defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1993 Vol. VI, No. 3

NON-REPORTING OF CHILD SEXUAL ABUSE
THE NEXT ATTEMPT AT INSURABILITY

By Mark L. Greiner, West Des Moines, Iowa

I. INTRODUCTION

Child abuse is a growing problem in this country. A significant number of child abuse reports involve sexual abuse. There is little dispute child sexual abuse has the potential to cause the victim emotional and physical injury. Perpetrators of child sexual abuse may be subject to both civil[1] and criminal[2] penalties. Plaintiffs who get judgments against child abusers sometimes seek recovery through the abuser's homeowners policy, but coverage for child sexual abuse is typically denied under intentional act exclusions.

Two recent cases, however, may be of concern to insurers who believe homeowners policies are insulated from civil child abuse liability.[3] Two juries, one in Minnesota and one in Texas, found the wives of two child abusers liable for negligently failing to protect their children from sexually abusive spouses. Litigation is now under way in both cases to decide if the mothers' homeowners policies covers their negligence in failing to prevent the abuse. Child abuse victims who have so far considered their abusers to be judgment proof because of intentional act exclusions will probably take note of these two cases. It seems likely, therefore, that courts will increasingly be faced with two difficult questions for which there is no clear judicial precedent: (1) To what standard should we hold spouses for failing to protect their children from an abusive spouse; and, (2) if a parent can be held liable for failing to prevent child sexual abuse, can the victim recover through the parent's homeowners policy?

This article will examine these two issues in the context of Iowa law. This author believes that, although a parent should be liable for failing to protect her child from a sexually abusive spouse, recovery through a homeowners policy should be prohibited.

II. CHILD ABUSE STATUTES: The Search For Standards

A. *Iowa Child Abuse Statutes*

Before examining the question of parental standards of care with respect to prevention of child sexual abuse in the context of civil liability, it is useful to examine the duties the Iowa Code imposes on parents in a criminal context. A reading of the plain language of the code sections dealing with child abuse and child endangerment reveals that a parent has an affirmative duty to act to prevent the abuse of her own child.[4]

> Child abuse in Iowa is defined in section 232.68(2) of the Iowa Code as:
> a. Any nonaccidental physical injury, or injury which is at variance with the history given of it, suffered by a child as the result of the acts or omissions of a person responsible for the care of the child.
> b. The commission of a sexual offense with or to a child . . . as a result of acts or omissions of the person responsible for the care of the child.[5]

The use of the word"omissions" in section 232.68 provides strong support for the proposition that a parent need

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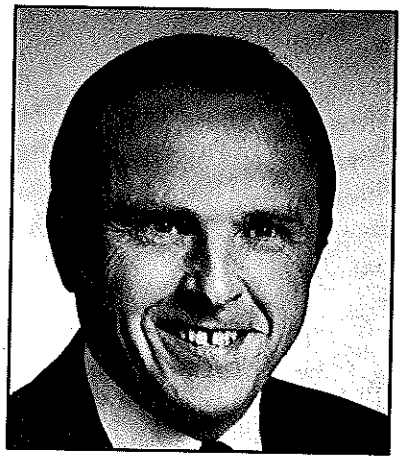
MESSAGE FROM THE PRESIDENT



John B. Grier

It is always a blow when a trusted friend is lost by reason of death. Ed Seitzinger was no exception. He was our founder, our mentor and although the title was never conferred, he served in the capacity of an executive secretary of our organization. He will be greatly missed. Elsewhere in this issue his contributions are more fully detailed.

Consistent with our past traditions, an outstanding legal education program is planned for our Annual Meeting. I urge each of you to make plans now to attend the meeting to be held October 6, 7 and 8 in Des Moines. Dick Sapp, our President-Elect, is in charge of the Annual Meeting. He has put together an outstanding program.

The publication, the *Defense Update*, in which this letter appears, has been a vital and important part of the advancement of the effectiveness of this organization. The Board of Editors of this publication have done outstanding work in putting the paper together on a quarterly basis. The effort which that takes often goes unrecognized, but is deeply appreciated by all of the members of the organization. I know that all of you join me in thanking Kenneth L. Allers, Jr., Kermit B. Anderson, Michael W. Ellwanger, James A. Pugh and Thomas J. Shields for the outstanding job which they have done and the vital service that they are performing to our organization.

The last issue of this publication was the subject of extensive discussion at our last Board Meeting, primarily because of an editorial appearing in the publication advocating the adoption of an instruction on whether any of the parties were insured against damages claimed against them. In the course of that editorial, two comments were made which were of concern to members of the Board and I have heard personally from some of our members. The statements of concern were as follows:

1. "If the choice is between jury verdicts in contradiction to the law or honest verdicts resulting from a dishonest instruction, the latter result is preferable;" and

2. "Lawyers and courts constantly mislead and misinform juries to ensure that only admissible evidence is received and considered."

Obviously, such statements made in the context of arguing for a particular jury instruction, cannot stand scrutiny based on their own merit. As one of our members aptly pointed out to me, "Any lawyer ... knows that the purpose of the rules of evidence is to ensure, insofar as possible in the conduct of human affairs, that justice on the basis of truth and honesty will be done. To say ... that the rules of evidence are vehicles for deceit and concealment to mislead and misinform juries is tantamount to accusing our profession of knowingly engaging in perversions of the truth." Any system of jurisprudence must have as its basic purpose, the ascertainment of the truth. All that the rules of evidence are trying to do is to ensure that only that evidence which has been deemed to be most reliable by our system of jurisprudence is actually considered by the judges of the facts who must ascertain the truth. A good editorial obviously is going to generate comment and thought by those who read it and on that standard the editorial in our April issue created the desired result. However, I wanted to make clear to the membership that by no means does the editorial necessarily represent the considered view of your Board of Directors or of the Association itself. At our Board Meeting, we reaffirmed the independence of our Board of Editors and their right to editorialize, but asked them to carefully scrutinize editorials which might not reflect the consensus of most members of our organization.

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A MAN FOR MANY REASONS

And so it must to all men.

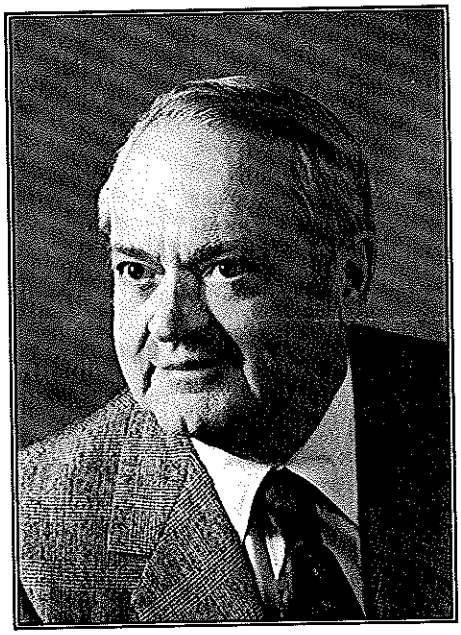
Such a dispassionate statement of the inevitability of human mortality is small comfort indeed when we are forced to apply it to Ed Seitzinger who left us all too soon on June 10 1993 at the age of 77.

Let us reminisce

Upon his graduation from the University of Iowa Law School in 1947, he sought a position with Iowa Farm Bureau Federation and was offered a job as a claims adjuster. No way, Ed wanted to practice law. It happened that Carl Stephens, who was chief house counsel for the company, overheard the conversation, offered to hire Ed, and so began Ed's career at Iowa Farm Bureau Federation, eventually becoming head of its law department, succeeding Ben Buckingham. In that position, he gained distinguished prominence in the Iowa bar and indeed, with his engaging personality, he attained national stature in his activities in such organizations as the Federation of Insurance Counsel (now known as Federation of Insurance and Corporate Counsel), The Defense Research Institute, Inc. and the International Association of Defense Counsel. Parenthetically, his close acquaintanceship with the hierarchy of these organizations accounted for the presence of many of the leading defense lawyers of the country as speakers at the annual programs of our Association.

In 1965, he and the late Ed Kelly, also of Des Moines, were principally involved in the formation of this Association. Ed Seitzinger drafted the articles of incorporation and became its first president. More details may be obtained from his history of the Association, published on the occasion of its silver anniversary in the January, 1990 issue of the *Defense Update*.

Thus began Ed's true love affair with this Association, an affectionate and meaningful relationship without which, the Iowa Defense Counsel Association would never have become one of the most successful



EDWARD F. SEITZINGER

defense lawyers organizations in the country, now recognized as such.

Why can this be said with justification?

The answer is not difficult, although the passage of time may have obscured it. From the very beginning, Ed, at the helm, and his fellow officers, insisted that the programs of the Association be of the highest quality, and of a level of excellence such as would be of benefit to lawyers interested in advancing their knowledge of the law. Consequently, if one reviews the discussions of legal problems presented at the annual meetings of the Association beginning with the very first annual meeting in 1965, one can at once understand Ed's pride in stating in his history (aforementioned): "There isn't any question that this Association has one of the finest, most informative and outstanding programs of any legal seminar that is put on in the state of Iowa, or for that matter, anywhere else."

This tradition of quality was authored from the inception of the Association by Ed Seitzinger. He set the style of the Association as one which was seriously interested in legal problems of consequence, presented to first class lawyers (judiciously selected) for the furtherance of their knowledge. This insistence on quality also extended to the type of lawyers to be judged worthy of membership in the Association, with the result that the present membership of more than 400 represent a large proportion of the finest lawyers in Iowa. Proof of this statement is not hard to come by. When one attends seminars of the Association, one sees its members paying rapt attention to the presentations, taking notes, asking pertinent questions, and very apparently taking delight in the discussions. Thus, each meeting is an adventure in learning, not just a facade to obtain credit for CLE requirements. What satisfaction our members must take in being a part of this community of scholars.

Further proof of the Association's quality? The following is taken from the minutes of the Board at its meeting on April 23, 1993:

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"Mr. Grier reported on the DRI defense bar leaders' (national) conference in San Francisco at which IDCA received the Rudolf Janata award for best defense organization."

All of us know of Ed's delight in his position - acknowledged by all - as the "power behind the throne"; of his directing the details and arrangements of the annual meetings, even to the very last meeting; of his wisdom, good humor and benign good will; and of his just pride in the Association, of which, it can truly be said, he was the *pater familias*.

Since its formation, the activities of the Association in programs beneficial to our profession and to the public, above and beyond programs for our members, have broadened in many ways, beyond the scope of discussion of this paper. But these programs may be likened to the effect of a stone thrown into a sun drenched pond, producing ever extending ripples of sparkling activity. In our case, that stone was cast by Ed Seitzinger.

Ed would have been the first to acknowledge his debt for a substantial part of his success to two extraordinary ladies: his wife Jo, and Ginger Plummer, his secretary for many years. Jo, a lady of great warmth, intelligence and courage, whom we join in grief. And Ginger, who was the architect of many of the delightful, surprising and creative features of our annual meetings, which deservedly earned for her the admiration and affection of the members and a life membership in the Association.

And so, in parting, we say to Ed, "Well done". We hope that in the future, as he may regard us from his eminence and observe our efforts, he may also say, "Well done". ❑

We wish to thank Harry Druker for this fine tribute to Mr. Edward F. Seitzinger. Harry Druker, a past President of the Iowa Defense Counsel Association, is retired from his Marshalltown Firm of Cartwright, Druker & Ryden and is living with his wife Rose at 483 Forest Avenue D, Palo Alto, CA 94301.

MESSAGE FROM THE PRESIDENT

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When my administration started, I asked that a study be undertaken as to the organizational structure which our Association should have to deal with the issues that will be facing us in the future. That committee was chaired by Dick Sapp and Greg Lederer. They submitted their report to the Board at its June meeting. The report proposes the following changes in our structure:

(a) expansion of our committee structure so as to include more of our members in the day-to-day activities of our Association;

(b) organizational changes so as to have a Board consisting of 13 members, one director from each of the eight judicial districts and five elected at large and in addition, four ex officio directors who shall be the officers of the corporation so that the total voting members of the Board will be 17;

(c) changes in the composition of the Executive Committee and the Nominating Committee;

(d) a recommendation that our legislative role should be judiciously exercised and should concentrate on matters designed to assure a "fair playing field" for litigants in the courts of Iowa.

After much discussion at our Board Meeting, it was decided that the recommendations of the committee should be carefully studied by each Board member and all of our members should be given the opportunity for input. Hence, the Board has deferred action on the committee's recommendation until a special meeting which is scheduled for Friday, July 23. If any of you should have any thoughts, recommendations or input that you would like to make in regard to the committee's report, each of the Board members has a copy of the report and I would be happy to make the report available to any of you who might request it. The committee has done an excellent job in making recommendations that will assist the Iowa Defense Counsel Association in maintaining its position of excellence in the service of the defense bar. Any suggestions you might have would be greatly appreciated.

I look forward to seeing each of you at our Annual Meeting.

Very truly yours,

John B. Grier
President

IN THE PIPELINE - PUNITIVES REVISITED

By Kermit B. Anderson, Des Moines, Iowa

On March 31, 1993, the United States Supreme Court heard arguments in *TXO Production v. Alliance Resources*, No. 92-479 (opinion below 419 S.E.2d 870 (W.Va. 1992)). This is a further case involving the due process implications of punitive damage awards which many hope will clarify the Supreme Court's earlier decision on this subject in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S.Ct. 1032 (1991). A decision is expected in late June.

In *Haslip*, a majority of the Court upheld a punitive award rendered by an Alabama jury of approximately four times the amount of compensatory damages. Justice Blackmun identified three factors which persuaded the Court that the Alabama punitive damage scheme comported with minimum notions of due process. First, the trial court's instructions confined the jury's discretion to legitimate policy concerns of deterrence and retribution and explained that the imposition of punitive damages was not compulsory. Second, Alabama's post-trial procedures were thought to insure "meaningful and adequate review" by the trial court whenever a jury has fixed the amount of punitive damages. Third, further review by Alabama's highest court where detailed substantive standards would be applied "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose[.]" 111 S.Ct. at 1044-1045. This latter feature of Alabama's scheme distinguished it from overly deferential systems employed in other states which upheld punitive awards unless "manifestly and grossly excessive" or unless passion, bias, and prejudice were so apparent as to "shock the conscience". *See* 111 S.Ct. at 1045 n. 10.

In a concurring opinion Justice Scalia criticized the majority's multifactor reasoning for providing no guidance as to whether other procedural schemes might also pass constitutional muster. According to Justice Scalia, this merely continued the uncertainty that the *Haslip* case was intended to resolve. He urged broad approval of the longstanding tradition of jury-assessed punitive damages because its historical acceptance in American Courts is evidence enough of its compliance with due process. *See* 111 S.Ct. at 1046-1054. Like Justice Scalia, Justice Kennedy was inclined to allow the "judgment of history" govern the outcome and noted that the majority's case-by-case approach will inevitably require further refinement "in some later case". 111 S.Ct. at 1055. Justice O'Connor was the lone dissenter.

TXO Production v. Alliance Resources Corp., cert. granted 113 S.Ct. 594, apparently now presents the "later case" anticipated by Justice Kennedy. It began as a declaratory judgment action brought in West Virginia state court by *TXO* Production Corporation against Alliance Resources Corporation to clear a purported cloud on *TXO's* title to oil and gas rights obtained from Alliance. Alliance counterclaimed for slander of title on which the jury returned awards against *TXO* for $19,000 in compensatory damages and for punitive damages of $10 million. As justification for the punitive award, *TXO* was found to have knowingly and intentionally brought a frivolous declaratory judgment action using the purported cloud as leverage for increasing its interest in the oil and gas rights. 419 S.E.2d at 875, 877.

TXO had argued on direct appeal that the award of punitive damages violated the due process principles announced in *Haslip* and West Virginia's post-*Haslip* decision of *Garnes v. Fleming Landfill,* 413 S.E.2d 897 (1991). In *Garnes* the Court adopted specific procedural standards to be applied in view of *Haslip*'s teachings, but that decision was handed down after the jury's verdict in *TXO*. The *TXO* Court declined to remand the case in light of the *Garnes* standards because to do so would "unnecessarily send far too many cases back for retrial." 419 S.E.2d at 886. Rather, the Court promised to be "especially diligent" in its review of punitive damage awards entered before *Garnes* was decided. *Id.*

The Court regarded the central issue in punitive damage cases to be whether the punitive damages bear a "reasonable relationship" to actual damages. *Id.* In an attempt to find some pattern of reasonableness, the Court examined all punitive damage opinions issued since *Haslip* and found the cases to fall into two general categories: "really stupid defendants" and

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BIFURCATION OF ISSUES IN AN UNDERINSURED MOTORIST CASE

By Micheal W. Ellwanger, Sioux City, Iowa

In *Leuchtenmacher v. Farm Bureau Mutual Insur. Co.*, 461 N.W.2d 291 (Iowa 1990), the Iowa Supreme Court held that an injured party does not have to recover against the tortfeasor before suing his own insurance company on his or her underinsured motorist coverage.

In *Handley v. Farm Bureau Mutual Insur. Co.*, 467 N.W.2d 247 (Iowa 1991), the Supreme Court held that where a plaintiff sues the tortfeasor and his or her own insurance company in the same action, the court should sever the two claims. The rationale of the court was that a jury in evaluating liability and/or damages in an action against the tortfeasor, should not be permitted to hear evidence regarding insurance.

In a recent ruling by District Court Judge Gary L. McMinimee, the court addressed the issue of the admissibility of evidence regarding insurance limits in the action against the insurance company (*Dahm v. United Fire Casualty/The Travelers Insur. Co.*, Sac County Law No. 17111). In this case the plaintiff settled with the tortfeasor for approximately 95% of the tortfeasor's insurance coverage. The plaintiff then pursued an action against his own insurance company. Prior to the trial, the insurance company filed a Motion In Limine and a Motion To Bifurcate Issues. The defendant insurance company contended that only factually contested and non-objectionable matters should be submitted to the jury. These issues were the fault of the tortfeasor and the damages sustained by the plaintiff. Given the jury's findings on these issues, the Judge could determine the amount of judgment which should be rendered against the insurance company. The defendant contended there was no need for the jury to be told how much money the plaintiff had recovered from the tortfeasor, and there was no need for the jury to know the policy limits of the defendant insurance company. The defendant also requested that evidence regarding worker's compensation payments also should be prohibited. The insurance company attempted to distinguish *Leuchtenmacher*. In *Leuchtenmacher*, the Supreme Court had rejected a contention that insurance evidence was inadmissible under Rule 411. The Supreme Court indicated that evidence of insurance limits was admissible in order to prove the plaintiff's claim under the insurance contract. *Supra* at page 294.

The defendant contended that *Leuchtenmacher* had been impliedly overruled in *Handley*. In *Handley*, the court had discussed at some length the danger of admitting insurance information in any case in which the liability against the tortfeasor or damages were issues. In *Handley*, the Court had recognized that "evidence of insurance can prejudice defendants by influencing jurors into returning liability verdicts against defendants on insufficient evidence and by causing jurors to bring in larger damage verdicts than they would if they believed the defendant would be required to pay it." *Supra* at 249.

The defendant insurance company in the *Dahm* case also relied upon the following statement in "Iowa Practice," pages 39-40, 1992 pocket part. The authors were specifically discussing the *Leuchtenmacher* decision when they stated:

> Offering evidence of the defendant's policy limits would arguably permit jurors to focus less on proof of plaintiff's damages and more on the available resources through the defendant insurer. Probative value of the evidence may be outweighed by its unfair prejudice in the same context that caused adoption of Rule 411. Similarly, defendant insurance company would probably stipulate to the underlying tortfeasor's policy limits for purposes of determining payment due from the defendant. Disclosure of that amount to the jury during trial may merely suggest a minimum for damages and thus be unfairly prejudicial.

The plaintiff vigorously resisted the Motion In Limine/Motion To Bifurcate in the *Dahm* case. The plaintiff relied on the language in *Leuchtenmacher* which specifically held that in an underinsured motorist claim, the policy limits of the defendant are admissible. The plaintiff also pointed to language in the *Handley* decision that indicated that although policy limits evidence is inadmissible in an action against the tortfeasor, it would be relevant to the underinsured motorist claim. *Supra* at page 249. The plaintiff contended that the underinsured motorist claim was a contract claim, and therefore the terms of the contract should be admissible.

The court issued its ruling on November 12, 1992. In this ruling the court sustained the motions of the insurance company. The court conceded that *Leuchtenmacher* and *Handley* both indicated that insurance information would be relevant in a contract action against the

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not actively be involved in harming the child to have her behavior defined as child abuse. However, this language accompanies provisions of the code relating to child abuse reporting, investigation, and rehabilitation.[6] Parental duties in these provisions are unclear. Section 232.69 discusses mandatory and permissive reporters of child abuse.[7] Under section 232.69(1), only certain classes of persons such as health practitioners, social workers, and licensed school employees who reasonably believe a child has suffered child abuse are required to report those beliefs.[8] Parents are not included within the class of mandatory reporters.[9] On the contrary, parents seem to fall within the class of permissive reporters under section 232.69(2).[10] It seems likely, however, the legislature did not include parents within the class of mandatory reporters for two reasons: (1) Section 232.69(3) requires all mandatory reporters to receive special training on identification and reporting of child abuse; and (2) other provisions of the code provide for criminal sanctions for a parent's failure to prevent child abuse.[11] That the legislature envisioned some role for parents as permissive reporters is evidenced by a provision stating spousal immunity does not apply in judicial proceedings resulting from operation of the reporting sections.[12]

Section 232.68, while defining child abuse in terms of omissions, is silent as to what level of knowledge must be present before a parent will be deemed to have omitted to act to prevent or stop the abuse. The section of the code that subjects a parent to criminal penalties for child abuse also seems to deal with omissions.[13] The child endangerment statute imposes criminal penalties when a parent "[k]nowingly acts in a manner that creates a substantial risk to a child['s] . . . physical, mental or emotional health or safety."[14] Further, section 726.6 prohibits a parent from "[k]nowingly permit[ing] the continu[ed] physical or sexual abuse of a child."[15] The use of the word "knowingly" in section 726.6 does little to clarify what level of knowledge is sufficient to violate the statute. Moreover, the question of knowledge sufficient to violate section 726.6 has not been addressed by the courts of this state.

In the recent Iowa child abuse case involving Joanne Taggart and her son Jonathan Waller, which received widespread publicity, Taggart was convicted under the child endangerment statute for failing to prevent the physical abuse of Jonathan by her boyfriend. Jonathan had been physically abused by Taggart's boyfriend for a period of two weeks. During this period of time Jonathan suffered injuries including a fractured arm, ruptured liver and a seriously burned hand as a result of the abuse. Ultimately, Jonathan was beaten so severely that he was hospitalized and nearly died from a serious head injury. In instances of severe physical abuse, such as the Jonathan Waller case, it seems unlikely a parent can claim a lack of knowledge as to the injuries and their source. A knowing standard is probably much more difficult to impose where the abuse is of a sexual nature, however, because, as one commentator has noted, "the victims are for the most part timid, inarticulate, and . . . may take years to realize [they have] been the victim of a sex crime."[16]

B. New York's Objective Standard

The validity of statutes imposing criminal liability on a parent for a knowing failure to prevent the abuse of their own child has been upheld in other states. Convictions for child abuse have also been upheld where the parent should have known the abuse was occurring but claimed ignorance. Parental standards under New York's child abuse statute, McKinney's Family Court Act, have been clearly defined by the courts.[17] Section 1012 of the Family Court Act defines an abused child as:

> [A] child less than eighteen years of age whose parent . . .
> (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death . . .
> or protracted impairment of physical or emotional health . . .
> or,
> (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death . . .
> or protracted impairment of physical or emotional health . . .
> or,
> (iii) commits, or allows to be committed, a sex offense against such child . . .[18]

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The language of the Family Court Act seems somewhat broader than the "knowingly" standard of Iowa's child endangerment statute. One New York court interpreting section 1012 the Family Court Act held the duty of a parent to prevent child sexual abuse is triggered when a reasonably prudent parent would have observed objective signals of sexual abuse exhibited by a child.[19] Another court held a parent to this standard even where the abuse occurred when the mother was not at home and the victim never informed her mother the abuse had occurred.[20]

New York's objective standard places a high premium on the protection of children. This standard makes good sense in that it implicitly acknowledges that the best remedy in a situation where one parent is engaged in an abusive relationship with a child is affirmative action on the part of the person best able to recognize and assess the risks to the child: the other parent. The "knowingly" standard of the Iowa child endangerment statute should demand no less of parents. Furthermore, civil standards of conduct for parents ought not be placed below criminal standards. Parents should not be able to escape either criminal or civil liability by pretending to turn a blind eye to an abusive situation.

III. TOLERANCE OF CHILD SEXUAL ABUSE: AN INSURABLE ACTIVITY?

Assuming a child sexual abuse victim is able to secure a judgment against one parent for failing to protect her from the other abusive parent, this judgment may prove to be worthless if not covered by homeowners insurance. Homeowners policies commonly contain provisions excluding coverage for injuries that are intended or expected by the insured. A typical intentional act exclusion reads:

"1. Coverage E-Personal Liability and Coverage F-Medical Payments to Others do not apply to bodily injury or property damage: a. which is expected or intended by the insured."[21] There is a wealth of authority holding acts of child sexual abuse fall within the language of intentional act exclusions.

A. *The Intentional Act Exclusion at Work: Altena v. United Fire & Casualty Co.*

In Iowa, the supreme court in *Altena v. United Fire & Casualty Co.*[22] found a major issue in sex abuse cases was the nature of the intent required to bring the abuse within the language of the intentional act exclusion.[23] The defendant in *Altena* faced civil liability for sexually abusing a young woman.[24] The court found three different views have developed:

> (1) The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's act;
> (2) The majority view is that the insured must have intended the act *and* to cause some kind of bodily injury;
> (3) A third view is that the insured must have had the specific intent to cause the type of injury suffered.[25]

The court expressly adopted the majority view.[26] However, the court stated that, in cases of sexual abuse, intent for purposes of the intentional act exclusion would be inferred.[27] The court reasoned a "factor favoring [the] inference [was] that were the allegations against [the defendant] proven in a criminal prosecution, he would be guilty of sexual abuse. The criminal character of the acts is a further recognition of the injury inherent in the commission of them."[28] The court further reasoned the insurer did not contemplate coverage under the homeowners policy for acts amounting to sexual abuse.[29] Finally, the court found public policy reasons dictated that coverage should not extend to this type of act.[30] The court stated:

> [O]ur own sense of propriety dictates that coverage for these types of criminal acts should be against the public policy of this state. Such a holding is in accord with the general rule that insurance to indemnify an insured against his or her own violation of criminal statutes is against public policy and therefore void.[31]

B. *The Intentional Act Exclusion: Beyond Altena*

The *Altena* case clearly establishes what numerous other jurisdictions have already held: that the sexual abuse of a child is conduct excluded from coverage under intentional act exclusions. The question of whether the exclusion also applies to a parent's failure to

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act when faced with objective evidence of child sexual abuse remains. *Altena* does, however, lend guidance in that inquiry. The public policy rationale with respect to noncoverage for a sexual abuser is the same for one who does nothing as the abuse occurs. Like the abuser, a parent who does nothing to protect a child from an abusive spouse can claim a lack of subjective intent to injure. However, under the *Altena* holding, the lack of subjective intent is irrelevant for purposes of the intentional act exclusion where the injury results from sexual abuse. Additionally, under the Iowa Code, one who "[k]nowingly permits the continuing physical or sexual abuse of a minor" is subject to the same criminal sanctions as the active abuser. Therefore, the logic used by the *Altena* court with respect to the public policy underlying exclusion of coverage for criminal acts applies to one who's failure to act also constitutes child endangerment.

C. *Intentional Act Exclusions: Does Intended Equal Expected?*

Another factor that is persuasive to the conclusion that a parent's failure to act to protect her child should not be covered under the intentional act exclusion is the plain language of the exclusion itself, which exempts intended and *expected* injuries. If the terms "intended" and "expected" were given their ordinary meanings, together they would seem to cover both injuries that were intended, and those that might reasonably be anticipated by the insured. The issue here seems to be whether "intended" and "expected" are to be construed as synonymous or given distinct meanings. No Iowa case has discussed whether the terms intended and expected are synonymous for purposes of coverage exclusion. Cases from other jurisdictions are split on this issue.

The view that the terms intended and expected are synonymous is represented by *Grange Mutual Casualty Co. v. Thomas*.[32] In *Thomas*, a family member who was observing a family quarrel was accidentally shot by the insured.[33] The injured party sought coverage under the insured's homeowners liability policy.[34] The insurer denied coverage based on the provision of the policy excluding coverage for injuries intended or expected by the insured.[35] The court disagreed with the insurer that the terms intended and expected in the exclusion should be given distinct meanings.[36] The court reasoned that if intended and expected were to be given distinct meanings,

> then, by a parity of reasoning, we would have to exclude any injury from an unintentional tort which a given jury might categorize as being 'expected' depending upon the degree of likelihood thereof under the facts and circumstances of the case. Conceivably, indeed, this might include an injury resulting from simple negligence and, under Florida law, could well include an injury resulting from gross negligence.[37]

The court held that such a position was contrary to established Florida law interpreting the intentional act exclusion.[38]

The view that the terms intended and expected should be given different meanings is represented by *City of Carter Lake v. Aetna Casualty & Surety Co.*[39] The court in *Carter Lake*, which was a federal diversity case interpreting Iowa law, held expected and intended were not synonymous.[40] The court, while acknowledging the absence of on-point Iowa cases discussing the issue stated, "[f]or the purposes of an exclusionary clause in an insurance policy the word 'expected' denotes that the actor knew or should have known that there was a substantial probability that certain consequences [would] result from his actions."[41] The *Carter Lake* case represents a logical construction of the word expected. This construction is also consistent with an affirmative parental duty to act to prevent situations carrying a "substantial risk to a child or minor's physical, mental or emotional health or safety."[42]

D. *Intentional Act Exclusions and Tolerance of Child Sexual Abuse: Two Cases for Guidance*

It appears no appellate court has explicitly ruled on the issue of whether insurance coverage is excluded in cases where a parent is found liable for failing to act to protect her child from the sexual abuse of a spouse. However, two recent cases have touched peripherally on the issue of whether one responsible for the safety of a child can be covered for negligent super-

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NON-REPORTING OF CHILD SEXUAL ABUSE
THE NEXT ATTEMPT AT INSURABILITY

Continued from page 9

vision of a child that results in sexual abuse. In *Atlantic Employers Insurance Co. v. Tots & Toddlers Pre-School Day Care Center*,[43] the insurer of a day care center sought a declaratory judgment that its policy excluded coverage for sexual abuse that had occurred at the center.[44] One of the allegations in the original complaint against the center charged the corporation with negligent supervision in failing to take steps to stop or prevent the abuse.[45] The court did not reach the coverage question with regard to the negligent supervision, but stated in dicta the corporation "might be denied coverage under the policy exclusion relating to violations of penal statutes if they participated in, condoned or had knowledge of illegal activity."[46] The language of this case supports the policy arguments against insuring criminal activity.

Another case touching on the coverage question is *D.W.H. v. Steele*.[47] In *Steele* a minor foster child sued Steele, her foster mother, and D.H., another foster child in Steele's home, for sexual abuse committed by D.H.[48] The allegation against Steele was for negligent supervision, failure to report the abuse under a Minnesota statute similar to Iowa's child abuse reporting statute, and sexual abuse.[49] From the facts it does not appear Steele was actively involved in the sexual abuse.[50] However, the court concluded her acts of omission were excluded from coverage under her homeowner's policy.[51] Applying reasoning similar to that in *Altena*, the court stated permitting coverage for either the abuser or Steele would violate "Minnesota's long-standing public policy that homeowner insurance policies do not provide coverage for criminal conduct."[52]

The *Steele* case is important in that it implicitly accepts the notion that a person responsible for a child cannot turn to a homeowner's policy for coverage for acts of omission resulting in the sexual abuse of a child. There is no reason the logic and holding of *Steele* cannot be directly applied to a factual situation where one parent fails to protect her child from the sexual abuse of the other parent.

IV. CONCLUSION

There can be little doubt child sexual abuse carries an enormous social cost. This cost is only one of the many reasons why this problem should represent an overriding national priority. The United States Supreme Court recognized this when it stated, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[53] The role of the courts in meeting this objective is manifest. It seems likely the courts will soon be faced with the problems of parental bystander liability for child sexual abuse and homeowner coverage questions accompanying that liability. Courts confronted with these issues will be setting off into unmapped judicial territory. These courts will, however, be armed with existing public policy in their search for answers. One of these policies, discussed in *Altena v. United Fire & Casualty Insurance Co.*,[54] states insurance coverage should not be available to indemnify a person for her own criminal acts.[55] A parent who ignores the sexual abuse of her child by her spouse has arguably committed a criminal act. Public policy, therefore, demands that coverage should be unavailable to the parent who ignores or permits the sexual abuse of her own child. This can be accomplished with a holding that parental liability for failure to prevent child sexual abuse falls under the policy provisions excluding coverage for injuries intended or expected by the insured.[56] Furthermore, such a holding is consistent with, and a logical extension of, the *Altena* case.

A construction of intentional act exclusions that prevents recovery for a parent's failure to protect her child from sexual abuse will not be without a negative impact on victims. The abused child, at first vindicated by a judgment, may try to execute the judgment only to find both parents are judgment-proof. Giving intentional act exclusions any other construction would no doubt provide a monetary remedy to yesterday's victims. But the cost would be borne by tomorrow's victims. When a court says a particular act is covered by insurance, that court is also, by inference, saying the act is insurable. Therefore, any deterrent effect imposed by the possibility of tort

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NON-REPORTING OF CHILD SEXUAL ABUSE
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liability could be eliminated by a potential tortfeasor through the purchase of insurance. This pay now, seek indemnification later plan might make sense when the tort liability arises through those accidents which normally accompany home ownership. But we as a society cannot afford to classify tolerance of child sexual abuse an insurable activity. The cost is simply too high.

Excluding these claims from homeowners coverage may seem unfair and cruel to the victims of child sexual abuse. However, sources for recovery against the judgment debtor do not begin and end with homeowners liability policies. In *Wagner v. Smith*[57] the Iowa Supreme Court, in deciding not to abrogate the parental immunity doctrine in cases of negligent supervision, noted other possible sources and indicated its reluctance to allow liability insurance to be a source for intrafamily recovery.[58] The court stated:

> We are aware that most tort suits by a child against a parent involve liability insurance . . . We can assume that future coverage for negligent supervision would either come at a high premium cost, or be obviated by a routine exclusion provision in liability policies. Accident or health insurance seems to be the more appropriate means of ensuring that insurance funds will be available for the care of an injured child.[59]

A holding that homeowners insurance is unavailable as a source of recovery for a victim of child sexual abuse will not mean she will be cut off completely. But, as the court in *Wagner* noted, health insurance seems the more appropriate vehicle of recovery than homeowners liability insurance.❑

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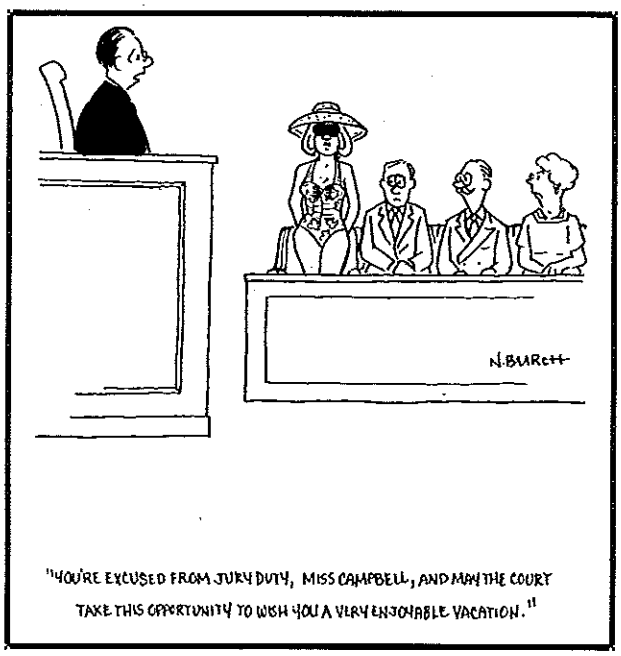
1. *See, e.g.*, Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988).
2. *See, e.g.*, IOWA CODE § 726.6 (1991).
3. Mark Hansen, *Liability for Spouse's Abuse*, A.B.A. J. 16 (February 1993)
4. *See* IOWA CODE §§ 232.68, 726.6 (1991).
5. IOWA CODE § 232.68(2) (1991).
6. *Id.* §§ 232.67-77.
7. *Id.* § 232.69.
8. *Id.* § 232.69(1).
9. *Id.*
10. *Id.*
11. See IOWA CODE § 726.6 (1991).
12. *Id.* § 232.74.
13. *Id.* § 726.6.
14. *Id.*
15. *Id.*
16. RICHARD A. POSNER, SEX AND REASON 399 (1992).
17. N.Y. FAM. CT. LAW §§ 1011-1075 (McKinney 1992).
18. *Id.* § 1012(e).
19. *In re* Jose Y., 576 N.Y.S.2d 297, 298 (N.Y. App. Div. 1991).
20. *In re* Katherine C., 471 N.Y.S.2d 216, 218 (N.Y. Fam. Ct. 1984).
21. TORT & INSURANCE PRACTICE SECTION OF THE AMERICAN BAR ASSOCIATION, ANNOTATIONS TO THE HOMEOWNERS POLICY 301 (Thomas W. Mallin & Michael E. Bragg, eds., 2d ed. 1990).
22. Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988).
23. *Id.* at 488.
24. *Id.* at 486.
25. *Id.* (quoting Pachucki v. Republic Ins.Co., 278 N.W.2d 898, 901 (Wis.1979)).
26. Altena v. United Fire & Casualty Ins. Co., 422 N.W.2d at 490.
27. *Id.*
28. *Id.* (citation omitted).
29. *Id.*
30. *Id.*
31. *Id.*
32. Grange Mut. Casualty Co. v. Thomas, 301 So.2d 158 (Fla. Dist. Ct. App. 1974).
33. *Id.*
34. See *Id.* at 158-59.
35. *Id.*
36. *Id.* at 159.
37. *Id.*
38. *Id.*
39. City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052 (8th Cir. 1979).
40. *Id.* at 1058.
41. *Id.* at 1058-59.
42. IOWA CODE § 726.6 (1991).
43. Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Center, 571 A.2d 300 (N.J. Super. Ct. App. Div. 1990), *cert. denied*, 584 A.2d 218 (N.J.).
44. *Id.* at 301.
45. *Id.*
46. *Id.* at 304.
47. D.W.H. v. Steele, 494 N.W.2d 513 (Minn. Ct. App. 1993).
48. *Id.* at 514.
49. D.W.H. v. Steele, 494 N.W.2d at 514.
50. *Id.* The facts state D.H. was the perpetrator of the abuse. *Id.*
51. *Id.* at 515.
52. D.W.H. v. Steele, 494 N.W.2d 513, 516 (Minn. Ct. App. 1993).
53. New York v. Ferber, 458 U.S. 747, 757 (1982).
54. Altena v.United Fire & Casualty Ins. Co., 422 N.W.2d 485 (Iowa 1988).
55. *Id.* at 490.
56. The same result can be accomplished with amendments to homeowners liability policies explicitly excluding coverage for all sexual abuse claims. These amendments might also exclude from coverage injuries related to sexual harassment and civil rights claims.
57. Wagner v. Smith, 340 N.W.2d 255 (Iowa 1983).
58. *Id.* at 257.
59. *Id.*

If computers threaten to take over the world, we can always start forming them into committees... that'll slow them down!

IN THE PIPELINE - PUNITIVES REVISITED *Continued from page 5*

"really mean defendants." *Id.* at 887-888. Really stupid defendants were defined as those who have not harmed victims intentionally but have harmed them as a result of extreme carelessness. Really mean defendants were those who intentionally committed acts they knew to be harmful. *Id.* at 888. In cases involving really stupid defendants where actual damages were neither negligible nor substantial, the outer limit of punitive awards was drawn by the Court at "roughly five to one."*Id.* at 889. Punitive damage limits for really mean defendants on the other hand were deemed to be appropriately higher in order to deter future evil acts. In such cases, the Court stated the primary consideration in determining the reasonableness of the jury's verdict under *Haslip* and *Garner* "is the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct." Id. Using these principles, the Court upheld the punitive award of 526 times actual damages as being necessary to discourage TXO from continuing its pattern and practice of "fraud, trickery, and deceit." *Id.* at 889-890.

By agreeing to review the West Virginia Supreme Court's decision in the *TXO* case, the United States Supreme Court seems prepared to further clarify its *Haslip* decision and perhaps articulate specific standards for measuring due process challenges to punitive damage awards. In argument, the Supreme Court reportedly did not focus its attention on the state court's amusing categorization of really mean and really stupid defendants, but rather upon other issues including whether various rationales for the punitive award were appropriately considered by the jury. *See* United States Law Week, 61 LW 3705. The Iowa Supreme Court has not had occasion to apply the *Haslip* decision to Iowa's punitive damage scheme. Although Judge O'Brien in *Burke v. Deere and Company*, 780 F.Supp. 1225 (S.D. Iowa 1991) held that Iowa's standard punitive damage instruction (ICJI 210.1) withstood scrutiny under *Haslip*, the final word on the subject remains to be heard. ❑



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BIFURCATION OF ISSUES IN AN UNDERINSURED MOTORIST CASE

Continued from page 6

insurance company. Nevertheless, the court indicated that it would be an abuse of discretion if it failed to order "separate trials of issues to limit the prejudice arising from the disclosure of the details of the liability and underinsured coverages." In *Handley*, the Supreme Court had ordered a separate trial of the claim against the tortfeasor, because of the danger from the admissibility of insurance information if the tort claim and the underinsured motorist claim were tried together. Utilizing the logic of the *Handley* case, Judge McMinimee held that the concerns which were identified in the *Handley* case could be avoided by first separately trying the issues of liability and damages, and after that a determination would be made as to the balance of any factual issues, if any, regarding the liability of the insurance company. The jury would be told that this was an action against an insurance company on the underinsured motorist coverage, but would not be told anything else about the "collateral issues."

After receiving this ruling, the plaintiff filed a Motion To Reconsider. The plaintiff argued that the court had misconstrued *Handley*. *Handley* had ordered a separate trial of claims, not issues. The plaintiff argued that it would be inappropriate in a contract action to prohibit the plaintiff from offering evidence of the contract. The motion was overruled.

The case was tried to a jury. A jury verdict was returned for the plaintiff. The plaintiff filed post trial motions which were overruled (including a motion for new trial upon the courts bifurcation of issues). The motion was overruled. Notice of appeal was filed and the case was settled.

COMMENT:

It does appear that in *Handley*, where the plaintiff sued the tortfeasor and the insurance company simultaneously in the same action, the court contemplated that the liability and damage issues would be determined first. The court in *Handley* at page 250 stated:

> In this manner, damages will be determined in a trial against (defendant) without evidence of insurance being available to the jury. Following the resolution of the damage issue in the trial against (defendant), plaintiff's claims against Farm Bureau can be adjudicated. *Supra* at page 250.

We know that in *Leuchtenmacher* the court held that a plaintiff can sue the insurance company without any prior determination of liability or damages. In such a setting, there is actually a "case within a case." The plaintiff has to prove the liability of the tortfeasor and the amount of his damages, as well as the contractual liability of the defendant insurance company. The Supreme Court of Iowa has not ruled on the issue of whether this "case within the case" should be tried separately. Judge McMinimee's ruling suggests how one District Court Judge thinks that the issue should be determined. ❑

Welcome New Members

The following new members were approved at the April 23 and June 11 Board Meetings:

Mark S. Lagomarcino Des Moines	Mark D. Sherinian Des Moines	Amy H. Snyder Davenport
Brian L. Wirt Des Moines	Todd W. Vraspir Des Moines	Gregory P. Bird Des Moines

LEGISLATIVE REPORT

By Robert M. Kreamer, Des Moines, Iowa

The 1993 Legislative Session was a unique session in that there was split control in the Iowa Legislature for the first time since 1967 with the Democrats controlling the Iowa Senate by a margin of 27 to 23, and the Republicans controlling the Iowa House of Representatives by a 51 to 49 margin. Furthermore, because of reapportionment and the large number of legislators not seeking reelection, there were 48 legislators sworn in to new seats in the legislature. Because of the many new legislators who lacked familiarity with the legislative process and the divided partisan control, the session moved at a slower pace than prior years and tended to devote most of its time to the appropriation and budgeting process.

Also, there appeared to develop the additional factor of philosophical gridlock. This gridlock transcended partisan politics and caused stalemates on such issues as gambling and employment drug testing where debate was attempted. While there was no debate on issues of consequence to the defense bar, there was nevertheless gridlock because of a recognition that bills supported in committee would not be favored on the floor, or bills supported in one chamber would not be supported in the other. This is clearly demonstrated by the fact that neither our legislative program nor the initiatives from the plaintiff's bar enjoyed appreciable legislative success.

The Iowa Defense Counsel Association supported the following legislation in the 1993 Legislative Session:

1. **Seat Belt Legislation.** This bill would allow the admissibility of the nonuse of safety belts or safety harnesses as evidence of comparative fault, See HSB 27 and SF 98.

2. **Interest on Judgments.** Interest on judgments shall run only from date of judgment. See HF 156 and SF 129.

3. **Ex Parte Communications.** This legislation would require the execution of a mandatory patient waiver by plaintiff upon the filing of lawsuit. See HSB 226.

4. **Consortium.** This legislation would overrule *Schwennen v. Abell,* 430 N.W.2d 98 (1988) which held that a spouse's recovery for consortium is not reduced by the comparative fault of the injured spouse. See HSB 40 and SF 255.

5. **Offers to Confess Judgment.** This legislation would expand the costs that can be recovered in the event that the plaintiff does not recover at least the amount contained in the offer.

The Iowa Defense Counsel Association was successful in opposing the following legislation:

1. **Products Liability Legislation.** This legislation would overrule the interpretation of Chapter 613.18 by the Iowa Supreme Court in *Bingham v. Marshall and Huschart Machinery Co.,* 485 N.W.2d 78 (1992). See HSB 55 and SSB 82.

2. **Loss of Services and Support.** This legislation would expand the right of a parent to recover for injuries to an adult child. We were successful in amending this legislation to preclude recovery for noneconomic damages in the Senate, but continue to oppose this legislation in the House. See SF 119.

3. **Unfair Competition by Insurer.** This legislation would create a cause of action against an insurer for unfair competition or deceptive acts under Iowa Code Chapter 507B. Additionally, this legislation contained other plaintiff provisions such as elimination of 180-day rule for designating experts in a malpractice action. See HF 45.

4. **Jury Instructions.** This legislation allows a jury in a case involving the State or one of its subdivisions to make findings of fact regarding the law as well as the facts. See HF 149.

Because this was my first year of lobbying for the Iowa Defense Counsel Association, it was necessary to not only meet the freshmen legislators, but to also meet with the veteran legislators and inform them of this new relationship. I believe that I was well received by not only legislators, but also other lobbyists and interest groups sharing our legislative perspectives.

I would like to thank the members of the Iowa Defense Counsel Association for the opportunity to have represented them this past year. A special thank you to the Legislative Committee and its chairman, Herb Selby, for the support and assistance given to me at every request. I look forward to working with you in the days ahead. Thank you! ❑

1993 IOWA DEFENSE COUNSEL ANNUAL MEETING

ANNUAL MEETING INFORMATION

The Iowa Defense Counsel Association Annual Meeting will be held Wednesday, October 6 through Friday, October 8 at the Embassy Suites Hotel in Des Moines. In addition to the usual outstanding CLE program, outlined on this page, this year's meeting will be highlighted by a new scheduling format and an elegant banquet to be held at the beautiful Des Moines Club.

By moving the meeting to a Wednesday through Friday format, the Board of Directors hopes to make it more convenient for all members to attend all seminar sessions and activities. The seminar program has been structured to qualify for 16 hours CLE credit, including 2 hours ethics, and at least 6 hours of federal CLE.

Look for registration materials to be mailed to Association members later this summer. Non-members may contact DeWayne Stroud at 225-5608 for registration materials.

Mark your calendars now for what promises to be another outstanding and enjoyable annual meeting!

Wednesday, October 6

9:00 a.m Registration Desk Opens

11:00 Board of Directors Meeting

1:00 Introduction and Report of the Association

1:15-2:00 Recent developments under Comparative Fault
- Tom Shields
Lane &Waterman Davenport, IA

2:00-2:45 Environmental Liability: Insurance Defense Issues
-Charles Becker
Belin, Harris, Lamson, et al.
Des Moines, IA

2:45-3:00 Break

3:00-3:45 Insurance Coverage Issues in Sex Discrimination and Abuse Cases
- Connie Alt
Shuttleworth & Ingersoll
Cedar Rapids, IA

3:45-4:15 View from the State Trial Bench
- Hon. Ross A. Walters, District Judge Fifth Judicial District, Des Moines, IA

4:15-5:15 Important Ethical Issues for Trial Lawyers
- James Gritzner
Nyemaster, Goode, et al.
Des Moines, IA

5:30-7:00 Cocktails

Thursday, October 7

8:30-9:30 Ethics Problems From the Perspective of the Defense Attorney
- John Lloyd Reynoldson, VanWerden, et al.
Osceola, IA

9:30-10:15 Issues in Commercial Litigation
- Speaker to be announced

10:15-10:30 Break

10:30-11:15 Judicial View of Proposed Amendments to the Federal Rules of Civil Procedure
- Magistrate-Judge Mark Bennett
U. S. District Court, Southern District of Iowa

11:15-12:00 Defense Attorney Perspective of Proposed Amendments to the Federal Rules of Civil Procedure
- David H. Luginbill Ahlers, Cooney, et al.
Des Moines, IA

12:00-12:45 Lunch

12:45-1:15 Supreme Court Report
- Justice, Iowa Supreme Court - to be announced

1:15-2:00 Wrongful Discharge Claims: Issues Affecting Defense of the Employer
- Frank Harty Nyemaster, Goode, et al.
Des Moines, IA

2:00-2:45 Workers' Compensation Update
- Deborah Dubik Petty, Neuman, et al.
Davenport, IA

2:45-3:00 Break

3:00-3:45 Appellate Procedure: New Rules and Practice Pointers
- Diane H. Stahle Davis, Hockenberg, et al.
Des Moines, IA

3:45-4:45 Retention and Relations With Defense Counsel
- View of Corporate and Insurance In-House Counsel
- Wendy N. Munyon, Assistant General Counsel
Grinnell Mutual Reinsurance Co.
Grinnell, IA
- Ed Graham, General Counsel Maytag Corporation

6:30 Reception - Des Moines Club

7:30 Annual Banquet - Des Moines Club

Friday, October 8

9:00-9:45 Handling Expert Witnesses in the Defense of Product Liability Cases
- Kevin M. Reynolds Whitfield & Eddy
Des Moines, IA

9:45-10:30 Defense of Employment Discrimination and Sex Harassment Claims
- Iris Muchmore
Simmons, Perrine, et al.
Cedar Rapids, IA

`10:30-10:45 Break

10:45-11:30 First and Third-Party Bad Faith
- Marsha Ternus Bradshaw, Fowler, et al.
Des Moines, IA

11:30-12:00 Legislative Developments
- Robert M. Kreamer Whitfield & Eddy
Des Moines, IA

12:00-12:45 Lunch

12:45-1:15 Developments in the Federal Court
- Hon. Ronald E. Longstaff
U. S. District Court Judge, Southern District of Iowa

1:15-2:00 Jury Instructions Update
- David L. Brown
Hanson, McClintock L Riley
Des Moines, IA

2:00-3:15 Annual Appellate Case Update
- Gregory M. Lederer
Simmons, Perrine, et al.
Cedar Rapids, IA

3:15-3:30 Election of Officers and Directors and Annual Meeting of Iowa Defense Counsel Association

3:45 Board of Directors Meeting

CLE CREDIT - 16.0 HOURS

Application has been submitted for 2 hours ethics and 6 hours federal CLE credit

Registration Material To Follow

FROM THE EDITORS

In a recent victory, GM demonstrated to the public that NBC News had been misleading in their presentation of a story on the safety of full size GM pickup trucks. NBC, apologized on air, the head of the news department resigned, and many commentators discussed "honesty in news reporting." However, one very important aspect was missed by the media. GM initially sued NBC and the private firm which staged the accident and acted as "experts". The dismissal of the lawsuit by GM included a dismissal of the suit against the "experts". No one seemed interested in the story of the "experts" and their role in the deception. What a shame! The public will never know if these "experts" had properly conducted the tests or were more concerned with providing NBC News with good news film footage.

The defense bar is no stranger to the proliferation of experts who will testify to almost any allegation. Whether the expert is truly knowledgeable in their respective field or just creating "junk science" is a decision for the jury. But most juries are ill prepared for making such decision and must depend on the attorneys to help sort out the facts and truths. It is also impossible for any attorney to be an expert in all fields of debate. Therefore, the number of hours spent by an attorney preparing for the "expert" drives the cost of litigation ever higher. This cost is borne by the general consumer in higher product costs in the market and insurance premiums.

Despite Peter Huber's attempt to expose junk science in his recent book Galileo's Revenge: Junk Science In The Courtroom, little else has been done to hold experts accountable for their testimony and methods of operation. It is the duty of all defense counsel to expose all experts who cater to their client rather than search for the truth. To sweep the problem of the "expert" under the rug, as GM did, only intensifies the problem. Not until experts know that their credibility will be on public display, will we finally bring both "junk" scientists and those operating on the wrong side of credibility to task for their disservice to the courtroom and the American public.

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