defense UPDATE

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THE BAR AGAINST EVIDENCE OF PLAINTIFF'S SEXUAL CONDUCT: HAS IOWA GONE TOO FAR?

By Thomas H. Walton, Des Moines, Iowa

Counsel for defendants in sexual harassment claims often seek to discover and admit into evidence information regarding the plaintiff's prior sexual history. While such information may appear directly relevant to whether the plaintiff welcomed a defendant's sexually-oriented conduct or found it offensive, defense counsel face significant hurdles in, first, even discovering such information, and second, getting it before the trier of fact.

In Iowa, this effort is further complicated by Iowa Code Section 668.15, which puts strict limitations on the discoverability of such information and broadly bars evidence concerning a plaintiff's past sexual behavior, even with the alleged harasser. The purpose of this article is to suggest to defense counsel arguments for discovering and admitting this often compelling evidence.

I. OVERVIEW OF IOWA CODE SECTION 668.15

In 1990, Iowa Code Section 668.15 was amended to make prior sexual conduct of the plaintiff inadmissible in a civil action based upon alleged sexual harassment. Iowa Code Section 668.15 provides:

668.15 Damages resulting from sexual abuse-evidence.

1. In a civil action alleging conduct which constitutes sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, a party seeking discovery of information concerning the plaintiff's sexual conduct with persons other than the person who committed the alleged act of sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.

2. In an action against a person accused of sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, by an alleged victim of the sexual abuse, sexual assault, or sexual harassment, for damages arising from an injury resulting from the alleged conduct, evidence concerning the past sexual behavior of the alleged victim is not admissible.

Prior to 1990, this special civil discovery and evidence rule applied only to actions based upon sexual abuse or sexual assault. In 1990, the section was amended to include sexual harassment.

It appears Iowa is the only state in the nation with a statute like this one. Two California provisions function somewhat like Section 668.15 but contain several important exceptions not included in the Iowa statute.[1]

For example, the California evidence rule has been interpreted as permitting evidence of a plaintiff's past sexual history in a sexual harassment case to show the cause of his or her emotional problems.[2] The California rule specifically provides exceptions to the nonadmissibility of a plaintiff's prior sexual conduct if such conduct occurred with the alleged harasser, if the testimony of the plaintiff's expert witness relates to the plaintiff's past sexual conduct, or the evidence is offered to attack the credibility of the plaintiff.

Similarly, Iowa's criminal rape shield statute also includes several exceptions to the general prohibition of evidence regarding an alleged victim's past sexual behavior, permitting such evidence if it is constitutionally required, to show an alternative cause for the victims injuries or to establish consent.[3]

On the other hand, Section 668.15(2) is a complete bar to such evidence, regardless of its relevancy, probative value or the purposes for which it is offered. The provision appears broad enough to exclude evidence of the plaintiff's sexual conduct with even the alleged harasser if it occurred prior to the conduct upon which the claim is based. It would bar evidence of the plaintiff's prior sexual conduct with other co-workers at the work place. It may bar cross-examination of a plaintiff's expert psychiatric witness about plaintiff's prior sexual conduct. For

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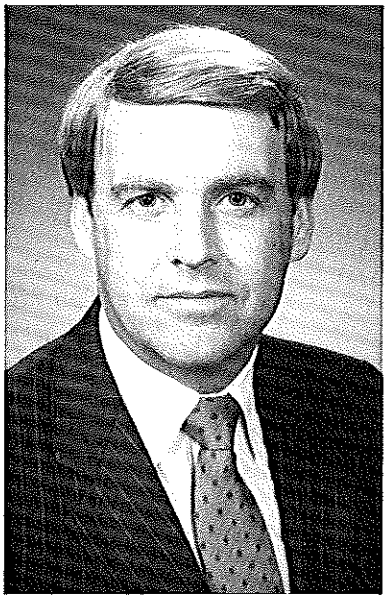
MESSAGE FROM THE PRESIDENT



Richard J. Sapp

I am writing this last message as President of the Association on the heels of another successful annual meeting. The celebration of our 30th anniversary as an association was highlighted by another outstanding continuing legal education program and another near record attendance. President-Elect and Program Chair, Greg Lederer, and all those individuals who worked hard to make the meeting successful, should again be congratulated.

As outgoing president, I wish to again thank all the members of the Board of Directors, committee chairs, and others who have contributed to the accomplishments of this past year. I wish to also add my special congratulations and thanks to all the past presidents who were honored as part of our 30th anniversary meeting. Their contributions to the Association in the past 30 years have allowed our organization to become the strong and respected voice which it is on trial issues in Iowa.

The establishment of our substantive law committees during this past year, and the refocusing of our legislative priorities, have given the Association new directions and opportunities to make the Association more responsive to our membership, and in a better position to address the issues which currently face defense trial lawyers in this state and nationally. Serving as president of this group, with the opportunity to interact with other trial groups, leaders of the judiciary, and constituent client groups, provides a perspective which is unique. I would be remiss in my final message not to comment on the primary issues which appear most pressing when viewed from this vantage point.

The most significant issues revolve around nothing less than whether the traditional adversary system of civil justice will survive substantially intact in the face of various reforms and alternate dispute resolution schemes which are being tested. Frequent litigants in the civil justice system–insurance companies, self-insured businesses, and government agencies - are in a particularly important position when it comes to improving the civil justice system. They can also irreparably damage this vital institution if ill-advised changes, whose long-term impacts are not weighted or understood, are imposed.

Critics of the American civil justice system must be careful to examine whether they are long-term contributors to the problems of which they complain. The fact that tort filings continue largely unabated despite the heightened awareness of potential tort liability throughout society, remarkable improvements in product safety, and unprecedented emphasis on loss prevention by insurers, leaves one to ponder why tort liability claims have not decreased. While good data continues to be lacking as to the effect of settlement philosophies on the filing of future claims, it certainly can be argued with some logic that the payment of questionable or inflated claims solely to avoid the effort sometimes necessary to defeat meritless claims has some long-term impact. If those frequent litigants who are constantly involved in civil claims resolution will refuse to permit the tort system to be used as a tool to extort unjustified payments or payments which contain a cost-of-defense inflation factor, the result may well be, over time, that some meaningful reduction in the amount of tort litigation might he experienced. Defense attorneys must remain receptive to new approaches and cost concerns regarding the defense of cases. Hopefully, cooperative efforts by groups such as our recently-formed Client Relations Committee, composed of both insurance company representative and private practitioners, will

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INCONSISTENT JURY VERDICTS

By Michael W. Ellwanger, Sioux City, Iowa

This article is prompted by a recent jury verdict in the Northern District of Iowa, in which it was alleged that an infant had suffered cerebral palsy, seizure disorder, cortical blindness, and other disabilities as a result of the negligence of a physician. The jury returned a verdict of $1 million for the plaintiffs. The breakdown on damages was as follows:

Past medical	0
Future medical	$360,000.00
Loss of earnings	0
Diminished earning capacity	0
Past pain and suffering	$70,000.00
Future pain and suffering	$210,000.00
Past loss of function of mind and body	0
Future loss of function of mind and body	0
Past parental loss of consortium	$ 80,000.00
Future parental loss of consortium	$280,000.00

By way of explanation, there was no recovery for past medical expenses because the parents' medical insurance policy had covered all medical expenses to the date of trial. No recovery could be made for this under Chapter 668.11. Furthermore, the jury actually found that future medical expenses would be $680,000.00, but also found that $320,000.00 of this would be paid for by collateral sources—primarily a private insurance program and therapies provided by the Area Education Agency. In addition, there was substantial evidence that the youngster had a significantly reduced life expectancy. Post trial juror interviews revealed that it was the consensus that the youngster would probably not live past age 15-18.

Post trial juror interviews also revealed some sentiment to award damages in the approximate sum of $1 million, and an allocation was made to arrive at that figure.

After the judgment was entered the plaintiffs filed a motion for a new trial on damages only. It was contended that the jury's return of "no damages" for future loss of earnings, past loss of function to the mind and body, and future loss of function to the mind and body was inadequate and contrary to the weight of the evidence. Plaintiffs also contended that the verdict was inconsistent in that an award of past and future pain and suffering necessitated an award for past and future loss to the mind and body.

One interesting legal issue that was raised on the post trial motions was whether the plaintiffs had waived the allegedly inconsistent jury verdict. Plaintiffs' counsel were unable to be in the courtroom at the time the jury verdict was returned (the jury and deliberated for over 2 1/2 days—the jury received the case at Noon on Wednesday and did not return the verdict until approximately 9:00 p.m. on Friday evening). Rule 49, Federal Rules of Civil Procedure, distinguishes between "special verdicts" and a "general verdict accompanied by answer to interrogatories." If the verdict form is a general verdict accompanied by answers to interrogatories (Rule 49[b]), and the answers are inconsistent with each other, the court shall return the jury for further consideration of its answers, or order a new trial. In *Lockard v. Missouri Pacific Railway Co.*, 894 F.2d 299 (8th Cir. 1990), the court held that the failure of counsel to object to an inconsistent jury verdict, prior to the time the jury is discharged, constitutes a waiver of the inconsistency.

Another issue which arose in post trial motions was whether the plaintiffs should be given a new trial on damages only, as opposed to a new trial on the entire case. The question is whether damages are so intertwined with liability that submission of only one of the issues would result in confusion and, ultimately, the denial of a fair trial. *Brooks v. Brattleboro Memorial Hospital*, 958 F.2d 525, 531 (2d Cir. 1992). In the Eight Circuit, before a trial may be had on only part of the issues, it must be determined that (1) the issues are clearly distinct; (2) neither party will be prejudiced; and (3) the action will result in judicial economy. *Butler v. Dowd*, 979 F.2d 661, 678 (8th Cir. 1992). The court also noted that it must be done with caution where the injury has "an important bearing on liability." Interestingly, if the court feels that the jury has reached a compromise verdict, then a retrial on damages only is inappropriate. Presumably some jurors would have "given in" on the issue of liability, in return for a reduced damage award. It would thus be inappropriate to allow the plaintiff a retrial on damages only. In the *Butler* case, *supra*, the court stated that "the verdict strongly suggests a recognition by the jury of the interrelationship of the issues and a tradeoff between liability, causation, and damages." When presented with a compromise verdict "courts have never found the issues to be sufficiently separable to approve a retrial on one issue only." *Id.* at page 678.

The plaintiffs also proposed additur in their post trial motions. Historically additur has been unavailable in

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BAD FAITH IN IOWA: ANOTHER DEVELOPMENT

By Thomas J. Shields, Davenport, Iowa

One of the anomalies in a first party bad faith suit brought by the insured against the insurer has been that the entire cause of action rests upon the existence of a contract. In many insurance policies, the insurers have wisely included a contractual statute of limitations requiring the disappointed party to bring suit within a certain period of time, generally no longer than one year from the date of loss.

Iowa has consistently upheld the contractual statute of limitations, *Thomas v. United Fire & Casualty Co.*, 426 N.W.2d 396, 399 (Iowa 1988), even though such limitations are at odds with Chapter 614, Code of Iowa, which governs generally statutes of limitations in Iowa.

In past cases, while the Supreme Court has upheld the validity of the contractual statute of limitations on a breach of contract action against the insurer, courts in general have been unwilling to extend that same contractual statute of limitations to claims for bad faith.

This issue came to the forefront in *Stahl v. Preston Mutual Insurance Association*, 517 N.W.2d 201 (Iowa 1994). In *Stahl*, Justice James Andreasen writing for the majority, the court sustained insurer's summary judgment, which was granted because the plaintiffs failed to file suit within the contractual one-year statute of limitations.

That is the good news. The case, however, does not turn simply upon the court's reaffirming the validity of the one-year contractual statute of limitations and then applying that standard across the board to all bad faith cases. A close analysis of the case is warranted.

Allen and Gloria Stahl were in the process of a dissolution of marriage when their house was destroyed by fire. At the time of the loss, Preston Mutual had issued a homeowner's insurance policy. Because of their marital difficulties, the Stahls separately filed claims with Preston Mutual for the loss.

The loss occurred on March 4, 1990. On June 28, 1990, Preston Mutual sent letters to each of the spouses, advising them that Gloria Stahl's claim in the amount of 50 percent of the loss was being honored; and denying Allen Stahl's claim because upon investigation Preston Mutual determined that Allen Stahl had intentionally misrepresented material facts and circumstances relating to the extent of the loss. Preston Mutual went on to declare void the policy as it pertained to any claims made by Allen Stahl.

In response, Allen Stahl's attorney sent a letter to Preston Mutual on July 30, 1990, requesting a detailed explanation of the facts and circumstances relating to the denial of the client's claim. Preston Mutual responded on September 28, 1990, providing a detailed list of items not found in the debris at the fire scene. No further contact occurred between Allen Stahl, his attorney, or Preston Mutual for more than a year.

On February 3, 1992, Allen Stahl filed a claim against Preston Mutual, in two counts: breach of contract and bad faith denial of his insurance claim. Thereafter, Preston Mutual filed a motion for summary judgment arguing that the one-year contractual statute of limitations barred the claim and constituted a complete defense. Allen Stahl's resistance was based upon two primary contentions: a bad faith claim is not an action for breach of contract falling within the contractual statute of limitations clause; and because Preston Mutual had previously declared the policy void because of policy conditions, it was estopped from relying on the contractual statute of limitations provision.

The trial court granted the motion for summary judgment, finding that where a bad faith claim is based solely on the denial of a claim for benefits, it is an action on the policy and the one year contractual statute of limitations is applicable. The court also found that Preston Mutual was not stopped from raising the contractual statute of limitations even though the company had declared the policy void.

The Supreme Court, *Id.*, 571 N.W.2d at 202, reaffirmed *Thomas v. United Fire & Casualty Co.*, *supra*, upholding the validity of contractual statutes of limitations. The court then turned its full attention to application of contractual statute of limitations defenses to claims of first party insurance bad faith.

The narrow issue which the court confronted, and which must be fully analyzed by any practitioner in bringing or defending a first party bad faith case, is how the action is pled. On appeal, Stahl argued that bad faith was an independent tort, and not an action for breach of an insurance contract. Preston Mutual argued that Allen Stahl's claim was merely an attempt to disguise an action in order to recover on the policy. Unfortunately for Allen Stahl, the Supreme Court agreed with Preston Mutual's contentions. *Stahl*, 517 N.W.2d at 202.

Therein lies the conundrum that

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example, it would probably bar cross-examination of the expert regarding a prior rape of the Plaintiff. Defendant's own expert could not testify that the rape was the cause of a plaintiff's emotional injuries, not any alleged harassment, because that would constitute "evidence concerning the past sexual behavior of the alleged victim."

There is only one reported case even mentioning Section 668.15. In *Weiss v. Amoco Oil Co.*, 142 F.2d 311 (S.D. Iowa 1992) (Magistrate Judge Bennett), a nonparty witness moved for a protective order to prohibit a former employee's discovery concerning her sexual history in connection with the employee's claim of wrongful discharge. The former employee claimed he was wrongfully discharged after the nonparty witness made allegations of sexual harassment against him. The Court held that the former employee was permitted to depose the nonparty witness as the discovery was relevant in determining which conduct or actions the employee would have thought welcome and whether the nonparty witness found the employee's conduct unwelcome. The Court held that Section 668.15(1) did not apply under the circumstances before it to bar discovery of the nonparty witness' prior sexual history because the plaintiff did not claim sexual harassment.

II. DISCOVERABILITY OF PLAINTIFF'S PAST SEXUAL CONDUCT WITH OTHERS

Section 668.15(1) sets forth a procedure for the discovery of a sexual harassment plaintiff's prior sexual conduct with persons other than the alleged perpetrator. The Court in *Weiss* noted that this subsection "only acts to shift the burden of proof to the party seeking such discovery of the plaintiff...."[4] No Iowa case has directly applied this particular subsection. However, some California state court decisions have applied an almost identical California Rule of Civil Procedure.[5]

Those decisions are *Vinson v. Superior Court,* 239 Cal. Rptr. 292, 740 P.2d 404 (1987), *Mendez v. Superior Court*, 206 Cal. App.3d 557 , 253 Cal. Rptr. 731 (1988), and *Knoettgen v. Superior Court*, 224 Cal. App.3d 11, 273 Cal. Rptr. 636 (1990). Each of these cases involved claims for sexual harassment or assault.

In *Knoettgen*, the defendants sought to obtain discovery regarding two prior sexual attacks upon plaintiff in her childhood. The defendants supported their motion to compel with an opinion from a forensic psychiatrist to the effect that it was necessary to inquire into the sexual assaults upon plaintiff to meaningfully evaluate her alleged emotional damages. Nevertheless, the Court held that the defendant failed to show good cause for the discovery and denied its motion to compel. The Court concluded that the discovery the defendant sought was "precisely that which the legislature has declared offensive, harassing, intimidating, unnecessary, unjustifiable and deplorable. A case based on the conduct of the plaintiff's coworkers should not be turned into an investigation of plaintiff's childhood."[6]

The defendants in *Vinson* had somewhat better luck. While the Court granted their request that plaintiff undergo a mental examination, the Court prohibited any inquiry into the plaintiff's past sexual history.[7]

In *Mendez*, the Court interpreted the good cause requirement of the California provision "as requiring factual assertions demonstrating a compelling public need for the disclosure - that the request of discovery is essential to a fair resolution of the case."[8] The defendants in *Mendez* sought to obtain information regarding the plaintiff's extramarital affairs, arguing that they were relevant to the cause of her alleged emotional distress. The Court rejected this argument. It noted that the defense had not offered a declaration by a mental health professional that such evidence would be relevant and necessary to a determination of the cause of plaintiff's emotion distress.[9] The Court concluded that, in order to justify an inquiry into a plaintiff's prior sexual history, the plaintiff must either claim some type of "special damage," such as perhaps injury to sexual functioning, or the defendant must demonstrate some "extraordinary circumstances" connected to plaintiff's claim.[10]

While not holding out much hope, these decisions are somewhat instructive on what defendants must show under Section 668.15(1) to justify the discovery of information concerning a plaintiff's past sexual conduct with persons other than the alleged harasser. Any effort to discover such information should be supported by the opinion of a mental health professional that either the plaintiff's past sexual history is particularly extraordinary for some reason or that information regarding the plaintiff's prior sexual history would be relevant to and necessary for determining the cause of his or her emotional problems, or whether the plaintiff welcomed, invited or initiated the sexual contacts with defen-

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dants or found them offensive. Defense counsel should avoid arguing that a plaintiff's prior sexual history is relevant to his or her credibility or propensity to act in a certain way, as these were the type of arguments statutes like Section 668.15 were enacted to prevent.

The Iowa Supreme Court in *State v. Clarke*, 343 N.W.2d 158 (Iowa 1984), indicated that the opinion of a mental health professional may make relevant otherwise irrelevant evidence. In *Clarke*, in which the defendant was charged with third degree sexual abuse, the trial court had excluded as barred by Iowa's rape shield law evidence regarding a prior sexual act by the victim. The State argued that such evidence should only be allowed as the basis of an expert psychiatric opinion that such a prior experience would make it more likely that a person would later fantasize about it. The Supreme Court characterized the State's position in this regard as "sound".[11]

III. AVOIDING SECTION 668.15(2)

If counsel wants to admit evidence of a plaintiff's prior sexual behavior, he or she will need to get around 668.15(2). Even if successful in doing that, counsel will need to articulate for the court why such evidence is relevant. Courts have not been particularly receptive to evidence relating to a plaintiff's past nonwork-related sexual conduct. On this issue, the *Weiss* Court, citing with approval the opinion in *Mitchell v. Hutchins*, 116 F.R.D. 481 (D. Utah 1987), stated:

> "In the instant case, evidence relating to the work environment where the alleged sexual harassment took place is obviously relevant, if such conduct was known to defendant.... This evidence can establish the context of the relationship between plaintiff and [defendant] and may have a bearing on what conduct [defendant] thought was welcome. At the same time, evidence of sexual conduct which is remote in time or place to plaintiff's working environment is irrelevant. [Defendant] cannot possibly use evidence of sexual activity of which he was unaware or which is unrelated to the alleged instances of sexual harassment as evidence to support his defense."[12]

Other courts have also not supported defendants' efforts to discover or admit into evidence information regarding a plaintiff's prior sexual conduct.[13] Defendants may have had more success in these cases if they had supported their request for information with expert evidence that a plaintiff's nonworkrelated sexually-oriented conduct would be relevant to what sexually suggestive words or actions the plaintiff would or would not likely have found offensive or would or would not have likely invited.

First, it should be noted that the evidentiary bar of Section 668.15(2) only applies "in an action against a person accused" of sexual abuse, assault or harassment by the alleged victim. If the defendant who seeks to admit evidence concerning the plaintiff's past sexual behavior is not the actual alleged abuser, such as an employer in a negligent-hiring action, the bar would not apply, although the restrictions on discovery in subsection (1) would still apply.

Counsel may also avoid the application of Section 668.15 in any case if the information sought does not in fact concern a plaintiff's past "sexual behavior." Under Iowa's rape shield law, the decisions indicate that to constitute "sexual behavior" the evidence or information in question must include "a showing or implication of sexual activity of some sort" accompanying the conduct of plaintiff.[14] Therefore, the term "sexual conduct" does not include such conduct as posing nude[15], prior delusions of sexual abuse,[16] watching pornographic films[17], or talking about sex or sexual desires.[18]

The term "sexual behavior" as used in the Iowa rape shield law does, however, include nonvolitional acts so as to bar evidence of prior sexual abuse or rape.[19] The Iowa Court has not directly addressed whether past false claims of rape or other sexual conduct falls within the definition of "sexual behavior."[20] However, other courts have squarely decided that past false accusations relating to sexual conduct are not barred as evidence of prior "sexual conduct."[21]

Further, counsel should avoid the application of Section 668.15 by removing to federal court any sexual harassment action filed in state court, either on diversity grounds or a federal question under Title VII. The broad federal evidence and discovery rules, rather than the Iowa rule, would then be applied, even in a diversity action, as such rules govern practice and procedure in federal courts.[22]

If that is not possible, counsel should be prepared to attack the constitutionality of Section 668.15(2) on the

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basis that the prohibition of evidence concerning a plaintiff's past sexual behavior may be a denial of substantive due process under certain circumstances. While a constitutional challenge would be an uphill battle, the Iowa statute does appear particularly draconian in its absolute ban of such evidence.

The denial of a right in a civil action to introduce evidence to support a defense implicates a defendant's right to a fair trial and due process. "'The legislature in its discretion may, without denial of due process of law, proscribe changes in the rules of evidence for the trial of civil cases...subject in all cases, however, to the limitation that it may not preclude a party from presenting the facts supporting his theory of the case.'"[23] A rule which shuts out evidence in a party's favor may deny that party the opportunity to a fair trial, which is essential to due process.[24] Where proffered evidence is relevant and not unduly prejudicial, the right to due process may require its admission.[25]

Despite a sexual shield law, specific instances of a person's past sexual conduct may be relevant and not unduly prejudicial, and therefore constitutionally required to be admitted, to explain a physical condition of the person, such as an injury or emotional problems, to show bias, prejudice or ulterior motive or where the evidence indicates that the person has habitually engaged in a prior pattern of behavior clearly similar to the conduct at issue.[26]

In a sexual harassment case, the federal courts have clearly held that a plaintiff's past sexual conduct is relevant and admissible to show that a plaintiff "welcomed" the defendant's sexually-oriented conduct.[27] These courts have permitted defendants to use evidence of a plaintiff's sexually-oriented conduct at the work place to show that he or she invited the defendant's sexually-oriented conduct or did not find it offensive. Even a plaintiff's nonwork-related sexual conduct may be admissible to explain the context of his or her co-employees' comments and actions or to otherwise explain the "totality of the circumstances." [28]

However, the sweeping prohibition of Section 668.15(2) would bar such obviously relevant evidence. While a plaintiff's privacy interests should be considered, "[o]n occasion [a plaintiff's] privacy interests may have to give way to her opponent's right to a fair trial."[29] Rape shield laws were enacted to promote the laudable purposes of preserving a rape victim's privacy, to encourage reporting of sexual assaults and as a reaction to the perceived tendency of courts to admit evidence of a rape victim's past sexual conduct to show a propensity for promiscuousness or that the victim was unchaste and therefore not to be believed.[30]

However, in the case of Section 668.15, which, unlike most rape shield laws, provides absolutely no exception to its general bar against the admissibility of evidence concerning a plaintiff's past sexual behavior, the pendulum has swung too far. The effect of this provision will be to bar a person accused of the grievous act of sexual harassment from defending him or herself by introducing judicially-declared relevant evidence. Under such circumstances, the absolute bar against such evidence in Section 668.15(2) should be declared unconstitutional as applied as in violation of a defendant's right to due process.

Significantly, in April of this year, the United States Supreme Court rejected an effort to amend Federal Rule of Evidence 412 to make that rule applicable in civil cases and to make evidence of the sexual behavior or predisposition of an alleged victim admissible only if the trial court found its probative value substantially outweighed the danger of harm to any alleged victim.[31] The Chief Justice explained that the Court could not approve the proposed amendment as it might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive rights."[32] The Chief Justice explained: "This Court recognized in *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 69 (1986), that evidence of an alleged victim's 'sexually provocative speech or dress' may be relevant in work place harassment cases, and some Justices expressed concern that the proposed amendment might encroach on the rights of defendants."[33] This is exactly what Iowa Code Section 668.15(2) does.

Undaunted, however, proponents of a change to Rule 412 included the change as part of the Violent Crime Control and Law Enforcement Act of 1994.[34] The changes to Rule 412 are identical to those rejected by the United States Supreme Court. As changed, Rule 412 now bars evidence in civil proceedings of any evidence offered to prove that an alleged victim engaged in other sexual behavior or to prove any alleged victim's "sexual predisposition." Unlike the Iowa rule, however, new Rule 412 does provide for the admissibility of such evidence if it is otherwise admissible and not unduly prejudicial. This change to

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Rule 412 appears to be largely symbolic: It first declares inadmissable evidence of a plaintiff's prior sexual conduct but then provides for its admissibility anyway. Further, unlike the Iowa rule, it does not alter the test for discoverability of such evidence. If members of the Supreme Court thought this rule might encroach on the rights of defendants, then Iowa Section 668.15(2) certainly does. ❐

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1 *See* Cal. Evidence Code § 1106 (West 1993); Cal. Code of Civ. Pro. § 2017(d) (West 1993).

2 *Patricia C. v. Mark D.*, 12 Cal. App. 4th 1211,16 Cal. Rptr. 2d 71 (1993).

3 *See* Iowa Rule of Evidence 412.

4 *Id.* at 314.

5 Cal. Code of Civ. Pro. § 2017(d)(West 1993).

6 *Id.*

7 740 P.2d at 411.

8 253 Cal. Rptr. at 737.

9 *Id.* at 739.

10 *Id.* at 741.

11 *Id.* at 162.

12 142 F.R.D. at 316.

13 *See Mitchell v. Hutchins*, 116 F.R.D. 481 (D. of Utah 1987) (court quashed defendant's deposition subpoenas directed to plaintiff's boyfriends and former boyfriends and a photograph who had allegedly taken sexually suggestive pictures of one or more of the plaintiffs as irrelevant); *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) (court granted plaintiff's motion for protective order in face of defendants efforts to dis cover information regarding her sexual history as irrelevant and calculated only to annoy, harass and oppress); *Douglas v. Blue Cross and Blue Shield*, Civil Action No. 88-2257-S (D.C. Kan.1989) (LEXIS 13089) (court denied defendant's request for production of certain "boudoir" photographs of plaintiff where plaintiff did not display photographs openly in work place or privately to defendants).

14 *State v. Zaehringer*, 280 N.W.2d 416, 420 (Iowa 1979).

15 *Id.*

16 *Jeffries v. Nicks*, 912 F.2d 982, 988 (8th Cir. 1990), *cert. denied*, 499 U.S. 427, 11 S. Ct. 1327, 113 L. Ed. 2d 259 (1991).

17 *State v. Wright*, 776 P.2d 1294 (Or. Ct. App. 1989).

18 *State v. Bonesh*, 401 N.W.2d 170 (Wis. Ct. App. 1986).

19 *State v. Trecek*, 456 N.W.2d 219, 226 (Iowa 1990).

20 *See State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990) (dissent by Justice Carter argues that such evidence does not fall within the rape shield law because it "relates to words not deeds").

21 *See Efrainm v. State*, 823 P.2d 264 (Nevada 1991); *Covington v. State*, 703 P.2d 436 (Alaska Ct. App. 1985); *People v. Williams*, 477 N.W.2d 877 (Mich. Ct. App. 1991).

22 *Hannah v. Plumer*, 380 U.S. 460, 85 S. Ct.1136, 14 L. Ed. 8 (1965).

23 *Danner v. Hass*, 257 Iowa 654, 134 N.W.2d 534, 543 (1965).

24 16 C.J.S. *Constitutional Law*, § 1168 (1984).

25 *See State v. Clark*, 343 N.W.2d 158, 161(Iowa 1988).

26 *Peabo v. Hackett*, 365 N.W.2d 120, 128 (Mich. 1984).

27 *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311, 316 (S.D. Iowa 1992); *Meritor Savings Bank v.Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed 2d 49 (1986); *Swentek v. U.S. Air, Inc.*, 830 F.2d 552, 556 (4th Cir. 1987); *Burns v. McGregor Electronic Ind., Inc.*, 989 F.2d 859 (8th Cir. 1993).

28 *Burns v. McGregor Electronic Ind., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992).

29 *Vinson v. Superior Court*, 239 Cal. Rptr. 292, 740 P.2d 404, 411 (1987).

30 *Jeffries v. Nicks*, 912 F.2d 982, 986 (8th Cir. 1990), *cert. denied*, 499 U.S. 927, 111 S. Ct.1327, 113 L. Ed. 2d 259 (1991); Wright & Graham *Federal Prac tice and Procedure* § 5382 (1980).

31 Letter dated April 29, 1994, from Chief Justice William H. Rehnquist to Chair of the Judicial Conference of the United States.

32 *Id.*

33 *Id.*

34 Pub. L. No. 103-322, § 40141, 108 Stat. 1797 (September 13, 1994).

NEW MEMBERS WELCOME!

Mark D. Aljets, Des Moines
Gary W. Armstrong, Storm Lake
Darel L. Frahm, Des Moines
Stephen J. Holtman, Cedar Rapids
Kristopher K. Madsen, Council Bluffs
Andre H. Merritt, Des Moines
Christopher F. O'Donohoe, New Hampton
Jack C. Paige, Cedar Rapids
Richard D. Stochl, New Hampton
Kevin W. Techau, Des Moines
Chad M. Van Kampen, Cedar Rapids
Webb L. Wassmer, Cedar Rapids

MESSAGE FROM THE PRESIDENT

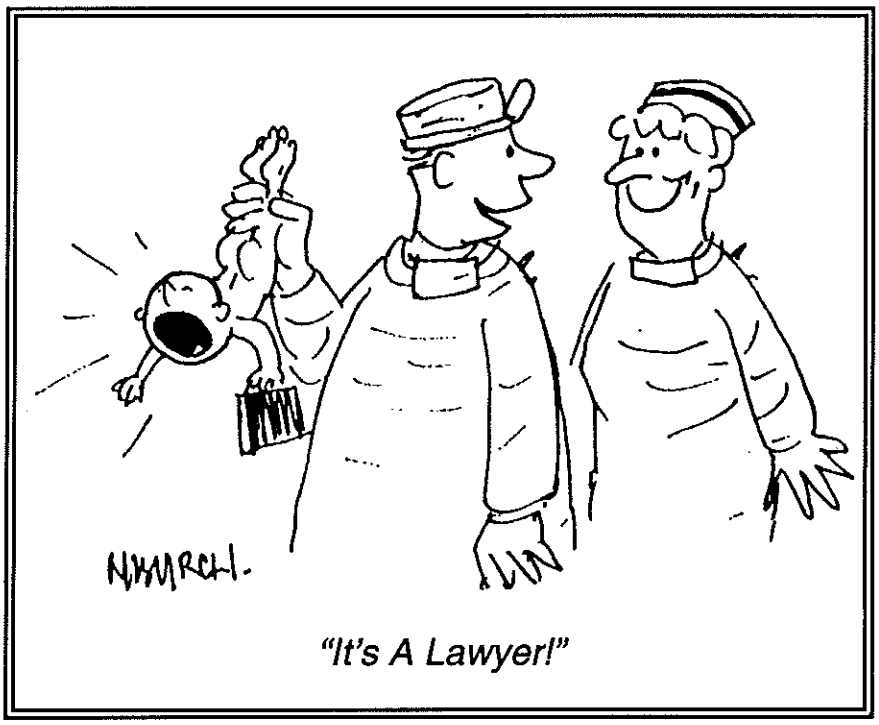
Continued from page 2

produce solutions.

The courts are not immune from responsibility for the volume and cost of tort litigation. The concerns of the many judges with crowded dockets and inadequate administrative support seems belied by the seeming contradictory view that nearly every claim should reach a jury. A more aggressive use of dispositive motions and greater restrictions on advocacy from the witness chair, masquerading as expert "testimony," would predictably, over time, restrict and reduce some degree of tort litigation.

As we enter our next year, I am confident that this Association has the structure and individual talent to tackle difficult issues such as that discussed above. I look forward to working with new President Greg Lederer, the Board, and to contributing in some way as these issues are tackled. I wish good luck to the Association and its new leaders in the coming year and hope that all of you will also offer your talents and time to the Association's valuable programs and activities.

Richard J. Sapp
President



"It's A Lawyer!"

1995 LEGISLATIVE AGENDA

At the next Board of Governors meeting on December 4, 1994, the 1995 legislative agenda will be finalized. If any member has any thoughts or ideas about changes in statute or rules, please communicate these to President Greg Lederer (Cedar Rapids) or Legislative Committee Chairman Mark Tripp (Des Moines).

Communication Hint: **When you run into someone whose name escapes you, a graceful solution is to announce your own name - the other person will usually reciprocate.**

INCONSISTENT JURY VERDICTS *Continued from page 3*

federal courts because it deprives the plaintiff of his constitutional right to a jury verdict. *Dimick v. Schiedt*, 293 U.S. 474 (1935). The only exception is where a statute entitles the party to certain damages. *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 632 (8th Cir. 1990). Plaintiff cited one case for the proposition that if a plaintiff consents to an additur, there is no constitutional infirmity. *McCoy v. Wean United*, Inc., 67 F.R.D. 495 (D.C. Tenn. 1975). Plaintiff also cited a case for the proposition that the trial court could simply "announce" to the parties his intention to order a new trial on damages unless the parties could "work something out on their own."*Chesevski v. Strawbridge & Clothier*, 25 F.Supp. 325 (D.C. NJ 1938).

Despite the above arguments, it does appear that additur is generally impermissible in federal actions because it violates the Seventh Amendment right to a jury trial. *Hicks v. Brown Group,* Inc., 902 F.2d 630 (8th Cir. 1990).

The above post trial controversies further emphasize the problems associated with the practice of many state district court judges (and federal judges) of using a multi-line verdict form. Many judges use eight lines: Past medical expense; Future medical expense; Past pain and suffering; Future pain and suffering; Past loss of function to mind and body; Future loss of function to mind and body; Past lost earnings; and Future lost earnings. This is the form which appears to be contemplated in Uniform Instruction 300.5. Interestingly, the model instructions which are also contained in the Iowa Civil Jury Instruction forms, seem to contemplate a general verdict form in which the jury is asked to determine the total amount of damages sustained by the plaintiff.

The "eight line" verdict form appears to be required by Chapter 668.3(8). This section states that the jury shall answer special interrogatories on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past damages and that portion of the judgment or decree awarded for future damages. Interestingly, this section is not part of the original statute that was adopted in 1984. It was added by way of amendment in 1987.

The Iowa Defense Counsel Association has made some effort in recent years to delete this provision. This effort is not prompted solely by a desire to reduce damage awards. Rather, it does appear that filling out an excessive number of lines creates the opportunity for jury confusion, duplication and possible error.

The problems associated with this verdict form are evident in cases such as *Cowan v. Flannery*, 461N.W.2d 155 (Iowa 1990). This was a typical whiplash case. On the date of trial the plaintiff had incurred approximately $4,000.00 in medical expense, 97% of which were for chiropractic care. The chiropractor testified that the plaintiff had suffered a permanent injury and would require future chiropractic treatments. The jury gave the plaintiff his $4,000.00 in past medical expenses and $17,220.00 for future medical expenses. Nothing else was awarded to the plaintiff. The Supreme Court ordered a new trial on damages, holding that "it is illogical to award past and future medical expenses incurred to relieve headache, neck and back pain and then allow nothing for such physical and mental paid and suffering." *Id.* at page 160. However, it is quite likely that the jury simply decided to award plaintiff $17,220.00 for his future injuries, including medical expenses, and put it all on the same line. Obviously the jury wasn't terrible persuaded by the plaintiff's claims, or they would have awarded additional money. If a general verdict form had been utilized in which the jury was asked to simply award the plaintiff past damages and future damages, the total of $21,220.00 would undoubtedly have been accepted by any appellate court. The problem was that the jury did not fill out the lines in a manner which was considered appropriate by the Supreme Court.

In the case of *Jackson v. Roger*, 507 N.W.2d 585 (Iowa Appeals 1993), the court held that where the plaintiff was awarded medical expenses and pain and suffering, the jury could refuse to award anything for loss of function to the mind and body. Although the result in this case may have been appropriate, it further indicates the problems that are created where a jury has to allocate a damage award among several different elements.

It is probable that every trial lawyer in the State of Iowa could come up with at least one example of problems associated with jurors filling out the verdict forms. These problems could all be eliminated by a simpler verdict form which allocates damages between pre-trial damages and post-trial damages. Prior to 1987 the jury was required to make findings which indicated "the amount of damages each claimant will be entitled to recover if contributory fault is disregarded," as well as an allocation of fault between

Continued on page 11

INCONSISTENT JURY VERDICTS

Continued from page 10

the parties. Section 668.3(2). The driving force behind the 1987 amendments appears to be a desire to modify the law regarding interest on judgments. Commencing in 1981, interest could be recovered on judgments from the date of the commencement of the action. Section 535.3. In 1987, new interest provisions were enacted with reference to comparative fault actions. Section 535.3 specifically stated that that section would no longer apply to cases governed by new Section 668.13. Section 668.13 provided that interest for *future damages* would not commence from the date of the petition. Rather, such interest would accrue from the date of entry of the judgment. Consequently, it became necessary for the jury to distinguish between future damages and past damages. Section 668.3 was enacted to provide that the jury must make specific findings as to past damages and future damages. Unfortunately, Section 668.3(8) also contained the aforesaid language in which the jury was to make a finding as to "each specific item of requested or awarded damages." Obviously, it is not necessary for the jury to make a finding as to each item of claimed damage, simply to distinguish between past damages and future damages.

It should also be noted that Chapter 668.6, which has been in the statute since initially enacted in 1984, provides that the court shall not discharge the jury until it has determined that the verdict or verdicts are consistent with the total damages and percentages of fault. If there are inconsistencies, the court should inform the jury of the inconsistencies and order the jury to resume deliberations. The jury should be instructed that it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies. Although the Iowa Supreme Court does not appear to have addressed the issue, it could perhaps be argued that a plaintiff who fails to object to a jury verdict, before the jury is discharged, waives the right to object later to the verdict. This would be similar to the federal rule in the Eighth Circuit as cited above.

In conclusion, it does appear without question that the eight line verdict form creates far more problems than it solves. Obviously the plaintiff's bar likes the form, because it may serve to increase verdicts. On the other hand, the rule in Iowa has always been, at least until 1987, that the judge could simply inform the jury of the elements of a plaintiff's damage claim, and the jury could determine how much to award in total. In light of the problems that are created by the multi-line form, it would appear that a return to the former practice would be preferable. ❐

ADDRESS BY LOCAL LAWYER TO FICC

Mr. Timothy J. Walker, an attorney with the law firm of Whitfield & Eddy, P.L.C., recently spoke at the Federation of Insurance and Corporate Counsel's (FICC) Convention held at the Chateau Whistler Resort, Whistler, British Columbia from July 23-30, 1994. The FICC is an organization of some 1,300 lawyers and insurance and corporate executives (both from the United States and abroad) interested in bettering the knowledge and skills of lawyers defending a wide variety of litigation and representing corporate interests in non-litigated matters. Mr. Walker's presentation included matters relating to the Flood of 93 - its impact and recovery - and future management disaster planning.

ADVANCE NOTICE

1995 ANNUAL MEETING

September 20 - 22, 1995

Embassy Suites
Des Moines, Iowa

BAD FAITH IN IOWA: ANOTHER DEVELOPMENT

Continued from page 4

courts and practitioners will face in the future in analyzing these cases, either from the standpoint of the plaintiff or the defendant. Is the action being brought on the policy? Or, instead, is it an independent tort?

The court, *Id.*, 517 N.W.2d at 203, stated, "The question of when a tort action is considered 'on the policy' is one of first impression in this state." Noting that other jurisdictions offered mixed responses to the question when presented with a variety of tort actions, the court also pointed out that two lines of authority emerged from these analysis.

The court stated:

> . . . The majority rule recognizes that "[w]here a contractual limitation refers only to actions upon a policy, it does not necessarily refer to different or collateral actions involving, in some measure, the policy proceeds." 20A John Alan Appleman & Jean Appleman, *Insurance Law and Practice*, Section 11603, at 452-56 (1976 & Supp. 1993) [hereinafter Appleman]. These courts for example have not applied the policy's limitations clause to tort actions relating to the procurement of insurance or the insurer's defense or settlement of the insured's claim. *See Fischer*, 66 A.L.R.4th at 861-76. On the other hand, some courts have determined "that any form of action, growing out of the contract, is governed by the limitation provision contained in the policy." 20A Appleman, Section 11603, at 456-57. *See, e.g. Modern Carpet Indus. Inc. v. Factory Ins. Ass'n*, 125 Ga.App. 150, 186 S.E.2d 586 (1971); *Fischer*, 66 A.L.R.4th at 863-77.
>
> We believe the minority's broad view is inconsistent with the purpose behind the first-party bad faith tort and therefore we reject it. *See Dolan*, 431 N.W.2d at 794. We find there is an important distinction between an action "arising out of the contractual relationship" and an action "on the policy.". . .

Id., 517 N.W.2d at 203.

The Supreme Court of Iowa noted that most claims may be said to have arisen or evolved from the insurance policy, but then stated that not all claims are "actions on the policy."

Justice Andreasen also offers a welcomed note of candor in his opinion, noting, *Id.* at 571 N.W.2d 203, "While the distinctions drawn by courts are sometimes subtle, absent conduct on the part of the insurer giving rise to an independent or collateral cause of action, most actions must be brought within the time allowed by the policy." Once making that comment, the court then notes that the analysis of these claims involves examination of the character of the alleged bad faith conduct, the timing of the relevant events, and the type of damages sought. *See Velasquez v. Truck Ins. Exchange*, 1 Cal.App.4th 712, 5 Cal.Rptr.2d 1, 4-6 (1991).

In discussing generally the contractual statute of limitations, the court has also pointed out that where events constituting bad faith occur either before or after the loss which would trigger policy coverage, an exemption from the policy's contractual statute of limitations are likely to be found. The court, citing two California cases, gave examples: Where a plaintiff's claim for fraud and bad faith related to the insurer's conduct with respect to the repair and restoration of previously damaged property, the damages sought were not for a loss covered by the policy, but related to events occurring after initial policy coverage. Likewise, the contractual statute of limitations did not apply in a bad faith claim which resulted from conduct occurring after the initial claim was paid by the insurer. *See Murphy v. All State Insurance Co., supra,* 147 Cal.Rptr. at 575; *Frazier v. Metropolitan Life Insurance Co.*, 169 Cal.App.3rd 90, 214 Cal.Rptr. 883, 890-91 (1985).

The court in *Stahl, Id.*, 517 N.W.2d at 204, stated, "In contrast, '[w]here denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad faith action is on the policy and the limitations provision applies.'" In arriving at that decision, and relying upon cases from California and Indiana, the court rejected Allen Stahl's attempts to have the Iowa courts adopt Wisconsin's first party bad faith standard.

In Wisconsin, first party bad faith is an independent tort for breach of a fiduciary duty owed by the insurer to the insured. The Supreme Court of Iowa has specifically rejected this fiduciary relationship, at least in first party claims. *See Dolan v. AID Insurance Co.*, 431 N.W.2d 790, 793 (Iowa 1988); and *North Iowa State Bank v. Allied Mutual Ins. Co.*, 471 N.W.2d 824, 828-29 (Iowa 1991).

The court specifically found that a review of Allen Stahl's pleadings revealed that his claim was one for an action on the policy, pointing out that the language in his petition lead to no other conclusion. In count II of his petition he asserted that Preston

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BAD FAITH IN IOWA: ANOTHER DEVELOPMENT

Continued from page 12

Mutual's decision was in bad faith because, "The insurer either knew or should have known there was no reasonable basis for its denial," and that the denial of his claim "was the reason that plaintiff did not recover the insurance benefits to which he would have otherwise been entitled." The court added that, "We find it significant that he fails to allege any additional acts of wrongdoing by the insurer which might otherwise give rise to a collateral or independent claim." *Id.*, 517 N.W.2d at 204.

Because Allen Stahl's entire action was based upon a claim that he was entitled to policy benefits, the court was not persuaded that he could rely upon Preston Mutual's earlier declaration that the policy was void as an estoppel to the assertion of the contractual statute of limitations.

The court also made an important announcement regarding conduct by an insurance company in denying claims, holding,

> Though certain conduct by an insurer may preclude the insurer from asserting a limitations period as a defense, mere denial of liability is clearly not the sort of act which estops an insurer from asserting the limitations defense. *See, e.g., Wendt v. White Pidgeon Mut. Ins. Ass'n*, 418 N.W.2d 374, 376 (Iowa App. 1987). Preston Mutual did nothing to mislead Stahl about its rejection of Stahl's claim or the one year limitations provision. The insured had ample time to commence suit within the limitations period. We find nothing in the record indicating that Preston Mutual made any representations to lull Stahl into delaying the filing of his action until after the limitations period had expired. Stahl's argument is without merit.

Since not all insurance companies include a contractual statute of limitations defense in their policies, this case will have a somewhat limited impact in defending first party bad faith actions in state and federal courts in Iowa. However, where such a limitation is available, then it is incumbent upon defense counsel, and the insurer, to carefully and fully analyze the claim being made against the company so as to determine whether the bad faith claim is one "on the policy," or whether it involves actions involving procurement of the policy, or actions that preceded or followed the loss in question.

Had the Supreme Court of Iowa adopted the minority rule, "that any form of action growing out of a contract is governed by the limitations provision contained in the policy," would have had a much broader impact upon first party bad faith suits in Iowa. Adoption of the majority rule, however, provides insurers one further confirmation of the validity of the contractual statute of limitations and provides additional ammunition for dispositive motions. ❐

POSITIONS AVAILABLE

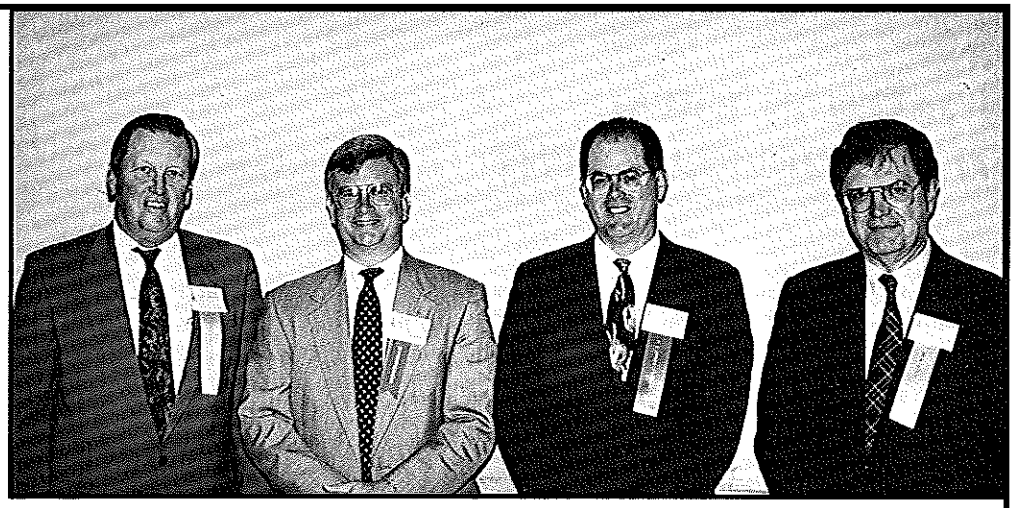
ATTORNEY WANTED: Waterloo law firm seeks trial attorney with experience in insurance defense, personal injury and other civil litigation. Send resume, references and salary requirements to Recruiting Committee, P.O. Box 810, Waterloo, IA 50704. All inquiries kept strictly confidential.

NOTE: There is no cost to IDCA members to place ads for positions available or seeking employment. Please submit your ad to one of the editors, in writing, just as you wish it to appear in print. All replies should be directed to your office or P.O. number.

IDCA

1994-1995

OFFICERS

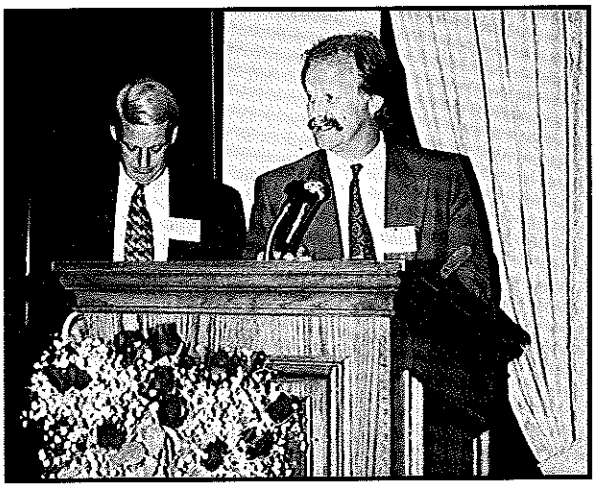


Officers (L to R) DeWayne Stroud, Treasurer; Robert A. Engberg, Secretary; Gregory M. Lederer, President; Charles E. Miller, President-Elect

Defense Update editorial board discusses upcoming issues

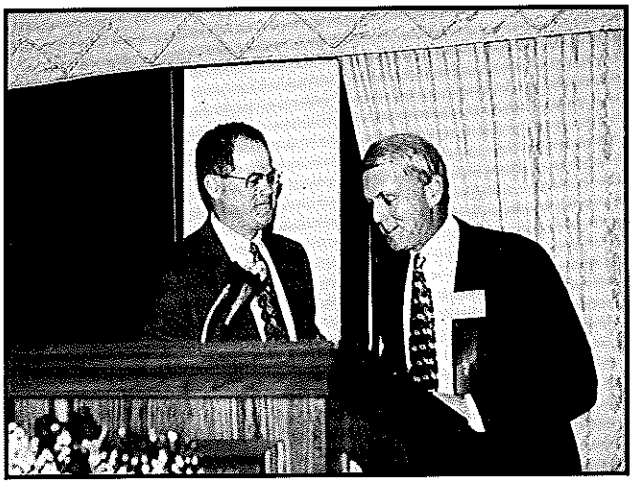
Past Presidents honored at 30th Anniversary Annual Banquet

1994 30th ANNIVERSARY
ANNUAL MEETING HIGHLIGHTS

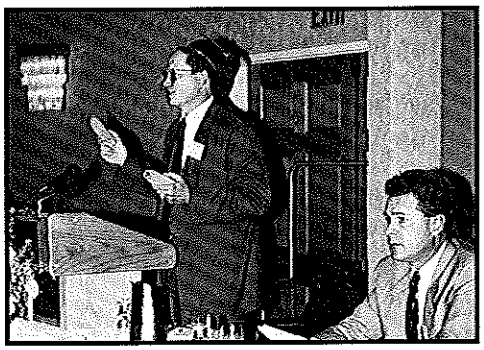


Marion Beatty receives the 1993-1994 "Eddie Award"

Wayne Taff, DRI Representative, presents IDCA with DRI's Exceptional Performance Award

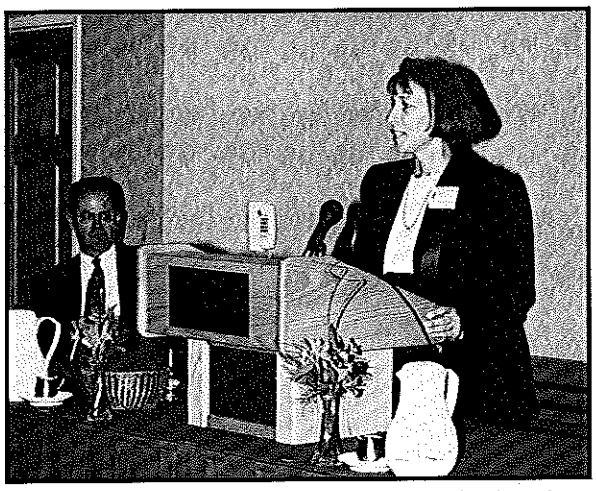


Dick Sapp passes gavel to Greg Lederer



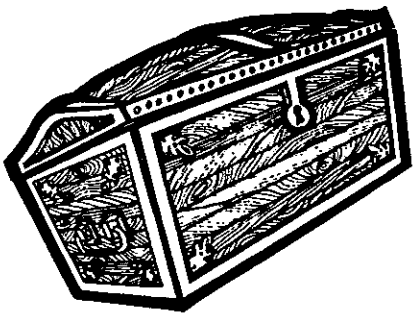
Mark Olson, of Minneapolis, dons his beanie to explain *Daubert*

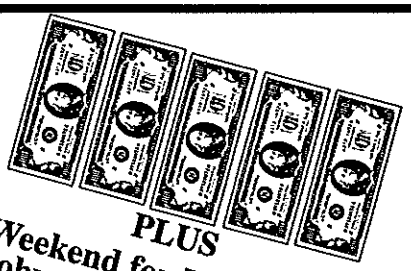
Board of Directors meet at Annual Meeting



Justice Ternus addresses members at lunch Thursday

Dave Riley discusses the benefits of visual aids





PLUS
Weekend for Two at any
John Q. Hammon Hotel!

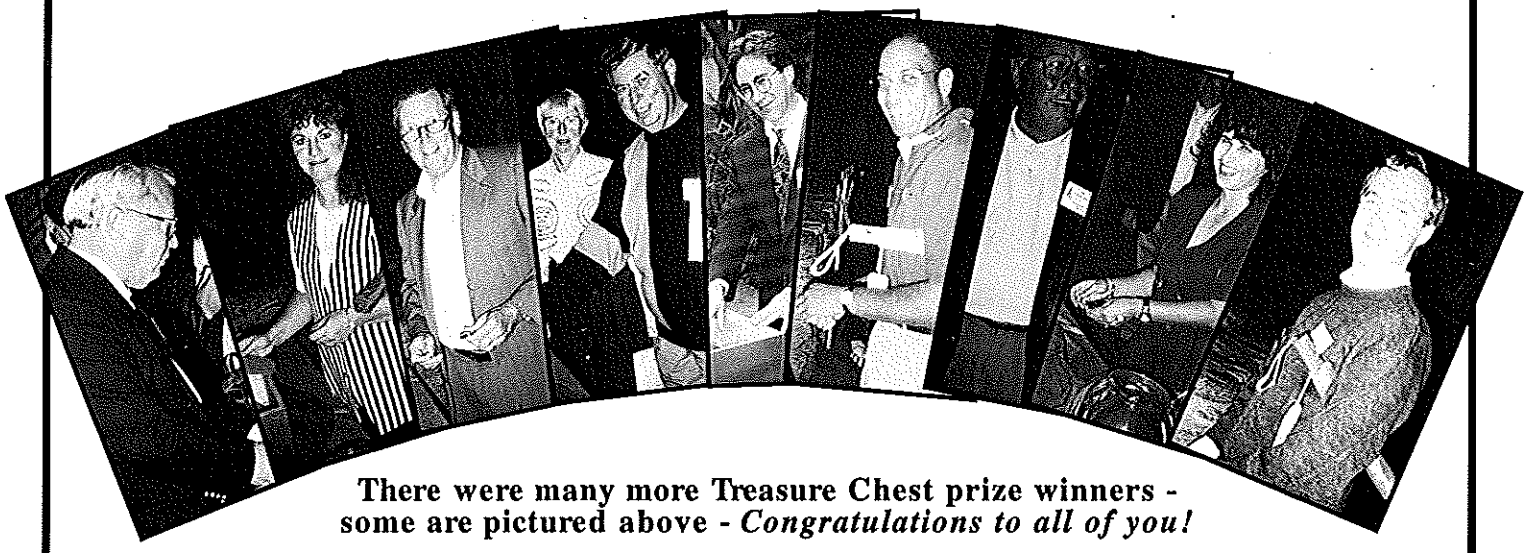
TREASURE CHEST GRAND PRIZE WINNER!

CONGRATULATIONS STEVEN P. LARSEN!

Steve receives his prize from DeWayne Stroud and Ginger Plummer - *enjoy your weekend Steve!*

Double Family Winners

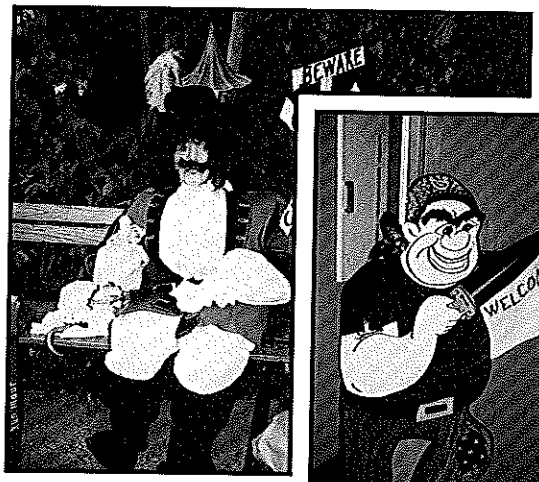
Bikakis, Beavers & Phipps

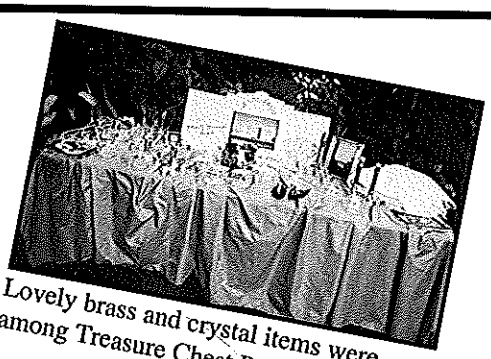


There were many more Treasure Chest prize winners - some are pictured above - *Congratulations to all of you!*

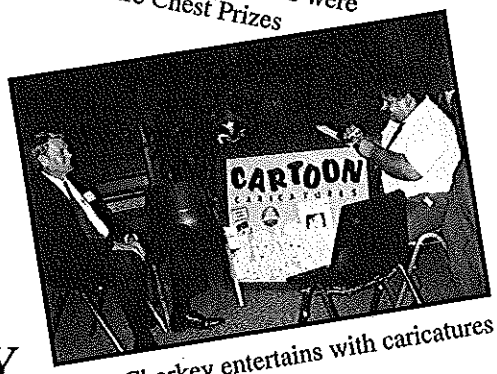
GOOD TIME HAD BY 30th ANNIVERSARY PARTY GOERS!

Captain Defenz and his First Mate welcame guests

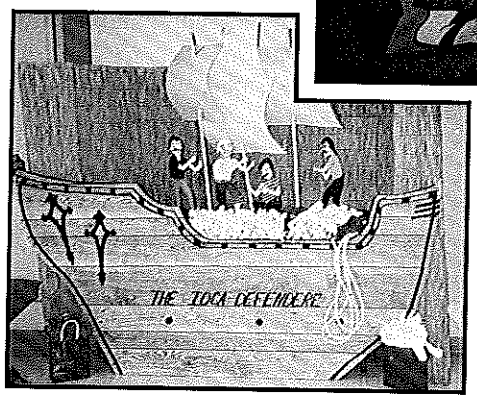




Lovely brass and crystal items were among Treasure Chest Prizes

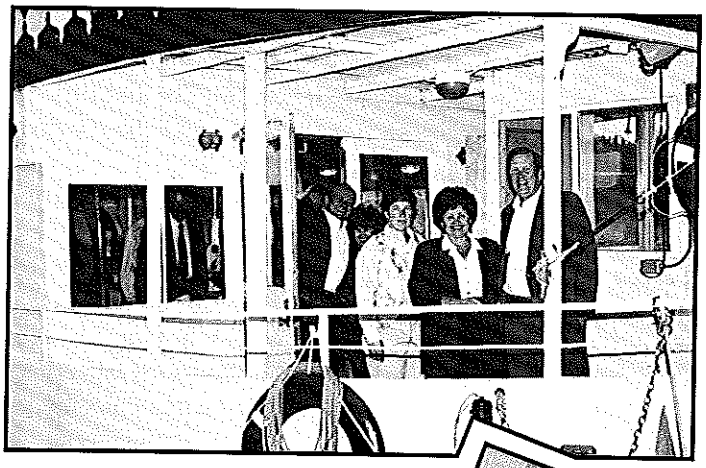


Andy Chorkey entertains with caricatures

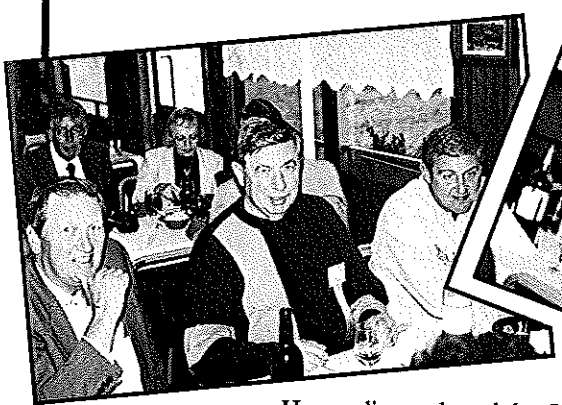


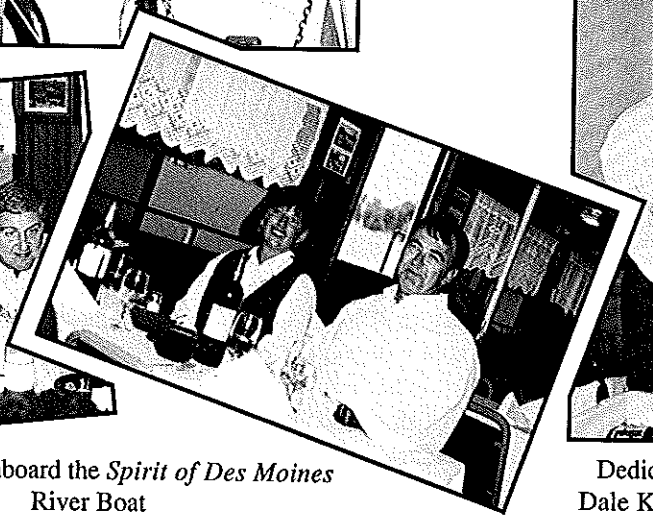
Captain's Ship *The IDCA Defendere* loaded with umbrella gifts for all

Rolled sleeves, loose tie - Mike and Michele take party serious!

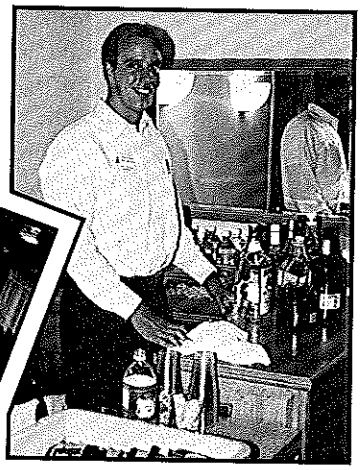


Jerry and Susan comfort exhausted Captain at party's end





Happy diners aboard the *Spirit of Des Moines* River Boat



Dedicated Hospitality Host Dale Knoshaug mans his post

"SPILL REALLY HITS THE SPOT"

The following article is reprinted by permission of the author, Mike Deupree, and the Cedar Rapids Gazette. We graciously thank Mr. Duepree for stating what was on many of our minds.

Shakespeare had it wrong.

The oft-quoted phrase from "King Henry IV" - "The first thing we do, let's kill all the lawyers"—may have been good advice in the 16th century, but it isn't good advice on the eve of the 21st.

Killing is obviously out, and if we're going to take drastic action to salvage our judicial system, our target shouldn't be lawyers. It should be jurors.

The King, Bobbitt and Menendez trials provided strong support for that argument, but mind-numbing decisions in liability cases are even worse. The most recent to make the headlines was in California, where a jury awarded a woman nearly $3 million because her coffee was too hot.

The intent here is not to argue fine points of the law. My expertise in law is such that I was of voting age before discovering that "pro bono" didn't refer to favorable reviews of Sonny and Cher. But it doesn't take a Holmes, either Oliver Wendell or Sherlock, to see that what's happening may be correct, but it ain't right.

The California woman bought a cup of coffee at McDonald's. She was trying to drive and hold the cup between her legs when she spilled it and suffered serious burns.

The jury granted nearly $3 million in punitive damages after learning that McDonald's coffee is served hotter than coffee experts recommend.

Now, I am not entirely without sympathy for the woman. If a restaurant employee had dumped coffee on her lap while handing her the cup, that would be pretty clear negligence. Same thing if the cup had been defective or the lid improperly attached. If the woman had chugged her drink under the impression it was iced tea, I'd probably be on her side. Not to the tune of $3 million, but on her side nonetheless. I'd give her a sympathetic wince and a couple of bucks.

Maybe there's more to this story than we've been told, which is frequently the case with liability horror stories.

Assuming we have the relevant facts straight, though, what happened here was a familiar process in which a lawyer convinced a jury to look at only a portion of reality.

Was the woman seriously injured and forced to endure great pain? Yes. Would her injuries have been as serious if McDonald's had served the coffee at a lower temperature? No. Does the insurance company have more money than God? Sure. Everybody knows that.

What the jurors didn't do is seriously ask themselves one additional question: Would the woman have been injured if she had behaved with the intelligence of the average fern?

The answer to that is obviously "no." So why wasn't the answer "no" when the jury was asked to award massive damages?

Because the jury felt sorry for the woman and decided to give her a chunk of the insurance company's inexhaustible funds. One shudders to speculate how big the award would have been if the driver, after pouring the coffee on herself, had veered onto a sidewalk and harvested a few slow-footed pedestrians.

The problem, of course, is that big companies really don't have inexhaustible funds. High awards mean higher prices for consumer goods and sometimes can put a business out of business, which is not good for its employees or the people who depend upon its taxes.

Government hasn't figured this out yet. Asked to do something about the situation, it is less likely to reform the laws than to require a warning on all coffee cups. Something like:

As is the case in most situations, there's a better way of handling this than waiting for the government to fix it. The insurance companies ought to fight fire with fire.

No, I didn't mean they should file a class-action suit against the jury on behalf of America, alleging emotional duress. I mean instead of appealing to the jury's sense of fairness and logic, which obviously doesn't work, the company counsel should appeal to its sense of pity.

Bring in a single mother working two jobs to explain that she won't be able to buy her kids cheeseburgers if the price goes up because of higher insurance premiums.

Have a company executive testify that if it weren't for liability insurance, health care could be provided for all employees.

Find some parents to testify how they couldn't afford to visit their child in the hospital if it weren't for Ronald McDonald House, and follow their appearances with a company accountant saying the company can either pay for the hostels or pay customers who spill beverages on themselves.

Or failing that, explain that the accident would never have happened if the woman's car had good cup-holders, so it's the auto manufacturer who should be sued. After all, everybody knows auto manufacturers have inexhaustible funds.

Come to think of it, that class-action suit idea doesn't sound so bad.❐

FROM THE EDITORS

On January 27, 1993, Paul Calden went to a restaurant in Tampa, Florida. He shot five of his former coworkers at Fireman's Fund, killing three and wounding two. Allstate, as the employer of Paul Calden prior to Firemen's Fund, has been sued by the victims. It is alleged that Allstate gave Mr. Calden a letter of recommendation which Firemen's Fund relied on prior to employing Mr. Calden. The victims further allege that Allstate knew of Calden's dangerous propensities but provided a severance package and letter of recommendation to terminate his employment without problems.

Murder in the work place has become an all too frequent event. As a result there is a movement to hold the employer liable for the acts of a disgruntled employee. Defense attorneys normally become involved in this issue after the tragedy. However, we believe this should change. The safety of the work place, including our own offices, should garner our attention prior to any possible problem.

We would recommend that the Board of Directors of our association take the lead and create a new committee to work with state regulators and lawmakers to provide a safe work place. Finding a way to defuse such explosive situations require guidance and training beyond what employers normally experience. A program to reduce the probability of violence should be as important to our organization as any other program we sponsor.

One of the harshest criticisms leveled at the legal profession centers on the line "only the attorneys will benefit from this tragedy." Here is an opportunity for the legal profession to prove this is not the case. More importantly, here is an opportunity for the legal profession to make our world a better place to live and work. That is something we can all live with. ❐

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