defense UPDATE

The Iowa Defense Counsel Association Newsletter April, 1993 Vol. VI, No. 2

PUT YOUR CARDS ON THE TABLE

STATUS REPORT ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE

By Kathleen L. Nutt, Des Moines, Iowa

Introduction

On August 15, 1991, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States distributed proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence. Several public hearings on the suggested amendments were held between November 21, 1991, and February 15, 1992. The Advisory Committee also accepted written comments on the proposed changes until the latter date.

Following a review of all written comments and the results obtained from public hearings on the suggested amendments, the Standing Committee published its Recommendations to the Judicial Conference in July 1992. On September 21, 1992, the Judicial Conference approved the lion's share of the Standing Committee's recommendations. Comments on the proposed amendments and their text are provided herein.

The proposed amendments have been transmitted to the United States Supreme Court for consideration by the Chief Justice who has until the end of May 1993 to make a decision on the proposed changes. Upon approval by the Supreme Court, the proposed amendments will be sent on to Congress who will automatically approve whatever the Chief Justice has decided regarding the changes. The earliest date the amendments could be effective would be December 1, 1993.

This article attempts to highlight some of the critical changes which are proposed as some of the new provisions may have an effect on your clients' desires to proceed with litigation in Federal Court as opposed to state court, when there is an option. I will also provide references to various articles which have commented on the proposed changes insofar as they may affect an attorney's Federal Court practice.

1. FRCP 4 Summons

FRCP 4 was sent to the Supreme Court in December 1990 but was returned to the Judicial Conference with concerns about its provisions for service in a foreign country. It is now returning to the Supreme Court for approval. The proposed amendment applies only to service of summons and provisions for service of other process are now covered by a new Rule 4.1.

The proposed Rule 4 authorizes use of any means of service as provided by either the law of the forum or the state in which the Defendant is to be served. The proposed rule extends the practice of securing a Defendant's agreement to dispense with actual service and requires the Court to impose costs of service on a Defendant who refuses to comply with a request to dispense with actual service. This provision will apply only where both parties are located in the United States. The revision to the rule also addresses problems associated with commencing actions against the United States, its officers, agents or corporations.

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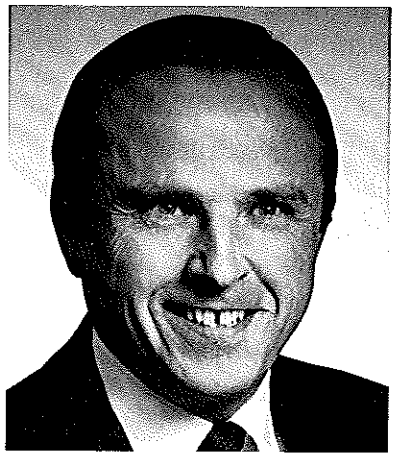
MESSAGE FROM THE PRESIDENT



John B. Grier

Each year the Defense Research Institute conducts a Bar Leaders Conference to which it invites the officers and directors of all of the defense organizations in the country. Iowa has always been a strong supporter of DRI and has had good attendance. This year was no exception. Among those attending were me, Dick Sapp, Greg Lederer, DeWayne Stroud, Dave Phipps, Bob Fanter, Herb Selby and Gene Marlett.

This year Iowa received the Rudolph Janata Award which is given annually by DRI to only one defense organization in the nation. Iowa was recognized for our contributions to the advancement of the interests of the defense bar through our continuing legal education programs and the other programs that we conduct on a yearly basis. As our organization is the only one in the nation recognized this year, we are very proud to have received it. A special note of thanks goes to Ed Seitzinger, one of our founders, who has been instrumental from our founding in seeing that the programs of the Iowa Defense Counsel are effective in promoting the interests of the defense bar. Without his guidance over the years, none of the recognition which is coming to our organization at the present time would have been possible. A lot of members devoted substantial hours of their time to make the award possible. Thank you.

At the Bar Leaders Conference in San Francisco, meetings were held with representatives of four major casualty insurance companies. These meetings detailed what is happening now and the plans for the future pertaining to the defense of casualty claims. The changes are drastic and will cause much adjustment on our part if we want to continue to participate in the resolution of casualty claims.

There are five major areas of change now underway. They are as follows:

1. Increased use of in-house counsel;
2. Drastic reductions in the list of approved attorneys;
3. Increased use of Alternate Dispute Resolution;
4. Regular and mandatory audits of legal bills;
5. Increased use of litigated matters being handled with limited discovery and limited activity by the attorney.

INCREASED USE OF IN-HOUSE COUNSEL

One of the carriers stated unequivocally that its goal for the future was to have 50% of all litigated claims nationwide handled by in-house counsel. Today in certain metropolitan areas, 70 to 80% of all litigated matters are handled by in-house counsel. In California alone, the figure state-wide Is at 70%. The insurance carriers believe they get better service, cheaper service and better quality with in-house counsel. At the meeting, there was sharp disagreement with these conclusions, but it did not appear that the major carriers were going to change their view of this matter. As many of you know, this change in Iowa will require a reversal of the ethics committee's decision determining that there exists an irreconcilable conflict if in-house counsel is used to represent an insured in a litigated matter and that the only way that the conflict can be avoided is for the insurance carrier to waive its limits of liability. North Dakota has a similar rule decreed by its Supreme Court. Most states do not. The chief complaint of those attorneys who had lost substantial business to in-house counsel was that the insurance companies had not given them the opportunity to demonstrate that they could provide the same services at the same or less cost; it simply happened. They were further disturbed because often the insurance company in creating an in-house staff, hires attorneys from outside counsels' offices and takes their most promising young attorneys after the firms have invested so much in training.

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DRASTIC REDUCTIONS IN THE LIST OF APPROVED ATTORNEYS

One of the carriers reported that when they started their program of reducing the approved list of attorneys, there were 3,500 firms on its list nation-wide. Today there are 1,000 and their goal is to reduce the list to 300. The insurance companies justify such reductions on the basis that it gives them better control over litigated cases, more economic clout with its outside counsel and fewer administrative costs by utilizing fewer attorneys. There was much discussion with these carriers about the advantages of counsel familiar with the region of their activity, rather than strangers coming into courtrooms to litigate matters as though they were hired guns from the big cities. Again, although the philosophy is different from carrier to carrier, there is no question but that more carriers are going to be considering whether they should reduce the number of approved attorneys on their outside counsel panels.

INCREASED USE OF ALTERNATE DISPUTE RESOLUTION

Alternate Dispute Resolution, or ADR, is becoming a tool embraced by a wide number of insurance carriers and being utilized widely throughout the country. Most carriers recognize that ADR is a concept widely endorsed by the plaintiff's bar, as it is generally perceived to result in higher indemnity awards. The insurance carriers are carefully evaluating whether or not the higher indemnity awards are offset by the reduced defense costs. If the analysis results in the conclusion that even though higher awards are being made in ADR, if the overall cost is reduced for the insurance company, we will see more and more use of this type of resolution.

REGULAR AND MANDATORY AUDITS OF LEGAL BILLS

The horror stories about audits were many. In fact, the most rampant rumor at the Conference was that the insurance carriers were hiring people to conduct the audits that were paid on the basis of how much money they saved the insurance carrier through the audit process. This was hotly denied by the insurance carriers. Nevertheless, it appears that the carriers are convinced that indeed they can save money on legal fees by auditing the bills of attorneys and much discussion occurred as to the parameters of what an auditor can and cannot do during the process of verifying legal bills.

INCREASED USE OF LITIGATED MATTERS BEING HANDLED WITH LIMITED DISCOVERY AND LIMITED ACTIVITY BY THE ATTORNEY

The insurance carriers will be insisting in the future that files be identified on the basis of those most likely to be tried and those most likely to be settled. For those that fall in the most likely to be settled category, the carriers are insisting that the attorney engage in minimal discovery and incur minimal costs in connection with the processing of that litigation. The attorneys are complaining that they cannot meet their ethical obligation to the insureds because of the actions of the insurance carriers in insisting on such limited activity. The relationship between the carrier and the attorney, therefore, becomes more adversarial.

These were the major areas that were discussed in San Francisco. The experience of the attorneys in California and the major metropolitan areas has been alarming. They are upset and they have lost substantial business. I think that it brought home to each of us attending the Conference that all of us in Iowa must work with our insurance carriers to ensure that we are providing the highest quality legal services at efficient costs in the eyes of those clients. However, no matter what we do, these changes are on the horizon for the Iowa practice. It was the conclusion of the Conference that those of us who can adjust to the changes outlined above will do very well; those of us who cannot, will not survive.

John B. Grier
President

DOCTORS DEPOSITION FEES:
REASONABLE COMPENSATION OR HIGHWAY ROBBERY

By Mark D. Sherinian, Des Moines, Iowa

It is not unusual for a plaintiff's treating physician to charge $100.00-$250.00 per hour for his or her deposition. However, some doctors have recently started charging $500.00 per hour or more for their testimony. If this rate were a true reflection of the doctor's income, he or she would be receiving gross income of $4,000.00 for an eight hour day, $20,000.00 for a 40 hour week, $92,000.00 for a 184 hour month or $1,000,000.00 for a 2000 hour year.

In fact, a rate of $500.00 per hour is twice the average hourly income of even the highest paid medical specialist. In a national study of over 10,000 doctors, the average annual gross income of all physicians regardless of specialty is $249,580.00.[1] Assuming an average of 40 hours per week and a 46 week year,[2] the doctor earns $135.64 per hour. General surgeons earn annual gross income of $268,060.00 or an hourly rate of $145.68 per hour. Orthopedic surgeons, the highest paid of all physicians, earn annual gross income of $466,000.00 per year or $253.00 per hour.

The deposition fees of experts appear to have generally gone unchallenged. There are only four reported cases which have addressed the reasonableness of an expert's fee. Judge Seyla in *Anthony vs. Abbott Lab*, 106 F.R.D. 461 (D.R.I. 1985) wrote an opinion on this issue which is as compelling in its prose as it is in its logic. In *Anthony*, one of plaintiff's experts, a physician retained for litigation, was requesting $420.00 per hour for his deposition. The Court described the fee as "astronomical" and "well outside the outer limits of the universe of rationally-supportable awards." The Court concluded:

> "For a person with little or no discernable overhead, a rate of $420.00 hourly strikes this court as unconscionable. Based on a standard (40 hour) work week, annualization would produce an income to Stolley of $840,000 yearly. He may well be a genius in his field, but this court cannot find that even so important and prestigious a profession as medicine has a right to command such exorbitant rewards." *Id* at 464.

In *Goldwater vs. Postmaster General of the United States*, 136 F.R.D. 317 at 340, (D. Conn. 1991) a psychiatric expert attempted to charge $450.00 per hour, an amount almost twice that of comparably respected psychiatrists. The Court indicated that neither $450.00, nor $350.00 per hour, previously charged by this expert, was "reasonable" and that such fee requests were "extravagant." *Id.* "This court is not so naive as to overlook the strain of esurience which sometimes seems to infect certain physicians when they become involved as experts in litigation." *Id.* (citing *Anthony*). The Court concluded that $200.00 per hour was a reasonable rate of compensation and such a rate promotes the goal of allowing plaintiffs to obtain competent experts without "unduly burdening defendants." *Goldwater*, 136 F.R.D. at 340. *See also Jochims vs. Isuzu Motors, Ltd*, 141 F.R.D. 493 (S.D. Iowa 1992) (internationally recognized aerospace engineer's fee of $500.00 per hour was held to be "grossly expensive" and reduced to $250.00 per hour). *Hurst vs. U.S.*, 123 F.R.D. 319 (D.S.D. C.D. 1988) (fee for renowned engineering expert in water flow reduced from $250.00 to $125.00).

Several reasons have been suggested to explain why doctors charge rates which are excessive. Some doctors perceive that their fees are being paid by attorneys. They do not seem to understand that in plaintiffs cases the client ultimately will pay the doctor's fee out of his or her own pocket. Where the doctor is employed by an insurance company, the increased expert fees will eventually increase insurance premiums. It also seems that some doctors set their fees at outrageous rates simply to avoid having to testify. In Cedar Rapids, a physician was commonly understood to not want his deposition taken at all and set his fees accordingly. [3]

Two years ago, a plastic surgeon in Des Moines was listed as an expert witness in a personal injury case. When his office manager was contacted to schedule his deposition, she indicated that his fee was $250.00 per hour and that he required a four hour minimum. A Rule 125(f) application

[1] Medical Economics Journal, September 2, 1991 p.120

[2] Socio Economic Characteristics of Medical Practice, 1992, (the average number of weeks practiced by a physician is 46)

[3] Des Moines Register. August 20, 1992

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RECENT INSURANCE CASES OF NOTE

By Thomas J. Shields, Davenport, Iowa

Periodically, the editors hope to bring you up to date regarding recent decisions of the Iowa Supreme Court and the Iowa Court of Appeals involving insurance issues.

The following summary includes cases decided by the Courts from November of 1992 through January of 1993. We are hopeful that this synopsis will be of benefit to you. While it is our intent to make this summary as comprehensive as possible, space limitations prevent discussion of all the cases in any detail, and while we hope we have selected the most important cases, we recognize that you may feel differently. But, we are the editors, and that's what we get paid the big dollars to do.

November 1992 Cases:

1. *Clark-Peterson Co. v. Cincinnati Insurance Co.*, __ N.W. 2d __ (Iowa 1992); No. 91-1088.

The Supreme Court affirmed the decisions of both the district court and the Court of Appeals upon application for further review. The central issue in this case turned upon the doctrine of reasonable expectations. The Supreme Court agreed with both the district court and the Court of Appeals that while an intentional discrimination action would be excluded under a "contractor's umbrella liability policy," nonetheless, under the doctrine of reasonable expectations, coverage should have been afforded. The Supreme Court held that it reviews application of the reasonable expectation doctrine with a view to the liability for which the insurance coverage was sought, and noted that the exclusions upon which Cincinnati Insurance Company relied would eviscerate the discrimination coverage explicitly agreed to in the policy.

2. *Continental Western Insurance Co. v. Krebill*, __ N.W.2d __ (Iowa 1992); No. 91-1663.

This is an underinsured motorist coverage question. Krebill and Nafziger were sued by Continental Western for repayment of $25,000 each, given to them by Continental Western Insurance pursuant to a release and trust agreement. After the settlement with Continental Western on the underinsured motorist question, Krebill obtained an additional $92,200 from three tort-feasors, resulting in a total recovery, including the underinsured motorist payment, of $117,200. Nafziger recovered $128,300 from other tort-feasors, which when added to the $25,000 payment from Continental Western made her total recovery $153,300. The parties stipulated that Krebill and Nafziger's injuries equaled or exceeded the total amounts of recovery that they received, including the underinsured motorist payments. The defendants refused to repay Continental Western Insurance Company, and the company brought suit. The district court granted summary judgment against Continental Western, and it appealed. The Supreme Court held that the goal of underinsurance is full compensation for the insured; underinsurance is understood to require full compensation to be measured in terms of the injury, not the policy. Because the parties stipulated that the injuries to each of the insureds equaled or exceeded the total amount of their recoveries, Continental was not entitled to any reimbursement.

3 . *Boles v. State Farm Fire & Casualty Co.*, __ N.W. 2d __ (Iowa 1992); No. 91-1463.

State Farm refused to defend the plaintiff in a civil action arising from a barroom scuffle and to indemnify him against liability. Boles filed a declaratory judgment action, which the district court granted to plaintiff. The Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals holding that plaintiff's own testimony established the critical factual issues which were: (1) whether the injury in the underlying case was expected or intended; or (2) whether the injury was a result of willful and malicious acts of Boles. Based on those facts, the Supreme Court felt the Court of Appeals' reversal of the trial court's summary judgment was appropriate, since there were factual issues in dispute as to the basis for denial of coverage.

December 1992 Cases:

1. *Allied Mutual Insurance Co. v. Telford*, __ N.W. 2d __ (Iowa 1992); No. 91-1974.

Allied filed a declaratory judgment action after Telford made a claim under his father's automobile insurance policy for injuries he sustained in a motor vehicle collision in California. Telford argued that underinsured motorist benefits were available to a "family member" under the policy and that he was entitled to those benefits because he was a resident of his parents' home and

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THE FORENSIC ACCOUNTANT

By Dale Cremers, CPA, Des Moines, Iowa

Although forensic accounting is a relatively new discipline to the accounting profession, the role of a forensic expert from other professions has been in place for some time.

The American Institute of Certified Public Accountants Management Advisory Services Technical Consulting Practice Aid No. 7, "Litigation on Services," defines forensic accounting as "The application of accounting principles, theories and discipline to facts or hypotheses at issue in a legal dispute. It includes every branch of accounting knowledge." Many professionals use the term forensic accounting synonymously with litigation services, while others regard forensic accounting as a subset of litigation services.

Consistent with the above definition, forensic accounting evidence is oriented to a court of law whether that courts criminal or civil. Furthermore, with the orientation to the court of law, a standard is immediately established as to the quality of the work, the forensic accountant must attain, as his or her findings are subject to public scrutiny should the mater go to trial. For the accounting profession, the possibility of public scrutiny makes the forensic application unique.

Accountants traditionally have provided financial auditing services. Accountants also provide fraud auditing and forensic accounting services. All three services involve investigative and examination techniques. The differences lie in the objectives of the engagements, the execution of the procedures and the parties to whom the CPA is obligated.

Financial auditing's objective is to render an opinion on whether the information appearing in a set of financial statements is presented fairly. These engagements are conducted after the transactions have occurred. The financial audit is an attest function and the auditor is responsible to the client and any third parties relying on the financial statements.

The objective of fraud auditing is to assess the likelihood that fraud will be detected or prevented in a corporate or regulatory environment. Fraud audits are usually conducted on a proactive basis, and should not be confused with fraud investigations which are conducted after the fact, and possibly by forensic accountants.

Forensic accounting's objective is related specifically to the issue defined by the party engaging the accountant. The client defines a goal, such as calculate the loss, calculate the royalty or follow the paper trail. The accountant may use certain examination techniques similar to those used in financial audits but the objective of those procedures is quite different. The forensic accountant may examine a trail of paperwork to corroborate the calculations needed to meet the specific goal of the engagement. The forensic accountant is not performing an attest function and is responsible only to his client. Ideally, forensic accounting should allow two parties to more quickly and efficiently resolve the complaint, statement of claim, inquiry, or at least reduce the financial element as an area of ongoing debate.

An example of a forensic investigation would be when an employee arranges a kickback scheme with a steel vendor. Steel carries various discounts based upon volume and mode of payment. The scheme would be for the employee to not take advantage of the most competitive pricing available to his employer. The vendor would then pay the excess directly to the employee. The forensic accountant would investigate the transactions to identify the rate of occurrence and the amount of excess cost paid by the employer. The forensic accountant may also be requested to determine if the only benefactor of the kickback scheme was the employee or if the vendor also benefited. There is no such thing as a typical forensic accounting engagement. As is true with most consulting engagements, the nature of work varies from one engagement to the next. Each accountant must draw from a variety of experiences with creative thought process to determine who did what, where and how.

Forensic accounting services may be applied to the following:

- Insurance claims
- Employee dishonesty
- Claims against professionals
- Workers' compensation claims
- Breach of contract losses
- Patent infringement
- Pension valuations
- Business valuations
- Kickback investigations
- Bankruptcy proceedings
- Any other investigative area requiring the examination and valuation expertise that a CPA possesses

Attorneys have traditionally consulted with experts such as appraisers,

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1993 LEGISLATIVE ISSUES

At the meeting of the Board of Governors of the Iowa Defense Counsel on February 26, 1993, there was a report concerning a variety of issues that are of importance to the Iowa Defense Counsel during the current legislative session. The report was provided by Herb Selby, chairman of the legislative committee for the Defense Counsel, and also Robert M. Kreamer of Des Moines, the Counsel's lobbyist. The following matters were discussed:

1. HSB27—This bill is supported by the Association. It eliminates the provision that failure to wear a seat belt may result in comparative fault of only 5%. It does not appear that the bill will move out of committee. The Senate version of the bill provides that failure to have a child in restraints constitutes negligence.

2. HSB40—The Counsel supports this bill which overrules *Schwennen v. Abell*, 430 N.W.2d 98 (1988). That case held that a spouse's recovery for consortium is not reduced by the comparative fault of the injured spouse. This is receiving rather widespread support from other organizations and does have a reasonably good chance of passage this year.

3. HSB54—Supported by the Association, this bill deals with offers to confess judgment, and expands the costs that can be recovered in the event a plaintiff does not accept an offer to confess judgment, and does not recover at least the amount in the offer.

4. HF156—This legislation is supported by the Association. It provides that interest on judgments shall only run from the date of judgment. See Chapter 668.13. It would eliminate the distinction between past damages and future damages. We have been advised that there is no way that this will be passed. A determination was made that instead of pursuing this amendment, we would focus our attention on the requirement that a "laundry list" of damages is to be included in the verdict form. It should be noted that Chapter 668.13 does require that the jury shall separate past damages from future damages, because interest on future damages runs from the date of the judgment and interest on past damages runs from the date of the petition. Chapter 668.3(8) states that a jury shall make a finding "on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past damages and that portion of the judgment or decree awarded for future damages." A numbers of Judges therefore include eight separate lines in every jury verdict—four lines for past damages (medical expenses, lost earnings, pain and suffering, loss of function of the mind and body), and four lines for future damages. It was felt that rather than focusing on a change in the commencement date of interest, it would be better to leave the distinction between past and future damages, and attempt to go from eight lines on the jury verdict down to two.

5. A bill which would require a mandatory patient waiver by a plaintiff upon the filing of his/her lawsuit, similar to the waiver in workers' compensation cases. The Association supports this legislation.

In addition to the above, the Association is opposing several other items of legislation, as follows:

6. SSB82—Product liability legislation which overrules the interpretation of Chapter 613.18 by the Iowa Supreme Court in *Binqham v. Marshall & Huschart Machinery Co.*, 405 N.W.2d 78 (Iowa 1992).

7. SF119—This expands the right of parents to recover for injuries to an adult child. Presently under Rule 8 the parent can only recover for "the expenses and actual loss of services, companionship and society resulting from injury to or death of a minor child." A compromise on this bill may be reached, in which a parent who is truly reliant upon an adult child for support, can recover for such loss of support or services. However, we are vigorously resisting the creation of a new cause of action whereby parents can recover for the lost "consortium" of the adult child.

8. HF45—We are resisting House File 45 which creates a cause of action against an insurer for unfair competition or deceptive acts under Chapter 507B of the Iowa Code. Interestingly, this bill which has been killed in committee, contained other "riders" which basically eliminated the 180 day rule for designating experts in a malpractice action, as well as some other "pro plaintiff" provisions.

9. HF149—The plaintiff's bar has been promoting a rather unusual bill—House File 149 allows a jury in a case involving the State or one its subdivisions to make findings of fact regarding the law as well as the facts. It is not believed that this is going anywhere. ❐

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Revised Rule 4 provides that service of summons on foreign defendants must proceed in accordance with international treaties such as the Hague Convention. The revision also reduces the use of federal marshals for service duties. Finally, the revised rule extends the reach of federal court personal jurisdiction on defendants against whom federal law claims are made but retains present territorial limits on effectiveness of service where there is some state in which personal jurisdiction can be asserted.

Proposed Rule 4.1 provides for nationwide service of orders of commitment for civil contempt but does not change the present practice regarding enforcement of injunctions or decrees not involving enforcement of federally created rights.

2. FRCP 5 Service and Filing of Pleadings and Other Papers

A technical amendment to Rule 5 has been proposed permitting district courts to adopt local rules for facsimile transmission.

3. FRCP 11 Signing Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

A key change in the proposed revision to Rule 11 would give the district court discretion on whether to impose sanctions instead of mandating sanctions once a rule violation was found. The amendment extends the rule's reach from those "signing" papers to those "presenting" papers, which is defined as "signing, filing, submitting or later advocating" the paper. The present rule provides that a signature on a pleading is a certification that "it is well grounded in fact;" the proposed rule change would provide that a signature is a certification that " allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery..." This a substantial change from the old proposition that a party should have its factual ducks in order before filing a pleading, or suffer the consequences. In the absence of exceptional circumstances, under the new rule a law firm may also be held responsible for violation of the rule by one of its partners, associates or employees. The proposed amendment will require that motions for Rule 11 sanctions be served initially only on the opposing party. If the opposing party fails to withdraw or correct a challenged pleading within twenty-one days, the motion could then be filed with the court. Finally, a subdivision has been added to clarify that Rule 11 does not apply to discovery disclosures. Sanctions for discovery problems are now specifically incorporated within Rules 26 through 37.

4. FRCP 16 Pretrial Conferences; Scheduling; Management

There are several technical changes to the proposed Rule 16. One substantive change is that the date of entry of a scheduling order will be measured from the date of appearance of or service on a Defendant rather than from the date of filing a complaint. The subsection addressing subjects for consideration at pretrial conferences has broadened the topics to be considered at a pretrial conference, including consideration of limitations or restrictions on use of expert testimony, the appropriateness and timing of summary adjudication, the control and scheduling of discovery including orders affecting disclosures and discovery under the proposed new discovery rules, settlement and the use of special procedures, orders for separate trial pursuant to Rule 42(b), orders requiring presentation of evidence early on in a trial that could be the basis for a judgment as a matter of law, orders establishing reasonable limits on time allowed for presenting evidence, and any other matters that would facilitate "just, speedy and inexpensive disposition." The revisions to the rule also give the court discretion to require the presence of a party or its representative either in person or by telephone at the time of the pretrial conference to consider possible settlement.

5. FRCP 26 General Provisions Regarding Discovery; Duty of Disclosure

The most controversial of the proposed changes is the amendment of Rule 26 which provides for mandatory self-executing disclosure of certain basic information before any other forms of discovery may be utilized. The proposal originally made by the Standing Committee in August 1991 required disclosure of "information that bears significantly on any claim or defense;" the proposed rule approved by the Judicial Conference requires the disclosure of

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"discoverable information relevant to disputed facts alleged with particularity in the pleadings." That information includes identity, address and telephone (if known) of individuals likely to have "discoverable information"; "a copy of, or a description by category and location of, all documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts"; "a computation of any category of damages" as well as making available for inspection and copying any unprivileged documents on which the computation is based; and provision of any insurance agreement. These disclosures are to be made at or within ten days after a meeting which the parties now must hold pursuant to subsection (f) of the proposed rule. The 26(f) meeting is to take place at least 14 days before a scheduling conference is held or a scheduling order due under Rule 16(b), i.e., within 76 days after an appearance or 106 days after complaint is served. Initial disclosures are to be based on information "reasonably available" to a party and a party is not excused from making disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

The revisions to Rule 26 also provide for disclosure of the identity of expert witnesses at least 90 days before the trial date or the date the case is to be ready for trial. This disclosure shall be accompanied by a written report prepared and signed by the witness containing "a complete statement of all opinions to be expressed and basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used"; "the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

As a side note, the original draft of Rule 26 allowed the Court to alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians. The proposed revision was not submitted to the Judicial Conference.

Additionally, pretrial disclosures of witnesses, whether they will be personally present or by means of deposition, and identification of exhibits shall be made at least thirty days before trial unless otherwise directed by the court. Within 14 days thereafter a party must serve and file a list disclosing objections to use of depositions or objections to admissibility of exhibits; objections not so disclosed, other than those for relevancy and materiality, shall be deemed waived unless excused for good cause shown.

All forms of disclosure must be made in writing, signed, served and promptly filed with the court unless otherwise directed by order or local rule. Once the initial disclosures are made the parties may proceed with other methods of discovery as have been used in the past. As will be discussed later, there have been some limitations placed on the use of those methods of discovery.

There are further provisions regarding discovery of expert opinions following provision of the required report. A new provision regarding claims of privilege or protection of trial preparation materials has been added to the rule and requires that such claims must be made expressly and should be supported by a description of the nature of the documents, communications, or things not produced under claim of privilege or as trial preparation that is sufficient to enable other parties to contest the claim.

With respect to protective orders, there has been added a requirement (which the local courts have been following) that parties must confer in good faith and certify their good faith attempts to resolve discovery disputes.

With respect to the timing and sequence of discovery, only with leave of Court or upon agreement of the parties may a party seek discovery from any source before making the required disclosures or seek discovery from another party before the date such disclosures have been made by or are due from such other party. As before, parties are under a duty to seasonably supplement discovery including corrections to prior responses; and they are also now required to seasonably supplement disclosures under subdivision (a) if they learn the information disclosed was not complete and correct.

All disclosures and discovery requests and responses must be

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signed by an attorney or by an unrepresented party and such signature constitutes a certification of the completeness and correctness of the disclosure after a reasonable inquiry is made.

There are several articles which have addressed the self-executing provisions of Rule 26. One bottom line which can be drawn from these articles is that if your client has a smoking gun, it will no longer be able to hide it in a maze of technical discovery requirements. A party will have to disclose the smoking gun up front, assuming it is "relevant to disputed facts alleged with particularity in the pleadings," before any discovery will be allowed to proceed. For comment on the implications of this rule which I do not have room to discuss in this article, please see Kieve, Commentary: Discovery Reform, 77 A.B.A. J. 79 (Dec. 1991); Federal Rule 26 Amendments: Wrong Medicine for Discovery Problems, 58 Defense Counsel Journal 454 (1991); What's Mine Is Yours!-And What To Do About It, 59 Defense Counsel Journal 154 (1992); The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure, 1 Journal of the American Board 1 (1991).

6. FRCP 29 Stipulations Regarding Discovery Procedure

Revisions to Rule 29 provide that parties may stipulate to extend thirty day periods for responses to discovery requests without leave of court unless the delay would interfere with dates set for completing discovery, hearing a motion or for trial.

7. FRCP 30 Depositions Upon Oral Examination

The Standing Committee originally proposed to change Rule 30 - Deposition Upon Oral Examination - by limiting the number of depositions per side and limiting the length of deposition. The Judicial Conference has retained the ten deposition per side change recommended by the Standing Committee but has eliminated the six hour limits proposed by the Standing Committee. Another revision to the Rule allows a party taking the deposition the choice of method of recording without need to obtain court permission. If a party intends to use part of a video or audio deposition at trial that party must provide the court and other parties with a written transcription of the portion to be played. Finally, there are revisions found in subsection (d) which are designed to deter improper attorney conduct by reducing conduct such as coaching, unnecessary objections, and inappropriate directions to not answer a question during deposition.

8. FRCP 31 Depositions upon Written Questions

Depositions upon written questions under Rule 31 are to be counted towards the ten deposition limit of Rule 30.

9. FRCP 32 Use of Depositions in Court Proceedings

The revision to Rule 32 does away with the risk of non-attendance at a deposition when a party has received less than eleven days' advance notice upon timely filing of a motion for protective order. The original draft of the revised rule provided that the deposition of an expert witness could be used at trial without establishing unavailability but that section was dropped from the draft approved by the Judicial Conference.

10. FRCP 33 Interrogatories to Parties

With respect to Rule 33 - Interrogatories to Parties - the original draft would have limited the parties to fifteen interrogatories including subparts. The Recommendation submitted to the Judicial Conference, apparently after comments and public hearings, increased the number of interrogatories to twenty-five instead of fifteen. The rationale for this reduction in interrogatories is based on the fact that much of the information usually sought is of the type designed to be disclosed under the self-executing disclosure provisions of Rule 26.

11. FRCP 34 Production of Documents and Things and Entry upon Land for Inspection and Other Purposes

Rule 34 has been revised to reflect changes made in Rule 26 and makes it clear that if a request for production is objectionable only in part, production should still be made with respect to the non-objectionable parts.

12. FRCP 37 Failure to Make Disclosure or Cooperate in Discovery; Sanctions

The Conference has approved proposed changes to Rule 37 regarding sanctions which complement the dis-

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closure provisions of Rule 26. A sanction for failure to make disclosure as required by Rule 26(a) would include automatic preclusion of the non-disclosing party from presenting the evidence on summary judgment or at trial; if such evidence is presented by an adverse party, the adverse party may be permitted to inform the jury of the fact of the failure to disclose. In addition to or in lieu thereof the Court may impose other and appropriate sanctions including payment of attorneys' fees, preclusion from conducting discovery and other actions authorized within the rule. Motions for sanctions may not be made unless the movant certifies that he/she in good faith conferred or attempted to confer with the other party to obtain the information sought without court intervention. The Committee Notes on all the proposed rule changes are particularly important for the reader to review, especially with respect to the proposed changes of Rule 37. The Committee notes that "evasive or incomplete disclosures and responses ... are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a)."

13. FRCP 54 Judgments; Costs

Proposed Rule 54 provides a procedure for resolving claims for attorney fees and a time limit within which motions for fees must be filed—fourteen days after final judgment unless otherwise specified. District courts are also authorized to adopt local Rules for the resolution of claims and to refer the issues to a Special Master.

14. Miscellaneous

In the original draft of proposed amendments, there were extensive revisions to Rule 56. These changes were submitted to the Judicial Conference and the Judicial Conference effectively killed any changes proposed to Rule 56. That Rule will stand as is for the present.

The original draft also included proposals which would allow district courts to adopt experimental rules on a local level which were not inconsistent with national rules. Those proposed changes did not make it to the Judicial Conference.

15. Federal Rules of Evidence

Finally, there are some technical changes in Federal Rules of Evidence 101 and 1101 as well as a change in FRE 705, disclosure of facts or data underlying expert opinion, to avoid conflict with the proposed revisions to Rule 26 and Federal Rule of Criminal Procedure 16 which require disclosure of expert opinions in advance of trial and the reasons therefor. The proposed changes to FRE 702 addressing limitations on the use of expert opinion testimony were sent to a newly established Evidence Committee for review and resubmission to the Judicial Conference.

There are other changes to various Rules including Rules 71(a), 72, 73, 74, 75 and 76, which changes are merely technical changes to conform to the Judicial Improvements Act of 1990. You can check 2 BNA Civil Trial Manual 431 (1992) for a summary of these changes.

These proposed rule changes signal a radical change in current discovery practice and procedure in federal court, a change which will affect all parties. Given the tendency of state courts to follow the federal rules, if these rules go into effect in the federal system, it cannot be long before they will be found in the state court systems also. There are some advocates of the rule changes who predict that these changes will cause parties to consider settlement at an earlier stage of litigation, thus saving parties much in legal fees. On the other hand, there are the pessimists who foresee that the changes will cause even greater discovery battles than presently occur. Certainly these positions are anticipatory, given that the Supreme Court has yet to decide on the changes. However, with the current climate of dissatisfaction with how lawsuits proceed and the courts' desires to rid themselves of their present burden of litigation, change of some sort is likely to occur and parties should prepare themselves for a new order in litigation. ❐

"Freedom and property rights are inseparable. You cannot have one without the other." George Washington

DOCTORS DEPOSITION FEES Continued from page 4

was made and the trial court ordered the defendants to pay the rate of $250.00 per hour but only for the time actually spent in the deposition.

The Iowa Supreme Court has accepted an interlocutory appeal in the case of *Pierce vs. Nelson*, (No. 92-1558, Polk County CL 92-54493). There the plaintiff's orthopedic surgeon intended to charge his customary fee of $500.00 per hour. When defendant's counsel attempted to negotiate the fee, plaintiff's counsel filed a motion for protective order requiring defendant's counsel to pay the fee. After a hearing on the matter and, despite the survey of doctor's fees described above, the trial court granted the motion and required defendants to pay the doctor's "normal" fee of $500.00 per hour. The trial court did not explicitly analyze the "reasonableness" of the $500.00 rate.

Rule 125(f) I.R.C.P. permits trial courts to set a "reasonable fee" for expert witnesses who are expected to be called as witnesses. Such a reasonable fee, however, "shall not exceed the expert's customary hourly or daily fee." (emphasis added) Rule 125(f) I.R.C.P. By implication, a "reasonable fee" may be less than the expert's "customary fee" and trial courts are granted discretion to prevent experts from exacting unreasonable fees.

In determining what constitutes a reasonable fee, Judge Bennett delineated a set of criteria which he adopted from the *Goldwater* opinion. Specifically, he used the following criteria:

1. The witness' area of expertise;
2. The education and training that is required to provide the expert insight which is sought;
3. The prevailing rates of other comparably respected available experts;
4. The nature, quality and complexity of the discovery responses provided;
5. The fee actually being charged to the party who retained the expert;
6. Fees traditionally charged by the expert on related matters;
7. Any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Jochims vs. Isuzu Motors, Ltd., supra, 141 F.R.D. 495-6.

However, in the case of treating physicians, the primary consideration should be to replace the income which the physician would have earned had he or she not been taken from his or her practice. This is essentially criteria No. 6 in the *Jochims* opinions. Furthermore, it is the primary consideration in a document entitled "Principles of Cooperation," a recent agreement by representatives of the ISBA and the IMS. *The Iowa Lawyer*, Vol. 52 No. 1 at 8 (January 1992). This agreement indicates that the physician has the right ". . . to expect reasonable compensation for testimony given as an expert or treating physician either by deposition or in court. It is reasonable that the compensation reflect the time away from medical practice . . . " (emphasis added) *Id.* at p.10.

The concept of compensating witnesses from the lost time away from their business is also one of the parameters set forth in the Iowa Code of Professional Responsibility. DR 7-109(c)(2) precludes lawyers from paying more than "reasonable compensation" to a non-expert witness for their "loss of time in attending or testifying." If a treating physician testifies to opinions only developed prior to litigation, he or she is considered a non-expert witness. *Day vs. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991). Consequently, the real measure of the doctor's fee is whether it is reasonable compensation for the doctor's displacement from his or her medical practice.

The Iowa Medical Society contends that doctors are not trying to profit from their testimony. At $500.00 per hour, any doctor should be able to make a profit. The amount of this fee not only demonstrates a profit motive but a general lack of recognition of the public duty to testify. For most witnesses it is a sacrifice to appear in court. The taxable witness fee for a non-expert witness is $10.00 per day plus mileage. Even lawyers are required by their rules of ethics to regularly volunteer their time to the judicial system in order to insure that everyone has access to the courts. A doctor who charges $500.00 per hour for his or her testimony is mocking those who make sacrifices to insure that the judicial system continues to serve the public good.

Most importantly, the exorbitant

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I recently attended a stress management seminar and discovered the cause of my stress is management.

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charges of doctors are only one example of the rising cost of litigation.
The court in *Anthony, supra* at 45, described this concern as follows:

> Our citizens' access to justice, which is at the core of our constitutional system of government, is under serious siege. Obtaining justice in this modern era costs too much. The courts are among our most treasured institutions. And, if they are to remain strong and viable, they cannot sit idly by in the face of attempts to loot the system.

The judicial system will continue to be looted as long as counsel permit doctors and others to do so. Too often, counsel will pay exorbitant fees in the vain hope that the doctor will make concessions during their depositions. It is hard to imagine a doctor who charges $500.00 per hour not knowing what testimony might damage his client. Even if paying an exorbitant fee is the "safe" approach, it is not the responsible one. If lawyers are truly officers of the court, they must guard against those who would take advantage of their position as indispensable witnesses. ❐

RECENT INSURANCE CASES OF NOTE Continued from page 5

he was entitled to rely upon the doctrine of reasonable expectations. The district court granted summary judgment in favor of Allied, and the Supreme Court affirmed. The Supreme Court held that Telford was not a person within the ordinary meaning of a resident for purposes of the father's insurance policy, since the facts were indisputable that he had intended to make the military his career, he had been married and had two children, he was self-supporting, and did not return to his parents' home even after he separated from his wife. He had been absent from his parents' home for approximately four years, and returned to the parents' home only during the period of his recuperation from his accident injuries, at which time he again left. The court specifically found no intent to maintain a permanent residency with the parents.

2. *Nassen v. National States Insurance Co.*, __ N.W.2d __ (Iowa 1992); No. 91-880.

This case involves allegations of breach of contract, bad faith, fraudulent misrepresentation, and punitive damages. Defendant National States issues a nursing home insurance policy. Thereafter, plaintiff was hospitalized briefly with uncontrolled diabetes and mild dementia, and upon her release from the hospital she was then admitted to a nursing home. The policy was issued in April of 1988 and the plaintiff went into a nursing home in June, 1988. Upon submission of a claim under the policy for nursing home expenses, National States refused to respond to the claims, and when contacted by plaintiff's attorney who in turn contacted National States, plaintiff's premium for the policy was returned and the policy purportedly was rescinded, effective the date of issuance. The jury returned a $43,800 verdict for breach of contract; $40,000 verdict for bad faith; $40,000 verdict for fraudulent misrepresentation; and $500,000 in punitive damages. The trial court ordered remittitur of the $40,000 fraud verdict, but upheld the remainder of the verdicts. Both plaintiff and defendant cross-appealed.

The Supreme Court affirmed, but noted that claims of bad faith and fraud overlap because the acts constituting fraud would have produced

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identical consequences to those as alleged under bad faith. The Supreme Court also affirmed the trial court's giving of instructions on the bad faith claim allowing the jury to award damages for emotional distress and for economic loss resulting from premature dissipation of plaintiff's assets and rejected the argument that the verdict, even though high, was the result of passion or prejudice. The Supreme Court also affirmed the awarding of punitive damages on the evidence, but rejected the plaintiff's argument that interest on the punitive damage award should run from the date of the filing of the petition.

3. *LeMars Mutual Insurance Co. v. Farm & City Insurance Co.*, __N.W.2d__ (Iowa 1992); No. 91-1409.

This suit between insurers arose out of a serious car accident caused by the fault of Farm & City's insured who was driving his father's automobile which was insured by Allied Insurance Group, upon which an umbrella policy had been issued by LeMars. Allied paid its full limits of $300,000, and LeMars paid $150,000 from its umbrella policy, but Farm & City did not contribute towards settlement. LeMars then brought suit against Farm & City for contribution and the district court found in favor of LeMars, holding that it had a true excess policy and the Farm & City policy was a primary policy which was required to be paid before contribution by the umbrella insurer. On appeal, the Supreme Court affirmed holding that a primary insurance provider cannot hide behind an excess insurance clause in its "other insurance" provision. The primary insurance policy must be exhausted before the umbrella policy may be reached for payment of settlement damages.

4. *Webb v. American Family Mutual Insurance Co.*, __ N.W.2d __ (Iowa 1992); No. 91-869.

This case involved construction of a homeowner's insurance policy. Plaintiffs had built a home upon a campground which they owned, and insured it with American Family. Plaintiff husband and wife went through a dissolution and plaintiff husband was ordered to pay plaintiff wife $50,000 in cash within 60 days of the decree. After the dissolution and before payment of the property settlement, the house burned. Plaintiffs submitted a detailed proof of loss claiming that plaintiff husband lost $88,530.64 in the fire. After investigation, American Family rejected the claim, citing arson by plaintiff husband and fraud in the proof of loss due to misrepresentation of the extent of the personal property lost in the fire. Plaintiffs sued American Family to enforce the policy and prior to trial the court ruled that plaintiff wife could not recover as an innocent co-insured if the verdict by the jury invalidated the policy as a result of plaintiff husband's fraudulent actions concerning his proof of loss. The jury found that there had been fraud in the proof of loss and denied recovery. The Court of Appeals reversed, finding that the plaintiff husband's misrepresentations were not material as a matter of law. Upon further review, the Supreme Court vacated the Court of Appeals' decision and affirmed the district court judgment.

The Supreme Court found that plaintiffs' motion for directed verdict was properly denied, since there was sufficient evidence which existed from which a jury could find that plaintiff husband intentionally misrepresented the extent of personal property destroyed and that that misrepresentation was material. The court also affirmed the jury's finding that the whole policy was void because of plaintiff husband's misrepresentation of material facts since the clear meaning of the policy bars recovery for all insureds when the policy is void by the acts of any insured.

January 1993 Cases:

1. *Felder v. State Farm Mutual Auto Insurance Co.*, __ N.W.2d __ (Iowa 1993); No. 91-1597.

This case involves interpretation of an automobile insurance policy regarding what constitutes "property damage." State Farm issued a policy to Ben, whose fault caused serious injuries to Felder. Felder recovered the policy limits of $100,000 for his "bodily injury," and then made claim under the property damage coverage for additional recovery alleging that the personal injury recovery did not cover his diminution of assets by virtue of payment for expenses beyond those covered by the personal injury provisions, and his family claimed that its loss of consortium claim was also "property damage" within the terms of the State Farm policy. The Supreme Court affirmed the district court's finding that neither "loss of consortium" or "diminution of assets" claims were covered by the property damage provisions of the State Farm policy. The court noted that while the policy defined "bodily injury," it provided no definition for the term "property damage." The court distinguished its recognition of consortium claims in dram shop cases as "property claims," holding that it did not believe consortium claims constitute property damage for purposes of an

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automobile liability policy if those claims arise solely out of a personal injury. The court found that to hold otherwise would result in two separate coverages providing for the same loss.

2. *Dessel v. Farm & City Insurance Co.*, __ N.W. 2d __ (Iowa 1993); No. 92-292.

Plaintiff while driving his motorcycle hit a milk truck resulting in serious injuries. Plaintiff settled with the driver of the milk truck, but that settlement did not cover the amount of his damages. His motorcycle had no underinsured motorist coverage, but a policy issued by Farm & City upon plaintiff's pickup truck did contain underinsured coverage. Plaintiff claimed $20,000 coverage under his pickup truck policy, and Farm & City denied the claim because the truck policy contained a "owned but not insured" exclusion. The district court upheld that denial. The Supreme Court in affirming that denial held that unlike uninsured motorist cases in which recognition of the exclusion would fully deny the insured coverage for injuries sustained, the "owned but not insured" exclusion is valid in an underinsured motorist policy.

3. *Grinnell Mutual Reinsurance Co. v. Employers Mutual Casualty Company*, __ N.W.2d __ (Iowa 1993); No. 91-1983.

A student of the Grinnell-Newburg school district was injured when she jumped from a bus set in motion by a fellow student. The two students were on a field trip under the supervision of a district teacher. The injured student and her parents sued the district and the teacher. The district was covered under a standard vehicle policy issued by Grinnell and a business protection policy issued by Employers. Grinnell defended and settled the case; Employers refused to participate in defense or settlement, and denied coverage. After settlement, Grinnell filed a petition for declaratory judgment against Employers, as well as a suit for contribution seeking 50% of the costs of defense and settlement. The district court entered judgment in favor of Grinnell, finding that non-vehicle-related acts by the district in failing to properly supervise students or promulgate and enforce reasonable safety rules regarding bus loading constituted negligence and was a proximate cause of the student's injuries. The Supreme Court affirmed. The only issue upon appeal was whether the motor vehicle exclusion in Employers' business protection policy had been correctly applied by the district court. The Supreme Court found that the district court had correctly determined that the district's negligent supervision regarding negligent loading of the bus was not vehicle related and was or could be found to be a proximate cause of the student's injuries. Therefore, the negligence alleged by the student was covered under the general liability policy; the district's negligent supervision of the students was not vehicle related. ❐

Have You...
marked your calendar
so you'll not forget
the IDCA Annual Meeting
begins on WEDNESDAY
this year ?

OCTOBER 6, 7 & 8

THE FORENSIC ACCOUNTANT Continued from page 6

economists and doctors to support their cases and, if necessary, provide expert testimony. Forensic accountants can be utilized to determine the value of a business, the impact an event had on a business or to investigate the paper trail left by financial fraud; and, to provide testimony as to his or her findings. Attorneys want to win and have learned that experienced forensic accounting professionals can enhance their preparation and presentation for litigation. That's why smart lawyers keep taking us to court. ❐

Mr. Cramer is Managing partner in Cremers, Holtzbauer & Associates P.C; Member AICPA SEC Division of Firms, Iowa Society of CPAs and National Association of Forensic Accountant; 1239 73rd Street, Suite A • Des Moines, IA 50311 • 515-274- 4804

FROM THE EDITORS

Juries are supposed to decide cases without reference to insurance. We all know this is a pipedream. It is a frequent occurrence for jurors to explain their actions by indicating, "we figured the defendant's insurance company would take care of it." In the past, defense counsel have accepted this practice as an inevitable fact of life for which there was no acceptable remedy. For instance, an instruction that the jury should disregard the presence of insurance, would surely act to confirm their beliefs, if only subconsciously, that the defendant won't have to personally pay the verdict they render. Defense counsel have always viewed silence as being preferable to the waving of such a red flag. Consequently, we accept the intrusion of insurance into the jury room and do nothing.

We believe there is a practical solution to this problem. Juries should be instructed that the defendant has no insurance to pay their verdict. Such an instruction would obviously deter the jury from acting on their suspicions concerning the existence of insurance.

Any objection that such an instruction would sanction a misstatement of fact can be answered in three ways. First, if the choice is between jury verdicts in contradiction to the law, or honest verdicts resulting from a dishonest instruction, the later result is preferable. Second, lawyers and courts constantly mislead and misinform juries to insure that only admissible evidence is received and considered. A misstatement of fact to insure compliance with the law is no less acceptable. And finally, the instruction to be given can be formulated so that no actual misstatement of fact is made. The following is suggested as such an instruction:

> The defendant has no insurance coverage which
> is relevant to any damages you may award.

Such an instruction should work to achieve the desired result without actually misleading the jury.

NEW MEMBERS

At the Board of Governors Meeting on February 26 the following new members were approved:

1. Julie Pulkarbek ..... Iowa City	4. Glenn Otte ..... Des Moines
2. Tom Hall ..... Des Moines	5. Joel T. S. Grier ..... Marshalltown
3. Larry Hills ..... Des Moines	6. Thomas Ochs ..... Cedar Rapids

JAMES A. PUGH
5400 UNIVERSITY AVE.
WEST DES MOINES, IOWA 50266

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