defense UPDATE

The Iowa Defense Counsel Association Newsletter October, 1991 Vol. IV No. 4

Litigation Sanctions

By L.W. Rosebrook and Michael J. Eason, Des Moines, Iowa

The recent activity of the United States Supreme Court in the area of litigation sanctions has been noted by Court observers. *See, e.g.* Stewart, *The Year of Sanctioning Litigants,* 77 A.B.A.J. 34 (August 1991). Similarly, passing references to litigation sanctions (requested or imposed) are becoming increasingly common in the reported decisions of the Iowa Supreme Court. The purpose of this article is to alert the reader to the most important recent developments in the federal and Iowa law of litigation sanctions.

The basis for most litigation sanctions in the Iowa courts is Iowa Rule of Civil Procedure 80(a). The rule provides, in relevant part:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: Counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

If a court paper is signed in violation of the rule, sanctions are mandatory and may be imposed on the person who signed the paper, a represented party, or both. *See Franzen v. Deere and Co.,* 409 N.W.2d 672, 674 (Iowa 1987) (discussing mandatory character of rule 80(a)).

The language of rule 80(a) closely parallels the language of rule 11 of the Federal Rules of Civil Procedure:

> The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Sanctions are mandatory when rule 11 is violated, and may be imposed upon the person who signed the offending court paper, a represented party, or both. Iowa courts look to federal cases applying rule 11 for guidance in applying rule 80(a). *Mathias v. Glandon,* 448 N.W.2d 443, 445 (Iowa 1989).

In its 1990-91 term, the United States Supreme Court decided two cases on the topic of litigation sanctions. In both cases, the Court demonstrated its willingness to sanction litigants -- and not just their attorneys -- for abusing the legal process.

"The purpose of this article is to alert the reader to the most important recent developments in the federal and Iowa law of litigation sanctions."

In the first of the two cases, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* -- U.S. --, 111 S.Ct. 922, 112 L.Ed.2d. 1140 (1991), the power of the federal courts under rule 11 was at issue. Business Guides, Inc. is a publisher of trade directories. The company plants "seeds," or deliberately inaccurate entries, in its own directories. When a Business Guides seed appears in a directory published by a competitor of the company, it is deemed by Business Guides to be evidence of copyright infringement by the competitor.

The case began as an action for copyright infringement based on the alleged presence of 10 Business Guides seeds in a directory published by Chromatic. The president of Business Guides and the company's attorney signed an application for a temporary restraining order (TRO), which was submitted with supporting affidavits signed by other employees of Business Guides. As the factual basis of the action began to crumble under investigation, supplemental affidavits from other Business Guides employees were submitted in a effort to justify the lawsuit.

The federal district court quickly discerned that there was no basis in fact for the copyright infringement action and request for a temporary restraining order. The court eventually imposed rule 11 monetary sanctions against Business Guides on the ground that the company had not made a reasonable inquiry before its president signed the initial TRO application and its research director signed a supplemental affidavit. After the court of appeals affirmed, the Supreme Court granted certiorari to decide "whether Rule 11 of the Federal Rules of Civil Procedure imposes an objective standard of reasonable inquiry on represented parties who sign pleadings motions, or other papers." -- U.S. at --, 111 S.Ct. at 925, 112 L.Ed. 2d at 1149.

Continued on page 10

MESSAGE FROM THE PRESIDENT

Alan E. Fredregill

COLLEGE OF TRIAL PRACTICE A SUCCESS

By any measure, the First Annual Iowa Defense Counsel Association College of Trial Practice was a resounding success. Held August 22-24 at the Holiday Inn University Park in West Des Moines, students from around the state were treated to first rate faculty presentations coupled with actual trial practice. Plans are already underway for next year's event. Dates will be selected and announced during the Annual Meeting. The Association is indebted to "Chancellor" David Phipps and "Dean of Student Affairs" Edward F. Seitzinger for their many hours of service in preparing and conducting this excellent educational event.

JURY INSTRUCTIONS, PART II

Greg Barntsen, Chair of the Task Force which has continued the Association's review of the Iowa Civil Jury Instructions, reports that the final draft is in the hands of the printer. Publication and mailing of Part II should occur within the next month for insertion into your white binder. Watch your mail!

CASE REPORT SYSTEM SWELLED BY RECENT ADDITIONS

As a result of a September mailing sent at the behest of office manager Judy Oggero, new contributions are being received to the IDCA case report system. Thanks to the following for their suport: Roland Peddicord, Jim Pickens, Robert Blink, Mark Woollums, Dennis Gray, Graig Warner, John Telleen, Timothy Walker and Marion Beatty. Keep up the good work!

MARLETT ANNOUNCES RETIREMENT

Gene Marlett, Treasurer of the Iowa Defense Counsel Association for the past 10 years, has announced his retirement from Farm Bureau Mutual Insurance. We are sad to report that he also will be resigning his post with the Association.

It is difficult to determine the enormous amount of time and effort Gene has devoted to the Association's business over the past decade, but there is no difficulty assessing the positive influence he's had. Due to his diligence, the Association has been, and continues to be, on a sound financial basis. We'll sorely miss Gene, and wish him the best of luck in retirement endeavors.

AMERICAN COLLEGE ANNOUNCES COURAGEOUS ADVOCACY AWARD

Ralph Gearhart, past president of this Association, and a member of the American College of Trial Lawyers, has alerted the IDCA to an award for "Courageous Advocacy" to be given by the College.

The award is given for outstanding efforts by a lawyer, whether or not a member of the College, on behalf of a controversial cause or client where the representation "occurs in the face of actual or possible disfavor or public unpopularity or adverse treatment by the media of the lawyer, client or cause."

Applications for consideration for the award should be mailed to Ralph, 500 Firstar Bank Building, P.O. Box 2107, Cedar Rapids, Iowa 52406-2107.

ASSOCIATION NEW YEAR

With the Annual Meeting and Seminar in October, the Association enters its 28th year of service to the defense bar of the State of Iowa. It has been my great privilege to serve as the 27th President. Rest assured that the enduring values and traditions of the Association are being passed to the capable hands of President-Elect David Hammer and Secretary Jack Grier. Thank you for the opportunity to be of service.

Alan E. Fredregill
PRESIDENT

1991 IDCA Annual Meeting

October 24, 25 & 26

Please mail TODAY the Annual Meeting registration form you received the week of September 9, 1991 - time is getting short! This year's meeting, "The Old Masters Course in the Defense of Civil Lawsuits," presented by past presidents of IDCA, will no doubt be a one-of-a-kind event—— *over 625 years of defense experience at your disposal!* The Italian Fest Thursday evening will be superb and the Annual Banquet Friday evening with the entertainment of Boyce Hollerman, a southern genteman and attorney, will be most enjoyable. **To miss any part of this Annual Meeting will be your loss!** We submit the program again for your benefit. (Registration Form enclosed.)

THURSDAY, OCTOBER 24

8:00-8:30 a.m. **Registration**
8:30-8:45 a.m. **Welcome by Alan E. Fredregill,** President, Iowa Defense Counsel Assn.
8:45-9:00 a.m. **Robert J. Federman,** President, FICC
9:00-10:00 a.m. **Ethics** - Norman G. Bastemeyer
10:00-10:15 a.m. **Mid-morning Break**

Discovery: Federal and State

10:15-11:00 a.m. **Discovery as a Weapon and a Response** Part I - Don N. Kersten
11:00-11:30 a.m. **Discovery as a Weapon and a Response** Part II - Claire F. Carlson
11:30-12:15 p.m. **The Failure to Let The Plaintiff Discover:** Legal and Ethical Consequences - Thomas D. Hanson

Experts

12:15-1:45 p.m. **Luncheon**
Observations of a Sitting Judge -Honorable Peter van Metre

Other Pre-Trial Matters

1:45-2:30 p.m. **Motion Practice** -Kenneth L. Keith
2:30-3:15 p.m. **The Effect of Comparative Fault on the Trial** - Philip J. Willson
3:15-3:30 p.m. **Mid-afternoon Break**
3:30-4:15 p.m. **The Selection, Care & Feeding of Experts and Their Dismemberment** - Patrick M. Roby
4:15-5:00 p.m. **The Settlement Alternative -- Some Peculiar Problems:** What Happens When Your Carrier Will Not Accept Your Advice or When Your Client and Carrier Disagree - David L. Phipps
5:00-6:00 p.m. **Hospitality Room Open**
6:00 p.m. **Aperitivi** (Cocktails)
7:00 p.m. **Italian Fest**

FRIDAY, OCTOBER 25

The Trial

8:30-9:15 a.m. **Jury Selection, Method and Ethics** - Raymond R. Stefani, Sr.
9:15-10:00 a.m. **Opening Statement** - Craig D. Warner
10:00-10:15 a.m. **Mid-Morning Break**
10:15-11:15 a.m. **Testimonial Objections and Cross-Exam** - Robert G. Allbee
11:15-12:00 **The Art of Summation** - Robert V. P. Waterman, Sr.
12:00-1:30 p.m. **Luncheon**
Remarks by the Honorable Arthur A. McGiverin, Chief Justice, Iowa Supreme Court
1:30-2:20 p.m. **Summations in the case of the administrator of the Estate of Humpty Dumpty, Plaintiff, vs. the owners of the wall, and certain medical doctors, d/b/a All the King's Men, Defendants.** The facts as stated are:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the King's horses,
And all the King's men,
Couldn't put Humpty together again.

Suit was brought against the landowner and the treating doctors. The gravamen against the owner is that, although on private property, the wall was attractive to children, was dangerously high and unprotected and had no warning signs. The claim against the doctors is that they failed to exercise the requisite standard of care. The parties defendant have each affirmatively raised the issue of comparative fault of decedent Dumpty.

1:30-1:45 p.m. **For the Plaintiff** - Tom Riley
1:45-2:00 p.m. **For the Defendant Landowner** - Patrick M. Roby
2:00-2:15 p.m. **For the Defendant Doctors** - Kenneth L. Keith
2:15-2:20 p.m. **For the Plaintiff** - Tom Riley

Support Staff: Who Will Succor The Defense Attorney?

2:20-2:45 p.m. **Effective Use of Your Own Staff, Wordsmiths and Forensic Psychologists** - Alanson K. Elgar
2:45-3:00 p.m. **Mid-afternoon Break**
3:00-3:15 p.m. **History of IDCA** - Edward F. Seitzinger, IDCA Founding President
3:15-4:00 p.m. **What Defense Organizations Can Do To Help The Defense —**
Karl Tippett - ADTA President
David Beck - IADC President
Bob Monnin - DRI President

The Future

4:00-5:00 p.m. **Symposium on the Near-Term Future:** What Those Defense Lawyers Under 40 May Expect During Their Practices - Herbert S. Selby, Edward F. Seitzinger, Marvin F. Heidman, Harold R. Grigg, LeRoy R. Voights, and Ralph W. Gearhart, Moderator
5:00-6:00 p.m. **Hospitality Room Open**
6:00 p.m. **Reception**
7:00 p.m. **Annual Banquet**
Boyce Hollerman, Guest Speaker

SATURDAY, OCTOBER 26

9:00-9:15 a.m. **Worker's Compensation Update - Part I** - Brad Price
9:15-9:30 a.m. **Worker's Compensation Update - Part II** - Jaki K. Samuelson
9:30-10:15 a.m. **Case Update** - Gregory M. Lederer
10:15-10:30 a.m. **Mid-morning Break**
10:30-11:00 a.m. **Case Update, Continued** - Gregory M. Lederer
11:00-11:30 a.m. **Legislative Report** - E. Kevin Kelly and Herbert S. Selby
11:30-12:00 **Annual Meeting and Election of Officers**

THE DEFENSE OF CATASTROPHIC DAMAGES

(Third of Three Part Series)

By Joseph L. Fitzgibbons, Estherville, Iowa, and Michael W. Ellwanger, Sioux City, Iowa.

ANNUITY EVIDENCE

As indicated in the previous two articles, the third topic addressed in this series will be the use of annuity evidence to reduce the damage exposure. Where the Plaintiff is contending that a substantial annual sum is required in order to meet medical costs and replace lost income, the defendant may be able to offer evidence to the effect that an annuity could provide this "stream of income" for an amount substantially less than plaintiff is proposing. There are several reasons why annuities can do this. First, as a matter of simple mathematics, where the original sum is invested and expended over the course of the annuity, a lesser sum can result in sufficient income to meet the plaintiff's demands. Furthermore, insurance companies that sell annuities frequently will provide and "impaired life quote." The insurance company, after reviewing the medical records, will often conclude that the individual will not have a normal life expectancy and therefore the premium charged for a guaranteed life annuity is less than with a person with a normal life expectancy. In cases of catastrophic injury this can be a significant savings.

The basic relevance argument that defendants rely upon is that the jury must reduce the damage award to present value. Iowa Jury Instruction 200.35 defines present value as "a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compenstate the plaintiff for further losses." A "reasonable rate of return" requires the jury to be familiar with what "rates of return" are available. An annuity certainly does constitute a "return." Furthermore, Rule 702, Iowa Rules of Evidence, provides that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. To the extent that the jury must determine present value, it would seem that an annuity expert could testify regarding annuities.

The issue has never been determined by the Iowa Supreme Court. One old case is often cited -- *VonTersch v. Ahrendsen,* 99 N.W.2d 287 (Iowa 1959). In this case the plaintiff called a local banker who testified that 3% per annum would be a fair return on a safe investment. The plaintiff then called a mathematician who testified that a certain sum of money would be required to provide a monthly income at a specified level over the life expectancy of the plaintiff, using the interest rate that the banker had testified was reasonable. According to this computation, at the end of the life expectancy period the fund would be exhausted. The Court held that this testimony was admissible, stating at page 291:

> We have not heretofore passed upon the questions presented. If this evidence is admissible, it is admissible to aid the jury in making their determination of the sum to be awarded plaintiff as the present value of the loss or impairment of future general earning capacity occasioned by permanent injuries, if any. And is to be taken into consideration, by the jury, with all of the other facts and circumstances bearing thereon shown in the evidence in making their determination.
>
> The testimony here was not testimony of the cost of annuity but testimony of the present value of the sum necessary to allow plaintiff a monthly income for the remainder of his life expectancy. No question of profit to an insurance or investment company or of undisclosed factors is involved.

The Court went on to indicate that other jurisdictions have approved the use of "annuity tables."

This case appears to stand for the proposition that simple mathematical annuity tables are admissible, but the cost of an annuity would not be admissible. However the Court's language regarding insurance annuities is pure dicta. Furthermore, in this case it was the plaintiff who was attempting to offer the annuity evidence. The Court may well have been cautious about unfairly increasing the damages by including a profit factor for the insurance company. This consideration would not apply if a defendant was attempting to offer the cost of an insurance annuity contract.

In the medical malpractice case which is the focus of this series of articles, the defendant proposed to use the testimony of an insurance broker. An insurance broker fed medical information to the insurance company with whom he had an agency relationship. The insurance company then came back with an impaired life determination. The broker then plugged this information into a computer and the computer generated a "cost" for the desired annuity. A Motion In Limine was filed to prohibit this testimony. In its briefing the plaintiff relied upon a series of cases involving Air Illinois, Inc. *Singh v. Air Illinois, Inc.,* 1988, 165 Ill. App.3d 923, 117 Ill. Dec. 501, 520, N.W.2d 952; *Exchange National Bank of Chicago v. Air Illinois, Inc.,* 1988, 167 Ill. App. 3d 1081, 118 Ill. Dec. 691, 522 N.E.2d 146; and *Lorenz v. Air Illinois, Inc.,* 1988, 168 Ill. App. 3d 1060, 119 Ill. Dec. 493,522 N.E.2d 1353. The plaintiff also relied upon *Herman v. Milwaukee Children's Hospital,* 361 N.W.2d 297 (Wisc. App. 1984). The defendant relied upon the case of *Cornejo v. State of Washington,* 788 P.2d 554 (Wash. App. 1990). The Court also indicated that there was support for

Continued on page 15

Treating Physicians and Rule 125: Defense Limbo

By George Lindeman and John McCoy, Waterloo, Iowa

Effective on August 3, 1987, former Iowa Rule of Civil Procedure 125 (regarding supplementation of pretrial discovery responses) was transferred in large measure to Rule122 (d). The primary substantive change of this amendment is to require a party to supplement discovery responses regarding the identity of all trial witnesses, not just expert witnesses.

In turn, former Rule 122(d) was modified and transferred to new Rule 125, which was subsequently amended on September 1, 1988. New Rule 125 consolidated all matters regarding expert-witness discovery. New Rule 125 includes a revised duty to supplement discovery as to expert witnesses within a more specific time frame and codifies the common-law power of the trial court to exclude or restrict the testimony of any expert whose identity or proposed testimony is not properly disclosed.

In review of the minutes of the 1986 and 1987 meetings of the Iowa Supreme Court Advisory Committee on Rules, it appears that the primary reasons for the promulgation of new Rule 125 were to avoid last-minute disclosures of the identity and opinions of expert witnesses and to promote a uniform judicial practice within the State for restriction or limitation of expert testimony which was not properly disclosed.

It is well-established in Iowa the purpose of discovery is to avoid surprise and to permit the issues to become well-defined so that all parties can formulate their positions. Iowa is committed to a liberal construction of the rules of pretrial discovery.

New Rule 125 attempts to balance the historic countervailing considerations of pretrial discovery:

> (A) The need for disclosure of relevant information to facilitate the clarification and narrowing of the issues in preparation for trial; versus
> (B) The need to protect litigants from burdensome (expensive) litigation requirements and to protect the litigant's attorney from unfair disclosure of trial strategy.

Although new Rule 125 provides more particular requirements for the disclosure of trial experts and their information, the Rule (as all procedural rules) ultimately relies on judicial enforcement for its effectiveness. The liberal or restrictive construction of this rule by the judiciary will have a substantial impact on whether Rule 125 accomplishes the statutory purpose of the Iowa Rules of Civil Procedure to simplify the proceedings and to promote the speedy determination of litigation upon its merits.

New Rule 125 appears to provide a more effective procedure for discovery of expert information "acquired or developed in anticipation of litigation or for trial." However, the recent decision of *Day v. McIlrath* has left initial discovery procedures for "occurrence experts" in limbo. That is, if an "expert" acquires his or her information in a relationship with any party not initiated by litigation, when and how can an adversary obtain discovery information from such an expert?

In *Day v. McIlrath,* Plaintiffs made a bodily injury claim against Defendants as a result of a motor-vehicle accident. In the course of pretrial discovery, one of the defendants propounded an interrogatory upon Plaintiffs seeking information from Plaintiffs' experts under new Rule 125. Plaintiffs objected to this interrogatory alleging that the treating physician's mental impressions and opinions were not acquired or developed in anticipation of litigation or for trial.

Upon Defendant's motion, the trial court ordered Plaintiffs to answer the interrogatory, but did not require the treating physician to sign his answers to this interrogatory. Plaintiffs then sought and received permission to raise an interlocutory appeal regarding this order.

The Iowa Supreme Court reversed the trial court's order, holding that the factual knowledge, mental impressions and opinions of the treating physician were not "acquired or developed in anticipation of litigation or for trial." Therefore, the Supreme Court found it "inappropriate to employ *all* disclosure procedures of Rule 125, including especially the requirement of the expert's signature,...." (Emphasis added).

The *Day* Court noted the provision of Rule 125(a)(1) which states as follows:

> Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge.

The Court noted that a treating physician normally learns the facts and forms opinions before being retained in litigation as an expert and often before the parties anticipate litigation. The Court also noted that a treating physician "ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability) which may become paramount in the context of a lawsuit." Finally, the *Day* Court stated:

Continued on page 13

IN THE PIPELINE

Product Liability Statute To Be Examined

By John Werner and Daniel J. Hanson, Des Moines, Iowa

Iowa Code § 613.18, which provides protection to non-manufacturers in some kinds of product liability suits, has been on the books since 1986. The Iowa Supreme Court has not had an opportunity to interpret Iowa Code § 613.18, but it may soon.

In August of 1989, the Iowa District Court for Polk County ruled that a non-manufacturer of a product could not be sued upon strict liability in tort or breach of implied warranty of merchantability for a defect in the original design of a product, pursuant to Iowa Code § 613.18. This ruling is on appeal to the Iowa Supreme Court. *Bingham v. Marshall & Huschart Mach. Co., Inc.*, No. 91-575.

The *Bingham* case involves a tablefeed multiple drilling machine manufactured by Moline Tool Company. In the mid-1970's, the machine was sold to John Deere & Co. by the area distributor, Marshall & Huschart Machinery Company. Marshall & Huschart did not design, assemble, or alter the machine in any way. Marshall & Huschart never actually possessed the machine itself. Marshall & Huschart was merely a sales agent who processed the sale.

In 1987, Mr. Bingham, while working at the Deere plant, was using the machine. While Mr. Bingham had his hands in the machine, a co-worker activated the machine, resulting in injury to Mr. Bingham's right thumb. Mr. Bingham sued Moline Tool and Marshall & Huschart on theories of strict liability, breach of warranty of merchantability, and negligence. His wife and children asserted consortium claims.

Marshall & Huschart moved to dimiss the claims, based upon Iowa Code § 613.18, which provides in relevant part:

> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

The plaintiffs argued that Iowa Code § 618.13 did not provide any protection from liability to Marshall & Huschart because Moline Tool, the manufacturer, was allegedly without assets. The plaintiffs asked the Iowa District Court to declare that Moline Tool was insolvent.

The Iowa District Court denied the plaintiffs' request to rule the manufacturer insolvent, and dismissed the counts against Marshall & Huschart based upon strict liability and breach of warranty. The plaintiffs then dismissed all of their causes of action against the manufacturer, Moline Tool. The case went to trial on a negligence theory and Marshall & Huschart prevailed.

On appeal, the main issue concerns the effect of Iowa Code § 613.18. The plaintiffs principal contention is that the statute is intended to grant protection to a wholesaler, retailer, distributor, or other seller *(i.e.,* a "middleman") *only* when the manufacturer is solvent. Under the plaintiff's interpretation of the statute, if the manufacturer is insolvent (as the plaintiffs contended Moline Tool was), then a middleman is not afforded any protection from liability under the statute. The plaintiffs also contended that the statute was ambiguous.

The defendant contends on appeal that the statute is unambiguous. The alleged defect in this case (a lack of dual controls) is clearly a design defect over which Marshall & Huschart had no control. In other words, the alleged defect is a "defect in the original design of manufacture" within the meaning of paragraph 1(a). Where the alleged defect is a "defect in the original design or manufacture," the middleman cannot be sued; solvency or insolvency of the manufacturer is irrelevant.

A number of other states' statutes provide for varing degrees of immunity or protection of middlemen in cases of strict liability or breach of warranty. No other state has a statute similar to Iowa Code § 613.18.

The plaintiffs contend that if the District Court is affirmed, all sellers or retailers will be totally exempt from products liability actions in Iowa. The defendant argues that unqualified immunity from suit exists only when there is a "defect in the original design or manufacture." Assemblers of products are entitled to some protection from liability, but their protection is qualified. When the defect is not one "in the original design or manufacture," then middlemen have qualified protection from liability under paragraph 1(b), and the middlemen lose that protection if the manufacturer has been judicially declared insolvent.

The defendant asserts that the statute is intended to repeal the common law principle of holding a middleman strictly liable for a defect over which the middleman had no control.

The issue has been briefed by both parties and it is expected that oral argument will be scheduled in a few months. □

Report of 1991 Legislative Session

By E. Kevin Kelly, Lobbyist of Iowa Defense Counsel Association

The 1991 Session of the Iowa Legislature was absolutely not a fun experience for anybody involved in the process. The staff, the press, the politicians, and most of all the lobbyists will look back on the first four months of 1991 and sigh with relief that it came to adjournment on Mother's Day morning. It came to an end with no great harm to the state, but no great help either.

It is important to remember they adjourned with a budget in an absolute chaos; there is no way a reasonably intelligent individual could look at the mess and believe that there is any semblance of balance to it. The prognosis at adjournment was it will get even worse moving into the fiscal year and even the layoffs will not solve the problem, only defer its final impact.

Of initial concern during the last session was the reapportionment question. In the end it turned out to be a non-issue, but until mid-April it was in the back of the minds of all of the legislators. The concern with reapportionment and the burden of the budget created a very volatile legislative environment. Everybody involved in the process was in a defensive mode. Too many times in the past, leaders have gone to the back rooms and let the members entertain themselves with a lot of bills that were fraught with opportunity to creative havoc with one group of interests or another. As I said before, collectively, there was a sigh of relief that no great damage was incurred. Unfortunately, it also did not provide a fertile legislative ground to do a lot of affirmative programs either.

The issues of concern to the Iowa Defense Counsel Association, however, did not fare all that poorly in this environment. There were even some mild gains. Foremost among them was a piece of legislation that overturned the *Hernandez* vs. Farmers Insurance Company 460 N.W.2d 842 (1990) ruling that allowed stacking of insurance policies. This provision to allow insurance companies to enforce the anti-stacking provisions of their policies was added as an amendment to the Insurance Commissioner's Bill.

Also on the association's agenda was a proposed piece of legislation that met with partial success. House File 594 was the Iowa Defense Counsel Association bill that would allow for ex parte physician interviews by either party's lawyer. The concept is identical to the circumstances that occur in workers' compensation cases. When a litigant puts his health in issue, the opposing attorney has an effective release to undertake an informal discovery visit with that litigant's medical evaluators.

We were able to pass the bill in the house by an overwhelming majority and then get the bill out of the Senate Judiciary Committee and on the floor for debate. After several attempts to get the bill debated, time began to run out. Just when it appeared that we would have our day on the floor, the Chairman of the Senate Judiciary Committee, in an unusual procedure, called the bill back to the Senate Judiciary Committee for the balance of the session. In a last ditch effort, we almost succeeded in adding the language of the bill as an amendment in a conference committee to a bill related to tort law. We failed only because of the absence of a key legislator at the crucial hour and an intense state-wide call program by the plaintiffs' attorneys.

The bill we were trying to put our privileged communication language legislation on was House File 335. This bill was intended to modify the Supreme Court Decision on *Miller vs. Wellman Dynamics Corporation* 419 N.W.2d 380 (1988) which said there is no cause of action for loss of services for an adult child. The House sponsor and floor manager of the bill was a new freshman lawyer-legislator who had had his decision in this matter overturned by the Court. He was obviously very close to the case. After the bill left the House, it underwent some substantial changes in the Senate. The bill was further modified in a conference committee, but failed to become law because of the Governor's veto.

The association also introduced for the legislators' consideration five other pieces of legislation. They included a bill designed to bring the consortium claims under the comparative fault law of the state. We also presented legislation that would allow the defense attorney to present in evidence the failure to use seat belts in a personal injury case without any restrictions on the evidence, or possible findings therefrom and a proposal that would make several modifications to Iowa's punitive damage law. The other two pieces were bills that would put limitations on cases for emotional distress when no actual injury took place and which would amend the statutory restrictions on the introduction of collateral sources which might go to mitigate the amount of damages.

In the beginning of this article I tried to explain the problems of the Session. It perhaps could best be summarized in the legislators' own words when a small group of them published what they called "The Top Ten List of Reasons to Adjourn." Two on the list that can be shared here are: (1) several of the livers of the legislators have been placed on the toxic waste site list and (2) that the leaders' backbone grafts have all failed. □

Before you give someone a piece of your mind - be sure you can get by with what you have!

Iowa Defense Counsel Association's **First** College of Trial Practice

By David L. Phipps, Des Moines, Iowa

COLLEGE OF TRIAL PRACTICE A TREMENDOUS SUCCESS!

"The presentations given were the best I've seen at any type of CLE program."

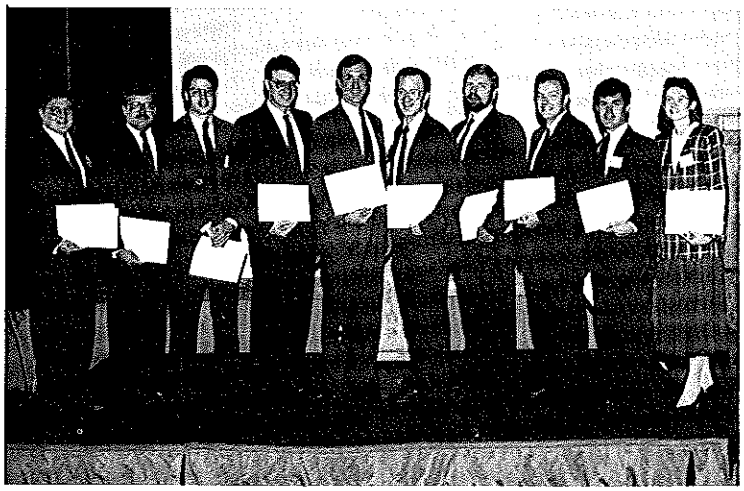
August 22nd through the 24th marked the first Iowa Defense Counsel Association's College of Trial Practice. the intensive 2½ day workshop was held at the University Park Holiday Inn in West Des Moines, Iowa. The first 11 participants in the College ranged in experience from recent law school graduates to 12 years of practice. They studied and practiced all trial procedures from the *voir dire* to verdict. Using a prepared summary or record of a fictional case entitled *Watson v. Thompson* the participants divided into participation groups to practice each aspect of the trial in a courtroom setting.

The college concluded on Saturday morning with a three hour mock trial carried out by each of the participation groups. Each of the sessions and the mock trial was accompanied by a meaningful session of critique by the other students and by faculty members. The College awarded certificates of completion to each of the ll participants at a ceremony held at the conclusion of the College.

The Iowa Defense Counsel Association's College of Trial Practice was a tremendous success thanks to the faculty which consisted of Philip J. Willson, Thomas A. Finley, Kasey W. Kincaid, Alan E. Fredergill, Carol A.H. Freeman, Robert J. Blink, Robert G. Allbee, Patrick M. Roby and Mark L. Tripp.

David L. Phipps served as chancellor. Edward F. Seitzinger served as Dean of Student Affairs and Eugene Marlett served as Registrar.

1991 GRADUATES



Left to right: Ken Winjum, Thomas Pospisil, Matthew Stierman, Mark Cory, Tom Peffer, William Early, Kent Kelsey, Michael McEnoe, Phil Jensen, Marsha Bormann. *Not shown:* Joel S. Hjelmaas.

Top left to right: Carol A.H. Freeman, Robert G. Allbee, Robert J. Blink, Philip J. Willson, Thomas A. Finley, Mark L. Tripp. *Bottom left to right:* Eugene Marlett, David L. Phipps, Edward F. Seitzinger, Alan E. Fredregill. *Not shown:* Kasey Kincaid, Patrick M. Roby.

The sessions of the College of Trial Practice were videotaped as were the final mock trials. The College was certified for 15¼ hours of Iowa C.L.E. credit. Application has also been made for federal credit.

Because of the positive experience of the College this year, it is anticipated that it will become a standard part of the Association's programming. Please watch future editions for the announcement of the forthcoming College of Trial Practice.

We would like to share some of the comments received from the students:

"On behalf of the 'students' of the Defense Counsel College of Trial Practice, I want to thank you for the opportunity to have participated . . .

Very rarely do participants at a seminar get to actually participate directly. Although you can pick up a lot of good ideas by hearing someone tell you of their experiences, it is only by practicing and doing a voir dire, an opening statement or a closing argument that you become comfortable with the process. As indicated by a number of the speakers at the College, until you become comfortable with the process, it's really not possible to focus on the more subtle, and more fun, refinments.

I found the Trial College to be a very worthwhile experience and will recommend it to other members of not only my firm but other firms as well"

Thomas P. Peffer

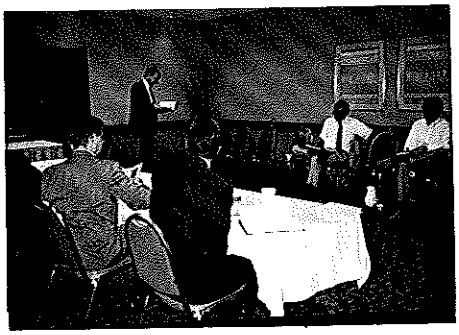
"I found the 1991 College of Trial Practice to be a valuable opportunity to learn from experienced and prominent trial attorneys. The lectures and materials were very informative and the critiques of our performances were particularly worthwhile. I would strongly encourage other attorneys to take advantage of this opportunity to brush up on trial skills from a defense perspective."

Joel S. Hjelmaas

"This letter is to express my appreciation for the work that you did in making the College of Trial Practice a success. I feel that I have greatly gained from my experience as a 'student' of the college. I am also thankful that the college was able to put together a truly outstanding faculty . . . I enjoyed the distinction made between 'litigators' and 'trial lawyers'. . . Although the speakers were excellent, the aspect of their 'college' that made it an outstanding experience was the fact that we had a chance to apply what we learned in the presentations . . . I hope that the Iowa Defense Counsel will continue to offer this program."

Ken A. Winjum

Mock Trials on Saturday were followed by sessions of critique.



This year's College was a tremendous success, and with all the enthusiasm displayed for the program, you can be assured that the 1992 College of Trial Practice will be even greater.

Litigation Sanctions Continued from page 1

In a 5-4 decision, the Court held that rule 11 does impose such a duty on represented parties who sign court papers. The Court wrote:

> [W]e hold that [rule 11] imposes on any party who signs a pleading, motion, or other paper -- whether the party's signature is required by the Rule or is provided voluntarily -- an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances.

-- U.S. at --, 111 S.Ct. at 933, 112 L.Ed.2d at 1159. The Court acknowledged that the adequacy of a represented party's legal inquiry will vary from case to case, depending on the resources and sophistication of the party.

One interesting aspect of *Business Guides* is its holding that affidavits submitted to a federal court are "other papers" within the meaning of rule 11. The dissenters complained:

> The majority's holding that affidavits are included among the "pleadings, motions, or other papers" covered by Rule 11 will doubtless be the portion of its opinion having the greatest impact, and will come as a surprise to many members of the bar. An affidavit submitted in support of a represented party's position will now have to be signed by at least one attorney, or else must be stricken pursuant to Rule 11's sixth sentence. I would construe the "papers" covered by Rule 11 to be those which, like pleadings or motions, invoke the power of the court, as distinct from supporting affidavits alleging factual matters as in this case or under Federal Rule of Civil Procedure 56.

-- U.S. at --, 111 S.Ct. at 939, 112 L.Ed.2d at 1166 (Kennedy, J., dissenting). Thus, affidavits filed in federal court on behalf of a represented party now must be signed by the party's attorney as well as the affiant. For purposes of sanctions, the merits of all such affidavits will be judged by rule 11 standards rather than the more lenient subjective bad faith standard suggested by rule 56(g) of the Federal Rules of Civil Procedure, for example.

Although probably less significant than *Businesss Guides* in its impact on the day-to-day practice of law, the opinion in *Chambers v. NASCO, Inc.*, -- U.S. --, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), is the most celebrated of the Court's recent pronouncements concerning litigation sanctions, probably because of the severity of the sanction imposed. The Court approved an order for sanctions of nearly $1 million against a represented party whose conduct included acts of fraud upon the court, other acts in contempt of court, the filing of frivolous pleadings and appeals, and abusive discovery tactics.

Chambers began as a simple action for specific performance of a contract in which Chambers agreed to sell his Louisiana television station's facilities and broadcast license to NASCO for $18 million. Within days of signing the contract, however, Chambers decided he did not want to sell to NASCO. NASCO insisted on performance. Chambers then embarked on what the district court found to be a scheme "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance." -- U.S. at --, 111 S.Ct. at 2130-31, 115 L.Ed.2d. at --. After more than three years of legal maneuvering by Chambers, NASCO obtained a final judgment in its favor.

Relying on its inherent power to sanction both conduct within and without the various federal statutes and rules of practice, the district court imposed sanctions against Chambers totalling nearly $1 million, which represented the amount of NASCO's litigation costs. Moreover, the Court reprimanded Chambers' sister (who assisted Chambers in attempting to deprive the court of jurisdiction), disbarred one of Chambers' attorneys, suspended another of them for six months, and suspended a third for five years. The court of appeals affirmed.

On certiorari, a 5-4 majority of the Supreme Court rejected Chambers' argument that the district court exceeded its authority by relying on its "inherent power" to sanction him without first taking all possible action under the various federal rules and statutes which allow for litigation sanctions. The Court held that when the district court finds, in its discretion, that the rules and statutes are inadequate to punish a party's bad faith conduct, the court may safely rely on its inherent power to fashion a sanction of sufficient impact. The Court wrote:

> It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," and that some of the other conduct might have been reached through other rules. Much of the bad faith conduct by Chambers, however, was beyond the reach of the rules, his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power

Continued on page 11

Litigation Sanctions Continued from page 10

> to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves.

Id. at ---, 111 S.Ct. at 2136, 115 L.Ed.2d at ---(citations omitted). The Court suggested that in the proper case, rule 11 also could support a sanction covering the entire cost of an innocent party's participation in meritless litigation.

The dissenters were again led by Justice Kennedy. Decrying the majority's "talismanic recitation of the phrase 'bad faith,'" the dissenters warned:

> Upon a finding of bad faith, courts may now ignore any and all textual limitations on sanctioning power. By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the rules and statutes, today's decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow.

Id. at ---, 111 S.Ct. at 2144, 115 L.Ed.2d at (Kennedy, J., dissenting).

The bad faith conduct in *Chambers* was so egregious that it is unlikely to be matched by many cases. Nevertheless, *Chambers* is important as an indicator of the Court's willingness to give federal district courts wide berth in policing both in-court and out-of-court conduct connected with civil litigation. The case demonstrates the breadth of the district court's discretion in ordering sanctions where it finds that a litigant has taken actions in connection with the litigation in bad faith. A federal court's inherent authority stretches as far beyond the bounds of rule 11 and the statutes of Congress as is necessary to deal with the range of abusive litigation tactics.

Although they lack the drama, controversy and high stakes of *Business Guides* and *Chambers,* the Iowa Supreme Court's recent opinions addressing the scope of Iowa Rule of Civil Procedure 80(a) probably are more important for the Iowa lawyer. The case of *Weigel v. Weigel,* 467 N.W.2d 277 (Iowa 1991), for example, was the Iowa Supreme Court's first opportunity to review an order of rule 80(a) sanctions levied against a represented party rather than an attorney. The court held that as long as an action is justified under the law and the facts, a party may not be sanctioned for filing the action merely because the party brought the action for an improper purpose.

Weigel began when, after Eva and Philip Weigel's marriage was dissolved and their property divided by court decree, Eva discovered evidence which tended to confirm her suspicion that Philip had understated his assets to the dissolution court. Thereafter an accountant reviewed Philip's records and advised Eva and her attorneys that Eva's suspicion was correct. Eva's attorneys then signed and filed a verified petition in equity accusing Philip of fraud.

The action proceeded to trial. The district court entered judgment for Philip after finding both Eva's testimony and the accountant's conclusions not credible.

On Philip's request for sanctions, the court refused to sanction Eva's attorneys because it found the attorneys had a reasonable factual and legal basis for filing the fraud suit. (The court did not decide whether rule 80(a) authorizes sanctions against an entire firm when one member violates the rule. Such sanctions are not authorized under rule 11 of the Federal Rules of Civil Procedure. *Pavelic & LeFlore v. Marvel Entertainment Group,* --- U.S. ---, ---, 110 S.Ct. 456, 460, 107 L.Ed.2d 438, 445 (1989). The holding of *Pavelic & LeFlore,* and other aspects of rule 11, may be up for reconsideration when the U.S. Judicial Conference's Advisory Committee on Civil Rules submits its report to the Standing Committee on the Rules of Practice and Procedure in September.)

Nothwithstanding its refusal to order sanctions against Eva's attorneys, however, the court did order sanctions against Eva. Citing the fact that during the dissolution action in 1984, "Eva told Philip that she would spend $100,000.00 to keep him from getting a penny of their assets," the court concluded:

> This [fraud] action was initiated by Eva to carry out her promise. Her verified Petition . . . was interposed for the purpose of harassing Philip Weigel and causing him to incur costs of litigation. Under the circumstances Eva should be required to pay Philip's reasonable expenses incurred, including a reasonable attorney fee.

Id. at 281.

On appeal, the supreme court affirmed the district court's refusal to sanction Eva's attorneys but reversed the order of sanctions against Eva herself. En route to its conclusion, the court clarified several aspects of rule 80(a) by explicitly endorsing the analogous federal law.

First, the court clarified the extent of discretion to be afforded district courts in assessing sanctions against attorneys and litigants. All facets of a district court's rule 80(a) determination now will be reviewed under the broadest abuse of discretion standard. The court noted, however, that even under this standard it "will still correct erroneous application of the law in the exercise of that discretion." *Id.* at 280. This is the same as the

Continued on page 12

If you always do what you have always done, you will always be what you have always been.

Litigation Sanctions Continued from page 11

analogous federal law explained by the Supreme Court in *Cooter & Gell v. Hartmarx Corporation,* --- U.S. ---, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

Second, the court adopted the federal standard for determining the "reasonableness" of an attorney's judgment that a court paper is justified by the facts and the law. Counsel's conduct is to be considered under all of the circumstances existing when the paper was filed, and is to be compared to the conduct of a reasonably competent attorney admitted to practice before the Iowa District Court. *Weigel,* 467 N.W.2d at 280-81 (citing *Golden Eagle Distrib. Corp. v. Burroughs Corp.,* 801 F.2d 1531, 1536-37 (9th Cir. 1986); *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 830 (9th Cir. 1986)).

The third and most significant point made in *Weigel* concerns the power of an Iowa District Court to order sanctions against a represented party. As previously noted, the district court in *Weigel* found Eva filed the fraud action "for the purpose of harassing Philip Weigel and causing him to incur costs of litigation." The supreme court did not question this finding. Nevertheless, the court reversed the order of sanctions against Eva. The court held that if counsel determines after reasonable inquiry that an action is well grounded in fact and law, then the client may not be sanctioned for going forward with the suit *even though the client's only purpose in doing so is to harass the opposing party.*

This holding of *Weigel* also is in accord with the analogous federal rule. *See, e.g., Jennings v. Joshua Indep. School Dist.,* 877 F.2d 313, 320 (5th Cir. 1989); *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 832 (9th Cir. 1986). Nevertheless, it seems at odds with the plain language of rule 80(a) which states a represented party may be sanctioned where a "motion, pleading, or other paper . . . [is] interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation." The court cited Practicalily as the justification for its decision:

> [I]f the rule were otherwise, actions such as dissolutions would provide endless work for courts in sorting out the sanctions possible in such emotionally charged and often acrimonious actions.

Weigel, 467 N.W.2d at 282.

The court attempted to add additional weight to its reasoning by distinguishing *Business Guides* and rule 11:

> [We note] substantial differences between federal rule 11 and Iowa rule 80(a) as they respect sanctions against parties. Federal rule 11 prescribes duties of "signers" to investigate the facts and the law in connection with proposed actions, while Iowa rule 80(a) imposes such duties only upon "counsel."

Weigel, 467 N.W.2d at 282. Although this observation is literally true, the authors submit it is not a valid distinction because rule 80(a) clearly authorizes sanctions against *represented parties* regardless of whether they signed the offending court paper.

Weigel, at first glance, appears to beat a significant retreat from the aggressive enforcement once envisioned for rule 80(a). *See, e.g., Franzen v. Deere and Co.,* 409 N.W.2d 672, 674 (Iowa 1987); Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach,* 36 Drake L. Rev. 483, 500-03 (1986-87). In fact, the case may be better understood as recognizing that the "improper purpose" prong of the rule was aimed more at abusive motions and discovery tactics than at the filing of lawsuits. The court's perceived disregard of the "improper purpose" prong of rule 80(a) may actually be the unfortunate consequence of an ambiguity in the rule itself. *Weigel* should not be allowed to impair the use of rule 80(a) for curtailing "hardball" litigation tactics, which, though well grounded in fact and law, should nevertheless result in sanctions if undertaken for an improper purpose. *Cf. Robinson v. National Cash Register Co.,* 808 F.2d 1119, 1130 (5th Cir. 1987) (decided under rule 11).

One month after *Weigel,* the court announced its opinion in *Fields v. Iowa District Court for Polk County,* 468 N.W.2d 38 (Iowa 1991). This supreme court opinion is the second to arise out of the case. In the first, *Darrah v. Des Moines General Hospital,* 436 N.W.2d 53 (Iowa 1989), the court held that voluntary dismissal of an action does not deprive the district court of jurisdiction to hear later-filed sanction motions.

The underlying action in *Fields* was a medical malpractice action in which the plaintiff, Darrah, was represented by attorney Fields. Darrah's action against her physician was resolved in the physician's favor on the merits, apparently because the expert witness whose testimony generally is required to prove medical negligence was never designated. *See* Iowa Code § 668.11 (1987); *Perin v. Hayne,* 210 N.W.2d 609, 613 (Iowa 1973). The district court later assessed sanctions against Fields in the amount of $9,204.

On appeal from the award of sanctions, the question was whether Fields had conducted a "reasonable inquiry" to determine whether the allegation of medical malpractice was "well grounded in fact." Fields argued that medical research he conducted at the state medical library, by itself, was sufficient to satisfy his obligation of "reasonable inquiry" before filing the suit.

The supreme court held that the district court did not abuse its discretion when it sanctioned Fields. The court listed several factors in support of its conclusion, including that there was no urgent time constraint which limited the amount of investigation which could be conducted prior to filing the petition; Fields did not obtain the opinion of any doctor prior to

Continued on page 13

Litigation Sanctions *Continued from page 12*

filing the petition; and he did not obtain any of Darrah's medical records prior to filing the petition. The court wrote:

> This wholesale failure to investigate prior to filing suit is a significant factor in assessing the adequacy of counsel's prefiling investigation. It was not adequate for Fields to rely on his client's account of what happened. The rule is that a reasonable inquiry into fact ordinarily requires more than exclusive reliance on the client's statement of the facts.

Fields, 468 N.W.2d at 39-40 (citations and quotations omitted).

Several points emerge from the court's opinion in *Fields:*

1. Prior to filing suit, an attorney is expected to make an effort to verify the client's version of the facts by resort to independent sources.
2. Prior to filing suit in a case which will require expert testimony to establish liability, an attorney is expected to obtain an expert opinion supporting liability on the facts of the case.
3. The two preceding requirements may be satisfied by a lower threshold of inquiry where the statute of limitations is about to run on plaintiff's claim.
4. An attorney's good faith belief in the merits of a client's case will not substitute for factual and legal inquiry.
5. An attorney's duty of inquiry under the rule is heightened when the attorney is on notice that other attorneys have found the case without merit.

The most remarkable point about *Fields* is that the case strongly suggests obtaining an expert opinion to support liability is a prerequisite to filing a medical malpractice action. Although the court balked at the chance to state this explicity, it approvingly cited a federal case which stated that medical malpractice counsel must "come to court armed with sound written medical opinions to support the particular claim." *Id.* at 39 (citing *Snipes v. United States,* 711 F. Supp. 827, 830-31 (W.D.N.C. 1989)). This requirement makes sense because many professional negligence cases, as a matter of law, cannot be proved without resort to expert testimony on the liability issue. *See, e.g., Baker v. Beal,* 225 N.W.2d 106, 112-13 (Iowa 1975) (legal malpractice); *Perin v. Hayne,* 210 N.W.2d 609, 613 (Iowa 1973) (medical malpractice).

Fields amd *Weigel* demonstrate the increasing use of rule 80(a) in the Iowa courts. *Business Guides* and *Chambers,* likewise, are examples of the increased use of litigation sanctions in federal courts. As these cases and others like them become more widely publicized, rule 80(a) and its federal counterpart will move closer to achieving their goals of "discourag[ing] dilatory or abusive tactics and [streamlining] the litigation process by lessening frivolous claims or defenses." *Franzen v. Deere and Co.,* 409 N.W.2d 672, 674 (Iowa 1987) (quoting Fed. R. Civ. P. 11 advisory committee note, *reprinted at* 97 F.R.D. 165, 198 (1983)). Achievement of those goals will be a welcomed development. □

Treating Physicians and Rule 125: Defense Limbo Continued from page 5

> In sum, we do not believe that a treating physician's factual knowledge, mental impressions and opinions stand on precisely the same footing, *especially in the early stages of litigation,* as those of the retained expert contemplated by Rule 125. (Emphasis added).

As you will note from the emphasis added in two of the preceding quotations from the *Day* opinion, the Iowa Supreme Court is apparently leaving open the possibility that certain provisions of Rule 125 may apply to treating physicians in the later stages of litigation. The potential application of Rule 125 to treating physicians is further suggested by the Court's reference to Rule 125(c) in the *Day* opinion:

> When a treating physician assumes a role in litigation analogous to the role of a retained expert, supplemental discovery under Rule 125(c) could become obligatory.

The Supreme Court's determination that a treating physician is not necessarily an expert retained in anticipation of litigation or for trial is consistent with certain federal decisions. However, by excluding treating physicians from the interrogatory requirements of Rule 125, the Supreme Court has placed Iowa defense counsel in a very precarious position. In most bodily injury cases, claimant's treating physicians are the primary experts on damage issues. The *Day* decision leaves the use of interrogatories to obtain pretrial information from these potential expert witnesses in limbo. Without such information, defense counsel may have difficulty in preparing deposition examination or trial cross-examination. Also, the *Day* decision does not address the issue of if, when and how a treating physician evolves into a Rule 125 expert.

As long as there are not more specific guidelines in the rules or by court decision, plaintiff's counsel exercises a substantial amount of control in determining if and when a treating physician becomes a trial witness for the purpose of answering interrogatories. Ironically,

Continued on page 14

Treating Physicians and Rule 125: Defense Limbo

Continued from page 13

Rule 125, which was intended to provide uniform, effective discovery of expert witnesses, may have spawned (at least in terms of an "occurrence expert", such as a treating physician) an appellate decision which appears to undermine a practical discovery tool which has been customarily used by defense counsel: Interrogatories regarding the opinions of plaintiff's treating physicians who will testify at trial.

It may be that the Supreme Court was concerned that the application of Rule 125 to treating physicians would cause an undue burden upon plaintiffs because plaintiffs could not control the treating physicians in requiring such discovery responses and because plaintiffs would be required to pay for the expert's time in responding to the interrogatory. These may be valid concerns for an uncooperative and/or nontestimonial physician; however, if a treating physician agrees to testify as a trial witness, such concerns are obviated and do not justify preventing defense counsel from obtaining sufficient information in order to adequately prepare for trial.

Defense counsel generally are not concerned regarding contemporaneous factual observations of the physician. The medical records, produced in response to a request for production of documents or subpoena, will identify such information and avoid unfair surprise at the time of deposition or at trial.

More bothersome issues to the defense are quasi-legal questions, such as permanency, disability, causation and future medical treatment and expense which may relate to expert opinions extrapolated from, and not necessarily readily discernable from, factual observations in the medical records. These quasi-legal, subjective expert opinions have very material effects on issues of legal responsibility and the amount of damages.

Defense counsel needs such quasi-legal information not only for effective preparation for examining the physician in deposition or trial, but also to isolate the issues which may require rebuttal testimony. It is difficult to believe that pretrial conferences or settlement negotiations can be effective unless the medical opinions of the primary treating physicians of personal injury claimants can be available to both sides within a reasonable period before trial.

Unfortunately, the *Day* Court appears to focus more on when and how information is received by the expert, as opposed to the substance of the expert's anticipated testimony. If a physician is going to testify regarding matters beyond contemoraneous factual observations, especially regarding the aforementioned quasi-legal opinions, the defense should have some reasonable opportunity to obtain such opinions before the physician's deposition or trial testimony. Otherwise, Rule 125, in the context of "occurrence experts", has effectively undermined a primary purpose of discovery: to avoid unfair surprise.

If defense counsel cannot rely on Rule 125 to identify testimonial treating physicians and their quasi-legal opinions, defense counsel might wish to consider the following approaches:

1. Interrogatories: While the *Day* decision may not require the disclosure of treating physicans' opinions through Rule 125 interrogatories (at least during the initial stages of litigation), *Day* certainly does not preclude the use of interrogatories to identify testimonial treating physicians. The identity of any potential trial witness, or of any person having knowledge of discoverable matters, is discoverable through interrogatories. The disavantage of interrogatories is that the opposing party dictates the timing of the disclosure of these individuals. Although the Iowa Rules of Civil Procedure require a party to properly supplement discovery responses to identify trial witnesses, it is extremely difficult to enforce such rules when the decision to designate a potential witness as a trial witness rests with a possibly dilatory, procrastinating or recalcitrant attorney.

Further, even though *Day* limits initial disclosure of treating-physician opinions, interrogatories directed to such physicians, especially regarding quasi-legal opinions, may be advantageous to lay foundation at trial to exclude eleventh-hour opinions on the basis of unfair surprise through Rule 125(d) or through the inherent power of the trial court.

2. Request for Production of Documents: *Day's* limited immunity for treating physicians from Rule 125 certainly does not preclude discovery of claimant's medical records pursuant to Iowa Rules of Civil Procedure 129 and 130. These records may identify a particular pool of prospective witnesses at an earlier date than disclosed by opposing counsel through interrogatory responses.

3. Depositions: The main weapon in the defense arsenal to extract opinions from treating physicians is the deposition. Court approval is not required for deposing an expert under the amended Iowa rules. The deposition, however, is a two-edged sword. On one hand, depositions can obtain all requested opinions directly from a treating physician. On the other hand, as noted earlier, the absence of pretestimonial disclosure of a physician's opinions may make it more difficult for defense counsel to examine the physician effectively, which is of particular concern because such depositions generally are admissible at trial. If placed in this position, defense counsel may wish to aggressively assert that the deposition fee of such a treating physician should be limited by Iowa Code Section 622.72 ($150/day), as opposed to a Rule 125 expert's fee as may be allowed by Rule 125(f).

4. Pretrial Scheduling Order: The preceding discovery techniques will not necessarily require plaintiff to identify which of his or her treating physicians will be trial witnesses. Even if the 30-day rule of Rule 125(c) is applied to treating physicians, thirty days is generally an inadequate period of time to arrange necessary

Continued on page 15

CATASTROPHIC DAMAGES Continued from page 4

admissibility found at 8 Am.Jur. *Proof of Facts* 2d, §5. The Court ultimately found that annuity evidence should be admissible. However, plaintiff's witness was not sufficiently qualified as an "expert" because he was getting computer generated numbers and he was unable to testify concerning the basis for those numbers. The Court concluded:

> The testimony regarding the cost of an annuity can be helpful to the jury in attempting to calculate the present value of furture damages as it will be required to do pursuant to Uniform Instruction 200.35, but the expert who testifies regarding the cost of the annuity must have personal knowledge of how that cost is calculated so that he may be subject to cross-examination on the factors discussed in 8 Am.Jur.2d *Proof of Facts* §5 and other factors which might be germane. He may base his opinions on facts or data made known to him outside of Court which are not the result of his own perceptions (Iowa Practice Vol. VII, §703.1, page 360) but he must not be a mere technician who plugs a disc into a computer and who really does not know how the answer is calculated.
>
> It is therefore hereby ordered that the plaintiff's motion in limine is denied provided the experts called by the defendants regarding the cost of the annuity have personal knowledge about how the cost of the annuity is calculated.

It should be noted that the *Cornejo* decision contains an excellent analysis of all of the arguments against annuity evidence. Generally, it rejects each of the arguments. However, counsel should read carefully what the case says about qualifications necessary to testify. The Court seems to imply that a mathematician/economist could qualify but perhaps an insurance witness would not. On the other hand, in the case quoted above, it would appear that an insurance executive who could testify concerning the basis for the annuity premium calculation would be able to testify.

It should come as no surprise that the plaintiff's bar vigorously opposes the use of annuity evidence. In a paper delivered to the Iowa Trial Lawyers Association at its seminar in January of 1991, George A. LaMarca stated:

> The defense lawyer who uses an annuitist should be prepared for a rigorous cross-examination, which if done properly by the plaintiff's attorney, will totally destroy the credibility of the annuitist (and the defense attorney, and his client, and his case, and so on!).

Perhaps Mr. LaMarca is exaggerating slightly. However, the defense counsel should be prepared for a vigorous battle, both on the admissibility issue, and also in connection with the actual presentation of evidence. □

Treating Physicians and Rule 125: Defense Limbo *Continued from page 14*

depositions and possible rebuttal testimony. Therefore, pretrial scheduling orders may be the most effective means to avoid the litigational shell game of "hide the trial expert."

Rule 125 does not restrict the authority of the trial court to enter a scheduling order, pursuant to the provisions of Iowa Rules of Civil Procedure 124.2 or 136-138. In fact, Rule 125(e), expressly authorizes the trial court to compel disclosure of trial witnesses without reference to whether an expert was "retained in anticipation of litigation or for trial." Defense counsel should make sure that any pretrial deadline for disclosure of expert witnesses should include treating physicians who will testify at trial. In this way, defense counsel will be provided a reasonable opportunity to prepare for trial. In fact, depending on how liberally or restrictively *Day* is interpreted, such designation of a treating physician as a trial witness may cause direct application of rule 125 to the physcian.

In summary, Rule 125, in light of the *Day* decision, certainly does not assist defense counsel in discovering the quasi-legal opinions of treating physicians before the physicians' deposition or trial testimony; however, there are alternative procedures (albeit possibly more cumbersome) which are still available. Hopefully, the trial court will fill the void of Rule 125 for "occurrence witnesses" through pretrial scheduling orders by requiring early designation of testimonial "occurrence witnesses" in order to allow both sides a fair opportunity to prepare for trial and/or in order to facilitate the pretrial resolution of claims.

The authors wish to thank Attorney Iris E. Muchmore, the current Chairperson of the Iowa Supreme Court Advisory Committee on Rules, and her assistant, Rhonda Dillemuth, who were kind enough to allow our review of the Rules Committee's minutes and correspondence for the years of 1986-1988. Also, the authors wish to thank their partner, Attorney Gene Yagla of Waterloo, Iowa, for copies of the Appeal Briefs and Appendix in the *Day v. McIlrath* decision cited in the opinion. □

FROM THE EDITORS

One of the functions of the Iowa Defense Counsel is to promote legislation which hopefully creates a fairer process in the litigation of tort claims. A recent Iowa Supreme Court case indicates that our best efforts can be foiled by an adverse interpretation or application of the statute. Section 668.14, The Code, was adopted to enable the jury to hear evidence that certain medical expenses had been paid by a collateral source. One of the primary objectives of this statute was to neutralize a possible tendency on the part of some jurors to return a verdict for the plaintiff in a case of very questionable liability, simply because the plaintiff cannot pay his bills. If the jury is aware of the fact that those bills have already been taken care of, perhaps the jury could be more objective in its assessment of liability. Unfortunately, in *Schonberger v. Roberts,* 456 N.W.2d 201 (Iowa 1990), the Supreme Court held that collateral source evidence would not be admissible in any case where there is a subrogation claim to the medical expense recovery.

It thus appears that we are back to the drawing board as far as the collateral source doctrine is concerned. This is not altogether bad, inasmuch as §668.14 was rather unclear, and it is not clear whether the intent was in fact to abrogate the collateral source doctrine, such as was done in malpractice cases under §147.136, The Code. The Iowa Defense Counsel and other interested parties should take this opportunity to redraft the statute to more clearly state its objective and to see to it that the objective is more effectively carried out. This may also be a good opportunity to analyze whether the Defense Counsel really wants an elimination of the collateral source doctrine. After all, the doctrine does enable our insurance clients to recover back some of the losses they pay for medical bills or collision damage. □

Michael W. Ellwanger
Suite 300, Toy National Bank Building
Sioux City, Iowa 51101