

# defense UPDATE

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## NEW FEDERAL RULES ADDRESSING ELECTRONIC DISCOVERY

By: Michael W. Thrall, Nyemaster, Goode, West, Hansell, & O'Brien, P.C., Des Moines, IA

**“Electronic discovery is no longer exceptional. It is now routine and likely to become even more so.”**

*-Judge Lee Rosenthal, S.D. Texas  
Chair of the Civil Rules Advisory Committee*

Electronic discovery is becoming more prevalent because, increasingly, the information that becomes evidence is being created, communicated, stored, and maintained in an electronic format. The Sedona Conference,<sup>1</sup> estimates that 93% of information today is first generated in digital format.<sup>2</sup> The Conference estimates that 70% of corporate records are stored in electronic format.<sup>3</sup> Of the staggering amount of electronic information that is generated, an estimated 30% is never printed to paper.<sup>4</sup> Those numbers have undoubtedly increased since the Sedona Conference began its work.

The role and importance of technology have mushroomed over the last decade. Technology touches virtually every aspect of our lives from how we work, how we play, and how we communicate. The scope and magnitude of electronic data received, transmitted, and utilized by businesses is overwhelming. It should come as no surprise, therefore, that discovery in today's litigation has increasingly focused on this electronic information.

Electronic discovery presents unique issues. The volume of electronic data maintained by both individuals and companies alike is staggering. The reasons are countless, but certainly the fact that technology now enables us to maintain documents, which would have previously filled a small warehouse on a shoebox of compact discs has made

it all too easy to keep and maintain all sorts of data and information. In addition, technology is changing almost daily. Changes in networks, software, and systems present an ever-changing terrain when trying to identify and produce relevant information. Furthermore, the data itself is many times incomprehensible when it is separated from the software and systems on which it was created. The informal nature of e-mail as well as the ability to retrieve data and communications embedded in electronic documents makes review of data for assertion of claims of attorney-client privilege or attorney-work product particularly challenging. Finally, the cost of locating and retrieving data and information, particularly when the producing party has not adequately planned for the inevitable document request, is many times staggering.<sup>5</sup>

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<sup>1</sup> The Sedona Conference Working Group on Best Practices for Electronic Document Retention, and Production consists of leading jurists, lawyers, experts and consultants in this field who addressed electronic document production, electronic records management, and related issues and have published recommendations, best practices and principles for addressing these issues which can be obtained on the Sedona Conference website, [www.thosedonaconference.org](http://www.thosedonaconference.org).

<sup>2</sup> The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (January 2004). (“Sedona Principles”).

<sup>3</sup> Id.  
<sup>4</sup> Id.

<sup>5</sup> Commercial electronic discovery revenues have been projected at \$1,295,000,000, up 56% from 2004, a year in which revenues had increased a staggering 94% from the year before. 2006 Socha-Gelbmann Electronic Discovery Survey. See <http://www.sochaconsulting/2006survey.htm>.

## MESSAGE FROM THE PRESIDENT



**Mark S. Brownlee**

Until I joined the board several years ago, I had little idea how much effort is devoted by so many people to maintain the quality of our organization.

A large hope and goal of mine is to ensure that our members are aware of the wide array of services available to them. The IDCA does much more than organize the fall and spring seminars, as good as they are. The IDCA offers many other services of value to defense counsel. These services are well-described on the IDCA website, found at [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org). They include an expert database, jury verdict information, a members' forum, information about IDCA publications and upcoming events, a member directory and helpful links to courts, legal associations and law schools. I encourage you to utilize these services as much as possible and we welcome any comments or suggestions you might have to improve them or otherwise enhance the value of your membership. We are extremely fortunate to have the services of our outstanding Associate Director, Julie Garrison, who will gladly receive and pass on any such comments or suggestions.

A lot of people have worked hard over for a lot of years to build the IDCA into a strong and useful organization. It will grow stronger and more useful through your support and participation as the members for whom it exists. Take advantage.

Mark S. Brownlee  
IDCA President

As this is my inaugural President's Message, I would have hoped that I would have something insightful or provocative to say. Regrettably, I do not. I do, however, want to express that I feel privileged to serve the IDCA, although it is intimidating to follow a long list of such dedicated and successful predecessors.

## IDCA WELCOMES NEW MEMBERS

**Thomas M. Boes**

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# IS DUE PROCESS DEAD FOR UNDERINSURED MOTORIST CARRIERS?

By: Brian Ivers, McDonald, Woodward & Ivers, P.C., Davenport, IA

When is an underinsured motorist (“UIM”) carrier bound by an excess verdict obtained by its insured against a tortfeasor? In many instances, this issue does not arise because when there is any potential for an excess verdict, the plaintiff generally sues the UIM carrier in the underlying action as a defendant. The UIM carrier then moves to sever prior to trial and agrees to be bound by any resulting verdict. However, there are occasions when the UIM carrier is not sued in the underlying action and a verdict in excess of the tortfeasor’s liability limits is obtained. Until recently, it was not particularly clear whether the UIM carrier would be bound by this excess verdict. In the recent cases of *Wilson v. Farm Bureau Mutual Insurance Company*, 714 N.W.2d 250 (Iowa 2006) and *American Family Mutual Insurance v. Petersen*, 679 N.W.2d 571 (Iowa 2004) the Iowa Supreme Court has indicated it favors binding the carrier in most instances. Before discussing these two cases, further explanation of the issue is warranted.

At the mandate of the Iowa Legislature, a UIM policy provides that a UIM carrier is bound to pay what an insured is legally entitled to recover from an underinsured tortfeasor. See Iowa Code 516A.<sup>1</sup> (2004). While Chapter 516A provides no defi-

nition of “legally entitled to recover”, the Iowa Supreme Court has determined that the only reasonable interpretation of legally entitled to recover is that it means the insured must have suffered damages caused by the fault of the underinsured motorist and be entitled to receive those damages. *Wetherbee v. Economy Fire & Cas. Co.*, 508 N.W.2d 657, 661 (Iowa 1993). However, the Iowa Supreme Court has never clearly defined the method by which legally entitled to recover is proven by an insured. At first blush, one would assume that an excess verdict against an underinsured tortfeasor establishes what the insured is “legally entitled to recover” against the UIM carrier. However, binding a UIM carrier, to a verdict where it was not a party to the lawsuit, seemingly violates the carrier’s due process rights. See, *Van Oort Constr. Co., Inc. v. Nuckoll’s Concrete Service, Inc.*, 599 N.W.2d 684, 690 (Iowa 1999) (it is a due process violation for a litigant to be bound by a judgment when the litigant was not a party or a privy in the first action and therefore never had an opportunity to be heard).

Many jurisdictions avoid this “due process” problem by binding the UIM carrier to an underlying verdict if the carrier is given notice of the underlying action, the right to intervene, and

may actually **participate in the underlying trial as a party**.<sup>1</sup> In those jurisdictions, due process is fulfilled because a UIM carrier has the right to intervene and fully protect itself as a party at the trial against the tortfeasor. If the insurance carrier chooses not to intervene, then it is bound by the underlying verdict. However, in Iowa no such procedure has ever been established by the Iowa Supreme Court. In fact, in Iowa such a procedure would not be possible under the current state of the law. Unlike these other jurisdictions, the Iowa Supreme Court has rightfully held that a UIM carrier should be severed and not allowed to participate in a trial against the tortfeasor because the introduction of insurance in the underlying lawsuit will inflate the verdict against the tortfeasor. *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247 (Iowa 1991).

So how is a UIM carrier’s due process rights protected in Iowa? Historically, this has not been a problem because the Iowa Supreme Court had indicated that **issue preclusion** determines whether an insurance carrier is bound by an underlying verdict. See *Mizer v. State Auto. and Cas. Underwriters*, 195 N.W.2d 367 (Iowa 1972); *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247 (Iowa

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<sup>1</sup> See *Id.* (stating it is further clear that our holding herein is conditioned upon and rests upon the compliance by the insured with the fundamentals of procedural due process. The carrier would not be bound unless given full notice and adequate opportunity to **intervene and defend** when the insured litigates the issues of liability and damages with the uninsured motorists tort-feasor(emphasis added)); see also *Keel v. MFA Ins. Co.*, 553 P.2d 153, 159 (Okla. 1976) (stating upon a trial courts discretionary determination that no prejudice will result in litigating **all of the issues in one trial**, the insurer is bound by the judgment as to all issues....(emphasis added)); *Fisher v. Allstate Ins. Co.*, 961 P.2d 350, 355 (Wash. 1998) (stating the benefits of joining the UIM insurer and tortfeasor in a single action outweigh any conflict between an insurer and insured **as well as the injection of insurance into that trial** (emphasis added)); *West Am. Ins. Co. v. Popa*, 723 A.2d 1, 5 (Md.1998) (holding uninsured/underinsured motorist carrier is entitled to be a party **throughout the trial of the tort case** (emphasis added)); *Heisner v. Jones*, 169 N.W.2d 606, 612 (Neb. 1969) (holding a carrier not bound unless given full notice and adequate opportunity to intervene and defend).

# THE “I’M SORRY” LAW – A NEW INSTRUMENT FOR PROFESSIONALS AND THE DEFENSE

By: Erik S. Fisk, Whitfield & Eddy, P.L.C., Des Moines, IA

## I. Introduction

On May 24, 2006, Governor Vilsack signed into law House File 2716, a bill for an act relating to civil actions for personal injury or death, including certain evidentiary, reporting, and procedural requirements. A section of the bill added Iowa Code Section 622.31, otherwise referred to as the “I’m Sorry” law, which excludes evidence of a professional’s apology or other expression of sympathy following an adverse outcome.

While initially drafted with health care professionals in mind, early legislative compromise expanded the protection to all licensed professionals. By passing the law, Iowa joins a growing trend of states taking a fresh approach to “tort reform” by equipping health care professionals with the protection to be honest and empathetic with their patients without fear that these statements will come back to haunt the health care professional in subsequent litigation. This article will examine the new law and its basic protections; place the law in context with the reform movement that created it; examine its principal purposes and aims; and review existing law and similar protections already afforded Iowa defendants to envision what the new law may mean for the defense practitioner.

## II. The Mechanics of the New Law

The I’m Sorry Law can be found in Iowa Code Section 622.31, which provides:

### Evidence of Regret or Sorrow

In any civil action for professional negligence, personal injury, or wrongful death or in any arbitration proceeding for professional negligence, personal injury, or wrongful death against a person in a profession represented by the examining boards listed in section 272C.1 and any other licensed professional recognized in this state, a hospital licensed pursuant to chapter 135B, or a health care facility licensed pursuant to chapter 135C, based upon the alleged negligence in the practice of that profession or occupation, that portion of a statement, affirmation, gesture, or conduct expressing sorrow, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that was made by the person to the plaintiff, relative of the plaintiff, or decision maker for the plaintiff that relates to the discomfort, pain, suffering, injury, or death of the plaintiff as a result of an alleged breach of the applicable standard of care is inadmissible as evidence. Any response by the plaintiff, relative of the plaintiff, or decision maker for the plaintiff to such statement, affirmation, gesture, or conduct is similarly inadmissible as evidence.

HF 2716, codified at Iowa Code § 622.31 (2005 & Supp.).

The section applies to a civil proceeding or arbitration for “professional negligence, personal injury, or wrongful death.” This limits the types

of actions under which a professional may be accorded the protection and further delineates that the protection applies to those statements made relating to the “discomfort, pain, suffering, injury, or death of the plaintiff” (or plaintiff’s decision maker) “as a result of an alleged breach of the applicable standard of care.” Accordingly, a professional does not appear to gain the protection of the statute for civil actions unrelated to the practice of his/her profession.

There are a number of striking features to this Code section. The first is that the section applies to a “hospital” licensed under Iowa Code chapter 135B and a “health care facility” licensed under Iowa Code chapter 135C. “Hospital” is defined in Iowa Code section 135B.1(3) to generally include a place devoted to diagnosing, treating, and caring for an individual suffering from illness, injury, or deformity, over a period exceeding twenty-four hours (and excludes hospice), and “health care facility” is defined in Iowa Code section 135C.1(6) to include residential care facilities, nursing facilities, and intermediate care facilities for persons with mental illness or retardation. These appear to be the only entities afforded protection under this section.

Accordingly, the officers or boards of hospitals and health care facilities can make statements protected by Iowa Code section 622.31, independent of any individual professional or professionals involved. This protection may be of value to these entities

# STANDARDS FOR THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY IN IOWA

By: Kevin M. Reynolds and John H. Moorlach, Whitfield & Eddy, PLC, Des Moines, IA

## I. Introduction

An important issue confronting defense practitioners in Iowa is the standard for the admissibility of expert witness testimony. This article discusses this subject as applied in both Iowa state and federal district courts, identifies the important similarities of the two approaches currently, and concludes with a suggested standard to govern all cases in Iowa in the future.

## II. The Iowa State Court Standard

Although many Iowa cases discussing the rules of evidence are criminal cases, the same rules apply in civil cases as well. *See* Iowa R. Evid. 5.101. Whether a civil or criminal case, Iowa Rule of Evidence 5.702, and attendant common-law standards, govern the admissibility of expert witness testimony in Iowa state courts.

### A. Iowa's Common-Law Standard.

Iowa courts “are committed to a liberal rule regarding the admissibility of expert witness opinion evidence.” *See Hylar v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996) (citing *Wick v. Henderson*, 485 N.W.2d 645, 648 (Iowa 1992)). Iowa appellate courts have also been deferential to the district court in the exercise of its discretion in this area. *See, e.g., Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997). However, these statements are more in the nature of general philosophy rather than the delineation of a useful test for the admissibility of expert testimony. Although most state ju-

risdictions follow either the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) or, as more recently set forth, in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Iowa follows neither. As for *Frye*, the Iowa Supreme Court explained in *State v. Hall*, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981), that:

We believe that the rationale of *Frye* should apply insofar as it bears upon the *reliability* of the proffered evidence. Accordingly, we do not believe that “general scientific acceptance” is a [separate] prerequisite to admission of evidence, scientific or otherwise, if the reliability of the evidence is otherwise established.

*Hall*, 297 N.W.2d at 85 (emphasis added). As to the “general acceptance” criteria, this is the same conclusion reached in *Daubert* thirteen years later. *See* 509 U.S. at 589 (“*Frye* made ‘general acceptance’ the exclusive test for admitting expert scientific testimony. That austere standard, absent form . . . should not be applied in federal trials.”).

Until 1980, Iowa courts required that, when a party proposed expert testimony based upon new or developing areas of science or technology, that party carried the burden of showing that the subject matter on which the expert’s opinion relied was “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *State v. Hall*, 297 N.W.2d at 84 (quoting *Frye*, 293 F. at

1014). Over time, the *Frye* “general acceptance” rule was routinely applied to determine the admissibility of all scientific evidence, regardless of novelty, in many jurisdictions. *Hall*, 297 N.W.2d at 84.

The Iowa Supreme Court, in *Hall*, went on to outline the factors that indicated why the proffered evidence—a bloodstain analysis—was reliable. *Id.* These factors were: 1) the expert’s “considerable experience and status as the leading expert in the field;” 2) “the existence of national training programs;” 3) recognized “organizations for experts in the field;” 4) major schools offering the course in the subject matter; 5) common place use of bloodstain analysis by police departments; 6) annual seminars on the subject; and 7) publications devoted to the subject matter. *Id.* The Court explained that determination of the reliability of any expert testimony is, necessarily, an ad hoc exercise in which the complexity of the subject matter plays a critical role. *See id.* (stating that “the foundation for neutron activation analysis, [for example], would require greater input from the scientific community . . . than blow-ups of handwriting exemplar, ballistic comparisons, or tire tracks.”). This is not to say that scientific acceptance should not be considered; rather, it becomes another factor that a trial court may take into account when determining *reliability*, particularly in those cases where the “the outcome of the trial may well turn on [an expert’s] opinion” in new or experimental fields. *See id.* at 85–86 (quoting from *State v. Conner*, 241 N.W.2d

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Courts, parties, and their attorneys have struggled to balance the many costs and other considerations that arise with conducting discovery in what has now been coined the “Information Age.” The learning curve has been steep and many companies and their counsel have suffered hard lessons as judges have levied sanctions in a number of highly publicized spoliation cases.

The Federal Rules of Civil Procedure could not have anticipated and did not adequately address these issues when they were originally promulgated. Accordingly, over six years ago, the Civil Rules Advisory Committee of the United States Judicial Conference began to study amendments to the Federal Rules of Civil Procedure to address electronic discovery. The results of the Committee’s efforts are reflected in proposed rules to the Federal Rules of Civil Procedure which were approved by the United States Judicial Conference on September 20, 2005. The Rules took effect on December 1, 2006.<sup>6</sup>

The amendments provide a welcome framework and source of predictability in an ever changing and dynamic area. The amendments address five general areas. The Civil Advisory Committee describes these areas as early attention to electronic discovery issues, discovery into electronically stored information that is not reasonably accessible, procedures for asserting claims of privilege protection after

production, interrogatories and request for production involving electronically stored information, and sanctions for a certain type of loss of electronically stored information.<sup>7</sup>

### **Early Attention to Electronic Discovery Issues**

The amendments mandate early attention to electronic discovery issues in Rules 16, 26(a), 26(f), and Form 35.

### **Planning Conference – Fed. R. Civ. P. 26(f)**

Rule 26(f) requires the parties “as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)” to confer and address a number of specified issues relevant to the management to the case. The amendment to Rule 26(f) adds a number of topics to be discussed by the parties pertaining specifically to electronic discovery. Under the amendments, parties are to confer as to “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>8</sup> In addition, the parties are directed to discuss “any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.”<sup>9</sup> The parties are further

encouraged “to discuss any issues relating to preserving discoverable information.”<sup>10</sup>

The reference in the amendment to Rule 26(f) to preservation discussions will likely serve two purposes. First, it should remind counsel of the duty to preserve relevant evidence and promote early discussions with the client as to the existence, location, and extent of relevant electronic data and information. Indeed, the amendment and recent cases virtually mandate those discussions occur at the outset of the case. Secondly, discussion of preservation issues with opposing counsel should help identify any unique preservation issues. For example, if a plaintiff in an employment discrimination case knows or believes an employee of the defendant sent e-mails relevant to the subject of the litigation, the specific identification of that employee and the need to preserve those e-mails should help avoid future disputes or disagreements over the extent to which electronic data and information was preserved.

Significantly, the amendment does not endorse preservation orders. Indeed, in the Committee Note, the Advisory Committee specifically states that “the requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders.”<sup>11</sup> To the extent preservation orders are entered, the Advisory Committee cautions that they

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<sup>6</sup> Many state courts are following suit. The Iowa Supreme Court is considering and is expected to soon issue proposed amendments to the Iowa Rules of Civil Procedure addressing electronic discovery.

<sup>7</sup> Report of the Civil Rules Advisory Committee (May 27, 2005) (“Report”). (The references to the proposed rules and committee notes in this article are to the rules and committee

<sup>8</sup> Fed. R. Civ. P. 26(f)(3).

<sup>9</sup> Fed. R. Civ. P. 26(f)(4).

<sup>10</sup> Fed. R. Civ. P. 26(f).

<sup>11</sup> Proposed Rule 26(f), committee note.

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should be “narrowly tailored” and issued ex parte “only in exceptional circumstances.”<sup>12</sup>

Parties are encouraged to discuss “any issues” which may relate to the disclosure or discovery of electronically stored information. The amendment allows parties the flexibility and freedom to raise whatever issues they believe may arise in the specific litigation. The expressed purpose of this amendment is to get issues relating to electronic discovery on the table early so that they can be addressed and resolved before either side invests substantial time and expense in an uncoordinated, random approach to electronic discovery.

The “form or forms” in which electronic discovery should be produced is perhaps the most important of the electronic discovery topics to be discussed by counsel. A producing party may maintain electronic data and information in many different forms. More importantly, parties will have many options as to the form or forms in which the electronic information is produced. There are currently no standards for how electronic data and information should be produced. Several groups are in the process of promulgating such standards in an effort to provide uniformity in litigation. However, those standards have not yet been finalized.

Whether documents are to be produced in “native format” or in a standardized format such as “.pdf” or “.tiff” are significant issues that will impact both how data is assembled as well as it

is ultimately produced. You should consider whether you need all of the documents produced in native format. The existence and content of metadata and other embedded data may not be relevant to all of the categories of documents that you request. Certainly, one readily appreciates the need to obtain an Excel spreadsheet in native format so as to ascertain the formulas utilized in making the computations reflected on the spreadsheet.<sup>13</sup> However, native format may not be necessary for other categories of documents.

One should also consider the software to be used to review the electronic information. Some software programs require or at least recommend that data be received in a specific format such as “.tiff.”

Counsel should further consider tailoring their discovery requests to the specific case. The volume of electronic data has increased exponentially the dilemma of having a semi-trailer full of documents delivered in response to an overly broad discovery request. Today, literally warehouses full of documents may be maintained electronically and available for production. An overly broad request may now result in the production of the equivalent of literally several semi trailers on a number of compact discs.

As previously discussed, the nature of electronic data presents unique issues for the preservation of attorney-client privilege and attorney-work product protection. The amendment requires the parties to discuss these is-

issues in the initial conference. The rule also suggests discussions as to a procedure to assert such claims after production. The Committee Note provides some insight as to the types of procedures that may be considered by a party. One proposed procedure, known as the “quick peek,” would allow the responding party to produce requested documents for an initial examination without the waiver of any privilege. After the requesting party has identified the documents or categories of documents it wishes to be produced, i.e. the “quick peek,” the responding party would then conduct its privilege review. This procedure enables a responding party to avoid the cost of conducting a privilege review of all of the documents and the resulting delay to the requesting party that such a review necessarily entails.

Another suggested procedure is what has become known as a “claw-back agreement.” Under this arrangement, the parties agree that the production of documents shall not constitute a waiver of the privilege so long as the responding party sometime subsequent to the production identifies the privileged documents and requests their return. Other voluntary arrangements will undoubtedly develop as parties address these issues. These arrangements are, however, voluntary. Existing substantive law as to the waiver of privilege is developing and its application to these voluntary agreements as yet unclear.

At least one court has cautioned against blind reliance on such agree-

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<sup>12</sup> Id.

<sup>13</sup> See *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005).

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ments to preserve privilege notwithstanding the new rule.<sup>14</sup> Chief Magistrate Judge Paul W. Grimm from the District of Maryland cautions “[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule.”<sup>15</sup> Courts do not agree as to whether or under what circumstances inadvertent production waives the attorney-client privilege or attorney-work product protection.<sup>16</sup> Courts have generally employed one of three approaches to the inadvertent production of privileged documents. Some courts apply a “strict accountability” approach under which any disclosure, whether intentional or inadvertent, waives the privilege.<sup>17</sup> At the other extreme, some courts employ a more lenient approach finding a waiver only if the disclosure was knowing and intentional or the result of gross negligence.<sup>18</sup> Finally, a number of courts employ a balancing test, weighing a number of factors to determine whether to excuse the inadvertent disclosure.<sup>19</sup> Before entering into any agreements as to privileged documents, one must review the applicable law in the jurisdiction in which the case is pending and in any jurisdiction in which that privilege may be challenged.

The Eighth Circuit has expressly re-

jected the lenient approach.<sup>20</sup> While the Eighth Circuit has yet to definitively apply either of the two alternative approaches – balancing test or strict test – in a federal question case, the Eighth Circuit has applied the “balancing” test in a diversity case applying Missouri law.<sup>21</sup> In doing so, the Eighth Circuit spoke disapprovingly of the strict test which finds a waiver in any production, whether inadvertent or intentional, observing that the strict test would likely impede and chill necessary attorney-client communications.<sup>22</sup> The “balancing” or “middle of the road” test requires a case-by-case fact specific analysis applying the following factors:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production,
- (2) the number of inadvertent disclosures,
- (3) the extent of the disclosures,
- (4) the promptness of measures taken to rectify the disclosure, and
- (5) whether the overriding interest of justice would be served by relieving the party of its error.<sup>23</sup>

As the Eighth Circuit observed, this test “accounts for the errors that inevitably occur in modern, document-intensive litigation, but treats carelessness

with privileged material as an indication of waiver.”<sup>24</sup> The balancing test has been followed in both the Northern and Southern Districts of Iowa.<sup>25</sup>

Judge Grimm ultimately upheld the parties’ agreement as to the inadvertent production of privileged documents but stressed the importance, if not the necessity, of a court order.<sup>26</sup> Accordingly, counsel is well advised to incorporate the provisions of their agreement into the court’s order approving the scheduling order and discovery plan or otherwise ensure the court’s involvement in the process. Furthermore, Judge Grimm cautioned against relying solely on the agreement and counsels parties to still conduct reasonable pre-production reviews.<sup>27</sup> This is particularly sound advice in jurisdictions such as the Eighth Circuit applying a balancing test.

Obviously, counsel will need to familiarize themselves both with the substantive issues in the case as well as how their client creates, maintains, and stores electronic information very early in the case for the conference to be of any value. Some courts already mandate this type of involvement by counsel in the preservation of relevant documents and information. Judge Shira A. Scheindlin in the fifth of her

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<sup>14</sup> Hopson v. Mayor and City Council of Balt., 232 F.R.D. 228, 234 (D. Md. 2005).

<sup>15</sup> Id.

<sup>16</sup> Id. at 235.

<sup>17</sup> Id.

<sup>18</sup> Id. at 235-36.

<sup>19</sup> Id. at 236.

<sup>20</sup> Lutheran Med. Ctr. of Omaha, Neb. v. Contractors, Laborers, Teamsters & Eng’rs Health & Welfare Plan, 25 F.3d 616 (8th Cir. 1994). Judge Grimm incorrectly lists the Eighth Circuit as a jurisdiction applying the most lenient rule finding waiver only if the inadvertently producing party is grossly negligent. Hopson, 232 F.R.D. at 235-36.

<sup>21</sup> Gray v. Bicknell, 86 F.3d 1472, 1483-84 (8th Cir. 1996).

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id. at 1484.

<sup>25</sup> See Engineered Prods. Co. v. Donaldson Co., Inc., 313 F. Supp. 2d 951, 1020-22 (N.D. Iowa 2004); Beavers v. Hobbs, 176 F.R.D. 562 (S.D. Iowa 1997).

<sup>26</sup> Hopson, 232 F.R.D. at 240.

<sup>27</sup> Id. at 244.



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*Zubulake v. UBS Warburg* decisions,<sup>28</sup> imposes rather daunting obligations on counsel in litigation. Whether and to what extent courts in other jurisdictions impose the breadth of obligations imposed by Judge Scheindlin on counsel remains to be seen.<sup>29</sup> Nevertheless, whether viewed as requirements or simply guidelines, Judge Scheindlin's opinion is instructive.

Judge Scheindlin summarized the "steps that counsel should take to ensure compliance with the preservation obligation" as follows:

*First*, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

*Second*, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key play-

ers should be periodically reminded that the preservation duty is still in place.

*Finally*, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.<sup>30</sup>

While Judge Scheindlin cautioned that these precautions may not be enough in some cases (or may be too much in others), they represent her requirements in a "typical case."<sup>31</sup>

The Advisory Committee's statement in the Committee Note that "failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes" has served omnipresent given recent sanction awards arising out of the parties failure to adequately and timely address their duty to preserve electronic evidence.<sup>32</sup>

### Required Disclosures – Fed. R. Civ. P. 26(a)

The change to Rule 26(a) clarifies that the duty to disclose or describe documents in the possession, custody, or control of the party that may be used to support that party's claims or defenses includes "electronically stored information." The Advisory Committee acknowledged that it may be difficult for a party or its counsel at this early stage in the litigation to be able to fully and completely disclose this information. The Advisory Committee contemplates that a party may be required to supplement its initial disclosures as additional information is discovered. However, for the reasons discussed above, early, thorough attention to this issue is advised.

### Scheduling Order – Rule 16(b), Form 35

Changes are further proposed to Rule 16(b) and the topics which may be included in the scheduling order to be submitted by the parties. Mirroring the

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<sup>28</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V"). Judge Scheindlin's decisions in *Zubulake* represent a veritable treatise on electronic discovery. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I"); *Zubulake v. UBS Warburg LLC*, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) ("Zubulake II"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III"); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV").

<sup>29</sup> Judge Scheindlin's decision has not yet been cited in a reported decision of the United States District Court of either the Northern or Southern District of Iowa or of the Eighth Circuit Court of Appeals.

<sup>30</sup> *Zubulake V*, at 433-34.

<sup>31</sup> *Id.* at 433.

<sup>32</sup> See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

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requirements of Rule 26(a), the amendments to Rule 16(b) now provide that the scheduling order may also include “provisions for disclosure or discovery of electronically stored information”<sup>33</sup> and “any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production.”<sup>34</sup> Similar changes are proposed to Form 35.

The United States District Courts in Iowa have not yet made any changes to their form scheduling order and discovery plan, instructions, or worksheet. The amendment to Form 35 merely provides a category for inclusion of the parties’ agreement. The scope and details of that agreement will be dictated by the nature, issues, amount in dispute, technical sophistication of the parties, and a host of other factors unique to each case. Judge Grimm provided the following list of topics that he found at a minimum should be discussed by counsel in their Rule 16(f) conference:

1. the type of information technology systems in use and the persons most knowledgeable in their operation;
  2. preservation of electronically stored information that may be relevant to the litigation;
  3. the scope of the electronic records sought (i.e. e-mail, voice mail, archived data, back-up or disaster recovery data, laptops, personal computers, PDA’s, deleted data);
  4. the format in which production will occur (will records be produced in “native” or searchable format, or image only);
  5. is metadata sought;
  6. whether the requesting party seeks to conduct any testing or sampling of the producing party’s IT system;
  7. the burdens and expenses that the producing party will face based on the Rule 26(b)(2) factors, and how they may be reduced (i.e. limiting the time period for which discovery is sought, limiting the amount of hours the producing party must spend searching, compiling and reviewing electronic records, using sampling to search, rather than searching all records, shifting to the producing party some of the production costs);
  8. the amount of pre-production privilege review that is reasonable for the producing party to undertake, and measures to preserve post-production assertion of privilege within a reasonable time; and
  9. any protective orders or confidentiality orders that should be in place regarding who may have access to information that is produced.<sup>35</sup>
- This list provides a helpful starting reference for counsel in fulfilling their responsibilities under the new rule.

### **Discovery into Electronically Stored Information that is not Reasonably Accessible**

The volume of electronic data and the technical ability to retrieve and search literally every source of information have presented troublesome cost allocation issues in litigation. One no longer questions whether one can locate the proverbial needle in the haystack. Rather the questions have shifted to at what cost and at whose expense will that needle be retrieved. As Judge Francis observed in *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, “Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”<sup>36</sup>

Early cases struggled with how to allocate costs, developing a number of different approaches to the assessment of costs in electronic discovery issues.

In *McPeck v. Ashcroft*, Judge Facciola applied a marginal utility test in determining how to assess the costs associated with electronic discovery.<sup>37</sup> The court held “the more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense.”<sup>38</sup> The court held “the less likely it is, the more unjust it would be to make the agency search at its own expense.”<sup>39</sup>

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<sup>33</sup> Fed. R. Civ. P. 16(b)(5)

<sup>34</sup> Fed. R. Civ. P. 16(b)(6)

<sup>35</sup> Hopson, 232 F.R.D. at 245.

<sup>36</sup> *Rowe Entm’t, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002) (“Rowe Entertainment”).

<sup>37</sup> *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (“McPeck”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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In *Rowe Entertainment*, Judge Francis employed a balancing approach.<sup>40</sup> The court balanced the following considerations in determining how to assess costs associated with the electronic discovery in that case:

1. the specificity of the discovery requests;
2. the likelihood of discovering critical information;
3. the availability of that information from other sources;
4. the purposes for which the responding party maintains the requested data;
5. the relative benefit to the parties of obtaining the information;
6. the total cost associated with production;
7. the relative ability of each party to control costs and its incentive to do so; and
8. the resources available to each party.<sup>41</sup>

Judge Scheindlin modified the *Rowe* factors and looked to the following in *Zubulake v. UBS Warburg LLC*:

1. the extent to which the request is specifically tailored to discover relevant information;
2. the availability of such information from other sources;
3. the total cost of production, compared to the amount in con-

- troversy;
4. the total cost of production, compared to the resources available to each party;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the parties of obtaining the information.<sup>42</sup>

Other organizations such as the Sedona Conference developed their own set of criteria.<sup>43</sup>

The amendment to Rule 26(b)(2) “is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.”<sup>44</sup> The amendment adopts what it refers to as a “two-tier” system.<sup>45</sup> Under the amendment, a party must produce otherwise discoverable information that is in an electronic format if it is “reasonably accessible.”<sup>46</sup> “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>47</sup> The initial burden of establishing the information “is not reasonably accessible because of undue burden or cost” in a motion to compel production of electronic information lies with the party from whom discovery is sought.<sup>48</sup>

If that showing is made, the burden shifts to the requesting party to demonstrate “good cause.”<sup>49</sup> In ascertaining whether or not “good cause” has been shown, the court is specifically directed to consider the limitations of Rule 26(b)(2)(C).<sup>50</sup> Those limitations include whether “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, (iii) the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>51</sup> The court may specify such conditions as it deems appropriate for the discovery.<sup>52</sup>

### “Reasonably Accessible”

Whether the electronic information is “reasonably accessible” is specifically tied to the burden or cost of its provision. The Committee did not expand the definition beyond that point, noting that “it is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.”<sup>53</sup> In this respect, the Committee recognized how quickly specific terminology became outdated in earlier amendments and

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<sup>40</sup> *Rowe Entertainment*, 205 F.R.D. at 429.

<sup>41</sup> *Id.*

<sup>42</sup> *Zubulake I*, 217 F.R.D. at 322.

<sup>43</sup> Sedona Principles

<sup>44</sup> Proposed Rule 26(b)(2), Committee Note.

<sup>45</sup> Report, p. 63.

<sup>46</sup> Fed. R. Civ. P. 26(b)(2)(B).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Fed. R. Civ. P. 26(b)(2)(C).

<sup>52</sup> Fed. R. Civ. P. 26(b)(2)(B). Rule 26(b)(2)(C) was formally known as Rule 26(b)(2)(B).

<sup>53</sup> Proposed Rule 26(b)(2)(B), Committee Note.

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how quickly technology changes.

The responding party need not incur the costs of identifying the specific electronic information that is not “reasonably accessible” and not being produced. Rather, the rule requires only that the party identify the “sources” of that information by “category or type,” and the reasons why it is not reasonably accessible.<sup>54</sup> At a minimum this requires the responding party to identify the medium on which the electronic information exists, its location and type, the specific burden or cost of production, and specific reasons why the electronic information is not “reasonably assessable.”

### “Good Cause”

The amendment specifically incorporates the language of what previously existed as Rule 26(b)(2)(B), renumbered 26(b)(2)(C). The rule requires a balancing of the costs and the potential benefits of discovery. The Committee Note contains a discussion of what will be viewed as “appropriate considerations” which will include:

(1) the specificity of the discovery requests; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that can-

not be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.<sup>55</sup>

The Committee Note acknowledges that the good cause determination “may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation.”<sup>56</sup> The Committee Note suggests in those instances that “focused discovery” which may include “sampling of the sources” may be needed by the parties before a determination could be made by the court.

### Preservation Whether or not Electronic Information is “Reasonably Accessible.”

Whether electronic information is “reasonably accessible” does not relieve a party from its duty to preserve relevant information. All potentially relevant information should be retained until the court has made a determination as to whether or not the responding party will be required to produce that information notwithstanding the fact that it may not be “reasonably accessible.” A party would be well advised to seek an earlier judicial determination by filing a motion for protective order as to its obligation to preserve electronic information that is not “reasonably accessible” if it does not want to wait for the requesting party’s motion to

compel before destroying any potential sources of relevant information.

### Procedure for Asserting Claims of Privilege in Work Product Protection After Production

While not limited to electronic discovery, the amendment to Rule 26(b)(5) was certainly motivated by the unique issues posed by the protection of privilege in electronic data and information. As the Committee Note observes, “when the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.”<sup>57</sup>

The new rule for the first time sets forth a specific procedure to be followed when privileged documents or information are inadvertently produced. The new rule requires the producing party to notify any party that received the information that it is subject to a claim of privilege or protection as trial preparation material and the basis for that claim. After being notified, the receiving party “must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.”<sup>58</sup> The privileged information must be sequestered or destroyed even if it has been incorporated into the receiving party’s attorney’s trial preparation materials or

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<sup>54</sup> Id.

<sup>55</sup> Proposed Rule 26(b)(2)(C), Committee Note.

<sup>56</sup> Id.

<sup>57</sup> Proposed Rule 26(b)(5)(B), Committee Note.

<sup>58</sup> Fed. R. Civ. P. 26(b)(5)(B).

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work product.<sup>59</sup> The receiving party also has the affirmative duty under the new rule to "take reasonable steps" to retrieve information to the extent it was provided to a third party prior to being notified of the claimed privilege nature of the document or information.<sup>60</sup> The receiving party "may promptly present the information to the court under seal for a determination of the claim."<sup>61</sup> Finally, the producing party has the affirmative obligation to preserve the information until the claim is resolved.<sup>62</sup>

Notably, the amendment does not address nor attempt to resolve the substantive issue as to whether or not the inadvertent production of the document constitutes a waiver of the privilege. Rather, the rule simply provides a framework within which such issues can be determined by the court. As the Committee Note states, the amendment "is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time consuming efforts to reduce the number of inevitable blunders."<sup>63</sup>

A provision in the originally published rule that would have required the producing party to assert the claim of privilege within a "reasonable time period" was stricken from the rule after receipt and consideration of public comment by the Committee. That is

not to imply, however, that the assertion of privilege within a "reasonable time" is not important. The law of many jurisdictions, including the Eighth Circuit,<sup>64</sup> require or at least consider whether or not privilege is asserted within a reasonable time as a factor in determining whether or not there has been a waiver of the privilege. The reference to "reasonable time" in the rule was deleted consistent with the Committee's intent to avoid making the rule in any respect substantive.

The Committee Note provides additional guidance as to the notice required under the rule.<sup>65</sup> The Committee suggests that the notice be in writing unless circumstances dictate otherwise such as the assertion of a claim of privilege during deposition.<sup>66</sup> The Committee further suggests that "the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and determine whether waiver has occurred."<sup>67</sup>

### **Interrogatories and Requests for Production Involving Electronically Stored Information**

The amendment to Rule 33 simply clarifies that the option to produce business records afforded under Rule 33(d) includes the option to produce electronically stored information.<sup>68</sup> As with the option to produce all business

records, the burden of deriving or ascertaining the answer must be "substantially the same for the party serving the interrogatory as for the party served."<sup>69</sup> The Committee Note provides further guidance as to the application of the rule when dealing with electronically stored information.<sup>70</sup> The Committee Note provides:

Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and

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<sup>59</sup> Proposed Rule 26(b)(5)(B), Committee Note.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Proposed Rule 26(b)(5), Introduction.

<sup>64</sup> See discussion, *infra*, at 7-9.

<sup>65</sup> Proposed Rule 26(b)(5)(B), Committee Note.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Fed. R. Civ. P. 33(d).

<sup>69</sup> Fed. R. Civ. P. 33(d).

<sup>70</sup> Proposed Rule 33(d), Committee Note.

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provide the answer itself rather than invoke Rule 33(d).<sup>71</sup>

More extensive changes were made to Rule 34 addressing production of documents. Initially, the title of the rule itself was expanded to specifically include “electronically stored information.”<sup>72</sup>

Changes were further made in the definition of documents contained in Rule 34(a).<sup>73</sup> While most, if not all, courts considered electronic information within the scope of the existing definition of “documents,” the definition is amended to specifically include “electronically stored information.”<sup>74</sup> The list of examples provided in the rule was expanded to include “sound recordings,” “images,” and data “stored in any medium.”<sup>75</sup> The definition was intended by the Committee to be “broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”<sup>76</sup>

The scope of the request was also expanded beyond inspection and copying to now include both testing and sampling.<sup>77</sup>

Additional changes were made in the procedure by which documents are

produced in Rule 34(b). The amended rule now states that “the request may specify the form or forms in which electronically stored information is to be produced.”<sup>78</sup> As discussed earlier, this topic should have been discussed as part of the parties’ initial conference and hopefully disputes as to the form or forms in which electronic information is to be produced already raised with the court. The new rule, however, specifically addresses objections to the requested form or forms for producing electronically stored information.<sup>79</sup> The responding party must not only state the reasons for the objection, but further must state the form or forms in which it intends to produce the electronically stored information.<sup>80</sup> In other words, it is not simply enough to object; the responding party must provide both the requesting party and the court with guidance as to how they believe the electronically stored information should be produced. If the request does not specify the form or forms for producing electronically stored information, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in which they are reasonably usable.<sup>81</sup> The new rule further clarifies that a responding party need not produce the same information in multiple forms.<sup>82</sup>

If the request does not specify a form or forms, a party has the option of producing electronic information in its native format as it exists on the producing party’s system or in “a reasonably usable form.”<sup>83</sup> A party cannot convert data “in ways that raise unnecessary obstacles for the requesting party.”<sup>84</sup> Tactics that were unacceptable in a paper world are no more acceptable when dealing with electronic data. For example, one cannot separate attachments from emails in a document production any more than one could separate enclosures from cover letters.<sup>85</sup> Simply dumping documents in no discernible order is no more acceptable when dealing with electronic documents.<sup>86</sup>

Metadata, however, presents its own unique considerations which is why it is so important to address the issue early in the case and to specify the form in which you want to receive the documents. A request for documents in their “native format” or for “active files” is generally understood to include a request for metadata. Similarly, a request for or production of documents as maintained in the course of a business has been held to include metadata.<sup>87</sup> As Magistrate Judge Waxse held in *Williams v. Sprint/United Management Co.*,

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<sup>71</sup> Id.

<sup>72</sup> Fed. R. Civ. P. 34.

<sup>73</sup> Fed. R. Civ. P. 34(a).

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Proposed Rule 34, Committee Note.

<sup>77</sup> Fed. R. Civ. P. 34(a).

<sup>78</sup> Fed. R. Civ. P. 34(b).

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Fed. R. Civ. P. 34(b)(ii).

<sup>82</sup> Fed. R. Civ. P. 34(b)(iii).

<sup>83</sup> Proposed Rule 34(b), Committee Report.

<sup>84</sup> Id.

<sup>85</sup> *Bergeson v. Shelter Mut. Ins. Co.*, 2006 WL 334675 (D. Kan. Feb. 14, 2006).

<sup>86</sup> *Miller v. Int’l Bus. Machines*, 2006 WL 995160 (N.D. Cal. Apr. 14, 2006); *CP Solutions PTE, Ltd. v. Gen. Elec. Co.*

<sup>87</sup> *Williams*, 230 F.R.D. at 652.

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Based on these emerging standards, the Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order. The initial burden with regard to the disclosure of the metadata would therefore be placed on the party to whom the request or order to produce is directed. The burden to object to the disclosure of metadata is appropriately placed on the party ordered to produce its electronic documents as they are ordinarily maintained because that party already has access to the metadata and is in the best position to determine whether producing it is objectionable. Placing the burden on the producing party is further supported by the fact that metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act by the producing party that alters the electronic document.<sup>88</sup>

Magistrate Judge Waxse ordered the producing party which had

“scrubbed” metadata from and “locked” cells on Excel spreadsheets to produce the electronic spreadsheets as they were maintained.<sup>89</sup> The privilege claimed with regard to certain metadata was deemed waived by the parties’ failure to object and produce a privilege log regarding the metadata.<sup>90</sup>

The law in this area is developing and will undoubtedly continue to develop as courts address these issues in specific cases.

### **Sanctions for a Certain Type of Loss of Electronically Stored Information**

Spoliation is neither new nor unique to electronic discovery. However, the volume and nature of electronic information present their own peculiar set of issues and considerations when spoliation is applied to electronic discovery. Allegations of spoliation from routine destruction of electronic data and backup tapes and highly publicized sanction awards have raised the stakes considerably for clients and their litigation counsel. Many of the sanctions have not been imposed for the affirmative intentional destruction of relevant evidence as one would traditionally have understood spoliation – feeding documents into the shredder as regulators knock on the door – but rather from the failure to suspend common document retention programs and policies. Indeed in one case, the offending party implemented a litigation hold and applied it to paper documents but

neglected to suspend the document retention program which periodically erased emails for a period of two years.<sup>91</sup> The result, a \$2,750,000 sanction and the exclusion of a number of key witnesses.<sup>92</sup>

The amendment to Rule 37(f) provides some protection to a party but it is very limited. The new rule provides in its entirety:

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.<sup>93</sup>

The rule only applies to the “routine operation” of the information system. The rule therefore contemplates that the “destruction” will have been the result of the routine application of an automated system. As described more fully in the Committee Note, “the ‘routine operation’ of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents.”<sup>94</sup>

New Rule 37(f) represents an acknowledgement of the necessity of document retention policies for today’s business. The automatic and routine de-

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<sup>88</sup> Id.

<sup>89</sup> Id. at 656.

<sup>90</sup> Id.

<sup>91</sup> United States v. Philip Morris USA, Inc., 327 F.Supp.2d 21 (D.D.C. 2004).

<sup>92</sup> Id.

<sup>93</sup> FED. R. CIV. P. 37(f).

<sup>94</sup> Proposed Rule 37(f), Committee Note.

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struction of information is essential in today's businesses. All of us have undoubtedly experienced delays and at times even failures of computers or computer systems when they become overloaded with data. Routine destruction of data and information that is no longer necessary to conduct the business is a necessary part of any information system today. Much of the information that clogs computer information systems is duplicative, outdated, could be of no conceivable relevance. Much information is routinely overridden, such as backup tapes that are maintained solely for disaster recovery purposes.

The new rule provides some protection when electronic information is deleted. However, the system or program deleting electronic information must have a valid business purpose and must be a necessary part of the information system. In other words, one cannot set up an information system to intentionally delete and destroy evidence they know will become relevant in anticipated litigation. As the Committee Note observes "a party cannot exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."<sup>95</sup>

The amendment only protects a party where the evidence is destroyed as a result of the routine, "good faith" operation of an electronic information system. Earlier drafts of the rule are in-

structive in determining the meaning of "good faith" in the adopted new rule. The initial published draft of the rule barred sanctions only if the party who lost electronically stored information had taken "reasonable" steps to preserve the information after it knew or should have known the information was discoverable in the action.<sup>96</sup> A footnote to the published rule invited comment on an alternative standard that would have barred sanctions unless the party recklessly or intentionally failed to preserve the information.<sup>97</sup> The "good faith" standard was perceived by the Committee to fall in-between the two initially published alternatives.

The Committee Note provides further guidance as to what "good faith" requires of a party. Compliance with statutory or regulatory standards applicable to the party is evidence of the parties "good faith."<sup>98</sup> Timely issuance of a reasonable "litigation hold" is further evidence of "good faith."<sup>99</sup> Meeting and conferring with opposing counsel in good faith as part of a Rule 16(b) conference to attempt to define what should be preserved and preservation in accordance with that plan should certainly help establish a party's "good faith." In addition, a party that acts quickly and reasonably to attempt to identify sources of evidence and who puts a reasonable plan in place to preserve that evidence similarly should be found to be acting in good faith.

Ignorance or "technical illiteracy" does not constitute good faith. Courts are losing patience with counsel and routinely reject counsel's proffered explanations that they do not understand technology. One district court judge rejected the excuses of a lawyer plaintiff finding the plaintiff's "claim that he is so computer illiterate that he could not comply with production is frankly ludicrous."<sup>100</sup>

"Good faith" will not, however, necessarily immunize one from sanctions. The rule recognizes that sanctions can still be imposed notwithstanding the good faith of a party in "exceptional circumstances." The only example of "exceptional circumstances" provided in the Committee Note is where a loss is "highly prejudicial."<sup>101</sup> In those cases the Committee suggests "sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct."<sup>102</sup>

The rule applies to a party's information system whether or not the party itself maintains the system. This aspect of the rule recognizes that the outsourcing of information systems is not uncommon today. A party seeking to fulfill its duty to preserve relevant evidence will be well advised to carefully consider not only on-site in-house information systems but also any outsourced off-site information systems or vendors that may have relevant evidence pertaining to the dispute.

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<sup>95</sup> Id.

<sup>96</sup> Initially published Rule 37(f).

<sup>97</sup> Id.

<sup>98</sup> Proposed Rule 37(f), Committee Note.

<sup>99</sup> Id.

<sup>100</sup> *Martin v. Nw. Mut. Life Ins. Co.*, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006). Other courts have rejected similar excuses.

<sup>101</sup> Id.

<sup>102</sup> Proposed Rule 37



## NEW FEDERAL RULES ADDRESSING ELECTRONIC DISCOVERY . . . *continued from page 16*

### **Subpoenas**

Conforming changes were made to proposed Rule 45 addressing subpoenas. These changes mirror the substantive changes discussed previously and will not be reiterated here.

### **Conclusion**

The ever-expanding role of technology in our society has necessitated amendments to the Federal Rules of Civil Procedure. The amendments represent a commendable effort to address issues facing trial attorneys and their clients today. These concepts will undoubtedly be further defined and developed by the courts as they address specific issues in the context of specific cases and facts. Further technological developments will undoubtedly dictate additional changes in the future. The speed with which technology changes has challenged our ability to keep up in many aspects of our lives. The Federal Rules of Civil Procedure will undoubtedly be no exception.

### **Appendix**

#### **Rule 16. Pretrial Conferences; Scheduling; Management**

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other

suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file motions; and
- (3) to complete discovery.

The scheduling order may also include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreement the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;
- (7) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

#### **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

##### **(a) Required Disclosures; Methods to Discover Additional Matter.**

- (1) **Initial Disclosures.** Except in categories of proceedings spec-

ified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

- (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
- (B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

##### **(b) Discovery Scope and Limits.**

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

##### **(2) Limitations**

- (A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

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(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the

burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

### (5) **Claims of Privilege or Protection of Trial Preparation Materials.**

#### (A) **Information Withheld.**

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) **Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making

the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

#### (f) **Conference of Parties; Planning for Discovery.**

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

- (1) what changes should be made in the timing, form, or requirement for disclosures under

## NEW FEDERAL RULES ADDRESSING ELECTRONIC DISCOVERY . . . *continued from page 18*

- Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (4) any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;
- (5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- (6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

### Form 35. Report of Parties' Planning Meeting

**3. Discovery Plan.** The parties jointly propose to the court the following discovery plan: (Use separate paragraphs or subparagraphs as necessary if parties disagree.)

Discovery will be needed on the following subjects:

\_\_\_\_\_

(brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled as follows:

(brief description of parties' proposals).

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows:

(brief description of provisions of proposed order).

All discovery commenced in time to be completed by \_\_\_\_\_ (date). (Discovery on \_\_\_\_\_ (issue for early discovery) to be completed by \_\_\_\_\_ (date)).

### Rule 33. Interrogatories to Parties

- (d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same

for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

### Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

- (a) Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit

## NEW FEDERAL RULES ADDRESSING ELECTRONIC DISCOVERY . . . continued from page 19

entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

**(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remain-

ing parts. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

- (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
- (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
- (iii) a party need not produce the same electronically stored information in more than one form.

### **Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions** \* \* \* \* \*

**(f) Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as

a result of the routine, good-faith operation of an electronic information system.

### **Rule 45. Subpoena**

#### **(a) Form; Issuance.**

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored

## NEW FEDERAL RULES ADDRESSING ELECTRONIC DISCOVERY . . . continued from page 20

information is to be produced.

(2) (2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

### (b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute

of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically

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stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person com-

manded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

- (3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
- (i) fails to allow reasonable time for compliance;
  - (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;
  - (iii) requires disclosure of privileged or other protected matter and no exception or waiv-

er applies; or  
(iv) subjects a person to undue burden.

- (B) If a subpoena
- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
  - (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
  - (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated,

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the court may order appearance or production only upon specified conditions.

### (d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order

discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The per-

son who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.** Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

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1991). However, in the recent *Petersen* and *Wilson* decisions, the Iowa Supreme Court seems to be straying from the issue preclusion analysis and turning to some yet to be defined procedure.

In *American Family Mutual Insurance v. Petersen*, 679 N.W.2d 571 (Iowa 2004) Petersen was assaulted by her ex-boyfriend while riding in his car. The ex-boyfriend was an uninsured motorist (“UM”). Petersen sued her former boyfriend, and obtained a default judgment. After obtaining the default judgment, Petersen sought a hearing in District Court to establish her damages. American Family was Petersen’s UM carrier. One week prior to the damages hearing, for the first time Petersen notified American Family of the hearing and her intent to seek reimbursement of those damages from American Family. American Family refused coverage and declined to intervene to defend the damages hearing. A judgment for damages was entered and American Family refused to pay and filed a petition for declaratory judgment. The trial court found there was no coverage for Petersen’s injuries.

On appeal, American Family was held not liable for the underlying judgment because of the lack of notice as was required by the policy provisions. However, one of the fringe issues involved in the appeal was whether American Family was bound by the underlying default judgment obtained by Petersen when American Family was not a party to the underlying case. Despite the prior *Mizer* and *Handley* decisions which discuss issue preclusion

as the method for determining the binding effect of an underlying judgment, the *Petersen* Court stated that:

[T]he binding effect of the tort judgment at issue in this case is not necessarily governed by the doctrine of res judicata and collateral estoppel; the language of the contract between the parties is the primary source of the parties’ respective rights. [citations omitted]. If an insured establishes legal entitlement to damages against an uninsured motorist, then the insurer is contractually obligated to pay the insured the damages as specified in the insurance policy. An insured generally satisfies the ‘legally entitled to recover’ condition of UM coverage when a valid judgment has been entered against the uninsured motorist. See *Mizer v. State Auto. & Cas. Underwriters*, 195 N.W.2d 367, 371 (Iowa 1972); see also *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247, 250 (Iowa 1991). *Petersen*, 679 N.W.2d at 584.

In so stating, the *Petersen* Court seems to be abandoning the issue preclusion analysis of *Mizer* and *Handley* to establish some “general rule” that a UM carrier is contractually bound to pay an underlying excess verdict, even when the carrier is not a party. However, what is very confusing is that the *Petersen* Court actually cites to the issue preclusion cases of *Mizer* and *Handley* as authority for this new “general rule” that issue preclusion does not govern. Given this, it is impossible to understand the Iowa Supreme Court’s reasoning here. What is clear, however, is that unlike

almost any other jurisdiction, the Iowa Supreme Court seems to be abandoning all concern for due process with respect to the insurance carrier.

In *Wilson v. Farm Bureau Mutual Insurance Company*, 714 N.W.2d 250 (Iowa 2006) a Farm Bureau insured obtained an excess verdict against an underinsured tortfeasor. This case involved a fairly complex factual scenario which must be reviewed to understand the Iowa Supreme Court’s holding.

Farm Bureau’s insured, Lily Wilson, was struck and killed by an underinsured motorist named Margie Carter. Ms. Carter had automobile insurance through Hartford Insurance Company with liability limits of \$100,000. Ms. Wilson had UIM coverage with Farm Bureau in the amount of \$100,000. Farm Bureau was never made a party to the underlying lawsuit. While Farm Bureau knew of the underlying lawsuit, it did not attempt to intervene.

At the trial of the underlying lawsuit, the jury was improperly instructed. During the trial there were allegations that Ms. Wilson was comparatively at fault for her own death. In that regard, the trial judge mistakenly submitted to the jury a comparative fault instruction that did not properly state Iowa law. The comparative fault instruction contained out-dated language to the effect that Ms. Wilson’s fault would not reduce any loss of consortium damages awarded to Ms. Wilson’s children. However, since 1997, loss of consortium damages are



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reduced by a plaintiff's comparative fault pursuant to Iowa Code Chapter 668. Apparently, no one caught this mistake before the comparative fault instruction was submitted to the jury.

At trial the jury assessed Ms. Wilson as having 20% comparative fault and awarded the Wilson Estate a favorable verdict, which included \$145,000 in loss of consortium damages for the children of Ms. Wilson. Because of the erroneous comparative fault instruction, the jury was incorrectly instructed that the loss of consortium damages would **not** be reduced by Lily Wilson's fault. However, following the verdict, the trial Judge, realizing his mistake, entered a judgment that **did** reduce the total verdict, including loss of consortium damages, by 20%. This reduced the overall verdict from \$156,836.25 to \$127,836.24.

Almost immediately following the judgment entry, faced with an excess verdict against its insured, Hartford agreed to pay its \$100,000 liability limits. The Wilson Estate accepted the \$100,000 and filed a motion to correct judgment entry asking that the judgment be raised from \$127,836.24 to \$156,836.25. In this motion, the Wilson Estate argued that the trial judge did not have the authority to reduce the verdict by Ms. Wilson's 20% comparative fault, because the incorrect comparative fault instruction became the law of the case since it was never objected to.

The Wilson Estate's purpose in filing the motion to correct judgment en-

try was to increase the amount of UIM damages Farm Bureau would owe from \$127,836.24 to \$156,836.25. Farm Bureau was not a party to the lawsuit and had no opportunity to resist the Wilson Estate's motion. To make matters worse, because Hartford had already agreed to pay its liability limits, Ms. Carter's attorney did not resist or respond to the motion to correct judgment entry in any way. At that point, the underlying case was being undefended. Consequently, the motion to correct judgment entry was granted without a hearing. In fact, the undisputed evidence showed that the Wilson Estate's attorney made two ex-parte telephone calls to the trial judge to discuss the motion to correct judgment entry. It was alleged by Farm Bureau that, because of this ex-parte communication, the trial judge granted the motion, believing he was signing an agreed-to Order.

The granting of the un-resisted motion to correct judgment entry raised the excess verdict from \$127,836.24 to \$156,836.25. After the motion was granted, the Wilson Estate immediately contacted Farm Bureau and demanded that Farm Bureau pay the Wilson Estate \$56,836.25 in UIM damages – Farm Bureau refused and the Wilson Estate sued claiming that Farm Bureau was bound by the \$156,836.25 amended judgment and was in bad faith for not paying the same.

During the course of the bad faith lawsuit, Farm Bureau offered to settle for \$27,836.24, which represented the original excess judgment after the un-

derlying verdict was reduced by 20%, but that offer was rejected by the Wilson Estate.

As is required by Iowa law, Farm Bureau's UIM policy provided that Farm Bureau was obligated to pay the Wilson Estate any underinsured motorist damages the Wilson Estate was "legally entitled to recover" from Ms. Carter. The Wilson Estate argued that the \$156,836.25 amended judgment against Ms. Carter conclusively established what the Wilson Estate was "legally entitled to recover" from Farm Bureau. Farm Bureau disagreed and raised several defenses.

First, Farm Bureau's UIM policy provided that Farm Bureau was "not bound by any judgment against any person or organization obtained without our written consent." Farm Bureau argued that it could not be bound because it was undisputed that no written consent was ever given for the \$156,836.25 amended judgment. Farm Bureau also argued that it was not bound by that amended judgment because of the principals of issue preclusion as set forth in *Mizer v. State Auto. & Cas. Underwriters*, 195 N.W.2d 367 (Iowa 1972) and *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247 (Iowa 1991).

In discussing these issues, the *Wilson* Court reiterated the new "general rule" from *American Family Mutual Insurance v. Petersen*, 679 N.W.2d 571 (Iowa 2004) that an underlying verdict generally establishes what an insured is "legally entitled to recover" against a UM/UIM carrier,

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even when the carrier is not a party to the underlying lawsuit. Again, there was no discussion of the potential violation of the due process rights of the insurance carrier. Ultimately, however, the Iowa Supreme Court relied on the consent-to-be-bound provision of the Farm Bureau policy to find that Farm Bureau was not bound to pay the amended judgment. In so doing, for the first time, the Iowa Supreme Court held that “consent-to-be-bound provision[s]” are “valid and enforceable provided the insurer does not withhold or refuse its consent without a reasonable basis to do so.” *Wilson*, 714 N.W.2d at 259. The Court went on to say:

Our holding that a consent-to-be-bound provision is valid and enforceable imposes on the insured and the insurer certain duties. Before the insured can satisfy the legally entitled to recover condition under the UIM coverage, the insured must comply with all of the other conditions of such coverage. For example, here, the UIM policy provision requires the insured to provide the insurer a copy of all suit papers when the insured sues the un-

derinsured motorist. In addition to complying with this condition, the insured must obtain a valid judgment against the underinsured motorist. Implicit in this last requirement is that the suit must be defended. Default judgments, insubstantial defenses, and collusion between the insured and the underinsured motorist will preclude the insured from satisfying the legally entitled to recover condition. In short, the insurer will not be bound by a judgment obtained through any of these means. Once the insured satisfies the legally entitled to recover condition of the UIM coverage, the insurer has an implied reciprocal duty to refrain from withholding or refusing its consent to be bound by the judgment without a reasonable basis to do so. *Id.* at 258.

The Iowa Supreme Court found that the “circumstances in which the amended judgment entry was granted” – meaning the ex-parte communication with the judge by the Wilson Estate’s attorney - “underscore the very reason for the consent-to-be-bound provision.” *Id.*

In the *Petersen* and *Wilson* decisions, the Iowa Supreme Court seemingly is abandoning issue preclusion in favor of a rule that generally binds the UM/UIM carrier to an underlying excess verdict even when the carrier is not a party to the underlying lawsuit. Intervening in the underlying lawsuit is not a viable option for the insurance carrier, because the tortfeasor will almost always move to sever because of the resulting prejudice of interjecting insurance into the trial.

Under *Handley* the UM/UIM carrier will rightfully be severed from the trial. Of course, all is not lost because the Iowa Supreme Court in *Petersen* and *Wilson* made it clear that the Court does not want to bind a UM/UIM carrier when it is unfair to do so. The notice and consent-to-be-bound policy provisions protected the insurance carriers in *Petersen* and *Wilson*. But absent these policy defenses, one must wonder whether a UM/UIM carrier is really without due process protection under the current state of the law. ■

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for at least two reasons. The first, and most obvious, is that, in the event of a multi-party suit where the physician(s)/nurse(s)/physician’s assistant(s)/etc. and the “hospital” or “health care facility” are named defendants, the defendant entity may be able to make its own statement of sorrow, sympathy, etc., without prejudice to itself or the individual defendant(s). The statute states that such statements will be “inadmissible as evidence,” and does not specify against whom; hence, the protection appears to run in favor of either the individual defendant or the entity defendant, regardless of which one makes the statement. More importantly, because entities enjoy the statute’s protection, they may be prompted to institute policies to convey the protected sentiments in the event of an adverse outcome, without concern that such statements would subsequently be used against them. The value of such policy is more fully examined under Part II of this article.

The second striking feature is the breadth of professions afforded the protection. The section protects persons in a profession represented by the examining boards listed in Iowa Code Section 272C.1, which covers, among others, boards licensing real estate agents, architects, engineers, morticians, physicians, nurses, and “[a]ny professional or occupational licensing board created after January 1, 1978.” Iowa Code § 272C.1(6)(y) (2005). An amendment on Wednesday, March 22, 2006, shortly after the bill was introduced on March 8, expanded the provision’s protection to all licensed professionals. Tim Higgins, *Bill Lets Doctors Say They’re Sorry*, Des Moines Reg., at

<http://desmoinesregister.com> (Mar. 23, 2006); see also Bill History for HF 2716, at <http://www.legis.state.ia.us> (last accessed Nov. 6, 2006).

Finally, the last sentence of the section protects “[a]ny response by the plaintiff, relative of the plaintiff, or decision maker for the plaintiff to such statement, affirmation, gesture, or conduct” by rendering it “inadmissible as evidence.” A plain reading of this phrase suggests that even a statement constituting an admission or evincing the plaintiff’s comparative fault would not be admissible against the plaintiff. Issues remain as to what would constitute a “response?” An immediate verbal response? A letter sent out three days after the statement? A letter sent out a month after the statement?

The short section provides much for consideration, and it is unclear what value the statute may have in accomplishing its reform objectives. Probably more important than the mechanics of the statute, however, are its policy implications and the way in which it may lead to a different strategy in the event of an adverse outcome.

### III. The “I’m Sorry” Initiative – A “New” Litigation Strategy

The “I’m Sorry” provision is part of a comprehensive reform strategy that is quite different from the traditional “damages cap” strategy. Nearly all of the “I’m Sorry” measures are motivated by a perception of a need for change in the field of medical practice generally. Accordingly, even though Iowa’s statute applies to a broad range of professionals, the data and literature surrounding

the reform measures are focused exclusively on medical malpractice.

The so-called medical malpractice “crisis” refers primarily to the rising premiums and commensurate reduction in the number of insurers providing coverage. In 2002, the AMA declared that twelve states faced crises in their medical liability systems and thirty more (including Iowa) were beginning to show signs of problems. American Medical Association, “AMA Analysis: A Dozen States in Medical Liability Crisis,” June 17, 2002 (AMA). In 2004, it was reported that the median increase in malpractice premiums ranged from 15 to 30 percent. Kenneth E. Thorpe, *The Medical Malpractice ‘Crisis’: Recent Trends and the Impact of State Tort Reforms*, at

<http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1> (last accessed Nov. 06, 2006). The problem exists in Iowa, and the state is split on how to handle the problem. In 2004, physician’s groups lobbied for the narrowly passed \$250,000 cap on “non-economic damages” that was vetoed in May of that year. David Pitt, *Iowa House Caps Medical Malpractice Suits*, Associated Press, Mar. 11, 2004.

The consensus of opinion is that the issues surrounding the “crisis,” and its proposed solutions, pit the interests of various stakeholders – doctors, hospitals, lawyers, insurance companies, and patients – against each other. The apology initiative, according to its advocates, attempts to address the needs of all stakeholders, and some data suggests it may experience modest success.

The movement appears to be traced

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to efforts taken in 1987 by Dr. Steve Kraman, the former Chief of Staff at the Veterans Administration Medical Center in Lexington, Kentucky. Kraman encouraged doctors and other staff members to express sorrow to patients who had suffered a bad result. In addition, the hospital reviewed complaints about bad outcomes and shared the information with claimants and their families in the spirit of honest disclosure. If a doctor or the hospital discovered an error or some negligence, settlement talks began immediately. Kraman observed that, by 2000, the Lexington VA Center had settled with 170 patients and went to trial only three times. Deroy Murdock, *Sorry Works: A Prescription for Fewer Medical Malpractice Suits*, National Review, Aug. 29, 2005. Furthermore, the average payment on a claim was \$16,000, compared to the national average for other VA hospitals’ payouts of \$98,000. *Id.*

The University of Michigan hospital system reported that, since starting a similar initiative, the system cut case-loads from 260-275 claims in 2002 to 120-140 in 2005. *Id.* Furthermore, before the initiative, resolving a typical claim in 2002 involved 1,160 days whereas, in 2005, that number dropped to 320 days. *Id.* Legal costs per case fell from \$65,000 to \$35,000, and annual costs dropped from \$3 million to \$1 million. *Id.*

COPIC Insurance Companies, a Denver insurer of about 5,800 Colorado physicians, had 1,942 physicians involved in a similar initiative it called its “3-R’s Program” (Recognize, Respond to, and Resolve Medical

Errors). *Id.* Up to March 31, 2004, the insurer had 1,187 documented discussions that included families, patients, and health care providers. *Id.* The Insurer reported in 2005 that 807 of the cases were resolved by enhanced communication, payouts were made in 352 cases, 28 went to the claims department as regular cases (11 were settled without involvement of legal counsel), and only 17 remained open. *Id.* Finally, the insurer reported that the average payment in its 3-R’s program was \$5,586, as opposed to average payments outside the program of \$284,000. *Id.*

While the numbers are premature, advocates insist that the strategy works. Proponents for damage caps assert that caps work to keep premiums low, and most cite California as a model which bears the statistical fruit. Proponents of the apology strategy would argue that caps do nothing to address the staggering number of medical errors. Many cite the landmark 1999 Institute of Medicine report, which posited that as many as 98,000 deaths in the United States each year were the result of medical errors. Kohn LT, Corrigan JM, Donaldson MS, eds., *To Err is Human: Building a Safer Health System* (National Academy Press 2000); see also David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 *Medical Care* 250-260 (2000) (concluding that roughly 3.7 percent of hospital admissions were associated with an adverse event and that a quarter of those admissions were the result of negligence). Caps do not address errors.

The “I’m Sorry” law is only one

piece of this strategy, however, and it is too early to predict the precise effect Iowa Code section 622.31 will have. It does give providers (and other professionals) the opportunity to apologize without it coming back to haunt them. This is, if nothing more, an important first step.

### IV. Fitting “I’m Sorry” into Traditional Strategy

What does the “I’m Sorry” law mean for the defense bar? From a policy perspective, the law may not be groundbreaking to most because it comports with the existing policy of Iowa law, as reflected in the rules of evidence, which favor dispute settlement and the “desire for peace.” *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 216 (Iowa 1984). This policy is reflected primarily in Iowa law governing offers to compromise under Iowa Rule of Evidence 5.408 and offers to pay expenses under Rule 5.409.

Evidence of settlement negotiations is inadmissible to prove or disprove liability or damages. Iowa R. Evid. 5.408. Offers to compromise are admissible, however, if “offered for another purpose.” *Id.* The principle of exclusion under 5.408 was “designed to exclude evidence only when it is tendered as an admission of weakness of the other party’s claim or defense, not when it is tendered to prove a fact other than liability.” *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 215 (Iowa 1984) (quoting *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 921 (Iowa 1979)); see also *Graber v. City of Ankeny*, 616 N.W.2d 633, 639 (Iowa 2000) (holding that

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plaintiff’s settlement with one party could not be used by the defendant to show that a party other than itself was at fault).

What constitutes “another purpose” for which such offer may be admissible? In *Bremicker v. MCI Telecommunications Corp.*, 420 N.W.2d 427, 428 (Iowa 1988), an employee sued his employer for wages, liquidated damages, court costs, and attorney fees under Iowa Code chapter 91A. After a jury verdict in his favor, plaintiff submitted an application for attorney fees in the amount of \$8,600, and the trial court reduced the amount to \$3,000, based in part by the defendant’s offer to pay all wages demanded by the plaintiff prior to trial. *Id.* at 427. On appeal, plaintiff argued that the trial court abused its discretion, in part by violating Iowa Rule of Evidence 408 in considering the offer of settlement. *Id.* After considering the principles behind the rule, the Iowa Supreme Court declared that “[t]he offer was not considered in determining the substantive liability of MCI but rather in determining the necessary attorney fees.” *Id.* at 428. Under the Court’s analysis, “[t]his [was] ‘another purpose’ under rule 408 which would permit admission of the settlement offer.” *Id.*

Similarly, in *Miller v. Component Homes, Inc.*, plaintiff employee wrote letters to his employer demanding payment of commissions owed to him in settlement of his claim. *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 215 (Iowa 1984). At trial, plaintiff was able to submit the letters, over defendant’s objection under Rule 408, on the basis that the letters were relevant

to show whether the employer’s failure to pay was intentional, which permitted plaintiff to recover attorney’s fees under Iowa Code chapter 91A. *Id.*

Iowa Rule of Evidence 5.409 provides that: “[e]vidence of furnishing or promising to pay expenses occasioned by an injury is not admissible to prove liability for the injury.” The Iowa Supreme Court has stated that offers to pay expenses are favored because “[a]dvance payments serve to meet the economic needs of injured persons more rapidly than is possible through the court system.” *Lewis v. Kennison*, 278 N.W.2d 12, 14 (Iowa 1979).

The protection extended to offers to pay expenses, however, is similarly limited; such offers are not admissible “to prove liability for the injury.” Hence, such offers may be admissible if offered for other purposes. Accordingly, crafty practitioners can occasionally find ways around rules 5.408 and 5.409 to get potentially prejudicial statements before a jury.

The language of the “I’m Sorry” law suggests that statements protected under that section are not subject to the same danger. The section provides that such statements are “inadmissible as evidence.”

Additionally, the plaintiff’s response to such a statement is “similarly inadmissible as evidence.” It stands to reason, then, that professionals seeking the protection can be fairly assured that statements falling in those protected by the statute will not be admitted into evidence.

### V. Conclusion

When used in conjunction with the existing Iowa rules of evidence, the “I’m Sorry” law may prove to be a useful tool to allow professionals to address valid claims. The most striking thing about the “I’m Sorry” law may be that it protects statements that would usually be made immediately after the adverse outcome – when emotions are likely highest, and injured parties are most in need of expressions of sympathy or sorrow. In this way, the new law may have the most impact precisely because it permits professionals to open dialogue early in the process.

Professionals may be able to prevent the silence and “stonewalling” that many malpractice plaintiffs feel from their health care providers after an adverse outcome. With dialogue and lines of communication open, professionals probably would face a much easier task when seeking to resolve legitimate claims in a reasonable manner. ■

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447, 459 (Iowa 1976) where the case hinged on the testimony of a polygrapher's opinion).

To be admissible, expert testimony must aid the jury in resolving a disputed issue and, again, be reliable. *Johnson v. Knoxville Comty. School Dist.*, 570 N.W.2d 633 (Iowa 1997). Conversely, unreliable opinions do not assist the fact-finder and are inadmissible. *State v. Brown*, 470 N.W.2d 30, 32-33 (Iowa 1991). Testimony that the evidence or process is reliable, relied upon by other experts, or utilized in other jurisdictions tends to establish the reliability of the proffered evidence or process. *State v. Klindt*, 389 N.W.2d 670, 672 (Iowa 1986). Further, reliability may be established through the expert's qualifications and experience and based upon the factual basis supporting the expert's opinion. *Van Wyk v. Norden Lab., Inc.*, 345 N.W.2d 81, 87 (Iowa 1984). The scrutiny a court must utilize to examine scientific evidence for reliability depends upon the complexity of the information and its probable impact on the fact-finding process. *State v. Murphy*, 451 N.W.2d 154, 156-57 (Iowa 1990); *see also Hall*, 297 N.W.2d at 86 (explaining that when proposed evidence is complex and highly dependent upon the expert's subjective analysis, the court will require a much stronger showing of reliability).

In Iowa, the expert must be qualified in the subject matter before giving an opinion. *State v. Peterson*, 219 N.W.2d 665, 673 (Iowa 1974). An expert must not only be generally qualified in the field of expertise, but must also be qualified to answer each question propounded. *Wick v. Henderson*,

485 N.W.2d 645, 648 (Iowa 1992). Experts may not give opinions on matters outside the scope of their knowledge simply because they have been designated as an expert. *Oldham v. Shenandoah Comty. School Dist.*, 461 N.W.2d 690, 698 (Iowa 1983). Prior to rendering an opinion, an expert's qualifications may be tested with a *voir dire* examination. *Bornn v. Madagan*, 414 N.W.2d 646, 647 (Iowa Ct. App. 1987). The proponent of the evidence bears the burden of demonstrating its admissibility. *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1983). As a general rule, decisions concerning an expert witness's qualifications are committed to the discretion of the trial court. *Mensink v. American Grain, et al.*, 564 N.W.2d 376, 379 (Iowa 1997).

The admissibility of an expert opinion necessarily depends upon the validity of its factual foundation; without which the opinion will be inadmissible. *See Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 247 (Iowa 1989). The liberal application of rules governing expert testimony in Iowa offer this caveat: the factual basis need not be complete, however, but simply *sufficient*. The *Mermigis* Court put it this way: "[A]n incomplete understanding of the facts [does] not prevent the admission of the opinion testimony, rather it affected the weight of the evidence." *Mermigis*, 437 N.W.2d at 248. For instance, in *Ort v. Klinger*, 496 N.W.2d 265, 267 (Iowa Ct. App. 1992), the Iowa Court of Appeals affirmed the trial court's decision to allow a physician to describe, in general terms, how certain chiropractic treatment may have aggravated the plaintiff's injuries, but would not allow spe-

cific opinion about the effect on the plaintiff's injuries where the physician expert did not know type of treatment used.

As for the federal *Daubert* rule, the Iowa Supreme Court held—in a product liability case—that the non-exclusive *Daubert* factors may be used persuasively in an appropriate situation. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532-33 (Iowa 1999) (deciding to “neither adopt nor reject [*Daubert*] as a standard test for all expert-testimony cases”). In *Daubert*, the United States Supreme Court described the work of the trial court as a “gatekeeping function,” and—moving from *Frye's* deferment to the scientific community—developed the following protocol to assist trial courts in deciding admissibility of expert testimony in scientific matters:

The trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

*Daubert*, 509 U.S. at 592-93. To aid a trial court in determining the scientific validity of offered testimony and whether its reasoning or methodology can be applied to the facts, the Court provided these non-exclusive factors: 1) whether the theory or tech-

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nique could be, or had been, tested; 2) whether the theory or technique had been subjected to peer review and publication; 3) known or potential rate of error; and 4) general acceptance within a relevant scientific community. *Id.* at 593–94. The *Leaf* Court stated that the *Daubert* factors might be “helpful” in a “complex” or scientific case. *Id.* at 533–34; compare *Mensink*, 564 N.W.2d at 381 (Iowa 1997) (refusing to apply *Daubert* in a case not involving “a highly complex matter of scientific evidence” where the expert testified that installation of a lightning protection system would reduce the chance of a structure being hit by lightning).

However, an important United States Supreme Court case that came down just one day before *Leaf*—*Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999)—held that the *Daubert* standards also apply to “garden variety” experts, who may not be espousing “scientific” testimony. To the extent the Iowa Supreme Court feels that the *Daubert* expert witness standards only apply to “complex” or “scientific” expert witness evidence, that interpretation is at odds with the Supreme Court’s view of the subject as outlined in *Kumho Tire*. *Kumho Tire* also added another non-exclusive factor for a trial court’s Rule 104 tool kit: “[An expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in that field.” *Kumho Tire*, 526 U.S. at 152. The basis for the Court’s holding in *Kumho Tire* was the language of Federal Rule of Evidence 702, which at that time was identical to Iowa Rule

of Evidence 5.702. If *Leaf* is narrowly applied, the *Daubert* factors may be used as persuasive elements only in cases involving “scientific,” rather than “technical” evidence. The *Leaf* Court relied on a medical malpractice case, *Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997) to engage in a *Daubert* analysis. In *Williams*, the Iowa Supreme Court felt compelled to apply *Daubert* because, it explained, “*Daubert* was the basis of the district court’s analysis, and the plaintiff did not object at trial or on appeal.” *Leaf*, 590 N.W.2d at 532. In *Williams*, the Iowa Supreme Court, after a thorough *Daubert* analysis helped by federal case law, came to an opposite conclusion from that of the trial court regarding the admissibility of expert opinion, and reversed the entry of a summary judgment for defendant. *Williams*, 561 N.W.2d at 828–831 (considering a case that involved the medical causation of a birth defect allegedly due to a pregnant mother’s failure to be inoculated for the chicken pox). A separate concurrence, in *Williams*, underscored the Court’s adamant refusal to adopt the *Daubert* rule, despite “the majority’s thorough and scholarly application.” *Id.* at 832 (Neuman, J., concurring). The Court’s decision in *Leaf* marks a clear movement in Iowa common law to move away from the adamant rejection of *Daubert* to allow a trial court—in carrying out its duties under Rule 5.104—to apply the *Daubert* rule when the trial court feels it may be helpful to do so.

Post-*Leaf* Iowa cases do not mention, much less discuss, the effect on *Kumho Tire* on the work of trial courts in determining admissibility of expert

testimony. Post-*Leaf* Iowa appellate court cases, however, do discuss, and implicitly affirm, the application of the *Daubert* rule when utilized by trial courts that find themselves faced with complex scientific questions. *See, e.g., State v. Holtz*, 653 N.W.2d 613, 616 (Iowa 2002) (affirming the use of *Daubert* “considerations” in a case involving an expert’s use of actuarial risk assessment instruments, but “if a trial court considers these factors, the court should focus solely on the principles and methodology, not on the conclusions they generate”); *State v. Rafferty*, 2002 Iowa App. LEXIS 1026 \* 8–9 (Iowa Ct. App. September 25, 2002) (unpublished) (affirming district court’s decision that the *Daubert* analysis, though available, is not required). What these cases reflect, among other things, is that the *Daubert* factors will only be considered by Iowa courts in the context of scientific opinion, rather than also to technical expertise as advised in *Kumho Tire*.

### **B. Iowa Rule of Evidence 5.702.**

Iowa Rule of Evidence 5.702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa’s rule on expert testimony, though identical to federal rule in the language set forth above, does not contain the following language from the

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federal rule, which was added in 2000 subsequent to *Daubert*:

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.

Fed. R. Evid. 702. Although this language is not an explicit part of Iowa Rule 5.702, these requirements are a part of the common law of expert witness evidence in Iowa, since reliability is the *sine qua non* of admissibility. See *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980); *State v. Brown*, 470 N.W.2d 30, 32–33 (Iowa 1991). Since reliability is required in Iowa, a principled argument can be made that Iowa Rule of Evidence 5.702 should be amended to include the language of the federal rule that was added in 2000.

In the most recent analysis of expert testimony by the Iowa Supreme Court—in which, interestingly, the Court did not cite Rule 5.702, (nor mention *Leaf*, much less *Daubert*)—the Court held that the testimony of claimed “experts” was not admissible and not sufficient to establish causation in a negligence case. *Yates v. Iowa West Racing Ass’n*, 721 N.W.2d 762 (2006). By engaging in a straight-forward, almost short-hand, approach to the question of expert reliability, the Court was, perhaps, signaling its reluctance to what the Court may perceive as calcifying a rigid Rule 5.104 protocol regarding expert testimony. On the other hand, perhaps the litigants did not argue the application of *Daubert* or *Leaf*.

In *Yates*, plaintiff owners of racing dogs, filed—*inter alia*—a negligence claim against a dog track, allegedly that poor track conditions caused injuries to their racing dogs. On appeal, the Iowa Supreme Court held that the testimony of three dog trainers (who were not veterinarians) was insufficient to establish causation, *i.e.*, that poor track conditions caused the injuries to the dogs. *Yates* stands for the proposition that if an expert witness is not qualified or competent to give a causation opinion, then that opinion will be held inadmissible. See *Dougherty v. Boyken*, 155 N.W.2d 488, 495 (Iowa 1968) (stating that an expert’s qualifications must be examined by the court before the testimony is admissible); *State v. Nowlin*, 244 N.W.2d 591, 595 (Iowa 1976) (before providing an opinion, an expert must disclose sufficient experience, knowledge, skill, education or training indicating the opinion will assist the fact-finder); *State v. Peterson*, 219 N.W.2d 665, 673 (Iowa 1974) (although it has broad discretion, the trial court should not admit testimony from an unqualified expert). The court must determine if a proffered expert has sufficient credentials to qualify as an expert and render an opinion. *Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 899 (Iowa 1980). In *Yates*, as a result of the exclusion of the unqualified causation testimony, the negligence claim was dismissed as a matter of law.

The *Frye* test for the admissibility of expert testimony is often viewed as less restrictive than the analysis required under *Daubert*. Nonetheless, one can make a principled argument that the *Frye* standard is actually more

restrictive than *Daubert*. See *Williams*, 561 N.W.2d at 825 (“The dilemma is that *Daubert* is both more and less restrictive of expert testimony.”) Under *Frye*, “general acceptance in the relevant scientific community” must be demonstrated before the evidence is admissible. Under *Daubert*, “general acceptance” is merely one of the non-exclusive factors a trial court may take into account. Under *Daubert*, new or cutting-edge techniques or technology might be admissible, whereas under *Frye*, it might not be if such evidence did not meet the “general acceptance” standard. This dilemma, posed by the *Williams* Court, can mean the *Daubert* rule, on the one hand, allows more science to come in since it does not have to be, *per se*, generally accepted, and on the other hand, may not allow enough science because of the scrutiny of a non-scientist—the trial judge. *Williams*, 561 N.W.2d at 825. Needless to say, the Iowa Supreme Court’s skepticism evidenced in *Williams* for the *Daubert* rule remains today. Interestingly, the *Williams* Court also foreshadowed the eventual *Kumho Tire* decision when it echoed the *Daubert* dissent’s question about whether the *Daubert* rule should apply equally to technical experts, as opposed to experts testifying from strictly scientific knowledge. *Id.*

### III. The Federal Court Standard in Iowa

Iowa’s federal courts are part of the Eighth Circuit. This federal circuit has applied *Daubert* to exclude proffered expert witness testimony in several cases. In many instances, the *Daubert* ruling has been dispositive of the case.



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Where the support of qualified expert witness testimony is lacking, motions for summary judgment have even been granted for defendants, and affirmed on appeal.

### **A. An Eighth Circuit Daubert Sampling.**

The Eighth Circuit's utilization of *Daubert* can be an important factor when deciding to remove a case filed in state court to federal court. In *Daubert*, the Supreme Court held that federal district court judges must act as gatekeepers to insure that expert testimony is reliable, relevant, and helpful to the jury. 509 U.S. at 597. Although *Daubert*, itself was limited to the admissibility of scientific testimony, the Supreme Court later held, as mentioned above, that a district court's gatekeeping responsibility applies to all expert testimony, whether or not "scientific" in nature. *Kumho Tire*, 526 U.S. at 141; see also *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1082 (8th Cir. 1999) (following *Kumho* with the reminder that "the *Daubert* reliability factors should only be relied upon to the extent that they are relevant"). The proponent of the expert testimony at issue bears the burden of showing that the testimony satisfies the requirements of Rule 702. *Bourjaily v. United States*, 483 U.S. 171, 175–176 (1987); see *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 688–692 (8th Cir. 2001) (reversing trial court's exclusion of plaintiff's expert where expert's testing, previous publication, and general acceptance of expert's theory that certain bottom-fire pneumatic nailers have a tendency to double fire, among

other things, was more than enough to meet the threshold for admissibility).

Though not required, *Kumho Tire*, 526 U.S. at 152, evidentiary hearings under Rule 702 are common; several cases in the Eighth Circuit have utilized an evidentiary hearing before deciding a *Daubert* motion. See, e.g., *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 988 (8th Cir. 2001) (affirming district court's exclusion of expert in a pharmaceutical product liability case, where district court held a four-day *Daubert* hearing on medical causation); *United States v. Davis*, 103 F.3d 660, 673–74 (8th Cir. 1996) (finding expert testimony on ballistics was admissible based on *Daubert* factors after preliminary evidentiary hearing was held); *United States v. Beasley*, 102 F.3d 1440, 1444–45 (8th Cir. 1996) (district court conducted an evidentiary hearing before trial to determine admissibility of DNA evidence); *Gier by & Through Gier v. Educational Serv. Unit No. 16*, 66 F.3d 940, 942–44 (8th Cir. 1995) (court conducted an evidentiary hearing before trial under *Daubert* on the grounds that the methodology of an expert was not reliable); *United States v. Johnson*, 56 F.3d 947, 952–53 (8th Cir. 1995) (district court held a two-day evidentiary hearing to determine the admissibility of DNA evidence under *Daubert* factors). Otherwise, the court may decide the issue on affidavits under Rule 104(a).

Though the Eighth Circuit affirms the principle that Rule 702 is "one of admissibility rather than exclusion" and a product of the federal rule's "liberal approach to relaxing the barriers

of opinion testimony," *Lauzon*, 270 F.3d at 686, in order for an expert's opinion to be reliable, the expert must have "good grounds" for his or her belief. The expert's opinion, to be reliable, must be based on scientific methods and procedures and not merely on "subjective belief or unsupported speculation." *Weisgram v. Marley Co.*, 169 F.3d 514, 521 (8th Cir. 1999), affirmed on appeal, 528 U.S. 440 (2000), quoting *Daubert*, 509 U.S. at 590.

In assessing the reliability of an expert's methodology under *Daubert* and Rule 702, the trial court must consider various factors, including: "(1) whether the theory or technique 'can be (or has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted." *Peitzmeier v. Hennessy Indus. Inc.*, 97 F.3d 293, 297 (8th Cir. 1999), citing *Daubert*, at 593–94. Additional factors have been incorporated since *Daubert*. They include: whether the technique or theory has been developed solely for purposes of litigation, *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1317 (9th Cir. 1995) (*Daubert* on remand); whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); whether the expert has accounted for obvious alternative explanations, *Claar v. Burlington N. R. R.*, 29 F.3d 499, 502–03 (9th Cir. 1994); whether the expert is "being as careful as he would be in his regular professional work outside his paid litigation consulting," *Sheehan v. Daily Racing*

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*Forms, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (following *Kumho Tire*, 526 U.S. at 152, for the proposition that *Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”); and, whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, *Kumho Tire*, 526 U.S. at 1175.

In recent decisions, courts in the Eighth Circuit have analyzed expert testimony which failed to meet the reliability standards emanating from *Daubert*. The Eighth Circuit routinely and regularly refuses to admit testimony from “experts” in product liability cases where the testimony is based on untested “theories” or speculation, where the expert has no experience with the product, or where the expert’s methods of reaching and formulating an opinion fails to comport with those methods generally accepted in the expert’s field.

In a fire subrogation case, *Fireman’s Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005), summary judgment in favor of defendant was affirmed, where plaintiff’s expert’s testimony would be too confusing for the jury. While the expert’s experiments appeared to recreate the cause of a fire in a copier, the experiments failed to address specific causation issue before the jury, leaving the jurors to reasonably conclude that the “test results were representative of actual copier operation at the time of the fire.” *Id.* at 1060. In *Unrein v.*

*Timesavers, Inc.*, 394 F.3d 1008 (8th Cir. 2005), expert testimony was excluded because the expert had furnished a design of his proposed safety features, but had not tested his proposed alternative design. In *Anderson v. Raymond Corp.*, 340 F.3d 520 (8th Cir. 2003), a products liability case concerning a type of forklift, the proposed expert testimony about the necessity of a protective guard was excluded where the expert “had never designed a forklift, a lift truck or similar machine, had never tested his guard theory, had never seen this protective device on a lift truck or similar machine, and had never designed the device he recommended.” *Id.* at 523.

In a pre-*Kumho Tire* case, *Weisgram*, the Eighth Circuit vacated the trial court’s decision to allow three experts to testify as to the cause and origin of a fire. In the lower court action, a fire investigator with the Fargo Fire Department, a master electrician from Ohio, and a metallurgist all provided testimony that the Weisgram’s space heater caused the fire in question. *Weisgram*, 169 F.3d at 518–22. Though the fire investigator “clearly was qualified as a fire cause and origin expert, there is no question that he was not qualified to offer an opinion that the [baseboard] heater malfunctioned.” *See id.* at 518 (characterizing as “sheer speculation” the investigator’s theory “the location of the throw rug when the fire started, the type of vinyl linoleum on the floor, the glue used some fifteen years prior to secure the vinyl to the underflooring, or the flammability of the vinyl or the glue”). The master electrician’s testimony was deemed flatly irrelevant as no theory was ad-

vanced that the fire’s source was electrical. *See id.* at 519–20 (looking askance that the electrician’s accounts were identical to the fire investigator’s even though the electrician never visited the burned structure and conducted no actual testing). The metallurgist’s testimony, likewise, was deemed to speculative to be admissible because he knew “practically nothing about the [baseboard] heater, or any other baseboard heater for that matter.” *See id.* at 521 (pointing out, as well, that the metallurgist performed no relevant tests and no *metallurgic* reasons for “his conclusion that the device was not properly sensing the temperature”).

### **B. Amended Federal Rule of Evidence 702.**

Federal Rule 702 was amended effective December 1, 2000, to include the last three phrases, which was intended to implement *Daubert*. A *Daubert* or Rule 702-based objection goes to the admissibility of the proffered evidence, and not merely to its weight. In *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924 (8th Cir. 2001), the Court explained:

As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion on cross-examination. Only if the expert’s opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.

*See id.* at 929–30 (quoting *Hose v.*

## STANDARDS FOR THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY IN IOWA . . . continued from page 34

*Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (internal citations and quotations omitted).

Notwithstanding the above, amended Rule 702 requires, among other things, that the expert “apply the principles and methods reliably to the facts of the case.” See Fed. R. Evid. 702(3). To this extent, amended Federal Rule of Evidence 702 can be seen as going even further than *Daubert*, which appears to focus merely on the fact that a recognized scientific methodology is employed. Expert witness testimony that is incorrect or unreliable would not meet the requirements for reliability explicitly set forth in Rule 702 as amended in 2000. See *Rudd v. General Motors Corp.*, 127 F. Supp. 2d 1330, 1336–37 (M. D. Ala. 2001) (explaining that, under *Daubert* and *Kumho Tire* that methodology or technique must be applied correctly to the facts in order for the testimony to be reliable and admissible).

When proposed expert testimony is scientific in nature, the trial judge must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-93. The Supreme Court observed that the *Daubert* inquiry is flexible. “Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” *Id.* at

594–95. In its capacity as gatekeeper, the trial court is to “separate expert opinion evidence based on ‘good grounds’ from subjective speculation that masquerades as scientific knowledge.” *Glastetter v. Novartis Phar. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). In the end, the trial court’s ultimate task is to ensure “that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.” *Daubert*, 509 U.S. at 597.

### IV. A Suggested Standard

#### A. Iowa Should Adopt *Daubert*.

The Iowa Supreme Court, in *Leaf*, found in *dicta* that the *Daubert* analysis may be “persuasive” in an appropriate “scientific” case. The *Daubert* standard was applied as the controlling standard where the issue of medical causation arose in *Williams*, where preclusion of the plaintiff’s expert’s testimony was reversed on appeal. Given Iowa’s common-law heritage of requiring expert witness testimony to be reliable before it is admissible, the application of the *Daubert* principles is not a “sea change” in Iowa law. There are many more things in common between *Daubert* and existing Iowa law than there are differences. The federal Supreme Court, in *Daubert*, and the state Supreme Court, in *Hall*, rejected the *Frye* rule as the applicable test for the admissibility of expert witness testimony. Both *Daubert* and Iowa Rules of Evidence 5.401 and 5.402 require relevance or “fit” before the testimony may be admitted, *e.g.*, the expert opinion must relate to the facts of the case.

As the court in *Daubert* stated: “[V]igorous crossexamination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” 509 U.S. at 595. On appeal, rulings on the admissibility of expert witness opinion evidence is subject to an abuse of discretion standard in both state and federal courts. See *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

If Iowa were to formally adopt *Daubert* for all cases involving the admissibility of expert witness testimony, it would simplify matters and give litigants the advantage of drawing upon relevant federal court precedent since *Daubert* was decided in 1993. This important precedent on a multitude of issues, disciplines and experts could assist and guide Iowa trial court judges (and litigants) whenever an issue of the admissibility of expert witness opinion is raised.

One might argue that there is no Iowa case which has held that the trial judge should act as a “gatekeeper” in excluding unreliable expert witness testimony. Yet, an Iowa trial court referred to its role as “gatekeeper” when it excluded the testimony of an accident reconstruction expert. See *Awan v. Albers*, 2003 Iowa App. LEXIS 735 (Iowa Ct. App. 2003) (unpublished). Also, former Chief Justice Lavorato cited to the *Daubert* “gatekeeper” terminology numerous times while implementing the test in *Williams*, although he noted that the issue of whether the *Daubert* standard applied there was not an issue preserved for

## STANDARDS FOR THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY IN IOWA . . . *continued from page 35*

appeal. 561 N.W.2d at 827. The trial court acts as a “gatekeeper” on all evidentiary rulings. Indeed, this is a fundamental role for the trial judge in any case tried to a jury. Iowa Rule of Evidence 5.104(a) or common-law pretrial motions *in limine*, which is identical to Fed. R. Civ. P. 104(a), were the genesis of the Iowa rule. A Rule 5.104(a) procedure was used to examine the admissibility of the proffered expert witness testimony in *Hall*, *Leaf*, and a whole host of other Iowa cases involving the admissibility of expert opinion evidence. Even though the “gatekeeper” terminology may be largely absent from Iowa law, this is, in fact, what Iowa trial judges are called upon to do whenever an objection to offered evidence is raised.

The Iowa Supreme Court raised specific concerns in *Leaf* about adopting the *Daubert* rule in state courts. First, the *Leaf* Court echoed past Iowa decisions, when it opined that “the *Daubert* analysis can be time consuming and costly.” 590 N.W.2d at 532 (quoting *Williams*, 561 N.W.2d at 827); *Johnson*, 570 N.W.2d at 637 (same). Yet, what appears from the federal cases in which *Daubert* is regularly applied is that it is not the *Daubert* rule’s application that triggers costly litigation, but the complexity of the issues. Indeed, from *Williams* to *Leaf*, the complaint about cost and time has been simply conclusory. *Daubert* is a flexible framework that is meant to be applied to the most straight-forward of Rule 104 decisions as it is the most complex. See *Kumho Tire*, 526 U.S. at 150 (“[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on

the nature of the issue, the expert’s particular expertise, and subject of his testimony.”). Comparing the state cases *Hall* and *Williams*—one adhering to Iowa common law and the other to the *Daubert* rule—clearly represent substantial amounts of time devoted to litigating novel areas of scientific law because of the necessity of the courts involved to assess the relevance and reliability of the offered testimony, and not due to the type of test involved or factors considered.

Related to the concern about cost and time has been the Iowa Supreme Court’s conclusion that *Daubert* would likely “only complicate [a] court’s decision.” *Leaf*, 590 N.W.2d at 531 (citing *Mensink*, 564 N.W.2d at 381). This concern is raised in the context of trying to determine the difference between scientific, as opposed to technical, opinion. In federal courts, the *Kumho Tire* decision, as discussed, put to rest any distinction—as to a Rule 104 analysis—between the two. “It seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by an particular method or technique.” Fed. R. Evid. 702 cmt. 2000 amendments (2006) (quoting *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997)). Iowa should follow this lead as well. While, as the *Leaf* Court recognized, some technical opinion is closer to the “ken of the average layman,” it should not be shielded from careful scrutiny by the trial court. As anyone who has attended a federal criminal trial can attest, a *Daubert* ob-

jection to a government agency expert is handled with great expediency either through a brief *voir dire* or a judicial decision made within moments based on the record established. In *Yates*, for example, applying the *Daubert* analysis would have yielded precisely the same result—a dog trainer can testify about a lot of things, but not about medical causation—in the same amount of time. Easy questions are easy when the facts are easy, are not made hard by the test used. Perhaps another factor in the Iowa Supreme Court’s language about cost, complication, and confusion lurks in the tension between the state and federal courts that no amount of comity can erase—the sense, justified or not, that litigation in federal court may, at times, be more expensive or complicated. This concern was not lost on the *Kumho Tire* Court when it took great pains to make plain that the *Daubert* “list of factors was meant to be helpful, not definitive,” 526 U.S. at 151, and that a “trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* the expert’s relevant testimony is reliable.” *Id.* at 152.

Another source of confusion derives from the subject matter itself and the difficulty judges have when they delve into scientific and technical areas for which they have little or no training. It was not without a grain of truth that a former law professor of one the authors chided his tort class, when congratulating them on their acceptance into law school, with the retort

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(apologies): “but we all know the only reason you are here is because you were no good at math or science.” From retort to substantial truth: studies devoted to assessing the scientific knowledge of the judiciary reveal an alarming lack of the most basic understanding of scientific theory, particularly two of the four *Daubert* criteria—falsifiability and error rates. Joelle Anne Moreno, *Eyes Wide Shut: Hidden Problems and Future Consequences of the Fact-Based Validity Standard*, 34 Seton Hall L. Rev. 89, 97 (2003). Further, many judges fail to see the distinction between the mere fact of peer review and critical analysis of the standards and procedures of the peer review process. *Id.* at 98–99. This is all to say, again, that it is not the type of judicial test that is adopted that is the most critical issue, but the willingness of the judiciary to assess difficult scientific and technical territory with diligence. Yet, as stated below, adopting the *Daubert* rule would help with just that task. This idea, of course, leads to the topic of an entirely different paper: the time and money required to support the judiciary to perform its irreplaceable task at every level.

The Iowa Supreme Court, when describing the application of *Daubert* frequently speaks of its focus on the reliability of the methodology in question and not the content of the expert’s conclusions. See *Leaf*, 590 N.W.2d at 532. At least one commentator has suggested this perception of *Daubert* kept many jurisdictions from embracing *Daubert*’s gatekeeping role, but that *Kumho Tire* “refocused the admissibility decision so that the fit/relevance prong became more relevant.” Moreno, *Eyes Wide*

*Shut*, 34 Seton Hall L. Rev. at 93; see also *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“[C]onclusions and methodology are not entirely distinct from one another.”). Again, Iowa common law, as well, has never lost sight of the need to keep the distance between an expert’s qualifications and the opinion expressed reasonable. See, e.g., *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999) (affirming the trial court’s decision to exclude opinion from scientist with an impressive academic background who wished to testify that all he needed was his “‘witch stick’ or ‘magic wand’ to detect electricity”).

Finally, the *Leaf* Court points out that Iowa is not alone in refusing to adopt the *Daubert* rule. See 590 N.W.2d at 532–533 (citing cases in Nevada, Kansas, Washington, Nebraska, and California for the proposition). In 2001, however, Nebraska shifted from the *Frye* analysis to the *Daubert* rule. See *Schafersman v. Agland Coop*, 631 N.W.2d 862, 876 (Neb. 2001) (“We are persuaded that Nebraska should join the majority of jurisdictions that have already concluded that the *Daubert* standards provide a more effective and just means of evaluating the admissibility of expert opinion testimony. Use of these standards may initially place more demands on trial and appellate courts, but will also permit those courts to ensure that juries in Nebraska are presented with expert testimony that is theoretically and methodologically reliable.”). Nevertheless, as of 2005, several other jurisdictions, in addition those listed by the Iowa Supreme Court, remain committed to either the *Frye* rule or their own com-

mon law analysis rather than adopt *Daubert*. See Products Liability Advisory Council, *Admissibility of Expert Evidence: A Synopsis of Law in 50 States* (2005) (including Alaska, Arizona, District of Columbia, Florida, Georgia, Hawaii, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Utah, and Virginia.). Others, like Iowa, have taken a mixed view, recognizing the application of *Daubert* in some instances while relying on state common law factors in others, but committing to neither *Frye* or *Daubert*. See *id.* (Alabama (as to DNA evidence), Colorado, Idaho, New Jersey (toxic tort only), Indiana, Oregon, South Carolina, Tennessee, and Wisconsin). Finally, twenty-one states have expressly adopted the *Daubert* rule. See *id.* (Alaska, Arkansas, Connecticut, Delaware, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Vermont, West Virginia, and Wyoming). If the Iowa Supreme Court should decide to embrace the *Daubert* rule, it will be in good company. See, e.g., *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 588 (Del. 2000) (adopting the *Daubert* and *Kumho Tire* interpretations of federal rule 702 where state rule was identical).

### **B. Iowa Should Apply the *Daubert* to All Experts Alike, Consistent with *Kumho Tire*.**

*Leaf*’s limitation on the use of *Daubert* persuasively in only those cases involving “scientific” expert testimony is at odds with the United States

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Supreme Court's decision in *Kumho Tire*. This unduly complicates matters because "scientific" and "technical" expert testimony must be distinguished. The only discernible distinction at present between *Daubert* and Iowa law is that in Iowa, *Daubert* is only applied to cases involving "novel," "complex" or "scientific" expert witness testimony, and it is only "persuasive" as opposed to the controlling test. The problem inherent in limiting *Daubert* to such cases is in defining what exactly constitutes a "novel," "complex," or "scientific" testimony from technical testimony. If the issue is not "complex," then the matter may not be the proper subject of expert witness testimony, since, as the evidence may not be "helpful" to the jury. See Iowa R. Evid. 5.702. Any expert witness opinion that is not based on sound science is, *a fortiori*, unreliable and should be rejected in both federal and Iowa courts. See *Kumho Tire*, 526 U.S. at 150 ("Engineering testimony rests upon scientific foundations . . . [as well as] personal knowledge or experience."). Also, under Iowa's interpretation, admissibility standards could be entirely circumvented by having an expert testify, that he or she is not basing their opinions on "science," but rather is testifying to "technical" matters. *Leaf's* limitation is also contradicted by Iowa Rule of Evidence 5.702, which groups "scientific, technical and other specialized knowledge" together, just as the federal rule does, and allows all or some to be the basis for expert witness evidence.

### **C. Iowa Rule 5.702 Should Be Amended to Mirror Federal Rule 702.**

Federal Rule of Evidence 702 was amended in 2000 to bring it into compliance with *Daubert*. Prior to December 1, 2000, the language of the state and federal rules was identical. This was also true at the time *Daubert* was decided in 1993. In the interests of consistency and judicial efficiency, Iowa Rule of Evidence 5.702 should be amended to correspond with the current federal rule. The amendment's substance is entirely consistent with well-established principles of the common law of expert witness evidence in Iowa. Expert witness opinion testimony in Iowa that is not "(1) . . . based on sufficient facts or data, "(2) . . . the product of reliable principles and methods," or involves (3) a situation where "the witness has [not] applied the principles and methods reliably to the facts of the case" is not admissible under the common law or Iowa Rule of Evidence 702. These "sufficiency" and "reliability" requirements have been an integral part of Iowa common law for many years. It would be helpful to codify them into Rule 5.702.

Second, the genesis of the Iowa Rules of Evidence was the Federal Rules of Evidence. An argument can be made that the Iowa Rules should be amended to bring them into compliance with current federal standards. *Daubert* was decided based on federal Rule 702. Iowa Rule of Evidence 702 was identical to the federal rule at the time. If the wording of both the state and current federal rules were the

same, it would give Iowa trial courts and litigants the advantage of drawing upon a vast wealth of federal law developed under federal Rule 702 and *Daubert* since 1993—as borne out in *Williams* and *Leaf*—to assist Iowa trial courts and litigants alike.

### **V. Conclusion**

It is most important to increase judicial awareness about the need to screen expert witness testimony for reliability and relevance, regardless of what formal test is used in that screening process. The standard for the admissibility of expert witness opinion evidence in Iowa could be simplified and clarified if the Iowa Supreme Court were to adopt *Daubert* in all cases involving expert testimony. The Court should also amend Iowa Rule of Evidence 5.702 to correspond with the language of Federal Rule of Evidence 702, as amended in 2000. ■

## IOWA DEFENSE COUNSEL ELECTS OFFICERS AT ANNUAL MEETING

The Iowa Defense Counsel Association elected its Officers for 2006-2007 at its Annual Meeting and Seminar in Des Moines on September 28-29, 2006 at the Hotel Fort Des Moines. Mark Brownlee of Kersten Brownlee Hendricks, L.L.P. in Fort Dodge is the new President of the Association succeeding Michael W. Thrall of the Des Moines Law Firm of Nyemaster, Goode, West, Hansell & O'Brien, P.C. Martha Shaff of Betty, Neuman & McMahon P.L.C. in Davenport was elected President-Elect and Megan Antenucci of the Des Moines Firm of Whitfield & Eddy, P.L.C. was elected Secretary. Noel McKibbin of Farm Bureau Mutual Insurance Company was re-elected Treasurer.

In addition, Joel Yunek, Mason City, Lyle Ditmars, Council Bluffs, Randy Willman, Iowa City, Gregory Witke, Des Moines, James Pugh, West Des Moines and Christine Conover, Des Moines were elected to new or additional terms on the Board of Directors. Hannah Rogers of Des Moines was also elected to the Board to serve in the Young Lawyers position.

The Iowa Defense Counsel Association's Public Service Award was presented to retiring Chief Justice of the Iowa Supreme Court, Louis Lavorato at the Association's Annual Banquet on Thursday evening. In addition, the Association recognized the contributions of a number of its



*Mike Thrall and Pam Nelson present Megan Antenucci with the Eddie Award.*



*The IDCA Board of Directors enjoys the annual banquet.*



*Mike Thrall presents Chief Justice Lavorato with the Public Service Award.*

Board members. Megan Antenucci, the Association's new Secretary, received the "Eddie" Award, named in honor of the Association's first president, Edward F. Seitzinger and presented annually to the Association's outstanding Board member. The contributions of outgoing Board

member Darrell Isaacson of Mason City were also recognized.

The Iowa Defense Counsel Seminar was an overwhelming success, featuring a number of nationally known speakers as well as attorneys and judges from across Iowa. Attendees heard presentations on persuasion in the courtroom, cutting edge trial technology, developments in electronic discovery, ethical considerations in trial and practice, as well as a number of other substantive and procedural areas. Paul H. Wieck II and Charles Harrington of the Supreme Court Commissions and Board of Professional Ethics Conduct, respectively, presented a program on the Ethics Complaint Process. Judges Ronald E. Longstaff and James E. Gritzner from the United States District Court presented during the luncheons on Thursday and Friday.

The Iowa Defense Counsel Association's 2007 Annual Meeting and Seminar has been scheduled for September 20-21, 2007 at the Downtown Marriot in Des Moines, Iowa. Information about the Association's events held throughout the year, including its Spring CLE Seminar which will be held in Des Moines on April 13, 2007 on the topic of Products Liability, as well as membership information can be obtained by calling the Association at (515) 244-2847 or through the Association website at [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org). ■

## SCHEDULE OF EVENTS

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### **FEBRUARY 9, 2007**

#### **IDCA Board Meeting**

The Suites of 800 Locust, Des Moines, IA  
 10:45 a.m. Executive Committee  
 11:00 a.m. Board Meeting/Luncheon

### **APRIL 13, 2007**

#### **IDCA Spring CLE Seminar**

Des Moines Golf & Country Club  
 1600 Jordan Creek Parkway, West Des Moines, IA  
 8:30 a.m. – 4:30 p.m.  
 Topic Products Liability

### **APRIL 13, 2007**

#### **IDCA Board Meeting**

Des Moines Golf & Country Club  
 1600 Jordan Creek Parkway, West Des Moines, IA  
 11:30 a.m. Full Board Meeting/Luncheon

### **SEPTEMBER 19, 2007**

#### **IDCA Board Meeting & Dinner**

Marriott Des Moines Downtown, Des Moines, IA  
 4:00 p.m. – 6:00 p.m.

### **SEPTEMBER 20-21, 2007**

#### **43rd Annual Meeting & Seminar**

Marriott Des Moines Downtown, Des Moines, IA  
 8:00 a.m. – 5:00 p.m. both days

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**The Editors:** Bruce L. Walker, Iowa City, IA; Thomas B. Read, Cedar Rapids, IA; Michael Ellwanger, Sioux City, IA; Kermit Anderson, Des Moines, IA; Noel McKibbin, West Des Moines, IA; Thomas D. Waterman, Davenport, IA; Kevin Reynolds, Des Moines, IA; Mark S. Brownlee, Fort Dodge, IA

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