that people have different preparation styles. But even those advocates who don't hold a formal moot court should have preparation sessions with colleagues who have not worked on a case and can bring that all-important objective, impartial perspective to the table.

Judge Lewis

There are some who believe that a fresh, spontaneous presentation is actually the best kind of presentation. Thelonius Monk used to record his albums that way, to the consternation of his fellow musicians. Monk used to say, "Look, we do everything in one take. If you make a mistake on my record, you're just going to have to listen to that mistake for the rest of your life."

That may have been fine for Thelonius Monk, but finding just the right rhythm and tone in music is different from accomplishing that feat while getting peppered with tough questions at an oral argument.

There is no substitute for extensive preparation, and that includes rehearsal. So, while some have enjoyed wonderful success as oral advocates without ever holding a moot court, for most advocates, the failure to do so risks too much. It is better to be safe than sorry when the stakes are so high. And besides, moot courts are the fun part of preparing for oral argument. At least for the judges! FD

Restatement, from page 13

defense counsel cannot merely assume that a plaintiff would have read, understood and *heeded* the warning or instruction that allegedly would have prevented the accident. This is especially true when all of the other warnings and instructions were obviously disregarded, or a plaintiff generally engages in "risky" behaviors.

"Scope of liability" may be an issue in a particular case as well. The *Royal Indemnity* case in Iowa, which resulted in the notable reversal of an eight-figure verdict for the plaintiff at trial, was decided on this element. This element can be at issue in those accidents with bizarre facts, convoluted fact patterns, or attenuated, unclear or unproven chain of circumstances, or when the results of conduct were not predictable or foreseeable pre-accident from an objective point of view. Be attentive to changes to the causation jury instructions in your jurisdiction. The second paragraph of the new Iowa Uniform Jury Instruction 700.3A, quoted above, recognizes that harm is not within the scope of liability if repetition of the defendant's conduct does not increase the risk of that harm. If the language of the new jury instruction in your jurisdiction is similar to Iowa's, this can be of assistance if an allegedly negligent act or omission and the plaintiff's injury are merely coincidental and unrelated.

Conclusion

Although certain aspects of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010)* and the recent cases following it elicit concern, the analyses are most likely here to stay. The duty and causation inquiries that underpin every tort case have significantly changed. There will be new jury instructions on causation for tort cases. This development has understandably attracted the attention of both the plaintiffs' and the defense bars. Any defense trial lawyer handling tort cases as a part of his or her practice should learn the new calculus and develop techniques to effectively present these concepts to courts and juries. FD

"You're Wrong!" from page 43

must be filed under tight deadlines and maintain word or page limitations.

In some jurisdictions, the prevailing party can and should file an answer to a petition for further appellate review. In other jurisdictions—such as the federal courts of appeals—the prevailing party files an answer only if the court asks it to do so.

Hopefully it is obvious from this article's discussion of the necessary ingredients for a successful petition that neither the petition, nor the answer, if one is required or requested, should duplicate the briefs on appeal. You must carefully tailor both to focus on the standards for post-decision review and explain why a case does or does not meet the criteria for further appellate scrutiny.

It's Always a Long Shot

Even if you do everything right in crafting a petition for a panel rehearing or a rehearing en banc, have a strong dissent, and a well-developed conflict on a recurring issue of great importance to the court and the public, a petition for a panel rehearing or a rehearing en banc will still be a long shot. It remains a cold, hard fact that courts almost always deny petitions for panel rehearings and rehearings en banc. The long odds, reluctance of the judges, and strategic risks and delay associated with seeking a panel rehearing or a rehearing en banc should give you pause. But with luck, hard work, and skillful analysis and writing, you definitely can improve your chances. FD

IOWA DEFENSE COUNSEL ASSOCIATION

defense UPDATE

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The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"

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The Iowa Supreme Court adopted important sections of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm in Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009). As a part of that change, the duty and causation analysis that would apply to every tort case alleging physical or emotional harm was significantly changed. The purpose of this article is to explore the relationship between duty and causation, to examine Iowa cases decided since Thompson, and to highlight strategic considerations for defense counsel.

Thompson v. Kaczinski.

In Thompson, plaintiff, a motorist, swerved to avoid components of a trampoline that were sitting in the road. The trampoline's owner had previously disassembled it and left it laying on the owner's lawn that was adjacent to the road. A few weeks later a windstorm blew the trampoline onto the road. The plaintiff motorist veered into a ditch and had an accident. The motorist alleged that the trampoline owner had been negligent.

Defendant filed a motion for summary judgment, and alleged that there was no legal duty under the facts, since the occurrence was "unforeseeable." The trial court granted summary judgment for defendant, and found that, as a matter of law, that it was "unforeseeable" that a thunderstorm would cause high winds that would, in turn, cause the trampoline to be blown out of the yard and onto the road. Therefore, the trial court concluded, the defendants owed no duty to the plaintiff motorist.

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The Iowa Supreme Court reversed. In doing so the Court adopted certain sections of the Restatement of Torts (Third), Liability for Physical and Emotional Harm. In addition to changing the duty analysis, the Court discarded the terms "proximate cause" and "substantial factor," and substituted a new test, "scope of liability"[1] to provide a limitation on an actor's liability. As a result, defense counsel must adapt to the new duty and causation analysis, and develop arguments to deal with these changes to present their client's defense to the jury.

The reshaping of the fundamental tort analysis by Thompson goes beyond the change from the "proximate cause" terminology to "scope of liability." In order to understand how Iowa law has changed, a review of Thompson's holding with respect to the elements of "duty" and "breach of duty" is necessary.

continued on page 2

1. In Thompson by discarding the terminology "proximate cause" in physical and emotional harm cases, the Court has ignored language set forth in Chapter 668 of the Iowa Code, a statutory enactment of the Iowa Legislature. That statute provides that:["T]he legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault." I.C.A. § 668.1(2).

WHAT'S INSIDE

Message From The President 13

IDCA Post-Session Legislative Report 14

IMEs and Justice for All:
City of Davenport v. Newcomb 16

Schedule of Events 18

New Members 18

I. DUTY.

The bedrock foundation of any tort claim based on negligence is the existence of a duty. The Court in *Thompson* adopted Section 7 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. That Section provides the test for when a duty will arise:

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

In any negligence case, the first questions are, did the defendant owe a duty[2] to the plaintiff and if so, what is the nature of the duty? Once a duty has been shown, as well as a breach of duty, then the analysis turns to the issue of legal causation. If any one of these elements is not proven, then liability is not established.

Although separate, the duty analysis is closely related to the causation analysis. Probably the most famous case that discusses this interrelationship was the time-honored case of *Palsgraf v. Long Island Ry. Co.*[3] In 1924 Helen Palsgraf stood on the platform of a Long Island Railroad railway station waiting for her train. On the same platform many feet away a man carrying a package tried to board a train that was moving. The man appeared unsteady and about to fall. A railroad guard tried to assist the man to board the train by pushing him from behind. This caused the man to drop the package which, unknown to all but the man himself, contained fireworks. The fireworks exploded when they hit the rails. The explosion caused some scales near where Helen was standing to fall. One of the scales fell on Helen causing her injuries.

The majority of the New York Court of Appeals held the Railroad was not liable to Helen because the guard did not breach a duty *to her*. "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all." "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, *with reference to her*, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, *with reference to some one else*." (Emphasis added.) "What the plaintiff must show is 'a wrong' *to herself*; i.e., a violation of her own right, and not merely a wrong *to some one else* . . . ." "The law of causation, remote or proximate, is thus foreign to the case before us." (Emphasis added.)

The dissent in *Palsgraf* took a different approach, arguing that the result turned on proximate cause, not negligence. "Is [negligence] a relative concept – the breach of some duty owing to a particular person or to particular persons?" "Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. *The act itself is wrongful*." (Emphasis added.) "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." "Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain." "But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."

The *Palsgraf* majority held the security guard owed no duty to Helen when he negligently pushed the man with the package. The dissent argued that negligence is negligence regardless of who or how someone is injured. The limitation on a person's liability is that the negligence must be the "proximate cause" of the damages.

Under the former Restatement 2nd approach "the conduct of the actor [had to be] negligent with respect to the other, *or a class of persons within which he is included*." REST 2d TORTS § 281. (emphasis added). Negligence was defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." REST 2d TORTS § 282. The Restatement 2nd focused on the actor's relationship to individuals or classes of persons in determining to whom a duty was owed. Risk was considered, but only in connection with determining to whom a duty was owed and whether that duty was breached. The actor had a duty only to those individuals or classes of individuals as to whom the actor's conduct created a "recognizable risk of harm." If, for some reason, the actor's conduct harmed someone who the actor could not reasonably anticipate would be injured, the actor was not liable to that person because he owed no duty to that person. REST 2d TORTS § 281, comment c. This is essentially the majority's analysis in *Palsgraf*.

An Iowa example of the prior duty analysis is *Bain v. Gillispie*, 357 N.W.2d 47 (Iowa App. 1984). In *Bain*, referee Jim Bain called a notorious foul at the end of the Iowa-Purdue basketball game in 1982. Many people felt that because of the foul call Iowa lost the game, thereby squelching its share of the conference title and ending it's post-season tournament possibilities. Gillispie owned a novelty shop in Iowa City that sold t-shirts with Bain's caricature on it with a noose around his neck. Bain sued for an injunction and damages. Gillispie counter-claimed alleging referee malpractice and claiming damages for loss of sales of Hawk-eye memorabilia since Iowa's season didn't continue. Bain moved for summary judgment on the counter-claim. The court analyzed the duty issue in Gillispie's counter-claim:

> Turning first to the negligence claim, the Gillespies argue that there was an issue of material fact of whether their damages were the *reasonably foreseeable consequence* of Bain's action. A prerequisite to establishing a claim of negligence is the existence of a duty. Negligence is the

2 The word "duty" is used here to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause. REST 2d TORTS § 4.

3 Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

breach of legal duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks. It has been defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. *The standard established by the law is foreseeability of harm or probability of injury.* "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; *it is risk to another or to others within the range of apprehension.*" Justice Cardozo in *Palsgraf v. Long Island Ry. Co.,* 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). The law's standard is one of reasonable foresight, not prophetic vision. *Bain* at 49 (citations omitted, emphasis added)

It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure Gillispies' business or one similarly situated and subject him to liability. The range of apprehension, while imaginable, does not extend to Gillispies' business interests. Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillispies have cited no authority, nor have we found any, which recognizes an independent tort for "referee malpractice." Absent corruption or bad faith, which is not alleged, we hold no such tort exists. As the trial court properly reasoned:

> This is a case where the undisputed facts are of such a nature that a rational fact finder could only reach one conclusion – *no foreseeability*, no duty, no liability. Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is a liability to a merchandiser like the Gillispies, why not to the thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks." There is no tortious doctrine of athletic official's malpractice that would give credence to Gillispie's counterclaim.

Bain v. Gillispie, 357 N.W.2d 47, 49-50 (Iowa App.1984).

Prior to *Thompson*, courts looked to see if there was a foreseeability of harm to the defendant because of the relationship of the plaintiff to the defendant. If so, then the defendant owed a duty of care to the plaintiff. Before *Thompson* the Court used three factors in deciding if a duty existed: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. "Our previous decisions have characterized the proposition that the relationship giving rise to a duty of care must be premised on the foreseeability of harm to the injured person as 'a fundamental rule of negligence law.' *Sankey v. Richenberger, 456 N.W.2d 206, 209-10 (Iowa 1990)*. The factors have not been viewed as three distinct and necessary elements, but rather as considerations employed in a balancing process." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009). "In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *J.A.H.*, 589 N.W.2d at 258 (cited by *Thompson*).

The problem with this approach, as noted by *Thompson*, is that the "foreseeability" inquiry is fact intensive and subjective, and is an issue peculiarly suited for a jury's determination. This is at odds with the view that whether or not a duty exists is uniquely a law issue for the court. There was a "cognitive dissonance" with the concept that duty is a law determination, but yet the underlying duty analysis was based on "foreseeability," a factual matter.

The Restatement 3rd PEH § 7 eliminates "foreseeability" of harm as one of the factors in the duty analysis. Rather, "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." REST 3d TORTS §7(a). Although this simplifies the duty analysis, it arguably establishes the existence of a duty in a wider variety of circumstances and situations, and this should be a concern to defendants. It no longer matters whether the physical harm to a particular person or class of people is foreseeable. Simply put, if the actor's conduct creates a risk of physical harm, the actor *must* exercise reasonable care. Although the concept of "foreseeability" has been removed from the duty analysis, it has not disappeared; it now plays a key role in the "breach of duty" element and will be considered by the trier of fact.

McCormick v. Nikkel, 2012 WL 1900113 (Iowa May 25, 2012) illustrates the first issue in determining if the actor owed a duty. Did the actor's conduct create a risk of physical harm? If the answer to this question is "no," then the actor owed no duty. If the answer to this question is "yes," then the actor had a duty to exercise reasonable care.

In *McCormick*, Little Sioux Corn Processors expanded its ethanol plant in 2006. Little Sioux bought the electrical equipment and hired Schoon to install it. In turn, Schoon hired Nikkel to actually hook up the wires in the metal cabinets where the equipment to control the flow of electricity in the system was located.

Nikkel was also supposed to install "fault indicators" inside the metal cabinets but, unfortunately, the holes in the mounting brackets were too small. Although Nikkel offered to do the extra work of drilling out the holes to make them the right size, Little Sioux declined the offer to save money, deciding to do that work itself. Little Sioux said it would also install the mounting brackets in the cabinets. Having finished all the hook up work it could do at the time Nikkel left the jobsite.

When Nikkel left it turned on the electricity. The cabinets were closed and in a safe condition. They were bolted shut with penta-

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

head bolts that could only be removed by a special penta-head socket wrench. Little Sioux had bought such a wrench along with the electrical equipment. After Nikkel left Little Sioux had exclusive access to and control over the cabinets and the equipment inside them. The cabinets also had high voltage warning signs on them.

In *McCormick* there was a critical issue of fact as to whether Nikkel told Little Sioux it had turned on the electricity. A Nikkel employee, Buford Peterson, said he energized the line in the presence of Russell Konwinski, who was Little Sioux's maintenance manager, and another Little Sioux employee. But, Konwinski denied he was present for this. Konwinski also said, "I had asked Buford Peterson to tell when the power would be turned on but I was not told by him before November 13, 2006 [the day of the accident], that it was on."

About a week after the lines were energized, Little Sioux's employees were doing the job of opening the boxes, removing the mounting brackets, drilling out the holes and re-installing the brackets inside the cabinets when one of them was electrocuted. The employee sued Nikkel, alleging it had control of the cabinet *when the line was energized* and it failed to warn him the equipment was energized.

The Court held the defendant owed no duty to the plaintiff because Nikkel didn't create a "risk of physical harm" when it energized the line that was then contained in a locked and secure box. There was nothing wrong with Nikkel's work when it left. Nikkel created no danger by energizing power lines that were safely in a locked box.[4]

The Restatement 3rd provides that , "[A]n actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct. REST 3d TORTS-PEH § 7 Comment o. "The risk arose [in the *McCormick* case] *only* when Little Sioux used the penta-head wrench to gain access to the switch gear and allowed an untrained worker (McCormick) to work on it without first turning the power off." *McCormick* footnote 4 (emphasis added).

The dissent in *McCormick* argued that, "The existence of Nikkel's duty turns on whether it created a risk of injury *when it energized the switchgear boxes before leaving the work site without notifying Konwinski* – not on whether it connected the wires to the switchgears badly." (Emphasis added.)

> This duty of a contractor to exercise reasonable care is not, as the majority opinion suggests, one that arises only when the contractor does bad or defective work. The duty arises instead whenever a risk of injury to others arises from the contractor's work without regard to whether the work is performed badly. This principle explains why a motorist owes a duty of care to others while driving (not just when driving badly), and it explains why a surgeon owes a duty of care while performing surgery (not just when operating badly). The question of whether the driver or the surgeon has failed to use reasonable care under the circumstances addresses not whether a duty was owed in the first place, but whether that duty was breached."

This is similar to the approach of the dissent in *Palsgraf*: "The proposition is this: Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Palsgraf*, 248 N.Y. 339, at 350; 1662 N.E. 99, at 103. This duty rule is an exact parallel to Section 7 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, adopted by the Iowa Court in *Thompson*. The dissent in McCormick would have found that Nickle owed McCormick a duty. "Accordingly, even if Nikkel did not owe to McCormick any special duties as a possessor of land, or as a contractor temporarily in control of the construction site, it still owed a general duty of reasonable care under section 7 of the Restatement (Third) because it created a risk of severe injury or death by energizing the switchgears and failing to notify Konwinski as requested. McCormick at *11.

The dissent in *McCormick* concluded that a fact issue was generated as to whether Nikkel *breached* the duty of reasonable care.

> Whether Nikkel exercised reasonable care under the circumstances by locking the cabinet, relying on warnings posted on the cabinet, and expecting Little Sioux employees to follow mandatory OSHA and company safety policies, are matters related to foreseeability, breach of duty, and scope of liability – all issues properly reserved for a jury's assessment. Accordingly, I would reverse and remand for trial." *McCormick* at 13.

Thus, the dissent in *McCormick* would have found a duty on the part of Nikkel as a matter of law, but would have left the determination of whether that duty was breached to the jury.

REST 3d TORTS §7(b), also adopted by *Thompson*, sets forth a narrow exception to the general duty rule. That exception provides that there can be particular classes of cases in which an "articulated countervailing principle or policy warrants denying or limiting liability." In these so-called "exceptional cases" a court may do one of two things. A court may decide that 1) the defendant has no duty at all to the plaintiff, or 2) the ordinary duty of reasonable care requires modification.

Duty remains a mechanism for limiting liability only when policy matters are considered and the court can fashion a duty/no duty determination for an entire class of cases. "Whether a duty arises out of a given relationship is a matter of law for the court's determination." *Thompson* at 834. For example, under established Iowa law a social host does not have a duty to the public not to serve a social guest to the point of intoxication. *See, e.g., Brenneman v. Stuelke*, 654 N.W.2d 507 (Iowa 2002).

Whether a court finds an exception to the general duty rule involves consideration of public policy issues. These are matters of

4 Within the duty analysis, who decides whether an actor's conduct creates a risk? The Restatement 3rd §37, comment c suggests the jury makes this decision. "[T]he fact finder would have to determine whether an actor's conduct created a risk of harm as a predicate for determining whether a duty exists under § 7 or whether a duty, if any, must be found in this Chapter." REST 3d TORTS-PEH § 37 Comment c.

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

general applicability and involve the drawing of bright lines of when an actor may or may not be liable. They are decisions for a court based upon the undisputed facts of a case.

Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm based on the specific facts of a case. *Id."* *Thompson* at 835 citing Restatement (Third) § 7 cont. j. In other words, an actor's conduct might well create a risk of physical harm but, for policy reasons, the actor will not be held liable to the injured person or will be held to a different measure of conduct than reasonable care.

McCormick v. Nikkel supra, also discussed application of this exception to the general duty rule. The *McCormick* Court found such an "exceptional case" and, in addition to finding no duty because Nikkel did not create a risk of physical harm, also held Nikkel owed no duty to the plaintiff based upon Restatement (Third) §7(b). The Court noted that, historically, liability follows control. The Court characterized this as the "control rule." The reason for the rule is the person who controls the work site is in the best position to assess the risks and to take safety precautions. Thus, when a landowner hires an independent contractor and turns complete control of the project over to the contractor, the landowner is not liable for an injury to an employee of the independent contractor. A property owner owes no duty to the employee of an independent contractor if the owner does not retained any control. The Court pointed out that, "This law [the "control rule"] is of long standing in Iowa." The Court observed that the *McCormick* case presented the "flip side" of the landowner/independent contractor coin because in *McCormick*, an employee of the *landowner*, Little Sioux, sought recovery from the *independent contractor*, Nikkel.

The Court said the "control rule" is an "articulated countervailing principle or policy" that allows a court under Restatement (Third) §7(b) to "modify or eliminate" the ordinary duty stated in §7(a). "Simply put, the cases involving parties that turn over control of premises to another party are 'a category of cases' where 'an articulated countervailing principle or policy' applies." When Nikkel left the jobsite and turned control of the equipment back to Little Sioux the electrical equipment was safe and secure. Little Sioux had complete control of the cabinets *when the accident happened*. "[W]e conclude that the control principle means Nikkel, the subcontractor, owed no general duty to McCormick, the employee of the property owner that had reassumed control of the equipment and the site." The Court distinguished other owner-contractor cases where the contractor performed bad or defective work. In a "bad work" case, the negligence happens at the time the "bad work" is done. But, in a "failure to warn" case like *McCormick* the failure happens continuously over time. As such, situations can arise where later parties may be in a better position to warn potential victims. Thus, the duty to warn fits well for the "control principle." The Court drew an analogy to Restatement (Third) of Torts: Prods. Liab. § 5, at 130 (1998) which eliminated the liability of suppliers of component part who don't have anything to do with the design or manufacture of the final product and whose component isn't defective. Such a supplier has, in effect, simply given up control of the part to the assembler who is in the best position to warn the public about the dangers of the final product which is probably made up of many different component parts supplied by many different suppliers.

The Court admitted in a footnote in *McCormick*, though, that, "[O]f course, review of specific facts may be necessary to determine that there has been a complete transfer of control and that the claim does not involve defective work performed by the contractor. Nonetheless, we are still dealing with a "category of cases." *Id.* at fn. 5.

Thus, the Court held Nikkel owed no duty to McCormick both because no duty arose under §7(a) since Nikkel did not create a risk of physical harm by energizing electrical equipment inside secure cabinets and because a contractor "turning control of the premises over to someone else" is a category of cases where as a policy (or precedent) matter no duty should apply under §7(b).

The dissent in *McCormick* took a different approach, parallel to the dissent in *Palsgraf*. "[T]he majority's analysis of the general duty question demonstrates a fundamental misunderstanding of the distinction between duty and scope of liability and results in a conflation of the two issues." The dissent argued that the case did not present "a category of cases where 'an articulated countervailing principle or policy' applies."

> I find no articulated countervailing principle or policy that warrants denying or limiting the liability of electrical contractors as a class of actors for risks of injury created by their own acts or omissions at a construction site. Although Nikkel did not control the construction site or the particular task performed by McCormick at the time of his injury, the McCormicks contend Nikkel owed a general duty to exercise reasonable care *when it energized the switchgears* and failed to inform Konwinski despite having been asked to do so. (Emphasis added.)

The dissent took the position that a situation where "a subcontractor that properly performs electrical work on a jobsite, then locks up the work and transfers control to the property owner [does not owe] a duty to an employee of the owner electrocuted six days later when the owner fails to de-energize the work site in contravention of various warnings and regulations" is not a clear, bright-line rule of law that would apply to a particular class of cases.

The dissent pointed out that the majority admitted there can be fact issues in some cases concerning how much control was actually transferred and whether the contractor performed "bad work." As such, the dissent argued, " . . . the majority effectively concedes that the existence of a duty will turn on fact questions in particular cases. On this point, the majority confuses its duty analysis with the analysis of scope of liability. 'When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability." Restatement (Third) § 7 cmt. *a,* at 78." *McCormick* at 13.

Instead of finding no duty, another approach a Court could take under §7(b) is to modify the "reasonable care" standard. The "reasonable care" standard is the "default" standard. [See also DAN B. DOBBS, THE LAW OF TORTS § 227, at 578 (2000)

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

("Among strangers ... the default rule is that everyone owes a duty of reasonable care to others to avoid physical harms.") (footnote omitted); REST 3d TORTS-PEH § 7]. For certain classification of cases this "reasonable care" standard has been modified in Iowa. For example, a physician "must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances."[5] A lawyer "must use the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances." And a beer and liquor licensee had it's duty changed by the Dram Shop Act such that it must not sell and serve an alcoholic beverage to a customer who it knows or should know is or would become intoxicated.

II. BREACH OF DUTY

After a "duty" is established, the next element of any negligence case is "was there a breach of duty?" *Thompson v. Kaczinski* addresses this element as well. Notably, the fundamental "duty," "breach of duty" and "causation" analysis has been retained.

The "breach of duty" element is where the fact finder becomes involved in the process. Whether a legal duty is breached under the circumstances of the particular case is an issue of fact for the fact finder to determine.

Section 3 of the Restatement (Third), which was adopted by the Court in *Thompson*, defines "negligence:"

> § 3. Negligence
>
> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

The Restatement 2nd defined negligence as "conduct which falls below the standard established by law for the protection of others against *unreasonable* risk of harm." (emphasis added.).[6] To be an unreasonable risk, the magnitude of the risk had to outweigh the utility of the act . The Restatement 2nd gave factors that the fact finder could use to determine the utility[7] of the actor's conduct and the magnitude of the risk.[8]

The breadth of the risks created by the actor's conduct was interpreted broadly. All normal and ordinary hazards were included as being within the scope of the risk created by the actor's conduct.

The conduct of the actor was always compared to the hypothetical conduct of the mythical "reasonable man" who, by definition, always exercised reasonable care. "The standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man under like circumstances."[9]

The Restatement Third provides a list of three factors to consider in determining whether the actor has exercised reasonable care:

1. The foreseeable likelihood that his conduct will result in harm,
2. The foreseeable severity of any harm that may ensue, and
3. The burden of precautions to eliminate or reduce the risk[10] of harm.[11]

Defense counsel can use these factors to develop arguments on why a defendant has exercised reasonable care in a particular case.

It is noteworthy that the term "foreseeable" that was dropped from the "duty" element in the Restatement Second, now reappears in the Restatement (Third) as a matter for the finder of fact to decide when determining whether the defendant breached the relevant duty. This is consistent with the analysis that foreseeability is fact intensive and is uniquely a jury issue.

"The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care." *Thompson* at 835. "A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination." *Id.*" *Thompson* at 835. "Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small

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5 Thus, the modified duty applicable to medical professionals, which employs customary rather than reasonable care, reflects concerns that a lay jury will not understand what constitutes reasonable care in the complex setting of providing medical care and the special expertise possessed by professionals. REST 3d TORTS-PEH §7.

6 In the Restatement2d, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others. REST 2d TORTS § 282.

7 (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct. REST 2d TORTS §292.

8 (a) the social value which the law attaches to the interests which are imperiled;
(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
(c) the extent of the harm likely to be caused to the interests imperiled;
(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm. REST 2d TORTS §293.

9 REST 2d TORTS §283.

10 Blacks Law Dictionary defines "risk" as, "The uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm." Black's Law Dictionary (9th ed. 2009).

11 When you are defending, in an appropriate case, make sure you present evidence of the burden of precautions to eliminate or reduce the risk of harm.

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

changes in the facts may make a dramatic change in how much risk is foreseeable . . . . [C]ourts should leave such determinations to juries unless no reasonable person could differ on the matter."

Restatement (Third) of Tort: Liab. for Physical Harm, § 7, cmt. j, at 97-98.

This is the essence of the risk concept of the Restatement 3rd. It is the "risk-benefit test" or "cost-benefit test" for negligence. It is a balancing approach. "Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages." Restatement Third § 3, comment e. The disadvantage of the actor's conduct is the magnitude of the risk, which is a combination of the foreseeable likelihood of harm and the severity of the harm. The advantage to the actor is not having to change his conduct so as to take precautions against the harm. Those precautions might involve financial burdens. They might involve time burdens. They might involve extra work. They might involve simple inconvenience. Do the disadvantages outweigh the advantages in a particular situation? If the answer is "yes," then the actor has breached his duty. If the answer is "no," the actor hasn't breached his duty. The trier of fact makes this decision, most typically the jury.

If the foreseeability of harm is small and whatever harm might happen is not severe and the burden to eliminate or reduce whatever little harm might happen is great, a fact finder could conclude the defendant did not breach its duty and, therefore, did not act negligently. But, where the foreseeability of harm is great and the harm that could happen is severe and it would not have taken much for the defendant to have taken precautions to eliminate or reduce the risk, a fact finder could conclude the defendant breached its duty and, therefore, did act negligently. As always, there are an infinite number of gray areas between these extremes.

If the Court decides the defendant owed a duty to plaintiff and that duty was reasonable or ordinary care *and* the jury decides the defendant did not act like a reasonable person under the circumstances, then the jury will find the defendant was negligent.

III. CAUSATION

The final element of every negligence case is causation. Causation remains as an element to be proven by plaintiff, but the analysis was significantly changed by *Thompson v. Kaczinski* and its adoption of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. The "proximate cause" terminology which has been a part of the lexicon in negligence cases in Iowa for over a hundred and fifty years has now been abandoned where a physical or emotional injury is claimed. This element is now referred to merely as "causation." In addition, the "substantial factor" test of proximate cause has been eliminated and has been replaced by "scope of liability."

Under the Restatement Third causation is broken down into two elements – factual cause and scope of liability.

> § 26. Factual Cause
>
> Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

The Restatement 3rd defines *factual* cause as harm that "would not have occurred absent the conduct." Restatement 3d §26. This is the classic "but for" test of causation and on this test the Restatement 3d is consistent with prior law.

The *legal* cause element of causation is now termed "scope of liability."

> § 29. Limitations On Liability For Tortious Conduct
>
> An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

Not only was *Thompson* a sea change of Iowa law with respect to duty, it also announced a new calculus for the determination of the *prima facie* element of causation in every tort case claiming physical or emotional injury. "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm *within the scope of liability*, unless the court determines that the ordinary duty of reasonable care is inapplicable." Restatement 3d §6, Liability For Negligence Causing Physical Harm.

Legal causation obviously requires something more than mere "but for" cause. Otherwise liability would be limitless. There must be reasonable limits to an actor's liability. Just because an actor is negligent doesn't mean the actor should be liable for all harms caused to all people over time for the endless chain of events the tortious conduct put into motion. The Restatement 2nd limited the actor's liability to those persons to whom the actor owed a legal duty, like the majority in *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). Under Iowa law before *Thompson*, the rule was that an actor's conduct was the proximate or legal cause of harm to another if (1) his conduct was a "substantial factor" in bringing about the harm and (2) there was no other rule relieving the actor of liability because of the manner in which his negligence resulted in the harm. *City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11, 18 (Iowa 2000).

The Restatement 3rd provides that the way in which to limit an actor's liability for tortious conduct is through the standard of "scope of liability" rather than by limiting an actor's duty. This approach was the approach taken by the dissent in *Palsgraf*. An actor is liable for only "those harms that result from the risks that made the actor's conduct tortious." Restatement 3rd §29.

The issue of "scope of liability" will not be present in most cases. In fact, most tort cases involving negligence resulting in physical or emotional harm will not warrant an instruction on scope of liability. In most cases the fighting issues will be whether the defendant breached a duty of reasonable care to the plaintiff and whether the defendant's breach was a factual cause of the plaintiff's medical problems and other damages. "Scope of liability" may become an issue in cases involving odd or unusual facts or quirky circumstances, the "chain of causation" cases or the "one-in-a-million" happenstance. As discussed supra, *McCormick* was one such example.

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

The reporters for the Restatement 3rd wrote that most of the cases where scope of liability is an issue involve persons who are within the scope of *some* harm, but who have been injured from a risk that wasn't one of the risks that made the actor's conduct tortious in the first place. A rule that says there is no duty to an "unforeseeable plaintiff" doesn't work well. As the authors of the Restatement 3rd wrote, "Although pronouncements of no duty to unforeseeable plaintiffs have some appeal, there is awkwardness in stating that the actor had a duty not to cause a certain range of harm, but had no duty to avoid causing the type of harm that actually occurred. In short, an unforeseeable-plaintiff rule is not very helpful in addressing most scope-of-liability issues." Another problem with an "unforeseeable plaintiff" rule is that it, once again, mixes what is typically thought to be a jury issue, foreseeability, with the determination of duty, which is a legal issue for the court to decide.

Another issue involves the proper breadth of the scope of liability. "Physical harm" means the physical impairment of the human body ("bodily harm") or of real property or tangible personal property ("property damage"). REST 3d TORTS-PEH § 4. "Risk is explained in § 3, Comment *e*, as consisting of harm occurring with some probability. The magnitude of the risk is the severity of the harm discounted by the probability that it will occur. For purposes of negligence, which requires foreseeability, risk is evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity." REST 3d TORTS-PEH § 29, comment d.

Before the jury reaches the issue of scope of liability, it has already found that the defendant has breached its duty. The jury has found that, on balance, the disadvantages of the defendant's conduct, or the magnitude of the risk, outweighs the advantages of not having to take precautions against the harm. What the jury needs to ask itself at this point is, "What are the harms that could have come about by the defendant's conduct? What are the harms that the defendant risked by acting the way he did? Are those one of the harms that could have been foreseeable when the defendant acted? Is it a harm that the defendant should have bothered to take precautions to eliminate or reduce the risk of coming about?" "If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm." REST 3d TORTS-PEH § 29, comment d.

"To apply this rule requires consideration, at an appropriate level of generality . . . of: (a) the risks that made the actor's conduct tortious, and (b) whether the harm for which recovery is sought was a result of any of those risks." REST 3d TORTS-PEH § 29, comment d. But, what is an "appropriate level of generality?" On the one hand, broadly speaking, the risk is of personal injury or property damage. But, personal injury or property damage is involved in all cases that arise under the Restatement Third. To characterize the risk this broadly would provide no limit on the scope of the defendant's liability.

The breadth of "scope of liability" under the Restatement 3d analysis was the primary issue in *Hill v. Damm*, 804 N.W.2d 95 (Iowa App. 2011). In *Hill*, discussed in more detail *infra*, a directed verdict for defendant was reversed on the basis of the general nature of the harm under the scope of liability analysis. At trial the court felt that the risk of harm was that the plaintiff, a school bus-riding, teenage girl who was engaged in an affair with an older man, would be sexually assaulted; in actuality her murder was arranged by the abuser. The Iowa Court of Appeals in *Hill* found that the nature of the harm was physical harm to the Plaintiff, and not just that she was likely to be sexually assaulted or abused.

With respect to the general nature of the risk of harm under the Restatement (Third) analysis of scope of liability, the reporters noted:

> The risk standard is defined with respect to risks of harm, while the "type of harm" can be described at varying levels of generality. It can also be described by including some degree of detail about how the harm occurred. In both Illustrations 2 and 3, the risk of harm might have been described generally as a risk of personal injury. Alternatively, it might have been described more specifically—as cuts, bruises, and internal injuries resulting from concussive forces that propelled metal into Alan in Illustration 2, or as a broken toe due to the force of a dropped shotgun that fell onto the toe in Illustration 3. Illustration 2 employs the general characterization, while Illustration 3 employs a narrower characterization, closer to the one provided in this Comment.

REST 3d TORTS-PEH § 29.

For the proper breadth of the scope of liability the Reporters employ a "reasonableness" test: is the harm that occurred one that logically follows from the risks created by the tortuous conduct? Some harms may result from tortuous conduct, but do not subject the actor to liability. Comment d of the Restatement (Third) discusses this issue:

> *Thus, the jury should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct.* If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm. When defendants move for a determination that the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.
>
> The standard imposed by this Section is often referred to as the requirement that the harm be "within the scope of the risk," or some similar phrase, for liability to be imposed. For the sake of convenience, this limitation on liability is referred to in the remainder of this Chapter as the "risk standard."

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

REST 3d TORTS-PEH § 29.

The manner in which the harm happened can be important in determining whether the harm was within the risks created by the conduct. This necessarily includes an examination into the circumstances surrounding the way in which harm came about, as well as the type of harm.

> Some aspects of the manner in which the harm occurs are relevant to a determination of the scope of an actor's liability … Mechanisms are important so long as they bear, in a general and reasonable way, on the risks that were created by the tortious conduct in the circumstances that existed at the time. (Restatement (Third) Torts, § 29, comment o).

In an unusual or bizarre set of circumstances, the result flowing from the tortious conduct may not fall within the scope of liability. However, the Restatement (Third) warns us that simply because a foreseeable harm came about in an unusual fashion does not insulate the actor from liability. In other words, an unusual mechanism of injury does not *per se* remove a particular harm from an actor's scope of liability. But in a particular case it can be something for the jury to consider in deciding if the harm was within the scope of liability.

"Repetition of defendant's conduct" is another test under the Restatement (Third) that can be used in the scope of liability analysis. That is, is the same harm likely to happen to another victim if the tortfeasor repeats his act? If not, then the result of the actor's conduct should not fall within the "scope of liability."

Several Iowa cases subsequent to *Thompson* have discussed the concept of "scope of liability." A quick review of these cases is instructive.

a. *Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839 (Iowa 2010).*

Royal Indem. Co. is an important decision, since the appellate court reversed a $39 million plaintiff's verdict based on the absence of the "scope of liability" element alone. The case arose out of a warehouse fire that destroyed new product inventory being stored by Deere & Co. After the insurance companies paid the losses, a property damage subrogation action was filed against Factory Mutual (FM). The suit claimed that FM's negligent inspection of the premises either resulted in the subsequent fire, or allowed the building's extinguishing system to be so faulty as to be incapable of putting out or limiting the fire damage.

In *Royal Indem. Co.*, the Iowa Supreme Court reversed the plaintiff's verdict and dismissed the case. It did so because plaintiffs failed to prove that FM's conduct "increased the risk of loss" to Deere's product. *Id.* at 853. There was a failure of proof because plaintiffs could not prove what the cause of the fire was, and could not prove why the fire suppression system did not work. Although the decision was based on the absence of the "scope of liability" element of the causation analysis, it could be argued that the result would have been same under prior law, i.e., that if there was no proof of what the cause of the fire was, then "proximate cause" was absent as a matter of law. It is also interesting to note that the case could have been decided based on the absence of *cause in fact* or "but for" cause as well, under either the prior "proximate cause" analysis or the new Restatement Third analysis. *Royal Indem. Co.* is a good illustration of how the various factors and elements of causation overlap. As a result, defense counsel needs to be ready to spot these issues and make all relevant alternative arguments.

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

In *Brokaw*, plaintiff and the defendant were high school basketball players. In a high school basketball game McSorley struck Brokaw. McSorley got a technical foul and was ejected from the game. Brokaw sued McSorley alleging the intentional tort of assault and battery. He also sued McSorley's school district for negligent failure to control McSorley's conduct. There was evidence at trial that McSorley was an intense player who had a "short fuse" but there was no evidence he was an assaultive-type of player.

In evaluating the school district's liability, the Supreme Court analyzed the duty element using Thompson's Restatement Third approach. It started with the "default" duty – the duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. Then the Court asked, "is this an exceptional cases where the general duty of reasonable care won't apply?" The Court turned to the definition of an "exceptional case." "An exceptional case is one in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Thompson* at 835. The Court noted that the School District wasn't arguing that coaches as a class have no duty to control the actions of their players. The Court could find no "countervailing principle or policy" to eliminate or modify the "default" duty. Thus, the Court concluded that the general duty to exercise reasonable care applied.

Next, the Court addressed the issue of whether the School District breached its duty. The Court turned to the Restatement Third of Torts §19 – Conduct that is Negligent Because of the Prospect of Improper Conduct by The Plaintiff or a Third Party. *Brokaw* dealt with the situation where a third person (the basketball player), not the defendant (the school district), committed the improper act. The Court applied Restatement (Third) §19.

> The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.

"This section imposes liability where the actions of the defendant "increase the likelihood that the plaintiff will be injured on account of the misconduct of a third party." *Id.* §19 cmt. *e*, at 218;" *Brokaw* at 391.

The court noted the Restatement Third acknowledged "that in this situation, there is not a clean delineation between negligence and scope of liability. Restatement (Third) § 19 cmt. *c*, at 216-17 ("[T] he issues of defendant negligence and scope of liability often tend to converge.")." *Brokaw* at 392.

As a review, §3 of the Restatement set for the three primary factors for a *fact finder* to consider in deciding whether a person breached a duty:

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

1. The foreseeable likelihood that the person's conduct will result in harm,
2. The foreseeable severity of any harm that may ensue, and,
3. The burden of precautions to eliminate or reduce the risk of harm.

Brokaw quoted a comment from the Restatement 3d which tailored these three factors to the situation where a third party, not the defendant, commits the injurious act.

> This Section is to a large extent a special case of § 3, and findings of defendant negligence under this Section hence largely depend on consideration of the primary negligence factors set forth in § 3. One factor is the foreseeable likelihood of improper conduct on the part of the plaintiff or a third party. A second factor is the severity of the injury that can result if a harmful episode occurs. The third factor concerns the burden of precautions available to the defendant that would protect against the prospect of improper conduct by the plaintiff or a third party …

Restatement (Third) § 19 cmt. *d*, at 217.

The Court noted that the Restatement 3rd cautioned against requiring excessive precautions for the somewhat foreseeable improper conduct of third parties. The Court adopted the language from a footnote to Section 19 for the standard. "The risk is sufficiently foreseeable to provide a basis for liability when "the actor [has] sufficient knowledge of the *immediate circumstances* or the *general character of the third party* to foresee that party's misconduct." *Brokaw* at 393-94 citing Restatement (Third) §19 cmts. g, h, at 220.

In the context of a sporting event, the court observed that there is the ever-present danger that an athlete could pop off suddenly and strike an opposing player. But, it is only when the "immediate circumstances or the general character of the player" should alert the coach that an assault is foreseeable that the coach needs to take action and bench the player.

"The plaintiffs seek to frame the issue as whether WMU could reasonably foresee that McSorley *could* act in an unsportsmanlike manner sufficient to potentially cause injury to another, while the trial court framed the issue as whether WMU could foresee that McSorley *would* intentionally strike another player in a violent fashion. *Brokaw* at 393. "Consistent with both the Restatement (Third) and *Godar,* the district court posed the proper question in determining whether a breach of duty occurred, i.e., whether the harm that occurred here-McSorley's intentional battery-was a foreseeable risk under the circumstances. *Brokaw* at 393.

"The question of whether WMU breached its duty of care turns on WMU's knowledge of McSorley's *general character* or the nature of the *immediate circumstances*, a question of fact. Restatement (Third) § 8, at 103. *Brokaw* at 393.

As to McSorley's general character, there was some evidence McSorley was an intense player who had a temper. But there was other evidence that he had never fouled out of a game, wasn't a discipline problem and didn't have a reputation as an aggressive player. The "evidence does not necessarily mandate a factual finding as a matter of law that based on knowledge of McSorley's general character it was foreseeable he was likely to commit battery on other players." *Brokaw* at 394.

As for the "immediate circumstances" prong Brokaw claims McSorley took a swing at another player in the game and committed an undercutting foul. The trial Court, after viewing the video tape of the game found both these claims unsubstantiated. Thus, the trial court found there were no "immediate circumstances" that would impose liability on the school district.

"On these factual issues, the district court determined that "WMU officials did not know, nor in the exercise of ordinary care should have known, that [McSorley] was likely to commit a battery against an opposing player." *Brokaw* at 393-94.

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

In *Langwith*, the issue was the extent of the duty owed by an insurance agent to his client. In *Langwith* there was a loss, and the insured subsequently filed an action against his agent alleging that the agent did not procure for him the proper type or amount of insurance. The case illustrates how a court can modify the general duty of reasonable care.

Before *Langwith* an insurance agent had a duty to use reasonable care in procuring the insurance that the insured asked for. But if, and only if, the insurance agent held himself out as an insurance specialist or consultant and received additional compensation for doing so could the agent be held to this greater duty. *Langwith* changed this. It held that if there was an agreement between the agent and the insured to render services beyond the general duty to obtain the coverage requested then the agent has a duty to perform with the skill and knowledge normally possessed by insurance agents under like circumstances

The Iowa Legislature subsequently abrogated the *Langwith* rule by passing Iowa Code §522B.11 which reverted the agent's duty back to the prior, *Sandbulte* standard. Since the substantive rule of law established by Langwith was later abrogated by a statute enacted by the Iowa Legislature, its legal authority with respect to the Restatement (Third) could be questioned.

d. Hill v. Damm, 804 N.W.2d 95 (Iowa App. 2011).

In *Hill*, a thirteen year old eighth grade girl intentionally got on the wrong school bus after school one day. After she was discovered on the wrong bus she insisted on being let off at the wrong stop which was near the place of business of an older man, David Damm, with whom she had been having an affair. Her parents had recently had her bus route changed so as to drop her off close to home so she could be watched after she got off the bus. There was evidence that some employees of the bus company, First Student, knew that the older man presented a danger to the thirteen year old. When the girl arrived at the man's place of business, she was taken to Illinois by prearrangement with the man's friend and murdered.

The trial court granted First Student's motion for directed verdict

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

on the grounds that her murder-for-hire was outside the scope of the bus company's liability. The bus company argued that no one foresaw a risk that the girl would be murdered. The girl's estate argued that there was a foreseeable risk that the girl would be harmed in some fashion by the molestation that was likely to happen. The Court of Appeals reversed, holding a jury question was generated.

> The question we must decide is: At what level of generality should the type of harm in this case be described? The plaintiffs argue, "If the risk is understood to be physical harm to Donnisha … then it is clear that everyone, including the bus company, was aware of the danger of physical harm to Donnisha." First Student counters that the identifiable risk at the time of the allegedly tortious conduct on the part of First Student was that David Damm would make contact with and sexually abuse Donnisha, not that he would hire a third party to kidnap Donnisha, take her across state lines, and have her murdered.
>
> We think this is a question that should have been submitted to and decided by the jury. Comment i to section 29 provides, "No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section . . . . " Many cases will pose straightforward or manageable determinations of whether the type of harm that occurred was one of those risked by the tortious conduct. Yet in others, there will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line. Those cases are left to the community judgment and common sense provided by the jury. Id. § 29 cmt. i, at 504–05 (emphasis added).

The lesson from the *Hill* case is where scope of liability is an issue, unless it is an exceptional case where causation is absent as a matter of law, the court will most likely have a jury decide it.

e. Hoyt v. Gutterz Bowl & Lounge, LLC, 2011 Iowa App. LEXIS 1276 (2011)(unpublished).

In *Hoyt*, a bar patron was assaulted by another customer in the bar's parking lot. The patron had been escorted out of the bar for verbally assaulting the customer who later attacked him the parking lot. Although the trial court granted summary judgment for the defendant-lounge, on appeal the court found that reasonable minds could differ as to whether the owner exercised reasonable care to protect the patron from the customer, and whether the harm that occurred fell within the owner's scope of liability.

The scope of liability was in issue because the person who had been verbally abusive in the bar towards another, was the victim of the assault by the other person outside the lounge. Applying the "appropriate level of generality" with which to describe the harm, as it did in *Hill*, the court concluded that a jury issue was created, and that the case should be reversed and remanded for trial.

IV. JURY INSTRUCTIONS.

A. Uniform instructions.

The jury instruction committee of the Iowa State Bar Association has drafted a new, uniform jury instruction which address the causation and scope of liability analysis adopted by *Thompson*. Those instructions provide as follows:

> 700.3 A Scope of Liability – Defined.
>
> You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiff's claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.
>
> Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

B. Additional instructions.

A reasoned argument can be made that a jury will need more guidance on the scope of liability inquiry than simply Jury Instruction No. 700.3A. You may want to consider requesting these instructions.

> Instruction 1
> Knowledge
>
> To establish that the defendant was negligent, it is not sufficient that there was a likelihood that [the plaintiff] would be harmed by [the conduct of the defendant]. To establish that the Defendant was negligent, the Plaintiff must establish that it was foreseeable to [the defendant] at the time he acted that [the plaintiff] would be harmed by [the conduct of the defendant].
>
> Authority: Restatement (Third) Torts: Liab. Physical Harm §3 (2010) (To establish the actor's negligence, it is not enough that there be a likelihood of harm. The likelihood must be foreseeable to the actor at the time of the actor's conduct.)
>
> *Thompson v. Kaczynski*, 774 N.W.2d 829 (Iowa 2009)
>
> Instruction 2
> Scope Of Liability — Defined
>
> You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiffs' claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid.

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

In determining whether the harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid, you may consider the following:

a) The risk that the defendant was seeking to avoid,
b) The manner in which the injury came about, and
c) Whether the type of injury was different from the injury that was contemplated or foreseen by anyone.

Consider whether repetition of defendant's conduct makes it more likely harm of the type the plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Authority:

Restatement (Third) Torts: Liab. Physical Harm §29 (2010)
Thompson v. Kaczynski, 774 N.W.2d 829 (Iowa 2009)
Iowa Uniform Civil Jury Instruction 700.3A (modified)

The jury instruction committee has not drafted a new uniform instruction on the issue of breach of duty. Until the committee does, defense counsel might want to consider requesting this instruction, which is simply a quote from the Restatement 3d:

Ordinary Care - Common Law Negligence – Defined

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

V. PRACTICE POINTERS FOR DEFENSE COUNSEL.

First and foremost, defense counsel should study *Thompson v. Kaczinski*, its progeny, and the Restatement (Third) in order to learn the new analysis and lexicon. Any petition or complaint that alleges "proximate cause" in a case governed by the Restatement (Third) is subject to an Iowa R. Civ. P. 1.421(1)(f) or Fed. R. Civ. P.12(b)(6) motion for "failure to state a claim upon which any relief can be granted." The terms "proximate cause" and "substantial factor" are no longer used. Any time a defendant's conduct creates a risk of physical or emotional harm, a duty to exercise reasonable care will exist, unless special circumstances exist. "Duty" is a question of law for the court. "Breach of duty" is a fact question for the jury. "Foreseeability" is no longer a part of the "duty" inquiry, but it is an integral part of the "breach of duty" calculus.

Defense counsel should develop ways in which to argue to the jury the differences between risk of harm and severity of harm, and how these factors, when coupled with the probability of occurrence and the burden of precautions, can tip the liability balance. The concept of "risk" can be understood as: 1) the severity of harm; multiplied by: 2) the probability of its occurrence. It is clear that a breach of duty will likely be found where both the severity of harm and probability of occurrence are significant. However, defense counsel should understand there can be situations where the risk of harm is great, but the probability is low; or other cases in which the risk of harm is low and the probability of occurrence is great. In either situation, defense counsel should argue, and a jury would be justified, in concluding that *no breach of duty occurred.*

Defense counsel should also add to this analysis a careful consideration about "the burden of precautions to reduce the severity of harm or probability of occurrence." Theoretically, the risk of harm and probability of occurrence could both be moderate or high, but if the burden of precautions is too burdensome or impossible, then the defendant should not be held liable. The Restatement (Third) supports a good-faith argument by defendant's counsel along these lines.

VI. APPLICABILITY OF THE RESTATEMENT (THIRD) ANALYSIS.

Certain tort cases may not employ the "scope of liability" analysis set forth in the Restatement (Third) of Torts, Liability for Physical and Emotional Harm. One example would be a dram shop action. Another example might be a fraud claim. One example is the recent case of Dier v. Peters, 815 N.W.2d 1(Iowa 2012). In a case of first impression, Dier recognized a cause of action for paternity fraud. In analyzing the historical elements of a fraud claim, the court utilized the standard proximate cause analysis. "Scope of liability" in the causation sense was not discussed or examined. Even though "fraud" is typically considered to be a tort (as opposed to contract) claim, the scope of liability formula adopted in *Thompson* was not employed. Since the damages sued for there (financial support for the child) did not constitute *"physical or emotional harm."*

Some open questions in cases continuing to use the former proximate cause analysis include: do those cases still use the "substantial factor" test of proximate cause? Don't the problems that previously existed with the use of proximate cause in tort cases for physical and emotional harm, continue to exist in other tort cases that continue to use the proximate cause terminology, irrespective of the nature of the damages? Why should those cases be treated differently? And finally and perhaps most importantly, since the uniform civil jury instructions have now been changed, what should the trial court (and the parties) use as standard jury instructions in those cases that use the "old" proximate cause analysis?

VII. CONCLUSION

Only a studious understanding of *Thompson* and the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, with all of their variations and intricacies, and subsequent Iowa cases on these subjects will allow defense counsel to fully and properly defend his or her client in a negligence or other tort case involving physical or emotional harm.

continued from previous page | *The Restatement (Third), Duty, Breach Of Duty and "Scope Of Liability"*

IOWA DEFENSE COUNSEL ASSOCIATION

A message from the president ...

Greg Barntsen

As my last letter to you as President of the Iowa Defense Council Association, I want to inform you of the activities that have been accomplished to further the mission of the Association. In recent months, our Association has joined together with the Property Casualty Insurers of America, the Iowa Insurance Institute and the Iowa Self Insurers Association to resist a Petition for Declaratory Order filed by the Workers' Compensation Core Group who has petitioned the Iowa Workers' Compensation Commissioner for a ruling that defendants be required to produce surveillance tapes and reports of the claimant's activities when they are conducted solely in anticipation of litigation. It is the Iowa Association for Justice Workers' Compensation Core Group's position that those materials are required to be disclosed under Iowa Code §85.27(2) because they concern the employee's physical or mental condition relative to the claim. The IDCA and the other organizations strongly disagree with this position and have indicated that if the Iowa Workers' Compensation Commissioner rules in favor of the workers' compensation group, they are going against A well-established Supreme Court Rules and case law. The issues have been well briefed by both parties but a decision has not been rendered. Through the IDCA's association with the Iowa Insurance Institute on this matter, it has been determined that it would be beneficial to both organizations to meet and discuss how the two organizations might interact and coordinate their activities in the future.

Members of the IDCA have written an amicus Brief in the case of **Ackelson v. Manley Toy Direct, LLC** that is pending before the Iowa Supreme Court. The Brief resists the plaintiff's claim that the Court should interpret the Iowa Civil Rights Act to allow punitive damages contrary to the wording of the act and stare decisis. I want to thank Megan R. Dimitt, Brenda K. Wallrichs, and James P. Craig of Lederer Weston Craig PLC for their hard work in preparing this Brief. This is another example of how the IDCA is able to serve its members and accomplish the mission and goals of this organization.

Bruce Walker, Vice President of the IDCA, has been an active participant in the ISBA's Fair and Impartial Courts Committee which is being led by Bob Waterman. That Committee has been considering what actions should be taken to support Iowa's selection of judges and the Iowa judicial system to keep it free of outside influence or political intimidation. The Committee has been active in promoting civics education in Iowa's classrooms and responding to misinformation and attacks on the Iowa Judiciary with letters to newspapers, TV and radio interviews and speaking to bar and public groups.

IDCA committees have been diligently working to consider ways to increase bar membership and improve the services we provide to our members. We are looking into making a listserv available to our members next year. Our recently formed committees will be putting together webinars so our Association can provide you with excellent continuing legal education. The Annual Meeting Committee has worked very hard this year and has put together an excellent program to be presented September 13 and 14, 2012. I encourage you all to attend.

I have enjoyed my tenure as President of the IDCA. It has been a privilege to serve in that capacity this year and I believe this organization will continue to provide its membership with excellent leadership in order to better serve its members.

IDCA Post-Session Legislative Report

By IDCA Lobbyists Scott Sundstrom and Brad Epperly, Nyemaster Goode, Des Moines, IA

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

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

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

- 1,202 bills and study bills (study bills are prospective committee bills)
- 98 resolutions
- 779 amendments (amendments can be as simple as changing a single word or number or can be the equivalent of lengthy complicated bills in themselves)

This year we registered on 63 bills, study bills and resolutions on behalf of the IDCA.

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

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

Scott Sundstrom

Brad Epperly

Judicial Branch Funding

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

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

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

Policy Issues

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

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

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

Trespassing: House File 2367 would have put into statute the duties a landowner owes to a trespasser. Although the bill generally codified the current common law duties, it deviated in some significant ways that could favor plaintiffs, particularly in "attractive nuisance" cases involving minors. Consequently, the IDCA opposed the bill after it was amended on the House floor. The bill was not taken up in the Senate.

Statute of Repose for Building Defect Claims: The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects sought legislation this session to shorten the statute of repose for building defect claims. Iowa currently has a 15-year statute of repose, which is among the longest in the nation. House File 2307 proposed to change the statute of repose to ten years (an earlier version of the bill had eight years). The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. It was approved by the House Commerce Committee, but was not debated on the House floor.

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

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

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

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

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

CONCLUSION

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

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

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

continued from previous page | *IDCA Post-Session Legislative Report*

IMEs and Justice for All: City of Davenport v. Newcomb

By Jessica L. Fiocchi, Betty, Neuman & McMahon, P.L.C, Davenport, IA

In April, the Iowa Court of Appeals decided on the controversial issue of requiring employees to submit to independent medical examinations ("IMEs") at the request of employers in cases where employers deny liability.[12] Rather than agreeing with the agency and district court decisions and limiting the ability of employers to require employee's to attend IMEs only with an accepted claim, the *Newcomb* Court determined that an employer who has denied a claim may still request the employee to attend an IME.[13] Based upon the rules of statutory interpretation as followed in Iowa, as well as relevant case law and public policy, the Iowa Court of Appeals has remained consistent with other Iowa law and instilled equity and fairness with its decision.

I. Iowa Code § 85.39

Iowa Code Section 85.39 provides, in relevant part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension.[14]

Iowa case law provides that "[w]hen the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute or resort to rules of construction."[15] In looking at Section 85.39, the text of the statute appears, at first glance, to be plain and clear. After an employee is injured, the employer may require the employee to submit to an IME. The statute contains no plain language requiring that a claim be accepted prior to the examination.

Jessica L. Fiocchi

However, when put into the context of a workers' compensation claim, the language "[a]fter an injury" becomes less clear.[16] Does this mean after an employee claims an injury? Is it limited to a situation where an employer admits that an injury occurred or admits liability? Where the text of a statute is ambiguous or unclear, statutes should be interpreted using "a logical, sensible construction which gives harmonious meaning to related sections and accomplishes the legislative purpose."[17] Looking to the legislative purpose of Section 85.39, the Iowa Supreme Court stated that the statute is "to require an employee to appear for 'examination' at the instance of the employer, doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury."[18] Prior to the IME, an employer cannot be certain of the degree of the injuries actually suffered by the employee and, as such, the employer is not necessarily in a position to accept liability. Therefore, if the purpose of the statute is to allow for the determination of causation, and thus compensability, or the extent of harm, it only makes sense that an employer should be able to request an employee to submit to an IME when the claim has not been accepted.

II. Iowa Case Law

Iowa case law has ruled differently in other related areas of the law, requiring accepted liability for reimbursement for medical examinations and control of claimant's medical care.[19] However, these situations are different from that of the employer directing the employee to attend an IME. For example, as discussed in the *McSpadden* decision, the portion of Section 85.39 dealing with reimbursement for medical examinations was originally contained in Section 85.34, which deals with permanent partial disability compensation and presumes that the right to compensation has already been determined, and was moved to Section 85.39 only to make the information easier to find in the statute.[20] Further, an examination requested by the employee following the employer's IME does not serve the same purpose of allowing an employer to determine the nature and extent of the injury for the first time. For the reimbursement of an employee-requested examination to be required under Section 85.39, "an evaluation of permanent disability" must have already been made by a physician retained

12 City of Davenport v. Newcomb, No. 2-032/11-1035, 2012 WL 1246316 (Iowa Ct. App. 2012).

13 Id. at *10.

14 IOWA CODE § 85.39.

15 Henriksen v. Younglove Constr., 540 N.W.2d 254, 258 (Iowa 1995).

16 IOWA CODE § 85.39.

17 McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

18 Daugherty v. Scandia Coal Co., 219 N.W. 65 (Iowa 1928) (discussing IOWA CODE § 1399, the 1924 version of IOWA CODE § 85.39).

19 See, e.g. McSpadden, 288 N.W.2d at 194 (holding that claimant cannot be reimbursed for medical examination until liability is established); Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 565 (Iowa 2006) (stating that an employer no longer has the right to control medical care of claimant if liability is denied).

20 McSpadden, 288 N.W.2d at 194.

by the employer. At this point then, the employer has already had the opportunity to determine the extent of the injury. Therefore, the fact that acceptance of a claim is a prerequisite for the requirement to reimbursement for an employee-requested examination is not inconsistent with the *Newcomb* decision.

Similarly, in the case of an employer's right to control the claimant's medical treatment, the purpose of medical treatment is not to determine the extent of the injury, but to treat whatever injury exists.[21] If the employer is choosing the medical care to treat an injury, this implies that the employer is admitting that an injury is indeed present, rather than attempting to find out whether a compensable work injury occurred, or the nature and extent of the injury. Therefore, while the purpose of Section 85.39 would be frustrated if employers were required to accept a claim, the same is not true of right to control treatment. This is also consistent with the *Newcomb* decision.

III. Comparison with Other State Law

The interpretation of Section 85.39 by the *Newcomb* court is consistent with that of similar statutes in other states. One example of this is Illinois, in which the courts have interpreted 820 ILCS 305/12, a statute very similar to Section 85.39. That statute states:

> An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act.[22]

While the Illinois version of the statute includes the language "employee entitled to receive disability payments," indicating that perhaps acceptance of a claim is required, the Illinois Supreme Court indicated otherwise. In *R. D. Masonry v. Industrial Commissioner*, the court held that "whether [the employee] is entitled to [benefits] is not dependent on whether the employer acknowledges liability by making payments" and the "legislature did not intend that an employer who denies liability and declines to make payments in a workers' compensation case be precluded from availing itself of the independent medical examination provision of Section 12."[23]

In Missouri, the IME statute provides that "after an employee has received an injury" he must "submit to reasonable medical examination at the request of the employer."[24] One claimant even argued that he was not required to submit to an IME because his employer had admitted the injury.[25] The court denied this was the case, and ruled the claimant was required to submit to the examination under the statute.

IV. Public Policy

As mentioned by the *Newcomb* court, requiring that an employer accept a claim before requiring an employee to submit to an IME would violate substantial justice, in that it would lead to situations in which the employer would be unable to obtain an independent evaluation of the claim of injury before determining whether to accept or deny liability.[26] Aside from disregarding the intent of the legislature in passing this statute, this would lead to unfair trials with an unequal opportunity for the employer to obtain and present unbiased evidence.[27] The *Newcomb* decision is one example of this, as the deputy commissioner stated that the claimant's evidence was "more convincing" than that of employer, who did not present the opinion of a specialist because the deputy commissioner had denied an IME by the specialist.[28] Allowing employers to request employees to submit to IMEs, which are paid for by the employer, prevents this inequity and allows for a more just workers' compensation system.

V. Iowa Rule of Civil Procedure 1.515

Iowa Rule of Civil Procedure 1.515 also provides for physical examinations of parties "when the mental or physical condition . . . is in controversy" and "for good cause shown."[29] In the *Newcomb* decision, the deputy commissioner indicated that the employer's first motion for an IME was denied because the employer failed to show good cause for the evaluation.[31] The deputy commissioner did not state that the physical condition of the claimant was not in controversy. This supports the notion that the purpose of the physical examination of the claimant is to shed light on the extent of the injury and determine whether, and to what degree, the employer should accept or deny the claim. Rule 1.515, like Section 85.39, contains no language requiring the employer to have admitted the injury prior to the examination. In fact, the commissioner has taken the stance that examinations under Rule 1.515 do not require acceptance of the claim to take place. Section 85.39 should be no different, as they serve the same general purpose.

VI. Conclusion

Based upon the language of Section 85.39 and the rules of statutory construction, IMEs are not intended to be limited to claims in which liability has been accepted. This is supported by comparison with similar statutes in other states, Rule 1.515, as well as by consideration of public policy and the interest of a fair and impartial court system. The Iowa Court of Appeals was correct in its decision that Section 85.39 applies to denied claims as well as accepted claims, and has supported the interest of the Iowa Court System in providing a just forum for all.

21 IOWA CODE § 85.27(4).

22 820 ILCS 305/12.

23 R. D. Masonry v. Indus. Comm'n, 830 N.E.2d 584, 589-90 (2005) (discussing that by filing a claim for his injury, claimant was asserting that he was entitled to compensation and thus falls under the IME statute).

24 MO. ANN. STAT. § 287.210(1).

25 State ex rel. Taylor v. Meiners, 309 S.W.3d 392,

26 City of Davenport v. Newcomb, No. 2-032/11-1035, 2012 WL 1246316, at *10 (Iowa Ct. App. 2012) (citing Ragan v. Petersen, 569 N.W.2d 390, 394 (Iowa Ct. App. 1997)).

27 Id.

28 Newcomb, 2012 WL 1246316, at *10.

29 IOWA R. CIV. P. 1.515.

continued from previous page | *IMEs and Justice for All: City of Davenport v. Newcomb*

IDCA Upcoming Events

CLE Webinar *Topic and registration to be announced.*	**Dec. 6, 2012** Noon – 1:00 p.m.
49th Annual Meeting & Seminar	**Sept. 19–20, 2013** 8:00 a.m. – 5:00 p.m.
50th Annual Meeting & Seminar	**Sept. 18–19, 2014** 8:00 a.m. – 5:00 p.m.

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Duty, Causation and the Restatement (3d) of Torts: Liability for Physical and Emotional Harm

Kevin Reynolds
Whitfield & Eddy, PLC
2014 IDCA Annual Seminar

Thompson v. Kaczinski, 774 N.W. 2d 829 (Iowa 2009)

- Facts of case
- Procedural posture
- Holding

"Duty" analysis: the prior law

- 4 basic elements of every tort action: duty, breach of duty, proximate cause and damages
- "Duty" is a question of law to be determined by the court
- Motions to dismiss, motion for summary judgment
- *Foreseeability* inquiry: if a result was not foreseeable, then there was no duty; if a result was foreseeable, then there was a duty

Duty analysis: the new law

- Everyone has a duty to act reasonable under the circumstances
- Unless there is an "articulated, countervailing principle or policy," this duty will always exist
- Duty is still a question of law for the court, but the question of whether a duty exists should not even be posed in most cases

Practical Effect of *Thompson*

- Removes foreseeability from duty determination
- Creates a "presumption" of a duty to act reasonable under the circumstances
- Effectively shifts the burden of proof to defendant to prove "no duty" from plaintiff who previously had the burden to establish duty
- Although Reporters claim that "breach of duty" can be a basis for summary judgment, I say "not likely"

Breach of duty

- Jury question: was the defendant's conduct reasonable under the circumstances? (i.e., did defendant "breach" the duty to act with reasonable care?)
- "Foreseeability" is merely one element to be considered in determining whether or not the actor acted with reasonable care
  - If something happens that is not foreseeable, then the fact finder might very well conclude that the conduct was not unreasonable
  - If the result is foreseeable, then it is likely that the jury will conclude that the actor failed to exercise reasonable care

Duty analysis: the new law

- "Articulated, countervailing principle or policy"
- Example: instead of a disassembled trampoline being blown into the road, consider a recycling container blown into the road while the resident is at work. Held: the policy in favor of recycling might very well override any "duty" to exercise reasonable care to make sure you don't let stuff blow into the road from your property on trash day (Justice Mark Cady concurrence)
- Or: if submitted, the jury might very well conclude that there was no failure to exercise reasonable care under the circumstances

"Articulated, countervailing principal or policy:" problems

- Statutory enactments: easy case
- Common-law (judge-made law): more difficult to predict
- Overall issue: Where do you draw the line between the judge making the law v. law made through the will of the people by their elected representatives? (Separation of powers)

"Proximate cause:" prior law

- 3 primary elements of every tort case: liability, *proximate cause* and damages.
- The element of "proximate cause" has 2 sub-elements:
  - Cause-in-fact, or "but for" cause
  - Legal cause or "proximate cause"
- Legal cause: "substantial factor"
- "Substantial factor:" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

“Proximate cause:” prior law

- “Except in an exceptional case, the issue of proximate cause is for the jury to decide”
- “There can be more than one proximate cause to an accident”

"Causation:" new law

- Proximate cause and substantial factor terms eliminated
- Causation now has 2 sub-elements:
  - Cause-in-fact, or "but for" cause
  - "Scope liability"
- Scope of liability: did the harm arise from the same general type of danger that was among the dangers that the defendant should have taken steps to avoid?
- "Except in an exceptional case, the issue of causation is for the jury to decide"
- "There can be more than one cause of an accident"

Scope of liability: examples

- Loaded shotgun given to a child. Child drops gun on toe, breaking toe. Held: no liability, result did not fall within the "scope of liability"
- Jars of peanut butter negligently stacked in grocery store. Jar falls to floor, breaking. Kid comes along and eats some peanut butter, gets deathly ill from peanut allergy. Held: no liability, result did not fall within the "scope of liability"
- Patient ingests wrong medicine from misfill. Gets dizzy, falls and breaks leg. Goes to nursing home. Sexually assaulted in nursing home. Held: no liability for sexual assault, did not fall within "scope of liability"

Jury instructions: prior law v. the new law

700.3 Proximate Cause -Defined. The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

"Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Authority

Gertst v. Marshall, 549 N.W.2d 810 (Iowa 1996)
Benn v. Thomas, 512 N.W.2d 537, 538-40 (Iowa 1994)
Walker v. Mlaker, 489 N.W.2d 401 (Iowa 1992)
Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991)
Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984)

Comment

Note: In a case where the evidence may show more than one cause contributed to the injury or damages, or sole proximate cause is an issue, the following sentence should be added: "There can be more than one proximate cause of an injury or damage."

Note: Consider appropriateness of giving this instruction in addition to Iowa Civil Jury Instruction 220.34 Previous Infirm Condition where "Eggshell Plaintiff Rule" applies.

Note: For a general discussion of "proximate cause" see Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996).

700.3 Cause - Defined. The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

Authority

Thompson v. Kaczinski, 774 N.W.2d 829, 836-39 (Iowa 2009)
Royal Indemnity Co. v. Factory Mut. Ins. Co., ___ N.W.2d ___, ___, No. 07-1324 *slip. op.* at 19 (Iowa June 11, 2010)
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26

Comment

Note: In a case where the evidence may show more than one cause contributed to the injury or damages, the following sentence should be added: "There can be more than one cause of an injury or damage."

Note: A separate instruction must be given where the evidence may show "multiple sufficient causes." *See Thompson*, 774 N.W.2d at 837 n. 3

Note: Consider appropriateness of giving this instruction in addition to Iowa Civil Jury Instruction 220.34 Previous Infirm Condition where "Eggshell Plaintiff Rule" applies.

700.3A Scope of Liability – Defined. You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiff's claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.

Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

Authority

Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009)
Royal Indemnity Co. v. Factory Mut. Ins. Co., ___ N.W.2d ___, ___, No. 07-1324 *slip. op.* at 18-20 (Iowa June 11, 2010)
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §§ 29, 30 & model instruction No. 2 (modified, at page 517).

Comment

In most cases, scope of liability will not be in dispute or will be adjudicated by the court on a dispositive motion. This instruction should be given only if under the facts of the particular case scope of liability is a question for the jury.

Subsequent Iowa cases

- *Van Fossen v. MidAmerica Energy Co.*, 777 N.W.2d 689 (Iowa 2009)
- Wife exposed to asbestos from washing husband's work clothing; mesothelioma
- (Justice Hecht): affirmed dismissal of a wrongful death claim on summary judgment. Although trial court used incorrect "no duty because not foreseeable" analysis, we reach the same result using the new duty analysis. Note: majority rule is that there is no duty to warn a family member of a worker's potential exposure to asbestos

Royal Indem. Co. v. FM Global, 786 N.W.2d 839 Iowa 2010)

- $39.5 million verdict for Plaintiff reversed on appeal, and case dismissed. Court cited and discussed *Thompson* proximate cause analysis with approval. Held that verdict should be reversed because plaintiff did not meet its burden of proving what caused a warehouse fire, and thus, could not prove "scope of liability" element of causation

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

- 1st baseman struck by a flying bat in a softball game
- Trial court: summary judgment granted based on "contact sport exception;" no showing that Defendant was reckless
- On appeal: Rest. 3d applied; Reversed; Defendant had a duty to exercise "reasonable care"
- It's up to the jury to decide whether he did or not

Langwith v. Amer. Nat'l. Gen'l. Ins. Co. (Justice Ternus)(Dec. 30, 2010)

- Claim v. insurance agent for negligence in not getting proper insurance coverage
- Slip op. p. 11, fn. 3: "Because the duty analysis. . . is based on agency principles and involves economic loss, the duty analysis adopted by this Court in *Thompson v. Kaczinski*. . . based on the Restatement Third. . .is not dispositive."

Brokaw v. Winfield-Mt. Union Comm. Sch. Dist., 788 N.W.2d 386 (Iowa 2010)

- High school basketball game
- One player punches another player
- Player sues school district for negligent failure to control the other player
- Held: no liability because no breach of duty as a matter of law

Hill v. Damm, 804 N.W.2d 95 (Iowa App. 2011)

- 13 yr. old girl had amorous liaison with older guy
- Employees of bus co. aware of danger
- Girl gets off at wrong stop; kidnapped to IL and murdered
- Trial court: directed verdict on "scope of liability"
- Held on appeal: reversed; "appropriate level of generality"

Hoyt v. Gutterz Bowl & Lounge, 829 N.W.772 (Iowa 2013

- Premises liability; bar patron taunted another patron; “tauntee” punched his lights out in parking lot
- Trial court grants summary judgment
- Held: reasonable minds could differ as to whether bar owner exercised reasonable care to protect patron from customer
- “appropriate level of generality re: “scope of liability”

McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368 (Iowa 2012)

- Subk'er hired by employer's contractor to perform electrical service on switchgears
- Held: no duty; leaving locked switch cabinets with power on did not cause risk of harm
- Decided based on "control"
- Dissent: leaving power on created risk of harm; would find a jury issue but up to jury to decide if duty breached

Mitchell v. Cedar Rapids Comm. Sch. Dist., 832 N.W.2d 689 (Iowa 2013)

- Special needs student sexually assaulted by another student after school and off campus
- Jury found the school dist. negligent for failing to adequately supervise the student
- Held: Plaintiff's verdict affirmed
- Defendant at trial conceded existence of duty

Mitchell (cont'd)

- Appellant pursued at directed verdict and on appeal: "scope of liability"
- Held: error not preserved on "no duty" argument, and did not preserve error on lack of factual causation
- Justice Cady concurrence: would affirm but found error preserved, but negligence occurred during school hours that caused harm after school hours

Mitchell (cont'd)

- Justice Waterman dissent: "Bad facts make bad law." I would hold that error was preserved, and Defendant would have won on "no duty" argument

Asher v. OB-GYN Specialists, __N.W.2d ___(Iowa May 9, 2014)

- Medical malpractice case
- Trial court found that Rest. 3d jury instructions on causation would not apply to a med mal case (?)
- Held: error occurred, but "no harm, no foul." Plaintiff's verdict affirmed; under old causation instructions, Plaintiff had a "heavier" burden
- Good case discussing causation change

Huck v. Wyeth Inc. et al., ___N.W.2d ___(Iowa July 11, 2014)

- Brand defendants in a pharmaceutical drug case have no liability based on failure to warn where Plaintiff ingested generic drug
- Common-law tort claim not preempted to the extent generic warning failed to implement a stronger warning approved by FDA in 2004
- “Therapy should not exceed 12 weeks”

Huck (cont'd)

- Concurrence in part and dissent by Justice Hecht (Wiggins and Appel join): Rest. 3d analysis supports liability here
- Failure to warn is analyzed under a negligence rubric

Huck (cont'd)

- Negligent design theory does not necessarily require the designed to manufacture or sell the product
- Brand manufacture has a duty of due care in designing the drug or warning
- Whether plaintiff ingests brand or generic is irrelevant to whether drug is designed defectively or has an inadequate warning
- Other jurisdictions have imposed liability on brand manufs. under these facts

Huck (cont'd)

"The brand defendants created risks in designing and manufacturing Reglan, and created risks in developing its warning which, by virtue of federal law, generics were required to mimic. Those risks gave rise to duties."

A brand mfgr. can breach its duty to warn and this can cause injury to a generic consumer

Closing comments

- Are these changes "pro-plaintiff" or "pro-defendant?"
- Is this a *fundamental* change, or merely a *clarification* of existing law and principle?
- The jury instructions will be different, but to what extent do lay-person jurors follow those instructions?
- How can defense lawyers use these changes to our best advantage?

Legislative Update

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2014 Iowa Defense Counsel Legislative Report

by IDCA Lobbyists Scott Sundstrom and Brad Epperly, Nyemaster Goode PC

The second session of the 85th Iowa General Assembly convened on January 13, 2014 (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). Despite numerous assurances by legislators before – and during – the session that this was going to be a short session, for the fourth year in a row the legislative session lasted longer than the per diem payments to legislators (legislators receive per diem payments for 100 calendar days on even years). Additionally, in a most unusual twist, the House and Senate did not adjourn on the same day. The House adjourned on May 1, for a total of 109 legislative days, which was 9 days after legislators' per diem expired. The Senate adjourned the following day, May 2, or 110 legislative days. The Senate adjourned a day after the House in order to take up a resolution authorizing the Senate Government Oversight Committee to issue subpoenas compelling the attendance of witnesses as part of that Committee's ongoing investigations into employment practices by state agencies.

The partisan divide of the legislature remained unchanged in 2014. Democrats controlled the Senate by the same narrow 26 to 24 margin. Top leadership remained the same as well: Majority Leader Mike Gronstal (D-Council Bluffs), President Pam Jochum (D-Dubuque), and Minority Leader Bill Dix (R-Shell Rock). There was one change in membership in the Senate. Kent Sorensen (R-Indianola) resigned his seat after a scandal. Elected to take his seat was then-Rep. Julian Garrett (R-Indianola). Republicans kept their control of the House by the same 53 to 47 margin. The two Republican leaders, Speaker Kraig Paulsen (R-Hiawatha) and Majority Leader Linda Upmeyer (R-Clear Lake), remained the same. House Democrats had a new Minority Leader, Mark Smith (D-Marshalltown) after former Minority Leader Kevin McCarthy (D-Des Moines) resigned in August 2013 to take a job in the Attorney General's office. As a result of Kevin McCarthy's resignation and Julian Garret's election to the Senate, special elections were held for their House seats. Brian Meyer (D-Des Moines) and Stan Gustafson (R-Cumming) won the former McCarthy and Garret seats easily.

The 2014 session, as expected, was not as momentous as the 2013 session. Eying the 2014 elections and confident that the successes of 2013 provided sufficient achievements for campaigns, legislators promised 2014 would be a short session. The first weeks of session seemed to bear out this prediction: the legislative "funnel" deadlines were moved up by a couple of weeks; bipartisan budget targets (i.e., agreed upon spending numbers) were agreed upon in record time; and a distinct bipartisan spirit pervaded the Capitol. Alas, it was not to be. The legislative session became mired down by investigations led by the Senate Government Oversight Committee into state employee hiring and discharge practices and by disagreements over the details in budget bills. The result was not a short session, but one that went 10 days past the expiration of legislators' per diem expenses.

In 2014 we monitored the following legislative activity for the Iowa Defense Counsel Association ("IDCA"):

- 1,256 bills and study bills (study bills are prospective committee bills)
- 70 resolutions
- 598 amendments (amendments can be as simple as changing a single word or number in a bill or can be the equivalent of lengthy, complicated bills in themselves)
- 144 bills passed both chambers

This year we registered on 58 bills, study bills, and resolutions on behalf of the IDCA.

The governor had 30 days after the legislature adjourned (i.e., until June 1, 2014) to approve or veto legislation sent to him in the last three days before adjournment or sent to him after the legislature adjourns. If the Governor does not approve or disapprove a bill within the thirty-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. Budget bills are subject to item vetoes, meaning the Governor has the power to veto parts of those bills and allow other parts to become law. This report will state whether each bill referenced has been enacted. Unless otherwise noted, enacted bills take effect on July 1, 2014.

Bills that were not finally acted upon during the 2014 will die and do carry over to the next General Assembly. The first session of the 86th Iowa General Assembly will convene on January 12, 2015.

I. ENACTED LEGISLATION

A. Judicial Branch Funding

1. General Operations

Continuing the tradition of cooperation within the legal community, the IDCA again worked in conjunction with other lawyer groups (the Iowa State Bar Association, and the Iowa Association for Justice), judges, court reporters, and others to seek full funding for Iowa's judicial branch. The judicial branch requested a budget increase

of approximately $5.9 million for FY 2015 (which begins on July 1, 2014). The increase is comprised of the following components:

- Maintaining increased services from FY 2014 (i.e., full time Clerk of Court offices in every county, increased juvenile court staff, additional court reporters, and EDMS transition) -- $4.3 million
- New additional services -- $1.6 million

The efforts of the supporters of full funding for the judicial branch were successful this year. The final judicial branch appropriations bill, **House File 2449**, appropriates $171,486,612 for the judicial branch for salaries of judicial branch employees, which includes the full requested increase for FY 2015. The bill appropriates an additional $3.1 million for witness and jury fees. The bill also included language stating that it was the intent of the General Assembly that the Judicial Branch emphasize the expansion of family treatment courts on a statewide basis. This language was included in response to the Chief Justice's remarks about the importance of family treatment courts during his Condition of the Judiciary speech in January. House File 2449 was **ENACTED**.

2. Judges' Salaries

In 2013, after many years of no increase in pay, all justices, judges, and magistrates received a salary increase of 4.5%. Because the increase in 2013 was not the full amount originally requested, there was some discussion with legislative leadership about further increasing judges' salaries in 2014. It became clear by mid-March that there was not the appetite for the increase, particularly among House Republicans. Consequently, no change in judicial salaries was enacted in 2014.

B. Insurance Agent Liability

House File 398, which concerns the duties of insurance producers, was enacted after two years of extensive lobbying by the insurance industry and IDCA in the face of opposition by the Iowa Association for Justice. The bill addresses concerns that arose from the Iowa Supreme Court's 2013 decision in *Pitts v. Farm Bureau,* where the Court held that claims could be brought against insurance agents for violations of duty to intended beneficiaries of life insurance policies and could be liable for negligent misrepresentation, significantly expanding the potential liability of insurance agents and insurers. Efforts to address the *Pitts* case began in 2013 and continued this session. House File 398 in its final form was the result of hours of discussions with the respective Judiciary Committee chairs in the House and Senate, as well as a contentious conference committee that did not finish its work until after 1:00 a.m. on the final night of the legislative session.

House File 398 does the following:

- Clarifies that insurance producers are generally not in the business of supplying information to others (and thus not subject to claims of negligent misrepresentation) unless they hold themselves out as experts and receive compensation from their clients in addition to commissions from an insurer.
- States that insurance producers have no duty to change the beneficiary on an insurance policy unless clear written evidence of the policyholder's intent to make the change is presented to the producer or the insurer prior to a claim.
- Limits the classes of persons to whom an agent owes duties as a result of an agency relationship: the policy owner, persons in privity of contract with the insurance producer, and the principal in an agency relationship with the producer.

Even though they agreed to passage, several Senators, particularly Senate Judiciary Chair Robb Hogg (D-Cedar Rapids), remained concerned about the provisions in the bill limiting the classes of persons to whom an insurance producer owes duties. That particular issue will likely be revisited next session.

C. "Good Samaritan" Law for Architects

Senate File 2239 provides additional liability protections for architects and professional engineers who provide voluntary professional assistance after a disaster. The purpose of the bill was to ensure that "good Samaritan" architects and professional engineers would not be discouraged from volunteering their services to assist with disaster recovery due to fears of potential liability. The bill does this by amending the Iowa Tort Claims Act (Iowa Code chapter 669) to provide that architects and professional engineers who:

1) voluntarily and without compensation (other than reimbursement of expenses) provide initial structural or building systems inspections for the purposes of determining whether a building is safe for human occupancy at the scene of a disaster; and

2) who are acting at the request and under the direction of the Commissioner of Public Safety and in coordination with the local emergency management commission are considered to be "employees of the state" for purposes of the Tort Claims Act. Senate File 2255 was **ENACTED.**

D. Volunteers on State Lands

House File 2397 directs the Department of Natural Resources to create a program to provide liability protection for nonprofit organizations and individuals working for such organizations who volunteer to provide services for state lands under the DNR's jurisdiction. The DNR will develop, by administrative rules, qualifications and requirements for participating organizations and individuals. Organizations and individuals that qualify for the program will be considered state volunteers for purposes of Iowa

Code section 669.24, which protects volunteers for the state from personal liability. House File 2397 was **ENACTED.**

E. Removal of Clerks of District Courts

Senate File 2313 modifies the procedures for removing Clerks of District Courts. Under current law, a Clerk of a District Court is removed by a majority vote of all district court judges in the judicial district. Senate File 2313 changes the procedure to empower the chief judge to remove the Clerk of Court after consultation with the other district judges in the judicial district. Senate File 2313 was **ENACTED.**

II. LEGISLATION CONSIDERED, BUT NOT ENACTED

The following bills received some amount of consideration this session (either passing one chamber or at least receiving some subcommittee consideration), but were not enacted into law.

A. Statute of Repose for Building Defect Claims

The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects again sought legislation this session, as they did in 2013 and 2012, to shorten the statute of repose for building defect claims. Iowa currently has a fifteen-year statute of repose, which is among the longest in the nation. **House File 2094** proposed to shorten the 15-year statute of repose. As originally introduced, the bill would have shortened the statute of repose to eight years for claims relating to all types of real property. In an attempt to reduce opposition to the bill, it was amended on the House floor to reduce the statute of repose to 10 years and to limit that change to only nonresidential property (the statute of repose for residential property would have remained at 15 years). The bill passed the House on a largely partisan vote in the fact of intense opposition from the Iowa Association for Justice and the Iowa State Bar Association. The bill was referred to the senate Judiciary Committee, where it died without further action.

The House made another attempt to enact the statute of repose change through an amendment to Senate File 2349, the Rebuild Iowa Infrastructure Fund Appropriations bill. Although the House adopted the amendment, the Senate would not accept it, and it was not included in the final version of the bill.

B. Statute of Limitations for Claims of Sexual Abuse of Minors

Senate File 2109 would have increased the statute of limitations for claims of sexual abuse of minors. Currently, such claims must be brought within one year of the attainment of majority or within four years of discovery of the claim if the discovery occurred after the attainment of majority. The bill would have increased the time periods to bring a claim to 25 years after the alleged victim turned 18, or 25 years after the discovery of the claim if the discovery occurred after the alleged victim turned 18. The bill received emotional support from advocates for victims of child sexual abuse. The Senate passed the bill with little fanfare. The IDCA then determined to oppose the bill based on concerns about the difficulties of defending claims involving conduct that occurred decades earlier and the difficulties of finding witnesses and evidence about such claims. IDCA President Jim Craig appeared before a House subcommittee considering the bill and provided legislators with the IDCA's concerns about the bill. Ultimately, the House Judiciary Committee did not approve the bill and Senate File 2109 did not move forward in the House.

C. Construction Contracts

Senate File 2155 would have created a new Iowa Code chapter entitled the Iowa Fairness in Private Construction Contracts Act to regulate the contractual rights of parties to construction contracts. The bill contained a number of provisions to protect subcontractors against what they viewed as abuses by general contractors. Among other provisions, the bill would have: (1) prohibited provisions in contracts allowing general contracts to pay subcontractors only after the general contractor had been paid; (2) banned contractual provisions waiving litigation rights; (3) required payments due to general contracts be made within 30 days and payments due to subcontractors be paid within 10 days. The bill passed the Senate, but was not approved by the House Judiciary Committee.

D. Ethical Standards for Shorthand Reports

Senate File 2114 would have created a set of ethical standards applicable to shorthand reporters. The standards included conflict of interest provisions and limits on fees charged. The bill passed the Senate but was not approved by the House Judiciary Committee.

E. Abortion-Related Torts

A pair of bills in the House supported by legislators opposed to abortion would have made changes to tort law for claims arising from an abortion. **House File 2098** would have created a cause of action on behalf of a woman who had an abortion against the physician who performed the abortion for physical injury or emotional distress resulting from failure of the physician to obtain informed consent. House File 2098 was approved by a subcommittee of the House Judiciary Committee, but was not approved by the full committee.

House Study Bill 598 would have amended Iowa Code section 611.20 to state that claims by an unborn, but viable, child survive the death of the child. The bill did not advance.

F. Municipal Tort Claims Act

Senate File 2012 would have amended the Iowa Municipal Tort Claims Act to exempt municipal employees from liability for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit, and interference with contract. State employees are exempt from such claims under the State Tort Claims Act, but similar exemptions are not present in the Municipal Tort Claims Act. In *Thomas v. Gavin,* 838 N.W. 518 (Iowa 2013), the Iowa Supreme Court held that municipal employees were subject to such claims due to differences in the language between the two tort claims acts. The bill did not advance.

G. Municipal Trails

Senate Study Bill 3147 would have protected municipalities against liability for claims of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a recreational trail that was constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction. The bill did not advance.

H. School Employee Liability

Senate Study Bill 3113 would have exempted school districts from claims arising out of conduct on school grounds during a non-school-sponsored extracurricular activity, except for claims of gross negligence. The bill did not advance.

I. Employment of Outside Counsel by the State

Senate Study Bill 3078 would have amended the procedures by which state agencies retain outside counsel when the Iowa Attorney General's office is unable to represent the agency. The bill would have required proposed outside counsel to submit an estimate of their legal fees. The outside counsel would have been prohibited from charging more than the estimate without the approval of the Executive Council. The bill did not advance.

CONCLUSION

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2014 which were of particular interest to the IDCA's members. The discussions of bills in this legislative report are general summaries only. For those bills which were enacted, the enrolled bills themselves should be referred to for specifics. Enrolled bills can be found at the General Assembly's website: www.legis.iowa.gov

It *Can* Happen, Even in Iowa: Current Trends in Bad Faith Litigation

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Michael F. Aylward is a senior partner in the Boston office of Morrison Mahoney LLP where he chairs the firm's Complex Insurance Coverage Practice group.

For the past three decades, Mr. Aylward has represented insurers and reinsurers in coverage disputes around the country concerning the application of liability insurance policies to commercial claims involving intellectual property disputes, environmental and mass tort claims and construction defect litigation. He has served as lead counsel in major coverage cases around the country and has successfully argued several landmark appeals on issues such as the pollution exclusion, "known loss" the meaning of "occurrence" and the scope of CGL coverage for cybernet and intellectual property claims. He has also advised various medical malpractice insurers concerning professional liability claims and consults frequently on bad faith and ethics disputes. He has also served as an arbitrator in numerous insurance coverage matters and has testified as an expert in matters involving coverage and reinsurance issues arising out of such claims.

Mr. Aylward has taken a leading role in the defense bar over the years, including a term on the DRI Board of Directors (2000-2003) and service as the chair of its Insurance Law Committee (1999-2001). Since 2004, he has served on DRI's Law Institute, which he has chaired since 2012..

In 2012, Aylward among the twelve founding members of the American College of Extra-Contractual and Coverage Counsel, which now has over two hundred members. He has also served in leadership roles for the American Bar Association (Insurance CLE); Federation of Defense and Corporate Counsel (past chair, Reinsurance and Excess Committee) and the International Association of Defense Counsel (Reinsurance and Excess Committee Chair). He is a frequent lecturer on insurance, ethics and bad faith issues and has published numerous articles on these topics, including a chapter on Understanding Bad Faith in the 2012 *Appleman* insurance treatise.

Michael is a graduate of Dartmouth College, where he received his B.A. with Honors (History) in 1976 and the Boston College Law School (J.D. Cum Laude, 1981).

I. INTRODUCTION

While suits against insurers issues of insurance coverage, insurers also increasingly face claims in tort, in contract, or consumer protection statutes for their alleged bad faith in interpreting or applying those contracts or for their claimed negligence or inadequacies in investigating or defending claims covered under the policy and, in some recent cases, for the manner in which they choose to defend or prosecute coverage litigation. The scope and contours of bad faith litigation reflect not only common law concepts such as the duty of good faith and fair dealing but also factors such as state statutes and insurance department regulations that vary by jurisdiction.

The cornerstone of all bad faith litigation is the doctrine of good faith and fair dealing, which was first recognized in California 50 years ago and has now been accepted by nearly every state as an implied part of all contracts. In the context of insurance, an insurer's failure to pay a claim may support an action for breach of contract, but a refusal to pay that breaches the covenant of good faith and fair dealing gives rise to a claim in tort for bad faith.

The duty of good faith and fair dealing has taken on particular significance in the context of insurance due to the special relationship that most courts have found that insurers are deemed to have with their insureds. Whether viewed as being fiduciary in nature or merely "special," many courts place particular weight on protecting the peace of mind of insureds, particularly in the context of personal lines policies, and will impose significant sanctions against insurers that act unreasonably in failing to protect the interests of their insureds.

Attorneys must also become familiar with statutes and regulations governing insurance policies and claims handling in their state. While most states use a Model Act list of types of conduct that are deemed "unfair claims settlement" practices, many states have unique rules governing when and how insurers should respond to policyholder claims.

This paper will begin with a brief overview of Iowa bad faith law and then will proceed to discuss leading trends in bad faith law that may yet someday gain traction in Iowa, including:

- Whether extracontractual liability can be imposed in a case where contractual liability is held not to exist because the insured's claim is not covered.
- Erosion of the "fairly debatable" defense to bad faith claims.
- "Institutional" bad faith based on the insurer's business practices.
- Whether using computer tools to adjust claims is bad faith.
- Is the attorney-client privilege viable in bad faith cases?
- Whether insurers that reject demands to pay their policy limits within weeks of receiving notice of a claim may therefore be subject to unlimited liability.
- Bad faith liability for post-denial coverage, notably the prosecution of coverage litigation.

II. IOWA BAD FAITH 101

The basic elements of Iowa bad faith law are well established.

To establish a claim for bad faith, a policyholder must establish that (1) the insurer had no reasonable basis for denying coverage and (2) knew, or had reason to know, that its denial was without basis. *Kiner v. Reliance Ins. Co.,* 463 N.W.2d 9, 12 (Iowa 1990) and *Sampson v. American Standard Ins. Co.,* 582 N.W.2d 146, 149 (Iowa 1998). The first element is objective, the second subjective. *Brown v. Danish Mut. Ins. Association*, 550 N.W.2d 171, 175 (Iowa Ct. App. 1996).

The Iowa Supreme Court initially permitted bad faith claims against insurance companies for breach of the implied covenant of good faith. Such claims were initially limited to cases in which policyholders were exposed to verdicts in excess of policy limits owing to their insurers failure to settle. *Kooyman v. Farm Bureau Mut. Ins. Co.,* 315 N.W.2d 30, 33-34 (Iowa 1982). *Id.* at 33-34. Later, the court recognized bad faith claims in the context of first party claims by insureds to recover for their own losses. *Dolan v. Aid Ins. Co.,* 431 N.W.2d 790, 791 (Iowa 1988).

The test for first-party bad faith is that the insured must show "the absence of a reasonable basis for denying the claim." *Dolan,* 431 N.W.2d at 794. When coverage is "reasonably debatable" the insurer has the right to have its rights adjudicated without being subject to tort claims. *Clark-Peterson Co. v. Independent Ins. Assocs.,* 514 N.W.2d 912, 914 (Iowa 1994).

A claim is "fairly debatable" when it is "open to dispute on any logical basis." *Bellville v. Farm Mut. Bureau Ins. Co.,* 702 N.W.2d 468, 473 (Iowa 2005). If a claim is ""fairly debatable,'' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Dolan v. AID Ins. Co.,* 431 N.W.2d 790, 794 (Iowa 1988). "A claim is 'fairly debatable' when it is open to dispute on any logical basis." *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468 (Iowa 2005).

There is some controversy with respect to whether this "fairly debatable" standard also applied to bad faith claims against liability insurers in light of the fiduciary obligations that a liability insurer owes to a policyholder. *North Iowa State Bank v. Allied Mutual Ins. Co.,* 471 N.W.2d 824, 828 (Iowa 1991). In *Walter v. Grinnell Mut. Reinsurance Co.,* 2007 WL 913855 (Iowa App. Mar. 28, 2007), the Court of Appeals ruled that a trial court erred in applying the "fairly debatable" defense to third-party liability claims against a casualty insurer that failed to settle a lawsuit against its insured within policy limits. Whereas the "fairly debatable" defense is available to first party insurers in light of the arms-length relationship between insurer and insured in such cases, the Court of Appeals held that a different standard should apply to third-party cases as insurers have a fiduciary duty to their policyholders to defend them against third-party claims. The Court of Appeals held that the appropriate test that the trial court should have applied, therefore, was whether the insurer's decision not to accept an offer to settle for policy limits was reasonable and reflected a full and fair consideration of the claims of liability and potential damages.

III. ISSUES OF CONCERN

A. Bad Faith In the Absence of Coverage

It would seem self-evident that an insurer should not face extracontractual liability in the absence of contractual liability. Just as the implied covenant of good faith and fair dealing arises from the existence of a contractual relationship, it would seem to follow that absent a breach of contract, no basis exists for imposing *extra*-contractual liability upon the insurer.

Twenty years ago, the Iowa Supreme Court ruled that here can be no bad faith in the absence of coverage. *See Johnson v. Farm Bureau Mut. Ins. Co.,* 533 N.W.2d 203 (Iowa 1995)("because denial of [insured's] coverage claim was appropriate, his claim for bad faith denial of coverage must also fail"). Over the succeeding decades, however, a growing number of jurisdictions have permitted insureds to pursue bad faith claims in the absence of coverage, if the insured has suffered an independent injury by reason of the insurer's claim handling. *Lloyd v. State Farm Mut. Automobile Ins. Co.*, 943 P.2d 729 (Ariz. Ct. App. 1996); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999); *Glen Falls Ins. Co.*, 616 N.E.2d 1123, 1126 (Ohio Ct. App. 1992) and *State Farm Mut. Auto Ins. v. Shrader*, 882 P.2d 813 (Wyo. 1994).

More generally, some courts have concluded that the duty of good faith is a covenant that can be breached even if the insurer does not have a duty to indemnify or defend the insured *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265, 1270 (Ariz. 1992); *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 336 (Haw. 1996); *Tornetta v. Allstate Ins. Co.,* 973 P.2d 8, 12 (Wash. Ct. App. 1999). Thus, in *Tadlock Painting Co. v. Maryland Cas. Co,* 473 S.E.2d 52 (S.C. 1996), the South Carolina Supreme Court ruled that bad faith may exist independently of an insurer's contractual obligations under a policy, rejecting the insurer's contention that there could not be bad faith if there was no coverage for a third-party claim.

Thus, where an insurer agreed to defend a claim under a reservation of rights and mis-handled the defense, as by negligently failing to settle within policy limits, some courts have declared that the insurer is responsible for any consequent damages to the insurer, even though it may ultimately be determined that the insurer should not have any indemnity obligation but for this mishap. *See.e.g. Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999). This is in keeping with the general legal principle that once a party undertakes a duty, it can be held liable for negligently performing that undertaking even it had no duty to do so originally. *But see Young v. Allstate Ins. Co.*, 198 P.3d 666 (Haw. 2008) (dismissal of a claimant's claim of breach of "assumed" duty of good faith and fair dealing against a tortfeasor's insurer upheld because the claim was premised upon a contract with the insurer that did not exist).

Likewise, some courts have ruled that first party insurers may be held legally liable for any damages that insureds may suffer as a consequence of the insurer's claims investigation even if the claim is ultimately determined to be outside the scope of its coverage. *State Farm Mut. Auto Ins. v. Shrader*, 882 P.2d 813 (Wyo. 1994). In *Coventry Associates v. American States Ins. Co.*, 961 P.2d 933 (Wash. 1998) the Washington Supreme Court ruled that even if a first party claim was not covered, an insurer might still be in bad faith if it had avoided making covering determinations by failing to carry out proper claim investigations

B. Erosion of the "Fairly Debatable" Defense

Historically, the defense that claims were "fairly debatable" was a bedrock defense to bad faith claims. If an insurer had a good faith basis for disputing the insured's claim, it could not be liable in bad faith for refusing to pay it. In recent years, however, courts in many states have chipped away at the scope of this defense, limiting its application in diverse circumstances. Indeed, as above, Iowa courts have already questioned whether this doctrine has any application to bad faith claims against liability insurers.

In most states an insurer will not be held liable for contesting the amount of the claimed loss if it has a reasonable factual basis for disputing the insured's calculations. *Debra O'Leary v. Metropolitan Property & Cas. Co.,* 52 Mass.App.Ct. 214, 752 N.E.2d 795 (2001), *review denied* (Mass. 2001). Thus, if a claim is "'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Dolan v. AID Ins. Co.,* 431 N.W.2d 790, 794 (Iowa 1988).

In a growing number of states, however, courts have ruled that factual disagreements cannot support a "fairly debatable" defense. *See Farmland Mutual Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000)(dispute over facts cannot form the basis for a "fairly debatable" defense).

The California Court of Appeal has also recently questioned whether the "genuine dispute" doctrine is a defense to bad faith claims in liability cases. In *Delgado v. Inter-Insurance Exchange of the Automobile Club of Southern California*, 153 Cal. 4th 571 (Cal. App. 2007), *review pending* (Cal. 2009) the Second District declared that a liability insurer had acted in bad faith in refusing to provide a defense to claims involving an incident in which a homeowner kicked the plaintiff and struck him in the nose while the two were standing on a sidewalk near the insured's home. In light of allegations in the complaint that the insured's actions arose out of a negligent and unreasonable belief that the insured was engaging in self-defense, the court held that the insurer had wrongly refused to provide a defense and that the insurer was therefore bound by a consent judgment that the insured subsequently entered into, notwithstanding the Superior Court's view that the agreement was "contrived." The California Court of Appeal argued in *Delgado* that there is a distinction between factual and legal disputes over coverage and that when the dispute is factual, the potential for coverage arises and a duty to defend exists until the factual dispute is conclusively resolved. *See also Montrose Chemical Corp. v. Superior Court,* 6 Cal.4th at 295. While agreeing that a liability insurer might avoid claims of bad faith based upon a genuine dispute concerning the application of the law, the Court of Appeal held that no similar defense could be raised based on a mere factual dispute since issues of fact necessarily presupposed a potential for coverage. The case is now pending before the California Supreme Court.

In 2001, the U.S. Court of Appeals for the Ninth Circuit ruled that the "genuine dispute" doctrine was not restricted to legal disputes concerning the meaning of policy terms but also extended to the manner in which an insurer conducts an investigation of the insured's claim. In *Guebara v. Allstate Ins. Co.*, 237 F.3d 987 (9th Cir. 2001), the insured sought to recover the value of her home and its contents after a house fire. During its investigation, Allstate received several statements from the insured in connection with the contents of the residence. Further, Allstate retained three separate fire/arson experts who concluded that it was improbable that the contents

claimed by the insured were actually lost in the fire. (*Id*. at 990-991). On appeal,, the Ninth Circuit held 2-1 that expert testimony did not automatically insulate an insurer from bad faith claims based on biased investigations, but could, as in this case, create a genuine issue of coverage sufficient to preclude a finding of bad faith.

Since *Guebara*, several California courts have refused to grant summary judgment to insurers in bad faith cases based on the insurer's inadequate investigation of the insured's claim. *See Jordan v. Allstate Ins. Co.,* 148 Cal. App.4th 1062, 1072 (2007) and *Chateau Chamberay Homeowner's Assn. v. Associated International Ins. Co.*, 90 Cal. App.4th 335 (2001). As the California Supreme Court explained in *Wilson v. 21st Century Ins. Co.,* 42 Cal.4th 713, 723-24 (2007):

> The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. The genuine issue rule in the context of bad faith claims allows a trial court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable – for example, where even under the plaintiff's version of the facts there is a genuine dispute as to the insurer's liability under California law. On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury can conclude that the insurer acted reasonably.

In the past, conflicting evidence, even if ultimately resolved in favor of the insured's claim for coverage, has been held sufficient to insulate the insurer from any claim of bad faith. In short, if there was enough evidence supporting the insurer's position to survive a motion for summary judgment or so little evidence that the insurer could obtain a directed verdict at the conclusion of the insured's case in chief, the insurer must have had a fairly debatable basis for its position.

For instance, Alabama has used a directed verdict standard for bad faith cases. As the Alabama Supreme Court declared in *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982):

> In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, this entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy or the denial thereof, the tort claim must fail and should not be submitted to the jury.

Even in Alabama, however, the directed verdict standard has been held not to apply in cases of extraordinary bad faith as where the insurer (1) intentionally or recklessly failed to investigate the plaintiff's claim; (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff's claims; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim." *National Ins. Ass'n v. Sockwell*, 829 So. 2d 111, 129-30 (Ala. 2002) (citing *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999)).

Several recent cases have applied a stricter standard, however.

In *Brehm v. 21st Century Ins. Co.,* 166 Cal. App.4th 1125, 1240 (2008), the California Court of Appeal declared that the issue of whether genuine dispute exists as matter of law could not be resolved through a demurrer or other dispositive motion practice. At trial, the Superior Court had sustained an auto insurer's demurrer and dismissed the insured's UIM suit on the grounds that the insurer had a contractual right to arbitrate the dispute. On appeal, the Second District held that the trial court erred in sustaining the insurer's demurrer on the basis of the "genuine dispute" doctrine, as there was reason to question whether the doctor's opinion that the insurer relied on reflected a reasonable evaluation of the objective medical evidence concerning the extent of the claimant's injuries. Nor was the insurer insulated from a claim of bad faith because it chose to arbitrate the insured's demand, as was its contractual right under the policy.

In *Jordan v. Allstate Ins. Co.* 148 Cal.App.4th 1062 (2007), the Court of Appeal again addressed the genuine dispute doctrine in the context of motions for summary judgment. The court concluded "Allstate's bad faith conduct cannot be resolved on summary judgment," because Jordan had presented "evidence sufficient to support the conclusion that Allstate did indeed fail to conduct a full, fair, thorough and timely investigation of Jordan's claim," but "Allstate may well be able to produce evidence that all or part of Jordan's factual assertions are false, or that Allstate's acts or omissions as claimed by Jordan were justified or reasonable in the circumstances." *Id.* at pp. 1076-1077. While agreeing that Allstate had established that it had reasonable basis for disputing coverage, the Second District declared that it did not necessarily follow that Allstate's resulting claim denial could be justified in the absence of a full, fair and thorough investigation of all of the bases upon which the claim was presented. The Court of Appeal held that the insured had presented sufficient facts to establish that Allstate's failure to abide by recommendations by its own adjuster that it retain a structural engineer to determine whether mold damage to the insured's property had resulted in hidden decay that might trigger the policy's "collapse" coverage was reasonable or not. The court also refused to find that the fact that litigation had already commenced might excuse Allstate from its continuing responsibility to fully investigate its policyholder's claim. The Court of Appeal also upheld the trial court's determination that the insured was permitted to enter into evidence the opinion of a so-called expert on insurance claim settlement practices to support its claim that Allstate's failure to conduct a full investigation violated Section 790.03(h) of the Unfair Insurance Practices Act.

In Rhode Island, the state Supreme Court announced in *Skaling v. Aetna Ins. Co.*, 742 A.2d 282 (R.I. 2002) that it would abandon its former requirement that an insured prove that it could obtain a judgment as a matter of law in order to sustain a finding of bad faith against an insurer. The court concluded that the "judgment as a matter of law" standard was unfair and unworkable in cases where the insurer intentionally or recklessly failed to properly investigate a

claim, failed to subject its investigation to an appropriate cognitive evaluation and review or otherwise acted in an oppressive or unreasonable manner. Further, the Supreme Court declared that whether the insurer's position was "fairly debatable" is a matter to be decided by the jury. The Rhode Island Supreme Court emphasized that "not every refusal to pay amounts to insurer bad faith. A plaintiff must demonstrate an absence of a reasonable basis in law or fact for denying the claim or an intentional or reckless failure to properly investigate the claim and subject the result to cognitive evaluation." The court declared that this was not a change in the law but reflected the continuing duty of insurers to always act in the best interests of an insured and not in their own pecuniary interests.

In *Smith v. Safeco Insurance Company,* 150 Wash.2d 478, 78 P.3d 1274 (2003), the Washington Supreme Court ruled 6-3 that although an insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based on reasonable grounds, where material issues of fact are in dispute with respect to the reasonableness of the insurer's actions, summary judgment is not appropriate. Accordingly, the court declared that, "The existence of some theoretical reasonable basis for the insurer's conduct does not end the inquiry with respect to the insurer's claimed bad faith." Writing in dissent, three justices argued that the Court of Appeals had properly granted summary judgment to Safeco in the absence of any evidence that its conduct was not unreasonable.

Likewise, the Kentucky Supreme Court has ruled that an insurer is not insulated from bad faith merely by reason of the fact that its position was "fairly debatable." In *Farmland Mutual Ins. Co. v. Johnson,* 36 S.W.3d 368, 375 (Ky. 2000), the court ruled that "although matters involving investigation and payment of a claim may be fairly debatable, an insurer is not thereby relieved from its duty to comply with the mandates of Kentucky law." Rather, the Kentucky Supreme Court held that jurors should consider whether "the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable." *Id.* at 375.

C. "Institutional" Bad Faith

In the past, most bad faith claims focused on the handling of a particular claim and the rogue conduct of a particular adjuster and his or her manager. Of late, however, policyholders have changed their focus to "institutional" conduct in which the Company's way of doing business is at issue. "Institutional" bad faith claims have the advantage of justifying a broader range of discovery and presenting a particularly "reptilian" message to juries to punish insurers to protect them and their families.

The basic claim in an institutional bad faith case is that insurers' policies and procedures related to claim evaluation and resolution, claim adjustment protocols and associated software, and performance and compensation criteria for claims personnel, are either individually or collectively intended to unfairly shrink indemnity payments to claimants or deprive insureds of policy benefits to which they are entitled.

Zilisch v. State Farm Mutual Automobile Insurance Co., 995 P.2d 276 (Ariz. 2000), is another leading case. There, Kimberly Zilisch sued State Farm for bad faith after the company allegedly refused to pay her the $100,000 limits of her under-insured motorist ("UIM") coverage despite knowing that the value of her UIM claim was nearly four times that amount. At trial,

Zilisch introduced evidence that State Farm had a nationwide practice of under-paying claims. The evidence suggested that State Farm set arbitrary payment goals for its claims personnel in order to achieve its goal of having the most profitable claims department in the country. *Id.* at 279. Promotions and salary increases for claims personnel were based on achieving these goals. *Id.* Not surprisingly, the plaintiff's expert witness opined that State Farm's conduct in handling Zilisch's claim was outrageous and was consistent with its business practices across the country. *Id.* State Farm countered that its refusal to pay Zilisch the full limits of her UIM coverage was reasonable because the value of her claim was fairly debatable.

A jury returned a $1 million verdict for Zilisch split between compensatory and punitive damages. Both sides appealed and the Arizona Court of Appeals held that even if State Farm engaged in improper claims practices that influenced its conduct, it was nonetheless entitled to judgment in its favor if Zilisch's claim was fairly debatable as a matter of law. *Id.* The Arizona Supreme Court granted review.

The Supreme Court concluded that the Court of Appeals erred in making the fair debate of the plaintiff's claim both the beginning and the end of its bad faith analysis. *Id.* at 280. In doing so, the *Zilisch* court discussed various evidentiary factors that might persuade a jury that in handling Zilisch's claim State Farm knowingly acted unreasonably, including the fact that (1) State Farm set arbitrary goals to reduce claim payments; and (2) claims representatives' salaries and bonuses were influenced by how much they paid to resolve claims. *Id.* The supreme court vacated the Court of Appeals opinion and remanded the case to that court for further consideration. *Id.* at 281.

G. Use of Technology As A Basis For Bad Faith

The practices that prompted many of the earlier "institutional" claims (*e.g.* giving employees bonuses based on how little they paid in losses) have wisely been jettisoned by most insurers. However, plaintiffs have a new focus on the computer programs and technological aids that insurers increasingly rely on to adjust claims and assign values to policyholder losses.

Until recently, most courts had rejected these challenges out of hand. *See Milhone v. Allstate Ins. Co.*, 289 F. Supp. 2d 1089, 1100-02 (D. Ariz. 2003) (holding that plaintiff did not show how Allstate's use of Colossus to evaluate claims was bad faith); *Young v. Allstate Ins. Co.*, 296 F. Supp. 2d 1111, 1123 (D. Ariz. 2003) (commenting on Allstate's CCPR and MIST programs); *Knoell v. Metro. Life Ins. Co.*, 163 F. Supp. 2d 1072, 1078 (D. Ariz. 2001) (discussing roundtables, keeping claims statistics, and profitability considerations); *Miller v. Allstate Ins. Co.*, No. CV 98-1974-WMB SHX, 1998 WL 937400, at *4 (C.D. Cal. Sept. 21, 1998) (involving Allstate's CCPR and MIST programs); *Nager v. Allstate Ins. Co.*, 99 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 2000) ("There is nothing tortious in Allstate's preliminary use of computerized billing programs as a yardstick to measure the reasonableness of chiropractic bills provided to a litigant by medical lien claimants.").

On the other hand, a federal judge in Pennsylvania ruled in *Williamson v. Chubb Ind. Ins. Co.*, 2012 WL 706838 (E.D. Pa. December 19, 2013) that Chubb might potentially have acted in bad faith in relying on a third-party adjuster's use of a program called "Exactimate" to estimate the amount of the insured's loss rather than the "Symbility" program that Chubb conventionally

uses. In declining to dismiss the bad faith claims against Chubb, Judge Baylsom ruled that the insured had presented a colorable claim that Chubb had acted in bad faith by engaging an adjusting firm knowing that it would use software that would result in a lower estimate of damages then Chubb's own in-house database would have generated. The District Court ruled that bad faith is not limited to an insurer's decision to deny benefits but may also result from the manner in which an insurer investigates and adjusts a loss. While leaving the door open for Chubb to present evidence to support its matter for adjustment, the court found that "departing from standard practice in order to generate a lower estimate may prove the dishonest purpose and self-interest that is the hallmark of bad faith."

Likewise, in *Truong v. Allstate Ins. Co.*, 227 P.3d 373 (N.M. 2010), the New Mexico Supreme Court reversed lower court's findings that Allstate's use of the computerized claims handling program "Colossus" does not violate the state's unfair practices act the court ruled that Allstate's use of the program fell within the regulatory exemption to the UPA set forth in Section 57-12-7 as state market conduct examiners had examined Allstate's use of Colossus and had previously approved it. The Plaintiffs, a certified class of Allstate insureds, alleged in their complaint that Allstate's use of Colossus had violated the UPA because it was programmed to underestimate and underpay their insurance claims below their true value. In 2007. the Court of Appeals ruled that, "A regulatory agency expressly permits an action or transaction within the meaning of Section 57-12-7 where: (1) the agency conducts a targeted examination of the defendant's broader conduct, (2) included in that examination is an explicit consideration of the specific action or transaction that allegedly violates the UPA, and (3) the agency explicitly approves the broader conduct in an official report." On further review, however, the New Mexico Supreme Court ruled in 2010 that "neither the conduct of the MCE nor its adoption by the Superintendent satisfied the "expressly permitted" requirement of the UPA exemption with respect to any aspect of Allstate's general or particularized use of Colossus."

In *Northeast Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co.,* 81 Mass. App. Ct. 1135 (2012), *aff'd*, 465 Mass. 358 (2013). the Appeals Court of Massachusetts affirmed a trial court's declaration that a motor vehicle insurer was precluded from relying on the Ingenix data base to prove that the medical charges for treatment of injuries suffered by its insured in an auto accident were unreasonable. In keeping with the Appeals Court's earlier ruling in *Davekos v. Liberty Mut. Ins. Co.,* 2008 Mass. App. Div. 32 (2008) the court ruled that the Ingenix data was unreliable. These findings were affirmed by the Supreme Judicial Court in 2013. The court found that:

> This evidence demonstrated that Ingenix is a sister company to one of the largest insurance providers in the country; it relies on the voluntary submission of data on medical costs from the limited universe of insurance companies who choose to participate in the program; it applies a proprietary relative value and conversion factor to the raw data; and it has never verified that the data produced as a result of this formula accurately correspond with actual charges for medical procedures.
>
> In other words, the data contained in the Ingenix database derives from raw data that is voluntarily submitted by participating

> insurance companies, not fully verified, and to which Ingenix applies its proprietary methodologies. On a largely identical record, the Appellate Division of the District Court held "there is nothing in the record to establish the accuracy or reliability of Ingenix's raw data and, thus, its statistical extrapolations." Davekos, supra at 34. In addition to this evidence, the judge had before him evidence that the New York Attorney General conducted an investigation of Ingenix and found that the "rates produced by Ingenix were remarkably lower than the actual cost of typical medical expenses." On such a record, we cannot say that the judge abused his discretion in excluding the evidence.

465 Mass. at 366-67.

On the other hand, a Massachusetts federal judge ruled in *McGovern Physical Therapy Associates v. Metropolitan Prop. & Cas. Ins. Co.,* 802 F. Supp.2d 306 (D. Mass. 2011) that Metropolitan did not commit an unfair or deceptive practice by using the Ingenix software to analyze medical bills and reduce PIP claims. Judge Stearns rejected the plaintiff's contention that M.G.L. c. 90, § 34M requires an individual physical examination of the plaintiff or that the use of Ingenix did not satisfy the statute's requirement that the insurer provide an Explanation of Benefits.

E. Challenges To The Attorney-Client Privilege

The Iowa Supreme Court declared in *Brandon v. West Bend Mutual Ins. Co.,* 681 N.W.2d 633 (Iowa 2004) that otherwise privileged communications between in-house claim adjusters and the lawyer that the insurer retained to pursue a subrogation action against an uninsured motorist were discoverable in a subsequent bad faith dispute between the insured and her insurer as the attorney had filed an appearance in the insured's name in the subrogation action. The court ruled that the "joint client" exception to the attorney/client privilege existed for those communications undertaken during the period of time before the subrogation action settled.

A growing number of courts have refused to recognize the attorney-client privilege in the context of bad faith claims, however, or have significantly circumscribed its scope.

In *State Farm Mutual Automobile Ins. Co. v. Lee,* 13 P.3d 1169 (Ariz. 2000) the Supreme Court ruled that coverage opinions received by State Farm had waived the privileged nature of such communications by placing at issue its employees' subjective understanding of the law. Even though State Farm had not expressly set forth an "advice of counsel" defense, the court nonetheless found an implied waiver based upon the insurer's contention that it had acted reasonably because of what it did to educate itself about the law, inasmuch as that investigation and knowledge about the law included information it obtained from its lawyers.

Florida courts have held that in an action for bad faith against an insurer for failing to settle a claim within policy limits, "all materials including documents, memoranda and letters, contained in the insurance company's file, up to and including the date of judgment in the

original litigation, should be produced." *Stone v. Travelers Ins. Co.,* 326 So.2d 241, 243 (Fla. App. Ct. 1976).

The Florida Supreme Court extended this analysis to third party claims in *Allstate Indemnity Co. v. Ruiz,* 899 So.2d 1121 (Fla. 2005) declaring that, "A fresh look at such decision convinces us that any distinction between first and third-party bad faith actions with regard to discovery purposes is unjustified and without support under Section 624.155. The court declared, therefore, that, "In connection with evaluating the obligation to process claims in good faith under Section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertaining in any way to coverage, benefits, liability or damages, should also be produced in a first-party bad faith action."

More recently, however, the Florida District Court of Appeal ruled in *Federated National Ins. Co. v. Fortin,* No. 4D13-132 (Fla. App. August 14, 2013) that a trial court erred in requiring Federated to produce its entire claim file in a bad faith action arising out of its claimed failure to settle the claims against its insured within policy limits. The Fourth District ruled that the demand was premature as the issues of coverage were still in dispute and as the claim file constituted work product. To the contrary, the Court of Appeal observed that a claimant may request an *in camera* inspection to confirm that the documents meet the criteria of work product or are subject to the attorney/client privilege.

A federal judge in Illinois ruled in *Catalina London v. Johnson & Bell, Ltd.,* 2012 U.S. Dist. LEXIS 147993 (N.D. Ill. October 11, 2012) that an insurer waived the attorney/client privilege and must produce communications exchanged with the law firm that it hired to represent it in a declaratory judgment action. Magistrate Judge Keys ruled that Catalina London had placed the content of these communications at issue by contending that predecessor counsel, Johnson & Bell, had committed malpractice by failing to identify rescission as a defense to coverage or by waiting too long to raise the issue. Johnson & Bell had argued in seeking these documents that they might show that the defense was still available to the insurer or that successor counsel itself had contributed to the problem.

The Appellate Division of the New York Supreme Court has modified but left largely intact its February 25 opinion requiring property insurers to turn over legal opinions received from outside coverage counsel. In *National Union Fire Ins. Co. of Pittsburgh, PA v. TransCanada Energy Co.,* (App. Div. July 31, 2014), the First Department ruled that those portions of the reports that involved factual investigation and claims adjustment by outside counsel prior to the insurers' actual denial of coverage were not privileged or subject to "common interest" protection. The Appellate Division refused to consider the insurers' argument that they actually denied coverage prior to the date identified in the Supreme Court's order, declaring that this issue was being improperly raised for the first time on appeal.

In Ohio, the state Supreme Court ruled 4-3 in *Boone v. Vanliner Ins. Co.,* 744 N.E.2d 154 (Ohio 2001) that correspondence between an insurance company and its outside coverage counsel evaluating a policyholder's claim for coverage is discoverable in a bad faith case. The majority concluded that "claims file materials that show an insurer's lack of good faith in

denying coverage are unworthy of protection" much like the claim fraud exception to the attorney/client privilege. "We hold that in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney/client communications related to the issue of coverage that were created prior to the denial of coverage...Of course if the trial court finds that the release of this information will inhibit the insurer's ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim." Three dissenting justices criticized the "unworthy of protection rationale" was even broader than the claimed fraud exception, which only waives the attorney/client privilege in the event of proof whereas the majority's analysis permits all such documents to be discovered in any case where bad faith is merely alleged."

In 2007, the Ohio legislature enacted Ohio Stat. Section 2317.02(A)(2), which provides that the general rule that an attorney should not testify concerning privileged communications contained an exception stating that, "If the client is an insurance company, the attorney may be compelled to testify, subject to an *in camera* inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications had made a *prima facie* showing of bad faith, fraud or criminal misconduct by the client." The Sixth Circuit has interpreted this amendment as not applying retroactively, however. *See In Re Professionals Direct Ins. Co.,* 578 F.3d 432 (6th Cir. 2009).

In Texas, the state Supreme Court has ruled 8-1 that communications between an insurer's lawyer and the insured may be discovered in a third party claimant's bad faith case. In *In Re XL Specialty Ins. Co.,* 373 S.W.3d 46 (Tex. 2012), the majority declared that a worker's compensation claimant was entitled to obtain access to reports that XL's outside counsel sent to the insured employer and a TPA concerning the progress of the comp hearing. The majority rejected XL's contention that these communications were subject to a "joint client" privilege pursuant to T.R.E. 503(b)(1)(C). In contrast to federal procedure, Texas requires that all communications be made in the context of pending action and therefore did not apply here since there was no pending litigation against the parties. Further, the court ruled that the "allied litigant" doctrine recognized by 503(b)(1)(C) only applied to communications between a client or the client's lawyer and another party's lawyer not to the other party itself. The court took note of the fact that in Texas, worker's compensation claims are brought directly against the comp carrier with limited involvement of the employer. The court therefore declined to protect communications in this case where they were not made to the insured's lawyer and the insured was not a party to the pending action. Writing in dissent, Justice Willett took note of the apparent inconsistency between the majority's holding and the court's ruling last week in *Ruttinger* that common law bad faith claims were inconsistent with the legislature's workers' compensation regime and argued that the court should have declined to issue a substantive opinion as it could not tell on the *mandamus* record whether a justiciable controversy remained to be decided.

Several states have pushed back against such intrusions. Even in West Virginia, which is a problematic state for insurers in many respects, the state Supreme Court ruled earlier this year in *State of West Virginia v. Bloom,* No. 13-1172 (W. Va. April 10, 2014) that a trial court erred in requiring a first party insurer's national coverage counsel to disclose its file with respect to the

underlying "subsidence" claim. The court rejected the insured's contention that Montpelier Insurance had waived the applicability of the attorney-client privilege to coverage opinions that it received from the law firm merely by reason of the fact that it had directed the law firm to communicate directly with its policyholders in denying coverage for such claims or had referenced the "gist" of the law firm's coverage analysis in its denial letters. Similarly, the court ruled that training materials that the firm had developed for in-house programs with other clients were protected from discovery. It ruled, however, that the firm's retention agreement and bills were not protected work product, while cautioning that the firm was free to redact any privileged task descriptions in its bills.

In a case where a property owner entered into a consent judgment with carbon monoxide victims, assigning its coverage rights and waiving the attorney/client privilege, a federal district court has nonetheless held that the insured's privilege waiver does not preclude an insurance company from asserting the work product doctrine to withhold certain portions of its claim file. On the other hand, Judge Thalken ruled in *Church Mut. Ins. Co. v. Clay Center Christian* Church, 2012 U.S. Dist. LEXIS 10552 (D. Neb. July 30, 2012) that the documents in question, which concerned a "cause and origin" inspection undertaken by an investigator hired by the insurance company, were the sort of investigation routinely carried out by insurance companies and were not prepared in anticipation of litigation pursuant to Rule 26(b)(3). Nevertheless, the district court declined to require production, declaring that the assignees had failed to show how this investigation was relevant to their assertion that the insurer had undertaken its insured's defense and was therefore estopped from now disputing coverage.

F. Time Limited Settlement Demands

In recent years, insurers have increasingly faced bad faith exposures as the result of their failure to accept settlement demands that are asserted at the very outset of the litigation and that contain such a short time for acceptance that the insurer has little or not opportunity to assess the insured's liability or the plaintiff's damages. These "time-limited" demands are frequently used by plaintiff's counsel as a means of expanding the funds available for claims that are otherwise subject to auto policies and other personal lines insurance policies with small limits.

Time-limit settlement demands are a particular problem for insurers in Florida. In *Berges v. Infinity Ins. Co*. 896 So.2d 665 (Fla. 2004), the Supreme Court ruled that an offer to settle is not invalid simply because there is a requirement of subsequent court approval. The court ruled that an auto insurer with limits of $10,000 per person/$20,000 per accident acted in bad faith in failing to promptly accept a time limit settlement demand in light of the severe nature of the injuries and its insured's undisputed liability for the accident. The court refused to find that the insurer's insistence on having the settlement, which involved a claim by a minor, first be approved by the court in condition for payment of its policy limits was reasonable or justified. The evidence at trial was that Infinity had received a time limit demand and had failed to pay it as it was still trying to obtain court approval for the minor settlement. Infinity had written to the claimant's attorney offering to settle but had sent the letter to the wrong zip code. The evidence further indicated that Infinity had failed to advise its policyholder of the settlement opportunity and, when it finally did notify him, was misleading about what had happened and failed to alert him to the fact that an earlier settlement opportunity had been missed. Although the District Court of Appeals found that Infinity could not have acted in bad faith, since the offer

that was presented was not one that could have been accepted absent court approval, the Florida Supreme Court adopted the view of Florida appellate districts that court approval was not necessary to create bad faith in claims involving minor claims. Accordingly, the state supreme court ruled that an offer to settle is not invalid simply because there is a requirement of subsequent court approval. *See also Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1287 (11th Cir. 1983)(settlement offer was not deficient despite the fact that it did not specifically provide for the disposition of all claims or the release of subrogation rights or liens). The court declared that:

1. Time-Based Demands: How Short is Too Short?

Perhaps the most frequent device used by the plaintiff's attorney seeking to "set up" the insurer to recover an amount in excess of policy limits is the time-based demand. Typically, the plaintiff's attorney sends a letter with limited information concerning the claim demanding that the insurer tender its limit within a specific time period or forfeit its right to settle for policy limits. In a case where the policy limits are insufficient to cover more than a fraction of the damages that the plaintiff might be expected to recover at trial, of course the real goal of the demand is to structure a situation where the demand will not be accepted by the insurer. Thus, a claim can be advanced that the insurer breached the duty to settle within policy limits that it owes to its policyholder and should therefore be held liable for an excess settlement or stipulated judgment. In fact, in reviewing many of the published decisions, what is striking is that most of them involve repeated "time limits" demands for settlement—suggesting that the whole concept is simply an artifice to "set up" the insurer for the "bad faith" claim.

None of the many courts that have addressed this issue have adopted any hard and fast rules regarding the circumstances in which a time-limits demand is appropriate; the length of time for a response that is "reasonable" for the claimant to impose; what type of information must be presented to the insurance company in order to justify such a demand for policy limits or the insurer's refusal to agree to such a demand; or what specific actions by an insurer (short of capitulating to the demand) will satisfy the insurer's obligations. Indeed, the highly fact-specific nature of every insurance claim virtually ensures that there are no hard and fast rules as to when a failure to accept a "time-limits" settlement demand will be construed to be an act of "bad faith."

For example, in *Southern General Ins. Co. v. Holt*, 416 S.E.2d 274 (Ga. 1992), the Georgia Supreme Court upheld a jury verdict against the insurer for "bad faith" failure to accept an offer to settle. Holt was involved in an automobile accident with Fortson. On October 7, 1987, Fortson's attorney wrote to the insurer, offering to settle the claim within ten days for $30,000. Medical bills and information concerning lost wages was provided. The offer was withdrawn a few days later, however, when the plaintiff entered the hospital for further treatment. On November 2, counsel for the plaintiff again wrote to the insurer, offering to settle for the policy limits and stating that her medical bills totaled more than $10,000 and her lost wages exceeded $5000. This offer as well was stated to be valid for ten days. On November 9, the attorney reiterated the offer. On November 10, he provided proof of additional expenses of more than $4000. On November 12, he extended the offer for another five days and included a certified copy of all medical records. The insurer did not seek additional time to evaluate the claim or respond to the offer before it expired. On November 18, Fortson's attorney withdrew

the settlement offer. On November 20 and again on December 4, the insurer attempted to settle the claim for the available policy limits. Fortson rejected the offer and the jury then returned a verdict of $82,000.

Holt assigned her claim for bad faith refusal to settle within policy limits to Fortson, who then commenced an action to recover the amount of the judgment from Southern General. The jury found for Fortson on the bad faith claim and both the Court of Appeals and the Supreme Court affirmed. The appellate courts rejected Southern General's claim that it did not breach any duty to its policyholder by failing to settle. As the Supreme Court noted:

> An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud or bad faith in failing to compromise the claim. In deciding whether to settle a claim within policy limits, the insurance company must give equal consideration to the interests of the insured. . .An insurance company does not fact in bad faith solely because it fails to accept a settlement offer within the deadline set by the inured person's attorney. *Grumbling v. Medallion Ins. Co*., 392 F.Supp. 717, 721 (D. Or. 1975), Just like the court in Grumbling, we note: "Nothing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could 'set up' an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open."
>
> We reject, however, Southern General's argument that an insurance company has no duty to its insured to respond to a deadline to settle a claim within policy limits when the company has knowledge of clear liability and special damages exceeding the policy limits. Rather, the issue is whether the facts show sufficient evidence to withstand an insurance company's motion for directed verdict and permit a jury to determine whether the insurer acted unreasonably in declining to accept a time-limited settlement offer.

416 S.E.2d at 276. In reaching this result, the court particularly noted the failure of the claims representative and claims manager to request an extension of time to evaluate the claim.

Applying the same type of general criteria, other courts have noted that in evaluating whether a failure by an insurer to respond to a time-limited settlement demand was reasonable, factors such as the alleged justification for the time limit. For example, *in Miel v. State Farm Mutual Auto. Ins. Co.,* 912 P.2d 1333 (Ariz. App. 1995), the Arizona Court of Appeals granted the insurer's motion for a new trial based upon the trial judge's refusal to permit evidence of the motives of the claimant and her attorney in setting a time limit in her settlement demand and then refusing State Farm's acceptance of the demand that came twelve days late:

> We acknowledge that a person injured by an insurer's policyholder occupies no contractual or fiduciary relationship with the insurer and may set a time limit for acceptance of a settlement offer, even if it is arbitrary or unreasonable. On the other hand, an insurer that allows such a time limit to expire does not necessarily act in bad faith.
>
> The length of time that lapsed after the deadline before State Farm accepted the demand, and the reasons the Plaintiff adhered to the deadline are relevant to whether the insurer acted unreasonably. What is reasonable on the part of the insurer, however, must be judged in light of all the facts surrounding the demand. Even though State Farm does not claim that the deadline was so short that it could not have been met, the reasons for a specific deadline may be relevant to whether the claimant has "set up" the insurer for a claim of bad faith.

912 P.2d at 1339-1340. *See also Mora v. Phoenix Indemnity Ins. Co.,* 996 P.2d 116 (Ariz. App. 1999)(even if we were to hold that breach of duty of equal consideration is also a breach of the duty to defend, six day delay in payment is more analogous to a defense under a reservation of rights rather than a breach that would prevent insurer from claiming a right to intervene); *Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990)(refusal to accept settlement offer that was premature, had conditions attached to it, and was only open for two weeks did not constitute bad faith); *Parich v. State Farm Mutual Auto. Ins. Co.,* 919 F.2d 906 (5th Cir. 1990)(recognizing "set up" defense when unrealistic settlement offers were presented through "carefully ambiguous demands coupled with sudden-death timetables").

The U.S. Court of Appeals for the Tenth Circuit ruled in *Wade v. EMCASCO Ins. Co.,* 483 F.3d 657 (10th Cir. 2007) that a Kansas insurer was not liable for a case that went to trial and resulted in a $3 million consent judgment where the insurer had been unable to pay its $100,000 limits to settle the claim at the very outset of the litigation due to the fact that the lawyer for the plaintiff initially refused to provide corroborating medical information and then withdrew his offer to settle for limits before the insurer could accept it. Under this unusual set of facts, the Tenth Circuit ruled that even though an insurer had an obligation to give equal consideration to the protection of its insured's interests and might be liable for an excess verdict where it had refused the settlement offer, liability should not arise where it had merely delayed in accepting one. Any contrary analysis would, in the court's view, create an incentive to manufacture bad faith claims by shortening the time period during which settlement offers could be accepted "while starving the insurer of the information needed to make a fair appraisal of the case." In a footnote, the Tenth Circuit observed that an insurer's attempt to accept an expired offer would not necessarily absolve it of any possible bad faith and that a jury should consider all facts and considerations in light of the Kansas Supreme Court's multi-factor approach in Bollinger.

The First Circuit has ruled in *Vermont Mut. Ins. Co. v. Maguire*, N662 F.3d 51 (1st Cir. 2011) that a homeowner's insurer did not breach any duty to defend by refusing to speed forward with an expedited settlement of the insured's assault and battery claim. Even assuming that

Vermont Mutual had a duty to defend in advance of any lawsuit being filed against its insured, the court ruled that insurers are entitled to a reasonable period of time to investigate claims and that Vermont Mutual did not breach its duty to defend by refusing to fund a settlement that the insured entered into mere weeks after the insurer's first notice. The court found that nothing in the insurer's reservation of rights or claims investigation indicated any intent to refuse to defend. Under the circumstances, the court refused to find that Vermont Mutual was obligated to reimburse its insureds for their attorney's fees for negotiating a settlement of the underlying claim and was relieved of any obligation to reimburse them for $425,000 that they paid to settle in light of the fact that the settlement was a "voluntary payment" forbidden by the policy.

2. Other Conditions Outside the Insurers' Control

Another variant on the time-limits settlement demand is one where the demand contains additional "conditions" that are not within the insurers' direct control. Perhaps the most typical example is where the demand could only be met if more than one insurer contributed. As noted above, in the *Cotton States* case, the insurer did not tender its $300,000 limits in response to a ten-day demand that was made "contingent upon State Farm Mutual Automobile Insurance Company also tendering its limits." The insurer contended that it was excused, as a matter of law, from tendering its policy limits because the plaintiff's demand contained a condition over which Cotton States had no control.

The Georgia Supreme Court rejected the insurer's position that the inclusion of this condition absolved it of any obligation to respond. The court noted that at trial the plaintiff had presented expert evidence that Cotton States could have offered its policy limits without waiting to see what State Farm would do or could have tendered its limits and then let plaintiff negotiate with the remaining insurers. The court thus held:

> if Cotton States had tendered its policy limits while the plaintiff's offer was pending, it would have done everything within its control to accept the plaintiff's offer and thus protect its policyholder from an excess verdict. In that situation, the insurance company would have given equal consideration to its insured's financial interests and fulfilled its duty to her.. .We conclude that an insurance company faced with a demand involving multiple insurers can create a safe harbor from liability for an insured's bad faith claim under Holt by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured."

580 S.E.2d at 522. *See also McNally v. Nationwide Ins. Co.,* 815 F.2d 254 (3d Cir. 1987)(rejecting insurer's argument that an offer was impermissibly conditional because it required a response from more than one insurer) and *Baton v. Transamerica Ins. Co.,* 584 F.2d 907 (9th Cir. 1978)(plaintiff who made a global demand to two insurers could not after the fact claim that it really intended to allow each insurer to tender its policy limits separately).

3. Illusory Offers

Still other cases may involve evidence that what appears to be a "firm" offer is not really one that can be accepted by the insurer or where, for example, when the insurer requests relatively minor administrative changes in accepting the offer the counsel for the plaintiff/policyholder attempts to "pull the plug" on the deal and set up the insurer for the bad faith claim. Other situations arise when the insurer "accepts" the settlement as proposed, but the claimant then attempts to add new terms that were not in the original offer. This was essentially the ruling made by the Ninth Circuit Court of Appeals in Baton, where the court noted that the duplicity of the plaintiff's counsel in attempting to re-write the terms of the deal after the fact and create a situation where the insurer would be found to be in breach of its settlement obligations would not be tolerated.

The Florida Court of Appeal reached a contrary decision in *Nichols v. The Hartford Ins. Co.,* 834 So.2d 217 (Fla. App.—1st Dist. 2002), *review denied*, 845 So.2d 890 (Fla. 2003). In Nichols, counsel for the injured plaintiffs sent a letter to The Hartford indicating that it would accept a policy limits settlement ($10,000) if paid by a date certain. The Hartford responded within the specified time frame indicating its acceptance of the offer and agreeing to send releases together with the settlement check. When The Hartford did so, however, its proposed form of release included an indemnification requirement in the event of further litigation arising out of the accident. Plaintiff's counsel rejected the proposed form of release. The Hartford then submitted a new form of release without the objectionable language. When no response was received to the tender of the new release, The Hartford commenced an action to enforce the original settlement agreement.

The Hartford was successful in the trial court, which granted its motion for summary judgment to enforce the original settlement. However, the Court of Appeal reversed, ruling that "although it was implicit in the settlement agreement that [Nichols] would executed releases, there was no meeting of the minds as to whether indemnification language would be included in those releases." The court went on to hold that since the indemnification language was an "essential term" of the settlement as to which there had been no agreement, the Nichols were not obligated to fulfill the settlement. The court further rejected the argument that since the check had been "tendered" within the time limits specified by the Nichols, the settlement agreement was for all practical purposes complete at that time. Instead, the court determined that since the Nichols' attorney was not free to cash the check until the terms of the release had been agreed upon, no settlement could have existed at that time. The court also went on to hold that The Hartford's removal of the objectionable language in the release and the Nichols' failure to respond did not indicate formal "acceptance," but rather constituted a new offer to settle that the Nichols were not required to accept.

Interpreting Alaska law, the Ninth Circuit ruled in *Allstate Ins. Co. v. Herron*, 634 F.3d 1101 (9th Cir. 2011) that Allstate's failure to pay its auto limit by the deadline imposed by plaintiff's counsel was not bad faith where the insurer had reasonable grounds for indicating that it needed further investigation before making a claim determination. As the jury found that Allstate had acted reasonably in waiting an additional two weeks to offer its limits, the court declined to find as a matter of law that Allstate breached its duty to settle. Even though the parties had stipulated that Allstate could have determined that its insured's liability exceeded the limits of its policy by the stated deadline, the court held that that was not the same as requiring a jury to conclude that Allstate should have determined that the claim presented a potential excess

exposure. In light of all the evidence, the court found that Allstate had acted promptly and with due diligence in investigating the claim and had been in repeated contact with plaintiff's counsel seeking liability and damages materials. The Ninth Circuit also ruled that the Alaska district court had not erred in barring the plaintiff from admitting alleged evidence of Allstate's failure to violate its own procedures and Alaska insurance regulations in investigating the accident as well as its failure to keep its insured advised of the risk of an excess exposure. Nevertheless, the Ninth Circuit held that the District Court had erred in entering an amended judgment unsupported by the facts declaring that the underlying plaintiff's receipt of the insured's rights pursuant to a consent judgment was a breach of the cooperation clause as there was no evidence that the consent judgment and assignment had prejudiced Allstate.

G. Post-Denial Conduct

Most bad faith claims are based upon the insurer's denial of coverage or, in the alternative, its conduct in handling the defense or resolution of the claims against its insured. In a growing number of cases, however, courts have allowed "procedural bad faith" claims based on conduct that occurred after the insurer has denied coverage and, in particular, based on the means by which the insurer pursues coverage litigation.. These courts reason that the insurer's duty to act in good faith and treat its insured fairly is not terminated simply because the parties also are in litigation.

In most cases, bad faith claims are based either on the insurer's refusal to accept coverage or on missteps in the handling and defense of the claim, as where an excess verdict results after an insurer fails to settle for an amount within policy limits. Increasingly, however, insureds and third-party claimants have sought to impose extra-contractual liability for conduct occurring after the insurer has already denied coverage and, in many cases, for the manner in which the insurer prosecutes or disputes a declaratory judgment action.

Claims brought by insureds and focus on whether the insured's assertion of coverage defenses and, in particular, the conduct of the insurer in litigating those coverage defenses, is in violation of the duty of good faith and fair dealing—they constitute bad faith.

To date, such arguments have not gained traction in Iowa. *See United Fire and Cas. Co. v. Shelley Funeral Home, Inc.,* 642 N.W.2d 648 (Iowa 2002)(insurer's decision to bring a declaratory judgment action at the conclusion of a case that it had defended under a reservation of rights was not evidence of bad faith as the insured was on notice from the reservation of rights that coverage was in dispute).

In most states, an action for declaratory relief is an approved procedure for an insurer to resolve the issue of its claimed coverage duties. Courts not only encourage insurers to institute actions for declaratory relief where coverage is in doubt but may severely sanction them if they don't. In Illinois, for instance, if an insurer fails to either defend under a reservation of rights or to commence an action for declaratory relief, it will be found to be estopped to dispute any indemnity duty if it is subsequently found to have had a duty to defend *See Trovillion v. USF&G*, 474 N.E.2d 953, 956 (Ill. App. Ct. 1985).

It may seem paradoxical that in pursuing a court-sanctioned remedy insurers may face claims of bad faith and incur extra-contractual liabilities. Nonetheless, a few courts have found that how, why and when an insurer pursues an action for declaratory relief may indeed form the basis for a claim of bad faith. At the heart of these cases is the conflict between the so-called "litigation privilege" and the implied duty of good faith and fair dealing.

For the most part, an insurer's decision to bring a declaratory relief claim has been held not to be a proper basis for a bad faith claim (in the absence of other evidence of the insurer's bad faith). S*ee, e.g.*, *State Farm Mut. Auto Ins. Co. v. Fisher*, 609 F.3d 1051 (10th Cir. 2010)(Colorado law); *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 874 (5th Cir. 1991); *Labonte v. Nat'l Grange Mut. Ins. Co*., 810 A.2d 250 (R.I. 2002); *Christian v. Am. Home Assurance Co.,* 577 P.2d 899, 905 (Okla. 1977) ("resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit").

Actions for bad faith have sometimes been permitted, however, if the legal basis on which coverage is being disputed is clearly without merit or if the insurer persists in pursuing an action even after it is found to be without merit. *See Federated Mut. Ins. Co. v. Anderson*, 297 Mont. 33 (1999) (insurer's prosecution of a "meritless appeal" could be used to support a claim for unfair trade practices); *Claussen v. Aetna Cas. & Sur. Co.,* 754 F. Supp. 1576, 1583 (S.D. Ga. 1990) (allowing insured's motion to amend to state claim for "bad faith" based upon insurer's refusal to pay claim after intervening changes in law made coverage defenses inapplicable).

In *Anderson*, an insured appealed the trial court's refusal to allow the insured to amend its complaint to add a claim for bad faith based upon the insurer's filing of a meritless appeal. The court held that an insurer's "fundamental right to defend itself extends only to legitimate litigation conduct," not meritless appeals. Thus, evidence of such conduct might be admissible to prove "a continuing course of conduct designed to avoid a prompt, fair and equitable settlement of a claim in which liability had become reasonably clear."

Whether an insurer had a "fairly debatable" reason for denying a claim requires consideration not only of the original decision to deny but also of the insurer's handling of any appeal or request for reconsideration of the original denial. In *Ex Parte Simmons* 791 So. 2d 371 (Ala. 2000), the Alabama Supreme Court ruled that the Court of Civil Appeals had erred when it concluded that "if the tort of bad faith was committed, it was committed at the time of the original denial and no later."

A federal district court in Massachusetts awarded double damages against a property insurer that persisted in prosecuting a declaratory judgment action even after learning that the initial basis for disputing coverage was in error. *Federal Ins. Co. v. HPSC, Inc.*, 480 F.3d 26 (1st Cir. 2007). Although the insurer's initial determination that the insured's misrepresentation concerning these claims was based on a good faith, albeit mistaken, reading of an investigative report, its subsequent decision to file a lawsuit seeking rescission of the policy without asking its insured to respond to its concerns with respect to any potential misrepresentation and without making any inquiry into the underlying facts constituted a breach of its statutory duty under Mass. Gen. Laws ch. 176D, § 3(9)(d). While Federal's conduct was not motivated by a dishonest purpose, spite or ill will, its failure to withdraw the lawsuit or accept coverage after the date that

it learned of its mistake was held to be a knowing or willful breach of its duty of good faith that required a doubling of the damages.

In California, insurers are precluded from pursuing claims for declaratory relief where an underlying claim is still proceeding against the insured. *Haskel, Inc. v. Superior Court*, 33 Cal. App. 4th 963 (1995) (allowing an insured to pursue claim of malicious prosecution; declaring that insureds should not have to fight a two-front war since "an insured obtains liability insurance in substantial part in order to be protected against the trauma and financial hardship of litigation.").

Nevertheless, in *Hillenbrand v. INA,* 104 Cal. App. 4th 784 (2002), the insurer brought two actions for declaratory relief against George F. Hillebrand, a framer who had been named in certain construction defect claims, arguing that such claims were excluded as being limited to the insured's own work and related business risk exclusions. After these actions were dismissed in the insured's favor, Hillebrand filed suit seeking contract damages and punitive damages for emotional distress. A jury found that the insurer had maliciously prosecuted the coverage actions as it had continued to pursue them, even while the underlying claims were still pending and notwithstanding evidence presented to it showing that the underlying claims sought damages for more than faulty workmanship. The California Court of Appeal held that the insurer's insistence on pursuing a claim for declaratory relief, even while the construction defect suits were still pending against its insured and in the face of evidence that facts known to it plainly triggered its defense obligation barred any possibility that the insurer had "probable cause to pursue the suit."

IV. CONCLUSION

In summary, there are a number of alarming trends that have surfaced around the country in recent years that are challenging long-held beliefs about the scope and strength of traditional defenses to bad faith claims. While Iowa has, to date, been largely immune from this contagion, both insurers and outside coverage counsel are well advised to be aware of these trends and to vigilantly oppose efforts by plaintiffs and policyholder counsel to make inroads and promote these ideas as the occasion may arise.

Successfully Challenging the Plaintiff Reptile Theory

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The well-known "Reptile Revolution" spearheaded by attorney Don Keenan, Esq. and jury consultant Dr. David Ball is now a ubiquitous threat to defendants across the nation.[1] It is advertised as the most powerful guide available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform.[2] Ball and Keenan's Reptile Revolution tactics have allowed mediocre plaintiff attorneys to pull off victories that only great plaintiff attorneys could do in the past. Although this article does not permit the space to fully address Reptile[3] attorney tactics, this article is part of a larger article and subsequent program that we offer which applies 25 years of scientific litigation psychology data to directly combat "Reptile" tactics.[4] While ten areas of vulnerability exist within litigation from the filing of a case to a jury's subsequent verdict[5], this article will address only one, and perhaps the most important area, because it serves as the foundation of the Reptile Theory's success – witness testimony.

It works, BUT...

The Reptile Theory first applied to litigation is the brain-child of Ball and Keenan, who went public with their concept nearly five years ago.[6] They borrowed the concept of the reptile brain from neuropsychologist Paul MacLean who first espoused the theory in the 60s.[7] MacLean theorized that three parts of the human brain reflect stages of human evolution: reptilian (primitive survival based), paleomammalian (emotion, reproduction, parenting), and neomammalian (language, logic, planning). Ironically, the Reptile Theory MacLean advanced has long since been revised and critiqued in neuropsychology scholarship,[8] but this did not prevent Ball and Keenan from adopting it for their purposes. Where MacLean suggests that the reptilian portion of the brain is responsible for species-typical instinctual behavior, such as aggression, dominance, or territoriality, Ball and Keenan interpret this to mean that reptilian subcortical region of the brain maximizes "survival advantages" and minimizes "survival dangers."[9] According to Ball and Keenan, "when the Reptile sees a survival danger, even a small one, she protects her genes," which, to the authors, can be correspondingly applied to jurors who may see danger and must "protect [her]self and the community," by awarding damages that punish or deter defendants.[10] If this sounds far-fetched, it is.

Despite the misuse of neuropsychology, what Ball and Keenan get right is encouraging plaintiff attorneys to convey "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community."[11] In order to generate this sense of immediate danger within jurors they "urge plaintiff's lawyers to frame a case so it appears that every defendant *chose* to violate a safety rule."[12] For Ball and Keenan, "every wrongful defendant act derives from a choice to violate a safety rule," and thus the courtroom becomes a safety arena wherein damage awards enhance safety and decrease the danger posed by the defendant.[13] According to Ball and Keenan, jurors serve as the guardians of community safety and the author's formula "Safety Rule + Danger = Reptile" theorizes that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by the defendant, resulting in jurors awarding damages to the plaintiff to protect

themselves and society (survival instinct).[14]

Novel Tactics

Ball and Keenan's Reptile methodology can indeed influence juror decision-making, but not because of its ability to tap into jurors' survival instincts. Instead, the authors' formulaic approach applies successful techniques long used by great plaintiff's attorneys: reduce a case to its essence and rhetorically focus a case on a critical issue for jurors (e.g. safety). The case reduction and rhetorical tactics simplify decision-making for jurors and persuade them of the plaintiff's case.[15] Large damage awards tend to come from juries who believe a defendant knowingly broke a rule, but is unwilling to admit it or tries to back out of a prior admission. Establishing the case's "rule" or principle early in the case is Ball and Keenan's specialty and lays the foundation for the reptile plaintiff's attorney.

The novelty and effectiveness of Ball and Keenan's approach is two-fold: (1) a long distance perspective to litigation – instead of focusing on framing jury issues as trial approaches, Ball and Keenan are teaching attorneys to focus on jury issues at depositions or as early as possible in a case, so that (v2) defendants naively agree to a seemingly innocuous rule, law, code, or principle that they broke or deviated from and thus must now live with the violation of their own rule or law. The defendant has now been framed in light of knowingly violating a rule or principle or forced to backslide out of it at trial, a tactic which erodes a witness' credibility with jurors. Either instance is a nightmare-come-true for defendants, because a low dollar case has exponentially increased and the plaintiff has begun to see real opportunities to exploit at trial. Preventing Reptile plaintiff attorneys from gaining leverage by increasing a defendant's exposure is the critical first step in combatting reptile tactics. Other vulnerabilities clearly exist, but witness testimony at deposition and at trial are by far the most important strategic elements where Reptile plaintiff attorneys lay the foundation for their cases and it is why we address this issue in the article.

Witness Testimony

Defendant's Deposition Testimony: Plaintiff attorneys have learned the quickest path to profits involves settling a case in excess of its actual value by forcing a defendant to pay. They accomplish high value settlements by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high.

Defendant's Trial Testimony: When the defendant agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the

obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the primary mistake is insufficient witness preparation that focuses on the science/medicine more than the manipulative Reptile techniques. The "gotcha moment," when the defendant gets boxed in by plaintiff's counsel and begins to respond emotionally (i.e., argumentativeness, defensiveness, or anxiety), typically results in a serious mess that is difficult to clean up during defense counsel's rehabilitation efforts. The irony here is that it is the defendant that goes into survival mode cognitively, not the jury. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers of the defendant. In reality, jurors award damages to punish the defendant who breaks safety rules, not to protect themselves or the community.

Witness Training

A black box analysis of how and why Reptile plaintiffs defeat defendants at deposition and trial reveals that the defendant witness is ultimately trapped by an agreement to one or more safety rules which creates a clear contradiction between the rule and their conduct in the specific case at hand. The Reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a "word game" in which the defendant needs to decide on whether to accept or reject the plaintiff attorney's language. The emotional Reptile attack attempts to force the defendant witness out of high road cognitive processing (patient, thoughtful, meticulous) and into low road cognitive processing (instinctual, spontaneous, survival). By forcing low road cognition, the Reptile plaintiff attorney can generate a response that will likely be negatively perceived by the jurors, thus hurting the defendant witness' credibility.

The Reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainer" in nature. These questions focus on the following big picture principles:

- Safety is always top priority
- Danger is never appropriate
- Protection is always top priority
- Reducing risk is always top priority
- Sooner is always better
- More is always better

Hypothetical safety questions are more specific and often take the form of an if-then statement, like "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you

to order tests X and Y, correct?" These deceptive questions are effective because they provide just enough information (compared to the big picture safety questions) to lure defendant witnesses into providing an inflexible, absolute answer. By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow for a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer like:

- "It depends on the circumstances"
- "Not necessarily in every situation"
- "Not always"
- "Sometimes that is true, but not all the time"
- "It can be in certain situations"

Bottom line: training a witness to withstand these reptilian attacks goes far beyond traditional "witness preparation." Instead, more sophisticated witness training is needed, as the witness must undergo cognitive and communicative restructuring. Witnesses must literally develop a new process of thinking and communicating through intense operant conditioning methods to ensure cognitive and communicative changes take place. This type of training requires doctoral level consultants with extensive experience evaluating and training humans in the employment of psychological and communicative strategies.

Nightmare at Trial

Attorney: "Doctor, patient safety is your top priority, isn't it?"

Doctor: "Yes, of course."

Attorney: "And the emergency procedure you chose to perform during Mr. Smith's surgery wasn't very safe because it resulted in his death correct?"

Doctor: "That's true, but you have to understand that I-"

Attorney: (with emphasis) "Doctor you didn't make Mr. Smith's safety your top priority, and because you are ignoring your own rule, you put Mr. Smith and perhaps all of your patients in danger, didn't you?"

It is at this point the Reptile Plaintiff attorney has his or her claws into the witness. Jurors simplify the case to be one in which the doctor knowingly put his patient at risk and violated his own safety rule. While the Reptile theory offers a more aggressive plaintiff strategy erroneously packaged in neuro-psych wrapping, Ball and Keenan's guidance can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. This article dealt with witness training because it is the first and most potent attack technique employed by the Reptile plaintiff attorney, and we urge you to develop new advanced techniques for witness training prior to deposition and trial. Thwarting reptilian attacks by reinforcing a solid defense foundation ensures protection for your client, minimizes your exposure, and offers you greater leverage in settlement discussions or in preparation for trial.

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Endnotes

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2 See www.reptilekeenanball.com for promotional material.

3 By "Reptile plaintiff attorneys" we do not mean to demean plaintiff attorneys practicing these tactics, but simply offer a term less burdensome than "plaintiff attorneys who practice 'reptile' tactics."

4 See Kanasky, William Jr., "Debunking and Redefining the Plaintiff Reptile Theory," Under review, 2014.

5 Deposition testimony, ADR, Motion en liminies, Supplemental juror questionnaire, voir dire, opening statements, graphics, trial testimony, closing arguments, and jury instructions.

6 See David Ball & Don Keenan, Reptile: the 2009 Manual of the Plaintiff's Revolution. Balloon Press, 2009.

7 See Paul D. MacLean, The Triune Brain in Evolution: Role in Paleocerebral Functions, Springer, 1990; and Reiner, A. "An Explanation of Behavior". Science 250 (4978): 303–305.

8 For discussions of weaknesses surrounding the Reptile Theory see Striedter, G. F. (2005) Principles of Brain Evolution. Sinauer Associates; Patton, Paul (December 2008). "One World, Many Minds: Intelligence in the Animal Kingdom". Scientific American. Retrieved 29 December 2008; Butler, A. B. and Hodos, W. Comparative Vertebrate Neuroanatomy: Evolution and Adaptation, Wiley; Smith CU., 2010, The triune brain in antiquity: Plato, Aristotle, Erasistratus. Journal of the History of the Neurosciences, 19:1-14.; and Ben Thomas "Revenge of the Lizard Brain," Blog.Scientific American.com 9/7/12.

9 David Ball & Don Keenan, Reptile: the 2009 Manual of the Plaintiff's Revolution. Balloon Press, 2009, Pg 17.

10 *Ibid*, Pg. 17, 19, 73.

11 *Ibid*, Pg 30.

12 David C. Marshall, "Lizards and Snakes in the Courtroom: What every defense attorney needs to know about the emerging plaintiff's reptile strategy" For The Defense, 4/2013, Pg 65.

13 Supra 9, Pg51.

14 *Ibid*, Pg.51

15 We believe jurors more commonly reflect a decision-making model called "Sensemaking," pioneered in the 1960s and 70s to explain group decision-making. Sensemaking has been adopted by the Department Of Defense and other high risk organizations to improve collective problem-solving in high stress environments. For more on the influence and widespread use of Sensemaking see Dennis Gioia and Kumar Chittipeddi, "Sensemaking and Sensegiving in Strategic Change Initiation," Strategic Management Journal 12 433-448; Maryl Louis, "Surprise and Sensemaking: What newcomers experience in entering unfamiliar organizational settings," Administrative Science Quarterly 25 226-251; Maryl Louis and Robert Sutton, "Switching Cognitive Gears: from habits of mind to active thinking," Human Relations 44 55-76; Ryan A. Malphurs Rhetoric and Discourse in Supreme Court Oral Arguments. New York: Routledge Press, 2013; William Starbuck and Frances Milliken, "Executives personal filters: What they notice and how they make sense," The Executive Effect. Donald Hambrick (ed). (Greenwhich CY: JAI 1998); Karl Weick, Making Sense of the Organization (Malden, MA: Blackwell 2001); Karl Weick, Sensemaking in Organizations (Thousand Oaks, CA: Sage 1995).

Invalid, Yet Potentially Effective

Debunking and Redefining the Plaintiff Reptile Theory

By Bill Kanasky

Defense attorneys need a clearer understanding of how the reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline.

The well-known "reptile revolution" spearheaded by attorney Don Keenan and jury consultant Dr. David Ball is now an ubiquitous threat to defendants across the nation. It is advertised as the most powerful guide available to plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform. Reptile books, DVDs, and seminars instruct plaintiff attorneys on how to implement these strategies during an entire litigation timeline, from discovery to closing argument. Most papers about the reptile theory merely define the theory itself, describe the various tactics, and provide rudimentary advice to defense counsel on how to "tame" or "beat" the reptile. However, few authors have attempted to directly challenge the reptile theory's validity or have attempted to provide alternative explanations to why these reptile tactics often work. This article aims to accomplish both goals, as well as to provide scientifically based solutions for defense attorneys to use at all points of the litigation timeline.

To date, the best attempt at debunking the reptile theory is Allen, Schwartz, and Wyzga's (2010) article "Atticus Finch Would Not Approve: Why a Courtroom Full of Rep-

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tiles is a Bad Idea." First, the authors immediately attack the reptile theory, stating that Ball and Keenan's neuroanatomical assumptions are incorrect. They claim that reptiles can't experience fear, as the reptile brain lacks a limbic system, the emotional center of the mammalian brain. Second, the authors state that fear responses in humans are unpredictable, thus using fear in the courtroom is a risky gamble at best. Finally, they claim that jurors "recoil" when they are treated disrespectfully, that is, as if they are reptiles, and using fear in the courtroom ultimately backfires. They go on to offer a solution to the reptile formula that focuses on constructing an effective narrative to persuade jurors.

This article is important because it is the first to challenge the neuroanatomical foundation of the reptile theory. The authors quickly point out that fear responses in humans are controlled by the higher-level limbic system, not the more primitive "reptile brain." As mentioned, specifically, they state that reptiles cannot respond to fear because they lack a limbic system, which eliminates emotion from the equation. Since the limbic system actually controls survival responses in humans, not the "reptile brain," the authors believe that the theory is fundamentally flawed. While they are partially correct in this analysis, the authors fail to recognize that danger is a threat, while fear is a complex emotion in response to danger. In other words, danger is a stimulus, while fear is an emotion. Ball and Keenan clearly sell danger, not fear. Their goal is to tap into the deepest part of the brain where danger is detected, and the instinctive aspects, often referred to as the "reptile brain." Interestingly, their goal may be to bypass fear altogether and simply go directly to jurors' automatic survival instincts because a juror has the cognitive capacity to decrease a fear, whereas it is impossible for a juror to deactivate an instinct. In sum, Ball and Keenan's neuroanatomical assumptions are accurate as they relate to the arguments that they make about danger, and would only be inaccurate if they made a similar argument about a fear response. As such, the authors' attack on the reptile theory is minimally effective because they have compared apples to oranges to some degree.

Allen, Schwartz, and Wyzga's (2010) article also provides a strategic solution to the reptile approach that is fairly inadequate: the use of narrative. While it is well-known that a persuasive narrative is an effective way to educate and influence jurors in any type of case, it only addresses one of the multiple areas that the reptile approach attacks. Ball and Keenan's tactics begin very early in the litigation timeline with deposition testimony, and extend to other parts of a trial in which narrative is irrelevant, such as voir dire and jury selection. Additionally, while the authors generally define why narratives are so effective, they fail to inform a reader how best to construct the story to derail the reptile story provided by a plaintiff's counsel specifically. Generalized "tips" on how to tell a better story are no match for Ball and Keenan's precision attack methods.

For defense attorneys to succeed persistently against the reptile approach, they need a clearer understanding of how the

reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline. Therefore, this article will focus on three areas: (1) why the overall reptile theory is invalid, (2) why the specific reptile tactics work, despite the invalidity of the overall theory, and (3) scientifically based solutions to defuse these tactics.

While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective.

Debunking Ball and Keenan's Reptile Theory

The reptile theory is now well-known to the defense bar. The highlights of the theory include the following:

- The "reptile" or "reptile brain" is a primitive, subcortical region of brain that houses survival instincts.
- When the reptile brain senses danger it goes into survival mode to protect itself and the community.
- The courtroom is a safety arena.
- Damages enhance safety and decrease danger.
- Jurors are the guardians of community safety.
- "safety rule + danger = reptile" is the core formula.

The "safety rule + danger = reptile" formula states that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by a defendant, awakening survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society. Ball and Keenan claim that use of their reptile strategy has resulted in nearly $5 billion in settlements and damage awards since 2009.

To debunk any theory, someone must show that the theory's core principles and formulas are flawed. The linchpin of Ball and Keenan's reptile theory is the brain's stimulus-response reaction to danger. They claim that exposing a safety rule violation (stimulus = danger) triggers jurors' automatic survival instincts to protect themselves and the community (response = award damages). The fatal flaws of the reptile theory are two-fold. First, a plaintiff's counsel can only "suggest" danger to jurors, rather than actually exposing them to a true threatening stimulus that would trigger survival instincts. In other words, the core foundation of the reptile theory is that danger triggers survival responses, but in reality, jurors are never exposed to any direct danger. Therefore, without an immediate threat, awakening the reptile brain in the manner in which Ball and Keenan describe is physiologically impossible.

Secondly, Ball and Keenan fail to mention that the reptile brain, called the "brainstem" in modern science and medicine, is not the sole brain region responsible for survival behaviors in humans. In fact, the reptile brain only plays a limited role in human survival instincts, whereas higher-level brain structures play a much larger role. Specifically, the reptile brain or brain stem is responsible for multiple automatic and involuntary functions that are necessary for basic physiological survival such as cardiac function, respiration, blood pressure, digestion, and swallowing. It is also responsible for alertness and arousal, key factors for protective survival from dangers. While the reptile brain or brain stem in humans plays a key role in detecting danger, the limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response. As such, Ball and Kennan's theory is invalid because true protective survival responses are not even triggered by the human reptile brain or brain stem, but rather by the more advanced limbic system.

Now, Ball and Keenan claim that even a mild threat can trigger the survival reaction. They claim that exposing a safety rule violation is an adequate stimulus powerful enough to shift jurors into survival mode. Again, the suggestion of a danger or potential threat is never enough to activate the brain's survival instincts because the nature of the threat must be intense and immediate. If survival instincts could be tapped so easily, our behavior would be totally irrational throughout the day, which explains why an intense, immediate threat is required to activate these strong instincts. To understand survival responses, it is important to comprehend the different classifications of threats and the types of subsequent survival reactions. Consider the examples below.

Example A: You hear reports of a recent robbery in your neighborhood. This is indeed a potential threat, but survival functions do not take over because the threat is not direct or imminent. Instead, when a potential threat is suggested, people actually become more logical and make an action plan, such as having a family meeting to discuss what occurred, making a plan to check door and window locks, to be more vigilant, and to speak with neighbors. This type of survival reaction is known as "high road" cognitive processing, in which someone carefully assesses many options and makes a careful choice.

Example B: You hear an intruder entering your house. This constitutes a direct threat, which triggers the fight or flight instinctual survival response. In other words, you will either quickly attack the intruder to protect yourself and your family, or you will run and call for help because there is no time to make a logical plan due to the imminent threat. This type of survival reaction is known as "low road" cognitive processing, processing in which cognition is very limited.

Example C: You walk around the corner and your five-year-old jumps out of nowhere and screams "boo!", resulting in you automatically jumping back and dropping the glass that you were holding. This constitutes an intense, immediate threat, which triggers a brain stem reflex that includes jumping backwards, muscle tension, causing the drop of the glass, dilated pupils, and increased heart and respiratory rate. This type of survival reaction is known as a "brain stem reflex" or "startle response," which is automatic, involving no cognition.

In humans, the reptile brain or brainstem only detects danger via attentiveness and alertness, and then the thalamus, the brain's "switchboard," usually takes over

and decides whether the danger is worthy of a survival response or a more thoughtful response. Thus, Example A illustrates high road cognitive processing, which is a slower road because it also travels through the cortical parts of the brain before a thoughtful and logical response is formed. Example B illustrates low road cognitive processing because a neural pathway transmits a signal from a dangerous stimulus to the thalamus, and then directly to the amygdala, triggering the fight or flight response, which then activates a quick survival response. Example C is more of a survival reflex from the reptile brain because the response is almost instantaneous from such an intense and direct threat.

As you can see above, suggested or potential threats simply cannot activate the survival responses in the reptile brain the way that Ball and Keenan suggest. If they could, society would be in survival mode nearly constantly, making logic extinct. The "safety rule + danger = reptile" formula is erroneous and should be replaced with "imminent danger + intensity = reptile" or "suggested danger + logic = planning." In conclusion, Ball and Keenan's reptile theory is invalid because the courtroom is not conducive to the type of threat necessary to awaken the reptile brain. However, disproving the reptile theory in its entirety does not necessarily eliminate the effectiveness of the theory's individual tools and methods. Ball and Keenan's reptile tactics can be very effective, but for a much different theoretical reason than they claim.

Redefining the Reptile Theory

The reptile methodology can indeed influence juror decision making, yet in a different way than advertised by Ball and Keenan. While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective. Without understanding those reasons, defense attorneys can be outmaneuvered in four primary areas when facing a reptile plaintiff attorney.

Defendant's Deposition Testimony

Plaintiff attorneys have figured out that the fastest way to a profit is to settle a case for much more than its actual economic value. They accomplish this by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreeing with multiple safety rules. Once these admissions are on the record, often on video tape, the defense must either settle the case for an amount over its true value or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy. In other words, if defendants are not specifically trained to deal with reptile questions and tactics, the odds of them delivering damaging testimony is high.

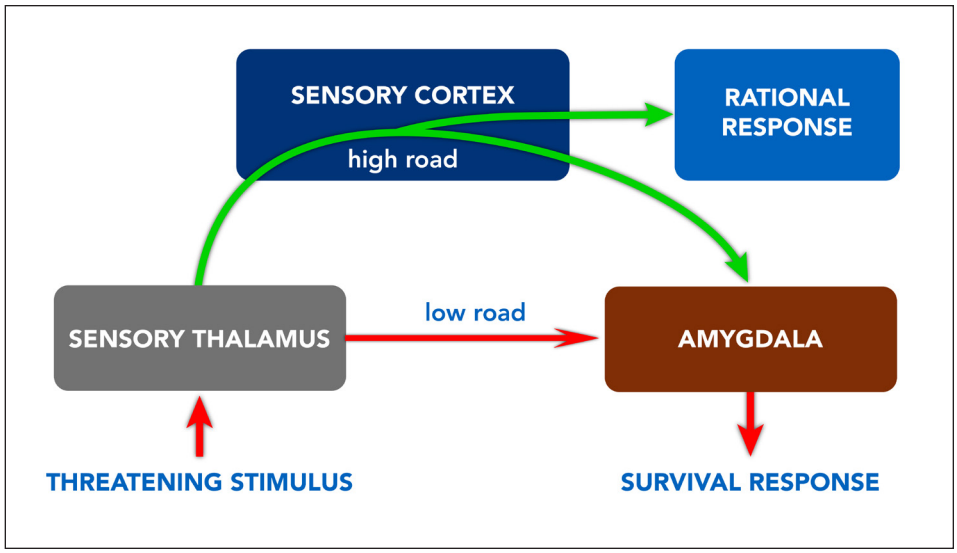
Voir Dire

Plaintiff attorneys use a psychological technique called "priming" during voir dire by establishing terms, language, and definitions early in the process, resulting in those stimuli being processed more quickly by jurors throughout a trial. Rather than fight fire with fire, defense attorneys instead tend to ask questions to identify stereotypical plaintiff jurors. By the end of jury selection, a plaintiff's counsel has "primed" a jury for his or her opening statement, resulting in easier cognitive digestion and acceptance of the plaintiff's story. Asking key questions to identify pro-plaintiff jurors is critically important during voir dire; however, not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.

Opening Statement

Perhaps the most apparent area of defense attorney weakness is opening statement construction. Know thy enemy: Dr. Ball is a professional story teller with a Ph.D. in Communications and Theater. He is a master of words and themes. Dr. Ball uses strategic ordering of information within a story to place a defendant in the spotlight of blame from the start. Dr. Ball understands that the better story wins, not necessarily the better science or medicine. Defense attorneys don't have Dr. Ball's training, and often resist seeking the assistance of jury consultants to develop their opening statements. The result is often a sim-

Not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.



ple, understandable plaintiff's story that immediately connects with a jury against a complex, confusing defense chronology that focuses on science rather than jury friendly themes.

Defense Trial Testimony

When a defendant or a defense witness agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the main mistake is insufficient witness preparation that focuses on the science or medicine more than the manipulative reptile process. The "gotcha moment," when a defense witness gets boxed in by a plaintiff's counsel and begins to respond emotionally (argumentatively, defensively, or anxiously) typically results in a severe mess that is difficult to clean up during a defense counsel's rehabilitation efforts. The irony here is that it is a *witness* goes into survival mode cognitively, *not a jury*. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers posed by the defendant. In reality, jurors award damages to punish a defendant that breaks safety rules, not to protect themselves or the community.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground.

These tactics do not work because the jurors' reptile brains are awakened and they strive to protect themselves and the community. Rather, these tactics work because plaintiff attorneys have taken a new strategic approach focusing on defendant conduct rather than sympathy and severity of injuries, and the defense bar has not yet adjusted. What at first appeared to be an innovative neuroscientific plaintiff "revolution" is simply a more aggressive plaintiff strategy that uses reliable and fundamental psychological tools to put defendants truly on trial.

The Solutions

So what solutions does a defense attorney have? A defense attorney can defeat a reptile attack in three ways: defusing a plaintiff's attorney's voir dire priming, delivering a more effective opening statement, and preparing defense witnesses differently.

Defusing Priming in Voir Dire

Priming is a technique used to influence or control attention and memory, and it can affect decision making significantly. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain. For example, if the trait description of "careless" is frequently used, that description tends to be automatically attributed to someone's behavior. In voir dire, a plaintiff's counsel begins the priming process with the goal of exposing jurors to stimuli such as danger, risk, safety, and protection so that those themes will resonate with jurors during the plaintiff's attorney's opening statement. Repetition is a form of priming that can make themes more believable. Therefore, the more jurors are primed with safety claims such as danger, risk, or violation of rules, among others, in voir dire through repetition, the odds of jurors believing those claims during opening statement significantly increases. This occurs because priming creates selective attention, causing jurors to reduce future information intake so they can focus on the safety claims. Priming can essentially blind jurors from processing new information, which can spell deep trouble for defense counsel since they always follow a plaintiff's counsel during a trial.

Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors during voir dire with a cognitive "plan" that can spoil a plaintiff's counsel's priming efforts. For example, a plaintiff attorney may attempt to prime jurors during voir dire with the notion that safety = priority with statements, such as "Who here feels that physicians should always put safety as their top priority? Who feels the community deserves that?", in an effort to later convey in an opening statement that the only way that a physician can be safe is to follow the safety rules of medicine strictly. Many defense attorneys counter with the ineffective response of asking jurors to focus on the law or the science. The more effective strategy would be to strip the original priming and "re-prime" jurors with a different cognitive plan. In a case using the physician example, the plan would focus on the following question: "Who here feels that a physician's *real* priority needs to be to treat every patient as a unique individual?" This tactic would weaken a plaintiff attorney's priming efforts and potentially create a defense priming effect that a defense attorney could build on during an opening statement.

Again, the reptile tactics that plaintiff attorneys use during voir dire have little to do with activating survival instincts. Instead, priming jurors to accept a plaintiff's terms, definitions, and language later on in a trial is the key psychological goal. Ball and Keenan would tell you that the safety language introduced during voir dire would awaken jurors' reptile brain. That claim is inaccurate because this priming effect is more about using fundamental cognitive principles successfully than about triggering survival instincts. Defense attorneys can neutralize these priming tactics by stripping an original primer's power and applying their own.

Delivering the Right Opening Statement

Before 2009, the majority of plaintiff attorneys heavily relied on sympathy-based stories to strike an emotional chord with a jury and drive them toward a high damages award. The classic defense response to such a strategy was to show how a defendant acted reasonably and to defend a defendant's conduct. This plaintiff strategy became ineffective over time as sympathy became a less potent variable as newer, desensitized generations started to fill the jury box, particularly Generation X and Y jurors. In response, the reptile revolution has generated a new story format that is far more effective with today's jurors: immediately putting a defendant's conduct on trial and *not* focusing on injuries and sympathy.

This is where many defense attorneys have fallen behind and have failed to make the proper adjustments to their strategy. The origin of this failure is simple: you must know thy enemy.

Dr. David Ball, co-developer of the reptile theory, is a brilliant scientist of storytelling. When he assists a plaintiff counsel in developing an opening statement, he masterfully uses the tools of emphasis, information ordering and repetition to create a masterpiece of persuasion for a jury. Not only is he an elite expert in opening statement construction, he is also an expert at luring his adversary—defense counsel—into telling an ineffective story to a jury. Specifically, the organization of his reptilian story ironically forces many defense attorneys into "survival" mode rather than adhering to effective defense strategy. As such, the top strategic mistake in response to a reptile opening statement is to go on the defensive immediately, and to deny each of a plaintiff's allegations. This instinctual response makes psychological sense: a plaintiff's counsel has bludgeoned a defendant with safety rules and danger threats for 45 minutes, resulting in great temptation to deny each allegation immediately one-by-one. However, this strategy is notoriously ineffective and is known as the "Hey, we didn't do anything wrong and we are a good or safe person or company" approach. Addressing each claim immediately is a deadly mistake because it highlights and repeats the reptile safety themes, thus validating them.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground. By reacting to a plaintiff's story immediately, the defense plays right into the Dr. Ball's hands and actually reinforces the plaintiff's arguments to the jury. This effect is called the "availability bias," meaning that jurors tend to blame the party that is most "available" or in the spotlight. If defense counsel takes the bait and illuminates safety issues relating to a client early in an opening statement, the reptile attorney has won the opening round. Avoiding this tempting "availability bias" trap is essential to developing a persuasive opening statement that will neutralize the reptile opening. Jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame besides your client is imperative to derailing the reptile attack. Defense counsel needs to arm jurors with the "real" story and immediately put a plaintiff or alternative causation on trial.

During the "opening" of an opening statement, meaning 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, such as information highlighting safety issues, which will taint a jury's perceptions from that point forward. Information presented early in an opening statement acts as a cognitive "lens" of sorts through which all subsequent information flows. This cognitive lens can drastically affect how jurors perceive information as a presentation progresses, so one must choose this lens very carefully. Dr. Ball specializes in creating a safety-danger lens through which jurors perceive a case, so defense counsel must provide jurors with an alternative lens immediately. Without this alternative lens, then an entire case will revolve around safety and danger, which drastically increases the odds of a plaintiff verdict with damages.

It is essential to emphasize key themes related to a plaintiff's culpability, alternative causation, or both, depending on the case, immediately because this is the time when jurors' brains are the most malleable. The defense story should only proceed after the "lens" has been placed, which should significantly influence jurors' perceptions and working hypotheses of a case. As Dr. Ball knows, 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 a story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue. This technique is often used by Dr. Ball to illuminate safety issues early in an opening statement. Unfortunately, few defense attorneys know the proper way to defuse it and to counterattack.

The best way to counterattack is by flash-forwarding immediately to culpability, alternative causation or both in an opening statement, and then to begin to tell the defense story. 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 tell the defense story in chronological order or, even worse, come out of the gate defending a client against each of a 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 because jurors will value that first three minutes of information more than any other part of an opening statement. Remember, jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame is imperative to derailing the reptile approach.

Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency.

Defense Trial Testimony

Black box analyses of how and why reptile plaintiffs defeat defendants during depositions and trials reveals that frequently a defense witness is ultimately trapped by an agreement to one or more safety rules, which creates a clear contradiction between a rule and a defendant's conduct in the specific case at hand. The perceptual effect of this dramatic "gotcha moment" is devastating, especially during a trial. A trial is not a battle of science or medicine; it is a battle of *perception*. The party that looks

and sounds correct is usually perceived as being more correct by a jury, regardless of the substance of a case. Therefore, when a defendant's witness is on the stand and it appears that a defendant broke safety rules in relation to the plaintiff, the perception of behavioral inconsistency has a powerful effect on jurors' decision making. Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency. For this reason, witnesses require special cognitive training to prevent the "gotcha moment" from ever occurring.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest.

To create the perception of inconsistency, a reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a "word game" in which a witness needs to decide whether to accept or to reject the plaintiff attorney's language. Baseball provides an excellent analogy to illustrate this process. An effective hitter carefully analyses each pitch coming in and classifies it, and that classification—fastball, curveball, off-speed, too high, too low—determines the timing of the hitter's swing or whether he even swings at all. A defense witness is the hitter in this analogy, while the plaintiff attorney is the pitcher. In the safety rule attack, the plaintiff attorney (pitcher) attempts to get a defendant's witness (hitter) to swing at a bad pitch that is out of the strike zone. Therefore, a defendant's witnesses need special training to learn how to classify questions properly as they are delivered because their baseline cognitive processing ability is too scattered to be able to detect the elusive "curveballs" effectively without it. Keeping with the analogy, a reptile plaintiff attorney (pitcher) will cleverly set up a defendant's witness (hitter) by repeatedly delivering questions (pitches) that are benign and easy to answer (hit). The repetitive exposure to benign stimuli leads to "cognitive momentum," in which a witness' brain begins to assume that subsequent questions will also be benign, and a tendency of automatic, rhythmic agreement begins to form. At this point a defendant's witness (hitter) has been cognitively "set up" for the safety questions (curve balls), which usually results in continued automatic, rhythmic agreement. Once this occurs, a reptile plaintiff attorney goes in for the kill: he or she begins to ask case-specific questions that are factual and must be agreed with and dramatically points out the contradiction between the agreed upon safety rule and a defendant's conduct in the case. Hence, the "gotcha moment" is brilliantly set up by using a witness' own cognitive patterns against him or her. Advances in technology have caused the brain to evolve so that it can process several stimuli simultaneously rather than isolating attention and concentration on a single stimulus. This cognitive pattern is hardwired and very difficult to reverse and is the top reason why a defendant's witness is highly vulnerable to reptile attorney precision attacks during adverse examination. In society, cognitive multitasking and quick thinking is very important because it leads to effective problem solving and productivity. When testifying, it is a fatal flaw that can result in a defendant's witness becoming trapped in a dangerous contradiction. Therefore, advanced cognitive training in the areas of attention, concentration, focus, and information processing are required so that a witness can avoid being defeated by the survival rule attack.

If a defendant's witness can develop the cognitive skills to survive the safety rule attack, a reptile plaintiff attorney must proceed with the emotional attack strategy. When a witness learns to detect and reject safety rules consistently, it puts a reptile plaintiff attorney in a difficult position because he or she cannot show any contradictions or inconsistencies. Then a reptile plaintiff attorney must use a different strategy to establish the safety rule, otherwise the dramatic contraction is not possible and the case cannot be won. The emotional attack reptile strategy attempts to force a defendant's witness out of patient, thoughtful, meticulous high road cognitive processing and into instinctual, spontaneous, survival low road cognitive processing. By forcing low road cognition, the reptile plaintiff attorney can generate a response that will likely be negatively perceived by jurors, thus hurting a defendant's witness' credibility.

Three emotional attack methods can force a defendant's witnesses into low road cognitive processing: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road cognition and regress into low road cognition, which will result in emotional and protective responses. Aggression occurs when a reptile plaintiff attorney turns hostile towards a defendant's witness and is characterized by a dramatic negative shift in volume, tone, and body language. This tactic is specifically designed to shock a defendant's witness and to activate low road cognitive processing and fight or flight, turning the witness hostile (fight) or instinctually to agree or become passive(flight). Either response will significantly undermine a witness' credibility and believability and will create the perception that a reptile plaintiff attorney is correct. A reptile plaintiff attorney then humiliates a witness by displaying shock, disbelief, and even laughter towards the witness' answers. Low road cognitive processing in this circumstance results in a defensive, survival response, characterized by "wait, wait… let me explain" types of responses that ultimately appear weak excuses in the eyes of a jury. Again, responding in a defensive manner creates the perception that a reptile plaintiff attorney is correct and that a defendant's witness has backpedaled and tried to talk his or her way out of a question. Finally, a reptile plaintiff attorney can attack with a display of confusion or lack of understanding, which threatens a defendant's witness by suggesting that his or her answers do not make sense. This is a very powerful emotional attack because it makes a defendant's witness feel like an inadequate communicator who struggles

to answer questions in a straightforward manner. This type of attack can force low road cognitive processing because a witness fears that his or her answers are insufficient and that he or she should explain more to a reptile plaintiff attorney in an effort to help him or her understand. This results in a jury perceiving a witness as disorganized and unsure of him or herself. Even worse, it allows a reptile plaintiff attorney to extend his or her adverse examination and emotional attack methods.

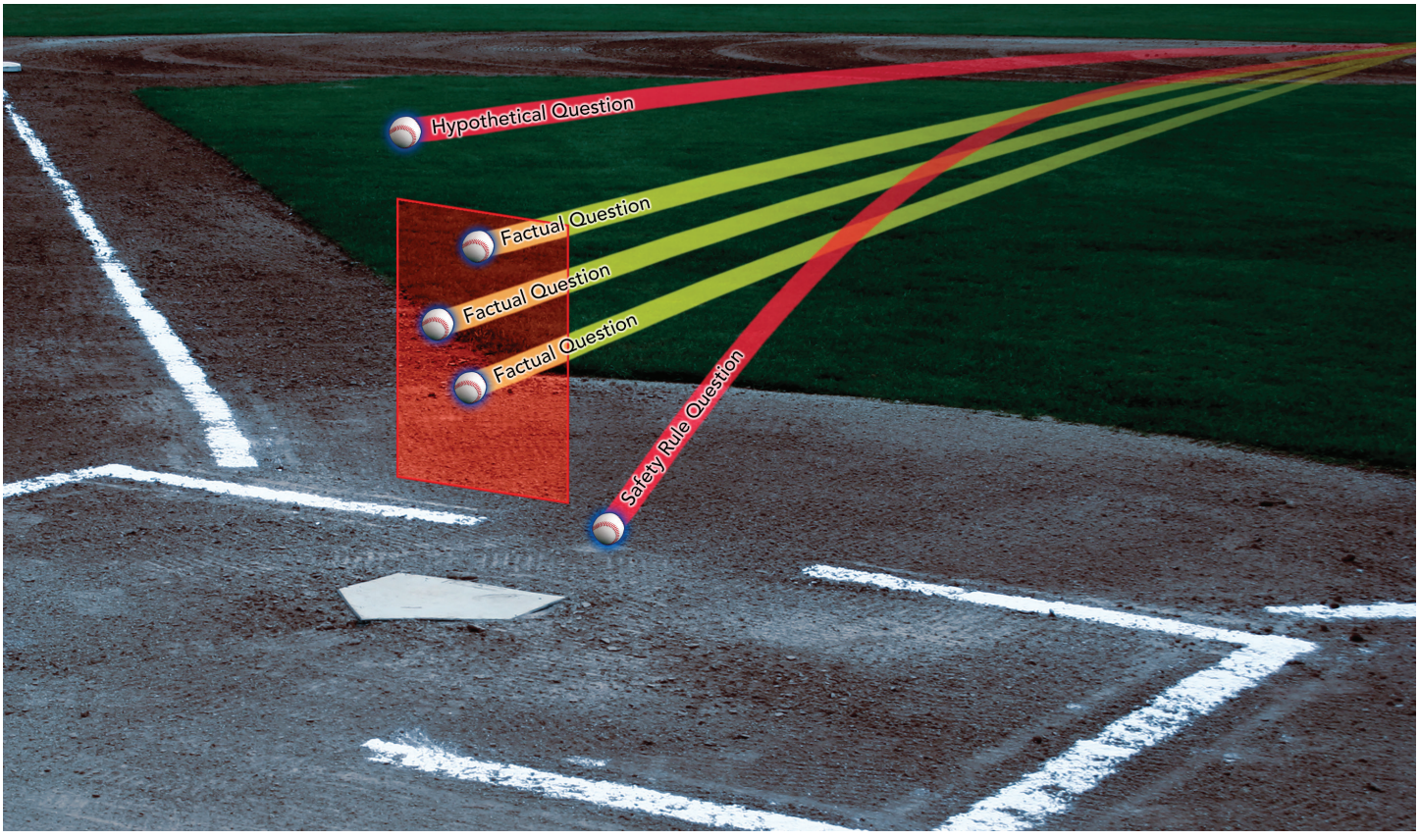
Similar to the safety rule attack, advanced cognitive training is required to desensitize a defense witness to these emotional attacks and to train him or her to remain in high road cognitive processing at all times. High road cognitive processing allows a witness to shoot down safety rule questions persistently, as well as calmly and confidently to repeat effective answers that will become the cornerstones of a subsequent examination by defense counsel. It is important to note that after a defendant's witness persistently rejects safety rule questions, jurors begin starving for information, deeply craving questions that begin with the words "what, why, and how." However, a reptile plaintiff attorney would never ask such questions since they would allow a well-prepared witness to deliver a persuasive narrative answer to a jury. Therefore, it is important that defense witnesses learn the proper responses to reptile plaintiff attorney questions and not force in their explanations during adverse examination.

There are two reasons why defense witnesses agree with safety rule questions: cognitive momentum, as described earlier, and the brain's preprogrammed acceptance that safety is good and danger is bad. Specifically, the brain is preprogrammed to embrace safety and to avoid danger, resulting in instinctual acceptance of these principles when presented in testimony. Safety rule questions are highly manipulative and come in all shapes and sizes. However, effective answers to safety questions are pre-planned and very limited in nature. Before discussing the most effective responses to safety rule questions, it is important to first classify the various types of safety rule questions that exist. There are two general types of safety rule questions: big picture safety questions and hypothetical safety questions. A reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainers" in nature. This is precisely why the brain's innate acceptance of safety principles becomes a major vulnerability for a defense witness. These questions focus on the following big picture principles:

- Safety is always top priority.
- Danger is never appropriate.
- Protection is always top priority.
- Reducing risk is always top priority.
- Sooner is always better.
- More is always better.

Hypothetical safety questions are more specific and often take the form of an if-then statement such as "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?" These questions are especially dangerous because a reptile plaintiff attorney skillfully can cherry-pick symptoms or factors and then suggest the safest course of action to a witness. These deceptive questions are effective because they provide just enough

Reptile, continued on page 76



Reptile, from page 21
information to lure witnesses into providing an absolute answer, thus setting the stage for the "gotcha moment." Therefore, a defense witness' ability to detect these precarious questions persistently is vital to defense counsel's ability to defend a client effectively later in the case.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest. If a witness can first develop the cognitive skills to understand consistently the true meaning and motivation of a reptile plaintiff attorney's question, the honest answer will always be some form of "it depends on the circumstances." By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer such as the following:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes that is true, but not all the time."
- "It can be in certain situations."

These answers are highly effective for four reasons. First, they are honest and accurate answers. Again, questions that lack adequate specificity cannot be answered in absolute terms so these "sometimes" type of responses are truthful. Second, these responses put intense pressure on a reptile plaintiff attorney to ask a defendant's witness "what does it depend on?" As stated before, the last thing that a reptile plaintiff attorney wants is to give a defendant's witness an opportunity to deliver persuasive narrative to a jury. When the logical and expected "what" question does not follow these responses, jurors tend to become frustrated with and often suspicious of, a reptile plaintiff attorney if he or she proceeds with an emotional attack. Third, they provide an excellent opportunity for defense counsel to ask a witness to offer explanations to jurors, who are starving for information. This is when a defense witness can really shine, can become a persuasive educator to jurors. Finally, most importantly, jurors widely accept and understand these answers because they perceive them as authentic and reasonable, particularly if defense counsel has properly primed the jurors for these responses during voir dire and opening statement. On the face of it, persistently delivering these answers seems simple. However, it is a very difficult task for defense witnesses because of their multitasking brains, the phenomenon of cognitive momentum, and low road cognitive processing due to emotional attacks. As such, a defense witness must undergo advanced cognitive training to learn to detect trap questions consistently, respond effectively, detect emotional attacks, maintain high road cognitive processing, and repeat answers with emotional poise.

Conclusion

In the end, the reptile theory is simply an aggressive plaintiff strategy that is erroneously packaged in neuroscientific wrapping. The authors are a veteran plaintiff attorney (Don Keenan), and a jury consultant (David Ball),)who have no formal training in neuroscience or neuropsychology, yet take highly complex neuroscientific principles and conveniently apply them to jury decision making. One thing is clear: Ball and Keenan have created a *brilliant* marketing campaign to (1)persuade plaintiff attorneys nationwide to attend their seminars and buy their DVDs, and (2) generate enough angst within the defense bar to get them to start brainstorming solutions.

Despite the theory's invalidity, the individual reptile tools can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. Defense counsel should do three things when facing a reptile plaintiff attorney. First, rethink your voir dire plan and develop a strategy to strip reptile plaintiff attorney priming and re-prime with defense language and definitions. Priming works, so learn to use it to your advantage during voir dire. Second, work with a qualified consultant to ensure that you will tell the right story in your opening statement, and not inadvertently reinforce a plaintiff's claims. Effectively reordering information can drastically affect jurors' perceptions. Finally, develop a new appreciation for training witnesses before deposition and trial appearances since this is the key area in which reptile plaintiff attorneys are sure to attack fiercely. Find a qualified consultant to provide your defense witnesses with the advanced cognitive training necessary to overcome both safety rule and emotional attacks. Such a consultant should have doctoral level training in cognitive and behavior science, and be intimately familiar with reptile tactics. FD

Workers' Compensation: An Update on Current Trends

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CURRENT TOPICS IN WORKERS COMPENSATION

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2013 Agency Transparency Report

Deputy	Total Decisions Issues	Claimant Win #	Claimant Win %	Claimant Partial Win #	Claimant Partial Win %	Employer Win #	Employer Win %
H. Walleser	15	6	40.0%	0	0.0%	9	60.0%
R. Pohlman	35	28	80.0%	2	5.7%	5	14.3%
M. McGovern	21	15	71.4%	2	9.5%	4	19.0%
D. Rasey	34	19	55.9%	4	11.7%	11	32.4%
L Walshire	29	18	62.1%	1	3.4%	10	34.5%
J. Christenson	44	31	70.5%	3	6.8%	10	22.7%
J. Elliott	23	15	65.2%	5	21.7%	3	13.1%
E. Fitch	19	12	63.2%	3	15.7%	4	21.1%
J. Gerrish-Lampe	58	35	60.3%	11	19.0%	12	20.7%
S. McElderry	36	26	72.2%	5	13.9%	5	13.9%
W. Grell	43	28	65.1%	3	7.0%	12	27.9%
J. Heitland	34	29	85.3%	4	11.8%	1	2.9%
TOTAL	**391**	**262**	**67.0%**	**43**	**11.0%**	**86**	**22.0%**

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Transparency Report

- <u>Definitions:</u>

. Claimant Win – Claimant wins all points requested in the case.

. Claimant Partial Win – Claimant receives significantly less in benefits than requested or the employer prevails on a number of points.

. Employer Win – Employer wins all points and claimant receives no benefits.

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Trend in Iowa

- Additional Worker's Compensation information:
- Every two years, the State of Oregon releases an objective, national study ranking all 50 states by which have the lowest workers' compensation costs – and are therefore most attractive to job creators. In 2006, Iowa had the 7th – lowest workers' compensation costs in the nation. As of the most recent study (2012), we had the 27th – lowest costs.

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Wins for Claimants

- For Claimant –
- Heitland – 97.1%
- J. Elliot – 86.9%
- McElderry – 86.1%
- Pohlman – 85.7%
- McGovern – 80.9%

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For Employers

- Walleser – 60.0% - RETIRED
- Walshire – 34.5%
- Rasey – 32.4% -RETIRED

- Loss of these deputies doesn't bode well for employers

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No Data Yet

- Erin Pals
- Joe Walsh

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Rate Increases

- The following outlines the rate increases and decreases in worker's compensation rates in Iowa.
  - 2010 – 2.3% increase
  - 2011- 4.7% increase
  - 2012 – 4.4% increase
  - 2013 – 7.9% increase
  - 2014 – 2.0% decrease

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Change in Leadership

- Commissioner Chris Godfrey resignation effective August 21
- New/Interim Commissioner to be Appointed by Gov. Branstad

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Nurse Case Managers

- Role that they play – treater? Part of the defense team?
- Communications with them probably discoverable in contested case
- Their reports – ditto
- Keep notes, memos information provided to them factual, objective
- Their reports must be provided to the worker's attorney in any case

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Nurse Case Managers

- Discovery of Nurse Case Managers
  - Winn v. Sunopta Food (12-12-12)
  - The nurse case manager has information concerning claimant's physical and mental condition
  - 85.27(2) requires disclosure of all such info the employer has about claimant
  - Can't be a part of the medical treatment team AND a member of the defense team

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Surveillance

Discovery of Surveillance

- Core Group of claimant's attorneys asked for declaratory ruling
- Prior rule – could withhold until after deposition of claimant
- 85.27 waiver goes both ways –
- Employer must disclose both the report and the video when requested

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Light Duty Issues

- If you have it available, or can make it available, should do so
- Make sure you have current restrictions from doctor and that employee does not exceed them
- If refuses light duty, can suspend benefits
- Light duty keeps them in the workforce and can help fend off the “disabled” mindset – keeping PPD lower

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Suitable Work

- Iowa Supreme Court held that suitable work requires two things:
- Must be “suitable” (hint, not defined)
- AND “Consistent with employee’s disability”
- Distance of available work from claimant’s home may be considered when deciding if “suitable”

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Suitable Work

- Commissioner appeal decision 3/1/12
- E'er offered work consistent with restrictions
- Claimant refused because the required scheduling change resulted in increased child care costs (exceeded her wages)
- Held: not all work consistent with the disability is suitable
- Not suitable when scheduling change cost claimant more than she would earn

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Suitable Work

- Claimant's attorney requested detailed job description of light duty job
- When E'er did not give one, Claimant refused, and argued it was not suitable because no job description given
- Held: It was suitable, had worked light duty from 5/7/10-12/31/10
- Claimant has burden to prove unsuitable
- (Oct. 2014 Commission decision)

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Suitable Work - Refusal

- Voluntary Terminations
- Test is 1)whether Claimant was offered suitable work, and 2) whether it was refused (2010 arb. dec.)
- Question remains – what is "suitable"?

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Refusal of Light Duty

- Arb. Dec. 8/7/12
- Shoulder injured 7/23/11, light duty offered 8/11/11 within restrictions
- Failed to show up on 8/15/11– termed
- Unilaterally rejected work offer without ever attempting it
- If she had tried, but been unable to do it, then it would not have been a refusal
- Held: not entitled to TPD benefits because of voluntary quit

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Involuntary Termination – Not Refusal to Work

- Sleeping on the job
- Absenteeism
- Temper Tantrum
- Walking off the job
- Errors
- Violating rules/policies
- Misappropriating Company documents

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Involuntary Termination – Refusal to Work

- Threatening the lives of co-workers
- "a single act of such consequence that a reasonable person would consider virtually certain to cause any employer to terminate employment relationship with any employee on the first offense or a repeated pattern of behavior that is actually harmful to employer's business"

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Employment Law Update: What is New, What is Interesting

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EMPLOYMENT CASE LAW UPDATE
2013 - 2014
Decisions of the United States Supreme Court
and the United States Court of Appeals for the Eighth Circuit

presented at
Iowa Defense Counsel Association
50th Annual Meeting & Seminar
September 18-19, 2014
by
United States Magistrate Judge Helen C. Adams
Southern District of Iowa[1]

I. DISABILITY CLAIMS

A. *Olsen v. Capital Region Medical Center*, 713 F.3d 1149 (8th Cir. 2013)

Background: Olsen suffered from epilepsy and had 14 seizure incidents while at work as a mammogram technologist. Several of these resulted in injuries to Olsen. Two incidents occurred in the presence of patients who were shaken and expressed concerns for patient safety. Capital Regional Medical Center provided accommodations in an attempt to limit the seizures by removing environmental triggers of seizures (i.e. removing the scroll function in keyboards, installing anti-glare filters on lights, etc.). After several seizures occurred in the workplace, Olsen was placed on paid administrative leave. She was allowed to return to work as a file clerk but requested that a Breast Health Coordinator position be created. The proposal was rejected because such a position had an RN qualification which Olsen did not meet. While a file clerk, Olsen had two more seizures and was placed on unpaid administrative leave. After a change in medication, Olsen was again permitted to return to work at her prior rate of pay. Olsen rejected the offer and was subsequently terminated.

Olsen claimed discrimination based on disability in violation of the ADA and Missouri Human Rights Act (MHRA). The district court granted summary judgment in favor of the Medical Center.

Holding: The Eighth Circuit affirmed concluding Olsen failed to show she was a qualified individual under the ADA or MHRA as she could not establish she could perform her work duties with or without accommodation. The court found the employer attempted numerous environmental accommodations but Olsen continued to suffer from seizures at work, during which she could not assure patient safety, an essential function of her job duties.

B. *Lors v. Dean*, 746 F.3d 857 (8th Cir. 2014)

Background: Lors worked for South Dakota Bureau of Information and Technology ("BIT") as a Computer Support Team Leader until he was transferred/demoted to a Computer Support Analyst position. BIT is a part of the South Dakota state government that runs public broadcasting and wires computer programs for agencies. Lors is a diabetic and alleged BIT demoted him because of his diabetes. BIT asserted that Lors was demoted as a result of

[1] Contributions to the preparation of the outline made by Kathy Nutt, law clerk to United States Magistrate Judge Ross A. Walters; Tyler Smith, intern for United States Chief Magistrate Judge Celeste F. Bremer; and Jed Brokaw, law clerk to United States Magistrate Judge Helen C. Adams.

inappropriate emails, failure to work well with co-workers, and difficulty following the chain of command.

Lors claimed discrimination under § 504 of the Rehabilitation Act of 1973 and the ADA. The district court granted summary judgment in favor of BIT and Lors appealed. BIT then placed him on a work improvement plan. Lors did not complete the work improvement plan and was terminated while his appeal was still pending in the 8th Circuit. The 8th Circuit affirmed the granting of summary judgment.

Lors subsequently filed a grievance with the South Dakota Career Service Commission arguing that BIT terminated him in retaliation for his discrimination claim, then filed a retaliation claim in federal court. Defendants moved for summary judgment while claiming they were immune to suit under the doctrine of sovereign immunity. Using the burden shifting *McDonnell Douglas* framework, the district court found Lors established a prima facie case for retaliation but defendants established a legitimate non-retaliatory reason for terminating Lors. The district court also found that a state court ruling had issue preclusion over the retaliation claim. The district court granted summary judgment in favor of BIT without addressing the issue of sovereign immunity.

Holding: The Eighth Circuit affirmed but did not reach the issue whether Title V of the ADA abrogates the sovereign immunity of the state of South Dakota as plaintiff's retaliation claim failed on the merits. Termination of plaintiff's employment during the litigation based on his "disruptive and insubordinate behavior" was not shown to be a pretext for retaliatory discrimination.

II. GENDER/RACE/RELIGION CLAIMS

A. *University of Texas Southwestern Medical Ctr. v. Nassar*, __ U.S. __, 133 S. Ct. 2517 (2013)

Background: Nassar worked as both a faculty member at the University of Texas and as a physician at a hospital that has an employment agreement to hire faculty from the University of Texas Southwestern Medical Center (UT). Nassar alleged his supervisor at UT, Dr. Levine was biased against him because of his religion and ethnic heritage. Nassar complained to Dr. Fitz, who was Dr. Levine's supervisor. Nassar and UT reached an agreement for Nassar to continue working at the hospital but leave UT. After Nassar and UT came to this agreement Nassar sent a letter to Dr. Fitz and others stating he was resigning from his position at UT and claiming that Dr. Levine's harassment was the reason for the resignation. This upset Dr. Fitz which led him to revoke the offer to work at the hospital.

Nassar claimed two Title VII violations: (1) Dr. Levine's religiously motivated harassment resulted in a constructive discharge, a violation of 42 U.S.C. § 2000e–2(a) which prohibits employer discrimination based on religion, race, color, national origin, or sex, and (2) Dr. Fitz's prevention of the hospital hiring Nassar was in retaliation for complaining about Dr. Levine's harassment, in violation of § 2000e–3(a) which prohibits employers from retaliating against an employee who has opposed an unlawful employment practice.

The district court found for Nassar on both claims. The Fifth Circuit vacated the constructive discharge claim but affirmed the retaliation claim because retaliation was a motivating factor, not its but-for cause, in the termination of Nassar.

Holding: The Supreme Court held Title VII retaliation claims under § 2000e-3 must be analyzed under a "but-for" causation standard, not "motivating factor" as in status-based claims under § 2000e-2(a). Judgment is vacated and case remanded to apply the "but for" causation standard.

B. *Vance v. Ball State University*, _U.S. _, 133 S. Ct. 2434 (2013)

Background: Vance, an African-American woman, worked in the dining services department at Ball State University. She alleged that Davis, a white woman who worked in the same department, "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." Davis did not have the ability to fire, hire, promote, transfer or discipline Vance.

Vance claimed she had been subjected to a racially hostile work environment in violation of Title VII. The district court granted summary judgment in favor of the University on the basis the University could not be held vicariously liable for Davis' actions. The Seventh Circuit affirmed.

Holding: The Supreme Court affirmed holding that an employee is considered a "supervisor" for purposes of vicarious liability only if that employee may take "tangible employee actions" against the victim/co-employee. A supervisor makes a tangible employment action when the action creates a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

C. *Muor v. U.S. Bank National Association*, 716 F.3d 1072 (8th Cir. 2013)

Background: Muor worked as an International Banking Specialist for U.S. Bank. She received favorable performance evaluations from her first two supervisors. Muor's co-worker, Czanstkowski, allegedly told Muor's first supervisor that Muor was unable to write or speak English and said that Muor "should go back to Cambodia where she came from." Czanstkowski later became Muor's supervisor. Czanstkowski initially gave favorable performance reviews to Muor. However, in 2007 Muor received a poor performance review from Czanstkowski because Muor was making too many errors for someone of her tenure. Muor then became ill and did not return to work for several months. After several notices that Muor would be replaced if she did not return to work, Muor was terminated.

Muor claimed discrimination and retaliation on the basis of race and national origin in violation of Title VII. The district court granted summary judgment in favor of U.S. Bank because Muor failed to establish a prima facie case of discrimination. The district court also found that even if Muor had presented a prima facie case, she failed to establish that U.S. Bank's reason for the adverse employment action (poor performance and failure to show up for work for several months) was pretext for discrimination.

Holding: The Eighth Circuit affirmed concluding Muor failed to demonstrate that the reason given for issuing a warning - her poor work performance - was pretextual. The court found the derogatory comments made several years earlier by a co-worker who subsequently became Muor's supervisor were not linked to the written warning.

D. *Evance v. Trumann Health Services, LLC*, 719 F.3d 673 (8th Cir.), *cert. denied*, 134 S. Ct. 799 (2013)

Background: Evance worked as a licensed practical nurse at the Trumann Health and Rehabilitation Center. Co-workers stated in affidavits that Evance made inappropriate contact with an 81 year old patient. No criminal charges were filed against Evance, but her employment was terminated.

Evance sued Trumann Health Services as well as her co-workers for discrimination in violation of Title VII asserting that each of the individual co-workers conspired to get her fired because of her gender, Pentecostal religion, and cleft palate disability. She claimed the actions

of the co-workers should be imputed to Trumann Health Services. The co-workers filed motions to dismiss which were granted by the district court. The district court also granted summary judgment in favor of Trumann Health Services.

Holding: The Eighth Circuit affirmed concluding Evance failed to demonstrate that the legitimate, nondiscriminatory reason given for her termination, that care center administrators had received reports she had "engaged in inappropriate sexual contact with a resident," was a pretext for discrimination. The court found the comparators Evance claimed to be applicable - every nurse or nursing assistant - had not been accused of misconduct and Evance failed to show that any who were not of the same religion or gender or disabled had been accused of the same or similar behavior and remained employed.

E. *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546 (8th Cir. 2013)

Background: Plaintiffs Bennett and Turney filed several grievances related to their supervisor's use of racially offensive language in the workplace at Riceland Foods. The supervisor was eventually required to complete a diversity training program. Shortly after these incidents Riceland Foods began reorganizing one of their facilities which required some job-elimination. Both Bennett and Turney had their positions terminated.

Bennett and Turney claimed they were terminated in retaliation for filing the grievances in violation of Title VII, 42 U.S.C. § 1981. They sought to hold Riceland Foods liable under the "cat's paw" theory that if an employer is duped into an adverse and unlawful employment action because of the influence of a supervisor, the employer may still be held liable for the unlawful action. The jury found for plaintiffs and awarded lost wages, benefits, and $300,000 for emotional distress. The district court did not allow plaintiffs' proffered jury instruction for punitive damages.

Holding: The Eighth Circuit affirmed concluding evidence on the retaliation claim was submissible to the jury under "cat's paw" theory. There was evidence supervisor proposed eliminating plaintiffs' jobs (after they would not stand down from grievances concerning racial slurs by supervisors) some six weeks after the grievances were found meritorious and there was evidence elimination of plaintiffs' jobs was unnecessary.

F. *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800 (8th Cir. 2013)

Background: Jackman, an African American woman, filed grievances and complaints at her place of employment with the Fort Des Moines Residential Facility as well as with her union representative. The complaints concerned the actions of Jackman's supervisor and co-workers. Her supervisor once commented that Jackman was a black woman that wanted to leave all the time. She also called the home of Jackman and stated that Jackman did not have to coordinate her schedule with her husband because she was a "big girl" and asked whether Jackman's husband had ever hit her. Other incidents included racially insensitive comments from co-workers. Jackman was investigated for her misuse of sick leave, abandoning her post, as well as intimidating a witness in connection with the abandonment incident.

Jackman alleged sex and race discrimination for the actions made by her supervisor and co-workers, as well as alleging that the investigations were in retaliation for the complaints and grievances, in violation of Title VII, 42 U.S.C. § 2000e. The district court for the Southern District of Iowa granted summary judgment to defendant.

Holding: The Eighth Circuit affirmed concluding Jackman failed to establish a prima facie case because she was still employed and did not show a cut in pay or benefits, or change in her job duties, thus no adverse action occurred.

G. *Wright v. St. Vincent Health System*, 730 F.3d 732 (8th Cir. 2013)

Background: Wright, an African-American woman, was employed to work the night shift at the St. Vincent Health System hospital. She originally worked the shift with two other nurses who were gradually placed on different shifts leaving Wright to cover the shift alone. Wright's performance began to decline. Several reports were filed in her record including failure to prepare operating rooms, failure to report to superiors, and general insubordination. Wright's supervisor made the decision to terminate Wright but needed to research whether it was permissible to do so over the phone. Before she was terminated, Wright filed a complaint alleging she was treated unfairly and harassed due to racial discrimination. Wright was subsequently terminated.

Wright claimed racial discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. The district court found in favor of the hospital on all claims.

Holding: The Eighth Circuit affirmed. Although timing of termination of plaintiff's employment by her supervisor in conjunction with her oral complaint of racial discrimination to employee relations coordinator (within 45 minutes) was "'incredibly suspicious,'" trial court did not overlook plaintiff's evidence of retaliation in light of strong evidence that supervisor had decided to terminate plaintiff before she made her complaint. The Eighth Circuit found the temporal connection alone was insufficient to establish Wright's claim.

H. *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025 (8th Cir. 2013)

Background: Sayger claimed he heard a supervisor at Riceland Foods (the same individual in the *Bennett* case above) use racist language. Sayger participated in the investigation of the supervisor that eventually led to the *Bennett* case, and testified in the *Bennett* jury trial. Sayger later received notice he would be laid off and potentially terminated if not recalled in 9 months.

Sayger claimed racial discrimination and retaliatory discharge for being a witness in an internal investigation into a complaint about a supervisor in violation of Title VII and 42 U.S.C. § 1981. The district court granted summary judgment in favor of Riceland Foods on the Title VII claim, but the § 1981 claim proceeded to trial. The jury found for Sayger on the retaliation claim. The district court denied Riceland Foods' JAML motion as well as Sayger's motion for a new trial to allow punitive damages. Both parties appealed.

Holding: The Eighth Circuit affirmed concluding Sayger was entitled to protection against retaliation as a co-worker under § 1981 and there was sufficient evidence of causation for jury to find his lay off was because he served as a witness. There was no abuse of discretion in not granting a new trial for punitive damages.

I. *Burton v. Arkansas Secretary of State*, 737 F.3d 1219 (8th Cir. 2013)

Background: Burton, an African- American, was a law enforcement officer with the State Capitol Police in Arkansas. Burton alleged another officer used racially offensive language towards him as well as sexually inappropriate language towards Burton's co-worker. The Chief of State Capitol Police instructed Burton to file a written complaint against the officer, which he did. The complaint garnered a "letter of counseling" for the offending officer. Burton made some errors on the job as well. He failed to file a traffic accident report in a timely manner and failed to show up at work on time because he had overslept as a result of working as private security until 7 a.m. at a party. He received an official letter of reprimand for his actions which requested that he discontinue his other work and submit a memorandum within five days explaining why he failed to file an accident report. Burton did not submit the memorandum and was terminated.

Burton claimed race discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e, and § 1983. The State moved for summary judgment which was denied by the district court with regards to the discrimination and retaliation claims. The district court found, however, that the 11th Amendment barred the § 1983 claims with regards to specific monetary damages. The State appealed the denial of summary judgment asserting qualified immunity.

Holding: The Eighth Circuit affirmed concluding the comparator evidence was sufficient to prevent summary judgment on claim of termination of employment based on race: white officer had multiple incidents of being late for work during his probationary period and plaintiff only one, yet white officer was not terminated and was required to write only one memorandum explaining his failure to report in spite of his multiple offenses, while plaintiff was fired for failing to write the memorandum.

J. *McMiller v. Metro*, 738 F.3d 185 (8th Cir. 2013)

Background: McMiller worked as a shift supervisor in the parts storeroom at the Bi–State Development Agency of Missouri–Illinois Metropolitan District's central repair facility. McMiller alleges a supervisor, Brown, made sexual advances towards her. McMiller told Brown to stop each time he attempted to make these advances and reported them to Brown's supervisor. Meanwhile, McMiller was performing poorly in the workplace. Her supervisors, including Brown, expressed to her that she was consistently tardy, wore revealing clothing rather than the metro uniform, and failed to complete her duties accurately and promptly. McMiller admitted to making mistakes but claims that Brown told her to wear the different clothing. McMiller was given a written memorandum that detailed a performance improvement plan. After the memo was delivered, Brown called McMiller into his office and locked the door. Brown asked McMiller to remove an ingrown facial hair and McMiller refused. Brown then told McMiller "you know I can terminate you." As McMiller attempted to leave Brown grabbed her wrist, turned her around, and kissed her face and forehead. Brown told McMiller that he was "not going to let anything happen to you while you are on this job." McMiller was later terminated for poor performance.

McMiller claimed employment discrimination on the basis of sex and a hostile work environment in violation of Title VII. The district court granted summary judgment in favor of defendant.

Holding: The Eighth Circuit affirmed in part, reversed in part. The court found sufficient evidence to avoid summary judgment on *quid pro quo* sexual harassment claim but concluded there was insufficient evidence of a hostile work environment.

K. *Rester v. Stephens Media, LLC*, 739 F.3d 1127 (8th Cir. 2014)

Background: Loretta Rester worked as a graphic designer for Hot Springs Village Voice an Arkansas newspaper owned by Stephens Media. Rester and her supervisor had a disagreement about a publication which became heated. Rester alleged the supervisor slammed his hands on her desk and began screaming and cursing at her. Rester claimed she tried to leave but the supervisor placed his hands on her to physically prevent her from leaving until she began "wailing and cussing and screaming and hollering." After ten minutes passed Rester returned to the office and met with the supervisor and the editor of the newspaper. The supervisor apologized. Rester reported the incident to the newspaper's publisher. No disciplinary action was taken against the supervisor. Rester then gave two-week notice of resignation. She was subsequently informed that the supervisor would be retiring shortly, but Rester stood by her resignation.

Rester sued her employer, the supervisor and the editor claiming sex discrimination, a hostile work environment, constructive discharge, and retaliation. The district court granted summary judgment in favor of defendants.

Holding: The Eighth Circuit affirmed concluding Rester failed to show her supervisor's conduct in screaming and yelling at her as they discussed problems with a publication was an adverse employment action or that it was based on her gender. There was no evidence Rester was terminated, suffered a change in pay, benefits or job duties as a result of the confrontation nor was there any sexist connotation in the incident.

L. *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014)

Background: Five African American officers who worked at the Nebraska State Penitentiary alleged they were subjected to a racially abusive environment by co-workers and supervisors, including racial taunts. The officers filed a complaint with the Nebraska prison system. They alleged that as a result of the complaint, their supervisors retaliated by pressing drug dogs on them in humiliating fashion and made racial taunts such as referring to them as "the gang," the "home boys," or "the back of the bus." One of the officers reported the instances of harassment through standard prison protocol. However, the officers claimed they were reluctant to report such incidents because they would be required to report the incidents to those participating in the racially abusive banter. The officers were dissatisfied with lack of action in response to the ongoing harassment and the treatment after their complaint was filed, including a bevy of citations for the officers detailing poor performance concerning their daily activities at the prison. One officer was cited for abandoning his post when he went to the bathroom.

The officers brought suit against various supervisors and prison administrators under 42 U.S.C. §§ 1981 & 1983 claiming a hostile work environment because of their race and that they had been retaliated against for reporting workplace harassment. The district court granted summary judgment in favor of the prison supervisors and administrators.

Holding: The Eighth Circuit reversed concluding the district court should have focused on "cumulative effect" of incidents alleged by the officers instead of on individual instances of conduct - summary judgment in favor of supervisor most frequently heard making racial comments should not have been granted.

M. *AuBuchon v. Geithner*, 743 F.3d 638 (8th Cir. 2014)

Background: AuBuchon, a Caucasian male, worked as an international examiner for the IRS. International examiners may receive a promotion to senior international examiner by successfully completing a case that is intended for someone at the level of a senior international examiner. AuBuchon successfully completed one of these cases but was not promoted. The promotion was awarded to an African-American female.

AuBuchon complained of racial and gender discrimination to the EEOC. Over the course of the following two years AuBuchon claimed the IRS retaliated against him for making his EEOC complaint that eventually led to his early retirement. AuBuchon then sued Secretary of the Treasury Geithner for retaliation under Title VII. The district court granted Geithner's motion for summary judgment finding the IRS was not required to create a senior international examiner position for AuBuchon and that AuBuchon's allegations of retaliation were insufficient to constitute a material adverse employment action or constructive discharge.

Holding: The Eighth Circuit affirmed concluding the employer was not required to create a position to which plaintiff could be promoted and it was speculative to conclude plaintiff would have been qualified for promotion had a position been created.

N. *Ames v. Nationwide Mut. Ins. Co.*, __ F.3d __, 2014 WL 2884081 (8th Cir. 2014)

Background: Ames worked as a loss mitigation specialist at Nationwide. She suffered pregnancy complications and received a doctor's order for bed rest. Ames discussed her bed rest with a supervisor who rolled her eyes and stated that she had never been on bed rest when she was pregnant. Ames returned to work after her maternity leave and experienced several issues with finding an appropriate room to lactate. When the issue made Ames visibly upset and had her in tears, her supervisor handed her a pen and paper and stated, "I think it's best that you go home to be with your babies." The supervisor proceeded to dictate a resignation letter for Ames.

Ames claimed sex and pregnancy discrimination as well as a forced resignation. Nationwide moved for summary judgment which the district court for the Southern District of Iowa granted.

Holding: The Eighth Circuit affirmed concluding Ames did not meet her burden of proving constructive discharge from employment when she resigned after returning from maternity leave - the summary judgment record demonstrated the employer attempted to accommodate Ames by extending her maternity leave and requesting Ames receive expedited access to lactation rooms (information about which was available on the company website for employees). That supervisor let Ames know what expectations there were with respect to work which had fallen behind in Ames' absence was not deemed to be unreasonable as company policies treated "all nursing mothers and loss-mitigation specialists alike."

O. *Gilster v. Primebank*, 747 F.3d 1007 (8th Cir. 2014)

Background: Gilster was employed at Primebank at the Sioux City branch where Joseph Strub was Market President. Gilster alleged Strub continuously sexually harassed her over the course of her employment. Gilster once inquired about a potential bonus and Strub replied, "take out your teeth, come into my office, and shut the door." This comment was made in front of other staff members. Gilster wears dentures because of a genetic condition. Strub made several other sexually inappropriate comments and gestures towards Gilster. Gilster filed a complaint with Primebank which the company investigated. Primebank issued a formal reprimand and required Strub to cease the harassment and attend sexual harassment training. While the harassment seemed to cease, Gilster alleged Strub began to retaliate against Gilster for her complaint. Gilster alleged Strub prevented her from dealing with new clients and withheld a promised promotion. Gilster then filed a complaint of sexual harassment and retaliation with the Iowa Civil Rights Commission which led to an investigation of the office. Co-workers claimed they saw a downturn in Gilster's performance at this time that was not instigated by company retaliation.

Gilster brought claims of sexual harassment and retaliation under Title VII against her employer Primebank and Strub. Gilster then discovered her office emails were being monitored and filed a second complaint with ICRC. Three days later Gilster was fired. She filed a second amended complaint and proceeded to trial in the Northern District of Iowa. The jury found Primebank and Strub liable for unlawful sexual harassment and retaliation and awarded her over $900,000. Defendants appealed claiming that during rebuttal closing argument Gilster's counsel made improper remarks that were so "plainly unwarranted and clearly injurious" that they warrant a new trial.

Holding: The Eighth Circuit reversed and remanded. The court concluded counsel's improper rebuttal closing argument, in which she referenced her own personal experiences with sexual harassment and vouched for her client's credibility through various comments, was sufficiently prejudicial to require reversal of judgment and remand for new trial.

P. *Clay v. Credit Bureau Enterprises, Inc.*, 754 F.3d 535 (8th Cir. 2014)

Background: Clay, an African-American female, worked for Credit Bureau Enterprises as a partial payment administration collector. She alleged that she applied for five promotions but was not hired for any of the positions. Clay received seven different disciplinary actions before she resigned. She claimed there was a double standard for white and black women as to dress codes and expected performance standards. She also alleged that co-workers had made racist comments towards her and supervisors would use racist language towards other African-American employees.

Clay claimed race discrimination, retaliation, and constructive discharge in violation of 42 U.S.C. § 1981. The district court for the Northern District of Iowa granted summary judgment in favor of defendant on all claims because they were time barred and without merit.

Holding: The Eighth Circuit affirmed the district court's conclusion that the various acts of harassing conduct alleged by plaintiff were not sufficiently severe or pervasive to be objectively offensive as they were infrequent, involved "low levels of severity," were not physically threatening nor shown to be humiliating or interfering with her work.

Q. *Young v. Builders Steel Co.*, 754 F.3d 573 (8th Cir. 2014)

Background: Young, an African-American male, worked as a steel fabricator and constructor for his employer Builders Steel. At one point in his career Young was promoted to a welding position. Since Young was not certified to be a welder, he offered to "bid down" or transfer to a burner position where no such certification was required. The burner position was paid at a lower hourly rate but Young alleged he was promised that his pay would be the same as if he was a welder. Young filed claims of discrimination with the EEOC. He was subsequently laid off and was the most senior burner to be laid off. Two workers with less seniority but higher qualifications were called back before Young.

Young claimed race discrimination and retaliation in violation of 42 U.S.C. § 1981. The district court granted summary judgment in favor of Builders Steel on both claims.

Holding: The Eighth Circuit affirmed concluding Young failed to show he was similarly situated "in all relevant respects" to any employees in his wage group as he could not show he could perform their jobs, failed to show his employer deviated from its lay-off policies and failed to show the employer's explanations for not calling him back were false.

R. *EEOC v. Audrain Health Care, Inc.*, __ F.3d __, 2014 WL 2922212 (8th Cir. 2014)

Background: The EEOC brought this action claiming Audrain Health Care refused to consider transferring a male registered nurse to a vacant operating room nurse position on the basis of his sex in violation of Title VII. The district court granted summary judgment to Audrain Health Care.

Holding: The Eighth Circuit affirmed holding that the male nurse did not suffer an adverse employment action when Audrain Health Care hired another candidate for the position. The evidence established that the male nurse did not make "every reasonable attempt to convey" his interest in the position because he did not complete a request for transfer form.

S. *Fiero v. CSG Systems, Inc.*, __ F.3d __, 2014 WL 3511780 (8th Cir. 2014)

Background: Fiero brought this action against her former employer alleging gender discrimination and retaliation in violation of Title VII. She asserts she was terminated after her supervisor unfairly scrutinized her compared to male peers. CSG Systems asserted Fiero's employment was terminated due to substantial problems with her job performance. Summary judgment was granted in favor of CSG Systems.

Holding: The Eighth Circuit affirmed concluding CSG System's proffered reason for termination (Fiero's performance-related problems) was a legitimate nondiscriminatory justification. Fiero failed to demonstrate the proffered reason was pretext for discrimination.

III. AGE CLAIMS

A. *Ridout v. JBS USA, LLC*, 716 F.3d 1079 (8th Cir. 2013)

Background: Ridout, 62 years old, was employed at JBS USA, a pork processor, for over 40 years. He rose the ranks of the company and eventually became superintendent of his department. An incident occurred where a machine began to malfunction. Ridout carried out general policy for fixing the machine that resulted in a backup of hog byproduct at the plant. When Ridout's supervisors discussed the problem with him, he became visibly upset and raised his voice during the discussion. Ridout complained that his supervisors were more worried about placing blame than fixing a problem. One supervisor stated that he told Ridout to "tone it down" or he would be sent home. Ridout testified he was told to go home, which he did. A few days later Ridout was suspended without pay. A meeting was held to see if Ridout could return. He was terminated after the meeting and replaced by a man under 40 years old who would be demoted a year later. This man was replaced by a 33 year old who had been terminated five years prior for wearing a mock KKK hood in front of a black employee.

Ridout claimed he was discharged because of his age in violation of the ADEA. The district court for the Southern District of Iowa granted summary judgment for defendant.

Holding: The Eighth Circuit reversed and remanded concluding Ridout presented sufficient evidence to demonstrate pretext arising from his record of satisfactory employment over 40 years and employer's failure to offer specific or contemporaneous evidence to support complaints he had been resistant to changes in his department.

B. *Holmes v. Trinity Health*, 729 F.3d 817 (8th Cir. 2013)

Background: Holmes was the Senior Vice President and COO at Trinity Health. John Kutch was CEO at the same time. Holmes expressed displeasure with Kutch's management style, specifically meeting with Holmes's subordinates without informing her. Holmes stated she was going to report Kutch to the North Dakota Department of Health. Kutch responded by asking if she was threatening him. Holmes asked Kutch if he wanted her to resign to which Kutch replied he wanted her job. Holmes relayed the incident to Human Resources. Trinity Health claims that Kutch resigned during this incident which Holmes denies. Later that evening Holmes was told to turn over her company cell phone and computer.

Holmes sued alleging wrongful termination in violation of the ADEA and sexual discrimination in violation of Title VII. The district court denied a motion for default judgment filed by Holmes and granted summary judgment to Trinity Health.

Holding: The Eighth Circuit affirmed concluding deposition testimony from former employees about their thoughts and feelings that age was a factor in how they were treated in the workplace did not amount to direct proof of age discrimination as the statements did not provide a "specific link" between that atmosphere and the adverse action against Holmes. Holmes also failed to make out a prima facie case of age discrimination as there was no evidence she was replaced by someone substantially younger. The evidence showed she was replaced by a woman over 70 years of age who, although having a different title, effectively assumed most of plaintiff's former job functions.

IV. FMLA CLAIMS

A. *Walker v. Trinity Marine Products*, 721 F.3d 542 (8th Cir. 2013), cert. denied, 134 S. Ct. 1293 (2014)

Background: Walker worked as a welder at Trinity Marine Products. Trinity informed Walker that it believed she suffered from a serious health condition and placed her on involuntary FMLA leave and required her to obtain certification from a physician to return to work. A first physician found Walker fit to return to work. Trinity refused to allow Walker to return to work and sent her for a second opinion. The second physician also found Walker fit to return to work without restrictions. Trinity again refused to allow Walker to return to work and sent her to Vanderbilt University Medical Center. The physician at Vanderbilt examined Walker twice and found that she was able to return to work without restrictions. When Walker presented the certification from Vanderbilt to Trinity she was told that she had exhausted her FMLA leave and was terminated.

Walker claimed Trinity interfered with her rights under the FMLA by placing her on leave and refusing to permit her to return to work despite being healthy. The district court found Walker failed to allege actionable interference with any FMLA benefit and dismissed the complaint.

Holding: The Eighth Circuit affirmed. Even assuming an employer's conduct in placing an employee on FMLA leave involuntarily is a cause of action under the statute, where plaintiff did not claim she was denied FMLA leave, only that she was terminated when all her leave was used up as a result of the forced leave, the Eighth Circuit held that forced leave could only interfere with a FMLA-protected right if plaintiff was prevented from using a benefit, which was not the case here. Because plaintiff admitted she did not suffer from a serious health condition covered by the Act, the claim that her employer violated FMLA by refusing to allow her to return to work upon receipt of multiple medical fitness certifications was also not covered by the Act.

B. *Hager v. Arkansas Dep't of Health*, 735 F.3d 1009 (8th Cir. 2013)

Background: Hager was employed at the Arkansas Department of Health where Dr. Zohoori was her supervisor. Dr. Zohoori instructed Hager to cancel a doctor's appointment Hager claimed she needed to prevent cataracts. Hager refused and Dr. Zohoori became irritated and falsely claimed she was insubordinate and disrespectful. He then terminated her without explanation.

Hager sued Dr. Zohoori in his individual and official capacities and the Department of Health alleging violations of Title VII, the ADEA, the Rehabilitation Act and the FMLA. Defendants moved to dismiss for failure to state a claim and sovereign immunity. The district court dismissed in part but allowed a gender discrimination claim and FMLA interference and retaliation claims against Dr. Zohoori, and allowed Title VII and Rehabilitation Act claims against the Department of Health. Defendants appealed.

Holding: The Eighth Circuit reversed and remanded. The court concluded that, in the absence of allegations plaintiff provided notice to her employer of the need for FMLA leave, she failed to state a claim for relief against employer under FMLA; allegation that defendant fired plaintiff for trying to take leave for a doctor's appointment did not include an allegation of intent to take FMLA leave or that plaintiff was qualified for that leave.

C. *Hill v. Walker*, 737 F.3d 1209 (8th Cir. 2013)

Background: Hill worked as a Family Service Worker for the Arkansas Department of Human Services where Walker was her supervisor. Hill's job description detailed that the "life and death" nature of Hill's work in a highly emotional and often confrontational environment created a stressful work environment. Hill suffers from anxiety and depression which she claims caused her to miss two court hearings. In one particularly stressful case, Hill sent a letter to Walker stating that she was removing herself from the case. Walker responded that Hill was not able to unilaterally remove herself and that dealing with these types of cases was the nature of the business. Walker offered to provide Hill with special staffing and aids to help her on the case but Hill still refused. The next day Hill showed up at work with a doctor's note placing her under a physician's care for an illness for a month. Hill asked to use her accrued compensatory time to cover her leave. She was told she was ineligible for FMLA leave because she had not been employed for 12 months. Walker did not approve Hill for the full time requested because it would place an unreasonable burden on the agency as one worker had resigned and another was already on sick leave. Hill did not return to work when Walker requested and stated it was "very unprofessional and unethical" for Walker to demand she return to work. Walker replied that Hill had violated Department policy by failing to return to work and terminated Hill's employment. Hill filed internal grievances but the termination was upheld.

Hill sued Walker in her individual and official capacities as an employee of the Department alleging that Walker's refusal to grant leave time was a violation of the FMLA. Walker filed a motion for summary judgment which was granted by the district court.

Holding: The Eighth Circuit affirmed concluding plaintiff's FMLA claims failed as she was not an "eligible employee" because she had not worked for the Department for the requisite 12-month period.

D. *Malloy v. U.S. Postal Service*, __ F.3d __, 2014 WL 2922307 (8th Cir. 2014)

Background: Malloy sued the U.S. Postal Service claiming her former employer violated her rights under the FMLA. Malloy was a "casual" employee used to supplement the Postal Service workforce. She had chronic attendance problems for which her employment was terminated. Malloy claimed she was terminated for using FMLA leave. The district court for the Southern District of Iowa granted summary judgment in favor of the Postal Service.

Holding: The Eighth Circuit affirmed concluding Malloy failed to present a submissible case of FMLA discrimination based solely on temporal proximity between exercise of FMLA rights and her termination eleven days later.

E. *Ebersole v. Novo Nordisk, Inc.*, __ F.3d __, 2014 WL 3361160 (8th Cir. 2014)

Background: Ebersole was a sales representative for Novo Nordisk, Inc., a pharmaceutical company that markets products to doctors. She was diagnosed with rheumatoid

arthritis at age 15 and had taken leave for her condition. Novo Nordisk terminated Ebersole's employment for falsifying calls to customers.

Ebersole sued Novo Nordisk and her former supervisor claiming the termination was in violation of the FMLA. The district court granted summary judgment in favor of Novo Nordisk.

Holding: The Eighth Circuit affirmed concluding Ebersole failed to produce sufficient evidence that the termination was a result of FMLA retaliation. The court found the supervisor's questions relating to Ebersole's condition were not discriminatory and the termination of Ebersole's employment for creation of false reports was not pretext for unlawful discrimination.

V. MISCELLANEOUS CLAIMS

A. *Sandifer v. United States Steel Corp.*, __ U.S. __, 134 S. Ct. 870 (2014)

Background: Sandifer and others at United States Steel Corporation brought collective action against their employer seeking back pay for time spent donning and doffing protective gear. This protective gear included flame retardant jackets, pants, hardhats, work gloves, safety glasses, etc. U.S. Steel required that all employers wear the protective gear. Sandifer claimed the Fair Labor Standards Act of 1938 requires that the time spent changing in and out of the protective gear is compensable. U.S. Steel argued that the CBA agreement between U.S. Steel and Sandifer's union because of a specific provision that allows the parties to collectively bargain over whether "time spent in changing clothes" can be compensated.

The district court granted U.S. Steel summary judgment in part finding that donning and doffing constituted changing clothes and therefore compensation for time spent donning and doffing such items could be collectively bargained for. The Seventh Circuit affirmed.

Holding: The Supreme Court affirmed holding that time spent donning and doffing protective gear was time spent "changing clothes" under section of FLSA allowing parties to collectively bargain over compensability of time spent changing clothes at the beginning or end of the workday.

B. *Lawson v. FMR LLC*, __ U.S. __, 134 S. Ct. 1158 (2014)

Background: Plaintiffs were employees of FMR a private company that advises and manages mutual funds for public companies with no employees. Plaintiffs claimed they blew the whistle on putative fraud relating to the mutual funds and that FMR retaliated in response. They alleged that FMR overstated expenses associated with operating the funds and FMR retaliated with adverse employment actions that eventually led to constructive termination.

Plaintiffs filed a claim against FMR for retaliation for whistleblowing in violation of 18 U.S.C. § 1514A(a). FMR argued neither plaintiff has relief under the Sarbanes-Oxley Act because FMR is a private company. The district court denied FMR's motion to dismiss. The First Circuit reversed holding that the statute only applies to public companies.

Holding: The Supreme Court reversed in favor of the plaintiffs holding that whistleblower protection under Sarbanes–Oxley extended to employees of private contractors and subcontractors serving public companies.

C. *United States v. Quality Stores, Inc.*, __ U.S. __, 134 S. Ct. 1395 (2014)

Background: Quality Stores filed chapter 11 bankruptcy and made severance payments to employees who were involuntarily terminated. Quality Stores paid and withheld taxes required under Federal Insurance Contributions Act (FICA). Later believing that the payments should not have been taxed as wages under FICA, Quality Stores sought a refund on behalf of itself and about 1,850 former employees. The IRS failed to allow or deny the refund.

Quality Stores brought their claim to Bankruptcy Court which granted summary judgment in their favor. The district court and the Sixth Circuit affirmed finding that severance payments are not wages under FICA.

Holding: The Supreme Court reversed holding that severance payments constituted "wages" for which employer was required to withhold FICA tax, and Internal Revenue Code chapter governing income-tax withholding did not limit meaning of term "wages" for FICA purposes.

D. *Hess v. Ables*, 714 F.3d 1048 (8th Cir. 2013)

Background: Hess worked for the City of Stuttgart. State Trooper Chastain was performing surveillance on a vehicle of a suspected drug dealer. Hess, the former girlfriend of the vehicle owner, opened the car door while it was under surveillance. At this point Chastain approached the vehicle and observed what looked to be crystal meth on the console. Chastain told Hess to return to work and called Hess' supervisor to request permission to interview her which was granted. Hess was asked to take a urine test which she refused. Hess was then terminated for failure to comply with city policies.

Hess claimed retaliatory discharge in violation of constitutional rights. The district court granted summary judgment in favor of defendants.

Holding: The Eighth Circuit affirmed holding city employees were entitled to qualified immunity from liability on individual capacity claims and official capacity claims against city employees, and claims against city, were properly dismissed.

E. *Floyd-Gimon v. University of Arkansas for Medical Sciences*, 716 F.3d 1141 (8th Cir. 2013)

Background: Floyd-Gimon worked as a liver transplant coordinator for the University of Arkansas for Medical Sciences. It was discovered that records pertaining to patient information was physically altered or forged. Floyd-Gimon's supervisors believed that she was behind the record falsification and terminated her employment.

Floyd-Gimon alleged due process violations and gender discrimination in violation of equal protection. Defendants were granted summary judgment.

Holding: The Eighth Circuit affirmed holding as follows: assuming that employee had property interest in her continued employment, she received all the process she was due; employee could not establish deprivation of constitutionally protected liberty interest in her reputation where she did not sufficiently, if at all, request name-clearing hearing; there was no direct evidence of gender discrimination; and university's proffered reason for employee's termination, altering patient records, was legitimate and nondiscriminatory and was not shown to be pretext for gender discrimination in violation of equal protection.

F. *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014)

Background: Six illegal alien workers without employment authorization worked in the Jerusalem Café for under minimum wage. One of the workers called the police after the employer's nephew struck him. Fearing that police would discover that he had illegal aliens working for him, he terminated the employees.

The workers filed a complaint alleging that their employer willfully failed to pay minimum and overtime wages in violation of the FLSA, 29 U.S.C. §§ 206(a), 207(a). The district court granted the workers' motion in limine to preclude mention of the workers' immigration status because they would be seeking previous wages and not prospective relief. The jury found in favor of the workers.

Holding: The Eighth Circuit affirmed holding that unauthorized aliens may sue under the FLSA to recover statutory damages for work actually performed; workers had standing to sue defendants under the FLSA; and district court reasonably concluded any reference to workers' immigration status would be substantially more prejudicial than probative.

G. *McCall v. Disabled American Veterans*, 723 F.3d 962 (8th Cir. 2013)

Background: McCall drove trucks for the Red Racks Thrift Store which is operated by the Disabled American Veterans. At times McCall would work for more than 40 hours a week which would generally garner overtime payments under the FLSA. However, the FLSA provision concerning overtime payment does not apply to any employee driving trucks greater than 10,000 pounds. While McCall periodically drove trucks with a gross weight of less than 10,000 pounds, the trucks were always capable of carrying greater than 10,000 pounds.

McCall claimed he should have received overtime pay under the FLSA. Both parties moved for summary judgment which the district court granted in favor of defendant.

Holding: The Eighth Circuit affirmed holding the district court properly determined that a FLSA-covered employee is one driving a vehicle with a gross vehicle weight rating of 10,000 pounds or less and, therefore, McCall was not a covered employee within the meaning of the FLSA overtime-pay provision.

H. *Inechien v. Nichols Aluminum, LLC*, 728 F.3d 816 (8th Cir. 2013)

Background: Inechien worked on a coil coating line for Nichols Aluminum. He filed grievances concerning a lack of breaks that were guaranteed by the CBA. The union did not request arbitration concerning the matter. Nichols Aluminum claimed that rest periods were available and Inechien was simply not using the correct method to take advantage of the rest periods.

Inechien claimed Nichols Aluminum breached the CBA by failing to establish rest periods for his line. The district court for the Southern District of Iowa granted summary judgment in favor of Nichols Aluminum and the union.

Holding: The Eighth Circuit affirmed holding union did not breach its duty of fair representation by deciding not to pursue a grievance. The union had good reasons for not attempting to arbitrate the issue based on its historical understanding of what the rest period practice had been, and the union had previously addressed a grievance on this issue, and attempted (unsuccessfully) to pursue the issue as a change to the CBA instead of asserting a violation of the existing CBA; therefore, the decision to not arbitrate the issue was not arbitrary.

I. *Adair v. ConAgra Foods, Inc.*, 728 F.3d 849 (8th Cir.2013)

Background: ConAgra requires workers at their facility to wear certain protective gear pursuant to their CBA. The protective gear is kept on site so the workers must change in and out of the gear at ConAgra. After putting on their gear workers walk to the time clock to punch in. At the end of the day the workers will punch out before changing out of their gear. The workers are not compensated for the time spent walking from the time clock to the area where they change in and out of their gear or the time spent changing.

Plaintiffs alleged ConAgra violated the Fair Labor Standards Act, 29 U.S.C. § 201, by failing to compensate them for time spent walking between changing stations and the time clock. The district court denied ConAgra's motion for summary judgment.

Holding: The Eighth Circuit reversed holding time spent by workers walking from changing station to clock and back was not compensable under FLSA.

J. *Alcan Packaging Co. v. Graphic Commc'n Conference, Int'l Bhd. of Teamsters*, 729 F.3d 839 (8th Cir. 2013)

Background: Alcan Packaging's parent company sold it to Bemis Company. The unions filed a grievance against Alcan Packaging claiming it violated their CBA because the workers were entitled to severance pay. Alcan Packaging denied the grievance claiming that since all of the workers from Alcan Packaging were hired by Bemis Company, and there was a seamless transition, no severance pay was required. The dispute was submitted to an arbitrator which found in favor of the unions. Alcan Packaging then filed an action in the Southern District of Iowa seeking to vacate the arbitrator's award of severance pay. The district court vacated the award and the unions appealed.

Holding: The Eighth Circuit reversed and remanded holding that because the arbitrator was at least arguably construing or applying the CBA, federal court had to defer to arbitrator's interpretation that operator "completely and permanently" closed plants by selling them and that employees were terminated as result of closures, entitling them to severance pay under appendix of CBA.

K. *Boehringer Ingelheim Vetmedica, Inc. v. United Food & Commercial Workers*, 739 F.3d 1136 (8th Cir. 2014)

Background: An employee at Boehringer Ingelheim Vetmedica (BIVI), an animal health pharmaceutical manufacturer, was terminated after falsifying work records. The employee's union grieved the discharge and sought arbitration over the matter pursuant to their CBA.

The arbitrator found that falsifying records was not "just cause" for the termination and ordered that the employee be reinstated with back pay. BIVI brought an action to vacate the arbitration award. The district court granted summary judgment to the union. BIVI appealed.

Holding: The Eighth Circuit affirmed concluding that arbitrator's decision reinstating fired employee but denying her back pay for her admitted violation of plant operating procedures and falsification of company records did not disregard the essence of the CBA and finding that BIVI waived argument that discharge was mandated by CBA.

L. *Becker v. International Bhd. of Teamsters Local 120*, 742 F.3d 330 (8th Cir. 2014)

Background: U.S. Foods announced it was closing their Eagan, MN facility where plaintiff Becker was employed. Becker's union sought to bar the closing. The union and U.S. Foods came to an agreement that employees could transfer from Eagan to the nearby Plymouth facility and maintain their seniority and pension. This agreement was not approved by the governing pension committees meaning that transfers to the Plymouth facility would transfer as new hires.

Becker and eight other employees filed a charge against their union with the NLRB alleging a failure to fairly represent the employees. The NLRB dismissed the charge. Becker's appeal was denied. Becker also attempted to use the grievance and arbitration process under the CBA. The arbitrator found for U.S. Foods. The employees then filed suit against U.S. Foods and their union in Minnesota state court. U.S. Foods removed the action to federal court. The district court granted U.S. Foods motion to dismiss and the union's motion for summary judgment finding that the claim was time barred.

Holding: The Eighth Circuit affirmed concluding claim was time-barred because employee knew of union's alleged breach when he filed unfair labor practices charge against union with the NLRB, triggering six-month limitations period.

M. *Dorris v. TXD Services, LP*, 753 F.3d 740 (8th Cir. 2014)

Background: Dorris was an employee at TXD Services as a floor hand. He was also a member of the Arkansas Army National Guard and received notice that he would be mobilized in Iraq in six months. He notified his supervisors and HR department at TXD. While at training Dorris received notice of his termination. Dorris contacted his HR department and was informed that he was terminated for failing to show up to work. TXD alleged Dorris completed an exit checklist before he left and had effectively quit his job at TXD. While overseas, TXD was sold to Foxxe Energy Holdings. Foxxe hired everyone on TXD's list of employees, of which Dorris was not included. Dorris returned to the United States and was ready to resume work. He contacted Foxxe seeking reemployment. Dorris was hired to the same position he had held at TXD.

Dorris filed a law suit claiming that TXD had violated the Uniformed Services Employment and Reemployment Rights Act. The district court granted TXD's motion for summary judgment.

Holding: The Eighth Circuit reversed concluding that disputed issues of whether inclusion on a list of current employees was an advantage or benefit of employment and whether the employer treated military leave differently than non-military leave precluded summary judgment.

N. *Madden v. Lumber One Home Center, Inc.*, 745 F.3d 899 (8th Cir. 2014)

Background: Plaintiffs Madden, O'Bar, and Wortman were employed at Lumber One Home Center, a small lumberyard. Plaintiffs were originally hired to serve as supervisors for a new store that was opening. They were salaried, labeled as executives, and classified by Lumber One as exempt from overtime pay under the FLSA. All three plaintiffs worked overtime hours. Eventually plaintiffs ended their employment with Lumber One. Later, a U.S. Department of Labor investigation revealed that plaintiffs may have been entitled to overtime pay.

Plaintiffs sued Lumber One to recover overtime wages alleging they were erroneously classified as exempt executives under the FLSA. A jury found in favor of Lumber One. Plaintiffs moved for JAML arguing that Lumber One did not present sufficient evidence that they were involved in personnel decisions, i.e. involvement in hiring and firing. The district court overturned the verdict and granted plaintiffs' motion. Lumber One appealed.

Holding: The Eighth Circuit affirmed in part and reversed in part. Two of the plaintiffs did not have hiring or firing authority and, therefore, did not meet the executive exemption; but third plaintiff had hiring and firing authority and, therefore, was eligible for the executive exemption.

O. *Magee v. Trustees of Hamline University*, 747 F.3d 532 (8th Cir. 2014)

Background: Magee was a law professor at Hamline University Law School. She wrote a commentary in the St. Paul Pioneer Press criticizing a state judge's decision not to investigate allegations of racism in a trial for a murder of a St. Paul police officer. The St. Paul Police Federation called for a boycott against the university and sought punitive action against Magee. The boycott requested "that the police department discontinue and make no future contracts or agreements with Hamline University for educational purposes." Later, Magee was charged with state tax-law violations and convicted of four gross misdemeanors. She was terminated after a faculty vote.

Magee sued the university, dean, and the police federation's president under § 1983 alleging that the termination was the result of Hamline University attempting to please the police and prevent her from teaching about police misconduct in violation of her constitutional right to free speech and as retaliation for past speech criticizing the government. The district court dismissed the complaint.

Holding: The Eighth Circuit affirmed holding police federation's president was not acting "under color of state law" when he published editorial; university and dean of its law school were not state actors; and federation's call for police department to boycott university did not constitute joint activity with state. In the absence of facts that conduct in publishing an editorial responsive to plaintiff's published commentary or contacting her university employer was under color of law, plaintiff's § 1983 complaint failed to state a claim of retaliation when her employment was terminated by the law school some four years later.

P. *Lane v. Franks*, __ U.S. __, 134 S. Ct. 2369 (2014)

Background: Lane worked as the Director of Community Intensive Training for Youth operated by the Central Alabama Community College. Lane conducted an audit of the program's expenses and discovered that Schmitz, an Alabama State Representative was on the payroll and had not been reporting for work. Lane terminated Schmitz' employment who was sentenced to 30 months in prison for mail fraud. The college's president then terminated Lane along with 28 other employees in a claimed effort to address financial difficulties. A few days later he rescinded all but two of the terminations. Lane remained terminated.

Lane sued the president in his individual and official capacities under 42 U.S.C. § 1983 alleging the president had violated the First Amendment by firing him in retaliation for testifying against Schmitz. The district court granted summary judgment in favor of the president holding that individual-capacity claims were barred by qualified immunity and the official-capacity claims were barred by the Eleventh Amendment. The Eleventh Circuit affirmed holding that Lane's testimony was not entitled to First Amendment protection as Lane spoke as an employee and not as a citizen because he was acting in his official capacity when he investigated and terminated Schmitz' employment.

Holding: The Supreme Court affirmed in part and reversed in part, holding that speech of an employee who testified under subpoena concerning his role in the termination of another state employee was entitled to First Amendment protection and he could not be fired in retaliation for engaging in that speech. However, the president was entitled to qualified immunity for § 1983 claims against him in his individual capacity as the state of Eleventh Circuit precedent at the time

did not prevent him from believing he could fire an employee for giving testimony on matters of which the employee gained knowledge because of his employment.

VI. Certiorari Granted

A. *Mach Mining v. EEOC*, 134 S. Ct. 2872 (June 30, 2014)

Issue Presented: Whether and to what extent a court may enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit?

B. *Young v. United Parcel Service, Inc.*, 134 S. Ct. 2898 (July 1, 2014)

Issue Presented: Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work"?

Leveraging Technology for Optimal Outcomes in Discovery

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PRE-COMPLAINT/INVESTIGATIVE PHASE

- Has a legal hold been triggered?
- Attorneys have an obligation to understand client's IT systems;
  - Assess your client's ESI sources, volumes, locations
  - Assess adversary's likely document population;
- Explore early filtering strategies;
  - Buzz terms
  - Custodians
  - Sources to safely exclude

RULE 502 AND CLAWBACK PROVISIONS

- Assess risk and consequences of inadvertent disclosure:
  - Privilege;
  - Proprietary Information;
  - Privacy Considerations.

DISPEL THE MYTHS

- ESI discovery is as easy as Google
- Technology eliminates human costs and errors
- Electronic searches are 100% reliable

SETTLEMENT CONSIDERATIONS

- Phased investigation
- Phased discovery

ELECTRONIC DATA IS NOT LIKE PAPER

Electronic information is vulnerable;

- It hides easily;
- It gets overwritten;
- It gets deleted;
- It gets changed;
- It's not easily quantifiable.

LEGAL HOLD NOTICES

- Trigger: reasonable anticipation of litigation;
- Benchmark for work product protection;
- No standard form;
- Smart and defensible filter strategies;
  - *Involve client and IT up front – have IT execute*
- Think beyond client;
  - Consider those in client's control:
    - Accountants, lawyers, contractors

OTHER CONSIDERATIONS TO FACILITATE USE OF TECHNOLOGY - LEGAL HOLD -

- Proportionality/Potential for Phasing
- Hold Method: In Place/Collect/Image
- Business Interruption
- Consider the risks of self collection and retention
    - Mischief
    - Bias
    - Innocent loss of files or metadata
- Technical capabilities

OTHER CONSIDERATIONS

- Demonstrative Verifiability
  - Require acknowledgement
  - Advance review by IT and key custodians for effectiveness
  - Illustrate good faith
- Internal point of contact/shepherd
- First filter of data
- What you want v. what adverse party wants

OTHER CONSIDERATIONS

- Drafting/Defining
- Case-Specific Scope
- Case Specific Custodians (past and present)
  - Require acknowledgement
- BYODs and Personal Accounts (social media)
- Ongoing Review and Adjustment
  - Later created data
  - New issues

PRO & CONS TO BRINGING YOUR OWN DEVICE TO WORK (BYOD)

- Shifts costs to user
- Worker satisfaction
- Cutting edge hardware and software

- Loss of control
- Retrieving data from past employees' devices
- Compliance with HIPAA or client confidentiality

SOCIAL MEDIA IMPLICATIONS

NOW, A STUDY IN WHAT NOT TO DO…

In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig., MDL No. 2385, 2013 WL 6486921 (S.D. Ill. Dec. 9, 2013):

- Poorly defined early hold scope
- Failure to identify key custodians
- Failure to inform employees of individual obligations

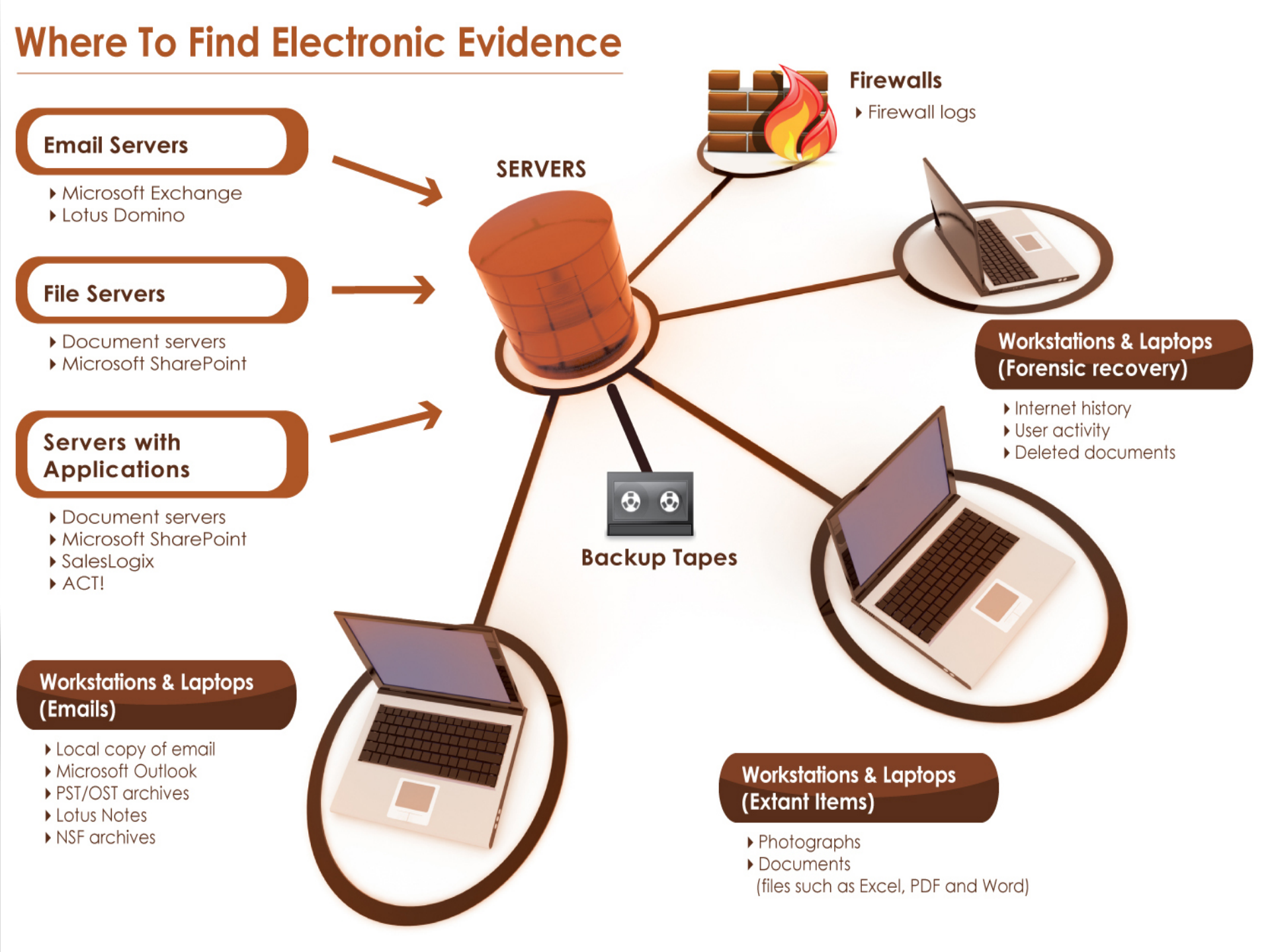
HOLD DEMANDS TO ADVERSE PARTIES

- Be willing to consider narrowing after conversation
  - Specificity of:
    - Document types
    - Custodians
    - Sources
- Defensibility
- Start the cooperation early

Discussing the need and value of transparency:

Moore v. Publicis Groupe, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012)

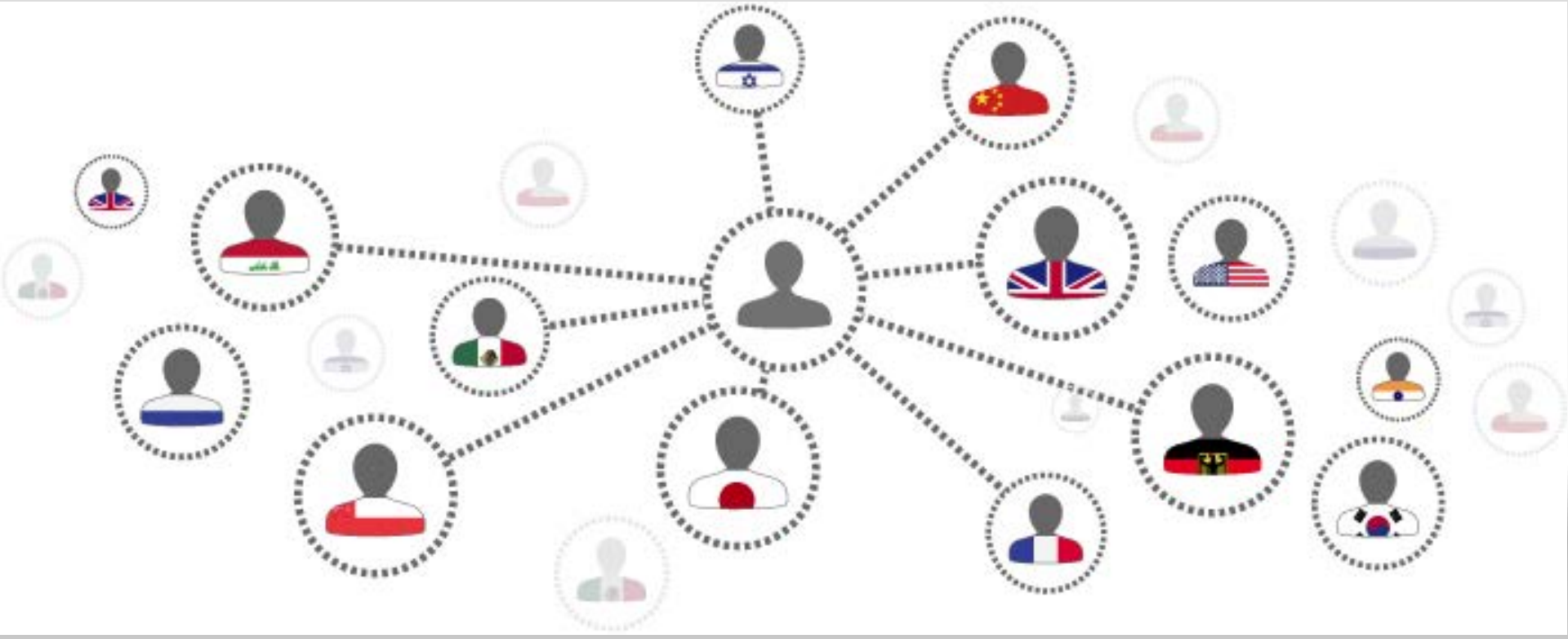
Where To Find Electronic Evidence



OTHER PLACES TO LOOK

- Network Servers (LAN, Cloud)
- Backup/Archive Systems (Tape, SAN)
- Desktops, Laptops, Notebooks & Tablet PCs
- Personal Storage Devices (thumb drives)
- Personal Clouds
- Thumb Drives
- Personal Digital Devices (Smart Phones, iPads)
- Things you don't usually think about…(digital voice mail, building security, GPS, RFID, iPods)

CONSIDER COMPANIES WITH OFFICES – OR DATA -- IN OTHER COUNTRIES



Privacy rules in other countries vary greatly and have a huge impact on collection efforts.

NOW YOU'RE READY TO BEGIN APPLYING TECHNOLOGY

- Collection (Targeted/Imaged)
  - Physical source/Hardware
  - Project-specific files/directories
- Early Case Assessment
  - Custodians
  - Search Term List
  - Targeted keywords
  - Date ranges
  - Domains
  - File/data types
  - De-Nist-ing
  - Predictive Coding (Technology Assisted Review/TAR)

CONSIDERATIONS

- How will you do your first pass review?
- Will there be a second pass review?
- Are there limitations in your search tool?
- How will you ensure defensibility?
  - Validation
  - Process Management
- Are there ways to apply valid bulk tags or mass-designations in the software?
- How will you treat family members when it comes to privilege?
  - One family member is privileged – all are privileged?
  - Splitting families – is your software able to do this?

SOURCES OF DISPUTES, DELAY AND DOWNSTREAM EXPENSES

- Technological assumptions;
- Uninformed/reactionary entrenching;
- The “term list” – what is on it and what it means;
- Protocol gamesmanship;
- Failure to identify all ESI sources.

COMMUNICATION AND COOPERATION

Communication and cooperation is increasingly expected. Here are 2 examples of counsel failures leading to expensive discovery about discovery:

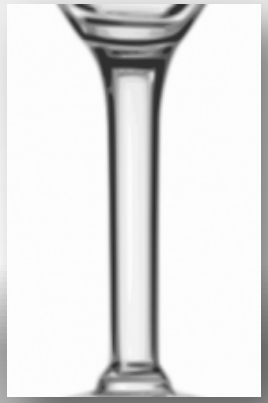
Tadayon v. Greyhound Lines, Inc., CIV. 10-1326 ABJ/JMF, 2012 WL 2048257, (D.D.C. June 6, 2012)

Ruiz-Bueno, III v. Scott, No. 2:12-cv-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013)

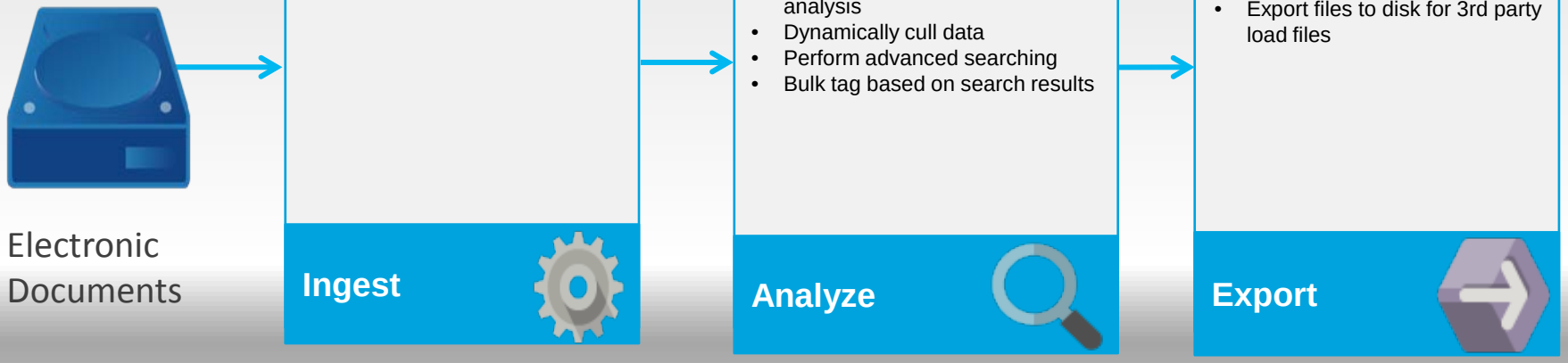
THE PROCESS OF REDUCING MOUNTAINS TO MOLEHILLS

Here is one way to look at the process

Here is another:



ECA SAMPLE WORKFLOW



Whether you have one attorney, or an army of attorneys working on a document review, there are some things you will want to take into account when setting up your review software.

CONSIDERATIONS – DATABASE SETUP

- Understand commitments made in discovery conference:
  - ❑ Did you agree to produce native files?
  - ❑ Did you agree to a clawback?
  - ❑ Or, will you be producing PDF or TIFF images?
  - ❑ Did you commit to producing metadata as well?
  - ❑ Which metadata fields need to be produced?
  - ❑ What about deduplication?
    - ▪ Global deduplication?
    - ▪ Custodian level deduplication?

OTHER CONSIDERATIONS – DATABASE SETUP

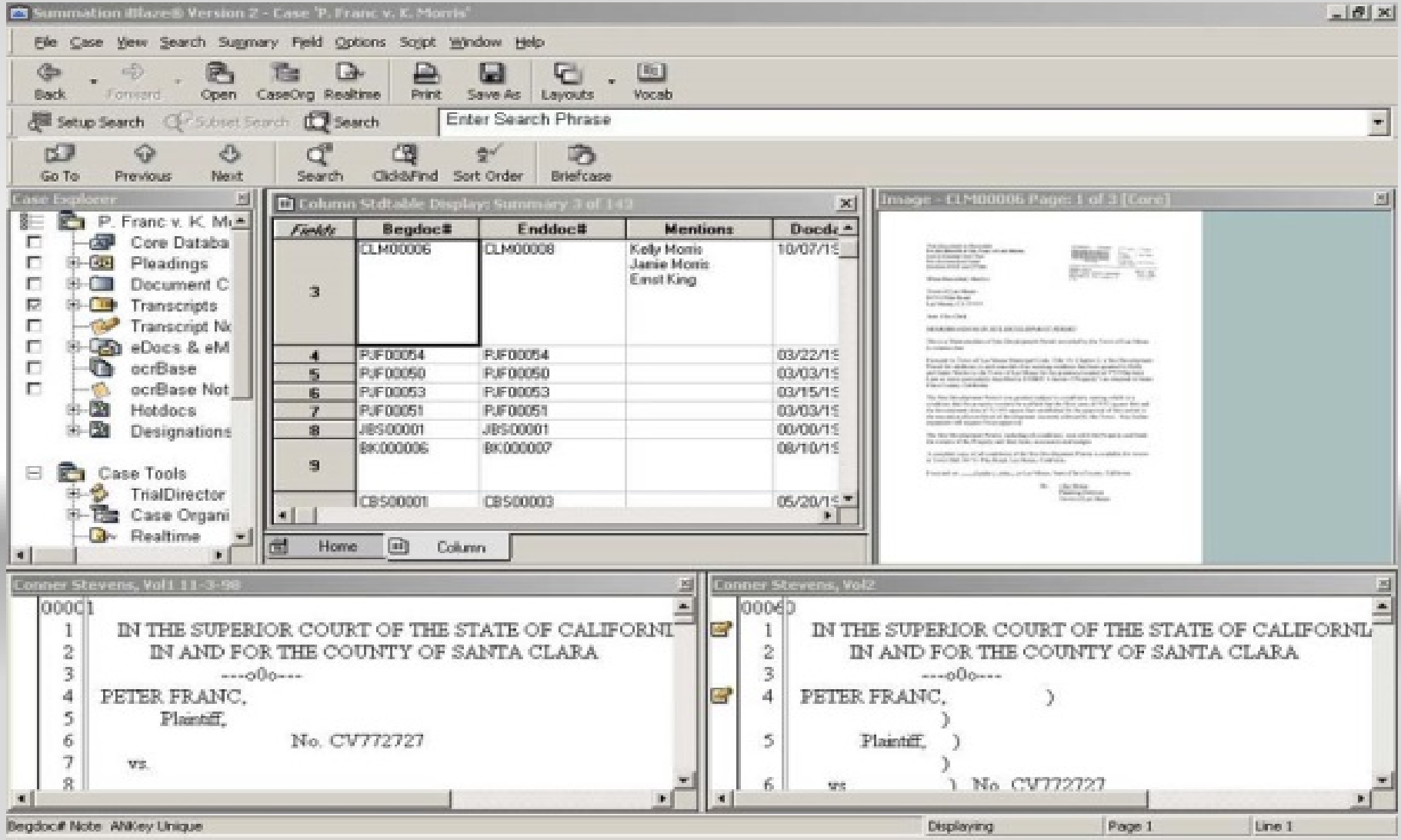
- Think through goals of the review:
  - ❑ Are you reviewing for Responsiveness/Relevancy prior to production?
  - ❑ Are you doing keyword searching as part of your review?
  - ❑ Will you be doing a simultaneous Privilege Review?
  - ❑ Will you be using this data for Deposition Preparation?
  - ❑ Or, are you reviewing what opposing counsel produced?
- Consider Possible Re-Use of Data (Multiple Matters)


Isn’t this awesome? Why didn’t we do this before?

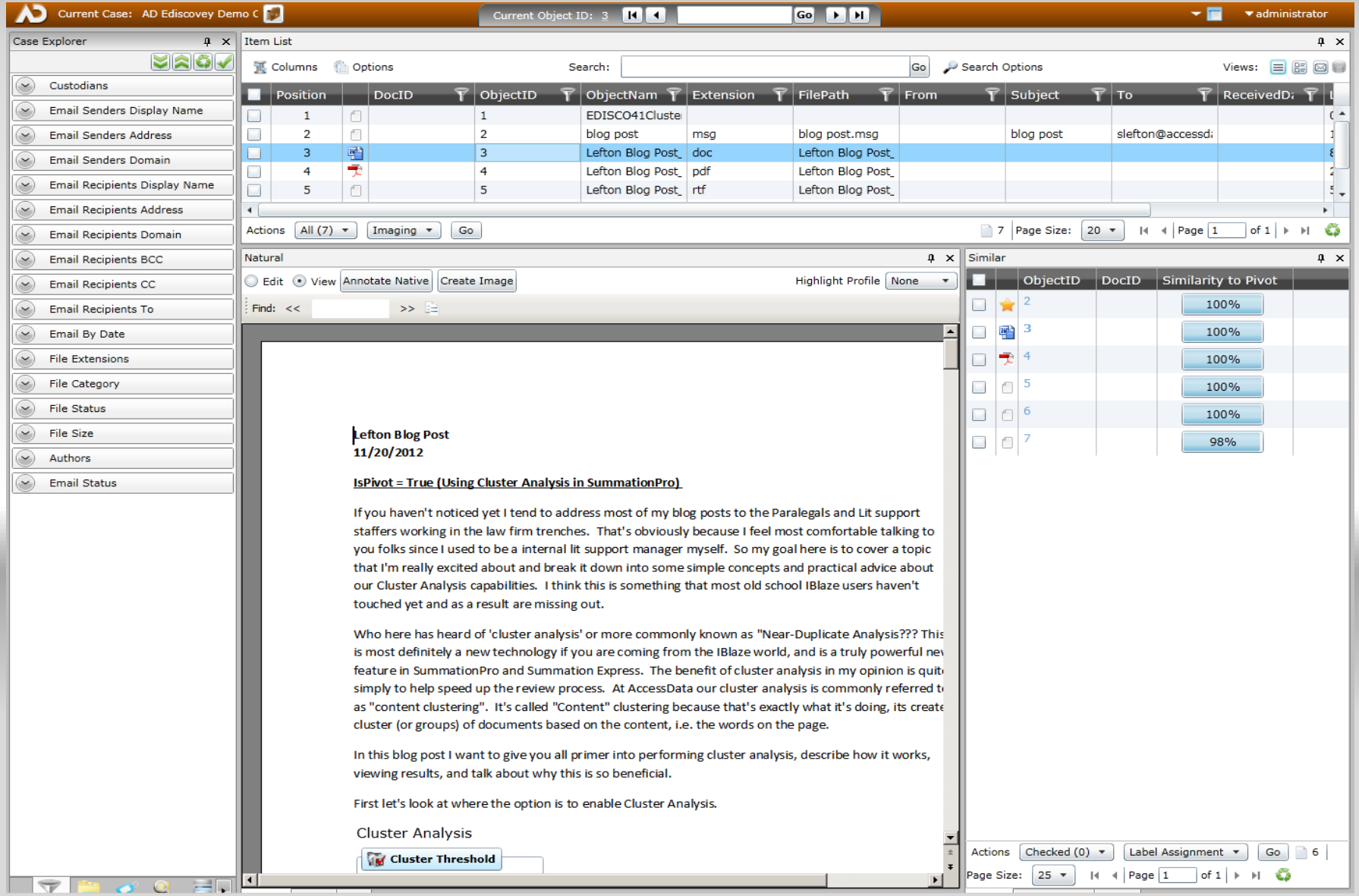
Tools Available

- Web-Based Tools
  - ❑Supported by Law Firm or In-House Legal Department
  - ❑Supported by 3rd party outside service provider
- In-House Tools
  - ❑Supported by Law Firm or In-House IT Department
  - ❑Web-enabled?
- Hosted Environment
  - ❑Supported by 3rd party outside service provider
  - ❑Web-enabled

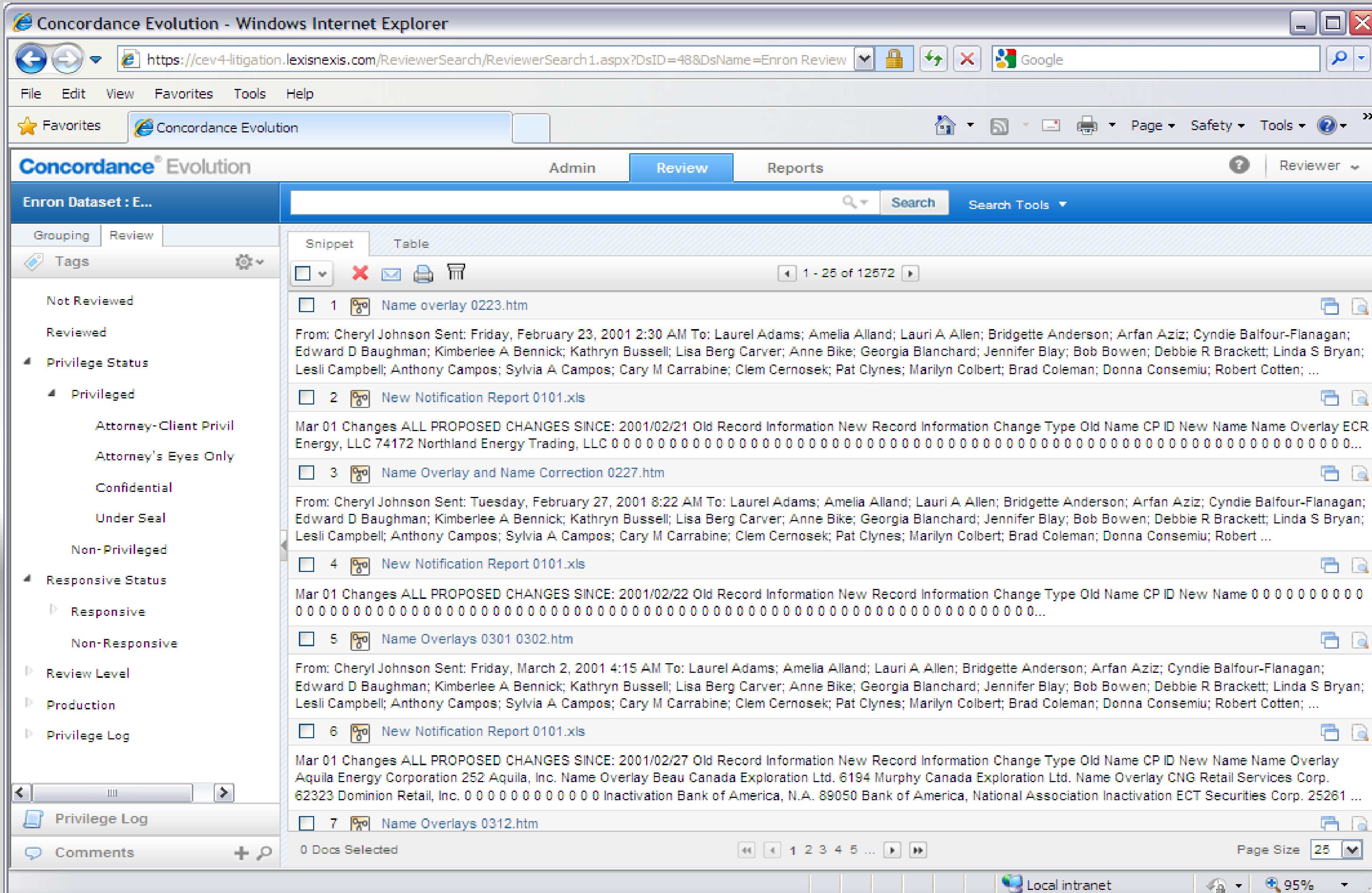
SUMMATION iBlaze – THE "OLD" SUMMATION



SUMMATION PRO – THE "NEW" SUMMATION



CONCORDANCE EVOLUTION



IPRO ENTERPRISE SUITE

{i-proclamation}

Simple, Affordable and Automated eDiscovery should be the expected norm!

NO additonal fees for analytics
- included in Eclipse review app

NO exorbriant named user fees
- concurrent pricing available

NO long term agreements needed
- buy what you need when you need it

NO upfront extra startup fees
- flexible pricing models

Ipro will **decrease** processing time, **prevent** errors from happening, **reduce** the human capital requirements, and **lower** your overall costs.

You now have a choice.

Learn More

Enterprise: End-to-End Digital Discovery

Desktop Review

Early Case Assessment

Allegro

Ipro Allegro is the early case assessment component of the Ipro Enterprise digital discovery platform. When integrated with Eclipse and eCapture, users can perform high-speed ingestion and interactive culling on large data stores before relevant information on native file review or full litigation processing and imaging.

Web-Based Review

Eclipse

Eclipse is the review component of the Ipro Enterprise digital discovery platform. After culling vast data stores using Allegro, firms can immediately complete analytical review before producing directly from Eclipse or sending to eCapture for enhanced processing and review.

High-Speed Processing

eCapture

eCapture is the processing component of the Ipro Enterprise Digital discovery platform. Fully distributed and infinitely scalable, eCapture can perform electronic discovery, enhanced processing and full production on litigation document collections of any size.

Desktop Review

Eclipse SE

Eclipse SE is an in-house discovery, review, and production platform built to handle up to 10,000,000 records and any number of users within your current infrastructure, without requiring a SQL backend or DBA. Intuitive and easy to install, Eclipse SE can be deployed in less than an hour and contains all the functionality your firm needs to effectively review cases of all sizes.

TOOLS OF MANY FLAVORS –
NO ONE TOOL IS THE SILVER BULLET

Relativity 8.2
From hold through production and everything in between.

Ringtail™ & Visual E-Discovery

exterro
Empowering Legal Teams

RECOMMIND

CATALYST
Powering Global Discovery

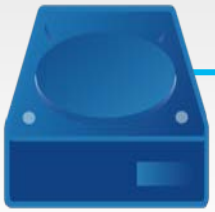
nuix
Simple. Powerful. Precise.

Case Logistix


allegro
insightful interactive culling


ipro
innovative information solutions

ALLEGRO WORKFLOW



Electronic Documents

Ingest

- Extract metadata
- Perform full-text indexing
- Includes foreign language recognition

Analyze

- Run file type and size reports, custodian summaries, dedupe and deNIST results, and exception reports
- Perform email and domain analysis
- Dynamically cull data
- Perform advanced searching
- Bulk tag based on search results

Export

- “Push” documents to Eclipse for native-file review or Capture for enhanced processing and image conversion (TIFF/PDF)
- Export files to disk for 3rd party load files

ENTERPRISE WORKFLOW

VISUAL DATA REPRESENTATION

- Visual Culling
- Dynamically target data based on predefined criteria such as file types, languages, and email domains
- Timeline Display
- By viewing data in a timeline, users are able to easily recognize and rectify potential gaps
- “Snapshots”
- Visually compare search results or filtered documents within collections by saving “Snapshots” of data manipulations


eclipse
powering digital review

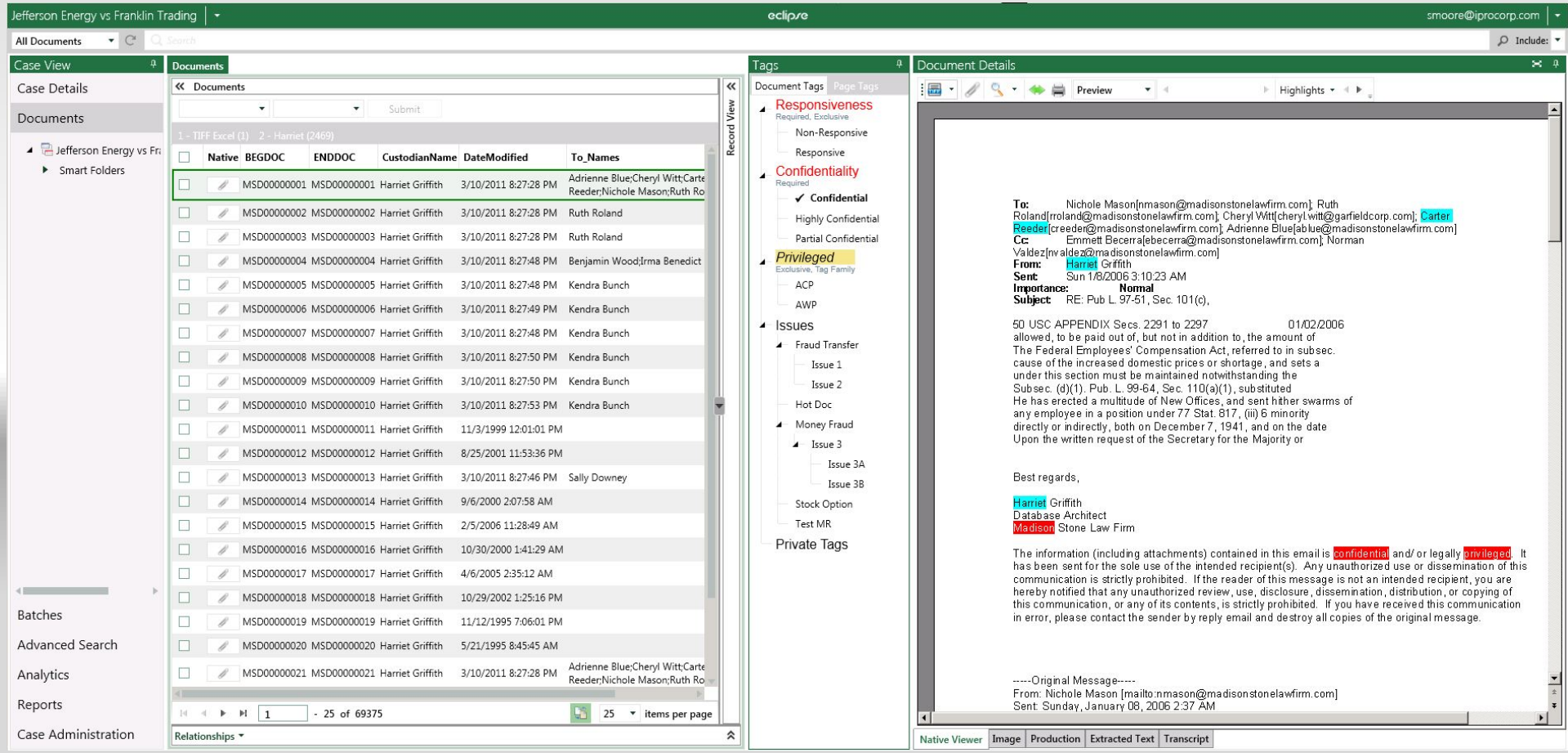

ipro
innovative information solutions

ENTERPRISE WORKFLOW

Collection ECA Review Processing Production

eclipse

powering digital review



DISCOVERY - DEPOSITIONS

- Specifically define how production will be made:
  - Formats;
  - Organization;
  - Metadata to be included;
- Depositions:
  - Hard copy when possible;
  - Native files:
    - Advance agreement with counsel;
    - Coversheets for control;
    - CDs easily labeled;

    (Note: Determine software requirements in advance)

Discovery – Document Review/ Document Productions

You only get it once…Rule 34(b)(@)(E)(i) or (ii); *Anderson Living Trust v. WPX Energy Prod., LLC,* -F.R.D.-, 2014 WL 930869 (D.N.M. Mar. 6, 2014)

DISCOVERY – DOCUMENT REVIEW/ DOCUMENT PRODUCTIONS

- Production Organization:
- Ordinary Course
- Folders and Subfolders
- Identified by Request #

- Production Format:
- Hard Copy
- Load Files
- "True: v. "Near Native/Hybrid" (TIFF)
- Images only (OCR Compatible)
- Proprietary software requirements

Loose/Active File:

Name & File Extensions
Author
Create Date and Time
Edit History

Emails:

Subject
Author
Recipient
CC/BCC
Rec'd Date/Time
Sent Date/Time
Threading/Attachments
Near Dupes

PRE-TRIAL SUBMISSIONS

- Hard copy v. Native
- Juror access to native files in evidence
- Redundant hard copies?
- Inform Court of native file issues
- Agree on marking native files

TRIAL

- Evidentiary impact of native files: giving the best “show” without loosing the “tell”
- Update database as you go to map for appeals
- Trial 101: Test and practice presentation

CONSIDER TECHNOLOGY IN THE COURTROOM

- Size and placement to optimize viewing
- Consider sight lines when placing equipment
- Courtroom scouting for power, cable lengths
- Choices of computer-based software:
  - Trial Director
  - Sanction
  - Now, iPad Apps

- Elmo for last minute hard copy evidentiary or demonstrative items

POST-TRIAL/APPEAL

- Which document version (especially native files) is in evidence?
- Ensure a clean record .
- Use database to track admitted exhibits .

What Can Iowa Lawyers and Law Firms Do to Recruit and Retain Diverse Attorneys?

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dburrell@deflaw.com

WHAT CAN IOWA LAWYERS AND LAW FIRMS DO TO RECRUIT AND RETAIN DIVERSE ATTORNEYS? MEETING THE CHALLENGE IS EASIER THAN YOU THINK!

By Douglas K. Burrell
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I. INTRODUCTION

To some, it may seem that recruiting and/or retaining diverse attorneys in the State of Iowa, a state with a 3% Black, 2% Asian, 5.5% Hispanic, and 0.5% Native American population, is an impossible task; but from my perspective, as a diverse attorney who initially returned to live and practice in Cedar Rapids, Iowa, it may not be as difficult as it appears. When I tried to return home and practice law, I thought it would be an easy process. I was born in Iowa City, Iowa; I grew up in Cedar Rapids; and I received my undergrad, graduate and Law degrees from the University of Iowa. Practicing in my home town and state was the most natural thought I had. I never entertained practicing anywhere else until I encountered roadblocks, which were the most perplexing things to me. The question I encountered most frequently was, "Will he stay?" I spoke to many Iowa lawyers who came to the conclusion, no matter what I told them, that I wasn't going to stay in the state of Iowa. Well, I didn't, but the reason wasn't because I wanted to leave. The reason why I ultimately left Iowa and moved to Georgia, was because my fiancée at the time (now my wife), was offered a job in Georgia. My wife worked as a weekend anchor at a TV station in Cedar Rapids, but the station would not promote her to one of the main anchor positions because, they told her, "the viewers are not ready for you." That misperception guided the decision making process of the station's executives even though my wife was one of the stations most popular anchors. So, we have lived in Georgia since 2000, but I have always had a

deep respect and admiration for the lawyers in Iowa with whom I was fortunate enough to practice and get to know during my first six years practicing law. I am thrilled and honored to be member of the Iowa Defense Counsel Association, and appreciate the opportunity to assist Iowa's lawyers and law firms in recruiting and retaining diverse attorneys.

So, the question is, what can be done to recruit and retain diverse attorneys and have them commit to staying with Iowa law firms? First, we need to understand that diverse attorneys should not have to live up to a higher standard than non-diverse attorneys. There are many reasons why attorneys leave law firms, especially young lawyers. Sometimes it's because the partners they work for are difficult people. Sometimes it's salary. Sometimes is work/life balance issues. Sometimes there are other factors. This does not mean we don't keep trying to recruit and retain diverse lawyers we believe can be successful and profitable for our law firms. There are, however, some different considerations for Iowa lawyers and law firms when it comes to recruiting and retaining diverse attorneys. While this paper tries to set forth some of the ways to recruit and retain diverse lawyers, please understand that it does not provide all of the strategies or tactics Iowa lawyers and law firms can utilize. But, it is my hope that the information contained herein provides you and your firm with a roadmap to develop a comprehensive and successful strategy.

II. RECRUITMENT

Iowa has a rich history of fairness and of being ahead of the curve when it comes to diversity issues. Therefore, it is important that Iowa lawyers tell that story to diverse candidates you are trying to recruit. It was in Iowa, in 1869, where Arabella A. Mansfield became the first woman admitted to practice law in the United States. The University of Iowa was one of the first law schools in the country to award a woman, Mary B. Hickey, a Law degree in 1873, and to an

African-American, Alexander G. Clark, Jr., in 1879. This state has had ground-breaking court decisions that we should all know about, including *In the Matter of Ralph;* where in 1839, the Iowa Supreme Court refused to recognize slavery in the state of Iowa; *Clark v. Board of Directors,* which was essentially the *Brown v. Board of Education* case, 86 years early; *Coger v. North Western Union Packet Company.*, which ensured equal access to public accommodations for all Iowans, regardless of their race. Iowa is also one of the first states to legalize same sex marriage, and regardless of your political views and affiliations, was the state that propelled the first African-American to become President of the United States.

Often the question for diverse non-residents of Iowa is, "why should I live and work there?" Well, the answer is in front of us. While not perfect, there has long been a sense of fairness and openness in Iowa, and if you as Iowa lawyers and law firms do not share this rich history with diverse lawyers, then you are hampering your own efforts from the beginning of the recruitment process.

However, telling the story of Iowa's rich history is not enough. You must do more than simply share Iowa's lengthy history of fairness and inclusion; you must engage diverse candidates in a personal way. Look no further than college athletics as an example of what can be done to engage diverse candidates so they will want to live and work in Iowa. Iowa and Iowa State's football and basketball coaches often go into the homes of the student athletes they are recruiting and communicate with them in a variety of ways, including telephone calls, e-mails, text messages, etc. trying to sell them on the benefits of enrolling in their school. After visiting the students at their homes, they bring them on campus to show them all of the opportunities and benefits the school has to offer. Recruiting diverse attorneys should be no different. Law firms and their attorneys need to go to the University of Iowa or Drake Law Schools, and get to know

the diverse students. You don't have to make any promises to hire them. All you have to say is "We are here because we want to get to know you," and then repeat the process, because one visit is not enough. Send them an e-mail or text from time to time and ask them how they are doing. Again, no one is saying you have to hire these students; you may get to know them and decide you don't want to hire them. But, if you believe they could be a match for your firm and they want to stay in Iowa, then you have the first chance of recruiting them to your team! Explained another way, recruiting diverse attorneys is no different than trying to obtain business from a client. You have to build a relationship with prospective clients over time; you have to earn their trust; and once they trust you, then good things will happen. When you get to know these students, find out about their backgrounds because it may be important when it comes to getting them to come to your firm. It is especially important to know if the law student is a first generation college, first generation grad school, or not because their level of social advancement could mean that their initial learning curve could be higher than the typical young lawyer; however, that does not mean that they will not be successful, if provided with the proper support. So, invite the diverse students to your firm. If a law school is in or near your city, hire the diverse students as law clerks during the school year for a few hours a week. Once again, it's a trial period. You are not making any promises to hire. But you are giving them and yourselves a chance for success if you think they would be a good fit, and if they are comfortable with you as well. For those who may be skeptical, take baby steps. Focus on students who grew up in Iowa, as they may be more likely to stay.

Now, some may say that the law schools do not have a big enough pool of diverse candidates, and if a significant number of Iowa firms go to the law schools, they will essentially be fighting over the same students. Well, at this time, you are right, but that doesn't mean you

don't make the effort. The one thing that is guaranteed is if you don't try, you will not succeed. You should also talk to the Deans of the law schools about the importance of expanding the pool of diverse students they are admitting each year. The more diverse students the law schools admit, the greater the pool from which you can recruit, and the greater chance you will be successful recruiting diverse students for your firm. And one more critical thing, avoid making assessments of the diverse law student strictly by the numbers. If you only recruit by the numbers, please be aware that you could lose some budding superstars! Why do I say that? Because from my perspective, as a graduate of the University Of Iowa College Of Law, I know of a significant number of diverse law school graduates who are partners in national and regional law firms around the country, started their own successful firms, are in-house attorneys in significant positions, or are working outside the field of law but doing incredible things! I look no further than Lonnie Johnson, Senior Director, Federal Relations with Exxon-Mobil, Derrick Dyer, who owns his own law firm in Washington, D.C. Stephanie Gaines, in-house counsel for Walgreens, Tracy LeBeau, Director, Office of Indian Energy Policy and Programs for the U.S. Department of Energy, Andre Merritt, a partner in a regional law firm, Michael Savala, General Counsel/Inspector General for The Iowa Department of Corrections, Leslie Davis, a partner in a national law firm, Carl Walker, Judge in Chicago, Karetha Dodd, Vice President – Head of Legal (Americas) with iGATE, Dwayne Green, owner of his own law firm, Greg Lacey, partner in a national law firm, Tim Ray, partner in a national law firm, Pamela Means, partner in a national law firm and President of the National Bar Association, which as everyone should know, was formed in Des Moines, Iowa, in 1925; and Tisha Tallman, President and CEO of the Georgia Hispanic Chamber of Commerce. Tisha, a native of Des Moines, was invited to the White House to participate in a roundtable discussion on transportation infrastructure. This is the type

of talent that has been produced within the State of Iowa. Many of these people may not have had the "numbers" that most recruiters look at, but they have "qualities" that drive them to be extremely successful. This list of individuals is a very small sample of the many diverse attorneys who attended law school in Iowa and have become successful. Wouldn't it be nice to have talented people like these working in your law firm?

III. PREPARE INTERNALLY FOR CHANGE

Recruiting diverse law students and lateral attorneys is not enough. If your firm is not ready for change, then the diverse lawyer will not stay. One of the things that I have observed is that any significant change which is not properly planned is doomed to failure. The first thing Iowa lawyers and firms must do is make sure that all of the partners in the firm are on board with hiring diverse attorneys. If they are not, they could be the individual who inadvertently, through indifference, or openly subverts the entire process. If someone is not on board with recruiting diverse attorneys, the reason(s) why they have reservations should be fully discussed. If partners simply want to focus on numbers, then your firm needs to have a frank discussion about why the numbers matter so much as opposed to the intangible qualities that have made those listed above so successful. Point out the list of diverse lawyers educated in Iowa who have succeeded somewhere else and ask what is so different about your firm that you cannot have the same success that their firms have had? I can tell you from experience that living in a major city is not the driving factor. I work in Atlanta, the city some call "the Black Mecca." Yet, when you look at the National Association of Law Placement ("NALP") studies, you will see that the percentage of diverse partners in Atlanta is similar to the number of diverse partners all around the country. Simply put, there is no greater advantage about working in a major city when it comes to progressing to partnership. Further, from a pure economic standpoint, it doesn't make sense to

allow talented diverse law students to leave the state without a fight; especially since clients are demanding that diverse attorneys work on their matters, and that law firms staff diverse trial teams. One needs to look no further than the young people in this country to understand that partners in law firms cannot be "the Grinch," they can't stop Christmas (diversity), from coming! Four years ago, I read an article in *U.S.A. Today*, that informed me that my now nine-year-old daughter belongs to the first class of majority, minority students in this country. Think about that! The diversity that our clients are preparing for will be here sooner than we all think!

Firms also have to prepare to overtly teach diverse attorneys your culture and language and not assume they will quickly learn the firm's unwritten rules. Simply put, the pressure faced by diverse attorneys to learn your firm's culture and language can be overwhelming at times and understanding the particular pressures faced by diverse attorneys can help smooth the transition into your firm. What do I mean by that? Often, when it comes to recruiting diverse lawyers, a question that I have routinely heard is, "Can she/he fit in?" In my opinion, what this question really is asking is "can we live with this person?" Why do I say that? Because the vast majority of diverse people have had to "fit in" their entire lives -- in their neighborhoods, the classroom, their place of employment or the communities where they live. They understand that often they are portrayed as being the "exception and not the rule;" and this portrayal comes with its own unique set of pressures. For example, when I grew up, oftentimes I would be the only black child in a classroom. Very quickly, everyone knew my name, and I struggled and felt extreme pressure to learn theirs. It wasn't until I got older that I realized why everybody knew my name. It's easy to learn the name of the one person who is different than everyone else. I also felt pressure to know the right answers because everyone would know if I was wrong. So, having an understanding that a diverse law student or lawyer coming into your firm has had that kind of

experience is important for the planning process. Stated another way, inviting a diverse attorney into your firm is like traveling to another country when you don't know the language and culture. You can make a lot of embarrassing mistakes unless someone from the dominate culture helps you. IT is also vitally important that you and your firm help the diverse attorneys adjust to your firm and the community; especially if they did not grow up in Iowa. Find someone from the diverse attorney's background to mentor and help them find a church, ethnic food, a barber shop or hair salon, and make adjustments for religious holidays or rituals. For instance, a Muslim lawyer will likely fast during Ramadan. Understanding that he/she is fasting, and respecting his/her fast, may be a simple gesture that will convince him/her to stay with your firm.

Finally, always have open and honest communication with the diverse attorneys whom you hire. When I came to Georgia, the partners at my law firm would always ask me if I wanted to work on a case with an African-American plaintiff. After they asked me a few times, I told them that they did not have to ask me; that my focus was on working on the best cases, and I did not want to be prevented from working on a case because they were concerned about perceptions when a case had a black plaintiff. Further, there are clients who want diverse attorneys working on cases that involve a diverse plaintiff, and it is important that you tell your diverse lawyers what they already know, or suspect, that they are being staffed on a matter to fulfill client needs and expectations. Lack of candor in this area can create mistrust. But be careful when it comes to staffing because it can backfire on you.

For example, I was once asked to staff a case where an elderly black woman who had raised three daughters after her husband died, had her house wrongly foreclosed, all of her personal belongings removed from her house and placed on the front yard by the sheriff, while her neighbors watched, and she was at work. Then, to add further insult to injury, it rained, and

her belongings were totally destroyed. The foreclosure was supposed to happen at an address like 1212 Peachtree Lane, but her house was actually on 1212 Peachtree Circle --- so there was no question that the foreclosure/eviction was a mistake. I was asked to go visit the lady at her home and speak with her to set the stage for a pre-suit settlement. When I arrived at her home, because of my non-southern accent, she immediately knew that I was not from Georgia. She asked me where I was from and I told her I grew up in Iowa. Then, she asked me the question that was going to determine for *her* whether she trusted me or not. She asked "Is your wife black?" When I responded, "yes," she began to trust me, and we were eventually able to get the case resolved at a pre-suit mediation.

My point is this, you must not be afraid to have open communication with any diverse attorney that you hire, especially when it comes to staffing. But, one simply cannot assume that a diverse attorney is going to be trusted by a diverse plaintiff, and the situation can deteriorate if things are not thought through or discussed. Also don't assume that a predominantly white jury will not respond to a diverse attorney. I tried a lot of cases while in Iowa, and I found the juries were always fair. Ultimately, if you are not comfortable having open and honest discussions with diverse attorneys about sensitive issues, please understand that once you hire them, your relationship could deteriorate and eventually backfire.

IV. EQUAL VERSUS FAIR

When it comes to diverse attorneys coming into a law firm, I have often heard the question being raised about whether the diverse attorney should receive "special treatment." The issue isn't "special treatment." The real issue is treating them fairly versus treating them equally with the other lawyers in the firm. For those of you who have children, do you think that they are the same? I certainly do not when it comes to my children. What I do with my two children

– a boy and a girl, is treat them fairly by sometimes giving them different opportunities to help make them successful. Simply put, a diverse attorney's unique characteristics can help your firm make money. As discussed above, more and more clients are insisting that the attorneys who work on their cases are diverse. This means, that sometimes, in order to maximize your profits, you may want to take that diverse attorney to meet your clients. You may have other non-diverse attorneys working for that client as well. They may think they are not being treated equally if you take the diverse attorney to meet the client and not them, but fairness, not equality, is really the issue. What the non-diverse attorney is asking for is equal treatment. In my opinion, what must be done in this type of instance is create different opportunities for the non-diverse attorneys to meet the client as well, or meet other clients. Another important thing to understand is that diverse attorneys' backgrounds can impact their learning curve. As I indicated above, a diverse attorney who is first generation college and/or first generation law school may have a different learning curve than a diverse attorney whose parents went to college and/or graduate school and grew up in a different environment. But that doesn't mean that diverse attorneys might not thrive once they catch up. Again, one you need look no farther than the list of successful attorneys who have been through Iowa's law schools to appreciate this point. Some of them are first generation college and law school graduates, and they are thriving.

V. DIVERSITY SUCCESS IS A TWO-WAY STREET

When it comes to the retention of diverse law students and lawyers, Iowa lawyers and law firms do not bear the entire burden. The diverse lawyers in your firm equally share the responsibility of becoming an active participant in your firm's culture. They need to attend the firm's social events and get to know the other attorneys and their spouses. One of the ways you can help the diverse attorneys understand their obligations is to give them the article attached to

this paper entitled "*Considerations and Strategies for Women and Minorities Navigating the Minefield of Law Firm Politics.*" I wrote this article when I was an associate at my firm, and it was subsequently published by DRI – *The Voice of the Defense Bar*. After it was published, I received e-mails from diverse attorneys around the country telling me that they wished they would have known this information when they were associates. However, I have personally experienced, after giving the article to young diverse attorneys, that some of them simply choose not to follow the recommendations that can help lead to their success. As we all know, people can be provided with a roadmap to better themselves, but choose to follow their own path instead. That's just part of life! Nevertheless, I believe that if you give someone a roadmap or advice that can help them be successful, you have done your part, and that is all one can do.

VI. CONCLUSION

Recruiting diverse attorneys to Iowa law firms can be easier than what you think if you (1) tell them Iowa's story of fairness and inclusion; (2) go to the law schools and meet them; (3) invite them to your firms; (4) talk to the deans about increasing the pool of diverse students; (5) prepare your firm by ensuring your partners are all on-board with recruiting and retaining diverse attorneys and they understand that your firm may have to make some changes; (6) have open and honest communication with all diverse students/lawyers, and help them adjust to your firm and community; (7) understand that treating diverse students/lawyers fairly does not mean giving them special treatment; and (8) make sure the diverse attorney understands that success is a two-way street. If these suggestions are implemented and followed, your probability of recruiting and retaining diverse law students and attorneys to your firm will substantially increase.

Considerations and Strategies for Women and Minorities

Navigating the Minefield of Law Firm Politics

By Douglas K. Burrell

The path that successful attorneys have traveled can be duplicated by others if a proactive approach is taken.

We are all aware of the stories, whether urban legend or true, where a gaffe or a series of gaffes made by a partner or associate severely crippled or ended their careers within their respective law firms. Navigating the minefield of law firm politics is a difficult and tricky process. This task can be especially daunting for women and minority attorneys who must not only navigate the obstacles to success common to all lawyers, but must also overcome the biases and stereotypes that remain in our society. This daunting task is even more challenging to women attorneys of color, who have to navigate law firm politics while dealing with issues relating to gender, stereotypes associated with their particular racial group, and/or their specific identification (*i.e.*, African-American women, Asian-American women, Hispanic-American women, Native-American women).

Because of the relative scarcity of women and minority attorneys within law firms, those attorneys often experience what I call the "Jackie Robinson" effect. The "Jackie Robinson" effect is when women or minority attorneys, whether based on their own perception, reality, or a combination thereof, feel an overwhelming pressure to succeed because they believe they are carrying the hopes and dreams of their family, gender, race, and/or ethnicity; and, if they do not succeed, then people will claim that they do not have the intellectual capabilities to meet the firm's standards, and/or the door of opportunity may close for others. The pressure of the "Jackie Robinson" effect can exponentially increase when a woman or minority attorney is exposed to the fear and resistance to change that law firm members may sometimes harbor, whether openly or under the surface.

Let's make no mistake about it, and this is not open to debate, in the minds of some women or minority attorneys, the pressure associated with the "Jackie Robinson" effect is very real. While the number of women and minority attorneys within law firms is small, there is one glaring fact that is undeniable: women and minority attorneys stand out and any mistakes that they make are magnified. The truth of the matter is simple. When you are one of three black male attorneys in a 90-lawyer law firm, or the only woman in a partic-

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ular practice group, or one of a handful of minority females within your law firm, everyone knows who you are or can easily find out.

Another factor that can influence a woman or minority attorney's ability to navigate the minefield of law firm politics is whether he or she is first-generation college and/or first-generation professional within his or her family. If there are no family members to talk to or to emulate, then that particular attorney's entry into a law firm environment is similar to the experience of a person who travels to a foreign country with no knowledge of the language and with little money. In this scenario, the traveler not only has to overcome the language barrier, but also must become assimilated into the dominant culture. Anyone who has ever traveled abroad knows that cultural mistakes can occur at any time, and when they do, the traveler is at the mercy of a person from the dominant culture. Whether the traveler ultimately has a good or bad experience depends on whether he or she receives help from that person.

Women attorneys also face the pressure that comes with their decision to have or forego having children; and, if they choose to have children, they must assess when to do it and how it may affect their careers. Within some circles, there remains the belief that when women attorneys have children they become less effective lawyers (*i.e.*, can they bill the required number of hours) and lack the commitment necessary to succeed in their practice area (*i.e.*, can they be relied upon to work on this important project). These beliefs continue to exist despite the fact that many firms tout their particular flexible partnership programs. Family-related questions make it increasingly difficult for women to navigate the minefield of law firm politics.

Yet, we are also aware of successful women and minority attorneys who seem to navigate the political minefields within their law firms. With all due respect to these very successful attorneys, they do not appear to have such a heightened degree of intelligence that their rise cannot be duplicated by those aspiring to follow in their footsteps. In fact, many of these successful attorneys have and will firmly state that their success can and should be duplicated. What successful attorneys have acquired, besides an incredible work ethic, is a road map that enables them to navigate law firm politics and avoid making the political gaffes that can hurt careers.

Some people have an innate ability to skillfully handle political situations; but even an innate ability must be fully developed. Others must learn how to handle political situations through some other means, preferably other than trial and error. So how does a woman or minority attorney learn how to handle the pressure that comes with his or her unique status, and successfully navigate the minefield of law firm politics, without crippling or killing his or her career? I firmly believe that to be successful within the law firm environment, one must take a proactive approach.

The purpose of this article is to provide women and minority attorneys with a basic outline and structure to help navigate the minefield of law firm politics. The information set forth below is not exhaustive and not the authoritative source on this issue; however, it is my hope that these suggestions will either provide you with a refresher course or with ideas you have not previously considered. It is hoped that some or all of the information below will help you in your career growth. It is also my ancillary hope that those of you who do not face the challenges of navigating gender, racial, or ethnic issues, due to various circumstances, while navigating law firm politics, will also gain insight into experiences that differ from your own.

Learn the Rules of the Game

I often hear attorneys emphatically state that the most important thing for young attorneys to do is to "do good work." They elaborate that a quality work product is the lifeblood of every law firm, and the inability to perform at the highest level could end or derail their careers within their respective law firms.

I agree that the performance of high quality work is critical to any attorney's long term success, but I disagree that it is the most important factor for success. Why? Because, in fact, there are successful people in every law firm who possess varying degrees of ability. But more important, I firmly believe that no attorney—especially a woman or minority attorney—can succeed in a law firm environment if the rules of the game are not quickly learned and mastered.

For those who are reluctant to engage in political behavior because they believe that hard work is the overriding way to achieve success, there is one question for you. Do you know someone who is incredibly intelligent, well respected, and hard working, but does not seem to get ahead?

While the path to success does not come with a handbook… there is a common framework that successful attorneys have recognized.

There are attorneys in just about every law firm who fit this profile. Simply put, there is no getting around "playing the game." The overwhelming reason why there are intelligent attorneys who do not progress is that achieving success at a law firm depends on how well you are able to develop relationships with others.

As with any game or competition, whether it's a sporting event, game show, or board game like Candy Land or Monopoly, no one can succeed unless he or she first learns how to play the game. It is also important to learn the rules so you don't unknowingly break them. This same philosophy applies when it comes to learning how to succeed in a law firm environment. While the path to success does not come with a handbook, it can vary from person to person and from firm to firm, there is a common framework that successful attorneys have recognized.

First and foremost, it is important to learn the *firm culture*. What is acceptable? What is not? What is the firm's overall approach? How does the firm view itself? There are some aspects of firm culture that people can easily communicate to you, while there are other aspects that are so ingrained that they are unspoken, yet very important. I have found that there are two

ways to learn the firm culture: (1) observe, and (2) ask questions. Observing or hearing about the mistakes of others is a good way to learn about what is unacceptable. Asking successful attorneys questions is another way.

Who are the successful attorneys within your firm who you will want to emulate or question? Partners and senior associates, who often have the "buzz" about them, have been around long enough to know what is acceptable and unacceptable. Although it can be beneficial to emulate successful attorneys, make sure that the person you emulate is part of the mainstream firm culture. Sometimes, successful people are allowed to deviate from the norm. What may be acceptable for them may not be acceptable for others.

When the heat is on, partners want to give critical assignments to reliable associates.

Partners and senior associates are not the only source of information about firm culture. Please recognize that anyone in your firm can be important to your career. Understand that staff personnel are the eyes and ears of the firm, and their opinions can have great weight. Staff personnel who have been around the firm a long time know the culture and can help associates navigate the firm's political minefields. It is important to treat staff personnel with respect, and to solicit opinions and advice when necessary and appropriate. I have also found that staff personnel want associates within their particular affinity group to succeed. A staff member who is valued and treated with respect will bend over backwards to help the associate.

Law firms often promote the idea that they are extremely flexible in terms of an associate's work schedule and state that it doesn't matter what the associate's schedule is, as long as the work gets done. While that philosophy may generally be true, I believe that one of the best ways to be successful within a law firm is for an associate to mirror his or her partners' schedule. The simple fact of the matter is: if you are around, you have a higher probability of getting good work assignments than if you are absent. When the heat is on, partners want to give critical assignments to reliable associates. Many times, after the other associates in my practice group have left the office at the end of the day, I have received a phone call from a partner asking me to help with a particular issue. I have also received critical assignments on the weekends. Part of the reason why I received these opportunities is because I maintain a consistent schedule.

Another point an associate must always remember is: do not become involved in partnership business. This may seem obvious, but I have seen associates' careers crash and burn because of their lack of discretion in this area. I once witnessed a series of situations where a fellow associate would make suggestions to the managing partner about how the firm should react to various issues. One day I was talking with the managing partner when the associate made an unsolicited recommendation. After the associate left, the managing partner looked at me and said, "He thinks he is a partner, but he is not." That comment has stayed with me, and I am very careful to avoid making comments or giving opinions about any issue that falls in the purview of the partnership.

If I am asked by a partner to weigh in on an issue, I make sure I give considerable thought to my response and answer as tactfully as possible. I take this approach because my prior experience suggests that partners do not want to be told what to do by associates, and they typically do not want to hear complaints about their firm, unless those complaints are infrequent and communicated in a diplomatic manner.

Use Your Uniqueness to Your Advantage

When I was 11 years old my diverse elementary school closed, and I had to integrate a new school. On the first day at my new school, every child in my class knew my name while I was struggling to learn theirs. Then one day it hit me. Of course my classmates knew my name—I was the only black child in the classroom. I stood out! Remember, as mentioned above, when there are few women and minorities in a group the "Jackie Robinson" effect can occur.

Women and minorities often discuss the belief that we cannot fail because we must keep the door open for those coming behind us. In the past, although I accepted this enormous responsibility, I also cringed at the great weight that accompanied it. Then one day I had an epiphany! I realized that because I stand out, if I did anything that was positive, everybody would know about it. Once that occurred to me, I decided to recognize but ignore the pitfalls that can accompany my minority status. Instead, I took the position that I have a tremendous advantage over others because I am automatically distinguished from the pack. After I realized this, I became more aggressive in my approach to integrating myself into organizations.

The realization that my uniqueness can have an empowering effect has allowed me to get to know key players faster than the average associate. I am not afraid to talk to and build relationships with the partners and other members in my firm. They know who I am anyway, so why not get to know them and let them get to know me.

It is also important for women and minority attorneys to be comfortable with themselves. I know that I am black and that is never going to change. And I like being black, even with some of the challenges it presents. Therefore, my office decoration reflects who I am and my personality. I display my African art and have photographs of my wife and children. I have a plaque that my brother gave me of his Northwestern University Rose Bowl team. When people enter my office, they can see a snapshot of who I am, and because I am comfortable with myself, they can become comfortable with me. I have found, and successful attorneys will verify, that a lot of times the choice work assignments flow to associates with whom the partners are comfortable. How can a partner be comfortable with a woman or minority associate if the woman or minority associate is not comfortable with him- or herself?

I have also found that because of my uniqueness I can develop a rapport with other people. People are often curious about who I am, where I'm from, and how I got here. Everyone's journey is unique in some

way, but similar to other people's in other ways. When you tell people about yourself and your background, they have an opportunity to identify with you and learn about the similarities that you both possess. The same is true when you ask questions and learn about other people.

Further, I have found that people like to talk about themselves. I have had conversations that simply consisted of my asking questions and the other person responding. By the time the conversation ended, the person felt he knew me a lot better. I don't ask questions as a tactic or gimmick. An individual's insincerity usually is exposed very fast. I truly do like to hear people's stories, and it gives me insight into who they are and what makes them tick. I have a friend who used this type of communication as a way to advance her career. Periodically, she invited the partners in her firm out to lunch to get to know them better. Over time, she built strong relationships with the majority of the partners. Several of these partners took an active interest in her career and steered her to many high-profile opportunities.

When it comes to an associate-partner relationship, the insight gained from personal communication can be critical to an associate's long term success. If a partner knows and trusts an associate, the partner may provide the associate with tips or guidance that can prove vital to the associate's advancement in the firm.

Do Good Work

As I stated previously, a high-quality work product is the lifeblood of any law firm. It is especially important that women and minority attorneys develop a reputation for producing high-quality work from the very start. I have found that successful attorneys typically have the philosophy: do whatever it takes to get the job done! If that means you have to stay late burning the midnight oil, do it. If that means you have to come in on weekends, do it. If that means you have to cancel some personal plans, cancel the plans.

Never refuse work that you may think is beneath you. While you do not want to get overwhelmed, it is important to establish yourself as a go-to person. Sometimes a partner may come to you with an assignment that may seem trivial, but it may be very important to either the partner or the client. Perform the work at the highest quality level and use the firm's resources to assist you. Look in the library if your firm still has one. Your library may contain resources like videotapes, deposition outlines, manuals, and other helpful materials. I suspect you will find some incredible resources that can assist you in completing your assignment. It is also helpful if you search your firm's internal database for briefs, motions, memos, and so forth, and use your firm's internal e-mail system to obtain information that may assist you in completing your work assignment.

Market Yourself: Communicate

I have attended several seminars, and at each seminar the panelists advise associates to market themselves to other attorneys within their firm. The term *market* can cause confusion and create mental barriers because people may associate the term with selling. Selling oneself can be a difficult hurdle in the minds of some women and minority attorneys because they may come from a culture that emphasizes humility. Instead of suggesting that women and minority attorneys "market or sell" themselves, I want to suggest they focus on communicating with others about their skills and accomplishments.

Communicating with others, at its core, is what we have done our entire lives. Communication is how we make and keep friends and how we develop relationships within our respective law firms. But how should that communication occur to help minority and women attorneys navigate the minefield of law firm politics? When it comes to work assignments, remember that an associate's job is to offer opinions and ideas. It is the partner's job to accept or reject each opinion or idea you offer. The bottom line is, you must offer something to the conversation, because it may help solve the client's problem.

Asking questions is another critical part of the communication process. An associate must make sure he or she understands the project at hand. I have found that under the stress and pressure of trying to resolve problems, sometimes the full scope of the assignment is inadequately communicated. It is an associate's job to ask enough questions to understand the issue at hand so the client's problem can be resolved. When you communicate with partners about work assignments, you are showing that you have the skills and ability to resolve the client's problem.

Women and minority associates must also communicate information to their practice group leaders about their career achievements, goals, and aspirations. Do not assume that others know how valuable you are to your firm. If you don't tell others about your accomplishments, who will? It is your career, you must manage it!

The bottom line is, you must offer something to the conversation, because it may help solve the client's problem.

In my firm, associates prepare and submit self-evaluations during the review process. I keep a pad of paper in my desk to note my accomplishments throughout the year. For example, I note when I win an oral argument, prevail on a motion for summary judgment, favorably settle a difficult case, win a trial, or do anything else that may have significance to my legal abilities, marketing and client development efforts, contributions to the firm, and/or other professional accomplishments. I also have a file that contains favorable comments from clients, and I attach those comments to my self-evaluation. Further, I create a list of the skills that I have not acquired and ask for an opportunity to acquire the skill. I check off each item from my list after I attain a level of proficiency in that particular area.

I take these measures because I do not expect my practice group leaders to remember all of my significant accomplishments throughout the year, or all of the skills I need to acquire to become a better lawyer. I understand that my practice group leaders are focused on their work and the work of the other associates within the practice group. Since people typically remember the most recent events, it is up to me to refresh their memory. If I fail in this task, I

should not complain when my review and/or future work assignments do not reflect my value to the firm.

Be Inclusive

Women and minority attorneys are well aware of the struggle to be included in social events, marketing opportunities, and so forth. In contrast, when we are the dominant group in social settings, we must also make an effort to include others. In 2007, I accompanied two partners from my firm to a diversity event sponsored by a client. During the seminar, I encountered some minority attorneys that I know, and we decided to go out to dinner. I made sure to include the two partners from my firm, and they had a wonderful time. I also established some significant contacts during the seminar and have shared access to these individuals with others in my firm.

When it comes to the topic of diversity, women and minority attorneys are in the perfect position to help guide majority attorneys through those particular minefields.

Women and minority attorneys must also be willing to discuss sensitive issues with majority attorneys. We must realize that when it comes to the issues of race, gender, and/or ethnicity, we travel in a culture that is foreign to most people. Accordingly, when it comes to the topic of diversity, women and minority attorneys are in the perfect position to help guide majority attorneys through those particular minefields. For example, when a majority attorney asks a woman or minority attorney for insight, information, and/or help navigating the minefields of race, gender, and/or ethnicity, the majority attorney has made him- or herself vulnerable to potential accusations that he or she is intolerant, insensitive, sexist, racist, or worse. Therefore, it is critical that we understand the majority attorney's perspective and recognize his or her vulnerability. In this situation, women and minority attorneys can have a positive and powerful impact on the majority attorney as long as the woman or minority attorney is inclusive and willing to talk about sensitive issues without appearing judgmental.

When I was a prosecutor, one of the judges in my district would frequently ask me questions from the perspective of a black male. While he would always preface his questions by stating that he knew I was not speaking for all black males, he was always appreciative of the fact that I would talk with him about these issues in an honest, yet tactful way. By talking with him about these issues, we developed a strong trusting relationship that continues to this day.

If we help guide majority attorneys through our world and experiences, they can gain a better understanding and appreciation of us. This understanding and appreciation can pay off later; especially if you're faced with a political gaffe, since these partners can come to your defense.

Stay Above the Fray

One of the worst ways to make political gaffes is to get involved in office disputes with other associates or staff. I believe that the best way to navigate this minefield is to be like Switzerland: remain neutral at all times. When it comes to other associates, I try to be respectful, but avoid getting involved in personality conflicts. Besides, getting involved in petty disputes will only come back to haunt you.

I also avoid the ego-driven "status" type situations. I have seen associates become upset because someone lower on the letterhead received some benefit that they did not. I view this type of egocentric approach as totally unproductive. In my mind, the only thing that matters is whether you are advancing within your firm. If you are advancing, it truly doesn't matter what type of benefits someone else receives. If you are not advancing or do not want to advance, it doesn't matter anyway because you probably will not be with your firm long.

Conflicts with staff can be tricky. Many staff have the belief, and rightfully so, that associates come and go, while they remain with the firm. Based on their longevity, a lot of times a partner or a senior associate will rely on the impressions of staff, this also includes court reporters, to evaluate an associate in terms of demeanor and work ethic. While you may have the supervisory authority to discipline staff, I have always believed that a judicious and infrequent use of one's authority is the best approach. I believe that leaders who inspire others to do their best are more effective than leaders who use fear as motivation.

Finally, the relationship between an associate and partner is somewhat akin to a marriage. Sometimes, the relationship is great, and at other times it can be strained. During the times when the relationship is strained, attempt to resolve any differences you may have with your partner on your own. Do not get others involved unless it becomes absolutely necessary, and use tact. By trying to resolve your differences with your partner yourself, you avoid embarrassing them or creating resentment because you did not come and talk to them first.

I have frequently heard associates comment that they cannot talk to their partners because the partner will not listen or will turn everything around and make the situation seem as if it is the associate's fault. I believe that the best way to handle these difficult situations is to tell your partner that you want to discuss the specific issue, but discuss the issue by asking questions. Avoid making statements because statements can be interpreted as defensive or accusatory. If you ask questions, you can stay above the fray because questions present the issue in a noncombative and nonthreatening manner. Also, by asking questions, it allows the partner to take on a teacher or mentor role, which is what you really want from your partner, and may help you to resolve the issue in your favor.

Every Social Function Is a Job Interview

Remember that you are always being evaluated, especially during social functions. Social functions can be a great way to get to know members of your firm on an informal basis, but they can also be the biggest political minefield you enter. If you are not careful, you can lose your reputation in a matter of seconds. The pressure associated with so-

cial events can cause some women and minority attorneys to decide against attending. This can be a fatal mistake because it could be interpreted as a lack of interest in being a part of the firm. Remember, there are so few women and minority attorneys in firms, everyone knows if they are in the room. Likewise, your absence cannot be ignored. Therefore, attend every event you can with the following proviso: *Dress appropriately, drink responsibly, and act sensibly!*

These admonitions are especially applicable to women attorneys; although, I agree that generally, a double standard applies to women attorneys. Sometimes, a male attorney's behavior is excused as "boys will be boys," but inappropriate behavior by women seems to always be remembered. I specifically recall attending a bar function and talking to partners at another firm. During the conversation, one of the partners pointed to a female associate in his firm and stated, "There's _____, drunk again." Needless to say, that associate did not remain at that firm for a long period of time.

When I first joined my firm, I attended all of its social functions, but I went with a strategy. For instance, if I were attending a social function that involved spouses, my wife and I would go over the firm website so that she could memorize the names and faces of the attorneys. After my wife and I entered a function, I would not see her until it was time to sit down for dinner. I knew she had to be comfortable operating on her own, and fortunately for me, my wife is a very likable person. We understand that we cannot hide in a crowd, so we might as well use our uniqueness to our advantage by building relationships.

Get Involved

All law firms have committees, sports teams, and/or community projects that afford attorneys an opportunity to participate in an event for their own personal satisfaction and the benefit of the firm. Participation in sporting events or community projects is a way to show that you are a team player. These events also provide a way to reveal your personality and are an excellent way to develop relationships with other members of the firm. Participation in firm committees provides a more formal vehicle to demonstrate your judgment and your commitment to the firm. The critical aspect of committee participation, however, is presenting good ideas and following up with assigned tasks.

In my first legal job, the managing partner constantly asked me to go running with him, and I consistently refused because I dislike running. I didn't realize the implicit nature of his invitations; he was really saying that he wanted to get to know me better, and I was not sophisticated enough to read the subtle clues. However, I learned from my mistake. When I was prosecuting, several attorneys in the office, including my boss, played chess during lunch. I quickly joined the group and frequently played with my boss. As a result, I developed a strong bond with him, and he wrote an incredible letter of recommendation for me when I moved to Georgia.

Ultimately, the perception that women or minority attorneys are committed to the firm's long term success is critical to their long term success as well.

Find a Mentor

It is well understood that a critical factor in the overall success of women and minority attorneys is having a strong mentor. Many firms claim to have formal mentorship programs, but the reality is that for the vast majority of women and minorities, these formal programs are ineffective. For those who disagree with this statement, I point to the low number of women and minority partners within most law firms to support my argument. Clearly, formal mentorship programs break down somewhere in the process. With that said, although, most formal mentorship programs are not as successful as hoped, they are still valuable to law firms, even if, at a minimum, they serve as a reminder that the path to partnership must be communicated; otherwise, apathy could set in and progress could end.

Required mentorship relationships often fail when the mentor is not truly committed to mentoring the attorney to whom he or she is assigned. So how does a woman or minority attorney find a committed mentor? Identify a successful attorney in your firm and seek him or her out for advice. Selecting mentors from your particular affinity group can be an asset because they can identify with your experiences, but also seek mentors among races and genders different from your own. It is critical that you have mentors who have access to different audiences advising and ultimately championing your cause.

After you seek advice from your mentor or mentors, the most vital part of the mentor-associate relationship occurs. If the advice is sound, even if you do not fully understand it, you must follow it, and let your mentor know the results. If the advice does not obtain the desired results, you must have an honest dialogue with your mentor so he or she can analyze what happened and guide you to a successful solution. Over time, you will develop a strong relationship with your mentor because he or she will know that you follow his or her advice, and that giving you advice is not a waste of precious time.

It is well understood that a critical factor in the overall success of women and minority attorneys is having a strong mentor.

Finally, be careful what you tell your mentor. If your mentor is a partner, remember that he or she has dual responsibilities: to you as the mentored associate and to the firm as a whole. Do not put your mentor in a difficult situation by trashing his or her partners or the firm. If you have a grievance with a partner or the firm, use tact and restraint in presenting your complaint. It is important that you present a fair and balanced account of the situation, including admitting that the partner may have some valid arguments supporting his or her position. Being fair and balanced will show that you are credible; allow your mentor to give you perspective and allow him or her to help you resolve the situation.

Conclusion

Navigating the minefield of law firm politics is a tricky process. This task can be especially daunting for women and minority attorneys who must not only navigate

Law Firm Politics, continued on page 67

Law Firm Politics, from page 61
the obstacles to success common to all lawyers, but must also overcome the biases and stereotypes that remain in our society. Yet there are successful women and minority attorneys who seem to be able to navigate the political minefields in their law firms.

The path successful women and minority attorneys have traveled can be duplicated by others if a proactive approach is taken. As a woman or minority attorney, you should learn the firm culture; use your uniqueness to your advantage; produce high-quality work; market yourself and communicate; stay above the fray; be inclusive; treat every social function as a job interview; get involved; and find a mentor. While taking these steps will not guarantee success, doing so should help women and minority attorneys avoid making critical mistakes that can cripple or end careers in their firms.FD

Unraveling Technical Problems: Some Practical Solutions

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2014 Iowa Defense Counsel Association 50th Annual Meeting & Seminar – 30 minute Session

Title: Association vs. causation: Demystifying the assessment of traumatic brain injuries

Presenter: Sam Perlmutter, Ph.D., Scientist, Exponent, Inc., Chicago, IL

Session Outline (30 Minutes):

1. ***Personal introduction (1 Minute)***
    a. Mechanical Engineering (Bachelors)
    b. Neuroscientist (Doctorate)
        i. The use of quantitative methodologies to research adults with brain injury
        ii. Evaluation/assessments of adults with brain injury
2. ***Traumatic Brain Injury (10 Minutes)***
    a. Epidemiology
        i. What is a traumatic brain injury (TBI)?
        ii. What is a mild traumatic brain injury (mTBI)?
        iii. Who is affected?
        iv. What are the symptoms, diagnosis, medical history, environment?
        v. Single vs cumulative event?
3. ***Case Examples (3 minutes)***
    a. Motor vehicle accident
    b. Furniture store
4. ***Analysis (15 Minutes)***
    a. Biomechanics
        i. Physics of the accident
        ii. Reaction of the human body
    b. Human Factors
        i. What test was chosen?
        ii. How was it chosen?
        iii. Is the test reliable?
        iv. What was the original intent when developing the test?
        v. How was it administered?
        vi. How was it interpreted?
        vii. What are the motivations of the individual taking the test?
    c. Quantitative vs Qualitative; what are limitations?
        i. Self-Report
        ii. Surveys
        iii. Reaction time
        iv. Reflexes
        v. Balance
        vi. Eye-head coordination, etc.
5. ***Conclusions (1 Minute)***
    a. mTBIs cannot be discretely diagnosed (i.e., broken bone, tumor, “abnormal” heart rate)
    b. The past/current/new methodologies have their respective limitations, and must be understood when defending against an mTBI claim

INDEX

Iowa Defense Counsel Association

1965 through 2013 Annual Meetings

This Index is supplied as a service to the members of the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

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ADMINISTRATIVE LAW

The Here and Now of The Iowa Administrative Law, 1977

Recent Developments in Administrative Law, 1996

A Gross Exaggeration: "but for" Causation is not Dead, 2009

ADVERTISING BY LAWYERS

Ethics and the Trial Lawyer: You Too Can Make Mistakes You Will Regret, 2012

AFFIRMATIVE DEFENSES (See PLEADINGS)

AMERICANS WITH DISABILITIES ACT

The A.D.A. And Civil Tort Liability, 1996

The Americans with Disabilities Act Applicability to the State Courts and Impact on Trial Practice, 1993

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

New Developments Under The Americans With Disabilities Act, 2000

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

APPEALS

Appellate Practice Suggestions, 1997

Appellate Procedure - New Rules and Some Often Asked Questions, 1993

Effective Appellate Advocacy – A View from the Iowa Court of Appeals, 2005

Innovations in Appellate Review, 1968

New Appellate Court and Backlog, 1976

A New Approach to Interlocutory Appeals, 2006

Rules (See RULES - Appellate)

Venus vs. Mars: From Depositions through Voir Dire, Trial and Appeal – Lessons from Iowa Women Trial Lawyers, 2011

APPELLATE DECISIONS REVIEW

(Reviews of Iowa Appellate Court Decisions have been presented in 1969 and 1975 through 2013)

Issues Presented to Supreme Court in Schmidt vs. Jenkins Truck Lines, Inc., 1969

Recent Tort Cases - 8th Circuit and Iowa Court of Appeals, 1978

BANKRUPTCY

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Litigation in Bankruptcy Court, 1982

BANKS

Due Process and the Federal Banking System, 1985

FDIC Practices and Procedures in Closed Banks, 1987

BUSINESS INTERRUPTION

Discovery in the Business Interruption Case, 1989

BUSINESS TORTS

Conspiracy, Trade Secrets, and Intentional Interference – New Developments in Business Torts, 2005

CAFA

Litigated Issues Under The Class Action Fairness Act ("CAFA"), 2005

CIVIL PROCEDURE (See RULES)

CIVIL RIGHTS

Civil Rights Actions Under Section 1983, 1980

Defending Against Age Discrimination Claims, 1997

Defending Civil Rights Claims Before the ICRC, 2003

Employment Law Update – ERISA; Age Discrimination Defenses; Retaliation, 2008

Evaluating the Employment Discrimination Case, 1987

A Gross Exaggeration: “but for” Causation is not Dead, 2009

CLASS ACTION

Iowa's New Class Action Law, 1980

Litigated Issues Under The Class Action Fairness Act (“CAFA”), 2005

CLOSING ARGUMENT

The Art Of Summation, 1991

Closing Arguments, 2011

Closing Arguments – Demonstration, 2004

Defending Punitive Damage Claims - Closing Argument, 1988

Law of Closing Argument, 1987

Opening and Closing the Book: Storytelling from the Plaintiff’s Perspective, 2002

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

Telling Stories: Closing Argument and the Talking Frog, 2011

Voir Dire - Opening and Closing Arguments, 1985

COLLATERAL ESTOPPEL (See PRECLUSION)

COLLATERAL SOURCE

Collateral Source Rule - Is It Still Reasonable?, 1985

Evidentiary Issues Related to Collateral Source Payments, 1999

COLLECTION

What Does It Mean To Be Judgment Proof, 1998

COLLEGES AND UNIVERSITIES

Defending Colleges and Universities, 2003

COMMERCIAL LITIGATION

Commercial Litigation, 1994

Defending Commercial Litigation Claims, 1999

COMMUNICATION

Communication in Litigation - Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood, 1996

Courtroom Communications and Related Issues, 2012

How Case Facts Intersection with Juror Values, Life Experiences and Decision Making Style, 2012

COMPARATIVE FAULT

Allocation Of Fault And Mitigation Of Damages, 1996

The Beat Goes On: Chapter 668 In Flux, 1993

Comparative Fault Update, 1989

Comparative Negligence, 1969

Comparative Negligence, 1980

Comparative Negligence and Comparative Fault: Review and Update, 1985

Comparative Negligence Update, 1981

Comparative Negligence Update, 1983

Defense Considerations Under Iowa's Comparative Fault, 1984

Defense Techniques Under Iowa's Comparative Fault Act, 1984

Effect of Comparative Fault on Consortium Claims, 1988

The Effect Of Comparative Fault On The Trial, 1991

Instructions - Comparative Negligence, 1983

Recent Developments Under the Iowa Comparative Fault Statute Has Chapter 668 Reached Maturity?, 1992

Sole Proximate Cause And Superseding And Intervening Causes, 2001

Trial Strategy Under Comparative Negligence and Contribution The Defense Perspective, 1984

COMPLEX LITIGATION

Handling of Complex Litigation as Viewed from the Bench, 1981

Individual and Group Defense of Complex Litigation, 1981

COMPUTERS

Better Computer Research Skills, 2002

Computerized Legal Research - WESTLAW, 1980

Dirty Tricks: Spying, Hacking & Stealing Client Data, 2012

Using Computerized Litigation Support -- Friend or Folly?, 1981

Using the Internet for Legal and Factual Research, 1999

CONFESSION OF JUDGMENT

Offers to Confess, 2000

CONFLICTS OF INTEREST

Conflicts of Interest, 1980

Conflicts of Interest - The Mushrooming Problem, 1985

Ethical Issues in Conflicts of Interest, 1999

Everyday Conflicts, 2013

Identifying and Dealing with Conflicts of Interest and Managing Fees Ethically, 2007

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

CONSORTIUM

Consortium Claims, 1998

Effect of Comparative Fault on Consortium Claims, 1988

CONSPIRACY

Conspiracy, Trade Secrets, and Intentional Interference – New Developments in Business Torts, 2005

CONSTRUCTION CASES

Damage to Contractors Own Work: Determining Insurance Coverage of Defective Workmanship Claims, 2008

Defending Construction Cases, 1988

How Architects Can Best Work with Attorneys in Defending Lawsuits, 2012

CONTEMPT

Contempt - An Overview, 2001

CONTRIBUTION/INDEMNITY

Allocation Of Fault And Mitigation Of Damages, 1996

Allocating Contribution Among Tortfeasors, 1975

Contractual Indemnity, 1975

Contribution, 1980

Contribution and Indemnity After Goetzman v. Wichern, 1987

Indemnity, 2009

Indemnity and Contribution in Iowa, 1975

Procedural Questions Relating to Contribution and Indemnity, 1975

Trial Strategy Under Comparative Negligence and Contribution The Defense Perspective, 1984

CORPORATIONS

The Challenge of Closely Held Corporation Litigation, 2012

Defending Corporate Clients and Officers in Criminal Cases, 1987

Directors' and Officers' Liability, 1986

Emerging Approach to Products Liability of Successor Corporations, 1979

When Corporations Choose Counsel, 1980

COUNTERCLAIMS

Permissive and Compulsory Counterclaims, 1978

COURTS

Charting the Future of Iowa's Courts, 1995

One Justice’s Perspective: Developments at the Iowa Supreme Court, 2013

What's New in Iowa Courts, 2012

CRASH DATA RETRIEVAL

Handling Novel Issues In Accident Reconstruction, 2001

CRASHWORTHINESS

Crashworthiness, 1994

Enhanced Injury Claims, 1994

Preventing Negligent Plaintiffs from Having "A Second Bite at The Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

CRIMINAL

Defending Corporate Clients and Officers in Criminal Cases, 1987

Protecting Your Client When The Civil Case Has Criminal Ramifications, 1997

Responding to a White Collar Crime Investigation, 2004

CROP DAMAGE

Strategy and Discovery in Crop Damage Cases, 1994

CROSS EXAMINATION

Advanced Techniques for Cross-Examination Using the Chapter Method, 2009

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Cross-Examination of the Chiropractor, 1984

Cross Examination Goes To The Movies, 1998

Testimonial Objections And Cross-examination, 1991

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

DAMAGES

Chiropractic

Chiropractic Treatment - Critical Analysis, 1998

Cross Examination of the Chiropractor, 1984

Closed Head

Brain Scanning: Defense of a Brain Injury Case, 2002

Evaluation and Defense of Closed Head Injury Cases, 1988

Medicolegal Aspects of Head Injury, 1998

Traumatic Brain Injury, 2012

Consortium

Consortium Claims, 1998

Defending Against Consortium Claims, 2003

Effect of Comparative Fault on Consortium Claims, 1988

Death

Elements of Damage in the Wrongful Death Case 1982

Evaluating Wrongful Death Claims, 1998

Preparing for the Plaintiff's Economist in a Death Case, 1968

A Trial: A New Technique in Proving Damages for the Death of a Wife and Mother, 1966

Economic Loss Doctrine

Economic Loss Doctrine, 2011

Economic

Defending Claims for Economic Damages - An Overview, 1999

Economic Impact of Ineffective Witness Testimony, 2013

Emotional Distress

Defending Against the Emotional Distress Claim, 1994

Emotional Distress, 1983

Employment

Evaluating Damages in Employment-Related Claims, 1998

Future Medical Expenses

Medicare and Future Medical Expenses in Personal Injury Litigation, 2008

Functional Capacity

Challenging Functional Capacity Evaluations, 2011

Functional Capacity Evaluations and the Defense of the Claim, 2008

General

Allocation Of Fault And Mitigation Of Damages, 1996

Bringing Understanding to the Defense Damages Case – Combining Tactics and Techniques with Overall Strategy, 2005

Chronic Pain: Fundamental Scientific Considerations, Specifically for Legal Claims, 2013

Damage Arguments: Approaches and Observations, 2003

Damages From the Defendant's Point of View, 1979

Defending Claims for Economic Damages - An Overview, 1999

A Discussion of Attorney-Client Privilege and Attorney Work Product in the Federal Court Setting, 2005

Economic Impact of Ineffective Witness Testimony, 2013

The Effective Defense of Damages: Sympathy and Gore, 2002

Functional Capacity Evaluations and the Defense of the Claim, 2008

Medical Subrogation and the "Make Whole" Doctrine, 2004

Pretrial Motions, A Growth Industry, 2000

The Question of Damages Resulting From Recent Iowa Legislative Changes, 1965

Techniques To Limit Damage Awards, 2001

Undermining the Value of Plaintiff's Case by Cross Examination – The Seventh Juror, 1987

Valuing Complex Plaintiff's Cases, 1999

Hedonic

Hedonic Damages: Pleasure or Pain, 1992

Injury Causation and Human Biomechanics

Injury Causation and Human Biomechanics, 2011

Internet

Using the Internet to Evaluate Damages, 2004

Low Impact Collisions

Analyzing Low Impact Collisions, 1998

Make Whole Doctrine

Medical Subrogation and the "Make Whole" Doctrine, 2004

Medicare

Handling Personal Injury Cases Involving Medicare Beneficiaries: What Defense Lawyers Need to Know, and What They Need to Do Differently, 2010

Medicare and Future Medical Expenses in Personal Injury Litigation, 2008

Post Traumatic Stress Disorder

Defending Post Traumatic Stress Disorder Claims, 2002

Products Liability

Defense of Punitive Damages Claims in Products Liability, 2003

Psychological

Traumatic Neurosis - The Zone of Danger, 1980

Pain

Chronic Pain: Fundamental Scientific Considerations, Specifically for Legal Claims, 2013

Resolving Claims Through Facts, Rather Than Expert Opinion: Examples of CRPS, RSD, Back Pain, Neck Pain, Post-traumatic Headache, Chronic Pain, Brain Injury, Mental Illness, PTSD, Kernicterus, etc., 2013

Punitive

Defending Punitive Damage Claims in Iowa, 2000

Defense of Punitive Damages Claims in Products Liability, 2003

Product Liability: Status Of Restatement And Punitive Damages, 1996

Punitive Damages, 1978

Punitive Damages After State Farm Mut. Auto Ins. Co. v. Campbell, An Update, 2005

Punitive Damages: The Doctrine of Just Enrichment, 1980

Punitive Damages in Strict Liability Claims, 1983

Selected Aspects of Punitive Damages, 1976

Rehabilitation

Challenging Functional Capacity Evaluations, 2011

Functional Capacity Evaluations and the Defense of the Claim, 2008

Use of Rehabilitation - In Theory and In Practice, 1978

Traumatic Brain Injury

Traumatic Brain Injury, 2012

Traumatic Neurosis

Traumatic Neurosis – The Zone of Danger, 1980

Vocational

Challenging Functional Capacity Evaluations, 2011

Functional Capacity Evaluations and the Defense of the Claim, 2008

Vocational Disability Evaluations, 1984

DEFAMATION

Defamation and its Defenses in Iowa, 1995

DIRECTORS AND OFFICERS (See CORPORATIONS)

DISCOVERY

Artful Discovery, 1978

Current Issues Re: Medical Records, 2003

Defending the Latest Plaintiff's Tactic – Deposition Notices of the CEO and Other Apex Witnesses, 2005

Defending Products Liability Cases Under OSHA and CPSA; Obtaining Information From Government Agencies, 1976

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Deposition of Expert Witnesses, 1977

Dirty Tricks: Spying, Hacking & Stealing Client Data, 2012

Discovery and Evidentiary Use of Journalistic Evidence, 1997

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Discovery in the Business Interruption Case, 1989

Discovery As A Weapon And A Response - Part I, 1991

Discovery As A Weapon And A Response - Part II, 1991

A Discussion of Attorney-Client Privilege and Attorney Work Product in the Federal Court Setting, 2005

E- Discovery, 2007

Effective Use Of Video Technology in Litigation, 1997

Electronic Discovery, 2006

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Conspiracy, Trade Secrets, and Intentional Interference – New Developments in Business Torts, 2005

Independent Medical Examinations, 2001

Interviewing The Treating Physician, Getting The Records and Related Topics, 2001

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pre-Trial Management, Discovery, and Procedures in Federal Court, 2011

Pretrial Motions, A Growth Industry, 2000

Pretrial Motion Practice, 1991

Reminders and Suggestions on the Use and Nonuse of Depositions Under the Iowa Rules, 1989

Report of the Civil Justice Advisory Committee: Discovery Reforms and Expedited Civil Actions, 2013

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