defense UPDATE

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LAW OF CLOSING ARGUMENT

By Alan E. Fredregill, Sioux City, Iowa

This article is an update of a presentation made at the Iowa Defense Counsel Association's 1988 Annual Meeting. It is intended as a practical guide for the Iowa defense lawyer rather than an exhaustive survey of the entire subject matter.

I. PROCEDURAL AUTHORITY

A. Iowa Rule of Civil Procedure 195: *Arguments.*

> The parties may either submit the case or argue it. The party with the burden of the issue shall have the opening and closing arguments. In opening, he shall disclose all points he relies on, and if his closing argument refers to any new material or fact not so disclosed, the adverse party may reply thereto, which shall close the argument. A party waiving opening argument is limited, in closing, to reply to the adverse argument; otherwise the adverse party shall have the closing argument. The court may limit the time for argument to itself, but not for arguments to the jury.

Note: The amount of time for jury argument is still unlimited, as it has been ever since the Rules were first adopted in 1943. However, the trial court does have the discretion to limit the scope of discussion on matters dealt with in closing argument. *Carter v. Wiese Corp.*, 360 N.W.2d 122 (Iowa App. 1984).

B. United States District Court, Northern and Southern Districts of Iowa, Local Rules of Court, effective July 1, 1994 Rule 6.e.: *General Procedure in Jury Trials, Final Arguments:*

> e. Final Arguments. In like order, parties shall offer their proofs, and at the conclusion of evidence, each party may make a final argument to the jury. Unless otherwise ordered counsel will be limited to one hour upon each side for the argument of cases to the jury. Counsel upon each side may divide their time between themselves, but the counsel who opens the argument shall make a fair statement of the points urged by that side. No more than two attorneys upon each side will be allowed to address the jury except by the permission of the court granted before the argument opens.

C. Iowa Code of Professional Responsibility for Lawyers, Ethical Consideration 7-24 (personal opinion of counsel not allowed in argument).

> *Rosenberger Enterprises Inc. v. Ins. Service Corp.*, 541 N.W.2d 904, 908 (Iowa App. 1995). "In his closing argument, counsel attempted to play to the passions of the jury through. . . interjection of his personal opinion as to the merits of the case. Counsel has no right to create evidence by his or her arguments, nor may counsel interject personal beliefs into argument." New trial granted for this and other abuses.

D. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 7-106 (C), Trial Conduct:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
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> (1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
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> * * * *
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> (3) Assert personal knowledge of the facts in issue, except when testifying as a witness.
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> (4) Assert personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused; but a lawyer may argue, during analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

E. Final arguments should not go outside the evidence. *Hoover v. First American Fire Ins. Co.*, 218 Iowa 559, 255 N.W. 705 (1934).

II. IMPROPER ARGUMENT

A. Mention of Insurance:

1. *Rosenberger Enterprises, Inc. v. Ins. Service Corp.*, 541 N.W.2d 904 (Iowa App. 1995). Repeated reference by plaintiff's counsel to errors and omissions insurance possessed by one of several defendants. New trial granted for this and other abuses.
2. *Mongar v. Barnard*, 248 Iowa

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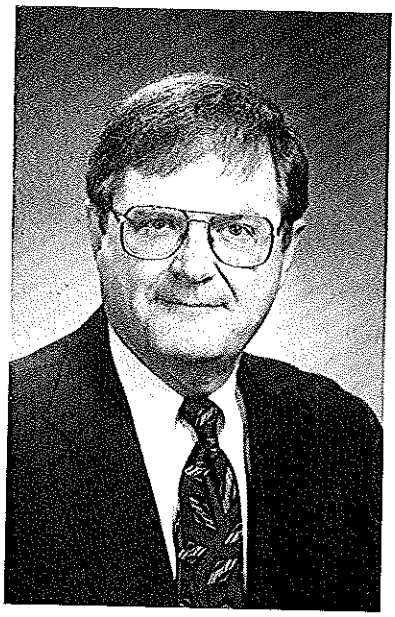
MESSAGE FROM THE PRESIDENT



Charles E. Miller

It hardly seems possible, but a year has passed since my first opportunity to share thoughts with you on this page. As You will recall, I urged each of you to become active in your organization. It has been gratifying that so many of you responded. For example, the Annual Meeting had over 200 registrants. We also had guests from the Colorado and Nebraska defense organizations. These "foreigners" came to observe how our Association has developed its reputation as a leader in state defense organizations. We are recognized as such because of the participation and dedication of you, the members. When you think about it, our relatively small Association runs a year-round program matched by few other (and much larger) states — and all with volunteer labor. That is not cause for self-congratulations — even if deserved — but for continuing and expanded commitment.

Such commitment to continuing improvement can be seen in the outreach to the insurance industry. Coordinated by Wendy Munyon and Marion Beatty, we have taken steps to involve more Iowa insurance companies in the Association so that there is an opportunity to share concerns and ideas for the improvement of the "tri-partite" relationship that is the foundation of most civil litigation. Clearly, fostering and improving that relationship must be a goal for our future.

Other essential commitments of the Association will be our continuing efforts to keep the legal playing field level through our legislative program. Education of young lawyers through the leadership of Bob Houghton with the Trial Academy must also continue. This program provides a great opportunity to show young lawyers how things can be done effectively and civilly, something that many new attorneys may not fully understand. Also important are the activities of our members in improving the image of all lawyers. Our reputation as a profession has never before been subject to the intensity of attacks and scrutiny as it is now. I am proud to be a member of an organization that has always been a leader in fostering the high standards of ethics and civility that must be a cornerstone of our legal system. I am confident your new officers and director will continue to advance these programs.

During my year as your President, many people contributed to our success. I wish to offer special thanks, however, to the Executive Committee of Bob Engberg, Jaki Samuelson, and DeWayne Stroud and our new Secretary, Mark Tripp. On a personal note, I wish to thank my wife, Pat, who has supported me for many years when legal matters have kept me away from home.

Finally, my thanks and best wishes to you, the members of *the best* defense organization in the country.

Charles Miller

REMITTITUR AND ADDITUR IN IOWA (Recent Developments)

By Michael W. Ellwanger, Sioux City, Iowa

Remitttur

A long line of Iowa cases has recognized remittitur. Northwest Digest 2d, New Trial, §162(1), cites 14 cases which have discussed the issue of whether the trial court should have granted a remittitur. The last three cases which have discussed the law have all been decided by the Court of Appeals, most recently *Lamb v. Newton-Livingston, Inc.*, 551 N.W.2d 333 (Iowa App. 1996). In the *Lamb* case, the plaintiff's mother was 76 years old when she committed suicide in a nursing home. Plaintiff sued the nursing home for loss of consortium and punitive damages. The court directed a verdict against the plaintiff on the punitive damage claim. The jury returned a verdict in favor of the plaintiff for $400,000.00 for loss of consortium. The defendant made a motion for new trial. The trial court ordered a remittitur of the verdict to $100,000.00 and ordered a new trial if it was not accepted. The defendant accepted the remittitur, but the plaintiff appealed. The Court of Appeals held that the trial court did not abuse its discretion in remitting the verdict. The trial court emphasized that the mother had a life expectancy of 9.71 years, that she was in ill health, that she had been emotionally unstable and demanding on her daughter. The daughter did visit the mother approximately three times each week. Although there was no evidence that the mother provided any parental care, advice or counsel to the daughter, the daughter did lose the mother's companionship and society.

In discussing whether the verdict was excessive, the court noted that a damage award should not be set aside unless it meets one of the following criteria: (1) it is flagrantly excessive or inadequate; (2) it shocks the conscious or sense of justice; (3) it raises a presumption it is the result of passion, prejudice or other ulterior motive; (4) it lacks evidential support. Citing *Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516, 524 (Iowa App. 1977).

The Iowa Supreme Court has noted that the trial court has broad discretion in granting a new trial conditioned on remittitur and the reviewing court will not interfere with its ruling unless there appears to have been an abuse of discretion. *Hurtig v. Bjork*, 138 N.W.2d 62 (Iowa 1965).

Obviously, the first thing one must do in obtaining a remittitur is to convince the judge that the verdict was excessive. In *Ort v. Klinger*, 496 N.W.2d 265 (Iowa App. 1992), the plaintiff had been in an automobile accident in which she suffered facial lacerations and also hurt her shoulder, neck, lower back and right foot. It appears that all of the injuries were soft tissue injuries. The jury returned a verdict in the amount of $176,618.00. The defendant requested a remittitur, which was denied by the trial court. The court noted that a reviewing court cannot set aside a verdict simply because it might have reached a different conclusion. It is not for the reviewing court to invade the province of the jury. In considering whether the verdict was excessive, the evidence must be considered in the light most favorable to the plaintiff. *Id.* at page 269. The court noted that the defendant's own medical expert witness testified that the plaintiff had a permanent impairment of 15-16%. The plaintiff was having headaches, could not engage in tasks such as long distance driving which required repetitive movement of the neck, and continued to have pain in her neck, low back and right foot. Plaintiff's primary treaters were two chiropractors who gave her a 30-40% disability rating. The court held that there was sufficient evidence to support the jury verdict.

For an interesting earlier case, you are referred to *Heerde v. Kinkade*, 85 N.W.2d 908 (Iowa 1957). In that case the plaintiff was injured in a fist fight with his farming neighbor. He had a $4.00 medical bill. The jury awarded the plaintiff $2,504.00 for actual damages and $2,500.00 for punitive damages. The court held that the defendant would be granted a new trial unless the plaintiff consented to a reduction of the judgment for actual damages to $1,504.00. The court left the punitive damage award of $2,500.00 intact.

Additur

The conventional wisdom has been that additur is not an available post-trial remedy in Iowa. For example, in the *Trial Handbook* of the Iowa Academy of Trial Lawyers, no Iowa cases are cited in the brief discussion on additur. Iowa Academy of Trial Lawyers, *Trial Handbook*, pages 4 and 5 (Second Edition, 1986). There is a split of authority as to whether trial courts have the power to increase an inadequate award by means of an additur. 22 Am.Jur.2d, Damages, §1030, page 1078-1079. *See also* 5 Am.Jur.2d, Appeal and Error, §946, page 373-374. Several courts have found that additur impinges upon the right to trial by jury. 22 Am.Jur.2d, Damages, §1030 at page 1079. The United States Supreme Court has held that a federal district court does not have the power, in view of the Seventh Amendment guarantee of

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IOWA SUPREME COURT REJECTS NEGLIGENT DISCHARGE CLAIM

By Frank Harty, Des Moines, Iowa

Iowa employers often ask for legal and practical advice on discharging employees. When should the employee be informed? Who should be present when the employee is told? What should the employee be told? These are all common questions asked by employers faced with the prospect of having to carry out an employee termination.

Employer trepidation is understandable given the potential risk. Even entirely lawful termination can result in claims of defamation, interference with contractual relations and intentional infliction of emotional distress.

The Iowa Supreme Court recently issued a decision that should give some comfort to Iowa employers. In *Huegerich v. IBP, Inc.*, 1996 Iowa Sup. Lexis 232 the Iowa Supreme Court soundly rejected the negligent discharge cause of action. The court in *Huegerich* reaffirmed Iowa's employment at-will doctrine and rejected the argument that the employer may be guilty of negligently terminating an employee.

The plaintiff in *Huegerich* was employed as a meat inspector at the defendant's Storm Lake packing facility. The court noted that IBP had adopted a strong anti-drug and alcohol policy at its Storm Lake facility. The company strictly enforced the policy which included a prohibition on the possession of "legend" or "look-alike drugs" on company property. The court explained that a look-alike drug is a substance having a similar appearance or the same effect as an illegal drug. Slip Op. at 2.

In 1991, Huegerich was searched as he was entering the plant. He was found to be carrying a bottle of over-the-counter asthma medication containing ephedrine hydrochloride, which is identical in appearance to the illegal street drug amphetamine referred to as "white cross" or "speed." A pill from the bottle was tested to confirm that the medication contained ephedrine. It tested positive. The defendant's head of security stated that the substance was "white cross."

The plaintiff offered to submit to a blood or urine test but was denied the opportunity. He was terminated for possessing a look-alike drug on plant property in violation of IBP's policy. Subsequent tests on the pills taken from the plaintiff revealed that they were Maxalert and not an illegal amphetamine.

Huegerich explained that while on a trip he purchased the pills for his girlfriend who was an asthmatic. Although IBP has an orientation process during which new employees are advised of the drug policy and provided training to help identify look-alike drugs, Huegerich did not go through the orientation program because he transferred to the plant from another subsidiary of the defendant. Huegerich testified at trial that he was generally aware of IBP's drug policy but was totally ignorant of the look-alike drug prohibition.

About a half year after he was terminated Huegerich testified that he was informed by co-employees that he had been fired for possessing "speed." Huegerich sued IBP for wrongful discharge, negligent discharge, defamation, breach of implied covenant of good faith and fair dealing, and outrageous conduct. In August of 1994 the action was tried to the district court for Buena Vista County. At the close of trial, the plaintiff moved to amend the petition to reallege the implied covenant of good faith and fair dealing but not the negligent discharge count.

The district court entered judgment in favor of the plaintiff and against IBP for wrongful discharge in the amount of $24,000 and for defamation in the amount of $20,000. The district court held for the defendant on Huegerich's outrageous conduct, breach of implied covenant of good faith and fair dealing and retaliatory discharge claims. The wrongful discharge judgment was based on a theory of negligent discharge. The court concluded that IBP was negligent in terminating Huegerich without properly administering its drug policy, failing to ensure Huegerich was provided orientation concerning the look-alike drug policy and failing to inform Huegerich he could be terminated for possessing look-alike drugs.

The Supreme Court reversed the trial court on both counts. The court began its analysis of the negligent discharge claim by reaffirming the "firmly ingrained" rule in Iowa that "an employer may discharge an at-will employee at any time, for any reason, or no reason at all." *Id.* at 5 (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994); *Lara v. Thomas*, 512 N.W.2d 777, 781 (Iowa 1994); *French v. Foods, Inc.*, 495 N.W.2d 768, 769 (Iowa 1993); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 455 (Iowa 1989). The court noted that it had recognized only two narrow exceptions to the general employment at-will doctrine:

> (1) where a termination violated a "well-recognized and defined public policy of the state"; or
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> (2) a discharge in violation of a contract created by an employer's personnel handbook

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CASE NOTE SUMMARY

By William H. Roemerman, Cedar Rapids, Iowa

EMPLOYERS MUTUAL v. CRTV

IOWA SUPREME COURT DECISION MAKES IT MORE DIFFICULT AND DANGEROUS FOR A LIABILITY CARRIER TO DECLINE TO DEFEND IT'S INSURED

In June, the Iowa Supreme Court decided a case which makes it much more difficult - and dangerous - for a liability carrier to decline to defend its insured. The case is *Employers Mutual Cas. Co. v. Cedar Rapids Television Co.* (No. 171 / 95-787). In theory, this case represents a logical extension of the Court's prior pronouncements on the duty to defend. In practice, it may represent a major expansion of the duty to defend, especially as it relates to business and professional liability coverage.

THE CASE:

Employers v. CRTV was a suit to recover defense costs incurred by the Cedar Rapids Television Co. (CRTV) in a prior lawsuit. The facts of the underlying suit are described in detail in *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352 (1994). That underlying litigation stemmed from a dispute between the owners of two television stations. The Plaintiff, Bond, was the general partner in a company that owned a Dubuque station. His station competed with CRTV's station. Bond had an agreement to sell his station to a third party. CRTV was involved in an ongoing dispute with Bond concerning rights to cable access in the Dubuque market and filed protests with the FCC to block the sale. CRTV's protests were ultimately overruled by the FCC via a procedure akin to summary judgment, but by the time the FCC ruled, Bond's sale had fallen through.

Bond then filed suit against CRTV. It appears that the form of the petition against CRTV followed the familiar format of setting forth a series of general allegations followed by numbered divisions, with each division alleging a specific tort. The torts alleged in the specific divisions were: (1) tortious interference with contract; (2) abuse of process; (3) malicious prosecution; and (4) intentional infliction of emotional distress.

CRTV was insured by Employers. As Employers construed its policy, coverage was provided for the malicious prosecution claim but not the other claims. By the time the coverage case reached the Supreme Court, there was no contention that the policy provided coverage for any of the other specific torts.

The Supreme Court had previously held that when a multi-count petition contains both covered torts and torts that are not covered, the insurer must defend the whole suit. See e.g. *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991). Presumably because of these holdings, Employers proceeded to defend the entire action under a reservation of rights. CRTV continued to employ its own lawyers to assist in the defense.

On the eve of trial, Bond amended his petition to withdraw those divisions claiming causes of action for abuse of process, malicious prosecution and intentional infliction of emotional distress. All that remained of the original petition were the general allegations and the count relating to tortious interference with contract. Since Employers believed that the only covered claim (the claim for malicious prosecution) was out of the lawsuit, it withdrew its defense. The case was tried and appealed on the theory of tortious interference with contract only. The defense was handled by CRTV's private attorneys. Although CRTV ultimately won, it incurred $354,393.83 in defense costs after Employers withdrew.

The Supreme Court held (5 to 3, with Justice Ternus taking no part) that Employers had a continuing duty to defend the Bond lawsuit even though there was no coverage for the remaining theory enumerated in the amended petition.

The Court noted that it has frequently held that an insurer's duty to defend is to be determined by the "facts" alleged in the plaintiff's petition. *See A.Y. McDonald supra. See also Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393 (Iowa 1978). It then determined that, even though the plaintiff in the Bond case had disclaimed the legal theory of malicious prosecution, the petition still contained factual allegations which, if proven, could support a malicious prosecution claim. The Court found the necessary elements of "malicious prosecution" by reading selected paragraphs of the general allegations and the interference with contract division. The Court concluded that:

"In deciding the scope of a liability policy's coverage, a court must compare the policy language with the facts pled in the underlying suit to see if the claim falls within the express terms of the policy; the legal nomenclature the plaintiff uses to frame the suit is relatively unimportant." *Employers Mutual Cas. Co. v. Cedar Rapids Television Co.* at p. 4 (quoting *Titan Holdings Syndicate, Inc. v. City of Keene* 898 F.2d 265 (1st Cir. 1990) In holding that the facts (rather than the legal theory) set out in the petition control the duty to defend, the Iowa Court suggested that it was merely following its prior cases and the holdings of other courts such as the one in the *Titan Holdings Syndicate* case. In fact, the Court went

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1996 LEGISLATIVE REPORT

By Robert M. Kreamer, Des Moines Iowa

The 1996 Iowa Legislature adjourned May 1st after spending one hundred fifteen days in session. While Iowa legislators successfully dealt with several important issues, the 1996 legislative session continued to experience a partisan and philosophical gridlock on most substantive issues because of the divided control of the Iowa House of Representatives and the Iowa Senate. While Republicans controlled the House by a 63-37 margin, the Democrats narrowly controlled the Senate by a 27-23 margin. Because of this control split, much of the session was spent posturing by both parties to win control of the Senate in the 1996 general election. Never was the gridlock and political posturing more apparent than on several issues of interest and importance to the Iowa Defense Counsel Association. This legislation of interest in 1996 included the following bills:

House File 345 - This legislation would have eliminated the statutory 10% interest provision found in Iowa Code Section 535.3 and provided that this interest would be at the same rate found in Iowa Code Section 668.13 in comparative fault actions. This legislation passed the Iowa House of Representatives in 1995 by a vote of 92-4 and was then approved this year by the Senate Judiciary Committee on a 10-5 vote. Despite successfully clearing this Senate committee and being placed on the Senate Debate Calendar, House File 345 was not allowed floor time for debate by the Senate leadership.

House File 362 - This legislation provided that the statute of limitations for a products liability action would be ten years from the date the product is first purchased. It also provided that where misuse, failure to maintain, or unauthorized alteration of a product is the primary cause of injury, the manufacturer, assembler, designer, wholesaler, retailer or distributor from whom the recovery of damages is sought shall not have any percentage of fault allocated against them under Iowa's comparative fault law. This legislation passed the Iowa House of Representatives in 1995 by a vote of 63-33 but was never given any consideration by the Iowa Senate this year.

House File 394 - This legislation provided that an action for medical malpractice allegedly committed on a minor under age six (6) must be commenced prior to the minor's eighth (8th) birthday. This legislation passed the Iowa House of Representatives in 1995 by a vote of 71-24 but was never given any consideration by the Iowa Senate this year.

House File 300 (Companion bill SSB 266) - This legislation would eliminate joint and several liability in comparative fault actions. No action was taken by either the House Judiciary Committee or the Senate Judiciary Committee.

House File 250 (Companion Bill SSB 263) - This legislation provided that the percentage of fault assigned to the person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium and overrules *Schwennen v. Abell*, 430 N.W. 2d 98 (Iowa 1988). No action was taken by either the House Judiciary Committee or the Senate Judiciary Committee.

House Study Bill 605 - This legislation provided a provision capping non-economic damages at $250,000 and also allowed an award of future damages to be reduced to present value. No action was taken on this legislation by the House Committee on Economic Development.

Senate File 2404 - This legislation rewrites the Iowa Administration Procedure Act found in Iowa Code Chapter 17A. This legislation was approved by the Senate Judiciary Committee and was then taken off the Senate Debate Calendar and referred to the Senate State Government Committee.

House File 130 - This legislation allowed the defendant, in any action where the plaintiff is a governmental entity, the right to inform the jury of its prerogative to judge the applicable law of the case as well as the facts and to return a verdict which does not apply the law as instructed by the judge. This legislation, opposed by all segments of the organized Bar, was approved by the House Judiciary Committee in 1995 but received no further consideration in 1996.

Senate File 257 - This so-called "Sunshine in Litigation Act" created a presumption that all court records in civil actions are open to the public unless access is restricted by law and was approved by the Senate Judiciary Committee in 1995. After this same subject matter was offered as an amendment to the Products Liability legislation *(House File 362)* and defeated by a vote of 60-33 in the Iowa House, this legislation was removed from the Senate Calendar and re-referred to the Senate Judiciary Committee.

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LAW OF CLOSING ARGUMENT *Continued from page 1*

899, 82 N.W. 2d 765, 770-71 (1957) ("During the final argument to the jury plaintiff's counsel said defendant would never have to pay any judgment in the case and the jury need not worry about his having to do so. . . The statement defendant would never have to pay any judgment in the case was highly improper and should not have been made except for the fact the trial court found, in overruling defendant's motion for new trial, it was in answer to argument for defendant. And defendant does not challenge the finding.")

3. *Stewart v. Hilton,* 247 Iowa 429, 437, 77 N.W.2d 637, 643 (1956) (New trial on other grounds):

> Error arises only when a party intentionally brings before the jury on an immaterial or irrelevant matter the fact that the opposite party carries insurance.

4. Inadvertent reference followed by cautionary comment by the court is not prejudicial error. *Carter v. Chicago Rock Island & Pacific Ry. Co.*, 247 Iowa 429, 74 N.W.2d 356, 360 (1956).

5. *Agans v. General Mills Inc.*, 242 Iowa 978, 984, 48 N.W.2d 242, 244 (1951) (Plaintiff's counsel told the jury that if the defendant was forced to pay even "one cent" of any judgment, then "I will personally reimburse him for it." Improper, but no new trial because the argument was found to be responsive to opposing counsel's argument.)

6. *Floy v. Hibbard*, 227 Iowa 149, 287 N.W. 829, 830 (1939) (New trial granted):

> [I]n the argument to the jury, plaintiff's counsel developed the idea very plainly so that the ordinary juror would easily catch on that the only party interested in preventing a verdict was the insurance company . . . .

7. Statement of plaintiff's counsel that the defendant would not have to pay and that they knew who would pay was error requiring reversal. *McCornack v. Pickerell,* 225 Iowa 1076, 283 N.W. 899, 903 (1939).

B. Suggestion of No Insurance:

1. Defendant's closing argument that his client was the only person sued implied that she was uninsured and was objectionable. *Fratzke v. Meyer*, 398 N.W.2d 200, 205-06 (Iowa App. 1986).

2. Suggesting that damages are not covered by insurance, when in fact they are, is objectionable. *Laguna v. Prouty,* 300 N.W.2d 98, 100-01 (Iowa 1981):

> [Counsel] acknowledged telling the jury plaintiff 'has come into Boone County asking a Boone County jury to take $200,000 out of the pocket . . . of the defendant.'
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> * * * *
>
> [W]e also believe the argument that plaintiff was asking the jury to take $200,000 'out of the pocket' of defendant could reasonably be taken to imply defendant was uninsured.

[However, a new trial was denied because, in the words of the Court, it did not "appear prejudice resulted or a different result could have been probable." *Id.* at 102.]

C. The "Golden Rule."

1. *Oldsen v. Jarvis*, 159 N.W.2d 431 (Iowa 1968):

> "During closing argument to the jury here plaintiff's counsel made this statement in substance: 'It's been suggested that my suggestion of $10,000 or $20,000 was ridiculous or something to that effect, but let me ask you this question: Would counsel for the defendant or his client or I or you_____"
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> * * * *
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> Counsel then asked that *opposing counsel* be admonished that use of the 'Golden Rule' argument was misconduct and improper. Plaintiff's counsel denied he had said anything improper yet; the court remarked he appeared to be moving toward the 'Golden Rule' argument. . . [Emphasis in original.]
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> [But new trial was denied conditioned upon remittitur.]

2. *Cardamon v. Iowa Lutheran Hospital,* 256 Iowa 506, 128 N.W.2d 226, 230 (1964):

> In a speculative vein counsel then hypothesized a person with injuries such as were claimed. He compared the hospital cost per day with the total number of days decedent had been disabled. In discussing pain and suffering counsel at one point said: 'It's easy to speak of pain and say how much would you stand for $2? Would you take $2 for an hour of pain? I am going to impose upon you one hour of pain for $2.'
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> Defendant's counsel promptly objected to the argument as being in violation of the 'Golden Rule' Argument.'
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> The statement was promptly withdrawn by counsel with an apology and the court mentioned a previous admonishment that the jurors were not to put themselves in that position. The error of the argument was not so serious as to prevent cure. The withdrawal and admonishment make us reluctant to interfere.
>
> [No new trial.]

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LAW OF CLOSING ARGUMENT *Continued from page 7*

3. *Russell v. Chicago Rock Island & Pacific R. Co.*, 249 Iowa 664, 86 N.W.2d 843, 848 (1957). New trial granted for asking "how much money would you jurors take to go through life injured as this man is":

> Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts.

D. Comparative financial status between parties.

1. *Rosenberger Enterprises, Inc. v. Ins. Service Corp.*, 541 N.W.2d 904 (Iowa App. 1995). Plaintiff's counsel "improperly suggested fault should not be allocated to Savoy [a codefendant] because, in contrast to O'Deen who had errors and omissions insurance coverage, Savoy had no ability to pay damages and to do so would "siphon off" damages recovered" by plaintiff. This was an "improper reference to the financial status of the parties." *Id.* at 907. New trial granted. "We find it likely counsel's conduct precluded the jury from properly assigning fault as required by law, resulting in a verdict that may have been a reflection only of the parties' ability to pay a judgment. We determine Rosenberger's counsel's conduct was prejudicial and that but for this conduct a different finding as to liability would have been probable." *Id.* at 908.

See also, Bisgaard v. Duvall, 169 Iowa 711, 151 N.W. 1051, 1054 (1915); *Burke v. Reiter*, 241 Iowa 807, 42 N.W.2d 875 (1950); *Vanarsdol v. Farlow*, 200 Iowa 495, 203 N.W. 794 (1925); *Almon v. Chicago & N.W. Ry. Co.*, 163 Iowa 449, 144 N.W. 997, 998 (1914).

E. Reading from or reference to any matter outside the record.

1. Law Books or Statutes: *State v. Mayes*, 286 N.W.2d 387, 392 (Iowa 1979), citing *Clark v. Iowa Central Ry. Co.*, 162 Iowa 630, 637, 144 N.W. 332, 334 (1913).

2. Reference to newspaper articles. *Effron, Kushner & Co. v. American Ry. Express Co.*, 195 Iowa 1168, 193 N.W.539 (1923).

3. Reading original notice and mention of attorney's lien. *Caplan v. Reynolds*, 191 Iowa 453, 182 N.W. 641, 642 (1921). [Lack of timely objection failed to preserve the error.]

4. *Sheldon Fixture Co. v. Atlas Oil Co.*, 178 Iowa 413, 159 N.W. 983 (1916). Explanation of amended pleading.

5. Result of former trial. *Miller v. Boone County*, 95 Iowa 5, 63 N.W. 352, 355 (1895). [But not reversible error.]

6. Withdrawn, amended or superseded pleadings. *Shipley v. Reasoner*, 87 Iowa 555, 54 N.W. 470 (1893); *Riley v. Iowa Falls*, 83 Iowa 761, 50 N.W. 33 (1891).

7. Minutes of evidence from former trial. *Martin v. Orndorff*, 22 Iowa 504, 505 (1867).

F. Other Unfair Techniques:

1. *Rosenberger Enterprises, Inc. v. Ins. Service Corp.*, 541 N.W.2d 904 (Iowa App. 1995). "In his closing argument, counsel attempt to play to the passions of the jury through religious imagery . . . ." New trial granted for this and other abuses.

2. Addressing individual jurors by name in final argument is improper. *In re Maier's Estate*, 236 Iowa 960, 20 N.W.2d 425 (1945) (But no new trial).

3. Requesting "jury nullification"; new trial granted. *White v. Chicago & N.W. Ry. Co.*, 145 Iowa 408, 124 N.W. 309, 312 (1910):

> [H]e urged the jury to avoid their duty in assessing the damages on the basis of fair compensation and to return an excessive verdict so that the court would be required to reduce it. This was a direct appeal to the jurors to forswear their duty and shift the burden to the court, and ought not to have been tolerated.

III. FAIR GAME

A. Comment on failure of party to call witness or to testify [in a civil case] on own behalf, or produce testimony within the party's control.

1. *Johnson v. Kinney*, 232 Iowa 1016, 7 N.W.2d 188, 193, 194 144 A.L.R. 997 (1942):

> It is legitimate to comment upon failure of the opposing party to produce testimony within his control.

2. But see, *Moore v. Vanderloo*, 386 N.W.2d 108, 116-17 (Iowa 1986), where plaintiff's counsel was not allowed to comment on the absence of defendant's expert witness who was mentioned in opening statement but not called to testify.

B. Use of Faulty Logic:

1. *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171 (Iowa 1990) (Faulty implication in argument, despite evidence to the contrary, is not grounds for new trial.)

2. *Barr v. Clinton Bridge Works*, 179 Iowa 702, 161 N.W. 695 (1917) (Erroneous deductions from the evidence in final argument are insufficient grounds for new trial.)

Continued on page 9

LAW OF CLOSING ARGUMENT *Continued from page 8*

3. *Moore v. Chicago & N.W. Ry. Co.*, 151 Iowa 353, 131 N.W. 30, 33 (1911):

> Counsel has the right to draw conclusions from the testimony and give them to the jury, even though his logic may be at fault, or the opinions expressed by him unjust. So long as he does not go outside of the record in a manner from which we may fairly infer prejudice to the other party, and does not abuse his privilege by appealing to prejudice and passion, rather than to reason, the field is his own, and the court should not interfere.

C. Comment on the effect of the answers to the special interrogatories in a comparative fault case under Iowa Code § 668.3(5) (1995):

> If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section.

1. *See also, Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985):

> [I]t is commonly thought to be inappropriate in a special verdicts submission for counsel to direct the jury's attention to the impact of any specific findings. . . . [However] under the circumstances here it does not seem appropriate to consider whether the trial court's ruling, rejecting the challenge to the argument was an abuse of discretion. Although there were special verdicts, there was also a general verdict. Because the submission was a combination of special verdicts and a general verdict we decline to review the assignment. [note 1] We need not, and do not, decide the effect, if any, of Iowa Code section 668.3 recently enacted . . . . The new provision does not apply in this case.

D. Retaliation.

1. *Smith v. Cedar Rapids Country Club*, 255 Iowa 1199, 124 N.W.2d 557, 567 (1964):

> The trial court, in refusing to certify defendant's bill of exceptions, said he well remembered what counsel had said to the jury in that regard and stated: 'I thought at the time that you were leading with your chin, and it would undoubtedly not be passed by the plaintiffs in their closing argument.'

2. *Mongar v. Barnard, supra,* at 771: "In the cited case the trial court denied a new trial in part because the record did not show the objectionable argument was not fairly responsive to argument for defendant. Here, as stated, there is an affirmative finding on this point."

3. *Agans v. General Mills. Inc., supra.* No new trial for improper reference to insurance where argument was responsive to opposing counsel's argument.

4. *Maine v. Rittenmeyer*, 169 Iowa 675, 151 N.W.599 (1915) (No new trial where improper argument by one side is made in response to that of the other.)

5. But *see, Welch v. Union Central Life Ins. Co.*, 117 Iowa 394, 90 N.W. 828 (1902) (Prejudicial remarks of counsel are not excusable because provoked by opposing counsel. New trial granted.)

E. Per Diem Formula

Corkery v. Greenberg, 253 Iowa 846, 114 N.W.2d 327 (1952)(Per diem formula suggested in argument as method to determine amount of personal injury damages is proper.)

F. Calculations:

1. Making computations for the jury on "recognition time" in truck accident case is okay. *Kuper v. Chicago & Northwestern Transp. Co.*, 290 N.W.2d 903 (Iowa 1980).

G. Use of Visual Aids is Proper.

1. Blackboard is okay. *Sauer v. Scott,* 238 N.W.2d 339 (Iowa 1976).

2. Use of toy vehicles is okay. *Nielsen v. Wessels,* 247 Iowa 213, 73 N.W.2d 83 (1955).

3. Even seating plaintiff beside jury to show scar can be okay. Mizner v. Lohr, 213 Iowa 1182, 238 N.W. 584 (1931).

4. Drawings used for illustration are okay even if not in evidence. *Stafford v. City of Oskaloosa*, 64 Iowa 251, 20 N.W. 174 (1884).

H. Use of Partial Transcript.

1. *Willis v. Schertz*, 188 Iowa 712, 175 N.W. 321 (1919) (Counsel may read abstracts from the evidence in final argument.)

2. Court has discretion on reading from transcripts. *McConkie v. Babcock*, 101 Iowa 126, 70 N.W. 103 (1897); *Van Vliet Fletcher Automobile Co. v. Crowell*, 171 Iowa 64, 149 N.W. 861 (1914);

I. Wide Latitude

1. Mild name-calling is tolerated:

a. *Johnson v. Kinney*, 232 Iowa 1016, 7 N.W.2d 188, 194, 144 A.L.R. 997 (1942)(no new trial for reference to opposing counsel as "trickster lawyer.")

b. *In re Roberts' Estate*, 231 Iowa 1088, 3 N.W.2d 161 (Iowa 1942)(No new trial for calling claimant the "black sheep of the family" and a "renegade".)

c. *Myers v. Chicago, B.& Q. Ry.*

Continued on page 10

LAW OF CLOSING ARGUMENT *Continued from page 9*

Co., 152 Iowa 330, 131 N.W.770 (1911) (No new trial for calling train crew a "gang".)

d. *Geiger v. Payne,* 102 Iowa 581,69N.W.55(1896) (Denun - ciation of defendant's conduct and character is appropriate if within the proof.)

2. Embellishments of oratory are permitted.

a. *Bohen v. North American Life Ins. Co.*, 188 Iowa 1349, 177 N.W. 706, 711 (1920):

The appellant also objected to the argument of plaintiff's counsel in which the latter remarked that – He did not want the jury, at the instance of any insurance company, to write an epitaph upon the tombstone of Marie P. Bohen that she was a cheat and a fraud. This merely suggested somewhat forcibly the consequence of an adverse conclusion by the jury, and the attorney was within the rule which does not require him to forego all the embellishments of oratory or to leave uncultivated the fertile field of fancy.

b. *Connelly v. Nolte*, 237 Iowa 114, 125, 21 N.W.2d 311, 316-17 (1946) (no prejudice from reference to opposing counsel as "professional wizard from Des Moines.")

c. *Hoegh v. See*, 215 Iowa 733, 737, 246 N.W. 787, 788 (1933) (Plaintiff was a law student. His lawyer said, "'Mr. Becker would not want a big scar on his forehead while going all over the state of Iowa trying these automobile cases.' . . . It seems to us that this was a legitimate argument."

d. But see, *Rosenberger Enterprises Inc. v. Ins. Service Corp.*, 541 N.W.2d 904, 908 (Iowa App. 1995):

[C]ounsel inappropriately attempted to influence the jury by references to his personal religious belief in God and the death of his father. Such melodramatic argument does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact.

IV. PRESERVATION OF ERROR:

1. *Team Central. Inc. v. Teamco Inc.*, 271 N.W.2d 914, 926 (Iowa 1978) ("The arguments were not reported. No objection was made when the alleged misconduct occurred. Ordinarily, this waives any impropriety in remarks of counsel. The reason for this rule is that failure to object deprives the trial court of the opportunity to avoid reversible error by timely admonition." No new trial.)

2. *Sauer v. Scott*, 238 N.W.2d 339 (Iowa 1976) (Standing objection insufficient to preserve error.)

3. *Turner v. Jones*, 215 N.W.2d 289, 291 (Iowa 1974) (Failure to object deprives the trial court of the opportunity to avoid reversible error by timely admonition.)

4. *Andrews v. Struble*, 178 N.W.2d 391 (Iowa 1970) (Final arguments reported. Objection and motion for mistrial were timely when made before submission to jury but after argument.)

5. *Agans v. General Mills, Inc.*, 242 Iowa 978, 983-85, 48 N.W.2d 242, 245-46 (1951): "When (or if) counsel on either side oversteps the bounds of proper argument, prompt steps should be taken by the other to make the event of record when the matter is fresh in everyone's mind, and the trial court given opportunity to take whatever proper steps are possible to repair the damage without necessitating a trial anew . . . Counsel for defendants were apparently not disturbed by the argument when made. They might have moved promptly for a mistrial then or at the close of the argument. They elected to await the jury's decision, if indeed they thought any serious error had been committed. Like the trial court we are powerless now to grant them relief . . ."

6. *Connelly v. Nolte,* 237 Iowa 114, 124-28, 21 N.W.2d 311, 316-18 (1946). No new trial. Belated and poorly documented claim of misconduct in argument.

7. *Hoegh v. See,* 215 Iowa 733, 737, 246 N.W. 787, 788 (1933) ("This court will not consider objections to statements made by counsel in argument, unless objection was made at the time the statement was made in the trial of the case"). ❑

Welcome New Members

Susan E. Bennett
Cedar Rapids, Iowa

Deborah A. Dubik
Davenport, Iowa

Jan D. Gibson
Des Moines, Iowa

Cheryl M. Herden
Cedar Rapids, Iowa

Scott J. Nelson
Dubuque, Iowa

Patrick M. Sealey
Sioux City, Iowa

Kris H. Smith
Des Moines, Iowa

REMITTITUR AND ADDITUR IN IOWA *Continued from page 3*

jury trial, to increase the amount of damages awarded by a jury to a plaintiff in a personal injury action without the consent of the plaintiff. *Dimick v. Schiedt,* 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296.

It has been suggested that where the trial court concludes that the damages are inadequate, it has three choices: (1) grant a new trial on all issues; (2) order a new trial restricted to the issue of damages; or (3) require a "voluntary" additur on pain of a new trial. 16 A.L.R. 2d 405. It has been noted that the additur practice is much less common than the correlative practice of requiring a remittitur of excessive damages. *Id.* at page 405.

Two recent decisions by the Iowa Court of Appeals seem to suggest that additur is an appropriate post-trial remedy. *In Foster v. Pyner,* 545 N.W.2d 584 (Iowa App. 1996), a mother brought an action on behalf of her minor child who had suffered injuries to her lip as a result of a dog bite. There was a difference of opinion among the plaintiff's physicians as to whether surgery would reduce the size of the child's scar. The surgery would cost $6,000.00. Even if there was surgery, she would be left with a permanent scar on her face. Prior to trial the defendants offered to confess judgment for $12,000.00. The jury awarded $1,000.00 for past pain and suffering and $84.00 for past medical expenses. The plaintiff made a motion for additur. The trial court sustained the motion and ordered $10,000.00 added to the verdict, to compensate the plaintiff for loss of function of the body, past and future. The order provided that the plaintiff would have a new trial if the defendants rejected the additur. The defendants rejected the additur and appealed. Defendants contended that the district court abused its discretion by granting the plaintiff a new trial.

On appeal the Court of Appeals held, consistent with the recent case of *Brant v. Bockholt,* 532 N.W.2d 801, 804-805 (Iowa 1995), that facial scarring did not justify an award for loss of function of the body, unless there was some functional impairment due to the facial scarring. Consequently, the absence of an award for loss of function of the mind or body did not render the jury verdict inadequate. Nor was the jury required to render an award for future medical expenses, because there was differing opinions on whether future surgery would be helpful. However, due to the fact that the scar was "conspicuous" and also permanent, the court concluded that the failure of the jury to award future pain and suffering was contrary to the evidence in the case. The Court of Appeals held that the district court correctly concluded that the verdict was inadequate. The court remanded for a new trial on the issue of damages. It should be noted that this case made no specific comment on the appropriateness of an additur award. The implied premise of the court's discussion, however, was that such an award was appropriate.

In McHose v. Physician & Clinic Services, 548 N.W.2d 158 (1996), a physician brought a breach of contract action against a hospital. The physician had entered into a contract whereby a medical clinic was to be opened in Grimes, Iowa. The plaintiff alleged that the defendant backed out of the contract and that he suffered monetary damages. This case was apparently tried to the court, which returned a verdict for $37,312.00. The plaintiff filed a motion asking the court to reconsider the amount of damages, but the court refused to increase the award. Interestingly, it does not appear from the opinion that the plaintiff asked for a new trial. Rather, he simply asked the court to reconsider the amount of damages awarded. Nevertheless, the Court of Appeals treated the matter as though a new trial had been requested based upon an inadequate damage award. The court noted at page 62:

> An inadequate damage award merits a new trial as much as an excessive one. *Witte v. Vogt,* 443 N.W.2d 715, 716 (Iowa 1989). We review this question to correct an abuse of discretion. *Id.* Thus, when the verdict is manifestly inadequate, we consider the refusal of the district court to grant a new trial an abuse of discretion that is subject to reversal. *Id.* Similarly, the refusal to grant additur can be an abuse of discretion when the verdict is inadequate.
>
> The court went on to hold that the trial court abused its discretion in refusing to grant additur. The plaintiff requested the Court of Appeals to enter a judgment for the full amount of the damages he believes was proven. However, the court determined that its review was not de novo and did not allow it to make such a determination. Consequently, the case was reversed and remanded for a new trial on the issue of damages only.

Neither of the above cases address the issue head-on of whether Iowa should recognize additur. As noted above, some jurisdictions have clearly rejected the idea. Nevertheless, the implication of both cases is that additur is a viable remedy in the State of Iowa. It should be noted, however, that neither case cites any other cases which recognize additur in Iowa. ❑

IOWA SUPREME COURT REJECTS . . . . *Continued from page 4*

or manual. While the district court held that the plaintiff's claims did not fall within either of these exceptions to the employment at-will doctrine, it concluded IBP was negligent in administering its drug policy.

The Supreme Court criticized the district court's reliance upon authority from other jurisdictions recognizing a cause of action for negligent discharge. The court stated: "to recognize a theory of negligent discharge would require the imposition of a duty of care upon an employer when discharging an employee. Such a duty would radically alter the long recognized doctrine allowing discharge for any reason or no reason at all." *Id.* at 7.

The court concluded by rejecting negligent discharge as an exception to the employment at-will doctrine.

The Court in *Huegerich* also developed further the Iowa law of defamation as it pertains to the employment context. In overturning the defamation judgment, the court held that the plaintiff failed to establish the element of publication. Interestingly, the court rejected the argument that the mere act of termination in itself could constitute the publication of a defamatory communication.

Plaintiffs sometime argue that the fact that they were escorted from a plant or required to clean out their desk under guard was a defamatory "communication." The courts decision in *Huegerich* should give Iowa employers comfort by alleviating fears that the manner in which an otherwise lawful termination is carried out may give rise to tort liability. ❑

CASE NOTE: *EMPLOYERS MUTUAL v. CRTV* *Continued from page 5*

considerably beyond its prior holdings. It is true that the Court's rulings in *Chipokas, supra,* and other cases teach that the duty to defend hinges on the "facts" plead in the petition. However, the stated purpose of the inquiry has always been to determine whether the lawsuit has any potential of leading to a covered judgment. The insurance policy at issue in the *CRTV* case only covered the malicious prosecution claim. It would seem that once the plaintiff disclaimed a malicious prosecution cause of action there was no longer any possibility of a covered judgment.

Even the *Titan Holdings Syndicate* case relied upon by the Iowa Court noted that when it becomes apparent that there can be no recovery under a covered *theory*, the duty to defend ends. *Titan Holdings Syndicate supra* at 269.

It now seems clear that in Iowa, insurance companies must sometimes defend even when there is no possibility of a covered judgment. All that matters is that the petition alleges facts which would have supported a covered cause of action, had the plaintiff elected to assert it. The legal theory actually relied upon by the plaintiff makes no difference.

WHAT IT MEANS TO INSURERS:

CRTV will have its most obvious impact on claims presented under policies which define coverage by specifying certain covered torts. Such policies include many malpractice policies as well as the "personal injury" portion of comprehensive general liability forms. Companies writing such policies can no longer look to the torts specified in a plaintiff s petition to determine if there is coverage. They must instead ignore the cause of action that the plaintiff meant to plead and see if a covered cause of action can be gleaned from the facts claimed. In other words, the insurance companies (or their lawyer) are required to recognize causes of action which were never recognized by the plaintiff's attorney.

The *CRTV* case might also have an effect on determining defense cost coverage under policies which exclude (rather than specifically include) named torts. For example, suppose an insurer writes a CGL policy for a tavern. The bodily injury portion of the policy specifically excludes dram shop claims. Typically the tavern carries other insurance for dram shop actions. A plaintiff files a petition which alleges (1) that the tavern served someone to the point of intoxication; (2) that the intoxicated person became combative; (3) that the plaintiff, another tavern patron, was assaulted by the intoxicated person; (4) that damages are claimed by reason of Section 123.92 (*the Dram Shop Act*). The facts pled in (1) through (3) would support a premises liability claim. Under the reasoning of the *CRTV* case, the CGL carrier would be required to participate in the defense even though the plaintiff has elected

Continued on page 13

CASE NOTE: *EMPLOYERS MUTUAL v. CRTV* *Continued from page 12*

not to make a claim under negligence theory.

In light of *CRTV*, insurers must not rely upon the labels placed by plaintiffs on their petitions or their stated intent to plead a particular cause of action. If a division of a petition says "ASSAULT" at the top, the company can no longer immediately say there is no coverage for that division by reason of an intentional acts exclusion. Instead, it must read past the label and see if the facts pled take the case out of coverage.

WHAT IT DOES NOT MEAN:

If the insurer must read the facts (rather than the legal labels) in the plaintiff's petition, it surely must be entitled to read all of the facts when making a decision to defend or not defend. Suppose an insured is sued under a petition which alleges: (1) defendant hit plaintiff; (2) the hit was intentional; (3) the hit caused damages. If you read only (1) and (3), there is a potential for coverage. However, paragraph 2 — the intentional act — is in the pleading. We believe the insurer is entitled to read all of the *facts* in the petition. This is the holding of *Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393 (Iowa 1978). Presumably, if the Supreme Court meant to overrule *Chipokas*, it would have said so. In other words, *CRTV* requires insurers to ignore a petition's statements concerning what legal theory is involved but it does not require insurers to ignore statements of alleged fact.

Presumably, *CRTV* also leaves intact the rule that an insurer may look outside of the petition if it is basing its denial of coverage on matters that are not addressed by the pleading. Thus, if a petition claims that John Doe was negligent in the operation of a motor vehicle and caused injury to Mary Doe, the petition, on its face, would qualify for coverage under an auto policy. However, if the insurance company has solid evidence that John and Mary Doe live in the same household and are father and daughter, the insurance company (with a family exclusion) may be justified in refusing to defend — even though the facts within the "four corners" of the petition would support a claim of coverage. The rule that the insurance company may look outside the petition for matters not covered by the petition is firmly established by *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 119 (Iowa 1984) and *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 445 (Iowa 1970). If the Supreme Court had meant to overrule *McAndrews* or *Central Bearings Co.*, it would have said so.

THE BOTTOM LINE:

The Supreme Court just made it more difficult for insurers to know when they must defend. In each instance, regardless of any labels the plaintiff has put on his cause of action, insurance companies and their lawyers must ask themselves: "Could these facts add up to a covered cause of action?" It doesn't matter that the plaintiff's lawyer hasn't been smart enough to think up a legal theory that would be covered by the policy. Insurers are now charged with discovering if a covered cause of action is lurking in the petition somewhere. ❑

1996 LEGISLATIVE REPORT: *Continued from page 6*

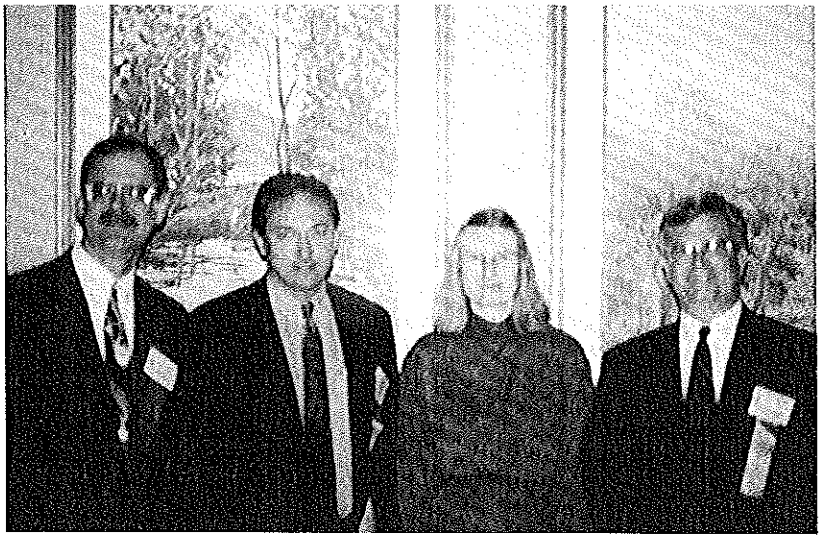
No further consideration was given this legislation in 1996.

While 1996 was a very busy and often frustrating year because of the gridlock that existed between the Iowa House and Iowa Senate, I am pleased to report that there was no legislation of an adverse nature to the Iowa Defense Counsel Association that won legislative approval. I am also pleased to report that I continue to be looked to for leadership by legislators, lobbyists and other interest groups sharing our legislative perspective on the above pieces of legislation and other related issues.

In closing, I would like to thank all of the members of the Iowa Defense Counsel Association for the opportunity to have represented you this past year. Additionally, I would like to give a special thank-you to the Board of Directors, the Legislative Committee and especially its chairperson, Mark Tripp, for all of the support and assistance that has been given me this past year. I look forward to working with you in the days ahead to continue to promote a strong defense attitude in the Iowa legislature. *THANK YOU!* ❑

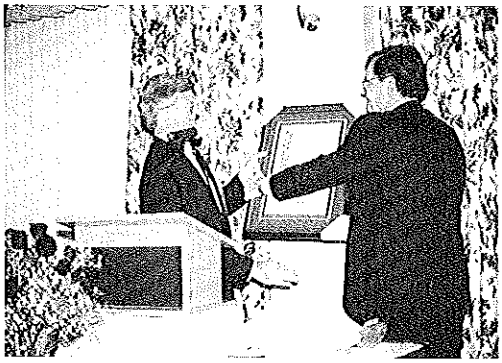
1996 ANNUAL MEETING HIGHLIGHTS

IDCA 1996 - 1997 OFFICERS



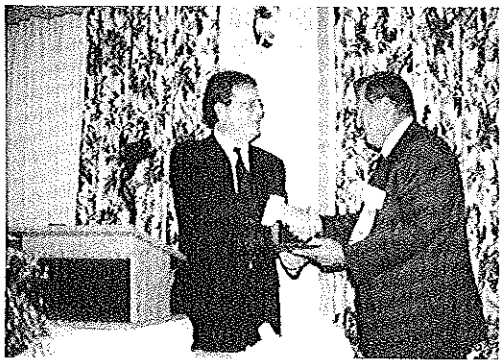
Left to right: James A. Pugh, Treasurer; Mark L. Tripp, Secretary; Jaki K. Samuelson, President-Elect; Robert A. Engberg, President

Chuck Miller, for IDCA, accepts DRI's Exceptional Performance Award from Wayne Taff



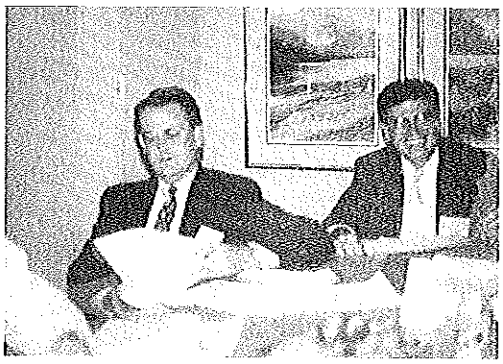
President Engberg congratulates outgoing President Miller

Mark Tripp receives the 1996 "Eddie Award" from Pam (Seitzinger) Holub



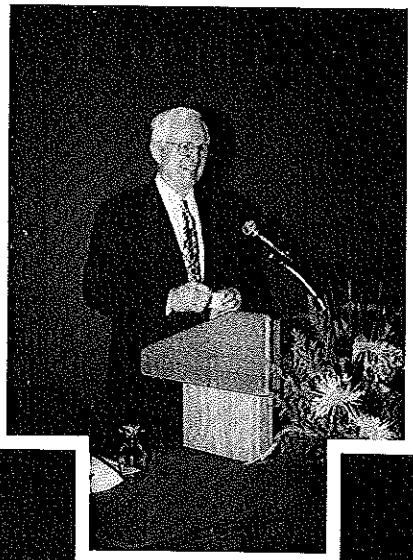
Retiring Treasurer DeWayne Stroud receives a special award for his outstanding services

Board Members meet to discuss pending business

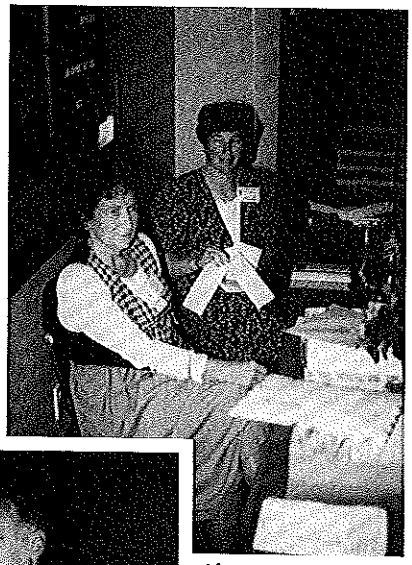


Defense Update co-edtitors Mark Brownlee and Kermit Anderson discuss the next issue

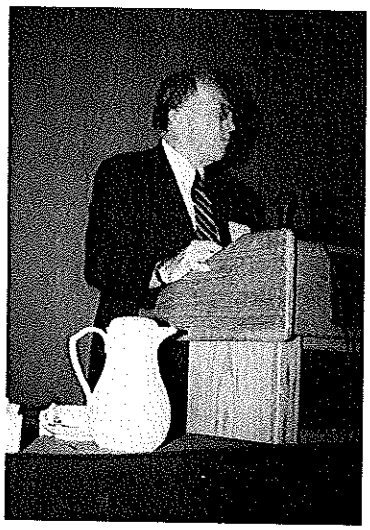
Above: Speaker Mary Ryan makes herself "appear larger!"



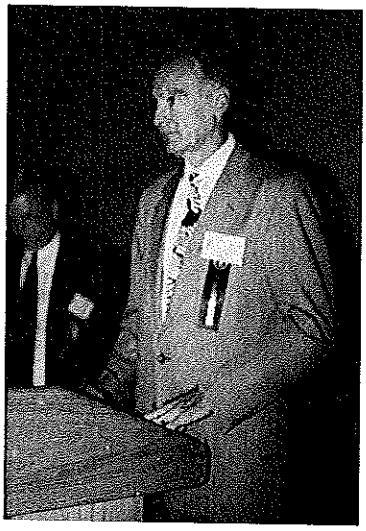
Above: "The Professor," Phil Willson discusses fault damages



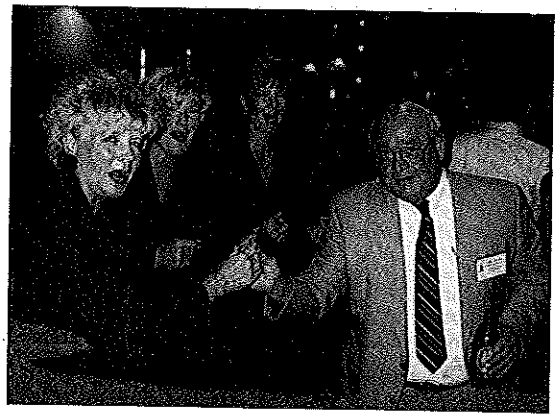
Above: The reception desk is aptly "manned" by Ginger and Ginger



Justice Andreasen *left,* and Judge Wolle *right,* report on the state of the judiciary



The Kuhlmann Sisters add fun to Wednesday evening's reception by getting people involved - including our special guests, Candace McCune, CO; James Snowden, NE; and Wayne Taff MO



FROM THE EDITORS

As the year grows to an end, Iowa judges and lawyers are again visited with the annual dilemma of what to do with cases that are on the strike list. Rule 215.1, Iowa Rules of Civil Procedure, mandates that all law or equity cases"where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. "

Even though most clerks of the various courts are diligent, and serve the necessary notice prior to August 15 of each year, sometimes various problems arise which greatly affect whether a case is continued to a new calendar year. In those instances where the clerks of the court entirely fail to send out the prescribed notices, Iowa law is very clear: no notice, no dismissal.

The situation becomes far less clear in those cases where the clerks do in fact send out the notices, but there is not "actual receipt" by either plaintiff's counsel or a pro se plaintiff. In many instances, counsel for the plaintiffs do receive notice indirectly, so that they do have actual notice of the affects of Rule 215.1, even though they may not have received direct written confirmation. In those cases, even though there is actual or constructive notice by plaintiff's counsel of the impending dismissal, the courts have refused to uphold the involuntary dismissal without prejudice when the plaintiff fails to move for a continuance beyond December 31 of the current year.

This is a legal fiction which should be changed. There are many instances in Iowa law where substantial compliance has been held to be the standard regarding noticed cases, i.e., notification to municipalities of tort claims; and dram claims. For some reason, however, application of the substantial compliance doctrine has not been applied by the Iowa courts to actual or constructive notice by plaintiffs or their counsel of a strike notice from the clerk of the court.

This philosophy should change. A party, or the party's attorney, who knows by actual knowledge or notice by whatever means, that a strike notice has been sent by the clerk of the court should be under the same duty as those plaintiffs who are the recipients of the notices sent by the clerk of the court.

Involuntary dismissals of lawsuits are not favored by the courts. A litigant may possess any number of good and valid reasons why the involuntary dismissal should not occur, and that again is within the discretion of the courts. Where the litigant hides behind the argument that the counsel did not directly receive the notice from the clerk of the court, as an excuse for not having the case continued or set for trial, far greater latitude and discretion should be allowed the district courts in determining the equities of the situation in determining whether the involuntary dismissal is appropriate, and also whether reinstatement of the case is appropriate if requested in a timely fashion.

The Supreme Court has embarked upon a program aimed at disposing of cases within an 18 month time frame from the date of filing. This schedule coincides with the requirements of Rule 215.1. To allow some litigants to keep cases alive long beyond the trier dismiss guidelines prolongs meritless litigation and unnecessarily clogs the court's dockets.

Thomas J. Shields
600 Davenport Bank Bldg.
Davenport, Iowa 52801