defense UPDATE

The Iowa Defense Counsel Association Newsletter February 2003 Vol. XVI, No. 1

THE HIPAA PRIVACY RULE:
HOW TO OBTAIN MEDICAL RECORDS AFTER APRIL 14, 2003

By: Diane Kutzko, Cedar Rapids, IA

Background

The HIPAA Privacy Rule[1] is the first comprehensive federal protection for an individual's medical information. The implementation date is April 14, 2003.[2] After that date, the use and disclosure of confidential medical information in the hands of physicians and hospitals and other individuals and entities covered by the Rule will be governed by HIPAA. The rule will change how individuals and entities covered by the Rule use and disclose patients' health information (whether such information is contained in a paper or electronic record, or orally communicated) and it will change, and probably complicate, the process of obtaining medical records for litigation. In fact, even before implmentation, lawyers are encountering misconceptions on the part of providers as to how to obtain records. One misunderstanding is that HIPAA will cover disclosure of records in all litigation settings, including workers' compensation. The Privacy Rule makes it clear that disclosures in workers' compensation cases will continue to be governed by Iowa Code Chapter 85. 45 CFR §164.514. HIPAA does not apply in that context. Another misconception is that attorney requests for medical information made before April of 2003 that are accompanied by a then valid authorization cannot be honored. That is not the case. The transition provisions of the HIPAA Privacy Rule specifically provide that any signed consent or waiver received prior to April 14, 2003 will be valid for medical information created or received prior to that date. 45 CFR §164.532. Yet another misconception, that records can never be faxed because of HIPAA, is similarly groundless.

Further complicating the situation is that HIPAA does not entirely preempt existing Iowa law concerning patient confidentiality. Because HIPAA acts as a "floor" for confidentiality, state laws and other federal regulations that are more protective of patient confidentiality are not preempted. Notably, the rules governing disclosure of mental health treatment information, AIDS related information, and substance abuse treatment will not be preempted. In addition, Iowa Code §622.10, which governs disclosure of medical records in litigation in the hands of physicians, surgeons, physician assistants, and advanced nurse practitioners, will not be preempted because it is arguably more protective of patient confidentiality than HIPAA. To clarify the interrelationship of HIPAA and Iowa law, an Iowa "work group" that includes members of the Litigation and Health Law Sections of the Bar Association, the Iowa Medical Society, and the Iowa Hospital Association, has put together a preemption analysis which is available at www.iowasnip.com and covers all Iowa statutory provisions involving use and disclosure of protected health information. In addition, the

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[1] 45 CFR parts 160 and 164.

[2] While the final Privacy Rule took effect on April 14, 2001, modifications were proposed in March of 2002. The "final, final" rule was issued on August 14, 2002.

Inside This Issue

MESSAGE FROM THE PRESIDENT

Mike Weston

BEYOND THE MAPS

The entire legal community of Iowa is buzzing about the issue of Judicial Branch Redistricting. Everyone seems to have an opinion about the work and final report of the Judicial Branch Redistricting Advisory Committee issued on December 13, 2002.

At this writing (1/6/03), it is not clear whether the Supreme Court will advance one of the three redistricting proposals of the Committee. Chief Justice Louis Lavorato addressed this issue during his State of the Judiciary Address on January 15, 2003. The Iowa Defense Counsel Association Board of Directors will consider its position after the Supreme Court decides what course it wishes to take.

Cutting across every opinion are basic truths that all must acknowledge if not concede. This is true with the entire subject of Judicial Branch Redistricting. Here are a few facts to consider.

1. It is highly unlikely that the Judicial Branch will have its pre-fiscal year 2000 funding restored anytime soon. Not a shred of evidence suggests anything to the contrary. Iowa's economy is relatively stagnant and revenues are not likely to increase dramatically anytime soon. The Judicial Branch has done more than cinched its belt. It now wears a 17th Century corset. When one of the most talented district judges in our State celebrates the gift of Post-It® notes from an anonymous donor, it has to leave any thoughtful person scratching his or her head. We all need to continue to point out the effect of these deep cuts on the delivery of justice in our State and fight mightily to prevent cuts through the muscle to the bone. But we also need a Plan B.

2. Every subdivision of state government is going through the process of reorganizing to retain its level of service or to enhance it in the face of decreased funding. One of the goals of the second administration of Governor Vilsack is to make state government more efficient. Every branch and subdivision is going through the same budget crisis that faces the Court. There will be increasing pressure on the Judicial Branch to react. The Bench, Bar and Court officials can control the process now. The legislature may not afford us that luxury much longer.

3. The population of the State has shifted since 1970. The current judicial districts were established in 1972. One can quarrel with a lot of things, but you cannot argue very long or hard about the fact that the 2000 Census demonstrates that some parts of Iowa have added people, some have declined and some have stayed about the same. The Judiciary exists to serve the citizens. Resources needed to be beefed up where the people are, while protecting every Iowan's access to justice.

4. The resolution of civil disputes is at the bottom of the judicial pecking order. Court power has to be rationed. When the rationing occurs, criminal and juvenile proceedings take priority. Nothing is more frustrating or difficult to explain to clients than the fact that their civil trial has been "bumped" because there is no judge or courtroom to try their case. Delay means more costs for our clients and less confidence in the system. Ultimately, our clients will turn to extra-judicial remedies to resolve legal

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MITIGATION REVISITED

By: Bruce L. Walker, Iowa City, IA

Since *Greenwood v. Mitchell*, 621 NW2d 200 (Iowa, 2001), the law of mitigation that we thought we understood has undergone considerable change and discussion. In this regard *see* the article by Lyle Ditmars in the April 2001 issue of Defense Update. Since the decision, *Greenwood* has been referred to in six decisions but not modified or overruled. *See Baker v. Smith*, 2002 WL 31307887, (Iowa App. Oct 16, 2002); *Matheson v. Vander Linden*, 2001 WL 1443840, (Iowa App. Nov 16, 2001); *Vasconez v. Mills*, 651 N.W.2d 48, 54 (Iowa Sep 05, 2002); *DeMoss v. Hamilton*, 644 N.W.2d 302, 307 (Iowa May 08, 2002); *Foster v. Ankrum*, 636 N.W.2d 104,106 (Iowa Nov 15, 2001); and *Richey-Butts v. Lay*, 2001 WL 1452149, (Iowa App. Nov 16, 2001). Recently, the Iowa Uniform Jury Instructions Committee has decided how to approach the question of submission of this issue to juries. On December 03, 2002, Judge James E. Kelley presented the following instruction to the Board of Governors at their meeting in Des Moines.

> 400.7 Comparative Fault – Mitigation
> Defendant claims plaintiff was at fault for failing to mitigate [his][her] damages by not [exercising ordinary care to obtain reasonable medical treatment][exercising ordinary care to follow medical advice and treatment][exercising ordinary care (specify manner in which defendant claims plaintiff had a duty to reduce damages)].
>
> Plaintiff has a duty to exercise ordinary care to reduce, minimize or limit [his][her] damages. However, plaintiff has no duty to do something that is unreasonable under the circumstances, such as [undergo serious or speculative medical treatment][undertake action which is unreasonably expensive or intrusive][undertake action which imposes unreasonable inconvenience].
>
> To prove defendant's claim of failure to mitigate, [he][she] must prove all of the following:
> 1. There was something plaintiff could do to mitigate [his][her] damages;
> 2. Requiring plaintiff to do so was reasonable under the circumstances;
> 3. Plaintiff acted unreasonably in failing to undertake the mitigating activity; and
> 4. Plaintiff's failure to undertake the mitigating activity proximately caused an identifiable portion of [his][her] damages.
>
> If the defendant has proved all of these numbered propositions, then defendant has proved this defense and you shall assign a percentage of fault to the plaintiff for the time period after the failure to mitigate. This amount will be used in answering the special interrogatory in the verdict. If the defendant has failed to prove one or more of these numbered propositions, then defendant has not proved plaintiff failed to mitigate [his][her] damages.
>
> Authority
> Iowa Code Section 668.1
> Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa 2001)
> Shewry v. Heuer, 255 Iowa 147, 121 N.W2d 529 (1963)
>
> Updegraff v. City of Ottumwa, 210 Iowa 382, 116 N.W.2d 928 (1929)
> White v. Chicago & N.W. Ry. Co., 145 Iowa 408, 124 N.W.309 (1910)
> Bailey v. City of Centerville, 108 Iowa 20, 78 N.W.831 (1899)
> Welter v. Humbolt County, 462 N.W.2d 335 (Iowa App. 1990)

It is anticipated that this new instruction will be published without change after approval by the Iowa Supreme Court this spring. The Committee will continue its work on the special interrogatories that will need to be submitted in the proper case. The following special interrogatories were used in at least two cases in Johnson County District Court in the past twenty four months.

Special Verdicts

> Question No. ____ Do you find the plaintiff failed to mitigate damages?

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THE IMPORTANCE OF THE SUDDEN EMERGENCY DOCTRINE IN IOWA

By: Sharon Soorholtz Greer, Marshalltown, IA

Every civil jury trial is tried with two strategies in mind: one for the jury and one for the appellate courts. The doctrine of sudden emergency is important for your analysis in dealing with both strategies. Obviously, as lawyers, we want juries to understand the legal duties imposed on clients and whether those duties were breached in such a way to require liability for serious injuries. It is also important to make certain that your factual record supports the instructions given to the jury.

Where a case involves the immediate decision and action of your defendant, sudden emergency may be a defense to any alleged negligent conduct. A "sudden emergency" is defined as:

> (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden unexpected occasion for action, exigency, pressing necessity.

Weiss v. Bal, 501 N.W.2d 478, 481 (Iowa 1993). "Whether a party is faced with a sudden emergency is ordinarily a question for the jury." *Id*.

The law recognizes the fact that a prudent person, when brought face to face with an unexpected danger, may fail to use the best judgment, may omit some precaution that otherwise might have been taken, and may not choose the best available method of meeting the dangers of the situation. 57A Am.Jur.2d, Negligence, Section 215, p. 262. This doctrine considers that a person cannot be held to the same standard of care and accuracy of choice as a situation where there is time for deliberation. *Id*. at Section 213, p. 259.

Both parties to a lawsuit are entitled to have their legal theories submitted to a jury "as long as they are supported by pleadings and substantial evidence." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "As long as the requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996). "Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion." *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996).

In Iowa, unexpected icy road conditions, unexpected heart attacks or seizures, and non-negligent car failures are situations where the Court will allow a sudden emergency instruction. *See, Mosell v. Estate of Marks*, 526 N.W.2d 179, 181 (Iowa App. 1974)(deer in path of car); *Reener v. Hill & Williams Bros. Inc.*, 502 N.W2d 26, 29 (Iowa App. 1993)(couch falling off back of a truck on freeway); *Bannon v. Pfiffner*, 333 N.W.2d 464, 470 (Iowa 1983)(unexpected icy road conditions); *Dickman v. Truck Transport, Inc.*, 224 N.W.2d 459 (Iowa 1974)(sudden dust storm) and *Bangs v. Keifer*, 174 N.W.2d 372, 373 (Iowa 1970)(unexpected and non-negligent brake failure).

In recent years, the Appellate Courts in Iowa have narrowed the use of the doctrine of sudden emergency. The Court discussed abolishing the doctrine but found it was necessary to inform juries about the proper standard of care in an emergency situation. *Weiss v. Bal*, 501 N.W.2d 478, 480 (Iowa 1993). The Court emphasized in *Weiss* that a narrowly drafted instruction can help define the standard of reasonable care of an actor under circumstances posed by an emergency. *Id*. at 481.

Juries do tell us that the instruction is helpful and without it they are confused about how to handle the negligence per se issue. Typically, it is not clear in the instructions that a jury may excuse what might otherwise be negligent conduct, especially where the negligence is defined by another instruction as "negligence per se." Those specification of negligence instructions tell juries clearly "a violation of this duty **is negligence**." Even though the "negligence" definition instruction talks of ordinary care and reasonable persons, it does not explain to juries how to analyze what seems to be conflicting instructions on what is or might be "negligent" under the law of the case. The marshalling instruction sets out what must be proved to recover. The marshalling instruction defines what specifications

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CASE COMMENT

McNALLY & NIMERGOOD V. NEUMANN-KIEWIT CONSTRUCTORS 648 N.W.2d 564 (Iowa 2002)

By: Patrick L. Woodward, Davenport, IA

Prior to *McNally & Nimergood v. Neumann-Kiewit Constructors*, 648 N.W.2d 564 (Iowa 2002), Iowa Courts narrowly construed indemnification agreements. Absent express language in the agreement, it was generally accepted that indemnification agreements would not be found to cover losses to the indemnitee caused by the indemnitee's own negligence. *See, Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916 (Iowa 1975) (indemnitees were not indemnified for their own negligence unless such intent was "clear and unequivocally expressed.") Absent such express and unequivocal language, Courts would not examine the contract for indemnification to determine the parties' intent.

By its decision in *McNally*, the Iowa Supreme Court abolished its bright line test and announced that Courts in Iowa will look to the contractual language in the indemnification to determine if in fact it was the parties' intent to indemnify the indemnitee for the indemnitee's own negligence.

The *McNally* case arose out of a work place accident in which an employee of Neumann was injured when his arm was pinched between an erected section of a tower crane and another section being hoisted in place by a crawler crane Neumann had leased from McNally. The employee sued Neumann alleging that Neumann was negligent in failing to inspect the crane, maintain and service the crane and in failing to properly operate the crane. As to McNally, the employee alleged that it was negligent in failing to inspect the crane before delivery, failing to properly maintain the crane before delivery and delivering the crane with a defective pump. Neumann was subsequently dismissed from the action under the employer immunity provisions of Chapter 85, *Code of Iowa*, and McNally settled with the employee during trial. Subsequent to the settlement, McNally sued Neumann for indemnification under the provisions of the lease agreement.

The terms of the lease were developed through the exchange of the parties' form agreements. McNally had executed its own agreement and forwarded it to Neumann. Rather than signing McNally's agreement, Neumann executed its own agreement and sent it to McNally who signed and returned the same to Neumann. The Neumann rental form agreement provided that the lessee (Neumann) would be liable for any and all damage to any persons or property while the crawler was in its possession except for damage caused by defects in the equipment. Neumann moved for and received summary judgment on the ground that the lease did not specifically provide that Neumann would indemnify McNally for McNally's own negligence.

While the Supreme Court ultimately affirmed the granting of summary judgment, it found that Neumann in fact had agreed under the language of the lease to indemnify McNally for McNally's own negligence except for that conduct specifically excluded under the lease language. In doing so, the Court rejected the rules of construction set forth in *Evans v. Howard A. Green Co.*, supra, and its progeny which required specific express language of indemnification. In reaching the decision in *McNally*,

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UPCOMING EVENTS

COMMERCIAL LAW & LITIGATION SEMINAR

April 25, 2003

Des Moines
Golf & Country Club

West Des Moines, IA

6.5 State CLE Hours Approved
6.5 Federal CLE Hours Pending

THE HIPAA PRIVACY RULE: . . . *continued from page 1*

Iowa Bar form, "Patient Authorization for Release of Information," is being revised to be HIPAA compliant as well as compliant with state law that is not preempted and will be available prior to April 14, 2003. As discussed below, while it may take some education in the provider community, the revised Bar Form should be sufficient for release of patient information in the litigation context.

HIPAA "Basics" [3]

The HIPAA Privacy Rule is complicated to apply in large part because of the number of new, defined terms that it introduces. The following is a brief summary of the Rule and defined terms that may be helpful in facilitating the obtaining of medical records in the litigation context.

- The HIPAA Privacy Rule itself is deceptively simple to state: "A covered entity may not use or disclose an individual's protected health information, except as provided by the rule."

- "Covered entities" are those health care providers who conduct certain financial and administrative transactions electronically, including billing to governmental entities. "Providers" include all entities that provide health related services as well as products and specifically include pharmacists as well as durable medical equipment providers. The term covered entity also covers "health plans" (which include Medicare and other government payers) as well as "health care clearinghouses" (entities that process patient data into electronic data sets). 45 CFR §614.501.

- "Protected health information" is individually identifiable information concerning the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for that provision of health care to an individual. 45 CFR §164.501. The Rule covers protected health information in any form — whether it is oral, written, or electronically created and transmitted.

- The Rule in its final form generally eliminates the requirement of patient consent for use and disclosure of protected health information for treatment, payment and what are called "health care operations", i.e., administrative or operational functions such as quality assurance and credentialing. (A provider may continue to require consent, but it is not mandatory.)

- The Rule, however, does not preempt the requirement under Iowa law and other federal regulations that a patient must specifically consent to use or disclosure of mental health treatment, substance abuse treatment and AIDS related information, and an authorization compliant with both Iowa law and the Privacy Rule may be required for this purpose.

- The Rule replaces the consent requirement with a requirement that providers and other entities covered by the Rule provide a patient on a one-time basis a lengthy "Notice of Privacy Practices" which outlines the uses and disclosures that the entity may make for treatment, payment and health care operations purposes, and other uses and disclosures it may make without the patient's authorization or consent. The Rule requires providers, and other covered entities, to obtain an "Acknowledgment" of receipt of the Notice or to document why the acknowledgment was not obtained. 45 CFR §164.520.

- A HIPAA compliant Authorization is generally required for disclosure to third parties, 45 CFR §164.508, which by all logic should include disclosures to attorneys in the litigation context. However, the drafters of the Rule complicated things by including a provision that specifically permits disclosure in judicial and

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[3] For anyone who wants a more complete understanding of HIPAA, or is advising health providers on the issue, a good starting point is the Office of Civil Rights' (OCR) Guidances, press releases, and summaries, which can be found at www.hhs.gov/ocr/hipaa. The OCR will be the enforcement agency for the Rule.

THE HIPAA PRIVACY RULE: . . . *continued from page 6*

administrative proceedings without consent or authorization if certain conditions are met. 45 CFR §164.512(e). A close examination of that provision, however, makes it clear that the provision is generally more appropriate where the party whose information is being sought is not a party to the proceedings. The drafters stated: "The provisions in this paragraph [164.512(e)] are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information." The Iowa preemption work group concluded that disclosure may be made pursuant to an Authorization that is consistent with both HIPAA and state law.

- The Rule also provides that protected health information may be obtained in judicial and administrative proceedings with a court order or subpoena. However, 45 CFR §164/512(e)(1)(ii), provides that a subpoena is only valid when the provider or other entity covered by the Rule receives "satisfactory assurance" that the party seeking the records has made a "good faith attempt" to give written notice to the patient whose records are being sought (or to mail notice to the patient's last known address). A literal reading of the Rule results in the conclusion that service of a subpoena on counsel for the patient as required by federal and state rules of civil procedure may not be sufficient to fulfill this requirement, which would make the use of a subpoena impracticable.[4]

- The Privacy Rule introduces the concept of "minimum necessary" information—i.e., an entity covered by the Rule must determine what information is minimally necessary for a proposed disclosure. 45 CFR §164.502(b). The "minimum necessary" rule does not apply to disclosures for treatment and does not apply to disclosures pursuant to a valid authorization signed by the patient. This is particularly significant in the litigation context when a HIPAA compliant authorization is obtained, as an attorney may specify the entire medical record and the provider may comply with that request. (Providers may however, continue to opt to provide only the records that they generate; not the records of others.)

- The Privacy Rule also establishes the concept of "business associates," who are independent contractors that use or create protected health information of the covered entity to render services to the entity or on the entity's behalf. 45 CFR §164.502(e). The Rule requires the covered entity to obtain written "business associate" agreements with such independent contractors; these agreements impose the same confidentiality obligations on the business associate as HIPAA does on the covered entity. A form business associate agreement has been provided by the Department of Health and Human Services. *See* 67 Fed. Reg No. 157, pp. 5382, 5364 (August 14, 2002), also located at www.hhs.gov/ocr/hipaa/contractprov.html. Attorneys who handle patient specific health information in rendering advice to a provider, either in the litigation context or otherwise, are business associates.

- Business associates in general are required to make access to protected health information in their possession and an accounting of disclosures available to individuals whose protected health information is being disclosed. The Rule arguably exempts attorneys from these requirements. Care needs to be taken that this is clear in the agreement.

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[4] Arguably, when the patient is also a party, the patient's attorney steps into the patient's shoes once litigation has commenced for purposes of service and notice, and therefore notice to the attorney is sufficient, but it may be very difficult to convince providers that this interpretation is correct.

THE HIPAA PRIVACY RULE: *. . . continued from page 7*

- The Rule provides patients specific rights, including the right to access to protected health information, §164.524; the right of an accounting, §164.528; and the right to request an amendment, §164.528.

What does all this mean for lawyers in the litigation context?

The HIPAA provisions directed to disclosure in the litigation context are complex and convoluted. As discussed above, the ability to subpoena records may become extremely problematic. However, providers may and should disclose patients' records pursuant to an authorization that is compliant with both HIPAA and Iowa law. This is true because an authorization, which requires the signed agreement of the patient, is more protective of a patient's rights than the HIPAA provisions specifically addressing disclosure in judicial and administrative proceedings, which do not require either consent or authorization. In addition, as discussed above, the drafters of the Rule made it explicit that they did not intend to alter the manner in which disclosures are made when the patient puts his or her medical condition at issue in litigation

Use of an authorization makes the most sense, although it may take some education of providers. The provisions of the Privacy Rule concerning disclosure in judicial and administrative proceedings are cumbersome and more appropriately suited to situations where the patient is not a party. Further, an authorization will be *required* in any event for disclosures in litigation not preempted by HIPAA, i.e., HIV, mental health information and substance abuse treatment information. Finally, obtaining records pursuant to an authorization is advantageous for the lawyer seeking medical records in litigation, because the "minimum necessary" principle does not apply to authorizations, and a provider should provide those records specified in the authorization (up to and including the entire record) without making an independent evaluation as to what records will be produced. (However, providers are still free to produce only those records they generate in their practice, and not other providers records located in the chart.)

It should be noted that patient records you receive may look "different" after April 14, 2003 in that they may contain the various accountings, requests for access and requests for amendments required by the Rule to protect patient rights. Notably, any request for an amendment does not have to be honored by the provider, but a procedure must be in place to allow such requests, and the amendment (if the request is granted) and or the proposed amendment must be placed in a patient's chart.

Finally, for those attorneys who represent providers and other covered entities and will be receiving patient specific information from them (e.g., in defense of a malpractice law suit), a business associate agreement will have to be signed. Care should be taken by the attorney to tailor the business associate agreement so that to the extent possible attorney client privilege is maintained.

Conclusion

Obtaining patient records from health care entities is about to become more complicated for lawyers. This is particularly true since there is understandable confusion in the health care community as to what the Rule requires. Such confusion has resulted from a number of revisions to key provisions since the Rule was first proposed. However, it is hoped that provider education and the revised Bar patient's authorization form will facilitate the obtaining of medical records under HIPAA.

MITIGATION REVISITED . . . *continued from page 3*

Answer "yes" or "no."

ANSWER:_____

(If you answered "yes", you will also answer the following question.)

Question No. ____: Do you find the plaintiff's failure to mitigate damages contributed to the plaintiff's damages?

Answer "yes" or "no"

ANSWER:_____

(If you have answered "yes", you will also answer the following question.)

Question No. ____: On what date did the plaintiff's failure to mitigate damages begin to contribute to the amount of the plaintiff's damages?

ANSWER:_____

Question No. ____: What percent, if any, do you find the damages awarded to the plaintiff should be reduced for failure to mitigate damages after the date you found in Question No. ____?

ANSWER:_____

Question No. ____: What amount of damages awarded to the plaintiff by you was incurred after the date you found in Question No. ____?

ANSWER:_____

Question No. ____: What amount of damages awarded to the plaintiff by you was incurred before the date you found in Question No. ____?

ANSWER:_____

There are, however, unresolved questions that must be considered before the submission of this instruction and special interrogatories. First, how can defense counsel without use of an Independent Medical Examination obtain the necessary proof from treating physicians that would meet the burden now placed on the defense? Sufficiency of the evidence to submit an instruction on mitigation of damages was discussed in *Baker v. Smith*, 2002 WL 31307883 (Iowa App. 2002). In this decision, the Supreme Court reversed the District Court's decision to submit a mitigation instruction based on an analysis of the Iowa Code Sections 668.1(12) and 668.3(3) for failure by the defense to prove that any physicians ever advised plaintiff to undergo any surgical procedure to alleviate their symptoms. This subject was further discussed in *Mathieson v. Vanderlinden*, 2001 WL 1443840 (Iowa App. 2001). In that decision, the Supreme Court affirmed the District Court in its refusal to submit a mitigation instruction despite testimony from physicians that smoking cigarettes and using codeine compounded the plaintiff's fibromyalgia and headaches. The basis of this decision was there was a failure to prove the third prong of the *Greenwood* decision that there be proof of a causal connection between the plaintiff's failure to mitigate and his damages. There was additional discussion in *Vasconez v. Mills*, 651 N.W.2d 48 (Iowa, 2002). Plaintiff sustained a closed head injury among other injuries. Defendant submitted evidence from a neuropsychologist that plaintiff's lingering emotional distress may not be entirely related to the accident. The court refused to submit the defendant's requested mitigation instruction based on the *Greenwood*'s test because defendant failed to bear the burden to prove counseling would have reduced the damages sought and that plaintiff never refused to follow medical advice.

The problem involving the Burden of Proof is especially true in Chronic Pain Syndrome cases where the current thought among treating Neurologists and Pain Specialists is that no treatment has been adequately proven to keep acute soft tissue injury from becoming chronic. The argument that had been effective before *Greenwood* that patients who delay in their treatment onset, jump from practitioner to practitioner, or fail to follow proper advice probably will no longer allow the submission of the mitigation defense to a jury.

Second, defense counsel in chronic soft tissue cases will frequently encounter treating chiropractic practitioners. If you submit the proposed uniform jury instruction you should anticipate an objection to the term "medical advice and treatment." The probability of you obtaining an

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MITIGATION REVISITED . . . *continued from page 9*

endorsement of the Court in use of the term "medical advice and treatment" over objection is suspect. In one Johnson County District Court case tried in September of 2002 the following instructions were requested and submitted by an experienced trial judge.

REQUESTED JURY INSTRUCTION NO_____

Defendants claim plaintiff's injuries were increased because [he][she] failed to exercise ordinary care to obtain reasonable medical treatment to mitigate [his][her] damages.

Evidence has been introduced that damages could have been reduced to some extent if [he][she] had obtained prompt proper medical treatment, took medication, and did [his][her] exercises. An injured person has no duty to undergo serious or speculative medical treatment. But if by reasonable expense and by reasonable inconvenience a person exercising ordinary care could have reduced the damages, [he][she] has a duty to do so.

Defendant must prove all of the following propositions:

1. Plaintiff failed to mitigate [his][her]damages;

2. Plaintiff's failure to mitigate damages contributed toplaintiffs damages;

3. The date that the plaintiff's failure to mitigate began to cause the plaintiff's damages;

4. The amount of damages that the failure to mitigate caused.

If defendant has proved all of these propositions, plaintiff's recovery may be reduced by some amount the damages awarded after any other reductions for comparative fault. If you allocate a percentage, I will apply this percentage after any other reduction for comparative fault to reduce Plaintiff's total recovery.

SUBMITTED JURY INSTRUCTION NO_____

The defendants claim the plaintiff's injuries were increased because [he][she] failed to exercise ordinary care to obtain reasonable health care to mitigate damages.

Evidence has been introduced that damages could have been reduced to some extent if [he][she] had obtained earlier and consistent health care. An injured person has no duty to undergo serious or speculative health care to pursue or persist with a particular course of health care treatment, but if by reasonable expense and by reasonable inconvenience a person exercising ordinary care could have reduced the damages, [he][she] has a duty to do so.

An injured person is under no duty to follow a health care provider's advice in order to minimize damages but is only under a duty to use ordinary care in the matter of following such advice. The injured person's obligation under the mitigation doctrine is one of ordinary care. If you find there were more effective options available to [him][her], this does not necessarily mean [he][she] failed in her obligation to exercise ordinary care.

Defendant must prove all of the following propositions to establish their defense:

1. Plaintiff failed to mitigate [his][her]damages;

2. Plaintiff's failure to mitigate damages contributed to plaintiffs damages;

3. The date that the plaintiff's failure to mitigate began to cause the plaintiff's damages;

4. The amount of damages that the failure to mitigate caused.

If defendant has proved all of these propositions, plaintiff's recovery may be reduced by some amount the damages awarded.

The third unresolved question involves issues of whether trial courts are called upon to decide how to

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THE IMPORTANCE OF THE SUDDEN EMERGENCY DOCTRINE IN IOWA . . . *continued from page 4*

of negligence might apply and directs the jurors to the definition of the specification (which states a violation of this duty is negligence).

We all know that typically in a sudden emergency, the actor has committed a negligent act (such as running a stop sign when the brakes fail) but the instruction on sudden emergency clearly tells the jury they may excuse the conduct when an emergency exists. This instruction defines Iowa law. Failing to state the law of emergency causes confusion because the jurors, without the sudden emergency instruction, have to somehow understand the court's directive that "this specification is negligence" verses the definition of "ordinary care". Ordinary care is never mentioned in the marshalling instruction, where the analysis of liability is summarized. These are all difficult subjects for law students, let alone lay jurors.

Clearly the Court has held that every day driving situations will not allow for an instruction on the doctrine. In *Weiss v. Bal*, 501 N.W.2d 478, 481-82 (Iowa 1993), the Court determined that a child darting through cars in a parking lot should be a driving condition one might expect and should be prepared to handle. Failing to stop suddenly in a long line of cars where the lead car died, will not warrant a sudden emergency defense for the last driver. *Beyer v. Todd*, 601 N.W.2d 35, 38-40 (Iowa 1999). The Court has also stated that sun blinding a driver also should be expected and driving should conform accordingly. *Vasconez v. Mills*, 651 N.W.2d 48, 54-55 (Iowa 2002). These were all deemed "foreseeable" situations that are not uncommon in usual driving.

Last year, the Iowa Court of Appeals and the Iowa Supreme Court split on a sudden emergency case in *Foster v. Ankrum*. *See*, 636 N.W.2d 104, 106 (Iowa 2001) *and* No. 99-1680 (Ia App. 2001). Ankrum's vehicle backed into Foster's foot when Ankrum and his driver attempted to escape a video store parking lot as Ankrum was being assaulted. The Iowa Court of Appeals determined that the Sudden Emergency instruction should have been given by the trial court. The Court of Appeals viewed the evidence in the light most favorable to Ankrum and determined they were confronted with unforeseen circumstances necessitating immediate action. The unusual circumstances of being attacked in a car and fleeing for safety did not require the normal precautions. The Court of Appeals determined that the conventional negligence instruction was not sufficient for all negligence cases. The case was remanded for new trial on liability.

Foster sought further review and the Iowa Supreme Court agreed with the trial court's decision to not allow the sudden emergency instruction. The Supreme Court analyzed the amount of time Ankrum's driver had to react. *Foster v. Ankrum*, 636 N.W.2d 104, 106 (Iowa 2001). The Court stated: "[i]t was 'probably ten to fifteen seconds' after the altercation began before Strutz stepped on the accelerator." *Id*. at 107. Having ten to fifteen seconds to assess the situation and take action is not a sudden emergency. *Id*. The Supreme Court held that having ten to fifteen seconds to think and to act was sufficient time to make judgment calls and drive off without striking the plaintiff, even though the passenger was being struck and pulled out the window of the car. *Id*.

The *Ankrum* decision further states that "the doctrine of sudden emergency has fallen into considerable criticism and has even been abandoned in some jurisdictions." *Id*. The concern was the "tendency to 'unduly emphasize one aspect of the case,' although we have not rejected the doctrine." *Id.* Finally, the Court noted that use of the instruction in Ankrum would not just preserve the doctrine, but expand it beyond its appropriate scope. *Id.*

It is now clear that for conduct to be legally excused by the sudden emergency doctrine, the event characterized as an "**emergency** must compel 'if not an instantaneous response, certainly something fairly close to that.'" *Id.* The instruction, not unlike the "child darting" instruction, must be maintained to alert jurors to the law of Iowa since this is such a difficult area to understand given all of the instructions submitted in negligence cases. We must not forget that jurors do have difficulties understanding instructions that appear to conflict on their face and the clearer we can be on the law, in lay terms, the more likely justice will be served.

SCHEDULE OF EVENTS

February 21, 2003

Iowa Defense Counsel Association
Board Meeting
Des Moines Club
Des Moines, IA

April 25, 2003

Iowa Defense Counsel Association
Board Meeting
Des Moines Golf & Country Club
West Des Moines, IA

April 25, 2003

Iowa Defense Counsel Association
Commercial Law & Litigation Seminar
Des Moines Golf & Country Club
West Des Moines, IA

June 5-6, 2003

Iowa Defense Counsel Association
Board Meeting
Ameristar Hotel
Council Bluffs, IA

June 6-7, 2003

Defense Research Institute
Mid-Regional Meeting
Ameristar Hotel
Council Bluffs, IA

September 24-26, 2003

Iowa Defense Counsel Association
Annual Meeting & Seminar
Des Moines Marriott Downtown
Des Moines, IA

CASE COMMENT
McNALLY & NIMERGOOD V. NEUMANN-KIEWIT CONSTRUCTORS

. . . *continued from page 5*

Justice Cady, writing for the Court, stated:

> . . . the distinction between contracts that explicitly mention the indemnitee's own fault or negligence and those that do not was never intended to create a fixed limitation on our rule of construction. We have long recognized that indemnity contracts do not need to expressly state that the indemnitee will be indemnified for its own negligence if the clear intent of the contractual language provides for such indemnification.
>
> Thus, our rule of construction does not actually require the contract to specifically mention the indemnitee's negligence or fault as long as this intention is otherwise clearly expressed by other words of the agreement.
>
> Moreover, our tendency to find general, all inclusive indemnification contracts to be insufficient to create indemnity for the indemnitee's own negligence is only a guideline, not a strict principle. *To hold otherwise would mean that the contract would need to contain a specific reference to the indemnitee's own negligence before such indemnification would be permitted. This is not our rule.* [emphasis added]

McNally & Nimergood v. Neumann-Kiewit, 648 N.W.2d at 572.

In reaching its decision, the Court focused on the language of exclusion contained in the Neumann lease, finding that the broad language provided that Neumann would indemnify McNally for all damage caused by the crawler while in its possession except for the damage caused by "defects in the equipment." The Court held that the language of exclusion contained in the lease demonstrated the intent of the parties for Neumann to indemnify McNally for McNally's own negligence except for defects in the equipment itself.

> The only purpose of the exclusion would be to express the intent for Neuman to be responsible for all damages, regardless of the cause, except for those damages caused by a defect in the crane.
>
> Thus, the contract entered into by the parties expressed a clear intent for McNally to be indemnified for its own negligence, unless that negligence was based on or attributable to a defect in the crane.

McNally, 648 N.W.2d at 573.

The impact of the *McNally* decision is not only limited to the

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CASE COMMENT
McNALLY & NIMERGOOD V. NEUMANN-KIEWIT CONSTRUCTORS . . . *continued from page 12*

scope of indemnification under broad, general indemnification contracts where exclusions to the indemnitee's negligence is contained, but potentially has far-reaching implications for commercial general liability policies. For instance, the standard form CGL policy excludes liability to an employee of the insured for injuries arising out of or in the course of employment with the insured and applies where the insured is liable as an employee or in another capacity, except such exclusion does not apply to liability assumed under an insured contract. Typically, an insured contract is defined as:

> . . . that part of any other contract or agreement pertaining to your business under which you assume the tort liability for another party to pay for bodily injury to a third party or organization. Tort liability means a liability imposed by law in the absence of a contract or agreement.

Under *McNally*, an indemnification agreement which heretofore would have been construed as not indemnifying the indemnitee for his own negligence would not be construed to be an insured contract. However, under the Court's decision in *McNally*, a broad indemnification agreement such as that in *McNally* would now fall within the scope of an insured contract and would provide coverage to the indemnitee for the indemnitee's own negligence.

For example, if an assumed X and Y entered into an agreement whereby X agrees to indemnify Y against liability for injuries to X's employees and others which may arise as a result of X's performance of any work under the contract, except for defects in the product supplied by Y, prior to *McNally*, the indemnification agreement would have been construed as not indemnifying Y for Y's own negligence. However, under *McNally*, since there was a specific exclusion as to what the indemnity agreement does not cover, in this case defects in products supplied by Y, the indemnification agreement may be interpreted as covering Y's negligence and if a standard CGL policy was in place, it may be an insured contract.

Under the general rules of contract construction, the *McNally* case is not breaking new ground. However, based on a long series of cases prior to *McNally*, contracts for indemnity were narrowly construed and contrary to Justice Cady's statement, there was a bright line test. With *McNally*, Courts are now free to give indemnity agreements the full and complete force as intended by the parties.

EDITOR'S CONCERNS . . . *continued from page 16*

principles proposed by the Family Law and ADR Sections that could have been interpreted to favor mandatory mediation.

It was interesting to note that during the discussions, one explanation for the need to have this mandatory method of conflict resolution is that the Judges in Marshall, Polk, Linn and Johnson Counties have requested this dispute resolution method. This is similar to the justification for the need for alternate dispute resolution in Small Claims Court in many counties. It is also similar to efforts by the legislature to save costs.

Since the December 3, 2002 meeting, communications with the chief judges of the eight judicial districts have resulted in responses from the First, Seventh and Eighth Districts opposing mandatory mediation in family law cases.

If the impetus for change in our judicial system comes from the State's Judges, I urge you to try to communicate our concern and support to the Judges in your district. A proper method of doing so would be in those instances where you have one-to-one or two-to-one communications in a pre-trial conference or settlement conference setting. I also urge you to use restraint in domestic relations and all other cases where it is possible to avoid unnecessary contested litigation. Finally, I would ask you to consider ways to alleviate the budget constraints currently hampering the judicial system. Your thoughts would be greatly appreciated. Once we are able to decide how to best approach our Governor, Chief Justice, Bar Association Board of Governors, and the Legislature, I assure you the Litigation Section and the other trial groups will do so to avoid any incursions into the public's access to the court system.

During the December 3, 2002 meeting, we were all advised by the Bar Associations' lobbyist Jim Carney that we should anticipate legislation in the following areas:

(1) Title Insurance;
(2) Medical Malpractice;
(3) Nursing Home Negligence; and
(4) Punitive Damages.

The Iowa Defense Counsel Legislative Committee met on December 11, 2002. They have proposed legislation in the following areas:

(1) Amend Iowa Code Chapter 677 to stop the running of all prejudgment interest from the date that the successful offer to confess judgment is served;

(2) Repeal the five percent (5%) cap on the reduction of a plaintiff's damages for failure to use a seatbelt and/or safety harness as provided in Iowa Code Section 321.445(4)(b); and

(3) Repeal Iowa Code Section 228.9 so that psychological records and test data would be discoverable as are other medical records as provided in the Iowa Rules of Civil Procedure and Iowa Code Section 622.10.

In addition, we were advised that we should also anticipate budget cuts in the already financially deprived judiciary budget. This may well accompany an effort to move forward on redistricting. The primary thrust for this effort from the legislature seems to be to save costs. I urge you to familiarize yourself with the pending redistricting plans. When you do, please register your thoughts in this area, along with any others referred to in this editorial, with your local legislators, particularly if they are your clients.

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

MITIGATION REVISITED . . . *continued from page 10*

disputes more efficiently.

5. The Judicial Branch Redistricting Advisory Committee was well formulated. It operated on principles that should be universally accepted by almost every member of the legal family. (See pp. 23-24 of the report.) It is hard to imagine a process that would have brought more diverse and interested parties to the table. Some say the process was rushed. But can we really afford to go through the 2003-2004 fiscal budgeting process without a plan to respond to the financial pressure and service demands in our State? Some say the recommendations were based on faulty assumptions. They question the methodology and conclusions of the National Center for State Courts reported to the Supreme Court in 2002. These matters were debated and considered when the Redistricting Committee reported. No deliberative body with all those affected at the table could have done any better. Setting up another Committee or Commission might come up with a different result, but will the process really be more fair?

The Redistricting Committee Report is the beginning of a process to help make the Judicial Branch more responsive to the citizens of Iowa. As we lend our voices to the debate, we should deal with facts. The legal family must speak together to the extent it can. If the leadership of the Iowa Legislature perceives gridlock between Bench, Bar, and Court Officials, it will take one of three courses. It will continue to handle judicial budgetary requests as it does other budgetary requests, funding some, not funding others, reflecting the revenues of the State and competing interests. Second, the Legislature will continue to increase its demands on the Court for services without additional funding. As the State increasingly becomes involved in societal disputes, the Court will increasingly serve as referee. Finally, the Legislature will take up the issue of judicial redistricting on its own and it will become a political issue with all that means. We might not like their changes at all. Irrespective of what the Court chooses (or has chosen to do), Bench, Bar and Court Officials need to agree on the principles they can to move this issue forward. The times cry out for the leadership of the legal profession. We all need to respond.

(The Final Report of the Judicial Branch of Redistricting Advisory Committee can be found on the Iowa Judicial Branch web site.)

apportion fault for mitigation in addition to comparative fault for negligence. There has been no definitive solution to this issue provided to date.

Most of these cases have settled post judgment after motions for new trial are overruled. Possibly one of the reasons these cases settle is due to these unsettled questions. This unsettled area allows some room for discussion and proper lawyering in negotiations. Counsel should be ready to make the proper record pre-jury submission at the close of all the evidence to preserve the arguments on this point for appeal and then utilize these objections in an effort to resolve the case during or before appeal.

I urge you to review the following decisions to determine if your case is the correct vehicle to take any of these issues before the Iowa Supreme Court to try to help us all to understand this area better. These mitigation issues remain somewhat unclear and probably favor claimants currently. Defense counsel must pick the correct set of facts to bring the issues back before the Supreme Court to try to resolve the unanswered questions that remain.

EDITOR'S CONCERNS . . .

By: Bruce L. Walker, Iowa City, IA

As we approach the new year and legislative session, all trial lawyers, judges and judicial staff should be interested in the proposals that will reach the floor of the Iowa House of Representatives or Senate. We should anticipate significant numbers of proposals due to the fact that there are more new legislators than in years past.

An area of immediate concern to the entire judicial system is the reintroduction involving mandatory pre-trial or pre-filing mediation in the area of child custody and visitation, see HF 678, that was vetoed by Governor Vilsack last year. This proposal will probably be reintroduced.

The position of the Iowa State Bar Association, Litigation Section, the Iowa Academy of Trial Lawyers, Iowa Association of Trial Lawyers, Iowa Chapter of American Board of Trial Advocates, and Iowa Defense Counsel Association has been to consistently oppose any measure that will restrict the public's access to the court system. This position will not change on the issue of mandatory mediation in this area or in any other.

Dialogue has been initiated with the Chairs of the Domestic Relations and Alternative Dispute Resolution Committees to coordinate resistance to this proposal with their committees and to avoid conflicted positions among these Bar Association groups. However, these committees have proposed principles that favored mandatory mediation but not legislation.

The Iowa State Bar Association Board of Governors on December 3, 2002 refused to adopt the statement of

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