defense UPDATE

The Iowa Defense Counsel Association Newsletter October, 1989 Vol. II, No. 2

DEFENSE COUNSEL LAW SCHOOL SEMINARS

Former President Ralph Gearhart gives us the following article detailing the history of the Association's Law School Seminars:

The Iowa Defense Counsel Association law school seminars commenced in 1968 and have continued annually without a break at Iowa and Drake Law Schools since that time. The seminars were the brainchild of Harry Druker, who also served as president of the organization in 1968. In the original outline, Harry noted the purpose of the programs as follows: To benefit law students, to benefit the IDCA and its participants, to benefit the law schools and the relationship between them and the practicing bar as well as to attempt to elevate the ability of trial lawyers. It is interesting to note that although the character of the seminars has changed considerably over the years, the purpose set out by our esteemed "Dean" Druker has remained substantially the same. The purpose of this report will be to generally outline the nature and character of the seminars and to document some of the interesting events and developments along the way.

The original program was given at College of Law, Drake University, May 10, 1968 commencing at 10:00 a.m. The following day the same program was given at the College of Law, SUI, Iowa City. After opening remarks by Harry Druker, Edward J. Kelly of Des Moines spoke on liability without fault. Bob Collins, superintendent of claims, Allied Mutual Insurance Company, followed with a talk on investigation of personal injury claims from the company's point of view. Bill Kuntze of Sioux City spoke on investigation of personal injury claims from the lawyer's point of view. After a luncheon break the faculty went at it again with opening statements and closing arguments by John Greer, Spencer, trial tactics, jury selection and cross examination, by Ken Keith of Ottumwa, which was followed by a question period. It was planned that the presentation be concluded at 4:00 p.m. Additional panelists were D. J. Fairgrave, D. J. Good and Philip Cless of Des Moines. I wish we had time and space to list all of our members who have participated in these programs. To quote Harry Druker, "the members of our faculty—were and are lawyers of the highest caliber—present company excluded in the interest of overmodesty...They do indeed emphasize the prestigious character of the law school seminar undertaking."

The form of the program remained approximately the same for several years although it became increasingly difficult to hold an audience for the entire day. The number of students in attendance would drop off dramatically following the complementary luncheon. It was also a considerable imposition on the busy trial lawyers to ask them to give up an entire day for the seminar, not to mention the time that went into preparation.

In 1974, the length of the program was cut to 3½ hours and the complementary luncheon was eliminated. I believe it was in 1974 that the Honorable George G. Fagg, Judge of the Second Judicial District, joined the faculty. Judge Fagg continued to participate until 1985 when his work on the U.S. Court of Appeals demanded so much of his time that it was impossible for him to continue.

One noteworthy and, in retrospect, amusing, incident occurred at the program in Iowa City in 1976. A law instructor who attended the program apparently took offense at the attitude of several of the speakers toward women as well as a tale W. T. Barnes told in dialect about a famous black trial lawyer, Henry McKnight of Des Moines. The instructor wrote several inflammatory letters to Harry Druker which were distributed among the faculty. This generated some most interesting responses from the members of our Association. Suffice to say the incident blew over, but I am sure it may have left some scars which exist to this day.

In 1978 I took over the responsibility of the programs when Harry Druker and his wife, Rose, decided they would rather spend their winters in California attending classes at Stanford than brave the Iowa winters.

By this time the trial advocacy programs at the two law schools had made significant progress and the students interested in trial advocacy were considerably more sophisticated. Dean Hines thought that the seminars might be more interesting and helpful to the students if we were to combine some sort of a trial demonstration with the usual talks by the faculty. To accommodate him, the 1980 program included a demonstration of examining and

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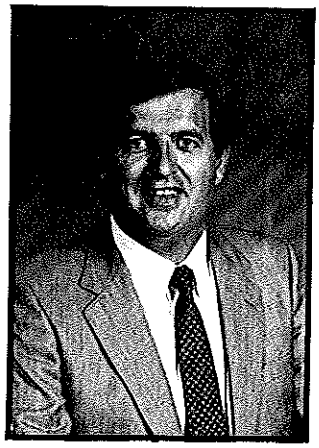
A MESSAGE FROM THE PRESIDENT



Patrick M. Roby, President

As you have seen from reviewing this issue of *Defense Update,* our Silver Anniversary Annual Meeting promises to be a great event both professionally and socially. I hope that you will all plan to attend the professional and social events.

During the three years that I have been a member of the Association's Executive Committee I have attended a number of meetings involving representatives of the various lawyer groups in the state such as the Iowa Bar Association, Iowa Academy of Trial Lawyers and the Association of Trial Lawyers of Iowa. I have constantly been surprised by the misperception or misunderstanding of what the Iowa Defense Counsel Association is and is not.

The Association *is* an association devoted primarily to representing the interest of and assisting in the continuing education of attorneys engaged primarily in the defense of civil litigation.

During the 25 years of the Associations's existence there have been significant and dramatic changes in civil litigaton in Iowa which have naturally affected defense attorneys. When I first became a member of the Association more than 15 years ago, most of the civil defense work in Iowa involved representation of insurance companies and their insureds. I think everyone who has been engaged in the defense of civil litigation for ten years or more has seen a decrease in the number of personal injury defense cases arising from automobile collisions and a corresponding increase in commercial litigation, bank litigation, professional liability and other areas. While many members of the organization still engage in a good deal of that work, there are many other members who do little or no insurance defense work. Despite this, the Association is often viewed from the outside as being tied in with the insurance industry. While there are indeed many areas where we naturally cooperate with the insurance industry, we are not viewed by them and we do not view ourselves as being representatives of the insurance industry.

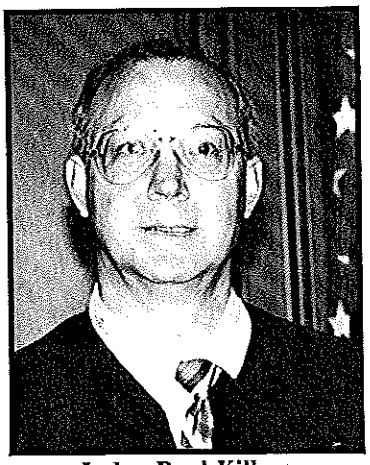
The objective of the Association has been, and hopefully will continue to be, the preservation of our civil justice system. We differ significantly from those who primarily represent plaintiffs in many respects and agree with them in others. All parties to a civil dispute are entitled to have their case decided on a level field. When the Association sees legislative proposals or proposed rule changes or other proposals which could tilt the balance away from the level field for defendants, then we act. We can only act through our members.

I hope that you share this perception of the Association's mission. If not, you should let your voice be heard. In any event, you should seek to take an active role in the Association's affairs and bring any concerns you have about the civil justice system to the attention of the Association so that we can hopefully play a role in any changes that are made either legislatively or judicially.

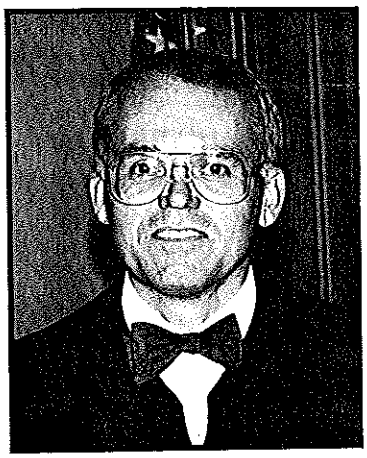
Pat Roby
President

FROM THE BENCH

Judges Kilburg and Robinson of the 6th District Court give us their views on jury selection from a Judge's perspective.



Judge Paul Kilburg



Judge L. Vern Robinson

As practicing attorneys, there was no part of a trial which we enjoyed more than the jury selection process. After some years on the bench, we find there is no part of a trial which we enjoy less. Part of this lack of enthusiasm is obviously one of perspective. However, a greater part, is our realization that excessive amounts of time are being expended on jury selection which have no legitimate relationship to the purpose for which voir dire is intended.

While jury selection is now an often uncontrolled exercise left largely to counsel, this has not always been true. The English system from which we adopted much of our trial procedure has never, nor does it now, envision the type of counsel-conducted voir dire which has become the norm in the United States. The United States initially adopted the English system and all jury questioning was conducted by the trial judge. It is only in the last hundred years that counsel-conducted voir dire has become accepted practice. This did not come into being without its critics. At the close of the nineteenth century, as unlimited voir dire was becoming popular, the Chief Justice of the New Jersey Supreme Court wrote: *"I think it would be impossible to exaggerate the evil consequences which would follow the adoption of the contrary practice. If the court is bound to permit counsel to engage in a public conversation with each juror, for the purpose of enabling counsel to determine whether he should interpose a challenge or not, what control has the court over the examination? Where can it draw the line between proper and improper questions, when the purpose of the talk is, not to prove a fact, or to establish a challenge, but only to furnish counsel information? How is a juror to be protected against improper questions, except by his refusal to answer them? And if he refuses to answer proper questions, what power has the court to compel him to answer? Or, if a juror is anxious to escape service, how can it be discovered whether his answers, not given under the sanctity of an oath, are true or false? Such a practice would introduce into this state, happily so fare free from them, the unseemly, vexatious and expensive delays in impaneling juries in criminal cases which have been a reproach to the administration of criminal justice in some other states."* *Clifford v. State,* 61 N.J.L. 217, 39 A. 721 (E & A 1897).

Traditionally, in state courts, attorneys have been allowed wide latitude in examining prospective jurors, and state court judges have been reluctant to break with this procedure. Counsel tend to conduct much of the questioning themselves with little or no inquiry by the trial judge. Whether this is the result of merely maintaining the status quo or the judge's desire to let counsel do the work, we must now recognize that many of the concerns expressed by Justice Magie have occurred, and the time has come to make constructive changes for the benefit of the litigants, and, more importantly, the public. Jury selection has too often become a tedious process which appears endless. A California judge stated that "unrestricted voir dire by counsel often trespasses on eternity." *Rousseau v. West Coast House Movers,* 64 Cal. Rptr. 655, (California, 1967).

John Karras, a Des Moines *Register* writer, after being called for jury duty observed that:

"...the lowest form of life in the American system of justice—the most abused, the most insulted, the most manipulated, the most mistreated—is without doubt the juror.

I would require that every lawyer and judge who has anything at all to do with trials and their rules be required to sit on three full weeks of jury duty at least once every three years. Jury selection would be changed."

These are legitimate criticisms. During trial, with its many pressures, we often fail to recognize the concerns of the citizens who are the lynchpin of our jury system. It is our considered opinion that changes are necessary in the jury selection process to reduce the

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CASE NOTE SUMMARY

Kermit Anderson of the Herrick, Langdon and Langdon firm reviews ***Prendergast v. Smith Laboratories.***

Since the arrival of comparitive fault in Iowa, the general verdict form has given way to the use of special interrogatories. Juries are now asked to make separate determinations regarding fault allocation, causation and damages. Not unpredictably, a jury's responses to a series of specific interrogatories may produce an unintended result, as in the recent Iowa case of *Prendergast v. Smith Laboratories, Inc.*, 440 N. W. 2d 880 (Iowa 1989).

Prendergast involved a combined medical malpractice/product liability suit against appellant Smith Laboratories and others. All defendants except Smith settled prior to trial. At trial, the jury was asked in special interrogatories, among other things, to (1) apportion fault among all defendants; (2) determine the amount of the plaintiff husband's damages; and (3) determine the amount of consortium damages for his wife. Without objection from either party, the Court's instructions did not inform the jury of the effect its answers might have upon any award ultimately entered against the lone defendant Smith.

It soon became apparent that this omitted information was a matter of persistent concern to the jury. During deliberations, three notes were delivered to the Court all asking basically the same question, i.e., whether the figures placed in answer to the damage interrogatories would be the specific amounts awarded to each respective plaintiff from defendant Smith or would they be further adjusted according to the extent of fault allocated to Smith. The court responded in each instance that fault apportionment and damages were to be separate and distinct determinations.

Shortly after receiving the last communication from the Court, the jury returned its verdict. It assigned 15% of the fault to Smith and apportioned the remainder to two of the three other defendants. In response to the damage interrogatories the jury entered the figures "$500,000" for the plaintiff husband and "$50,000" for his wife. The Court polled the jury and each indicated assent to the verdict as delivered and reported. The jury was thereupon discharged.

However, in discussions with counsel and on-the-record interviews with the Court the day after the verdict, jurors stated that they intended the figures as written to be the amounts actually awarded to the plaintiffs against Defendant Smith. The interviews further revealed that the jury had reached no decision regarding total damages for either plaintiff. Based upon this testimony, the trial court entered an order reforming the verdict so that the total damages were shown to be $3⅓ million and judgment was entered against Defendant Smith for $550,000. If the reformation were not upheld on appeal, a new trial was ordered on the damage question only.

The issue on appeal was whether Iowa Rule of Evidence 606(b) required exclusion of the evidence upon which the trial court's action was based. If so, the verdict as reported would be reinstated since it was not facially invalid and apparently no issue was raised concerning its sufficiency. As recently interpreted in *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988), Rule 606(b) permitted testimony concerning extraneous influences, but prohibited statements relating to any feature of the deliberative process occurring in the jury room.

The Court first found the juror testimony competent to reveal a mistake in the rendition of an otherwise unaminous verdict. Rule 606(b) does not, the court concluded, prohibit evidence which aids in establishing that which was actually agreed to by the jury. 440 N.W.2d at 883. But since the jury had never made a formal decision as to plaintiffs' total damages, the Court found no basis in the record for the trial court's reformation. The judgment on the reformed verdict was therefore reversed.

The Court then moved to the issue of whether the lower court's alternative grant of a new trial could be upheld on the basis of juror testimony showing that the jury failed to respond to one of the special verdict findings. The Court again found Rule 606(b) no impediment and concluded that the proper recourse was to order a new trial on the omitted issue. The Rule's inapplicability was stated in the following curious language:

If the issue were whether a verdict may be overturned because it was induced by the jury's misunderstanding of the court's instructions, Rule 606(b) would render juror testimony inadmissible for purposes of achieving that result. The situation to which the rule of testimonial exclusion applies, however, presupposes that the jury has in fact responded to the fact finding process entrusted to it and returned a finding on the issue which was submitted. Once that finding has been solemnized in a formal verdict accepted by the court it may not be impeached on the ground that it was induced by juror misapprehension as to the controlling principles of law. 440 N.W.2d at 884.

In support of its decision, the Court relied upon federal decisions applying identical Federal Rule of Evidence 606(b). One of these decisions, *Attridge v. Cencorp. Div. of Dover Technologies International, Inc.* 836 F.2d 113 (2nd Cir. 1987) involved a similar situation in which jurors testified that they had intended the figures written in the special verdict

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DEFENSE COUNSEL LAW SCHOOL SEMINARS - *Continued from Page 1*

cross examining a doctor who had recently testified at a trial. This program was very successful and proved that Dean Hines' suggestion had been a good one. It was also in 1980 that the IDCA Board voted to donate $1,000 to each law school to support its advocacy program. This annual donation, which has continued to the present, is very much appreciated by the law schools.

In 1980 I came across an article in the "Third Branch", a bulletin of the federal courts, which significantly changed the course of our seminars. The article by Federal Judge Thomas D. Lambros of the Northern District of Ohio, outlined an alternate dispute resolution procedure he had developed in his court which he called the summary jury trial. This procedure, which is quite common and widely used today, was new at that time. It occurred to me that it would be an ideal vehicle for a trial demonstration in our law school seminars. We have held a summary jury trial at the law school seminars each year since 1980 with great success. Our summary jury trials were based on actual cases which had been disposed of either by trial or settlement before use on the program. The format of the program was as follows: After I made some introductory remarks in which I explained the nature and purpose of the IDCA and presented the law school Dean with a check for $1,000, the faculty members each gave a 20-minute talk on different phases of a jury trial from opening statement and jury selection through final arguments. After the talks the program was turned over to Judge Fagg and a six person jury was selected from the student audience to hear the case. Counsel then made arguments to the jury based solely on the record provided, including pleadings, interrogatory answers, deposition summaries, signed statements, etc. Following the arguments, brief instructions were given to the jury which then went out to decide the issues. While the jury was deliberating, Judge Fagg gave the students a short talk. His remarks were always well done and well received. The jury then returned to give their consensus verdict and this was usually followed by a lively question and answer period. Some of the refinements that have been made along the way are as follows:

1. Because of his busy schedule in 1983, Judge Fagg was unable to attend the Drake seminar. "Judge" Gearhart had to take his place. As often happens, this turned out to be a blessing in disguise. Since Judge Fagg was not available to make his usual remarks while the jury deliberated, I decided to have the jury deliberate in front of the audience. This procedure has been continued and has proven to be one of the highlights of the program. The jury soon forgets that they are deliberating in front of their fellow students and go at the issues as if they were sequestered. It also, in effect, puts the entire audience on the jury and makes for some lively questions at the end of the program.

2. Due to time restrictions, in 1986 we dropped the four 20-minute talks and substituted a final pretrial conference. This is something that law students rarely would be able to see and provides an excellent lead-in to the summary trial. The brainstorm for this idea came from Judge Ron Longstaff, who joined our faculty that year and has become indispensable.

3. At the suggestion of Dave Dutton we cut the faculty to two lawyers and substituted student co-counsel who are selected in advance and provided with copies of the materials which are to be used in the summary trials. Student co-counsel have been very helpful in assisting in picking the jury and even on some occasions, participating in the arguments.

4. The most significant step forward in our program occurred in 1988 when we were able to present a live case for summary trial. This was repeated in 1989 and has made our IDCA seminars a unique experience for not only the students but the lawyers presenting their cases. It is particularly significant to the lawyers who are actually holding their final pretrial conference and submitting the evidence which will be used at the trial to listen to the jury deliberate. Not only that, but they get to do it twice within two days to different juries. The variance in results at the two schools has been interesting to say the least.

As stated in Harry Druker's original outline, the programs were to benefit participants as well as students. The current programs certainly seem to be doing this.

I would hope in the future that we would have members of our association vying with each other for the opportunity of presenting one of their live cases for summary trial at the Defense Counsel Association seminars. I invite you all to keep your eyes open for cases that would make interesting programs. I guarantee you will not only benefit the law school and the students but you will benefit yourselves and your clients as well as having a most interesting experience.

FROM THE BENCH

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number of person-hours which are being needlessly lost. Voir dire is always a balancing act. A fairly wide latitude should be allowed counsel to make inquiry into legitimate areas of juror qualifications. At the same time, limitations must be placed on inquiry which is time consuming and has no legal purpose. Because judges have been somewhat reluctant to impose limitations, counsel too often go far beyond the legitimate purposes of voir dire.

Our purpose here is not to address all of the possible problems associated

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FROM THE BENCH - *Continued*

with voir dire. It is limited to suggesting some areas where inquiry may be changed or limited voluntarily by counsel, thereby expediting the jury selection process. The end result will hopefully be a better rapport with the jury and fewer scowls from the judge. In making our suggestions, we do not pass on the legal propriety of the areas of inquiry though many are clearly improper as well as being time consuming. For instance:

1. *Schmoosing*— To schmoos - from Yiddish—to chat. It is important to treat jurors as you do your friends. It is perfectly acceptable to approach them with friendly humor, common courtesy, and a legitimate interest in who they are. However, no one is interested in idle chit-chat which has no legitimate purpose. No one is really interested in a juror's child's athletic prowess (except the juror, of course). No one cares if a juror and an attorney have a mutual acquaintance or where a juror's children go to school. It is ordinarily redundant as well as time consuming to determine if someone is a Hawkeye fan. Our point is this—too much time is wasted so counsel can demonstrate what nice people they are. Besides, most people are really not very good at schmoosing, and this is readily apparent to any person bright enough to qualify as a juror. Be yourself. It is more effective and more efficient.

2. *Making a Juror Your Expert*— Often when counsel discover that a potential juror is a member of a trade or profession which has some relevance to the proceedings at hand, they will attempt to make the juror their witness. They will ask "hypothetical situations" of the juror which just happen to correspond closely to the facts of the case. The questions are often phrased in the following form: "Would you agree with me that...?" The sole purpose for this type of inquiry is to elicit favorable opinions in front of the prospective jurors before any actual witnesses have been presented. Additionally, counsel usually recognize that this "expert" will not sit as a juror on this case. Because of this, we feel this type of inquiry is improper and should not be permitted.

3. *Making a Juror a Lawyer*— The attorneys and the trial judge often spend tremendous amounts of time before and during the trial, attempting to define the legal theories of a particular case. However, counsel during voir dire, will often feel compelled to ask a potential juror with no legal training their understanding of various legal terms. For example: "Mr. Smith, what does 'preponderance of the evidence' mean to you?" While it never hurts to have a second opinion, it should be obvious that this is not the person to ask. The questions are time consuming, they often embarrass the juror and seldom have much to do with a challenge for cause. For those reasons, this type of question should never be asked.

4. *Asking the Juror Hypothetical Questions*— Periodically, counsel will engage in an interesting exercise involving hypothetical questions. The game begins when counsel presents a prospective juror with a hypothetical question which has little resemblance to the case at hand. Counsel then inquire what the juror would do or how they would feel about this "hypothetical" set of facts. Once answered, more facts are added to obtain additional opinions. This continues until the "hypothetical" question bears an overwhelming similarity to the case being tried. When the appropriate responses have been provided, counsel will often ask the juror if he or she can rely on that response.

This technique is commonly known as "staking out" a juror. It is improper. No juror should ever be required to pledge to a future action. The only pledge which a juror should be asked to make is whether he or she will follow their oath as a juror which was administered by the court.

5. *Asking Questions to Pass the Day*— Even though trial counsel probably know, to a large extent, who will be stricken from the panel before any questions are even asked, many feel it necessary to ask filler questions. They do so for several reasons which appear valid but are really just a waste of time. Counsel often have the misconception that every juror should have his or her moment in the spotlight. This concept is a corollary to and closely associated with counsel's desire to show jurors that he or she is equally friendly to all jurors. In reality, however, we believe most jurors would admit that they don't care if they were ever asked a question.

Secondly, counsel are often of the opinion that their voir dire must consume an approximately equal amount of time as their adversary. It appeals to those who feel quantity is more important than quality. Thus, immaterial questions such as the following may be asked:

a) What do you like to do in your spare time?

b) What questions do you think I should ask you?

c) Are their any questions you would like to ask me?

d) What laws would you like to see changed?

e) What kind of evidence would you like to hear?

The foregoing list is not complete. However, we encourage counsel to never utilize any of this list. Jurors are intelligent people. Don't patronize them and embarrass yourself by using this technique.

6. *Asking Questions About Jury Deliberations*— After almost every case, we advise jurors that they do not have to discuss their deliberations or deliberative process with anyone. Yet, when they are questioned as prospective jurors, counsel will almost always inquire as to prior jury service. If the prospective juror has served in the

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FROM THE BENCH - *Continued*

past, counsel will often inquire as to what process the jury used in reaching a decision even though the deliberations may have occurred in the weeks, months or even years past. It is our feeling that what occurred in the jury room is sacrosanct, no matter how long ago, and there is nothing about the voir dire process which changes that right to secrecy. We encourage counsel to respect that right and not make the type of inquiry which forces a juror to discuss the deliberative process.

The half dozen areas which we chose to discuss are certainly not all inclusive. They are merely intended to point out certain areas which we feel are particularly time consuming. With an ever increasing case load, lawyers and judges must come to the realization that the jury selection process, after one or two hours, becomes boring, tedious and usually an unecessary imposition on the citizens who are performing an important public service. By reasonably restricting the time it takes to select a jury, countless hours of citizens' time will be saved. Each prospective juror's time is valuable, and when self-employed persons or wage earners are at the county courthouse serving on jury duty, millions of dollars of time are lost each year. The legal profession must become sensitive to the hardships which jurors endure so that counsel's clients can enjoy their right to a jury trial. If counsel reevaluated their voir dire procedure, one or two hours of court time could be saved in every case simply by shortening the jury selection process. In so doing, more court time will be available to more litigants and their cases can be docketed more expeditiously.

Conclusion. Because of over extended court dockets, we no longer have the luxury of limitless amounts of court time. The day may be coming when state court judges, by necessity, take over examination of prospective jurors. We would hate to see this happen, because, in spite of our comments, we feel it is important for counsel and litigants to have some personal contact with prospective jurors. This contact enables counsel to make informed decisions while exercising strikes. Eye contact, body language and voice intonation are all important factors in making these decisions. In an attempt to achieve a balance, we propose the following:

1. Setting time restrictions during which counsel may examine prospective jurors. Appellate courts have ordinarily categorized such restrictions as discretionary functions. In so doing, these courts have held that it is not an abuse of descretion to severely limit time allocated to voir dire. Time constraints would be decided by the trial judge at the final pre-trial conference, after consultation with trial counsel. This allows flexibility but still places time parameters on the jury selection process.

2. We feel the trial judge should conduct a partial examination of prospective jurors. There are general categories of inquiry which the trial judge can perform expeditiously. In addition to many of the statutory grounds for challenge, proposed questions could be submitted by counsel at the final pre-trial conference.

3. Greater emphasis should be placed on giving pre-trial instructions. In every criminal or civil case, there are certain instructions which are not in dispute; i.e. fault, beyond a reasonable doubt, proximate cause, etc. Using this procedure, the trial judge can accurately inform the prospective jurors about undisputed general legal propositions. It provides a partial anchor for the jurors and prevents embarrassment to them when counsel pose such questions.

4. Jury questionnaires should be expanded so that pertinent information is available to counsel before trial. Copies should be made available to trial counsel sufficiently in advance of trial so counsel have an opportunity to thoroughly examine them. Juror attitudes have become an important aspect of jury selection. Many matters now obtained in voir dire could be acquired in the jury questionnaire. Information about levels of education, hobbies and advocations, periodicals and books commonly read, as well as a myriad of other information is paricularly susceptible to written questionnaires. Representatives of the bench and trial bar of a particular judicial district could meet to decide what information is particularly relevant in that area.

5. Jurors should be released as soon as possible. In a civil case, when it becomes apparent there will be few, if any, challenges for cause, many of the prospective jurors who are not part of the initial group of 16 can be safely released. After initial questioning, the clerk can draw the names of a limited number of additional jurors who would remain in reserve in the event a juror is excused for cause. This would allow the remainder to be released early.

6. Judges and lawyers must always remember the inconvenience which we impose on jurors. We can achieve greater time efficiency as well as project an impression of greater efficiency to the public if we all strictly adhere to stated time standards. Judges, and to some extent the lawyers, tell the jurors when the trial will start in the morning and when the proceedings will recess. We owe it to the jurors as well as the system to strictly adhere to these times.

Caseloads in every state court continue to increase as more and more people are using the legal system to resolve conflicts. All participants in the legal process have an obligation to see that the system runs fairly and efficiently so it remains available to all who choose to use it. There is no panacea for crowded dockets. However, eliminating unnecessary expenditures of time examining jurors is a significant step in saving time, thereby allowing us to fulfill our obligation to jurors and the public.

CASE NOTE SUMMARY - *Continued from Page 4*

forms to reflect an adjusted rather than an unadjusted verdict. The testimony was held not excludable by Rule 606(b) on the basis that it was "designed to ascertain what the jury decided and not why they did so." 836 F.2d at 117.

The *Attridge* case, however, stands in contrast to decisions of the Fifth Circuit in *Peveto v. Sears, Roebuck & Company,* 807 F.2d 486 (5th Cir. 1987) and *Robles v. Exxon Corp.,* 862 F.2d 1201 (5th Cir. 1989). In *Peveto,* Rule 606(b) was applied to bar evidence that a majority of jurors had misunderstood the effect their answers to comparative fault interrogatories would have upon the amount of the plaintiff's recovery. Similarly, in *Robles,* Rule 606(b) was held to prohibit testimony of juror misunderstanding concerning the effect of finding plaintiff more than 50% negligent. According to the reasoning of the *Robles* court, these were not errors involving mere clerical discrepancies as in *U.S. v. Dotson,* 817 F.2d 1127 (5th Cir. 1987) and *University Computing Company v. Lykes-Youngstown Corp.,* 504 F.2d 518 (5th Cir. 1974), (both cited by the *Prendergast* court in support of its decision). Rather, they were substantive errors necessarily implicating the jury's mental processes regarding an understanding of the Court's instructions and the application of those instructions to the facts of the case. 862 F.2d at 1208. The result in *Attridge* was deemed irreconcilable with *Preveto. Id.* at 1206 n.5.

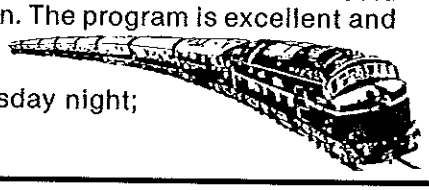
The Court's decision in *Prendergast* is difficult to explain. In simple terms, it can be seen as an affirmation of the principle that Rule 606(b) will not prohibit juror testimony where the jury is in unaminous agreement that through inadvertence, oversight or mistake the verdict announced was not the verdict actually reached. See generally 3 J. Weinstein and M. Burger, *Weinstein's Evidence* ¶606[04] at 606-40 (1987). But what of the established authorities holding that Rule 606(b) operates to prohibit testimony that a juror misunderstood the court's instructions or was confused about the "legal significance of the jury's answers to special interrogatories"? 3 J. Weinstein and M. Burger, *Weinstein's Evidence* ¶606[04] at 606-34 through 606-35. One could argue convincingly that this was truly the essence of the *Prendergast* jury's "mistake". The critical distinction lies in the characterization of the inquiry. Is the testimony offered to confirm the "accuracy" of the verdict as reflecting what the jury actually decided, or is it offered to determine the "validity" of the verdict as reflecting the jury's understanding of the court's instructions and their application to the facts of the case. The *Robles* court found the two inquiries indistinguishable and both prohibited by Rule 606(b). The *Prendergast* decision by placing the proffered evidence in the former category illustrates the elusive and perhaps artificial nature of the task; and it will doubtless invite post-trial challenges that a verdict, although superficially valid, does not represent the jury's intended result.

Author's Note: Since the preparation of this article, the Eighth Circuit's opinion in *Karl v. Burlington Northern R. Co.,* 880 F.2d 68 (8th Cir. 1989) was published in the Federal Reporter advance sheets. *Karl* was an appeal from a judgment entered in the Northern District of Iowa and involved the identical issue presented in *Prendergast.* The district court had amended the original verdict based upon juror evidence received after discharge that the damage interrogatory was answered with a net figure rather than a gross figure. In reversing the lower court, the Eighth Circuit decided the issue contrary to the Iowa Supreme Court in *Prendergast* and held the evidence inadmissible under Rule 606(b). 880 F.2d at 73-75.

PROCRASTINATE NO LONGER!

THE 1989 SILVER ANNIVERSARY ANNUAL MEETING IS FAST APPROACHING!
SEND YOUR REGISTRATION CARDS IN TODAY!

As you know, this year is the 25th Anniversary of the founding of our Association and we would like to encourage all of you to attend to help celebrate this occasion. The program is excellent and the special events you'll certainly enjoy.



Remember, space is limited on the *Pathfinder Dinner Train* Thursday night; it is on a first-come basis - don't be one of those left on the platform waving goodbye!.

SILVER ANNIVERSARY ANNUAL MEETING PROGRAM
OCTOBER 26, 27 & 28, 1989

THURSDAY, OCTOBER 26th

7:00 a.m.	**Board of Directors Meeting**
8:00 a.m.	**Registration**
8:45-9:00 a.m.	**Report of the Association**
9:00-10:00 a.m.	**Worker's Compensation Update Highlights and Compensible Suicide** Judith Higgs - Sioux City
10:00-10:30 a.m.	**IDCA Task Force Review of Civil Jury Instructions** Thomas D. Hanson and David L. Phipps — Des Moines Angela Simon — Dubuque Gregory M. Lederer — Cedar Rapids
10:30-10:45 a.m.	**Break**
10:45-11:45 a.m.	**IDCA Task Force Review of Civil Jury Instructions**
11:45-12:15 p.m.	**Ethics and *Mallard v. U.S. District Ct. of Iowa,*** Gordon E. Allen - Des Moines
12:15-1:00 p.m.	**Luncheon**
1:00-1:30 p.m.	**Fair Settlement or Failed Justice? A Defense Lawyer's Ethical Dilemma** The Honorable Linda K. Neuman, Justice, Iowa Supreme Court
1:30-2:30 p.m.	**Accounting for Lost Profits in the Business Interruption Case** Stephen G. Morrison - Columbia, SC
2:30-3:30 p.m.	**The Problem of Unreliable Expert Witness Testimony** Thomas M. Crisham - Chicago, IL
3:30-3:45 p.m.	**Break**
3:45-4:45 p.m.	**First Party Bad Faith in Iowa** Timothy J. Walker - Des Moines
4:45-5:15 p.m.	**A Fresh Look at Voir Dire** John D. Stonebraker - Davenport
6:30-9:30 p.m.*	Dinner aboard the ***Pathfinder Dinner Train***

***Note: 6:00 p.m.** Chartered buses to leave from NORTH side of University Park Holiday Inn for transportation to Train Station

FRIDAY, OCTOBER 27th

8:45-9:45 a.m.	**Defending Toxic Tort Cases** Richard J. Sapp - Des Moines
9:45-10:15 a.m.	**Comparative Fault Update** Gregory G. Barntsen - Council Bluffs
10:15-10:30 a.m.	**Break**
10:30-11:30 a.m.	**Settlement Techniques and Releases** Eric J. Magnuson - Minneapolis, MN
11:30-12:00 p.m.	**Discovery Sanctions and IRCP 125** Constance M. Alt - Cedar Rapids
12:00-1:00 p.m.	**Luncheon**
1:00-1:30 p.m.	**Current Developments in Federal Practice** The Honorable Ronald E. Longstaff Magistrate, U.S. District Court
1:30-2:30 p.m.	**Operator's Manual for a Witness Chair** Thomas O. Baker - Kansas City, MO
2:30-3:00 p.m.	**Current Activities of National Defense Associations - Representatives of:** International Association of Defense Counsel, Federation of Insurance and Corporate Counsel, Association of Defense Trial Attorneys
3:00-3:15 p.m.	**Break**
3:15-4:15 p.m.	**Needs of Our Civil Justice System from a National Perspective** Barry Bauman - Washington, DC
4:15-4:45 p.m.	**Reminders and Suggestions on the Use and Non-use of Depositions Under Iowa Rules** John B. Grier - Marshalltown
6:00-7:00 p.m.	**Reception**
7:00 p.m.	**Annual Banquet**

SATURDAY, OCTOBER 28th

9:00-10:00 a.m.	**Annual Appellate Case Review** Gregory M. Lederer - Cedar Rapids
10:00-10:15 a.m.	**Break**
10:15-10:45 a.m.	**Statutory Limitations on an Employer's Right to Discharge Employees** Iris E. Muchmore - Cedar Rapids
10:45 a.m.	**Election of Officers and Directors and Recess Annual Meeting**
11:30 a.m.	**Board of Directors Meeting**

NOTE FROM THE EDITORS

In the last five to ten years we have noticed with increasing frequency a practice in our profession which has us disturbed. We are referring to the customary letter sent by an insured's personal counsel to the insurer-retained defense counsel demanding that the insured's liability limits be offered towards settlement. It is not the "limits demand letter" itself which troubles us, but rather, the cavalier way in which it is used.

For the most part, these letters appear to be written after minimal consultation with the insured and include no meaningful analysis of the liability and damage issues contained in the action. As such, the letter provides no real aid to the insurer and defense counsel in evaluating the claim and arriving at a reasonable settlement offer. If, as it appears, the "limits demand letter" is not intended to provide the insurance defense counsel with additional, reasoned insight into the issues of the case, what then is its purpose? Simply put, the "limits demand letter" is written as an exercise to create an exhibit for the potential bad faith case which will arise should a judgment in excess of limits be rendered. While the insured's personal counsel may feel that he has satisfied his duty to his client by creating such an exhibit, his actions have, for the most part, done nothing to benefit his client and may in fact have hurt him.

We do not advocate that "limits demand letters" never be used, only that they be used in situations where they are meaningful. Every case is not a limits case, so they should not be sent out every time a client seeks advice on an excess problem. When they are utilized, the writer should spend sufficient time analyzing the case to make his opinion worth something. And finally, personal counsel should see that his communications are directed solely at the insurer and/or defense counsel. There is no need to involve plaintiff's counsel and reinforce his evaluation of the case.

The ultimate purpose of a "limits demand letter", it should be remembered, is to minimize the client's personal exposure, not to set the insurance company up for a bad faith claim. If personal counsel directs his attention to that purpose rather than to the creation of a trial exhibit, all parties on the defense side, insured and insurer, will be benefited.

The Editors:
Kenneth L. Allers, Jr., Cedar Rapids, IA
Michael W. Ellwanger, Sioux City, IA
John B. Grier, Marshalltown, IA
James A. Pugh, West Des Moines, IA
Ross A. Walters, Des Moines, IA

James A. Pugh
5400 University
West Des Moines, Iowa 50265

Hon. Wm. Pattinson
2810 Eisenhower
Ames, IA 50010