defense UPDATE

The Iowa Defense Counsel Association Newsletter April 2001 Vol. XIV, No. 2

INSURED STATUS OF A FAMILY MEMBER

By: Mark S. Brownlee, Fort Dodge, IA

An issue which seems to present itself with increasing frequency is whether or not a family member of the named insured qualifies as a resident of the named insured's household and therefore qualifies as an insured under the same policy. The residency issue arises in a variety of contexts, i.e. college students, members of the armed forces, children of divorced parents, adult children who have returned to their parents' home, etc. The issue most commonly arises in two contexts:

(1) a family member claims insured status in connection with a claim for property damage, uninsured or underinsured motorist benefits; or

(2) the named insured seeks liability coverage in connection with a claim by a family member.

The first situation seems to arise far more often than the second. For reasons which will be discussed hereafter, prevailing rules of construction may produce different results under the same facts, depending on which party (insurer or family member) advocates insured status.

Most liability insurance policies provide coverage to family members of the named insured. "Family member" is usually defined as a person related to the named insured by blood, marriage or adoption who is a resident of the named insured's household or similar language. The issue normally involves determining whether or not the specific facts satisfy the residency requirement.

Before discussing the factors and considerations endorsed by the Iowa Supreme Court in addressing this residency issue, the question of whether the issue is ultimately one of fact or law warrants discussion. Some well-established rules must be considered.

Construction of an insurance policy is generally regarded as a question of law for the court. Interpretation, the process of determining the meaning of words used, is also a question of law for the court unless it depends on extrinsic evidence or a choice among reasonable inferences to be drawn (which is essentially the definition of a fact issue). AMCO Insurance Co. v. Rossman, 518 N.W.2d 333, 334 (Iowa 1994). See, also, Austin v. CUNA Mut. Life Ins. Co., 603 N.W.2d 577 (Iowa 1999). Unfortunately, the line between the construction and the interpretation is often blurred.

continued on page 6

Inside This Issue

"Insured Status of a Family Member"
Mark S. Brownlee . . . . . .Page 1

Message From the President:
"Cell Phones & E-mail Usage by Lawyers"
Marion L. Beatty . . . . . .Page 2

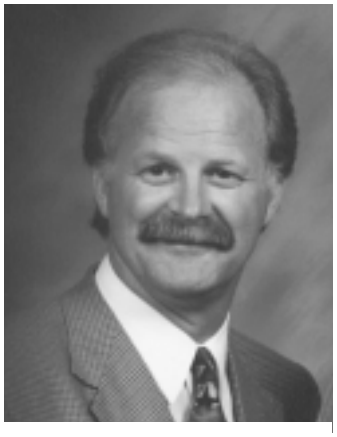
"How to Defend Commercial Defamation Claims For An Advertiser"
Bruce L. Walker . . . . . .Page 3

"Federal Rules Change"
Reprinted with permission from:
Atkinson Baker Inc.,
Court Reporters of Glendale, CA . . . . . .Page 4

Greenwood vs. Mitchell
Lyle Ditmars . . . . . .Page 5

MESSAGE FROM THE PRESIDENT

"Cell Phones and E-mail Usage by Lawyers"



Marion L. Beatty

Cell phones and e-mail are standard equipment for lawyers in the 21st century. Increasingly clients expect that their lawyer will be available and immediately responsive to them , and if the lawyer does not live up to those expectations the client will find a new lawyer who will fulfill those expectations. Thus lawyers are frequently seen sitting, driving, walking and occasionally running with the cell phone glued to their ear keeping in touch with their clients, case developments and abreast of the latest happenings in their office. The moment the busy lawyer sits down at his desk he is duty bound to check his e-mails and respond.

Are you one of these lawyers? Do you occasionally discuss confidential information? If you are discussing confidential information hopefully you have remembered your ethical obligation regarding such communications.

Formal Opinion 90-44 of the Iowa Supreme Court Board of Professional Ethics and Conduct (May 24, 1991) provides that:

(1) "A layer using a cellular, mobile or portable telephone shall inform the other party thereof and that any matter communicated in this manner is not confidential and may also result in the loss of attorney-client privilege, and

(2) If the lawyer is aware that the other party is using such means of communication the same caveat shall be given by the lawyer."

The opinion holds that a client has a reasonable right to presume his or her conversations with a lawyer, whether in person or by telephone or other device are confidential. Citing current Canon 4 the opinion recites "that a lawyer should preserve the confidences and Secrets of a client. EC 4-1, 4-4 and 4-6 and DR 4-101(A) (B) and (D). See also Edwards v. Bardwell, 632 F. Supp. 584 (M.D. La 1986), 808 F.2d 57 (aff'd), 110 S. Ct. 723 (Cert. den'd); Tyler v. Berodt, 877 F.2d 705 (8th cir. 1989), which arose out of suits for damages claiming among other things violation of the Federal wire tap statute."

Many states have addressed the issue of cell phone and cordless phone use by lawyers. Overwhelmingly these courts addressing the issue of expectation of privacy have concluded that there is no such expectation when using a telephone, which transmits by radio waves.

However, states more recently addressing the issue have drawn a distinction between the two types of cell phones in use: the analog and digital. Since analog cordless and cellular phone are more easily intercepted both intentionally and unintentionally these states have concluded that they may be used to transmit or receive confidential client information only if the lawyer has the informed consent of his client to use this medium. Full disclosure of the risks must be made before such use. On the other hand, these state have provided that the use of phones using digital technology within a digital service area may be used to communicate confidential information without violating ethical rules. This is essentially because there is less risk of intercep-

continued on page 9

"How To Defend Commercial Defamation Claims For An Advertiser"

By: Bruce L. Walker, Iowa City, IA

The recent development of claims involving defamation has required all trial lawyers to be generally familiar with this area. If you have never been called upon to advise or represent your clients in this field of the law, I urge you to consult with someone you know who has because it can be a very complicated area of the law with potential for "bombshell" Plaintiff's verdicts that may not be covered by your client's insurance package.

The 1999 Johnson County cases of Caveman Adventures, Unlimited, d/b/a/ the Electronics Cave vs. Mark Woodburn, Woodburn Electronic Inc. and Robert Woodburn, No. 56388, and Caveman Adventures, Unlimited d/b/a the Electronics Cave vs. Press Citizen Co. Inc., d/b/a The Iowa City Press Citizen, No. 57711, can serve as a primer for understanding the various concepts involved.

In the Caveman cases, Plaintiff claimed that defamatory advertising by defendants Woodburn with the Iowa City Press Citizen had caused damage to it's business. There was a demand for retraction on Defendant Press Citizen based on Iowa Code Section 659.2. There was no retraction. The Woodburn case preceded the Press Citizen case to trial and resulted in a verdict in favor of the Plaintiff in the amount of $30,000 in actual damages and $750 in punitive damages. No appeal was taken by Defendant. The judgment as paid. The Press Citizen case then went to verdict resulting in an award of $240,000 in favor of the Plaintiff for punitive damages only. Before that judgment was resolved, The Press Citizen tendered the judgment to Woodburn based on an indemnification agreement incorporated in the application for advertising. The tender was rejected by Woodburn after Woodburn tendered the judgment and demand to their carrier. Woodburn's carrier refused both indemnity and defense. No further action has been taken by the Press Citizen to date of this article.

With this as background, if you are consulted on a similar claim and can't refer or refuse to represent the client, the following are some of the issues you need to consider to properly represent your client:

The decisions you must make in each case are driven by the facts presented. You must take the time and you should warn your client that it will take a substantial investment of their time and resources to be sure that you have a complete understanding of all the facts involved in the alleged defamatory statements and the case.

In the Woodburn trial, a critical piece of evidence had not been disclosed by one of the Defendants to counsel until trial. Although it isn't clear whether the jury's verdict was influenced by the late disclosure of this piece of critical evidence, we can assume it was. Make sure that you review all of the client's files yourself or turn over the task to a trusted associate or paralegal. Take the time and even impose on the client if you have to do so to make sure that you have all the materials you need to properly defend the claim.

Familiarize yourself with the legal issues. Start with Iowa Code Chapter 659 and annotations. I also suggest a review of the Iowa Uniform Jury Instructions Chapter 2100. While you are doing that and before or after you file the initial answer, consider what single (if possible) defense you intend to rely on for the theme of your case. You should consider whether the Iowa Comparative Fault Act applies to the case.

There is an interesting article at 16 ALR 4th 1372 dealing with the liability of Commercial Printers for Defamatory Statements Contained in Matter Printed For Another. This resource should further be pursued in order to tailor the research to the facts of your case. ALR has numerous articles on this subject that may be beneficial for you to review. Once you have completed the ini-

continued on page 10

Federal Rules Change

Reprinted with permission from: Atkinson Baker Inc., Court Reporters of Glendale, CA

Submitted by: Mike Ellwanger, Sioux City, IA

On December 1, as part of the broadest set of changes since 1993, district courts lose the right to use local rules to opt out of the federal discovery and disclosure procedures, restrictions are made to what needs to be disclosed or what can be discovered, limits are set on the lengths of depositions as well as many other amendments.

New evidence Rules go into effect at the same time. One of the biggest changes is incorporating the *Daubert* and *Kumho* decisions into Rules 701, 702 and 703. Other changes deal with challenges to evidentiary rulings (Rule 103), admissibility of character evidence (Rule 404) and allowing for the self-certification of business records (Rules 803 and 902).

Finally, we will take a look at upcoming proposed changes to take place in 2001 and 2002 affecting electronic service, preemption of Copyright Rules and financial disclosure.

Rules of Civil Procedure

December 1st will see changes to rules 4 and 12 regarding service on United States government officers and employees as well as amendments to the Admiralty Rules. The big news, however, is a revamping of Discovery Rules 5, 26, 30, 34 and 37.

Rule 5(d) – In 1980, Rule 5(d) was amended to allow courts to order that discovery materials not be filed with the court and most courts have adopted Local Rules to that effect. That practice is now being standardized with the amendment to rule 5(d) which is designed to supercede and invalidate any local options in this area. The new Rule states that, "…disclosures under Rule 26(a)(1) or (2) and the following discovery requests the responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission."

Rule 26(a) – Several changes were made regarding initial disclosures that must be made by parties. The new rule eliminates a District Court's option of modifying the federal procedures by local rule. Disclosure rules can still be modified by stipulation or court order. The scope of the data that must be disclosed has also been narrowed from "information relevant to disputed facts alleged with particularity in the pleadings" to "information that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Provisions have been made for disclosure by parties added to the case after the initial disclosure period. In addition, eight types of cases were exempted from the disclosure requirements and the timing of disclosure was changed.

Rule 26(b)(1) – In this section, discoverable material was narrowed from that "relevant to the subject matter" to that "relevant to the claim or defense of any party." The court may, however, still "order discovery of any matter relevant to the subject matter involved in the action." According to the Committee Note, "The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Other information that may be deemed relevant and discoverable could include "other incidents of the same type, or involving the same product," "information about organizational

continued on page 11

GREENWOOD VS. MITCHELL

By: Lyle Ditmars, Council Bluffs, IA

In an opinion dated January 18, 2001, Greenwood vs. Mitchell, 621 N.W.2d (Iowa 2001), The Iowa Supreme Court issued a significant statement as to the use of a "failure to mitigate" as an affirmative defense.

The plaintiff was located on a sidewalk when the defendant apparently lost control of his vehicle and left the roadway. The Plaintiff alleged he injured his shoulder as he attempted to get to safety. On the morning the trial was to begin defendant admitted he caused the accident but denied he caused any injury. The only affirmative defense raised was plaintiff's failure to mitigate damages.

The argument by the defendant as to the failure to mitigate was, according to the opinion, based upon the plaintiff's alleged failure to follow up on a series of home exercises prescribed by a physical therapist. The jury found this argument persuasive and allocated 60% of the total fault to the plaintiff. The Trial Court entered judgment against plaintiff.

A Motion for New Trial filed by the plaintiff followed in which the plaintiff alleged the defendant "had not introduced substantial evidence to justify submission of the failure-to-mitigate instructions" and the "verdict was not reconcilable with the evidence, in that any failure to mitigate on the part of the plaintiff occurred more than six months after the accident."

In overruling this motion the trial court stated in part:

We don't draw a distinction between what all the damages were and what all the pain and suffering were up until the time [plaintiff] decides not to do his home exercises. Maybe we should, but that's not [what] the statute says.

The Court of Appeals affirmed the ruling of the trial court but the Supreme Court, after granting plaintiff's Application for Further Review, reversed.

The Supreme Court first examined the nature of the defense, relying heavily on the official comments to the Uniform Comparative Fault Act and then cited, at page 205 from its opinion in Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa1992).

Like contributory negligence, avoidable consequences is the review of the reasonableness of the plaintiff's conduct as a defense in a negligence action. Both doctrines examine the plaintiff's duty to care for his own interests and require the plaintiff to exercise only the standard of care of the reasonable person under the circumstances. Yet, contributory negligence and avoidable consequences are distinct: [C]ontributory negligence is negligence of the plaintiff before any damage, or any invasion of his rights has occurred …The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damage may still be averted, and bars recovery only for such damages. Id. (emphasis added) (quote W. Page Keeton et al., Prosser, Keeton on the Law of Torts § 65, at 458 (th ed. 1984) [hereinafter "Prosser on Torts"]).

The court then set out the four requirements necessary to establish the defense:

(1) Substantial evidence that there was something the plaintiff could do to mitigate his/her loss.
(2) Requiring the plaintiff to do so was reasonable under circumstances.
(3) The plaintiff acted unreasonably in failing to "undertake the mitigating activity".
(4) A casual connection between the failure to mitigate and the damages.

In its evaluation as to whether the defendant had submitted sufficient evidence to establish each of the four criteria noted above the court took the time to discuss the burden of proof issue as well. At page 207 the Supreme Court made its position clear:

We see no principled distinction

continued on page 14

INSURED STATUS . . . *continued from page 1*

Notably, in two recent cases decided by the Iowa Supreme Court, the residency issue was characterized as a question of fact, not as a matter of law. See, Rossman supra; Frunzar v. Allied Property and Casualty Ins. Co., 548 N.W.2d 880 (Iowa 1996). An understanding of the facts which gave rise to the residency issue in Rossman and Frunzar provides added insight into the proper application of the factors bearing upon that issue.

In Rossman, the issue was whether or not Rossman was a "resident" of his sister's home at the time of the fire in which Rossman's personal property was lost. Rossman had resided with his parents intermittently since 1985, and on a permanent basis since 1990. A fire at his parents' home in May of 1991 rendered it uninhabitable, so the parents moved into a trailer and Rossman moved in with his sister, Marie Atkinson. Rossman took with him all of his clothes and personal effects except for some furniture that he stored. Rossman had complete access to the Atkinson home and occasionally ate meals with the Atknison family. He did not help with the mortgage payments for the property, but he did do some minor repairs and would baby-sit the Atkinson children. Rossman maintained his own post office box for mail delivery.

On July 26, 1991, a fire severely damaged the Atkinson home, after which Rossman moved back into his parents' home a few days later, but soon thereafter bought his own home. Rossman sought to recover for the loss of his personal items under an AMCO policy issued to Rossman's sister. AMCO denied coverage on the basis that Rossman was not a "resident" of his sister's household for purposes of coverage. AMCO filed a declaratory judgment action. The residency issue was submitted to a jury for determination upon instructions based upon a three-part test formulated in a Wisconsin case, Pamperin v. Milwaukee Mutual Insurance, 197 N.W.2d 783, 738 (Wisc. 1972):

(1) whether the person is living under the same roof;
(2) whether there is a close, intimate and formal relationship; and
(3) whether the intended duration of the stay is likely to be substantial [and] is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct and reliance thereon.

The jury found that Rossman did not qualify as a "resident" of his sister's household. Rossman urged that the court should have submitted an instruction that "a residence is established by the act of dwelling in a place for some time and that a residence could be either temporary or permanent." 518 N.W.2d at 335. The Iowa Supreme Court rejected Rossman's argument and affirmed the district court.

In Frunzar, the issue was whether or not the plaintiff was a resident of her father's household at the time of a March 26, 1993 accident and therefore qualified for uninsured motorist benefits under her fathers' policy. The district court found that the plaintiff met her burden of proof on the issue of residency and the Iowa Supreme Court affirmed on that issue. In doing so, the Court cited seven factors to be considered in determining the issue of residency:

(1) Whether the claimant was living under the same roof as the named insured at the time of the loss;
(2) Whether the relationship between the claimant and the named insured was close and intimate;
(3) Whether the claimant's stay at the household of the named insured was likely to be substantial;
(4) The age of the claimant;
(5) Whether the claimant had a res-

continued on page 7

INSURED STATUS . . . *continued from page 6*

idence separate from that of the named insured;

(6) Whether the claimant was self-sufficient at the time of the loss; and

(7) The frequency and duration of the claimant's stay in the named insured's household.

548 N.W.2d at 885. The court further observed that "… no one factor controls the residency analysis and the term 'resident' is not susceptible to one overriding definition." Id.

The plaintiff had lived with her parents since her divorce in 1990. She had no address of her own at the time of the accident and used her parents' home address for mail and tax purposes. She kept her clothes and other personal items in her bedroom at her parents' home, she maintained a "close parent-child relationship" and she "exercised regular visitation with her son at her parents' home since her divorce in 1990." Id.

Another factor deemed significant by the court was that the plaintiff's intent was to stay at her parents' home indefinitely. In this regard, the court noted that the "plaintiff" was twenty-nine years old, divorced, unemployed, and had no immediate prospects of becoming self-sufficient. 548 N.W.2d at 886. While Allied contended the plaintiff's sole residence at the time of the accident was her sister's apartment, the evidence showed that she only stayed overnight there about once a month when she had been out drinking and was not welcome at home. The plaintiff typically slept on a couch at her sister's apartment on those nights and did not regularly keep clothing or personal items there, nor did she use her sister's address for mail delivery.

In consideration of these facts, the Iowa Supreme Court affirmed the district court's finding that the plaintiff was a resident of her father's household at the time of the accident for purposes of her uninsured motorist claim against her father's automobile insurer.

In Plymouth Farmers Mut. Ins. Ass'n. v. Armour, 584 N.W.2d 289 (Iowa1998), a fire insurer brought a declaratory judgment action seeking to deny coverage for the destruction of the insured's house through arson on the part of her estranged husband, Robert. Plymouth had denied coverage on the basis that Robert was an insured under the policy and had intentionally caused the loss. Robert's name had been removed as a named insured months before the fire, so the issue was whether or not he qualified as an "insured person." If so, the intentional acts exclusion would exclude coverage.

The policy defined *insured person* as "a person living with you and related to you by blood, marriage, or adoption …" *You* was defined as "the Insured named in the Declarations and spouse if living in the same household." Robert remained married to the named insured, so the only issue to be decided was whether or not he was "living in the same household."

After citing several fundamental rules of policy interpretation and construction, the Iowa Supreme Court concurred with the trial court's finding of fact that Robert was not residing with the insured when he committed the arson. Accordingly, the Court affirmed the trial court's conclusion that Robert, as a matter of law, "was not living in the house before, during, or after the fire loss." 584 N.W.2d at 293. In reaching that conclusion, the Court referred to the factors cited in Rossman, which formed the basis for those enumerated in Frunzar.

Without regard to how the Rossman jury decided the residency issue, it is significant that the issue was submitted to a jury as a question of fact, rather than being decided by the court as a question of law. Indeed, jury submission seems to eliminate certain rules of construction which would otherwise apply. Insurance policies are contracts of adhesion which are to be construed in a light most favor-

continued on page 8

INSURED STATUS . . . *continued from page 7*

able to the insured. Cincinnati Insurance Co. v. Hopkins Sporting Goods, 552 N.W.2d 837, 839 (Iowa 1997). Insurance companies must define limitations and exclusionary clauses in clear and explicit terms. Iowa Comprehensive Petroleum Underground Storage Tanks Fund Bank v. Federated Mutual Insurance Company, 568 N.W.2d 815 (Iowa 1997). Undefined words are given their ordinary meaning. Rossman, 518 N.W.2d 334. While coverage clauses are to be given broad and comprehensive meaning, exclusionary clauses are to be given narrow and restrictive construction. Farm and City Insurance Company v. Gilmore, 539 N.W.2d 154, 157 (Iowa 1995). Exclusions from coverage must be strictly construed against the insurer. Lemars Mutual Insurance Company v. Joffer, 574 N.W.2d 303, 307 (Iowa 1998). An insurer has the burden to prove a coverage exclusion. Gilmore, 539 N.W.2d at 157. When insurance policy language is susceptible to more than one meaning, the interpretation favoring the insured is adopted. Armour, 584 N.W.2d at 292.

Rossman and Frunzar suggest that the determination of residency involves a question of fact using prescribed factors, which occurs free of the onerous rules of construction just described. It should not make a difference if the fact-finder is the court or a jury. The same considerations and rules should be applied. The court utilizes the applicable rules of construction in determining whether or not a fact question exists in consideration of the Frunzar factors.

The matter of how and when the rules of construction are applied is significant inasmuch as the rules generally work against the insurer. The prevailing rules of construction essentially prescribe that a person seeking coverage gets the benefit of the doubt. Treating a residency issue as a fact question should avoid the potentially fatal effect of those rules, but at the same time, jurors do not look with favor on insurers seeking to void coverage.

As previously mentioned, application of the rules of construction may produce different results (resident or non-resident) under the same facts, depending upon which party is advocating resident status. The same rules of construction which tilt the balance to a finding of residency on the part of a family member and resulting coverage for his or her uninsured or underinsured motorist claim may, under the same fact, regarding the family member's residence, tilt the balance to a finding of non-residency to avoid application of an intra-family exclusion and thereby provide coverage to a named insured sued by a family member.

In summary, because exclusions are narrowly and strictly construed and coverage provisions are broadly construed, a determination of residency may depend upon how it affects coverage. If an insurer can persuade the court to treat residency as a fact question, which is (but should not be) more likely in the context of a jury trial, it may improve an insurer's chance of prevailing by avoiding the rules of construction which would otherwise apply.❑

UPCOMING EVENTS

Annual Meeting
Sept. 26-28

Embassy Suites on the River

Des Moines, IA

MESSAGE FROM THE PRESIDENT . . . *continued from page 2*

tion using this technology and thus a reasonable expectation of privacy. (For example see Minnesota Lawyers Professional Responsibility Board, Formal Opinion 19 (1999).)

While digital phones do provide a more secure method of communication it should be remembered they are still not completely safe. When a digital phone is used it may not always be transmitting over a digital system. It is still a good idea to have your clients consent. This is particularly true until our ethics commission revisits this issue and determines if digital phone use should enjoy a different status than that of analog phone use which was prevalent when the 1991 opinion was issued. What about e-mail messages? How safe are they? What are the ethical considerations?

Iowa Supreme Court Board of Professional Ethics and Conduct Formal Opinion 96-1 provides in relevant part that "with sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgement includes consent for communication thereof on the Internet or non-secure Intranet or other forms of propriety networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system." Most other states that have addressed the subject have agreed.

As our use of these methods of communication accelerates at a dizzying pace, it is wise to keep in mind the admonitions of these ethics opinions while expecting that these avenues of commerce will become increasingly secure and reliable, and new ethical rules and opinions will so reflect. The Electronic Communication Privacy Act of 1986 specifically prohibits the intentional interception of wire, oral, and electronic communications. A number of federal courts have more recently determined that cell phone users do have a reasonable expectation of privacy even though both cellular communications and electronic mail are technologies of questionable privacy.❑

What about e-mail messages?

How safe are they?

What are the ethical considerations?

WELCOME NEW MEMBERS

Kristin Borchert
Grinnell, IA

Christine L. Conover
Cedar Rapids, IA

Robert L. Ford
Waterloo, IA

Mary E. Funk
Des Moines, IA

Joseph P. McLaughlin
West Des Moines, IA

Mark A. Roberts
Cedar Rapids, IA

Peter Sand
Des Moines, IA

Todd Strothers
Des Moines, IA

Brenda K. Wallrichs
Cedar Rapids, IA

HOW TO DEFEND COMMERCIAL DEFAMATION CLAIMS . . . continued from page 3

tial/preliminary research, you'll be able to intelligently discuss with your client the factual issues that are presented by your case.

When you review a file for the Defendant, you need to be aware of the issues involving insurance coverage that may exist. If your case involves an indemnification agreement in the application for advertising, you should read American Guarantee v. Shel-Ray Underwriters, 844 F. Supp. 325 (SD Tex., 1993) and Fun Spree Vacations Inc. v. Orion Insurance Company, 659 So.2d 419 (FLA. APP., 1995). Both of these cases involved the duty to defend an insured under a business owner's liability insurance policy. There may be exclusionary language in paragraph BP(4) or elsewhere in the policy for claims for personal or advertising injury based on assumed liability in a written agreement. If you are consulted before the alleged defamatory conduct, you may recommend that the client's insurance agent be consulted to see if a rider to cover contractual indemnification can be purchased if possible.

If you believe that there is no submissable issues of fact, I urge you to reconsider. Normally that doesn't occur given the complexity of this area of law and the general competency of counsel that handle these cases. However, on occasion, a dispositive motion is advisable. It has been my experience that some of the issues involved in these cases will be submitted to a jury. Before that occurs, a well reasoned and concise motion in limine, followed by a motion for directed verdict along with proper briefing, needs to be supplied to the trial judge. Even if you are unsuccessful, the basis and research for an appeal are completed.

There is usually not a factual dispute about the issue of whether the Defendant made the alleged statement. The question of whether or not the statement is defamatory is for the court to decide before the issue is submitted to a jury. There is normally no question of whether the statement is communicated. In the more recent case of Huff v. Lone Tree Health Care Center, Johnson County Law No. 059053, defamatory statements were made in a resident's chart and in meetings involving the staff, the resident and the family of the resident. The issue of communication was raised but the case was submitted to a jury.

> The decisions you must make in each case are driven by the facts presented. You must take the time and you should warn your client that it will take a substantial investment of their time and resources to be sure that you have a complete understanding of all the facts involved in the alleged defamatory statements and the case.

Where defamation per quod is alleged the question of MALICE must be explored. A proper defense is TRUTH but you must be sure that your defenses will be submitted before you go too far with your open-

continued on page 15

FEDERAL RULES CHANGE . . . *continued from page 4*

arrangements or filing systems of a party" or "information that could be used to impeach a likely witness."

Rule 26 (b)(2) – This rule has been changed to eliminate the right of the District Courts to use local rules to alter the limits on the number or length of depositions or number of interrogatories established by Rules 30, 31 and 33. Such limits may still be changed by court order or the agreement of the parties, and Requests for Admissions may still be limited by local rule or court order.

Rule 26(d) – This rule was amended to "remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded under subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but 'standing' orders altering the moratorium are not authorized." (from Committee Note)

Rule 26(f) – The initial meeting of parties was changed to a conference so that all parties do not have to be present in person. Face-to-face meetings may be ordered on a case-by-case basis, but not by local rule or standing order. Scheduling changes were also made.

Rule 30 – In 1993 trail courts were given the authority to limit deposition length by local rule. This is now being standardized nationwide so that, "Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours." The provision for the court reporter to file the deposition transcript with the court has also now been eliminated.

Rule 37(c) – This rule was amended to provide that "A party that without substantial justification fails to … amend a prior response to discovery as required by Rule 26(e)(2) is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."

The full text of these changes, and the Committee Notes is available from the Administrative Office of the U.S. Courts (www.uscourts.gov).

Evidence Rules

Rule 103 – Rulings on Evidence was changed to settle the differences of opinion between courts on "whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. …Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial." (Report of the Advisory Committee on Evidence Rules, May 1, 1999, p.2)

In accordance with this reasoning, the following sentence was added to Rule 103(a)(2), "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim or error for appeal."

The committee also provided an extensive note to accompany the new rule including, among other points:

!that the rule applied to "all rulings on evidence whether they occur at or before trial, including so-called '*in-limine*' hearings."

!that counsel have a duty "to clarify whether … a ruling is definitive when there is doubt on that point."

!that if the court revisits its decision and "changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the

continued on page 12

FEDERAL RULES CHANGE . . . *continued from page 11*

evidence is offered to preserve the claim of error for appeal."

!"the amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in the definitive ruling, and who then offers the evidence to 'remove the sting' of its anticipated prejudicial effect, thereby waives the right to appeal the trail court's ruling."

Rule 404 – Character Evidence was changed to "provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character." (*ibid* p.3)

This is changed by adding to Rule 404(a)(1) that "if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under the Rule 404(a)(2), evidence of that same trait of character of the accused [can be] offered by the prosecution."

According to the Committee Note, "The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused, has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor."

Rules 701-703 – Opinion Testimony have been modified to reflect the decisions rendered over the past few years in *Daubert, Joiner, Kumho* and other cases.

Rule 701 on lay witness opinion testimony was amended to read that such opinions are limited to ones that are "(c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Per the Committee Note, this change was made in order to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of rule 702 … By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P.26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a lay person."

The committee then goes on to provide further guidance as to which rule applies to different situations. "The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. … The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules."

Rule 702 was amended "to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert's testimony is reliable… [It] specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony…, requires a showing of reliable

continued on page 13

FEDERAL RULES CHANGE . . . *continued from page 12*

methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."(*ibid* p.5)

The new rule, therefore, adds that expert testimony is admissible "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The Rules Committee specifically rejected the idea of including in the rule a listing of particular tests that must be applied to expert testimony. As covered in the Committee Note, "*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. …No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. … The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate. Courts both before and after *Daubert* have found other factors to be relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. [Five factors are discussed.] All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. ... Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony."

Rule 703 was amended to address the situation where "Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference." (From the Committee Notes.) The Rule was therefore amended to clarify that such information does not need to be admissible "in order for the opinion or inference to be admitted." The amendment goes on to state that, "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

Rules 803 and 902 – Admissibility of Business Records
Rule 803(6) was amended to allow records kept in the normal course of business to be admitted if they are accompanied "by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification… "This change brings the federal rule in alignment with the trend in state rules and eliminates "the expense and inconvenience of producing time-consuming foundation witnesses." (Committee Note) To facilitate this change, Rule 902 – Self-authentification also was amended to provide a procedure for this certification to take place.

The complete text of these amendments, including the Committee Notes and other discussion, is available from the Administrative Office of the U.S. Courts at www.uscourts.gov/rules/approved.htm .

Proposed Rules

The Committee on Rules of Practice and Procedure has submitted one set of changes to the Judicial Conference for consideration and has issued another set for comment. The first two items below, if approved, will go into effect December 1, 2001. The other two are open for comment until February 15, 2001 and will become effective December 1, 2002.

Electronic Service

Rules 5(b), 6(e) and 77(d) would allow parties and the court clerk to serve papers electronically, but only if the parties consent to such service. Three days will be added to the time period to respond to such service, just as is currently allowed for mail service.

continued on page 15

GREENWOOD VS. MITCHELL . . . continued from page 5

between the defendant's burden to prove a casual connection between the plaintiff's failure to mitigate and the plaintiff's damages, and the plaintiff's burden to prove that the defendant's fault was a proximate cause of the plaintiff's damages. If expert medical testimony is required to establish a casual link between fault and damages in one situation, such testimony should be equally require in the other. In other words, the standard of proof is no less exacting when the defendant alleges the plaintiff caused his own damages than it is when the plaintiff alleges that the defendant caused the plaintiff's damages.

In holding the defense of mitigation of damages should not have been submitted to the jury the Court discussed the evidence presented and, in its opinion, the deficiencies thereof. Plaintiff had been given certain exercises to be done at home, and after a period of time, had decided not to continue with those exercises. The crux of the Court's holding appears at page 206:

Conspicuously absent from the record is any testimony that Greenwood's failure to continue his home exercise regimen in perpetuity was unreasonable. Nor is there any expert testimony that Greenwood's continuation of home exercises would have prevented certain damages.

The case was remanded for a new trial with additional direction as to how the jury should be instructed if additional evidence on the issue sufficient to support the submission of the issue is presented.

The Court held that a two step process is required in situations where failure to mitigate damages is raised as a defense and the failure to mitigate occurs after the occurrence thus effecting only a portion of the damages.

Two separate verdict forms are to be used. One for the period of time prior to an alleged failure to mitigate and another for the period of time that includes the alleged failure. However, the Court did not address at least two issues which will arise using this system.

The first situation is where the jury finds more than 50% of the fault based upon a failure to mitigate as to all or part of a particular item of damage is attributable to a plaintiff. Does the plaintiff receive anything as to that item of damage?

The second situation is where other comparative fault is alleged and is found by the jury to exist. For example, the plaintiff is found to be 40% at fault for the accident which caused injury in a personal injury case. The jury also finds the plaintiff failed to mitigate at least some portion of his/her damages and attributes 40% of the fault to the plaintiff. For those damages subject to the mitigation defense, does the plaintiff receive 60% of 100% or 60% of 60%?

Even though arguments could be made both ways it seems that in the first situation the plaintiff receives nothing for the damage in question and in the second, 60% of 60%. This would be the most logical way to reconcile the Greenwood decision with Chapter 668. Other interpretations are inevitable and resolution of the issues will require further direction from the Court. However, it is safe to say, that regardless of the final outcome, jury instructions in cases involving the defense of mitigation of damages will be longer and undoubtedly more complicated.❑

FEDERAL RULES CHANGE

. . . continued from page 12

Copyright Impoundment

Rule 65(f) would be added stating that "This rule applies to copyright impoundment proceedings." This change was made together with a change to Rule 82 abrogating the 1909 Copyright Rules.

Financial Disclosure

New Civil Rule 7.1 and Criminal Rule 12.4 are based on Appellate Rule 26.1 and would require that any non-governmental corporate party disclose any parent corporation and require that the clerk of the court deliver this statement to the judge.

Entry of Judgment

Rules 54 (Judgments; Costs) and 58 (Entry of Judgment) would be changed to address the problem where a judgment or order should have been entered in a separate document, but never was, so the time to file an appeal never begins to run.❑

The full text of the proposed rules and commentary on them is available in the Rulemaking section of the Administrative Office of the U.S. Courts website at www.uscourts.gov/rules/ . Comments on the proposed rules can be submitted by fax, mail, e-mail, or through a web-based form. For instructions go to www.u.s.courts.gov/rules/comment2001/submit.htm .

HOW TO DEFEND COMMERCIAL DEFAMATION

. . . continued from page 9

ing statement. If you try to rely on truth as your defense and fail to have it submitted and/or fail to convince the jury, you can exacerbate the award.

Another area that is useful to explore for the defense is causation and damages. If you are able to show there were no true damages or there was no connection between the alleged damages and the statement, your case can be defended to a successful conclusion. The distinction between general and specific damages must be determined pre-trial to effectively present and argue the case. If the case is one of defamation per se no specific damages need to be proven. See Vinson v. Linn Mar Community School District, 360 N.W.2d 108 (Iowa, 1984). If the defamation is per quod, specific damages must be proven. Id.

Punitive damages are a fertile area for claimants in this field of the law because of the standard required to submit defamation claims to a jury. A good factual defense is best if you are defending a claim for punitive damages. If there is not a good factual defense, the Defendant needs to show appropriate regret which can be difficult in these cases.

It is important to check the client's policy of insurance to be certain that there are no exclusions that apply to a Plaintiff's claims. In addition, it is not clear whether punitive damages are covered by indemnification agreements that are contained in publishing or advertising agreements. It seems to be clearer but not completely certain that actual damage can be reimbursed based on an indemnification agreement.

In the case of the Press Citizen Award, the damages recovered by Plaintiff were all punitive damages. Actual damages were not involved. If there was an attempt to include actual damages in the Press Citizen case, the defense of Res Judicata/Collateral Estoppel would have been raised. The award against the Press Citizen was based solely on the failure to retract after demand was made pursuant to section 659.2 Iowa Code. Under these circumstances, if you represent the advertiser, I urge you to assert that the indemnification agreement is not enforceable. The tender of defense was denied on behalf of the Woodburns. To date, the publisher has not followed-up on the demand. One can only hope that they won't.❑

FROM THE EDITORS

After learning that as Editor I was to submit an editorial, I struggled with an appropriate topic. While reading the ABA Journal February 2001, I saw a book review of "In The Interests Of Justice: Reforming the Legal Profession" by Deborah Rhode. After practicing for 28 years I felt that this topic was something of sufficient general interest that it warranted comment.

All of us hear comments from non-lawyers about our profession. I know I do. The persuasiveness of the feeling is enough that in recent years I have begun to take the comments seriously. Does society really want us to reform or are we, as lawyers, merely an easy target for abuse? Ms. Rhode seems to feel, and I think that I agree, that maybe it is time for our profession to take the criticism seriously and try to achieve the necessary reform before it is forced on us. The attitude in society of prevailing at any cost and the measure of success is to be solely judged on a person's affluence or wealth may not be the true measure of our profession. No one lawyer can change society's impression, however, each of us, in our individual practices and communities, can, if we ascribe to a higher standard over time, make the necessary change in the attitude. Hopefully, in this way, we can avoid unnecessary implementation from outside the profession on the way we practice law. Without attempting to be inclusive, I urge all of us to try to abide by a few simple rules:

1. Ours is a service profession. Try to remember to put your own personal interests behind your client's. Treat them with the respect that they deserve. Communicate with them at all critical junctures in their cases. Take the time necessary to really listen to them and respond to their needs and concerns. Call them and have them come in to see how they are doing from time to time. It may not increase your billable hours or your collections, but it will increase your stature, and more importantly, the profession's stature.

2. Treat opposing counsel and their clients with respect and professionalism. It doesn't take any more effort to use courtesy in your approach than to play "hardball". Of course there are situations that cannot be handled in this fashion, but try to reduce them by approaching every case initially as described herein. There is no greater compliment in my opinion than to be consulted by opposing counsel in difficult cases and hired by opposing clients, particularly after you prevailed.

3. Treat the Court system with respect. This doesn't mean just the Judges but it certainly includesthem. It is too easy to blame the judge for a poor result. Don't fall victim to that easy excuse. Take responsibility for the result when it is unfavorable as well as when its favorable. Try to act professionally and courteously to the Court and Clerk personnel that you come in contact with.

4. Give of your time to the profession on committees and boards. When asked, participate as speakers or authors in the multiple opportunities that are available to us as a profession. Volunteer if you are not asked. There are hundreds of opportunities.

5. Participate in your community. Volunteer to provide your time and talents in all areas not just on boards. Let the non-lawyer population get to know you as a person. Our strength as a profession is in our diversity. Let society experience that diversity outside what they read or hear in the media.

6. Keep your skills sharp by attending the necessary CLE programs and if you have the time, attend more than the minimum. hourly requirement. Read, discuss and make yourself available to mentor others. It will be rewarding and educational for you.

If we all try to achieve a level of competence and professionalism we won't need to be concerned about statutory or judicial reform of the profession. I feel that we are better able to make the changes that are necessary than any outside group.

The Editors: Kermit B. Anderson, Des Moines, Iowa; Mark S. Brownlee, Fort Dodge, Iowa; Michael W. Ellwanger, Sioux City, Iowa; Noel McKibbin, West Des Moines, Iowa; Bruce L. Walker, Iowa City, Iowa; Patrick L. Woodward, Davenport, Iowa

Iowa Defense Counsel Association
431 East Locust Street, Suite, 300
Des Moines, IA 50309
Phone: (515) 244-2847
Fax: (515) 243-2049
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

Presorted
Standard
US Postage Paid
Des Moines IA
Permit No. 3885