defense UPDATE

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PROTECTING YOUR CLIENT FROM 'SMOKING GUNS' IN THE 21ST CENTURY

E-MAIL CORRESPONDENCE: WHY "DELETE" DOESN'T MEAN "DELETE"

By Matthew Haindfield, Des Moines, IA

It has been said that "the brightest flashes in the world of thought are incomplete until they have been proved to have their counterparts in the world of fact."[1] In our modern society, the "brightest flashes in the world of thought" are often transmitted instantaneously from sender to recipient via e-mail messages. For plaintiffs, such messages may prove to be the best source of evidence for taking such seemingly ethereal flashes of thought into the realm of fact.[2] As defense lawyers, it is important to keep abreast of the emerging body of case law in this area, and to provide our clients with sound advice for preventing a potential plaintiff from pointing a 'smoking gun' e-mail in the client's direction.

E-Mails as a Dangerous Source of 'Smoking Guns'

A key difference between e-mails and paper documents is the informal tone and conversational style used in the electronic medium. As numerous litigants and commentators have found, people routinely use e-mail to send informal or "uncensored" messages they would never "put in writing."[3] This mentality is a potential nightmare for defense lawyers.

For example, imagine a situation in which, as in the similar case of *Owens v. Morgan Stanley & Co, Inc.*, you represent a small company who, along with an offending corporate officer, has been sued for sending interoffice e-mails containing racist "jokes" about the purported speech patters of African Americans.[4] Or instead, imagine representing a local police force whose officer has sent an e-mail to a fellow officer remorselessly bragging that he "hadn't beaten anyone as bad as [the plaintiff] in a long time."[5] As you can see, the use and misuse of e-mail clearly poses immense problems for attorneys defending cases involving informal and inappropriate e-mail messages.

E-Mail Messages Are Difficult to Discard

Another key difference between e-mails and paper documents is the uniquely durable nature of electronic evidence.[6] Those who wish to discard paper documents often simply throw out or shred the documents.[7] However, those who wish to discard digital information do not possess such straightforward solutions.[8] Contrary to popular belief, hitting the 'delete' button does not destroy an e-mail message, nor is it the digital equivalent of throwing out or shredding a hard copy document.[9] Instead, e-mail messages are often stored in backup archives, computer drives, servers, and digital tapes for an indefinite period of time.[10] Indeed, one expert has noted that a typical e-mail message is copied, stored, and may potentially be discovered from a *minimum* of seven places throughout the tramsmission chain of the electronic message.[11] And in recent years, plaintiffs' attorneys have recognized that e-mail messages can serve as a virtually indelible record of the potentially damaging electronic conversations between litigants, witnesses, corporate officers, and employees. And in many jurisdictions, these electronic conversations are discoverable.

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MESSAGE FROM THE PRESIDENT

Robert D. Houghton

The Iowa Defense Counsel Association has had the benefit of many dependable, devoted people in order to become the strong organization it is today. Ginger Plummer has been one of the behind-the-scene individuals who have served the IDCA unselfishly, and with dignity. Since Ginger is taking early retirement this year, I wanted to recognize her many contributions to our organization.

Ginger started with the Farm Bureau legal department in 1970. Edward F. Seitzinger hired her as a "green" legal secretary. Ed, of course, was one of the founders and the first president of the IDCA. As a result, Ginger immediately became involved in planning the 1970 annual meeting with Ed and then president Phil Willson. She has since that time helped plan 30 more annual meetings, banquets and other special events, all of which have gone on without a noticeable hitch. Ginger has been responsible for the collection, printing and publication of the written materials for the annual meetings. Working with the membership Chairmen, Ginger is responsible for the membership dues and records; she has seen our organization grow from approximately 50 members to 450 members today. During her tenure, the quarterly *Defense Update* was started and,working with the editors, she has been responsible for the layout and publication of all but the first two issues.

The IDCA has been an integral part of Ginger's and her husband Terry's life for the past 30 years (Terry does most of the printing for IDCA). Since Ginger has been involved in almost every phase of our organization, I thought it would be interesting to find out what she considers to be her favorite memories of our organization. Ginger said that her top choice was when she was made an honorary life member. The most humorous memory is a toss up between several members doing the Hula on stage at the Hawaiian theme dinner, and Allen Fredregill on stage with pantlegs rolled up and barefoot, stomping grapes in a wooden barrel during the Italian theme dinner! She also gets a chuckle out of that fact that we have "closed several places down." Johnny & Kays and Charlie's Showplace both closed; shortly after we had dinner aboard the Pathfinder dinner train it went under, as did the Spirit of Des Moines Riverboat - it literally sank shortly after we had dinner aboard it!

Ginger, as you can see, has in effect been serving our organization as "Executive Secretary" for many years and she has done so gratuitously. Most state organizations our size have paid Executive Secretaries, or Executive Directors. For instance, Georgia, Connecticut, Kansas, Maryland, Massachusetts, Montana, Mississippi, Oklahoma and West Virginia have organizations that are the same size or smaller and all have paid Executive Secretaries or Executive Directors. Ginger's pending retirement has led your Board to recommending that IDCA employ an Executive Secretary.

At the annual meeting this year, the Executive Committee will recommend that Bob Kreamer be retained as the Executive Secretary of IDCA. Bob has served IDCA as our lobbyist since 1993. He is a graduate of the University of Iowa Law School. He is a former partner in the Whitfield and Eddy law firm. In 1996, he started his own office in Des Moines and his primary area of practice has been lobbying the Iowa Legislature and the various state administrative agencies. Bob was elected to the Iowa House of Representatives and served there for 8 years. He was the Assistant Majority Leader, Speaker Pro Tempore and Assistant Minority Leader. It is anticipated that Bob will continue to lobby for IDCA with his expanded duties of Executive Secretary.

On behalf of the Board of IDCA, I want to thank Ginger for her years of unfailing service to our organization. We are fortunate to have Bob Kreamer on deck, and willing to carry on the tradition and standards set before him. ❑

TIMELY SERVICE OF THE ORIGINAL NOTICE AND PETITION: RECENT SUPREME COURT DEVELOPMENTS

By Jean Dickson Feeney, Davenport, Iowa

Introduction

First and foremost, a civil action is commenced by filing a petition in the district court. Iowa R. Civ. P. 48. However, even when counsel has timely filed a petition within the appropriate statute of limitations, additional hurdles and deadlines continue to be triggered by the requirement that the original notice be timely served. In recent years, the supreme court has, on a case by case basis, dictated certain requirements in what is considered timely service of the original notice. However, in January of 1998, the supreme court went a step further to impose a statutory 90-day deadline. Iowa R. Civ. P. 49(f).

Although there has yet to be case law on the newly enacted rule 49(f) which imposes this 90-day deadline, a review of the more recent case law on the issue of the timely service of an original notice identifies the continued concerns of the supreme court as well as potential pitfalls which can trap the unwary.

Pre-1998 Amendments

For years, the supreme court has consistently recognized the obligation of a plaintiff to diligently and timely obtain service on a defendant. *See Henry v. Shober*, 566 N.W.2d 190, 192 (Iowa 1997). Prior to January of 1998, the timing of the service of an original notice and petition was dictated by case law and by the language of Iowa R.Civ. P. 49(b). The old Rule 49 set no time limit within which service was to be accomplished. The old Rule 49(b) required, upon the filing of the original notice and petition, the clerk to *forthwith* deliver the petition, original notice, and direction for service to the sheriff, or to another "appropriate person" for service on the defendant. Iowa R. Civ. P. 49(b) (1997).

In determining whether a delay of service of an original notice was abusive, the supreme court examined whether the delay was presumptively abusive. *Alvarez v. Meadow Lane Mall Ltd. Partnership*, 560 N.W.2d 588, 591 (Iowa 1997). The court consistently held that a delay of service beyond 120 days was presumptively abusive. *Henry*, 566 N.W.2d at 192; *Alvarez*, 560 N.W.2d at 591. A lengthy delay suggests that the Plaintiff "filed the petition, not to seriously institute litigation, but rather to 'ice' the statute of limitations for a later determination on whether to proceed with suit." *Alvarez*, 560 N.W.2d at 591.

If the delay is presumptively abusive, the court must determine if the plaintiff carried the burden in proving the delay was justified. *Id.* Adequate justification for delay in service is equated to good cause. *McCormick v. Meyer*, 582 N.W.2d 141, 145 (Iowa 1998). The supreme court has found "inadvertence, neglect, misunderstanding, ignorance of the rule or its burden" to be insufficient to establish good cause. *Henry*, 566 N.W.2d at 192-93 (quoting *Vincent v. Reynolds Mem'l Hosp., Inc.*, 141 F.R.D. 436, 437-38 (N.D.W.Va. 1992)). Intentional non-service in order to delay the development of a civil action or to allow time to further additional information and settlement negotiations, even if done in good faith, do not constitute adequate justification. *Id.*

1998 Amendment - Rule 49(f)

However, in January 1998, the supreme court went a step further to codify its case law and further shortened the time period for service of a petition upon a defendant. Following Iowa R. of Civ. P. 49(f) as amended in 1998, if service is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative, shall dismiss the action without prejudice as to that defendant, respondent or other party to be served. Iowa R. Civ. P. 49(f). Rule 49(f) does give a plaintiff the ability to establish good cause for the failure of service, which allows the court to extend time for service for an appropriate period. Iowa R. Civ. P. 49(f).

Recent Developments in Iowa Supreme Court Case Law

However, neither the provision in Rule 49(f) allowing for an extension of time nor the previous language of Rule 49(b) prior to its amendment offer counsel any absolute protection where there has been a delay in service of process. In *Carroll v. Martin*, ___ N.W.2d ___ (Iowa 2000), plaintiff's counsel filed suit on December 11, 1997, for damages for a January 18, 1996, automobile accident. Plaintiff, a Missouri resident, had been rear-ended in Polk County by a tractor trailer operated by a California resident and owned by a company in Utah.

On June 5, 1998, counsel for the plaintiff filed a "motion for leave to extend time for service of process." The motion alleged that the plaintiff had not located a proper person or agent for service of process despite expenditure

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OFFERS TO CONFESS JUDGMENT:
AN IMPORTANT TACTICAL TOOL FOR DEFENSE COUNSEL

By: Jeff W. Wright and Sarah J. Kuehl, Sioux City, Iowa

When settlement negotiations have stalled and it appears as if the parties will be involved in protracted and expensive litigation, a formal offer to confess judgment can be an important tactical tool for defense counsel. A carefully calculated offer of judgment will force the plaintiff to consider the risks of proceeding with litigation. Offers to confess judgment, available in both state and federal court, allow defending parties to make an offer to the plaintiff which can shift some of the costs of litigation to the plaintiff. If the defending party makes a formal offer to confess judgment, and the plaintiff declines to accept the offer then later fails to recover a judgment more than the offer, the plaintiff is liable for both their own post-offer costs, as well as the defending party's costs. Thus, the offer of judgment can be a strategic tool for defense counsel both to obtain settlement and reduce costs. In the context of two hypothetical fact scenarios in federal and state court, this article will review offers to confess judgment and the important issues for defense counsel to consider.

* * *

Suppose one of your defense clients contacts you with a new file and, through discussions with the client, through reviewing the file, and receiving discovery answers, you realize it is a car accident case and the plaintiff is complaining of neck injuries. She has had excessive chiropractic care and has gone to various other physicians upon the referral of her chiropractor. As is fairly typical, the plaintiff has obviously over-treated and her medical bills are dramatically trumped up. Eventually, you send the plaintiff to an IME and your doctor confirms your suspicions: the plaintiff may have been slightly injured in the accident, but not nearly as bad as she and her attorney would like you to believe.

As the discovery process continues, the parties engage in settlement discussions. The plaintiff's attorney is being completely unreasonable based on your assessment of the case, and it is obvious the case is going to be tried. The time is perfect to file an Offer to Confess Judgment for your desired amount.

Offers to Confess Judgment are a statutory creation and can be found in § 677 of the Iowa Code.[1] Section 677 exists "to encourage settlement, put an end to litigation, and to prevent the accumulation of costs." *Harris v. Olson*, 558 N.W.2d 408, 410 (Iowa 1997) (quoting *Hughes v. Burlington N. R.R.*, 545 N.W.2d 318, 320 (Iowa 1996)). As a result, the statute is to be given a liberal construction by the courts. *Sheer Const. Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 333 (Iowa 1982).

Within § 677 are four different types of Offers to Confess Judgment depending on when the offer is filed. Iowa Code § 677; *Sheer*, 326 N.W.2d 328, 332-33. The first method provides a mechanism for making an offer before suit is filed. Iowa Code §§ 677.1-.3; *Sheer*, 326 N.W.2d at 333. The second provides the defendant an opportunity to offer to confess judgment in court. Iowa Code §§ 677.4-.6; *see Sheer*, 326 N.W.2d at 333 (holding that nothing in the controlling statute requires this type of offer to be made in writing, but noting it is preferred to note on the record the presence of the plaintiff herself to avoid the three days' notice requirement of § 677.5). Under this scenario, if the plaintiff is present when the defendant makes the offer and refuses to accept, the plaintiff is responsible for all court costs incurred after the offer should the judgment be for less than the defendant's offer. Iowa Code § 677.5. The penalty for the plaintiff failing to accept the offer is the cost of the trial. *Sheer*, 326 N.W.2d at 333. A third method for offering to confess judgment is a "conditional offer" procedure. *Id.*: Iowa Code §§ 677.11-.13. This method permits the defendant to make an offer, in writing, that, "if the defendant fails in his defense, the amount of recovery shall be assessed at a specified sum." *Sheer*, 326 N.W.2d at 333 (quoting Iowa Code § 677.11).

Since your suit has already been filed and it is before trial, you choose the most commonly used method of offering to confess judgment. That procedure is set forth in Iowa Code §§ 677.7-.10. Pursuant to § 677.7, any time after suit has been commenced, the defendant can serve the plaintiff or her attorney with a *written* offer to confess judgment for a specified sum plus costs. Iowa Code § 677.7. Once you make your offer, the plaintiff will have five days to give notice to you of her acceptance, and then she must file the offer and an affidavit that acceptance was made within the five days. Iowa Code § 677.8; *see Harris*, 558 N.W.2d at 410, fn.1 (Iowa 1995) (noting recent decision by the Iowa Supreme Court that three-day grace period for responding to notices served by mail in Iowa R. of Civ. P. 83(b) does not apply to statutory time

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PARADISE LOST
THE EXPERTS' FALL FROM MASTERY TO SPECIALIZATION

By Russell D. Melton, J.D. Minneapolis, MN

Him the Almighty Power
Hurled headlong flaming from th' ethereal sky
With hideous ruin and combustion down
To bottomless perdition, there to dwell
In adamantine chains and penal fire.
-John Milton

SUMMARY

Fires, explosions, product failures, structural collapse, and catastrophic losses, by their very nature, are destructive. Often, they destroy the evidence necessary to determine who should bear the responsibility for their occurrence. Sometimes, they tragically injure the persons who might otherwise shed light on what took place in the moments before a catastrophe. Because of this, the use of experts in the areas of fire, explosions, product failures, and construction losses has become a necessity. The highly technical nature of this field has, in turn, gone from an expert to testify on all issues to an expert to testify on each specialty issue. Thus, the experts' fall from mastery to specialization.

John Milton, English poet, wrote in 1665 of Satan's fall from grace as second only to God in heaven to ruler of the nether regions. His fall was occasioned by his pride. Russell Melton, Scottish-American lawyer, writes here today of the expert witnesses' fall from general mastery of the accident scene to merely a part of a team of investigators looking at the loss. Fifteen years ago, an adjuster could handle investigation of the entire scene. Ten years ago, experts became mandatory. Today, numerous experts investigate a single scene. This trend toward greater specialization of experts has been driven by the changing standards for the admission of expert testimony.

Accordingly, the effective use of experts is vital to success in today's courtrooms. This is shown through the many different ways attorneys use experts to accomplish the client's goals. Experts evaluate the facts of a case and help attorneys determine whether there is sufficient cause to bring a lawsuit. A good example of this evaluation process may be seen in a subrogation case involving fire loss. An insurance carrier may retain an attorney who retains an expert to review the evidence and determine whether that evidence is sufficient to pursue a claim against another at-fault party, in order to recoup the insurer's payments to the insured.

Once a case is in suit, an attorney may retain an expert to help determine case strategy and to provide the attorney with explanations of technical information. Another use of consulting experts is to help attorneys prepare for depositions of opposing experts. Consulting experts can also help attorneys prepare for cross-examination of opposing experts at trial. The better versed in technical subjects an attorney is, the fewer consulting experts that attorney may need to retain. Therefore, technically-trained attorneys can lower the overall expenses in a case.

The other major area where experts are commonly used by litigation attorneys is trial testimony. Sometimes "testifying" experts are separate from "consulting" experts. An expert who is retained to consult, may not necessarily testify because he or she (while highly skilled and experienced) does not present his or her opinions to the jury as well as another expert. Regardless, the experts as well as the attorneys must be familiar with expert witness admissibility standards, regulatory standards and guidelines, laboratory analysis and methodology.

EXPERT WITNESS ADMISSIBILITY STANDARDS

The admissibility standards for expert witness remained essentially static from 1923 to 1993. During that time, federal courts applied what is referred to as the *Frye* standard when evaluating the admissibility of expert testimony. Under *Frye*, the admissibility of expert witness testimony was evaluated based upon whether it was "generally accepted" as reliable in the relevant scientific community.

In 1993, the Supreme Court decided the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786. The issue in *Daubert* was whether the new Federal Rule of Evidence 702 superseded *Frye's* "general acceptance" test. The *Daubert* Court held that when faced with a proffer of expert scientific testimony, a trial judge must determine whether the expert is proposing to testify to (1) scientific knowledge, that (2) will assist the trier of fact to understand or determine a fact in issue. The Court reasoned that this entails a preliminary assessment as to whether the reasoning or methodology underlying the proffered testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.

The *Daubert* Court characterized the issue of whether the theory or technique can or has been tested as a key question to be answered. In particular, the Court observed, "[t]he statements constituting a scientific explanation must be capable of empirical test." In the eyes of the *Daubert* Court, this

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Discovering Deleted Documents and E-Mails: Developing Case Law

It has become evident that computers are central to modern life and consequently also to much civil litigation.[12] As one district court put it: "[c]omputers have become so commonplace that most court battles now involve discovery of some computer-stored information."[13]

Iowa Rule of Civil Procedure 129(a) and Federal Rule of Civil Procedure 34(a) have been amended to "accord with changing technology" with respect to electronic data and documents.[14] Specifically, the Rules currently provide for the discovery of documents including "data compilations from which information can be obtained [or], translated, if necessary, by the respondent through detection devices into reasonably usable form . . ."[15] Indeed, today it is black letter law that computerized data is now "discoverable if relevant."[16]

The law is also clear in that data in computerized form is discoverable even if paper 'hard copies' of the information have been previously produced . . ."[17]

Moreover, defendants may be subject to sanctions for "spoliation" or failing to produce relevant computer data.[18] It is important to recognize that clients are under a duty to produce *and* preserve relevant electronic data upon notice of threatened or pending litigation and, if such preventative steps are not taken, the court may impose extremely harsh sanctions upon the offending party, including a jury instruction allowing the fact finder to infer that destroyed computer data was relevant to the plaintiff's claim and would have ultimately supported various elements of the plaintiff's claim.[19]

Practical Advice for Lawyers and Clients in Dealing with Electronic Evidence

The unique characteristics of electronic evidence--its volume, durability, uncensored nature, and ease of transmission-- make it a critical source of information for clients and lawyers to manage.[20] In today's modern society, clients should be advised before potential or threatened litigation arises about the particularly durable and damaging characteristics of electronic records, particularly e-mail.[21] In addition, attorneys should take affirmative steps to educate their clients about the need for a comprehensive computer and/or e-mail policy in order to prevent inappropriate or unauthorized messages from being sent in the first place.[22] Finally, attorneys should be mindful of the ever changing rules regarding the retention and destruction of electronic records and data. Specifically, clients should be mindful of the need for an up-to-date, well-established, and uniformly implemented records retention and management policy designed to preserve various types of essential electronic data and to periodically purge nonessential records [23]

As noted by one commentator, "the days of the 'paper trail' have ended"[24] Instead, millions of electronic "flashes in the world of thought" are pulsing throughout our society on a web of fiberoptic telephone lines every day. As defense attorneys, we must prepare our clients for the day when such seemingly ethereal messages could "prove to have their counterpart in the world of fact" as evidence in pending litigation against them. In addition, we mustprepare ourselves to deal with such situations when they arise. ❐

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1. JOHN TYNDALL, SCIENTIFIC MATERIALISM (circa 1850).
2. *See generally*, Gregory S. Johnson, A *Practitioner's Overview of Digital Discovery*, 33 Gonz. L. Rev. 347 (1998).
3. Christine Chung and David Byer, *The Electronic Paper Trail: Evidentiary Obstacles to Discovery and Admission of Electronic Evidence*, 4 B.U. J. SCI. TECH. L. 5, 19 (1998).
4. *Owens v. Morgan Stanley & Co. Inc.*, No. 96 CIV. 9747(DLC), 74 Fair Empl. Prac Cas. (BNA) 876, 1997 WL 403454, at * 1 (S.D.N.Y. July 17, 1997).
5. *See, United States v. Koon*, 34 F.3d 1416, 1425 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).
6. Chung, *supra* note 3, at 12.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. JAMES L. MICHALOWICZ & GEORGE J. SOCHA, JR., ELECTRONIC DISCOVERY 221 (2000) (noting location of latent copies of deleted e-mails as stored in the following seven places in a typical electronic transmission: (1) sender's hard drive (2) sender's backup drive (3) sender's mail server's backup tapes (4) internet server backup tapes (5) recipient's mail server's backup tapes (6) recipient's hard disk (7) recipient's backup drive).
12. 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2218 at 449 (2d ed. 1994).
13. *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985).
14. IOWA R. CIV. P. 129(a) (as amended in 1973); FED. R. CIV. P. 34(a) (as amended in 1970).
15. IOWA R. CIV. P. 129(a); FED. R. CIV. P. 34(a).
16. *See, Anti-Monopoly, Inc. v. Hashro, Inc.*, 94 CIV 2120, 1995 WL 649934 at *2 (S.D.N.Y. 1995).
17. *See, United States of America v. Microsoft Corp.*, No. CIV. A. 98- 1232, 1998 WL 699028 at *2 (D.D.C. 1998).
18. *See, e.g. Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1380-84 (7th Cir. 1993) (upholding sanctions for defendant's failure to produce relevant computer records).
19. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997)(sanctions imposed by court included allowing inference that destroyed documents were relevant and would have supported the plaintiff's claim for defendant's failure to act quickly and efficiently to prevent the destruction of electronic data)
20. Chung, *supra* note 3, at 43.
21. *Id.* at 44.
22. *Id.*
23. *Id.*
24. *Id.* at 45.

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of time and energy. Plaintiff had hired a private investigator to locate an agent for service. The court entered an ex parte order sustaining the motion and authorized an extension until June 26. On June 24, the plaintiff subsequently served the defendants pursuant to Iowa Code § 321.501, Iowa's long arm statute for service of nonresident motorists by service with the director of transportation.

On July 16, all three defendants filed a motion to dismiss alleging the 195 day delay between the filing of the petition and service of the original notice was presumptively abusive. Plaintiff's resistance in part relied upon Rule 49(f) as amended and the fact that the court had extended the time for service to June 26, 1998.

The district court found the 195 day delay was presumptively abusive. The court of appeals reversed and the supreme court subsequently vacated the decision of the court of appeals. The supreme court agreed there was substantial evidence to support the district court's finding of inadequate justification for the delay in service.

As an important caveat to counsel, the court recognized that the plaintiff could not rely upon the initial, ex parte, order of the court which extended the time for service. The supreme court found that the court's initial order extending time was not a final order, and therefore the court had the power to correct its prior ruling. In other words, the district court *was not prohibited from revisiting its earlier determination that justification existed for the delay of service in this case.* Once all parties are before the court (the defendants having been served), it was appropriate for the court to revisit the prior ruling.

In fact, the court based its decision on Rule 49(f), as it existed before the amendment because the petition was filed in December 1997, before the amendment took effect. Nevertheless, the decision is instructive on the supreme court's continued analysis on whether there has been an unjustified abusive delay in completing service. Again, the supreme court equated justification for delay in service to good cause. *Id.* (citing *McCormick v. Meyer*, 582 N.W.2d 141, 145 (Iowa 1998)). "Good cause" is found in the language of Rule 49(f), as amended.

In finding substantial evidence to support the district court's conclusion that there was an inadequate justification for the delay in service, the court noted that the plaintiff had always had the correct address for the individual defendant. The plaintiff's primary counsel in Mississippi furthermore had sufficient information regarding the whereabouts of the corporate counsel and the law imputes that knowledge to the plaintiff. The court also recognized that had the plaintiff used the nonresident motorist statute immediately, he might have been successful in effectuating service.

Another harsh result from a delay in service arose in the supreme court's decision of *Becker v. Becker*, 603 N.W.2d 627 (Iowa 1999). Again, this case involved a petition filed before the amendments to Rule 49(f) took place. Plaintiffs had filed their petition on March 10, 1997. Defendant was not served until 171 days later and, on the defendant's motion, the action, was dismissed on October 7, 1997.

No appeal was taken from the dismissal. However, the plaintiffs subsequently attempted to refile their petition as a new action. The newly filed petition was again dismissed. The district court had ruled that, because the first order dismissing the first action did not state the dismissal as without prejudice and the dismissal was not voluntary, that it was deemed an adjudication on the merits pursuant to Iowa R. of Civ. P. 217.

The district court rejected the plaintiffs' argument that the first dismissal had been based on a want of jurisdiction. Because the original dismissal was grounded solely on abuse of process, and not on any finding of jurisdiction, the court found that the dismissal was properly deemed an adjudication on the merits. Plaintiffs' failure to effectuate a voluntary dismissal and to allow the court to dismiss under an order which did not specify that it was without prejudice resulted in a dismissal on the merits. This was true even though the plaintiffs were suing for their minor child and very likely there were no statute of limitations problems at the time the plaintiffs refilled.

Summary

To date, the supreme court has not filed any decisions based on Rule 49(f) as amended. However, the basic premise remains the same. A presumptively abusive delay in the service of an original notice and petition will expose counsel to a potential dismissal of that original notice and petition. Under the new Rule 49(f), service must be effectuated within 90 days. After that period of time, however, a number of possible scenarios arise. The court has the

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option of dismissing, albeit now without prejudice. The court has the option of dictating another manner of service. Finally, if the party can establish good cause, then the court shall extend the time for service.

However, even under the guise of Rule 49(f) as amended, counsel still needs to be cautious about any dismissals entered by the court. Rule 49(f) allows for an order of dismissal to be entered *sua sponte*. Although the dismissal is without prejudice, clearly the dismissal is problematic where there are statute of limitations questions.

Furthermore, although Rule 49(f) as amended was not directly addressed by the supreme court in the *Carroll* decision, the case certainly suggests that an order granting an extension of time to obtain service does not offer counsel absolute protection against a subsequent motion to dismiss for untimely service. Even if such an order is obtained, counsel should take steps to make certain the record clearly establishes that good caused existed for the granting of that extension of time.

Following the continued concerns of the supreme court - avoiding a delay which is presumptively abusive and/or establishing good cause for any delay - counsel has protection when coming across an unexpected delay in obtaining service. However, as the supreme court has now shortened the time for service and given counsel the protection of a dismissal without prejudice, counsel should be even more careful to comply with the rules and holdings of the supreme court in making certain that service is timely effectuated. ❑

MONTANA COURT RULES
INSURER LITIGATION GUIDELINES ARE UNETHICAL

The Montana Supreme Court has ruled that defense counsel in Montana who submit to requirements in insurer litigation management guidelines that require prior approval for certain defense tasks "violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds" The court's April 28 decision, in *In The Matter of The Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures,* No. 98-612, 2000 Westlaw 502545, began as a petition for declaratory relief that two defense firms in Great Falls, Montana filed with the supreme court pursuant to its original jurisdiction over the Rules of Professional Conduct for Montana lawyers. The case presented two questions: (1) whether a lawyer may agree to abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of the insured; and (2) whether a lawyer may be required by an insurer to submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of his or her client and do so without violating client confidentiality?

After analyzing the Montana Rules of Professional Conduct and earlier Montana cases interpreting the tripartite relationship, the supreme court concluded that defense counsel has only one client: the insured. Because an insurer has control over the defense of the suit, appointed defense counsel must always be free to follow its independent judgment. Moreover, the court stated that the rules of professional conduct are not superseded by the terms of an insurance policy, nor do they only apply in cases where a conflict of interest is apparent from the outset. In particular, the court found fault with various provisions of insurer case management guidelines that require defense counsel to obtain prior approval from the insurer before he or she may schedule depositions, undertake legal research, employ experts, or prepare motions. The court found that "the requirement of prior approval fundamentally interferes with defense counsels' exercise of their independent judgment, as required by Rule 1.8(f) of the Montana Rules of Professional Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense."

For a complete analysis of the Montana decision, see the articles beginning on pages 8 and 10 of this issue of *For The Defense.* They present the views of the lawyers who argued the two sides of the case, for the insurers and for the law firms.❑

OFFER TO CONFESS JUDGMENT . . . *Continued from page 4*

frames thereby limiting response to offers to confess judgment under § 677.7 to only five days). As a matter of course, it is advisable to specify the time limits for responding and the method by which the plaintiff must respond in the offer itself. The more specific and clear your offer is, the more likely it is that the court will uphold it in the face of a later challenge by the plaintiff. For example, both the statute and the Supreme Court require the offer to specifically state that the offer includes accrued court costs. Iowa Code § 677.7; *Means v. City of Boone*, 214 Iowa 948; 241 N.W. 671 (1932).

Five days pass after you file your offer to confess, and the plaintiff does not accept. Suddenly, you get a knot in your stomach because you think you just made an admission that will be Exhibit 1 at trial. Never fear, § 677.9 provides that the offer is withdrawn if not accepted in five days and that it shall not be admissible as evidence at trial. Iowa Code § 677.9. Therefore, you should file a Motion in Limine at trial simply to assure that it does not get mentioned. *Id.*

Since the Plaintiff has chosen not to accept your offer, you wonder what the consequences are. Section 677.10 states that if the plaintiff fails to obtain a judgment over the amount offered, the plaintiff cannot recover costs and shall pay your costs from the time of the offer. Iowa Code § 677.10. Thus, if the plaintiff gets a judgment for less than your offer, not only will your client be pleased with a low verdict, he will also be happy to discover that he won't have to pay the plaintiff's court costs and possibly some of his own. *Id:*

Now, suppose the plaintiff does accept your offer to confess. You clearly specified in your offer the amount you are offering plus taxable court costs. *See Brockhouse v. State*, 449 N.W.2d 380, 383 (Iowa 1989) (holding that phrase "with costs" is in addition to the sum in the offer). In the plaintiff s affidavit of acceptance, she also includes what her attorney believes are taxable court costs. You find that she is seeking all of her costs for depositions, as well as a provision about prejudgment interest. Immediately, you send an associate to the books to determine whether these costs are taxable.

Your associate reports back to you about the deposition costs and refers you to Iowa R. of Civ. Procedure 157. Rule 157 provides that the only deposition costs taxable to the opposing party are those "costs as were necessarily incurred for testimony offered and admitted upon the trial." Iowa R. Civ. P. 157; *Hughes*, 545 N.W.2d at 321(noting that statutes providing for recovery of costs are strictly construed). In *Hughes*, the Court held that costs for depositions are not to be assessed beyond the scope of Rule 157 when an offer to confess pursuant to § 677 is involved. *Id.* The necessary standard, then, for assessment of deposition costs is whether the deposition was actually "introduced into evidence in whole or in part at trial." *Coker v. Abel-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992) (quoting *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986)). The *Coker* Court further held that the only deposition costs that could ever be recovered would be for the original transcripts of those actually used at trial, i.e., copies of the transcripts are merely "routine litigation expenses" and are not recoverable. *Coker*, 491 N.W.2d at 153. Since your offer was accepted, no depositions were "admitted upon the trial" and none of those costs are recoverable. Iowa R. Civ. P. 157; *Coker*, 491 N.W.2d at 151.

Your associate's research also renders valuable information about prejudgment interest. He refers you to the *Hughes* case. *Hughes*, 545 N.W.2d at 321. In *Hughes*, the plaintiff argued that, since the acceptance of an offer to confess resulted in a judgment, she was entitled to prejudgment interest. Fortunately, you only offered one amount and did not specify how much was to be assessed as past damages and how much was to be assessed for future damages. *Id.* The *Hughes* Court found that if there is no agreement between the parties as to prejudgment interest, the judgment amount will draw statutory interest from the date of the judgment only. *Id.* at 322 (noting that a judgment resulting from an offer to confess is the product of a voluntary agreement and the parties could have negotiated settlement figures that included interest or agreed to a rate of interest from a specified date). "When the offer is silent as to prejudgment interest and its rate, the court will not impose terms." *Id.*

* * *

Similar to the Iowa statutory provision which provides for Offers to Confess Judgment in state cases, Offers of Judgment may be used in federal cases pursuant to Fed. R of Civ. P. 68. Suppose you represent an employer in defense of an employment discrimination claim pending in federal, rather

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OFFER TO CONFESS JUDGMENT . . . *Continued from page 9*

than state, court. After completing initial discovery, you attempt to feel the other side out for a possible settlement. However, plaintiff's counsel has not been receptive to your reasonable offers, and it appears as if the case is going to be tried unless you are able to win on summary judgment. Before investing the time and costs associated with further pretrial procedures, it is advisable to consider filing an Offer of Judgment.

Federal Rule of Civil Procedure Rule 68 provides a procedural device through which a defending party may offer to allow judgment to be taken against them for an amount specified, with costs then accrued. Fed. R. Civ. P. 68. Like the Iowa statute, the primary purpose of Rule 68 is to promote settlement. *Delta Airlines. Inc. v. August*, 450 U.S. 346, 352 (1981). An Offer of Judgment is particularly attractive when it would appear that the plaintiff may recover some amount. As the defending party, you can shift to the plaintiff part of the risk in proceeding with the litigation by making a calculated Offer of Judgment within your settlement range. If the plaintiff fails to accept the Offer of Judgment and the judgment obtained by the plaintiff is not more favorable than the offer, the plaintiff is liable for the costs of both parties incurred after the offer. Thus the Offer of Judgment "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

You may serve a Rule 68 Offer of Judgment at any time after suit is filed. Fed. R. Civ. P. 68. Obviously, it is to your advantage to make an Offer of Judgment as soon as practicable. The earlier you can evaluate the case and make the offer, the more costs you can potentially shift to the plaintiff.

In order to be valid, your Offer of Judgment must be served more than 10 days prior to commencement of trial. *Id.* The time allowed for accepting the offer is 10 days after service. *Id.* Counsel should be aware of the interaction of the 10 day time limitation imposed by Rule 68 with Rule 6 which addresses the computation of time under the federal rules. Because the time allowed for acceptance under Rule 68 is less than 11 days, Rule 6(a) requires that intermediate weekend days and legal holidays be excluded from computation of the time period. Fed. R. Civ. P. 6(a). The time allowed for accepting may be extended even further if the offer was served by mail. Under such circumstances, Rule 6(e) allows the plaintiff to add 3 additional days to the time period in which action is required. Fed. R. Civ. P. 6(e).

As you will recall, the Iowa rule pertaining to the time allowed for accepting Offers to Confess Judgment in state court differs significantly from the federal rule. The Iowa statute does not allow for extra time if served by mail, and strictly limits the time period in which the plaintiff may accept an Offer to Confess Judgment made pursuant to Iowa law. Counsel who practice in both state and federal courts should keep these differences in mind and be aware that what you think is only a 10 day time period, may easily expand to a much longer period of time under the federal rules.

In order to properly accept your Offer of Judgment made pursuant to Rule 68, the plaintiff must serve written notice of acceptance within the proscribed time period. Fed. R. Civ. P. 68. The acceptance and offer will be evaluated under general principles of contract law. *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir. 1988); *Stewart v. Professional Computer Centers, Inc.*, 148 F.3d 937, 939 (8th Cir. 1998). In order to create a binding agreement there must have been an objective manifestation of mutual assent. *Radecki*, 858 F.2d at 400; *Stewart*, 148 F.3d at 939. The plaintiff will not be able to partially accept some terms of the offer while rejecting others. Defense counsel should therefore carefully evaluate the form of the plaintiffs acceptance as well as the time in which the acceptance is made.

In order to be valid as a Rule 68 Offer of Judgment, your offer must have included some amount for costs. Rule 68 grants a defending party the power to make an offer to allow judgment to be taken against it "to the effect specified in the offer, with costs then accrued." Fed. R. Civ. P. 68. Your offer to confess may even stipulate a particular amount which the defendant is willing to pay for costs as part of the Rule 68 offer to confess. *Marek*, 473 U.S. at 6. By specifically stating the amount you will pay for costs, either as part of the total offer or as a separate sum, you avoid disputes after acceptance as to what will be included in costs.

An important consideration for counsel defending an employment law case, such as the one in this example, is whether or not attorney fees may be included as part of costs. As you

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OFFER TO CONFESS JUDGMENT . . . *Continued from page 10*

know, many federal discrimination statutes provide for the prevailing party to recover attorney fees. Costs awarded pursuant to Rule 68 will include attorney fees if the offer expresses the intent to include attorney fees as part of costs, or where the offer is silent, only if the underlying statute defines "costs" to include attorney fees. *See* Fed. R. Civ. P. 68; *Marek*, 473 U.S. at 6, 9. Several of the federal employment discrimination statutes treat the attorney fee issue differently. Therefore, you must be particularly careful to check the statute under which the plaintiff is seeking damages to determine whether or not attorney fees are viewed as an element of "costs." You may avoid uncertainty and the intervening effect of the underlying statute by making explicit whether or not your offer permits the plaintiff to recover attorney fees or by stating a specific sum that your client is willing to pay for costs. If you fail to address the attorney fees issue, then as indicated in *Marek*, liability for attorney fees as part of costs will depend upon the underlying statute and how the statute views attorney fees. *Marek*, 473 U.S. at 6, 9.

Suppose that the plaintiff has accepted your Offer of Judgment which specifically excluded attorney fees, but did not state a specific sum which you will pay for costs. The costs recoverable are typically those listed in 28 U.S.C. section 1920. The plaintiff may also seek payment for costs relating to the taking of depositions. As previously discussed, the Iowa standard for recovering deposition costs is quite narrow. The federal standard for the recovery of deposition costs is much broader. In federal court, deposition costs may be taxed when the court finds that all or any part of a deposition was "necessarily obtained for use in the case." *See Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 152 (Iowa 1992) (quoting *Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1553 (5th Cir. 1984)).

Now let's assume that the plaintiff has not accepted your Offer of Judgment. The consequences of non-acceptance are similar under federal law to the consequences under state law. An Offer of Judgment not accepted within the time period is deemed withdrawn. Fed. R. Civ. P. 68. Similar to the Iowa statute, you need not fear that an Offer of Judgment will become evidence at trial. Rule 68 explicitly states that an Offer of Judgment which is not accepted is not admissible at trial and will only be admissible in a proceeding to determine costs. Fed. R. Civ. P. 68. Again, a Motion in Limine will assure counsel that such matters are not mentioned when the case proceeds to trial.

If at the conclusion of trial, judgment is entered against your client for an amount less than what was offered, the plaintiff will be liable for costs incurred by both parties after the offer was made. Fed. R. Civ. P. 68. The cost-shifting consequences only apply if the plaintiff recovers less than your Offer of Judgment. However, Rule 68's cost-shifting provisions do not apply when judgment is entered in favor of the defending party. *Delta Air Lines. Inc. v. August*, 450 U.S. 346, 351 (1981).

* * *

As you can see, there are many important issues which defense counsel should consider when making a formal offer of judgment. When used appropriately, offers to confess judgment can be a significant tactical device to encourage settlement and reduce the costs of litigation for which your client will be liable. ❑

It should be noted that § 676 and § 678 also relate to Confessions of Judgement and should be given due consideration when an Offer to Confess pursuant to § 677 is filed. This article will focus only on Ch. 677.

WELCOME NEW MEMBERS

Brent R. Ruther
Burlington, Iowa

Jeff W. Wright
Sioux City, Iowa

Vincent A. Purtell
Sioux Falls, South Dakota

Michael J. Davenport
Council Bluffs, Iowa

Darron L. Brawner
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Stephanie L. Hinz
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Debra L. Dalton
Des Moines, Iowa

Stephanie L. Marett
Des Moines, Iowa

PARADISE LOST . . . *Continued from page 5*

question is critical to the judge's inquiry because, "[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."

The Court then proceeded to list what have become known as the "*Daubert* factors" for the admissibility of scientific expert testimony from 1993 until 1999. Those factors are:

(1) Whether the theory or technique can be (and has been) tested,

(2) Whether it has been subjected to peer review and publication,

(3) Whether there is a high known or potential rate of error and whether there are standards controlling the techniques's operation, and

(4) Whether the theory or technique enjoys "general acceptance" within the relevant scientific community.

Although at first blush the Supreme Court's test announced in *Daubert* appeared clear and relatively straightforward, the actual holding was rather limited by the facts presented. This much the *Daubert* Court recognized in its own footnote where it stated "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." The effect of this footnote was to create an exception from the *Daubert* analysis for non-scientific experts even though these experts were still subject to Rule 702.

THE "NEW" MODERN STANDARD

Finally, in 1999, the Supreme Court had occasion to revisit this self-imposed exception to *Daubert* when it heard the case of *Kumho Tire Company v. Carmichael*, 119 S.Ct. 1167, which raised once again the question of non-scientific testimony. The Court in *Kumho Tire* decided two issues that affected the admissibility of all expert witnesses.

1. The *Daubert* test applies to all experts.

Contrary to its earlier footnote in *Daubert*, the Supreme Court held that the *Daubert* factors should be applied to all experts regardless of their expert basis:

> [I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is not a clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure science theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear and legal lines capable of application in particular cases* * * Neither is there convincing need to make such distinctions.

Through this statement, the Court expanded the analysis contained in *Daubert* to include ALL experts, without exception.

2. The *Daubert* test is a flexible one.

The Supreme Court next addressed how a trial court should apply the *Daubert* factors. The Court observed that the *Daubert* factors do not constitute a definitive checklist to be blindly applied by the trial judge. The Court agreed that "*Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's expertise, and the subject of his testimony."

PRACTICAL APPLICATION

The use of the admissibility rules is a double-edged sword. One can use the standards to keep the opposing side's witness from offering opinions at trial; however, the opposing side can turn those same rules against you as well. Now that the Supreme Court has clarified the application of *Daubert* and reiterated the trial court's role as "gatekeeper" to ensure that only relevant and reliable testimony reaches the finder of fact, a litigation attorney must always consider whether the retained expert's testimony will later be held admissible in court. Therefore, today's attorneys must evaluate a proposed expert's qualifications and methodology from the very moment the expert is retained.

1. The expert must have the necessary qualifications.

Many times in practice, an expert will hold him or herself out as having expertise in a given field, such as mechanical design of industrial heating appliances. This chosen expert may have an engineering background. It may be in mechanical engineering. They may even have design experience. However, the expert should have significant education indicative of, or akin to a doctorate in the particular field or study. The expert should also have extensive experience in the laboratory

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as well as experience within industry working with the particular subject matter.

Another area where unqualified experts commonly appear is in connection with so-called laboratory technicians. Lab technician is a very non-descriptive word. Attorneys presented with a question of using a lab technician must first ask themselves questions such as what type of testing is involved and what type of qualifications are relevant. This is why attorneys practicing in the technical must be familiar with standards and certifications.

2. The expert must use an accepted and tested methodology.

Methodology is the science of procedure and protocol. Attorneys looking to retain an expert must first look at the process a proposed expert proposes to use or has used in order to arrive at his or her conclusions. The attorney must also determine if any "steps" in the process were either skipped or were intentionally overlooked which could lead to contrary or unclear results. The attorney must evaluate whether the expert's conclusion has presented too large of an analytical gap between the data and the opinion being offered.

When evaluating the methodology employed by a given expert, the wise attorney should look to see if there are any standards which provide for a proper process to follow for a given type of test or investigation. An often seen example of the applicability of standards or recommendations, when evaluating a fire expert's methodology, is the use of NFPA 921 to evaluate the methodology of a fire investigator. Sections 2-3 of NFPA 921 describe a six step process using the scientific method for fire investigations. Because methodological analysis involves an in-depth understanding of the scientific principles involved, the more technically knowledgeable the attorney is as well as the more proficient within establishing protocol, the more efficiently he or she may represent the client.

EXPERTS IN FIRE & EXPLOSION

Unfortunately, this paper is unable to address the issues relating to the use of experts in product liability, construction failure and catastrophic losses, however, an overview of two significant types of losses is marginally possible. There are many experts which specialize in the facets of both fire and explosion. Accordingly, it is necessary to have a functional understanding of the components of fires and explosions so the practitioner can obtain an appropriately qualified expert. Having this knowledge also allows the practitioner to more efficiently communicate with the expert. Efficient communication with experts can save the client significant attorney time that may otherwise be wasted by an expert having to bring the attorney "up to speed" in the particular subject matter.

The first type of loss is due to fire and the resulting damage from the fire. There are three major categories of fires where experts can play a significant role. These areas are Cause & Origin, Fire Spread, and Laboratory Analysis. Each of these areas has several sub-components and principles. Again, attorneys who practice in the area of fire related loss are well advised to gain a working knowledge of the different standards and requirements that exist.

1. The Fire's Cause & Origin

Cause and Origin (C&O) analysis is the scientific process of viewing, documenting, and analyzing the scene of a fire in order to determine the fire's cause. The ultimate goal of this science is to pinpoint the fire's origin and who or what is responsible. Actually, C&O is a misnomer of sorts. More accurately, it should be referred to as O&C because one must first determine the origin of the fire in order to be able to then determine the cause. C&O is truly a science in and of itself. Fire science can be contrasted with the practice of fire service. Fire service is not a hard science. It deals with collecting facts at the scene before and during the fire to assess a likely location for the point or area of origin. From there an attempt is made to determine the ignition site and cause. Frequently, other scientifically specialized experts are needed to develop the causation theory.

It is very important to note the difference between fire science and fire service. Fire scientists are academically trained individuals with technical or engineering backgrounds who have specialized knowledge and training which allows them to practice in the areas of Cause & Origin, Fire Spread, and Laboratory Analysis. Commonly, fire scientists have masters or doctorate degrees as well as extensive practical engineering experience. Additionally, attorneys should seek fire scientists who have previously testified in depositions and at trial on similar matters.

Fire service experts are individuals who have many years of training and experience as firefighters. They usually

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do not have advanced college degrees, and commonly do not have technical or engineering educational backgrounds. Many have completed specialized schools involving fire investigation and arson investigation.

Modern Cause & Origin investigations involve complex engineering issues, such as mechanical failure, chemical reactivity, and design. Therefore, an attorney involved in fire litigation needs to retain experts who have the necessary training and experience to perform an appropriate analysis. An appropriate analysis must be used to show that the methodology and opinions offered by the expert are reliable. Without such careful planning, one runs the increased and unpleasant risk that the expert's opinions will be inadmissible at trial.

An additional necessity when considering which expert to hire for a case is to make sure the expert is a Certified Fire Investigator (CFI). CFI designation is the recognition that the expert has the knowledge, training, experience, and expertise to be a qualified fire investigator. Certification is achieved by passing a comprehensive written examination and a review of publications by the National Certification Board, which is a committee of internationally recognized experts. Again, designation CFI is a preliminary threshold with the determination of the appropriate expert.

The field of fire science is undergoing a period of unprecedented change and evolution. A driving force behind this change is the development of internationally recognized standards and guides for fire scientists. There are several technical standards which apply to Cause & Origin investigations. Attorneys who practice in the fields of Fire and Explosion litigation should ensure that they only hire experts who are well versed in these standards. ❑

(Part II of this article will appear in the next issue.)

Did you know. . .

* The Iowa State Fair will be held Aug. 10-20. It is one of the largest celebrations of agriculture in the nation. The fair was first held in Fairfield in 1854, six years before Abraham Lincoln became president. Total expenditures for staging the first fair was $323. More than 7,000 attended.

* After a second year in Fairfield, the state fair traveled from town to town before settling in Des Moines in 1878. Eight years later (1886) the fair was held on what is now its permanent home. That was the same year that the state capitol was completed.

* The fair is 146 years old. The fair was not held for four years during World War II; the 1898 edition was cancelled because the World Fair was held in Omaha that year. ❑

Source: Iowa State Fair

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ANNUAL MEETING & SEMINAR SEPTEMBER 20, 21 & 22, 2000

This year's annual meeting & seminar of the Iowa Defense Counsel Association will be September 20-22 at the Embassy Suites in Des Moines, Iowa. The program has been assembled by Vice-President Marion Beatty. The program starts on Wednesday, September 20, at 1:00 p.m. and runs through Friday at 2:45 p.m. The topics and speakers are as follows:

- **Supreme Court Update**
  Honorable Arthur A. McGiverin
- **Case Law Update I**
  Anjela A. Shutts
- **Offers to Confess: Their Effective Use**
  Chad M. Von Kampen
- **Workers' Compensation Update**
  Honorable Iris J. Post
- **Defending the Environmental Claim**
  Steven J. Pace
- **Defending Insurance Agents**
  Maurice B. Nieland
- **Ethical Issues for the Iowa Defense Attorney**
  Charles L. Harrington
- **Case Law Update II**
  Paul P. Morf
- **Products Liability Update**
  Kevin M. Reynolds
- **Defense of Trademarks and Trade Names; Internet Abuse of Trade Names and Trademarks**
  Edmund J. Sease
  Michael G Voorhees
- **2000 Legislative Report**
  Robert Kreamer
- **Case Law Update II**
  Jason T. Madden
- **Views from the Bench - Court of Appeals**
  Honorable Michael Streit
- **Subrogation Issues Arising out of the Defenseof Personal Injury Cases**
  John B. Grier
- **Recent Developments in Employment Law**
  Gordon R. Fischer
- **Defending Punitive Damage Claims**
  Thomas D. Waterman
- **New Model Rules of Professional Conduct**
  David L. Phipps
- **New Developments for the Defense Lawyer:**

  The Restatement Third - Compensation or Direction by Third Person Ethical Issues
  C. Bradley Price

  Recommended Case Handling Guidelines for Insurers and for Law Firms - Where Do We Go Now?
  Wendy N. Munyon

  In the Matter of Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures In the Supreme Court of the State of Montana
  Alanson K. Elgar

  The ABA Model Rules and Integration of the Same in Your Practice
  Sharon Soorholtz Greer
- **Update from the Defense Research Institute**
  Timothy P. Shimberg
- **New Developments on Disabilities Under the ADA**
  Iris E. Muchmore
- **Good Faith Settlements and the Right to a Defense in Iowa**
  Gregory G. Barnsten
- **Pretrial Motions**
  Michael J. Coyle
- **Medical Malpractice Defense: The Most Common Mistake Observations and Suggestions from Filing Through Verdict**
  Thomas A. Finley
- **Iowa Federal Courts Entering the 21st Century**
  Honorable Charles R. Wolle
- **Mediation from the Plaintiff, Defense and Mediator's Point of View-A Panel Discussion**
  David S. Wiggins, Neven J. Mulholland,
  John M. French, Bruce L. Walker,
  Paul C. Thune

FROM THE EDITORS

In 1997, the legislature amended Iowa Code § 668.3(2)(b) to subject consortium claims to the same comparative fault bar or reduction applicable to an injured party's claim. The obvious purpose of the amendment was to eliminate the windfall recovery (1% fault, 100% recovery) otherwise possible under the former rule. The fairness of such result was thoughtfully questioned in Justice Harris' dissenting opinion in *Schwennen v. Abell,* 430 NW 2nd 98 (Iowa 1998). Unfortunately, and perhaps inadvertently, this type of windfall may still partially exist by reason of a difference between the "new" statutory language and "old" Rule 8.

Iowa Code §688.3(2)(b) expressly applies to claims "for loss of consortium, services, companionship, or society." Rule 8 allows parents to recover "for the expense and actual loss of services, companionship and society resulting from injury or death of a minor child." Because §668.3(2)(b), unlike Rule 8, contains no specific reference to "expense," a district court recently ruled that parental claims for medical expenses resulting from a minor's injury are not subject to the comparative fault bar or reduction applicable to all other claims possessed by spouses and parents of injured parties. Accordingly, the parents of a child found to be 99% at fault may arguably recover 100% of the child's medical expenses, most of which are usually paid by a health insurance carrier.

Is this what the legislature intended? Were medical expenses incurred for an injured child purposely exempted from the otherwise pervasive effect of an injured party's comparative fault? We doubt it. This anomaly should be addressed during the next legislative session. ❑

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