defense UPDATE

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THE BELL CANNOT BE UNRUNG: ASK NOT AGAINST WHOM IT TOLLS

by
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The role of the expert witness has proliferated and magnified exponentially in the last fifty years in both state and Federal Courts. In only one other, but related area of trial law, has the change been as profound and structure-shaking, and that is the fulminating of judicial power in matters of evidence, where a predictable rule of evidence has been superseded by an unpredictable judicial balancing of interests, protected by a broad grant of judicial discretion.[1]

In an increasingly complex society in which advances in technological knowledge are so myriad that they virtually tumble over themselves in rapidity, it was inevitable that the courts would determine that jurors would need technical assistance in technical matters. While a laudable concept, the *idea* has been lost in the *institution*. The necessary limitations of the concept have disappeared into the massive maw of the creature.

As early as 1941 in Iowa, *Grismore v. Consolidated Products*, 232 Iowa 328, 5 N.W.2d 646 (1942), permitted the expert to introduce into evidence the expert's opinion as to the ultimate issues to be decided by the jury, provided the opinion was not cloaked in terms of negligence. From this has developed the extensive, expensive and excessive cottage industry of the "expert." As one contemporary poet has put it:

> "Commencing with questionable premises
> And laddering assumption upon assumption
> And inference upon inference,
> The expert sweeps upward and onward
> To the mellifluous exposition
> Of the grand fallacy."
> (Evan Rhys, *Poems from the Ledge*)

In Iowa, as elsewhere, experts have been permitted to opine about the ultimate issues as to whether a professional has failed to meet the appropriate standard of care, or a manufacturer, or almost anyone else, between completing scientific theories, and whether injury or loss occurred to a party, as well as a multitude of other circumstances.

Now no one can reasonably argue conceptually that expertise is not, in appropriate cases, needed, but there must be a careful avoidance of its hazards. Without change there is catastrophe, but change cannot be caprice. It is a demonstrable phenomenon that change in the law tend to be cyclical, and even circular. For the last several hundred years the common law has gone from a position of status (with rights and wrongs flowing from a person's involuntary or feudal position in life) to one of free contracts (whereby rights and wrongs arise from voluntary positions based on contract) and now the swing is to back to status, based on the inherency of certain rights. It is this uneasy dichotomy between freedom and security which results in the constantly changing balance.

The law of evidence has gone from the historic concept with predictability based upon rules of evidence to a thoroughly variable one of how a particular judge at a particular time will balance certain shifting contemporary social interests. This judicial balancing of interests is as amorphous as was English equity practice where the judicial measure was claimed to be the length of the chancellor's foot.

The reliance upon experts' opinions as to liability is also reaching back into ancient law, for it is essentially a new use of the old concept of compurgators, wherein liability was determined by the swearing of persons as to whether a party would have committed a particular act.

Indeed, the abuse of the expert exception harkens uncomfortably back even further to the antediluvian legal practice of hired champions to engage in armed combat, with victory forever determining the truth of the matter. It is no wonder that the common law developed as a welcome alternative to this essentially barbaric method of dispute resolution.

There appear to be two particular areas in which expert testimony has become potentially abusive to litigants and dangerous to the very concept of the use of experts.

The first abuse is in the field of medical malpractice claims, where in Iowa, and elsewhere, medical *specialists* have been permitted to testify about the pro-

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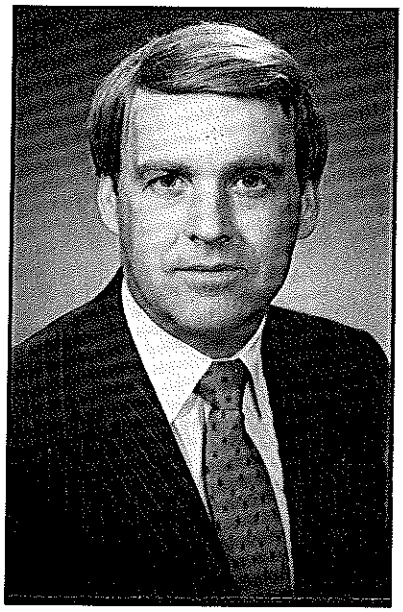
MESSAGE FROM THE PRESIDENT



Richard J. Sapp

The year 1994 promises continued debate on a number of important issues affecting the civil justice system, both here in Iowa and at the national level. These include new amendments to the Rules of Civil Procedure in the federal courts and possible rules changes in Iowa, litigation costs, unequal access to legal resources, court budgets, and liability issues arising in the context of health care reform. It is appropriate to summarize the role I anticipate for IDCA in this dialogue and other expected activities of our Association in the coming months. One of my goals is to raise the level of involvement of IDCA on such important questions, both as a highly credible source of legal analysis and an advocate of important public interests.

Because of the importance of possible legislative activity, your Legislative Committee has already been hard at work and the Board of Directors has approved the broad outlines of our legislative positions for the upcoming year. It is the view of your leadership that IDCA will continue to support well-reasoned changes which improve our judicial procedures or remedy unfair and imbalanced liabilities within the tort system. Some proposals for reform nationally, however, include disturbing attacks on fundamental components of the American civil justice system. IDCA will oppose ill-advised proposals which displace traditional protections inherent in the American adversary system of justice.

Your Association has been actively involved alongside numerous national groups in opposing recent amendments to the Federal Rules of Civil Procedure. While unanticipated political missteps (what else?) in the closing hours of the Congressional session derailed amendments which would have deleted the most objectionable of the new amendments, there is some hope that Congress will revisit the rules when it reconvenes in January. We will continue to communicate our views on several of the proposed rules to our Iowa Congressional delegation.

The approval of an expanded committee structure for our Association at the October, 1993 annual meeting presents an exciting opportunity for an expansion of our activities. By creating several new substantive law committees, as well as a committee on client relations, we will be able to accomplish far more than past boards of directors have been able to undertake. I am please to report that committee applications have exceeded all expectations, and when committee appointments are finalized later this month, you will see that all committees will be well staffed by very talented members of our Association. While this inaugural year of our committee structure will involve some trial and error, our committee work will allow far greater member involvement and a higher profile for IDCA on a wider range of issues in years to come.

The newly expanded Board of Directors resulted in the election of several outstanding new Board members. With our expanded Board and new committees to work with, I am looking forward to a productive and important year for the Association. I, and the Board of Directors, welcome any thoughts any of you may have concerning the issues and activities in which we are involved. We look forward to your input.

Richard J. Sapp
President

A VIEW OF DEFENSE COUNSEL'S POSITION UNDER SECTION 668.11, CODE OF IOWA

By Patrick L. Woodard, Burlington, Iowa

As a matter of "immediate importance" to the citizens of Iowa, in 1986 the Iowa Legislature enacted Section 668.11 mandating the deadline for disclosure of expert witnesses in a professional negligence case. *See*, Comments, ICA Section 668.11. In part, Section 668.11 provides:

"668.11 DISCLOSURE OF EXPERT WITNESSES IN LIABILITY CASES INVOLVING LICENSED PROFESSIONALS

1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
   a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time for disclosure.
   b. The defendant within ninety days of plaintiff's certification.
2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown."

* * *

Since its enactment, defense lawyers have had to struggle with how to handle requests from opposing counsel to extend the one hundred eighty day deadline for disclosure of plaintiff's experts. In most cases, such requests should be denied and motions to the court resisted.

Historically, in all but the most egregious suits the Iowa Supreme Court has required expert testimony in professional negligence actions, not to simply aid the jury under Iowa Rule of Evidence 702, but to establish the duty of care and that the complained of conduct violated that standard of care. *See*, e.g. *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W.425 (1940). Prudent attorneys before ever commencing an action for professional negligence obtain an expert opinion to this effect. Arguably, no less is required of an attorney under Iowa Rule of Civil Procedure 80.

Under Iowa Rule of Civil Procedure 80, when an attorney signs a petition commencing a professional negligence claim the attorney is certifying that to the "best of counsel's knowledge, information and belief, formed after reasonable inquiry, (the allegation of professional negligence) is well grounded in fact and warranted by existing law ...." *See*, Iowa Rule of Civil Procedure 80. It is reasonable to assume that in light of the Supreme Court's requirement of expert testimony to establish a prima facia claim of professional negligence, that the pre-filing Rule 80 inquiry requires an attorney to obtain a review of the facts and receive an opinion from someone qualified in the field that a breach of the applicable duty of care has occurred. When viewed in this context, it is difficult to understand how a claim for professional negligence can be made without the plaintiff designating their experts within one hundred eighty days of answer.

Despite the logical conclusion reached under Rule 80, in today's atmosphere a refusal to grant an extension to any deadline or disclosure date is often seen by opposing counsel as well as some courts as a demonstration of lack of professionalism and courtesy. In routine pre-trial matters under discovery rules as well as the 120-day scheduling order, time limits and deadlines are established for the purpose of enhancing the discovery process and ensuring the orderly completion of pre-trial preparations with minimal court intervention. Deadlines for disclosure of experts under the 120-day scheduling order and other phases of the pre-trial process are established from the trial date and reasonable requests to extend such dates should seldom, if ever, be resisted. But the disclosure deadlines of Section 668, must be viewed differently. This statutory requirement, while being deemed procedural in nature, is not intended to simply ensure the orderly pre-trial process; to the contrary, the Iowa Supreme Court has recognized that the purpose of Section 668.11 is to "provide professionals relief from nuisance suits and avoid the cost of extended litigation in frivolous cases". *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993).

In this context, where does that leave the defense lawyer when he receives a request on the one hundred and seventy ninth day from plaintiff's counsel to extend the deadlines for designation of witnesses under Section 668.11? It is suggested that guidance can be found under the Supreme Court's decision in *Hantsbarger.*

At first glance, the court's decision in Hantsbarger is alarming. After determining that the provisions of Section 668.11 are procedural rather than substantive, the court focused upon the "good cause" provisions of Section 668.11 (2) and held that the determination of "good cause" must be based upon the evaluation of two factors: (1) The seriousness of the deviation from the disclosure requirements; and (2) the defendant's prejudice or lack thereof by allowing the extension. The court then determined

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MEDICAL MALPRACTICE CASES— FIVE YEAR OVERVIEW

By Michael W. Ellwanger, Sioux City, Iowa

INTRODUCTION: Since January of 1989, there have been at least 24 medical malpractice cases that have been decided by the Iowa Supreme Court or the Court of Appeals. Most of these cases deal with just a few issues. Those issues include the extent to which experts are needed, whether experts have been timely designated by the defendants, and whether certain jury instructions were appropriate. The jury instructions which are most often scrutinized are the "honest mistake" instruction and the "alternative course of treatment" instruction. The former is now definitely out, and the latter may be used under appropriate circumstances.

Since 1970, there have been over 70 cases decided by the Iowa Supreme Court. For most of the period, the decisions were almost universally in favor of the defendant. However, over the last few years, there have been several cases which have been resolved in favor of the plaintiff.

Herewith the cases of the last 5 years.

1. *Strain v. Heinssen*, 434 N.W.2d 640 (Iowa 1989). Obstetrical malpractice claim. Defense verdict affirmed (even though CA reversed). Held couldn't cross exam defense expert about his prior testimony for defendant's malpractice carrier.

2. *Donovan v. State*, 445 N.W.2d 763 (Iowa 1989). Alleged negligence— caused post heart surgery staph infection. Summary judgment for defendants affirmed. Held courts refusal to extend time for expert not abuse of discretion and summary judgment appropriate.

3. *Surgical Associates v. Ball*, 447 N.W.2d 676 (Iowa App. 1989). Post operative infection. Directed verdict for defendants affirmed. (1) Expert testimony lacking or insufficient; and (2) insufficient facts for abandonment.

4. *Farley v. Ginther*, 450 N.W.2d 853 (Iowa App. 1990). Alleged malpractice in broken leg repair. Summary judgment for defendants affirmed. Held: (1) okay to bar expert testimony due to prejudice to defendants where expert not identified in answers to interrogatories; and (2) summary judgment appropriate.

5. *Marquis v. Niss*, 451 N.W.2d 833 (Iowa 1990). Surgery to remove part of colon. Alleged improper diagnosis and surgery not indicated. Defense verdict affirmed. Honest mistake in judgment instruction affirmed.

6. *Oswald v. Leqrand*, 453 N.W.2d 634 (Iowa 1990). Portions of claim dismissed on motion for summary judgment for lack of expert testimony. However, some of plaintiff's theories, which amounted to "extremely rude behavior or gross insensitivity" allowed to go to trial without expert witness.

7. *Berg v. Des Moines General*, 456 N.W.2d 173 (Iowa 1990). Plaintiff alleged negligence in diagnosing heart attack. Jury verdict for defendant. Supreme Court held it was abuse of discretion not to compel production of internal statements of nurses prepared in anticipation of litigation (variance reports).

8. *Thomas v. Fellows*, 456 N.W.2d 170 (Iowa 1990). Trial court granted summary judgment against plaintiff where plaintiff failed to designate experts. Statute is constitutional (668.11). Lack of knowledge of counsel is not good cause.

9. *Hutchinson v. Broadlawns*, 459 N.W.2d 273 (Iowa 1990). IV catheter left in elderly patient's arm six days. He died of staph infection. His estate recovered $250,000.00. Affirmed. Rejected defendant's arguments that (1) trial court should have given "alternative methods of treatment" instruction, and also that (2) trial court should have given instruction that failure to diagnose a condition properly is not sufficient, alone, to establish negligence. Court also ruled that the granddaughter did not have a consortium claim.

10. *Pessagno v. U.S.*, 751 F.Supp. 149 (SD Iowa 1990). VA hospital not liable for suicide of mental patient which occurred off hospital grounds, because the suicide was not foreseeable.

11. *Schultze v. Landmark Hotel*, 463 N.W.2d 47 (Iowa 1990). Statute of limitations on medical malpractice actions for wrongful death begins to run on date of discovery of the injury or death—not discovery that it was wrongful (Ch. 614[9]).

12. *Eaton v. Meester*, 464 N.W.2d 691 (Iowa App. 1990). Medical malpractice case dismissed as a discovery sanction . . . "we find abundant evidence in the record . . . that the extreme tardiness exhibited by counsel and Eaton was willful and in bad faith."

13. *Wilson v. Hayes*, 464 N.W.2d 250 (Iowa 1990). Supreme Court sustains dismissal of lawsuit by doctors against plaintiff's attorneys. Lawsuit based on theories of malicious prosecution and abuse of process. Held there was "probable cause" and that action not commenced "primarily" for ulterior reasons.

14. *Fields v. Iowa District Court*, 468 N.W.2d 38 (1991). Sanctions imposed against attorney for plaintiff in medical malpractice case. No expert witness. Research at state medical library inadequate investigation. Trial court had granted summary judgment.

15. *Cox v. Jones*, 470 N.W.2d 23 (Iowa 1991). Plaintiff sustained detached retina after cataract implant. Plaintiff had no expert. Summary judgment granted against plaintiff on theories of lack of informed consent,

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ENFORCEMENT OF CONTRIBUTION CLAIMS

By Phil Willson, Council Bluffs, Iowa

HOW CONTRIBUTION CLAIMS ARISE

1. A defendant can file a cross-claim against a co-defendant.

2. A defendant can join a third party for the purpose of making a contribution claim.

3. A jointly and severally liable defendant can make a post trial motion for contribution based on the allocation of fault established in a final judgment. § 668.6(1)

Illustration:

A sues **B** and **C**. His damages are $12,500.

A is found 20% at fault.
B is found 50% at fault.
C is found 30% at fault.

A, with a joint-and-several judgment for $10,000.00 against **B**, collects the whole amount from **B**.

On proper motion to the court, **B** is entitled to contribution from **C** in the amount of 3/8 of the amount paid - $3,750.

4. A party who has paid a final judgment or settled with a claimant can file suit for contribution. § 668.6(1)

Illustration:

A sues **B**. His damages are $20,000.

A is found 40% at fault.
B is found 60% at fault.
Judgment for **A** for $12,000 is paid by **B**.

B then brings a separate action seeking contribution from **C**, who was not a party to the original action.

C is found to be liable for the same injury, and as between **B** & **C**, **C** is found to be 50% at fault.
Judgment for contribution for $6,000 is awarded to **B**.
If **A** had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including **A** and **B**, and contribution against **C** would have been awarded on that basis.

NOTE: Illustrations are from the Comments to the Uniform Comparative Fault Act sections adopted as Iowa Code § 668.6(1)(2). (The first illustration is modified to reflect Iowa's joint and several rule.)

CONTRIBUTION - ESSENTIALS FOR RECOVERY - JURY INSTRUCTION

1. Common liability to a claimant* (set out elements of proof of plaintiff's liability to claimant and defendant's liability to claimant).
2. Involving the same indivisible claim.
3. Involving the same injury, death or harm.

[4. The amount of the claim as established by itemization in a judgment or verdict.
5. The amount paid by plaintiff.
6. The percentage of fault of each of the parties.]

or

[4. A settlement in which liability of defendant has been extinguished.
5. The amount of the settlement was reasonable.
6. The amount paid by plaintiff.
7. The percentage of fault of each of the parties.]

AUTHORITIES

Iowa Code §§ 668.5 and 668.6.

Cincinnati Ins. Co. v. Evans, 493 N.W.2d 798 (Iowa 1992).

Britt-Tech v. American Magnetics, 463 N.W.2d 26 (Iowa 1990).
RE "Same Indivisible Claim", see *Treanor v. B.P.E. Leasing, Inc.*, 158 N.W.2d 4, 5-7 (Iowa 1968); *Becker v. D & E Distributing Co.*, 247 N.W.2d 727, 730, 731 (Iowa 1976); *Howell v. River Products Co.*, 379 N.W.2d 919, 922 (Iowa 1986); and Restatement Torts Second §§ 433A, 433B, 879, 881.

* Need not rest on same legal theory. *Allied Mutual Ins. Co. v. State*, 473 N.W.2d 24, 26, 27 (Iowa 1991), and *Cincinnati, supra*, 493 N.W.2d at 801.

STATUTE OF LIMITATIONS

A contribution suit must be commenced within one year after:

A. Final judgment, if judgment has been rendered, or

B. Payment, discharging defendant's liability, made within claimant's period of limitations, or

C. Payment, discharging defendant's liability, made within one year after a settlement made within claimant's period of limitations.

AUTHORITIES

Iowa Code § 668.6(3). Iowa Nat. Mut. Ins. Co. v. Granneman, 448 N.W.2d 840 (Iowa 1988). Insurance Co. of N. America v. Coast Catamaran, 753 F.Supp. 804 (S.D. Iowa 1991).

NOTE: No time limit is set for post-trial motions for contribution. □

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fessional conduct of medical *generalists*. It surely cannot be disputed that the specialist brings special knowledge not intended to be attained by a generalist who is necessarily and obviously less specialized. It is submitted that, in fairness, the narrow but deep knowledge of the medical *specialist* should not be called upon to pass upon the broad but narrow knowledge of the medical *generalist*, nor conversely, should the *generalist* pass upon the case of the *specialist*. Only like should indict like.

Historically, the Iowa Courts have permitted this practice, requiring only some nexus, which is based upon the usual assertion that the objection goes only to the weight of the testimony, not to its admissibility, with the jury determining what to believe. This illogically presumes that in a subject which is sufficiently complex so that the jury needs expert testimony in the first place, that a jury can evaluate competency and the reasonableness of colliding complicated concepts.

What has been judicially permitted?

(1) The general view was stated in *Shover v. Iowa Lutheran Hospital,* 252 Iowa 706, 107 N.W.2d 85 (1961), a bed-fall case, which the court permitted an osteopathic physician (a generalist) to opine as to whether the fall was the cause of the Plaintiff's spinal condition, stating:

> "In any event we think Dr. Hughs was sufficiently qualified to express the opinion he said he had. What defendant's argument amounts to is that only a doctor who is a specialist in treating injuries to the spine is qualified to express such an opinion. It is not required that a physician be a specialist in the particular field in order to express such an opinion. *Ward v. Sears,* 247 Iowa 1231, 1239, 78 N.W.2d 545, 549, and citations; *Eqgermont v. Central Surety & Insurance Corp.*, 238 Iowa 28, 32, 24 N.W.2d 809, 810-811. *See also Lowman v. Kuecker*, 246 Iowa 1227, 71 N.W.2d 586, 52 A.L.R.2d 1380; 20 Am. Jur. Evidence, section 865.

An annotation, 54 A.L.R. 860, 861, states:

> '* * * by the great weight of authority, a physician or surgeon is not incompetent to testify, as an expert, merely because he is not a specialist in the particular branch of his profession involved in the case; although this fact may be considered as affecting the weight of his testimony.'"

(2) *Perin v. Hayne,* 210 N.W.2d 609 (Iowa 1973), concerned a paralysis of the vocal chords which allegedly occurred incident to a neurosurgical procedure involving an anterior approach cervical fusion. A surgeon was permitted to testify against the defendant neurosurgeon, the justification appearing at p. 612:

> "Dr. Walter Eidbo, a Des Moines surgeon, testified for Plaintiff. He is not a neurosurgeon but has assisted neurosurgeons, including Defendant, in anterior approach cervical fusion surgery."

(3) In *State of Iowa v. Wallin,* 195 N.W.2d 95 (Iowa 1972) familiarity was regarded as a sufficient basis to permit an osteopathic physician to give opinions regarding blood tests, the opinion reasoning at p. 100;

> "However, along with most other courts, we have held a doctor may testify on a variety of medical subjects without being a specialist in each. Dr. Luka's general familiarity with blood alcohol tests is obvious from his testimony. He stated he had an opinion as to what effect the alcohol in defendant's blood at the time of the accident would have on him. This opinion, he said, was based on his background as a licensed osteopathic physician. That background includes not only his extensive experience as a practicing doctor but also his educational preparation for admission to practice his profession. *See Shover v. Iowa Lutheran Hospital,* 252 Iowa 706, 713, 714, 107 N.W.2d 85, 89 (1961). This was enough to permit Dr. Luka to express an opinion on the matter at issue here.
>
> The objections raised by defendant go to the weight of Dr. Luka's testimony rather than to its admissibility. We hold the trial court did not abuse its discretion in permitting the evidence to go in."

(4) In *Eggermont v. Central Surety and Insurance Corp.,* 238 Iowa 28, 24 N.W.2d 809 (1946), a physician who was not a radiologist was permitted to testify regarding x-rays, because he had a course in that subject in medical school.

(5) In *State v. Backus,* 147 N.W. 2d 9 (Iowa 1966) a paternity action in which the issue was whether a man could ejaculate without knowing that it occurred, the Supreme Court, citing *Shover*, held that it was error to deny a medical doctor, not a urologist, the opportunity to give an expert opinion in the field of urology. (In this case, one can only wonder about the neces-

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sity for an expert in the first place.)

The Iowa Legislature recognized the judicial willingness to permit medical witnesses to give opinion testimony against other doctors even of a different specialty even if more highly trained in superior disciplines, and conversely, even if not as highly trained in a more general discipline. Concerned about this judicial latitude, the 71st General Assembly enacted §147.139 establishing an expert witness standard, which provides:

> "The Court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case."

Manifestly, both the Iowa House and the Senate intended to tighten the admissibility of an expert's medical and dental opinions, and the limitation was that the testifying parties have qualifications which "relate *directly* to the medical problem or problems at issue and the type of treatment administered in the case." Now, "qualifications" is a word of art, and the reference must be to those whose specialized training *and* experience afford them the necessary knowledge. Surely training without experience is as hazardous as experience without training. Only both parts attain the whole.

What has been the judicial response?

(1) June 8, 1986 was the effective date of the statute, which was clearly substantive. The first case decided thereafter by the Supreme Court was *DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)*, with an opinion dated Sept. 17, 1986. Section 147.139 was not mentioned. *Shover* was mentioned, along with its rubric that a medical expert need not be a specialist, which was clearly contravened by §147.139. The theory of the case was lost chance of survival and the precise issue was whether Plaintiff's medical expert had a "lack of specialization in family practice, experience, and education..."

The Court found that he had been in family practice for many years, which should have resolved the issue, but the Court then added the justificatory language at p.138:

> "The admission of expert testimony rests in the discretion of the district court, and we will not reverse its decision 'absent manifest abuse of that discretion.' *Ganrud v. Smith,* 206 N.W.2d 311, 314 (Iowa 1973). 'We are committed to a liberal rule on the admission of opinion testimony.' *Id.* Moreover, the source of expert knowledge 'is not significant, and knowledge from experience is every bit as good as acquired academically.' McCormick, *Opinion Evidence in Iowa,* 19 Drake L.Rev. 245, 263 (1970). A physician need not be a specialist in a particular field of medicine to give an expert opinion. *See Shover v. Iowa Lutheran Hospital,* 252 Iowa 706, 713, 107 N.W.2d 85, 89 (1961)."

(2) *Wick v. Henderson,* et al., 485 N.W.2d 645 (Iowa 1992), held that a Plaintiff's expert, a neurologist, was qualified to testify as to the standard of care of a nurse anesthetist. The Supreme Court held as a matter of statutory construction that §147.139 was inapplicable by its terms to a nurse.

(3) *Surgical Consultants v. Ball,* 447 N.W.2d 676 (Iowa Ct. App. 1989), was the classic case of a doctor suing for his bill with a malpractice suit being the responsive filing. The counterclaim was for a claimed failure of follow-up care and a directed verdict was granted by the trial court for the doctor because the testimony as to malpractice was by the Plaintiff and her sister whose medical entitlements were that they were nurse's aides. Neither the trial court nor the appellate court cited §147.139 nor Evidence Rule 702, but the Supreme Court referred to their lack of medical education and experience, which obviously came from that Rule of Evidence. The Supreme Court affirmed, stating at p. 678:

> "The negligence of a specialist is based on the failure to apply the degree of skill, care, and learning possessed and experienced by specialists in similar circumstances. *Perkins v. Walker,* 406 N.W.2d 189, 191 (Iowa 1987).

(4) In *Tappe v. Iowa Methodist Medical Center, et al.,* 477 N.W.2d 396 (Iowa 1991), the operator of a heart-lung machine during a surgical procedure was asked to give a medical opinion as to what had caused plaintiff's brain damage. Objection was made on the basis of both §147.139 and Evidence Rule 702. The Court affirmed the lack of qualification of the operator.

(5) *Welte v. Bello,* 482 N.W.2d 437 (Iowa 1992) involved an arm burn from the administration of an anesthetic. The court recognized §147.139, stating the applicable law at p. 439, but held that the requirement of §147.139 was satisfied because both the anesthesiologist and the medical expert testified that such injuries do not occur without negligence.

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(6) *Wheeler v. Dental East P.C.*, 494 N.W.2d 248 (Iowa Ct. App. 1992), involved a dentist and a claim of negligence, but §147.139 is neither cited nor referred to conceptually, although Evidence Rule 702 was relied upon.

Section 147.139 unmistakenly creates a significant exception to Rule 702, which latter rule permits training *or* experience. The only reasonable statutory interpretation of §147.139 is that the term qualifications refers to training *and* experience. Any other interpretation would vitiate the act and its obvious intent.

Moreover, the reach of §147.139 no longer affords the trial court the comfortable cloak of judicial discretion in a case appropriately covered by the statute.

For those of us who deal in the law, there is a special sadness when it is lay people who identify and correct a legal practice as an abuse, rather than the bench or the bar.

* * *

The second abuse is the expert as an advocate. Surely, an expert witness should not be an advocate—that is the role of the attorney—and the expert who is an advocate disqualifies his or her expertise and sullies the entire concept of the expert witness. Such a person is a "professional" witness, a successor to the 19th Century seller of snake oil, and as such should have no role whatsoever in any judicial system.

With the dramatic increase in the role of the expert witness, a new breed of witness has burgeoned, the self-styled human factors experts. That such a specialty was a calculated response to the liberalization of the expert's role is established by the fact that it did not even emerge as a discipline until after the rule liberalization. This circumstance alone should raise a serious question as to its legitimacy. That, however, has not occurred, and the human factors witness has been metaphorically taken to the judicial bosom.

The four purposes of using human factors experts in trials are enunciated by Am. Jr. 40 Am. Jr. Trials 639, 640 (1990):

> "Trial counsel typically employ human factors experts to serve three principal roles. First, they are offered to provide explanations of an accident based on human factors or behavior. Second, human factors specialists can apply engineering and human factors concepts to product or machine design in order to testify as to whether an object was defective and unreasonably dangerous. Third, they may be asked to give opinions as to what was or was not feasible at the time a product was designed. For plaintiffs there is a fourth role for human factors experts: they are often called upon to exculpate the plaintiff from conduct that otherwise would be regarded as negligent."

Under Federal Rule 702, and the same Iowa Rule of Evidence 702, expert testimony is admissible if the opinions will assist the trier of fact in understanding the evidence or in determining factual issues.

Iowa Rule of Evidence 703 provides the window of admissibility:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by expert in the particular field in forming opinions or inferences upon the subject, the facts or data need be not admissible in evidence.

The trial court has the discretionary authority to admit or deny, and our Supreme Court has characterized this as a "broad discretion." *Cook v. Iowa*, 476 N.W.2d 617 (Iowa 1991) at page 620, stating at page 620:

> "This Court has long been committed to a liberal view which allows opinion testimony if it will aid the jury and is based on special training, experience, and knowledge with respect to the issue in questions. *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242, 247 (Iowa 1989)."

One of the issues in the *Cook* case was the admissibility of testimony by a human factors expert, who was permitted to testify.

> "He testified concerning the reasonableness of plaintiff's behavior based upon assumptions gleaned from testimony in a prior criminal proceeding concerning plaintiff's conduct in passing another motor vehicle shortly before reaching the intersection where the accident occurred. Hulbert opined what plaintiff's conduct and reactions might reasonably have been in the course of the passing maneuver and immediately thereafter when the intersection first came into view." p. 620

But the problem extends beyond the human factor expert.

An examination of cases in Iowa and other jurisdictions show a permissive willingness to generally permit the expert testimony under the unproved assumption that the jury is able to and will separate the wheat from the chaff. As earlier observed in this article, if the jury is given expert testimony in the first place, it must *necessarily be* on the basis of a

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THE BELL CANNOT BE UNRUNG: ASK NOT AGAINST WHOM IT TOLLS

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prior judicial determination that the particular matter opined about is beyond the common knowledge of the jury.

In *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (DC Cir. 1984), a case involving complicated medical issues, the court permitted an expert to testify on matters at the frontier edge of knowledge, stating at p. 1534:

> "On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a [causal] link exists, it is for the jury to decide whether to credit such testimony." 736 F.2d at 1534.

Subsequently in *Noval v. U.S.*, 865 F.2d 718 (6th Cir. 1989) involving a death by disease, the 6th Circuit excluded causation testimony as conjectural since the cause of the disease was unknown.

What can be done about "experts" without sound qualifications or who espouse views which are scientifically or technologically unsound?

The most reasonable method would be motions in limine, but they offer little assistance, if denied, and even if the trial court states the issue has been preserved. *See Johnson v. Interstate Power Co.*, cited *supra*. Accordingly, and unfortunately, what should be cannot be regarded as a viable response.

Motions for partial summary judgment, or motions to exclude, or 104 Rule of Evidence Motions offer the best procedure, and require judicial scrutiny of the expert or his opinions.

The grounds depend upon the applicable facts, but some general possibilities for denial of the testimony follow:

1. The opinions will not assist the jury because they concern matters about which the jury is knowledgeable.

a. Iowa Rule of Evidence 702.

b. *Westbrooks v. State*, 173 Cal.App. 3rd 1203, 219 Cal.Rptr. 674 (1985). Human factors testimony on adequacy of warning excluded.

c. In *Tacke v. Vermeer*, 220 Mont. 1, 713 P.2d 527 (1986), a human factors expert's opinion as to cause of accident was excluded.

d. *Ferebee v. Chevron*, cited *supra*, a human factors expert's opinions re adequacy of warning were excluded.

e. *Garwood v. Intern. Paper Co.*, 666 F.2d 217 (5th Cir. 1982). A human factors expert's testimony re excluded because it wouldn't aid jury.

f. *DeRosa v. Kalb*, 90 Ct. App. 1282, 752 P2d 1282 (1988). A human factors expert's opinion as to a sign causing an accident excluded.

2. The witness is not qualified as an expert. (Rule 702) See also *Tack v. Vemeer*, cited *supra*.

3. The opinions don't qualify as scientific evidence as they lack the necessary scientific reliability. In *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979), the testimony of a psychologist as to the unreliability of eye-witness identification was excluded.

4. There is a danger of unfair prejudice, confusion of the issues, or misleading the jury. (Fed. Rule 403.)

The problem of unqualified expert witnesses freely opining about questionable conclusions is an increasingly serious problem. The only viable solution is a rigorous pre-determination by the Court to avoid the unsatisfactory "weight of the evidence" justification for submission. The party opposing the witness as to the preferred opinions must take the initiative and move for relief. Some judicial assistance in this regard has just been received from the United States Supreme Court.

On June 28, 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 Supreme Court Reporter 2786, involving the issue of expert testimony. A rare unanimous Court agreed that the test of generally accepted concepts long ago enunciated in *Frye v. United States*, 293 F. 1013 (1929) was dethroned by Federal Rules of Evidence 702. Thus, another salutary rule, characterized by Judge Blackmun at page 2794 as that "austere standard", is removed, as the interest of what drafters of Rule 702 characterized as a "liberal thrust" and "the general approach of relaxing the traditional barriers to opinion testimony." This is certainly the current direction and all the supporting buzz words are in place, but is this the fairest direction?

However, the trial court must still, under Federal Rule 104(a), determine, upon challenge, the qualification of the expert or the admissibility of evidence. The *Daubert* opinion is fruitful in general rules, which was criticized by Judge Rehnquist, but which concluded that the trial court should thereafter consider whether the scientific knowledge has been tested, of which subjection to peer review and publication are significant guardposts. 113 Sp. Ct. 2786.

Moreover, and significantly, the *Daubert* Court recognized Summary Judgment as a means of attacking the absurd or variant opinions, and stressed the "Gatekeeping role" of the trial judge.

Although the denigration of the *Frye* "general acceptance" concept hardly seems to be a step forward, the Majority (but not a unanimous Court in that part of the decision) offered strong support for the judicial screening of experts, stating at pp. 2794 and 2795:

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> "that the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

and at page 2796:

> "Faced with a proffer of expert testimony, then the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that the federal judges possess the capacity to undertake this review."

In a footnote to the *Daubert* opinion, Justice Blackmun observed:

> "Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule of Evid. 201." *Daubert* cited *supra* at p. 2796.

The United States Supreme Court is on record as to the necessity of the "gatekeeping role" of the judiciary as to expert witnesses and their proposed testimony, and given the alacrity with which the Iowa Supreme Court accepts Federal rules and interpretations thereof, it may be that it will not be long before Iowa judges will also be actively involved as serious guardians of the expert gate. In an age of "junk science" and the expert-advocate, it can be none too soon, for the bell cannot be unrung.

[1] The sad result has been a morbid non-uniformity in the reception of evidence. Two recent examples should suffice. In *Johnson v. IPC*, 481 N.W.2d 310 (Iowa 1992) in an approved exercise of discretion, the trial court refused to admit evidence showing the failure of a third party to follow OSHA regulations. Subsequently, in *Wiersgalla v. Garrett*, 486 N.W. 2d 290 (Iowa 1992) the submission of such evidence was permitted and instructed upon. Where the predictability of the reception of evidence is hazarded by judicial discretion, the people, for whose benefit the laws of evidence were created, lose, and where any particular rule of evidence or of law cannot be predicted by counsel, the institution loses. □

A VIEW OF DEFENSE COUNSEL'S POSITION UNDER SECTION 668.11, CODE OF IOWA

Continued from Page 3

that the trial court erred in refusing to grant the request for extension because of the lack of prejudice to defendants.

The facts in *Hantsbarger* are important in understanding the court's holding. In *Hantsbarger*, the plaintiff attempted to comply with Section 668.11 but failed to technically meet the requirements of certification of the expert's qualifications and purpose for calling the expert. Plaintiff's counsel had referred to all witnesses as "Dr." without distinguishing between medical doctors and Ph.D's. When plaintiff's counsel learned of his error, he filed an amended certification under Section 668.11 correcting the defects within a week. In addition, defense counsel apparently knew at least some of the experts designated by the plaintiffs yet resisted the plaintiffs' amended designation on the basis of Section 668.11. On appeal, the Supreme Court while acknowledging the technical noncompliance with Section 668.11 focused upon the conduct of defense counsel and the lack of actual prejudice to the defendant in finding that the trial court had abused its discretion.

For defense counsel, what this means is that the determination of what action to be taken where a request for extension deadlines under Section 668.11 is made must be based upon a balancing of the underlying requirements of Rule 80 and the intent of the Legislature together with the actual effect which an extension will have. Where it is apparent that plaintiff's counsel does not have the requisite expert and failed to obtain an expert's opinion prior to filing a professional negligence claim, the best interests of your client require the denial of a request for an extension and a zealous defense of motions therefore. On the other hand, where compliance with Section 668.11 is technically deficient or as a result of matters outside of the control of opposing counsel, considerations of professionalism and courtesy should dictate the proper avenue to follow. □

MEDICAL MALPRACTICE CASES— FIVE YEAR OVERVIEW

Continued from Page 4

inadequate follow-up care and abandonment. Plaintiff could not establish a case under any of her theories without expert testimony. No good cause where plaintiff attempted to designate a treating physician as her expert well after time deadline.

16. *Doe v. Johnston*, 476 N.W.2d 28 (Iowa 1991). HIV from blood transfusion. Suit based on implied consent. Jury held for doctor. Held that there was a jury question, not negligent as a matter of law.

17. *Tappe v. Iowa Methodist Center*, 477 N.W.2d 396 (1991). Patient suffered stroke during heart bypass surgery. Held res ipsa not apply where all experts agree injury could occur even if proper care given. Rejected "captain of ship" instruction. Regarding implied consent, case discusses 147.137—no requirement to discuss every risk.

18. *Welte v. Bello*, 482 N.W.2d 437 (1992). Patient suffers arm injury from improper IV, which was executed by nurse and which anesthesiologist failed to discover during surgery. Anesthesiologist obtained summary judgment because plaintiff had no expert against him. Reversed—plaintiff entitled to res ipsa loquitur. Also, instruction in case against hospital on res ipsa was defective because it required the "common experience of a health care professional."

19. *Wick v. Henderson*, 485 N.W.2d 645 (1992). Patient suffered permanent damage to left arm due to compression of ulnar nerve during surgery. Directed verdict for defendants reversed. Held: (1) neurologist was qualified to testify against anesthetist and anesthesiologist; and (2) res ipsa applied and plaintiff not required to produce expert testimony.

20. *Vachon v. Broadlawns Medical Foundation*, 490 N.W.2d 820 (Iowa 1992). Professional wrestler lost his leg after car accident. He blamed defendants for delayed diagnosis of compartment syndrome. Defense verdict affirmed. Supreme Court approved instruction on "alternative courses of treatment." However, in future should no longer give "mere mistake" instruction.

21. *Cockerton v. Mercy Hospital*, 490 N.W.2d. 856 (Iowa App. 1992). Patient has fainting spell and fell on way to x-ray. Held that expert testimony was not required.

22. *Kennis v. Mercy Hospital*, 491 N.W.2d 161 (Iowa 1992). Kennis had surgery, which resulted in a somewhat different procedure being performed. Bad result ensued. Held: (1) battery claim dismissed because no expert testimony that alternative procedure was a "totally different type of treatment;" (2) informed consent claim dismissed because no expert testimony that the performance of the alternative procedure was likely or material; (3) specific negligence claims dismissed because no experts--rejected claim of injury to different part of body; (4) rejected res ipsa claim--expert testimony required to show that complications wouldn't occur unless there was negligence.

23. *Peters v. VanderKooi*, 494 N.W.2d 708 (Iowa 1993). Obstetrical malpractice case--brain damaged infant. Surgeons were unavailable for C-section when doctor deemed necessary. Defense verdict reversed. Held that facts did not justify the "alternative methods of treatment" instruction. Court also questioned trial court's refusal to grant plaintiff change of venue; and provided guidance on the use of collateral source evidence.

24. *Hantsabarger v. Coffin*, 501 N.W.2d 501 (Iowa 1993). Plaintiff did not substantially comply with §668.11 (designation of experts in malpractice case); however, defendant was not prejudiced because there was full compliance within a week of the deadline. □

Is Anybody Out There...

The editorial staff of the *Defense Update* is anxious to hear from its readers regarding the articles and positions presented in this newsletter. Written comments should be directed to any of the editors listed on the back page. To be published, all letters must be signed and the editors reserve the right to edit said letters where appropriate. If we receive sufficient response we will be able to start a regular "Mailbag" section of the *Defense Update*. Let's hear from you.

FICC ANNOUNCES VIDEOTAPE ON *HOW TO HANDLE PUNITIVE DAMAGE CLAIMS*

Includes Irving Younger Videotape Excerpts

The "fat lady" may not have sung yet relative to the constitutional challenges to punitive damages, but after ***TXO v. Alliance*** she sure must be warming up. The real battle over punitive damages will be in the trenches at trial and looking for constitutional relief may be a little like leaving the porch light on for Jimmy Hoffa. The defense has to redouble its efforts to find ways to talk with juries about punitive damages and to convince them that punitive damages are not appropriate.

The FICC has produced an outstanding series of tapes addressing the problems associated with defending against claims of punitive damages. The recent ***TXO, Haslip*** and other decisions, plus the dangerous nature of any case involving punitive damages, prompted the FICC to bring together a prominent faculty to analyze the problems associated with such claims and demonstrate techniques which have been successful in defending claims for punitive damages.

This series of tapes is done in the same "how to" fashion of the *Sympathy* tape which brought significant ole's from those in the defense bar who had the opportunity to view it and utilize it in the continuing education of their firms' lawyers.

Punitive damage claims are sympathy's evil sister. They not only interject the most inflammatory evidence into the case, but they carry the possibility of boxcar award numbers, like the $10 million in ***TXO***.

This series of tapes builds on excerpts of a lecture presented at an FICC meeting by the late Irving Younger, the dean of legal seminar speakers, with interviews and demonstrations. The moderator is Doug Houser, a former president of the FICC and a Fellow in the American College of Trial Lawyers. Providing the background and substantive overview and analysis is Professor James Ghiardi, Professor of Law at Marquette University Law School, and co-author of the most respected treatise in the area, ***Punitive Damages: Law and Practice*** by Ghiardi and Kircher.

The insurance company perspective is provided by Leo Jordan, Vice President of State Farm Insurance Co. The perspective of outside counsel actively involved in the defense of punitive damage claims is provided by Marvin Karp, Stephen Cozen and Dudley Oldham (Fellows of the American College of Trial Lawyers). Demonstrations of opening statements and closing arguments in punitive damage cases are provided by Messrs. Cozen and Oldham.

The videotapes combine various formats, including lecture, dialogue and demonstrations. They are just under an hour each. The series is accompanied by a course handout that enhances the learning experience. The tapes are directed to how to deal with and hopefully control punitive damage claims in a jury case throughout trial.

There are four tapes in the series. The first tape looks at punitive damages in general, their basis, the current status of constitutional attacks, the types of cases in which they are available as a remedy and the general rules applicable to all cases in which punitive damages are sought. Three separate tapes then look at the specifics of punitive damages in first-party bad faith cases, third-party bad faith cases, and products liability and commercial litigation. While each of the tapes stands on its own, the specific tapes build on the introductory tape and we encourage the series be purchased as a set.

The tapes are not just for outside trial counsel, but for company executives and corporate counsels as well.

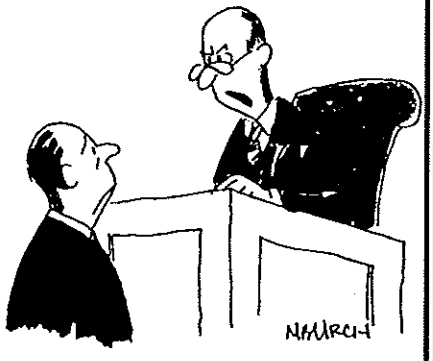
Single tapes are priced at $175 each and the series is available for $595, both plus shipping. Orders should be sent to Joe Olshan, Administrative Secretary, FICC, P.O. Box 111, Walpole, MA 02081; FAX: 508-668-6892; Telephone No. 508-668-6859.

The next Federation videotape will address ***How to Handle Fear In The Courtroom: Chemicals, Cancer & Common Sense.***

New Members

The folowing new members were approved at the 1993 Annual Meeting and November, 1993 Board Meeting:

Stephanie L. Glenn	Des Moines	Richard J. Kirschman	Des Moines
Steven P. Larsen	Des Moines	Bennett A. Webster	Des Moines
Steven E. Ort	New London	Ted. J. Wallace	Bettendorf
Richard Allen Miller	W. Des Moines	Henry J. Bevel	Waterloo
Lee P.Hook	Des Moines	Steven R. Cantonwine	Des Moines
Bruce L. Gettman, Jr.	Waterloo		

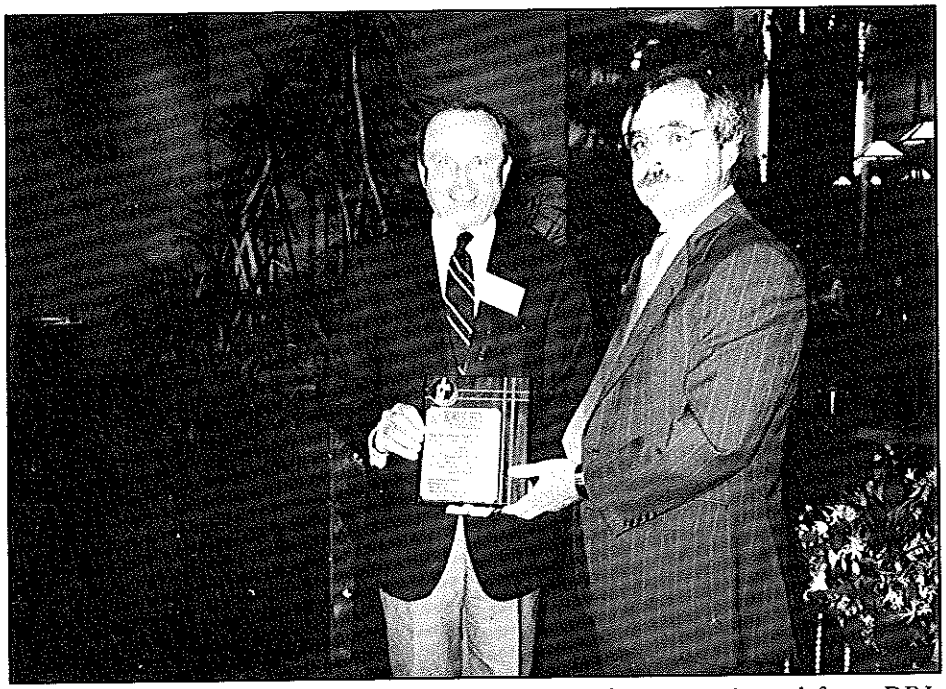


"Are you pleading insanity for your client, Counselor, or for yourself ?"

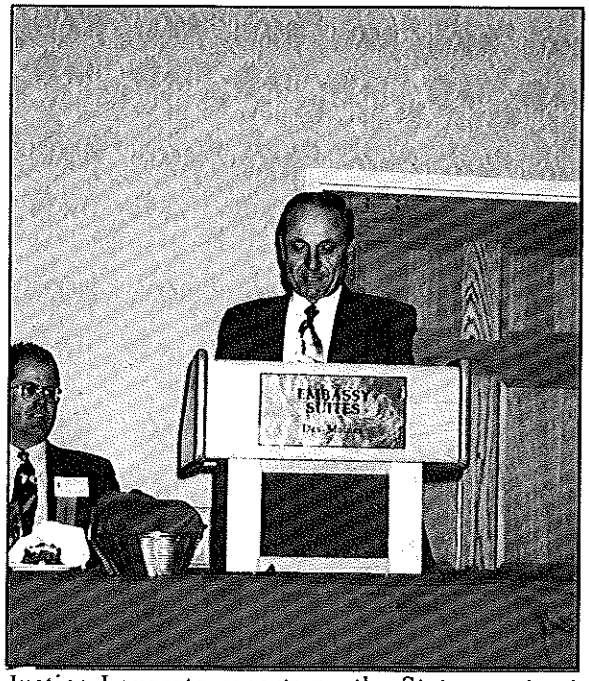
1993 ANNUAL MEETING HIGHLIGHTS

1993-1994 OFFICERS

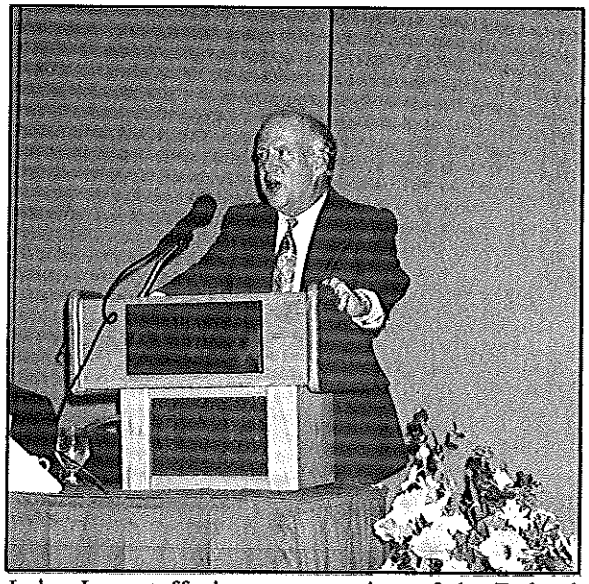
IDCA Officers (l to r) Charles E. Miller, Secretary; Richard J. Sapp, President; Gregory M. Lederer, President - Elect; DeWayne Stroud, Treasurer.



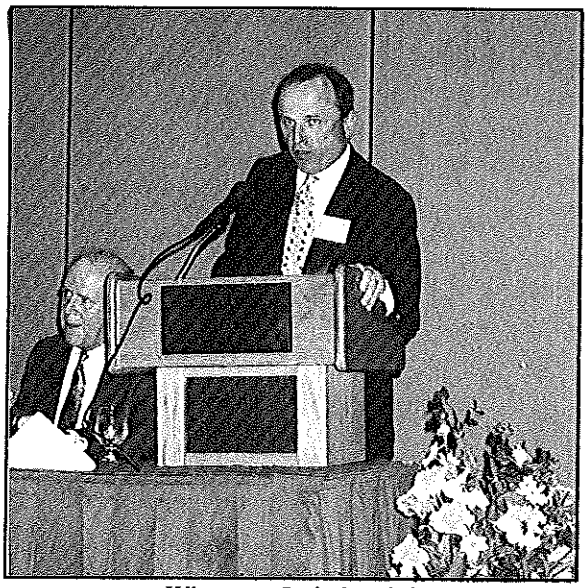
President Grier accepts the DRI Exceptional Performance Award from DRI Representative Wayne Taff.



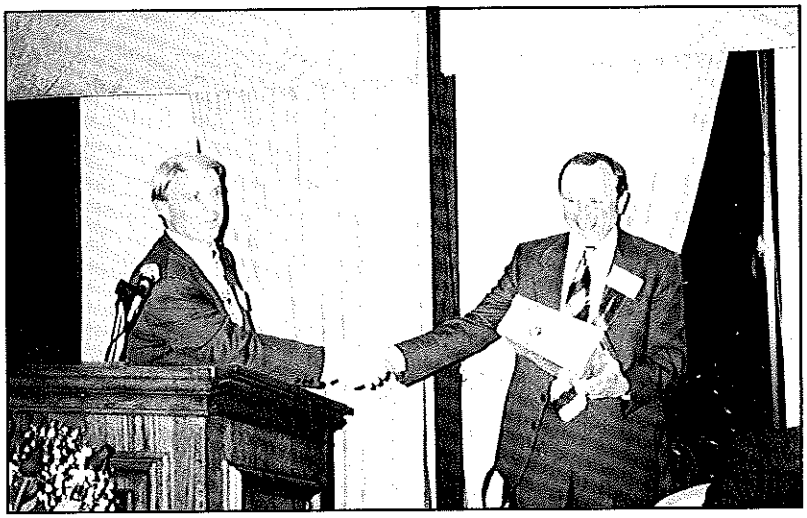
Justice Lavorato reports on the State courts at Thursday's luncheon.



Judge Longstaff gives an overview of the Federal courts.



Who gave Jack that tie?



President Grier steps down and President-Elect Sapp takes the reins.

Marion "Jo" Seitzinger congratulates "Eddie" winner, DeWayne Stroud.

DeWayne Stroud is awarded the "Eddie" for his outstanding contributions to the Association.

FROM THE EDITORS

December 1,1993, a day that will live in infamy in the legal profession? December 1, 1993, was the effective date of the new amendments to the Federal Rules of Civil Procedures.

Some of our colleagues have been loud in their criticism of these amendments, suggesting that with their enactment, Congress has finally found a way to substantially reduce the caseload in the Federal Courts. Most conspicuous among the amendments are those contained in Rule 26, which some critics have subtitled the "Tell me everything you have in your file, and then give it to me" rule.

While that characterization seems extreme, some commentators have suggested that in practice, that is exactly what the amendments to Rule 26 really mean.

We know from experience that lawyers, on whole, are very resistant to change. The amendments to the Federal Rules represent change. Some of our more senior members in the Bar still like to talk about the reaction of then-senior members of the Bar when the Federal Rules of Civil Procedure were first promulgated in 1949. Chaos was predicted.

We know from experience that the chaos did not occur in 1949; and any chaos in the Federal system cannot be blamed upon the Rules of Civil Procedure or its subsequent amendments.

There are provisions in the new amendments to the Federal Rules of Civil Procedure that permit discretionary approaches to the Rules changes by the Federal District Judges and the Magistrate Judges. The preliminary comments and observations emanating from the Federal bench in Iowa seem to indicate that the judiciary is going to take a very close look at the Rules changes and to attempt to ensure that their implementation is done fairly on a case-by-case basis.

This is not to suggest that some litigants and their counsel will not be gravely disappointed by the application of some of these new rules.

It is too soon now to prophesy the ultimate effect of these Rules changes. It is, of course, an appropriate time for all attorneys who practice in the Federal Courts to become familiar with these Rules changes and to cooperate in their application. It is also highly appropriate for the lawyers of this state to make known to the Federal Courts what, if any, problems the Rules are creating and how those problems can be alleviated.

And what about the Defense Bar's concern over the application of Rule 26? Well, that brings to mind the old adage, "What goes around comes around." Plaintiffs are not immune from having to disgorge their files either, and remember, in most cases, the plaintiffs have already had a number of months, if not years, in which to prepare their cases for filing.

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Davenport, Iowa 52801