defense UPDATE

The Iowa Defense Counsel Association Newsletter October, 1997 Vol. X , No. 4

# TRIPARTITE RELATIONSHIP: ALI ALERT

By John T. McCoy, Waterloo, Iowa

In a defense practice, an attorney encounters separate and distinct relationships with liability-insurance carriers. If the insurer is a party-defendant, the insurer, of course, is the client and is entitled to all benefits and protections of the attorney-client relationship. However, in a third-party liability situation, when the insurer retains the attorney to represent its insured, the tripartite relationship is created (insured, insurer and attorney), which, by its very nature, raises potentially countervailing interests among its litigation partners. The tripartite relationship generates questions regarding the relationship of the insurer and defense attorney, which, in turn, generates substantial legal and ethical issues.

This article will address the evolving tripartite relationship in Iowa and how the American Law Institute's *Restatement (Third), Law Governing Lawyers*, may impact this relationship.

## INSURER-INSURED RELATIONSHIP

The insurer-insured relationship in Iowa arises from, and is defined by, the insurance contract. *See Essex Ins. Co. v. Fieldhouse Inc.*, 506 N.W.2d 772, 775 (Iowa 1993); *A. Y. McDonald Indus. v. INA*, 475 N.W.2d 607, 618-19 (Iowa 1991). Beyond the specific terms of the insurance contract, the Supreme Court has also recognized reciprocal, commonlaw duties of good faith and fair dealing between the insurer and insured, which means that "neither party will do anything to injure the rights of the other in receiving the benefits of the agreement." *See Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 33 (Iowa 1982). In a third-party liability situation, the Supreme Court has also recognized a heightened-duty standard for the insurer because the insurer is a claims professional who, normally by the terms of the insurance contract, controls the litigation. *Id.* Finally, there is suggestion in certain Iowa Supreme Court cases that, in special situations (such as when the insured is exposed to a judgment in excess of policy limits), the insurer may owe the insured fiduciary duties which are not well-defined, but which suggest that the insurer may have to act primarily, but not necessarily exclusively, for the benefit of the insured. *See Wierck v. Grinnell Mut. Reins. Co.*, 456 N.W.2d 191, 194-95. *See also, North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W.2d 824, 829 (Iowa 1991) (dicta); *Pirkl v. Northwestern Mut. Ins. Ass'n.*, 348 N.W.2d 633, 635 (Iowa 1984) (dicta); *Restatement (Second) of Agency*, § 13, Comment (a).

## DEFENSE COUNSEL-INSURED RELATIONSHIP

The attorney-insured relationship in Iowa, and generally throughout the United States, is recognized as an attorney-client relationship. *See Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923 (Iowa 1958). *See also Allstate Ins. Co. v. Keller*, 149 N.E.2d 482, 486 (Ill. 1958); K. Bowdre, *"Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel,"* 17 American Journal of Trial Advocacy 101, 112-13 (1993). This relationship requires the defense counsel to perform all legal and ethical duties owed to the insured as if the insured had personally retained the attorney. *See, e.g., Iowa Code of Professional Responsibility for Lawyers*, Canon 4 (A Lawyer Should Retain the Confidences and Secrets of a Client) and Canon 5 (A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client). However, despite the duty of confidentiality to the insured, the Iowa Supreme Court has recognized that defense counsel may communicate with the insurer to permit the insurer to perform its duties under the insurance contract (ex. duties to defend and to indemnify to the policy limits), at least as long as such disclosure is not unfairly prejudicial to the insured. *See Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923 (Iowa 1958).

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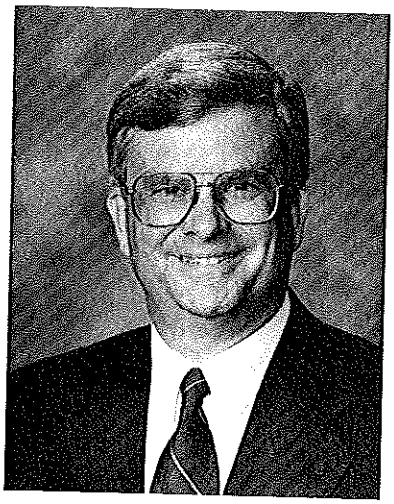
# MESSAGE FROM THE PRESIDENT



**Robert A. Engberg**
**President**

It was one year ago in my first "Message from the President" that I outlined the opportunities awaiting the Iowa Defense Counsel Association in the year to follow. Our members, officers, directors, and past-presidents did more than I could ever have asked and contributed more than I could ever have anticipated in taking advantage of those opportunities and in achieving our goals during the past year. My now completed term as President was the source of much personal satisfaction because of your efforts and I will always be grateful for the exceptional support given me and the Association.

Just a few of our members' accomplishments include efforts of the Legislative Committee and of IDCA Secretary and Committee Chair Mark Tripp and Lobbyist Bob Kreamer which led to the passage of an Iowa Legislative Agenda several years in the making; testimony by IDCA Board Member and Rules Committee Chair David Brown to the Iowa Supreme Court on proposed amendments to the Iowa Rule of Civil Procedure; coordination by Editor Ken Allers, Kermit Anderson, Mark Brownlee, Mike Ellwanger, Jim Pugh, Tom Shields, Pat Woodward and numerous other authors and contributors which resulted in the excellent quarterly publications of our *Defense Update* magazine; printing by the Client Relations Committee and IDCA Broad Member and Committee Chair Marion Beatty of a very useful brochure setting forth the history, function, and services of the IDCA; presentation by the Law School Programs Committee and IDCA Board Member and Committee Chair Bob Houghton of legal education programs in our two law schools; continued efforts by IDCA Board Member and Membership Committee Chair Manny Bikakis to retain and attract new members; and the contribution of time, talents, and resources by many of our board members which led to the very successful Mid-Region DRI meeting hosted by the IDCA in Des Moines last May.

Our year concluded in September with our 33rd Annual Meeting and Seminar organized by President-Elect and Program Chair Jaki Samuelson and General Program Chairs Jim Pugh and Ginger Plummer. We are all grateful to those who served as speakers and to Jaki, Jim, and Ginger for planning and implementing another exceptional program. Their efforts were responsible for continuing our Association's long history of providing high quality legal education opportunities. We are also appreciative of the efforts of Dale Knoshaug for his many hours of service hosting the hospitality suite and his efforts in providing additional social opportunities. Special thanks also go to DRI President Bob Fanter and DRI Director Wayne Taff who graciously accepted our invitation to be our guests and who contributed much by their presence and by their presentations.

I am very grateful to have had the opportunity to serve over the past year and I am very appreciative of each of your efforts which resulted in this year being so productive and so enjoyable. I join the rest of our members in congratulating newly elected President Jaki Samuelson, President-Elect Mark Tripp, Secretary Bob Houghton, and Treasurer Jim Pugh as they and the rest of our Board of Directors continue our programs of service to our member and to the clients we serve.

# LET THE JURY DO ITS JOB

By Patrick L. Woodward and Patricia Rhodes Cepican, Davenport, Iowa

## INTRODUCTION

You and your opposing counsel argue your case to the jury, the judge instructs the jury as to the law, the jury retires, hands are shaken all around, and you go back to your office and await the results. You tell your partners the case went well. You have that feeling of anxious anticipation. After three hours, your feelings of anticipation start to fade as apprehension begins to nibble at the edges of your mind, but then you tell yourself that the jurors who heard this case were intelligent, paid close attention to the evidence, arguments and instructions, and so they must be carefully reviewing all the evidence and debating the merits of the various claims. By the fifth hour, you jump at every phone call. Then that call comes from the judge. You have knots in your stomach because you know they have been talking about money - - and you are sure by now it is big money.

The judge tells you the jury has come back with a verdict, which he has reviewed but not yet accepted. The jury awarded the plaintiff all or part of her past medical expenses but nothing else. Your first feeling is that of relief and perhaps exhilaration as you smile about the fact that although the plaintiff asked for six figures, she barely got four. Then, the judge says that the verdict is inconsistent under Iowa law and that he cannot accept it as this is a basis for an automatic new trial. He wants you and the plaintiff's attorney to agree on a supplemental instruction to submit to the jury advising that it must award the plaintiff additional damages for at least pain and suffering. Your initial reaction is that the jury has already found the plaintiff did not prove any item of damage other than medical expenses but a quick review of the case law tells you that despite everything we tell the jury in our instructions, at least for the present time in Iowa, the judge is correct. If there is an award of past medical expenses, a jury must also award monetary damages for past pain and suffering. You then discuss the language for the supplementary instruction with the court and opposing counsel and perhaps object to its submission to preserve the record. The court overrules your objection and submits the supplementary instruction advising the jury it must award additional damages and you sit back and wonder why we just don't let the jury do its job.

## DISCUSSION

We instruct our juries to base their verdict only upon the evidence. (ICJI 100.4). We instruct the jurors they are to determine the credibility of witnesses and that they can give the witnesses' testimony, including expert witnesses, as much weight as they think it deserves. (ICJI 100.9 and 100.12). We tell the jury it is to award amounts for such items of damage as it finds have been caused by the defendant, that it is to enter zero for any item of damage the plaintiff has failed to prove. (ICJI 200. 1, Question No. 6 of 300.4)

Regarding the function of the jury, our Supreme Court has said:

> Our case law shows that we have been loathe to interfere with the jury verdicts . . . Fixing the amount of damages is a function for the jury. The court should interfere only when the damage award is "flagrantly excessive or inadequate, so out of reason as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.". . . We have stated that the most important of these reasons is whether there is support in the evidence. . . (citations omitted)

*Sallis v. Lamansky,* 420 N.W.2d 795, 799 (Iowa 1988). Yet, when the jurors who have listened to all of the evidence return a verdict for only past medical expenses, be it all or part of those expenses requested by the plaintiff, our court automatically deems the vedict inconsistent and requires an award of pain and suffering or orders reversal and a new trial, perhaps conditioned on an additur.

The reasoning behind this current rule is a presumption that there must be pain and suffering if medical expenses are incurred. As articulated by the Iowa Supreme Court in *Cowan v. Flannery,* 461 N.W.2d 155, 160 (Iowa 1990):

> 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 pain and suffering. Having determined medical expenses were recoverable, there seems no way for the jury to disallow recovery for . . . pain and suffering for the same injuries. Although the award may be adequate, a special verdict award of nothing for pain and suffering is inconsistent and unsupported by evidence.

*Cowan v. Flannery,* 461 N.W.2d at 160. While this may be true in some cases, in others it is not. A better approach for courts to undertake is to examine each case individually with deference being given to the jury which heard, considered and judged the evidence.

For example, it is not unusual for the parties to an accident to be transported by ambulance to the emergency room regardless of their

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# 1997 LEGISLATIVE REPORT

By Bob M. Kreamer, Des Moines, Iowa

I am pleased to report that the 1997 session of the Iowa Legislature was a landmark session of accomplishment for the Iowa Defense Counsel Association. The Iowa Defense Counsel Association, along with other organizations interested in tort reform and leveling the playing field in civil litigation, successfully promoted the legislative approval of House File 693.

Success in this legislative effort began last November with the 1996 general election where control of the Iowa Senate switched from a 27-23 Democrat margin to a 29-21 (later 28-22 with a mid-session resignation) Republican margin. This control switch in the Senate was major because prior tort-reform efforts had been thwarted for several years and, with the election of new leadership, this issue would now be given the opportunity for discussion and debate. In this same election, however, control of the Iowa House of Representatives by Republicans was narrowed from a 63-27 margin to 54-46.

The next steps taken in obtaining the successful passage of House File 693 were meetings with other interest groups sharing our belief that tort reform was needed to provide both individuals and businesses a more fair and reasonable civil justice system in Iowa. From these meetings a game plan was developed to educate and inform legislators why tort reform was necessary and to overcome the substantial opposition expected from the Iowa Trial Lawyers Association, labor unions and other organizations. After many meetings, hearings and drafting revisions, House File 693 was brought to the floor of the Iowa House of Representatives and on April 1st, after eight hours of debate, was passed on a vote of 55-44. Despite numerous attempts to eliminate or weaken provisions by the opposition during debate, there were no amendments adopted to House File 693 that were opposed by the Iowa Defense Counsel Association. Representative Jeff Lamberti did a superior job of floor-managing this legislation.

In the Senate there also were several meetings and hearings on House File 693 and debate was finally held on April 18th. After a particularly emotional and long debate, almost five hours, tort reform successfully passed the Senate on a 30-17 vote. Freshman Senator Larry McKibben did an excellent job of floor-managing the legislation and again every attempt by the opposition to weaken the bill failed.

The final step in the long and difficult journey of House File 693 occurred on May 29th when Governor Terry E. Branstad enthusiastically signed this bill into law.

Of the seven major components to this legislation, five were initiated by and were a part of the 1997 legislative program of the Iowa Defense Cousel Association. These IDCA-sponsored issues contained in House 693 are:

1. Reduction of the statutory 10% interest provision on judgments found in Iowa Code Section 535.3 to the average auction price of fifty-two (52) week United States treasury bills settled immediately prior to the date of judgment plus two (2) percent.
2. Iowa Code Section 622.10 was amended to allow defendants easier access to plaintiff's medical records upon the commencement of a civil action.
3. The Iowa Supreme Court case of *Brandt v. Bockholt,* 532 N.W. 2d 81 (1995) was overturned by allowing all awards of future damages to be reduced to present value.
4. The Iowa Supreme Court case of *Schwennen v. Abell,* 430 N.W. 2d 98 (1988) was overturned by providing 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.
5. Eliminate joint and several liability in all awards of non-economic damages.

The remaining two components of House File 693 were:

1. A fifteen-year statute of repose was established for products liability actions.
2. A statute of limitations of age 10 was established for actions based on alleged medical malpractice committed on minors age eight or under.

It should be noted that there are different effective dates for the various sections of House File 693 and I would direct your attention to Section 16 to determine the specific effective date of interest to you.

It is not often that a lobbyist gets the pleasure of giving a report such as this to a client. It should be emphasized that there were many people who played a major role in helping win passage of this landmark legislation, but special thanks go to Mark Tripp, legislative chairperson, and all of the Board of Directors of the Iowa Defense Counsel Association for their continual support and assistance throughout the session. This team effort is responsible for the most significant tort reform ever successfully promoted by the IDCA.

Finally, for allowing me the opportunity and privilege to represent you before the Iowa General Assembly,

Thank You! □

## TRIPARTITE RELATIONSHIP: ALI ALERT . . . *Continued from page 1*

### INSURER-DEFENSE COUNSEL RELATIONSHIP

The insurer-attorney relationship has been described by judicial decisions and legal authors as an attorney-client relationship, an employer-employee relationship, an employer-independent contractor relationship or some hybrid relationship of the above. *See e.g. Atlanta Int'l Ins. Co. v. Bell,* 475 N.W.2d 294, 297 (Mich. 1991); *Nandorf, Inc. v. CNA Ins. Cos.,* 479 N.E.2d 988, 991 (Ill. App. 1985); S. Machanic, *"Insurance Defense Counsel: Who is the Client?"* 43 Fed. Ins. Corp. Counsel Quarterly 45-52 (Fall 1992); N. DeMarco & E. Swartz, *"The Role of Defense Counsel in the Tripartite Relationship"* 42 Fed. Ins. Corp. Counsel Quarterly 381, 391-92 (Summer 1992).

In Iowa, we have almost gone full circle in defining the attorney-insurer relationship. In *Henke v. Iowa Home Mut. Cas. Co.,* 87 N.W.2d 920, 923 (Iowa 1958), the insurer argued that the insurer was entitled to an exclusive attorney-client relationship with defense counsel and that the insured was not a client of the defense attorney. The Supreme Court held that the insured was a client of the defense attorney and described the relationship as "joint clients," while warning defense counsel not to attempt to represent both parties if a conflict develops. *Id.* at 924-25.

In *Petersen v. Farmers Cas. Co.,* 226 N.W.2d 226, 227-28 (Iowa 1975), the Iowa Supreme Court had an opportunity to explain the relationship between the attorney and the insurer, but decided that definition of that relationship was not necessary to resolve the issues in that case. The Court found that the insurer was vicariously liable for the attorney's negligence in failing to perfect an appeal, despite the fact that the insurer had argued that the attorney was an independent contractor. *Id.* at 228, 230-31. However, by carefully restricting its holding to the facts of the case, the Supreme Court held that the insurer was liable because the insurer had represented to the insured that it was appealing an adverse district court decision, and the insured detrimentally relied on that representation, and the Supreme Court did not resolve the independent-contractor issue. *Id.* at 231.

Although case law is limited on the issue, it does not appear likely that the Iowa Supreme Court will define the attorney-insurer relationship as an unqualified or "pure" attorney-client relationship, because the Court (similar to other jurisdictions) has recognized the insured as being the attorney's "client." However, if the insurer is not the attorney's client, what relationship is there, and why has the tripartite relationship been able to effectively function for many years without this relationship being specifically defined?

The apparent reason for the dearth of judicial authority in Iowa defining the insurer-attorney relationship is that, in most cases, there is a commonality of interest among the tripartite parties to defend against the third-party's claim, and tripartite-relationship issues never arise. Also, irrespective of the insurer's theoretical status in the tripartite relationship, its functional needs are the same.

Whether the insurer is recognized as some form of "quasi-client" and/or as the employer of the attorney, the insurer needs information from the defense attorney to perform its obligations to the insured under the insurance contact (duties to defend and indemnify). Further, the insurer needs some degree of litigation control to contain the costs of litigation for financial stability and to avoid unreasonable premiums. This need for some degree of litigation control is especially important in cases in which there is no reasonable probability of excess exposure to the insured.

Although certain ethical duties owed by defense counsel to the insured (ex. duty to keep nondisclosed prejudicial coverage information confidential) may preclude the insurer from the full benefits of an attorney-client relationship, there are still very substantial reciprocal duties owed between the insurer and attorney. The (express or implied) employment agreement between the insurer and defense counsel would appear to require duties quite similar to, but not necessarily identical with, the attorney-client relationship. That is, the common-law contractual obligations of good faith (neither party doing anything to injure the rights of the other in receiving the benefits of the agreement) and of fair dealing (honesty in fact) would appear to apply to the insurer-attorney contract, as well as the insurer-insured contract. Also, since the insurer, a claims professional, is retaining another claims professional, the attorney, there is arguably a reciprocal heightened-duty standard to use the knowledge, skill and ability ordinarily possessed and exercised by claims professionals in similar circumstances. Therefore, the reciprocal concepts of good faith, fair dealing and heightened-duty standards would appear to afford protection to both insurers and defense attorneys in fulfilling their obligations to each other and, most importantly, to the insured.

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## TRIPARTITE RELATIONSHIP: ALI ALERT . . . *Continued from page 5*

While the existence of a common adversary (the claimant) normally binds the tripartite parties in a cooperative relationship, the relationship may become strained when conflicts arise, such as coverage issues, alternative covered/noncovered claims, excess claims and defense of multiple insureds. Conflicts cause the tripartite parties to evaluate what specific duties are owed to each other. Traditionally, legal guidance is provided by *ad hoc* case-by-case judicial decisions or reference to uniform guidelines promulgated by qualified organizations.

An example of how a well-intentioned, *ad hoc* resolution of a conflict issue, such as a reserved coverage issue, might create more problems than it solves is as follows.

In 1984, a California case sent shock waves through the insurance industry. The Court in *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.* 162 Cal. App. 3d 358, 370, 208 Cal. Rptr. 494, 502 (1984) held that "[a] conflict arises once the insurer takes the view [that] a coverage issue is present." *Cumis* found that, in such a conflict situation, the insured is entitled to independent counsel at the insurer's expense, unless the insured gives informed consent to the continued representation by the attorney retained by the insurer. 162 Cal. App. 3d at 375; 208 Cal. Rptr. at 506. This independent counsel has become known as "*Cumis* counsel."

The effect of *Cumis* has been restricted by subsequent legislation and judicial decisions. *See Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. App. 4th 345, 2 Cal. Rptr. 2d 884, 887 (1991); *Foremost Ins. Co. v. Wilks*, 206 Cal. App. 3d 251, 253 Cal. Rptr. 596, 602 (1988). However, the problems which arise when an insured, who is not a claims professional, retains defense counsel, are aptly described in the post-*Cumis* decision of *Center Foundation v. Chicago Ins.* Co. 278 Cal. Rptr. 13, 17-18 (Cal. App. 2 Dist. 1991 ).

In *Center Foundation,* the *Cumis* counsel selected by the insured to defend medical-malpractice claims were not experienced medical-malpractice litigators (the two named partners had never tried a malpractice case, and the attorney assigned to maintain primary management responsibility had never tried a jury case, and had not even taken a deposition before being involved in that case). *Id.* at 17. The defense firm selected by the insured billed a total of 19,379.4 hours in defending the underlying claim, including 1,129.50 hours (approximately $180,000) in preparing a summary judgment motion (described by an expert witness as a "hopeless waste of time"), even though the motion was never actually heard by the Court. *Id.* The defense firm billed 263 hours for the preparation of one defendant for his deposition and an additional 85 hours for the firm's preparation for the same deposition. *Id.* at 18. The defense firm summarized the depositions, charging between 48 and 87 hours for each deposition, which effect was described by an expert as useless because it would take as long to read the summaries as the depositions themselves. *Id.* One attorney in the defense firm charged for more than 24 hours in a single day (it certainly is easy to criticize) and for 78 hours over a 4-day period. *Id.* Paralegals and secretaries were sometimes billed as attorneys at attorney rates. *Id.*

Although *Center Foundation* involved an outrageous (and, hopefully, unusual) situation, it does underscore the legitimate need for the insurer to reasonably control and contain litigation expenses, even in the context of a potential conflict of interest between the insurer and insured. Possibly, a more prudent approach for resolving a reserved-coverage issue to protect both the insurer and insured is noted by the Washington Supreme Court in *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137 (Wash. 1986), in which the Court determined that the insurer still had the right to select defense counsel, but under a heightened standard of good faith for the insurer:

> (1) The insurer must perform a thorough investigation and retain competent counsel for the insured.
>
> (2) Both the insurer and defense counsel must understand that only the insured is counsel's client.
>
> (3) The insurer must keep the insured fully informed of all developments on the coverage and liability issues, including all settlement demands and offers.
>
> (4) The insurer must refrain from any action indicating a greater concern for the insurer's monetary interest than for the insured's.

The *Tank* Court noted the following requirements for defense counsel:

> (1) Be clear that counsel's representation is of the insured only.
>
> (2) Disclose all potential conflicts between the insured and the insurer.
>
> (3) Communicate to the insured all relevant information concerning the defense.
>
> (4) Disclose all offers of settlement.

*Id.* at 1137-38.

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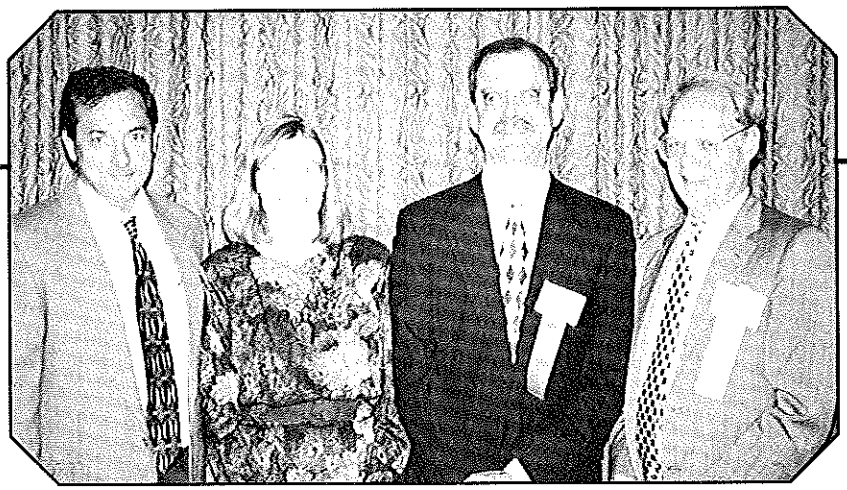
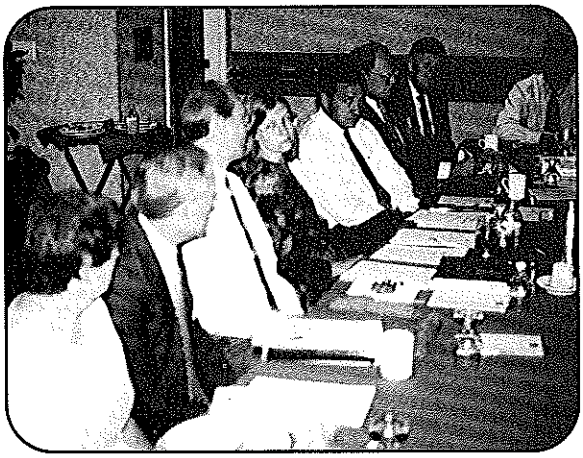
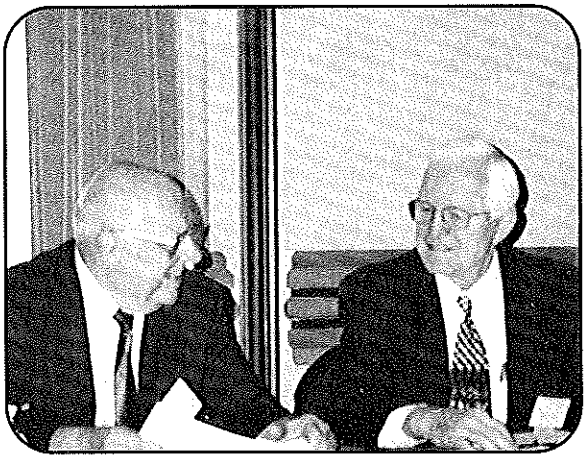
# 1997 ANNUAL MEETING HIGHLIGHTS



Mark L. Tripp, President-Elect; Jaki Samuelson, President;
James A. Pugh, Treasurer; Robert Houghton, Secretary



Board meets prior to Annual Meeting



Past Presidents Herb Selby and Phil Willson

Dave Phipps receives
"Eddie Award" from
Pam (Seitzinger) Holub

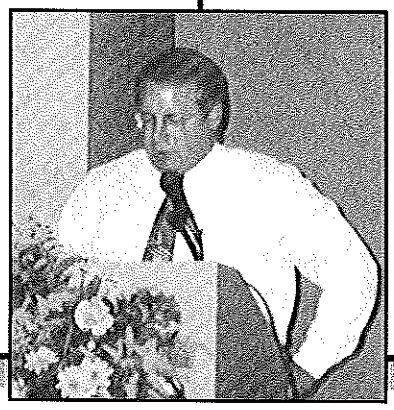
DRI President Bob Fanter
addresses group

Bob Engberg passes
president's gavel to
Jaki Samuelson

# 1997 ANNUAL MEETING HIGHLIGHTS

Justice Marsha K. Ternus and Judge Ronald E. Longstaff report on the state of the judiciary

Once again the seminar program was presented by a group of excellent speakers



*Fantastic weather allowed for outdoor receptions*

Thursday at Glen Oaks Country Club

Wednesday at Embassy Suites

Engberg meets with Samuelson and her daughter

## TRIPARTITE RELATIONSHIP: ALI ALERT . . . *Continued from page 6*

Dissatisfied with an *ad hoc* approach to defining the duties and responsibilities of lawyers, the American Law Institute (ALI) has been preparing *Restatement (Third), Law Governing Lawyers*. This is a new Restatement addressing issues which previously have been broadly covered by the Restatements of Contracts, Torts and Agency in an attempt to clarify and synthesize the common law applicable to the legal profession. Although public attention has been focused on ALI's recent adoption of the comprehensive *Restatement of Products Liability*, there has been a considerable amount of effort invested in the *Law Governing Lawyers*. The proposed Final Draft No. 1, approved in May 1996, constitutes 762 pages.

While a great deal of the text of *Restatement (Third), Law Governing Lawyers,* was provisionally approved by the ALI in May 1996, Section 215 of the Draft Restatement, and Comment (f) thereto, relating to the tripartite relationship, was not approved, due in part to the commendable efforts of Attorney John R. Woodard III, Tulsa, Oklahoma, and his DRI Task Force, which was formed to address these Restatement provisions.

Section 215 of the Draft Restatement, currently (August 1997) states as follows:

> § 215. Compensation or Direction by Third Person
>
> (1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.
>
> (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:
>
> (a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
>
> (b) the client consents to the direction under the limitations and conditions provided in § 202.

Comment (f) to this § 215 (captioned "Representing insured") provides in part:

> A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. It is clear in such an arrangement that the designated lawyer represents the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. *Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26 subject to the law of the jurisdiction.* Whether or not such a relationship exists, *communications between the lawyer and representatives of the insurer* concerning such matters as progress reports, case evaluations, and settlement are *communications with an agent of the client.* . . . Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer has standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. . . .

(Emphasis added)

(Note: Section 26, approved as provisional text by the ALI in May 1996 states as follows:

> § 26. Formation of Client-Lawyer Relationship.
>
> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

In May 1996, the ALI voted to refer Section 215 back to the Reporter for further drafting and probable future consideration in a revised form. Section 215 and Comment (f) are currently in the Preliminary Draft No. 13 stage.

Section 215 and Comment (f) are scheduled to be discussed by an ALI Members Consultive Group in Philadelphia, Pennsylvania, on September 5, 1997, and are scheduled to be discussed at an ALI Adviser's meeting in Stowe, Vermont, on September 11-13, 1997. It is anticipated that *Restatement (Third), Law Governing Lawyers,* will be addressed at an ALI Counsel Meeting on December 9-12, 1997, and may be introduced for formal approval by ALI in its Annual Meeting, scheduled for May 11-14, 1998.

*Continued on page 8*

## TRIPARTITE RELATIONSHIP: ALI ALERT . . . *Continued from page 7*

The Reporter in charge of *Restatement (Third), Law Governing Lawyers,* is Charles W. Wolfram, Cornell Law School, 106 Myron Taylor Hall, Ithaca, New York 14853-4901. The Associate Reporters are John Leubsdorf, Ruttgers University Law School, 15 Washington Street, Newark, New Jersey 07102, and Thomas D. Morgan, George Washington University, National Law Center, 720 20th Street, Northwest, Washington, D.C. 20052. Further information regarding *Restatement (Third), Law Governing Lawyers,* may be obtained from the Internet (www.ali.org). The Proposed Final Draft No. 1 (including § 26, but not including the recent preliminary drafts of § 215 and Comment (f) may be obtained from the ALI (Order No. 5552, $75, plus $4.50 postage/handling).

Attorney William T. Barker of Chicago, Illinois, who has been attempting to address DRI's concerns regarding § 215 and Comment (f) to the ALI Reporters, indicated that only detailed analyses of particular issues would have much weight with the Reporters. That is, if you plan to submit input, make it detailed and referenced.

By letter to the ALI Reporter, dated August 27, 1997, Mr. Barker submitted a very detailed analysis of § 215 and Comment (f), which letter has been provided to the Editors of *For The Defense*. His concerns include the identification of the insurer as an "agent" of the insured and the possible confusing reference to "law of the jurisdiction" in defining the insurer's relationship with defense counsel.

It is difficult to evaluate the potential effect of § 215 and Comment (f) because the final wording has not yet been determined. However, due to the fact that the insurer-attorney relationship in third-party claims is not well-defined in Iowa and due to the fact that the Iowa Supreme Court has scrutinized *Restatement* provisions in defining Iowa common law in the area of contracts and tort, it might be reasonably expected that the proposed ALI standards will have a substantial impact on defining the tripartite relationship in Iowa.

While uniform guidelines would be helpful in addressing the complex issues of the tripartite relationship, there is a downside. Whatever guidelines are adopted will most probably be utilized as legal standards in claims of insurer bad faith and/or attorney malpractice. Such standards will probably also influence the Court's interpretation of attorney disciplinary rules and ethical considerations under the *Iowa Code of Professional Responsibility for Lawyers*. If the standards are not reasonable and functional, the development of tripartite law in Iowa may be painful.

As an outgrowth of the 1993 Annual Meeting, the Iowa Defense Counsel Association formed a Client-Relations Committee in January 1994. This Committee has been involved in making presentations at the IDCA Annual Meetings and Seminars since 1994, addressing various issues raised by the tripartite relationship. Any specific input to the Committee should be directed to its Chair, Attorney Marion L. Beatty, Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., 301 West Broadway, P. O. Box 28, Decorah, Iowa 52101: Facsimile: 319-382-2783.

Hopefully, the legal community will approach these issues with a common understanding that every party in the tripartite relationship needs, and depends on, each other, and the rights and duties of these parties are not mutually exclusive. That is, we need to develop a win-win solution for the tripartite issues, recognizing each party's legitimate interests. Otherwise, the tripartite relationship will degenerate into a lose-lose situation in which all parties selfishly attempt to protect their own interests, which will only increase the cost of defense, increase the cost of liability insurance, increase the frequency of bad-faith and malpractice actions and inhibit the traditional tripartite team approach in defending lawsuits and resolving claims.□

### NOTICE

The IDCA Board of Directors is in the process of setting its legislative agenda for 1998. Due to the successful adoption of our 1997 agenda, we are working with a clean slate this year. If you have any suggestions for legislative proposals to be considered, please contact Legislative Chairman,J. Michael Weston, 319-366-7331.

## LET THE JURY DO ITS JOB . . . *Continued from page 3*

conditions or complaints. If only diagnostic tests are performed at the emergency room would it not be logical to award the plaintiff the cost of the medical expenses associated therewith and no pain and suffering? Likewise, as is commonly the case, the plaintiff had preexisting conditions and received medical care and treatment regarding those conditions. However, the jury on hearing the evidence does not believe that the accident in question caused additional pain and suffering flowing from the preexisting conditions. Is this illogical or inconsistent? Finally, what if the plaintiff fails to introduce evidence of pain and suffering or introduces evidence which the jury, as the finders of fact, do not believe is credible? Each of these is a situation in which, on its face, a jury verdict awarding only medical expenses should arguably be allowed to stand. There are many other examples, but the essence of this position lies in the very foundation of our jury system - - - the plaintiff has the burden to prove by a preponderance of the evidence each element of damage and it is the jury's responsibility to determine whether or not that burden has been met. After all, "the question of proximate cause between an accident and an injury is a question of fact which is, in virtually all cases, reserved for the jury." *Oak Leaf County Club, Inc. v. Wilson,* 257 N.W.2d 739, 746 (Iowa 1977).

While failure to award pain and suffering damages where there has been an award of medical expenses has heretofore been an automatic ground for new trial, there are signs that interference with such a jury determination in every case is eroding. In *Foggia v. Des Moines Bowl-O-Mat, Inc.,* 543 N.W.2d 889 (Iowa 1996), the Iowa Supreme Court examined the question of whether as a matter of law an award of past pain and suffering and no award for past or future medical expenses was inconsistent. While this is inverse to the typical situation discussed herein, the court in its holding stated:

> Recently we reviewed extensively our cases involving questions of inadequate awards where the awards were approximately equal to or less than the special damages. We discovered *we have not adopted an inflexible rule that every verdict awarding only special damages is inadequate as a matter of law.*

*Foggia*, 543 N.W.2d at 891, quoting, *Matthess v. State Farm Mut. Auto. Ins. Co.,* 521 N.W.2d 699, 702 (Iowa 1994). *Foggia* is one of several recent cases in which the Iowa appellate courts appear to be backing away from the previously held position that an award of only special damages is automatically an inconsistent verdict and moving toward a willingness to allow this determination to be driven by the evidence on a case by case basis. The jury verdict in Foggia was for a small amount of pain and suffering. Plaintiff argued it was illogical and inconsistent for the jury to make this award without allowing recovery for past medical expense, past loss of function, or future pain and suffering. The Court interpreted the jury's decision thus:

> The jury in this case found that the plaintiff's claimed medical expenses, loss of function, and much of his pain and suffering were not the result of this fall. . . . these are the precise types of findings within the province of the jury. . . . 543 N.W. 2d at 892.

In *Jackson v. Roger,* 506 N.W.2d 585 (Iowa App. 1993) and *Foster v. Pyner,* 545 N.W.2d 584 (Iowa App. 1996), the plaintiffs asked that their verdicts be set aside as inconsistent because they were awarded medical expenses and pain and suffering but nothing for loss of function or physical injury. In both cases, the Court of Appeals upheld the verdicts.

While this is a start, the courts should allow the jury to do its job and award the damages justified by the evidence and nothing more. Only in the extraordinary case should the courts interfere with the verdict determination of the jury.

Recently, the United States Court of Appeals for the Eighth Circuit applying Iowa law and the Illinois Supreme Court took such a position. In *Penney v. Praxair,* 116 F.3d 330 (8th Cir. 1997), the jury awarded past and future medical expenses but no damages for loss of function or pain and suffering. The plaintiff's motion for a new trial, which claimed the verdict was facially inconsistent and invalid, was denied. Relying on *Matthess* and *Foggia,* the Eighth Circuit affirmed. It described the controlling principles:

> Under Iowa law, whether a particular award of damages is adequate turns on the facts of each case. . . . The test is whether the verdict "fairly and reasonably compensates" a person for the injury sustained. . . . the court must determine whether, allowing the jury "its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties.". . . (citations omitted) 116 F.3d at 333.

Praxair had disputed the extent of Mr. Penney's injuries and whether the

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tanker truck-car accident proximately caused pain and suffering. Penney had preexisting neck and back problems and suffered a heart attack and underwent two angioplasties between the accident and trial. In discussing the task faced by the jury, the Court stated:

> The jury had a difficult decision to make considering the evidence offered to discount Leonard's pain and suffering and to show alternative causes for his injuries. Given the conflicting evidence in this case, we find the damages award fairly and reasonably compensated Leonard for his injury. 116 F.3d at 333.

In *Snover v. McGraw*, 217 Ill. Dec. 734, 172 Il1.2d 438, 667 N.E.2d 1310 (1996) the Illinois court was confronted with an award of medical expenses but no pain and suffering. In reversing the longstanding rule identical to Iowa's that such an award was ipso facto an inconsistent verdict followed by a number of the appellate courts in Illinois, the Illinois Supreme Court stated:

> . . . a jury may award pain-related medical expenses and may also determine that the evidence of pain and suffering was insufficient to support a monetary award. We believe it lies within the jury's power and discretion to award nothing for pain and suffering in this circumstance where the evidence supports such an award.

*Snover*, 667 N.E.2d at 1315. In providing guidance for the implementation of this policy, the court advised trial courts to handle this issue on a case by case basis:

> If the evidence clearly indicates that the plaintiff suffered serious injury, a verdict for medical expenses alone could be inconsistent. This determination is best made by the trial court in a post-trial motion . . . In making this determination, the trial court should consider the distinction between subjective complaints of injury and objective symptoms. In cases in which the plaintiff's evidence of injury is primarily subjective in nature and not accompanied by objective symptoms, the jury may choose to disbelieve the plaintiff's testimony as to pain. In such a circumstance, the jury may reasonably find the plaintiff's evidence of pain and suffering to be unconvincing. 667 N.E.2d at 1316.

The reasoning of the Eighth Circuit Court of Appeals and the Illinois Supreme Court makes sense as it allows the jury to perform the function for which we empanel it. The jury examines the evidence, follows the instructions and makes the determination as to whether the plaintiff has met the requisite burden of proof for each element of damage. There is nothing magical about the concept of pain and suffering which makes it different from any other item of damage. Where it is logical that a claim for pain and suffering may not have been established in a particular case, the court should not interfere with the function of the jury and an award of no damages for pain and suffering should be allowed to stand.

### CONCLUSION

The days of being told that regardless of what the evidence showed or the jury believed, an award of past medical expenses only was "illogical" are perhaps numbered. Our Supreme Court in *Foggia* has taken the first step in recognizing there is no "inflexible rule that every verdict awarding only special damages is inadequate as a matter of law." The next step is to recognize that each case must be examined separately and the determination of the trier of fact should not be automatically disturbed. ❐

### DRI POSITION OPEN

This winter, David Phipps will step down as the DRI State Representative after serving in said position for the last three years. Anyone interested in serving in that position should contact President Jaki Samuelson. The duties of the State Representatives are threefold: membership, liaison and leadership. The State Representative is expected to attend the DRI Annual Meeting, one State Representative Meeting each year, and such Mid-Region meeting as may be arrange. The Representative is elected by the local state defense association and can serve up to three, one year terms.

### FINAL NOTICE

The new IDCA Roster will go to print shortly. All changes **MUST** be in by **November 20, 1997.** Please mail to Ginger Plummer, 5400 University Avenue, West Des Moines, Iowa 50266, or Fax to 515-225-4686

# IN THE PIPELINE: DEFENSE DARLINGS DUEL

By Michael W. Ellwanger, Soiux City, Iowa

Two prominent defense attorneys, both of whom have served on the Board of Editors for the Iowa Defense Counsel *Update*, are currently locked in a death struggle in the Iowa Supreme Court. Jim Pugh of Des Moines represents Farm Bureau and Jack Grier of Marshalltown represents Allied Mutual. It seems that an insured of Farm Bureau was involved in an accident with an insured of Allied Mutual. The Allied Mutual insured was arguably at fault. Farm Bureau paid its insured's medical expenses in the total sum of $7,863.36, and then wrote a letter to Allied Mutual advising Allied of its subrogation interest and asking that it be protected. Instead, Allied settled with the insured for $11,000.00. Farm Bureau sued Allied claiming Allied's "failure to protect" Farm Bureau rendered it liable to Farm Bureau in the sum of $7,863.36. Farm Bureau's case was dismissed on Motion for Summary Judgment.

It is interesting that Jim Pugh/Farm Bureau, an otherwise conservative defense lawyer, appears to be arguing that the Iowa Supreme Court recognize a new theory of recovery (Jim normally expresses the view that the term "deserving plaintiff" is an oxymoron). Jim's response is that this is not a new cause of action, and that 33 other jurisdictions have recognized a duty on the part of the tortfeasor's insuror to protect the interests of subrogees, if they have received notice of subrogation interest.

On the other hand, Jack Grier is well known as an honorable and collegial defense lawyer. However, he appears to be telling Farm Bureau to forget it, even though most insurance companies probably would have named Farm Bureau on the check. One wonders whether the injured party would have accepted $11,000.00, if Allied had reminded the injured party that 74% of the settlement would have to be turned over to Farm Bureau (Jack Grier was not involved in the settlement negotiations).

In the briefs, Farm Bureau concedes that there is no clear-cut theory of law under which this obligation can be placed. Traditional theories of tort or contract do not seem to apply. However, as noted above, numerous jurisdictions have apparently concluded that it is the "right thing to do," and have recognized such an obligation.

Allied responds that Farm Bureau is not the proper party in interest to maintain this action, that there is no legal basis for imposing such a duty, and that if new duties are to be created, they should be created by the legislature. Allied also argues that Farm Bureau's remedy is to sue its own insured.

This case involves interesting legal issues and the entire defense bar is eagerly awaiting the outcome. (See *Farm Bureau Mutual Ins. Co.v. Allied Mutual Ins. Co.*, Supreme Court 97-219.)□

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# FROM THE EDITORS

It all started in the spring of 1989. Five gentlemen, Mike Ellwanger, Jim Pugh, Jack Grier, Ross Walters, and Ken Allers, sat at a table trying to decide how to carry through on a commitment to publish a newsletter four times a year for the IDCA. Over eight years and thirty-two issues, The Defense Update continues to grow and flourish. In 1990, Kermit Anderson replaced Ross when he became a judge. Tom Shields replaced Jack Grier when he became president-elect of the IDCA in 1991. Mark Brownlee became the sixth member of our board in 1994. Pat Woodward joined the group in 1997 when Tom Shields moved on to other opportunities. We now lose Jim Pugh whose duties of treasurer of the IDCA occupy his time. It is a sad farewell to Jim who has, at times, prodded us to action, sharpened our wits, made us laugh, and encouraged us with his enthusiasm.

This publication is indebted to the original members of the Board of Editors who started and made a commitment to four issues a year. This publication is indebted to those who have joined the board and brought fresh ideas and new energy. This publication is indebted to Ginger Plummer who is always pushing us to complete the tasks at hand. But the *Defense Update* is indebted mostly to the IDCA membership and their willingness to contribute to this publication. Without you, it would die. No six individuals could, by themselves, continue this publication on their own. It takes the membership to make this publication work as much as it takes the membership to make this entire organization work and grow.

Jim Pugh has left his mark on the *Defense Update*. He will be missed as were the others who left before him. We are sure that his replacement will serve and foster the tradition that the IDCA membership has become to expect and assist. The Board of Editors thanks you for your help and looks forward to working with you in the future years.



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