defense UPDATE

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HELP OR HINDRANCE: PROTECTING PSYCHOLOGICAL TESTING MATERIALS IN IOWA

By: Gretchen Kraemer, J.D., Ph.D.[1], Des Moines, IA

Although experts typically are required to disclose all the bases for their opinions, Iowa is unique among the states in providing special protection for psychological test material, rendering it beyond the reach of counsel. This protection presents special challenges to counsel defending against serious claims of psychological or cognitive injury. This article provides an overview of the special protection to psychological test material, an explanation of the difference between testing material and testing data, and some thoughts on other resources that may be useful for counsel working with psychological data.

Many psychological testing materials are restricted by the publisher to licensed psychologists, or other duly qualified professional. This restriction aids in preserving the test's utility and ensuring that it will be appropriately administered and scored by qualified persons. The tests often derive their value from the fact that the testing questions are unfamiliar to the responding client. Standardized testing materials are valuable also by virtue of the fact that the same testing questions are administered to all respondents. Standardized tests permit psychologists to compare any one respondent's scores to "norms," or pools of responses providing data on how typical a given response is. The use of standardized tests renders an assessment more objective. But, if the questions and answers for the tests are widely known, individual test takers could easily prepare to provide a particular type of response, rendering the test vulnerable to manipulation. In fact, research on the subject confirms that individuals who obtain access to test content can and do manipulate test results, coach others to manipulate results, and are more skilled at avoiding measures designed to detect test manipulation. See Test Security: Official Position Statement of the National Academy of Neuropsychology, 15 Archives of Clinical Neuropsychology 383-386 (2000). In other words, if individuals get the answers, or the questions, cheating increases.

Perhaps in part to address this potential for manipulation or misuse, the Iowa legislature specially protects psychological testing material from disclosure, even in court proceedings. Iowa Code section 228.9 provides:

> a person in possession of psychological test material shall not disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in any administrative, judicial, or legislative proceeding. However, upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual shall be disclosed to a psychologist licensed pursuant to chapter 154B designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials.

Although this statute may be viewed as a worthy protection of psychological testing material, the prohibition on disclosure apparently conflicts with the requirements for experts to disclose the bases, facts, and materials underlying their opinions under Iowa Rule of Civil Procedure 1.508 or Federal Rule of Civil Procedure 26(a)(2)(B). It adds an additional

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MESSAGE FROM THE PRESIDENT

Michael W. Thrall

The Benefits of Membership

The hallmark of any association is the benefits it provides to its members. We are under increasing pressure to practice more efficiently and economically in providing legal services to our clients. We are challenged by increasing costs and overhead, rapidly changing technology, and well-organized and well-financed opposition. Today's defense practice demands a new level of organization, efficiency, and substantive knowledge coupled with the trial skills and advocacy that has always characterized our membership.

The Iowa Defense Counsel Association provides an array of services to better equip us to compete and succeed in today's litigation. Many of these benefits can be accessed through the Association's webpage. If you have not done so already, I would encourage you to log on to the webpage at www.iowadefensecounsel.org to review these services and benefits.

Iowa Jury Verdict Research

The Iowa Defense Counsel Association maintains a database for its members of jury verdicts in the State of Iowa. This comprehensive database provides counsel with ready access to information with regard to cases tried through the state. One can search the database by case caption, trial date, case type, injury type, plaintiff attorney or defendant attorney. The database is further organized by Iowa Judicial Districts providing a sufficient way to locate cases in a relevant jurisdiction. Information with regard to jury verdicts is gathered directly from the Court Administrator's Office or Clerk of Court's Office. We do not rely solely on attorneys to self-report. Accordingly, the Association's jury database prevents a much more accurate reflection of jury verdicts than those sites which rely solely on self-reporting and end up only tending to report the victories.

Expert Witness Database

The Iowa Defense Counsel has begun assembling information with regard to expert witnesses encountered in litigation throughout the state. This database will provide not only a ready source of information with regard to opposing experts, but also serve as a resource when attempting to locate a witness with expertise with whom to consult on your cases.

Member List Serve

List serves have become an increasingly effective means by which to communicate and share ideas. The Iowa Defense Counsel Association List Serve, identified as the "Member Forum" on the website, provides you an opportunity to confer with your peers and share ideas on a host of topics.

Legislative Initiatives

The Iowa Defense Counsel Association is represented before the Iowa Legislature by Robert Kreamer. The Association has been actively involved in a number of initiatives of interest to the defense bar and its clients. Of most recent note, the Associate was active in securing passage of amendments to Iowa Worker's Compensation Statute that allowed for allocation of responsibility for multiple workplace injuries between responsible employers.

Amicus Briefs

The Iowa Defense Counsel Association is available to submit Amicus Curiae Briefs in any appeal involving substantive issues of interests to the Association and its members. The Iowa Defense Counsel together with the Defense Research Institute submitted an Amicus Brief in the recent case of *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002), involving significant issues of Iowa products liability law.

Continuing Legal Education

The Iowa Defense Counsel Association's Annual Meeting remains one of the premier CLE programs in the state. This year's seminar featured a number of nationally known speakers as well as outstanding members of the state's Defense Bar, who spoke on a variety of timely substantive topics. In addition, the Iowa Defense Counsel's one-day seminar in the spring on specialized areas of practice has proven to be extremely popular with the Bar. These quality continuing education programs are available at a discount to members.

There are many challenges facing the Defense Bar today. The Iowa Defense Counsel Association is a welcome ally in that battle.

THE "STATE" OF THE "STATE-OF-THE-ART" DEFENSE IN IOWA

By: Robert L. Fanter, Des Moines, IA and Kevin M. Reynolds[1], Des Moines, IA

I. INTRODUCTION

"State of the art" is unique in that it is characterized as a complete defense to a claim based on product liability in Iowa. This defense is statutory and can be found at Iowa Code Section 668.12. That statute provides in pertinent part as follows:

> In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state of the art in existence at the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or labeled. Nothing contained in this section shall diminish the duty of an assembler, designed, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn.

This statute is very broad in its coverage, explicitly protecting all suppliers in the chain of distribution against all claims, however designated. Section 668.12 was originally enacted two decades ago in 1986 and was designed to limit the liability of product defendants. However, its effect in practice has been checkered at best. This statute was amended effective July 1, 2004, with a new section added to clarify that there is no duty to warn where dangers are open and obvious.[2] The "state-of-the-art" aspect of the statute is the subject of this article.

II. WHAT IS "STATE OF THE ART"?

After nearly 20 years of managing by the courts, what exactly is state of the art? As Justice Potter Stewart wrote in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), after acknowledging his inability to define pornography, "I know it when I see it." *Id.* at 197 (concurring opinion). As Justice Ternus noted in *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294 (Iowa 1994):

> State of the art is a confusing concept as one commentator has aptly pointed out:
>
> > And what about "state of the art?" "State of the art" is a chameleon-like term, referring to everything from ordinary customs of the trade to the objective existence of technological information to economic feasibility. Its meanings are so diverse and so easily confused that the wise course of action, I think, is to eschew its use completely.

Id. at 298 (concurring opinion; quoting J. W. Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. Rev. 734, 750-51 (1983)).

State of the art eludes easy definition. First, it is distinguishable from industry custom and practice. *See, e.g., Falada v. Trinity Industries, Inc.*, 642 N.W.2d 247, 250 (Iowa 2002)("Custom refers to what was being done in the industry state of the art refers to what feasibly could have been done.")(quoting *Chown v. USM Corp.*, 297 N.W.2d 218, 221 (Iowa 1980)); *Hughes*, 522 N.W.2d at 295 (same); *Hillrichs v. Avco Corp.*, 514 N.W.2d at 94, 98 (Iowa 1994)(state of the art is not the same as custom and practice in the industry). As discussed below, the confusion over this distinction appears to be one reason for the Court's holding in *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 291 (Iowa 1994), that state of the art is not a complete defense in an action based on failure to warn or instruct. Industry custom and practice, or "custom and practice in the industry," is what other manufacturers or suppliers are doing in terms of the design, manufacture or warnings on a product. Although it may be a relevant to the issue of state of the art, it is not the identical concept.

Second, in order for a design to be "state of the art," it must be feasible. "In products liability actions, "state of the art" refers to what feasibly could have been done." *Falada*, 642 N.W.2d at 250. "Feasibility" in the context of the state-of-the-art defense, connotes a product design that is practically, as well as technologically, sound. *Hughes*, 522 N.W.2d at 296.

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[1] Messrs. Fanter and Reynolds are members of the Des Moines law firm of Whitfield & Eddy, PLC.

[2] These changes were discussed in "Defense Update" in the Winter/Spring of 2005 in an article entitled "'Failure to Warn:' Statutory Changes in Iowa Law," George Eichhorn and Kevin M. Reynolds.

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hurdle to clear when defending a claim of psychological or cognitive injury. Further, this provision may conflict with ethical requirements of psychologists, as discussed below. How does a diligent trial lawyer work with psychological data in light of Iowa Code section 228.9?

APA Ethics Code: Distinction between test data and test materials. Just what is psychological testing material and how are materials different from the data? The American Psychological Association's 2002 Ethics Code provides helpful definitions distinguishing between data, which should be disclosed, and materials, which may be restricted to maintain test security.

9.04 Release of Test Data.

(a) The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11. Maintaining Test Security).

(b) In the absence of a claim/patient release, psychologists provide test data only as required by law or court order.

9.11 Maintaining Test Security.

The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data. Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.

Persons who put their mental state at issue by filing a lawsuit and claiming mental distress or cognitive impairment must provide access to their medical and mental health records. Typically, this involves providing a release of information. Under the definitions of the American Psychological Association, the responses of a patient/client to testing are test data, not test materials, and should be released. Likewise, under Iowa Code section 228.9, although the test materials are restricted, test data should be released in accordance with the law. Thus, with a release of information, this material should be available to counsel for the defense for investigation, cross-examination, or other legitimate purpose. The test data, or the individual responses, do not compromise test security in the same manner that release of testing materials may compromise the security and standardization of the measure. And test data, as opposed to test materials, are directly pertinent to defending a case containing a mental health or cognitive claim.

For example, in a standard Rorschach Inkblot Test, the administrator presents cards to the responding client sequentially, asking "What might this be?" The administrator then records the client's responses. The Rorschach cards are test materials, which are restricted by the publisher and cannot be disclosed under Iowa law. The responses to the cards, however, are test data, which are not precluded from disclosure by Iowa Code section 228.9, and are properly disclosed in accordance with the APA ethical code. Response sheets to measures such as the Wechsler scales of intelligence or memory, or neuropsychological measures, which contain both questions and data, might seem less straight-forward, however, the APA definitions cover these as well. The publishers of many measures provide response sheets which may include either prompts to ease recording testing data, or in some cases, provide part of the subtest itself. For example, in sequencing and coding subtests, the material and responses are presented as part of the record sheet. Here, although there is testing material included as part of the record sheet, the APA definitions specifically provide that this material is considered test data. "Those portions of test materials that include client/patient responses are included in the definition of test data." See 9.04(a) of APA Ethical Code. Thus, record sheets containing test data may be disclosed. The Iowa statute does not offer a distinction between testing materials and test data. Thus, there is a valid argument for obtaining testing data in any case where cognitive functioning is placed at issue.

Attorneys will require the assistance of a consulting psychologist to under-

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stand the meaning of the testing data, much like attorneys consult with toxicologists on the meaning of laboratory reports, or radiologists on the meaning of various scans. Providing the data to the attorney in addition to a psychologist permits the attorney to better understand the issues and to make use of the data in explaining his or her understanding and position to the court.

Objectivity and Transparency. Although Iowa Code section 228.9 would appear to protect psychologists, not all psychologists find the restriction appropriate. Ethical standards require transparency in research articles and assessments. The underlying data and assumptions should be presented and available for scrutiny. So long as the security of the test materials are maintained, the data and interpretations derived from the data should be available for review and for cross-examination.

The Specialty Guidelines for Forensic Psychologists, promulgated by the American Psychology-Law Society/Division 41 of the American Psychological Association, require disclosure of psychological test data. Section VI. B. states:

> Forensic psychologists have an obligation to document and be prepared to make available, subject to court order or the rules of evidence, all data that form the basis for their evidence of services. The standard to be applied to such documentation or recording *anticipates* that the detail and quality of such documentation will be subject to reasonable judicial scrutiny.

(emphasis in the original). Thus, the ethical guidelines applicable to forensic work anticipates the necessity of making psychological testing data available.

The goals of objectivity and transparency also guard against scientific fraud, or the perception of fraud. Unfortunately, there are rare cases in which a test may be mistakenly scored, a test or subtest given but eliminated from the analysis, or an unfounded interpretation provided. Like other disciplines, there are occasions where reasonable minds can reach different conclusions, and occasions where only a limited number of conclusions are intellectually honest. Presenting the data openly allows all viewers to use their own judgment to determine whether a conclusion is supported, offer meaningful critique, guard against innocent error, or highlight fraud. Further, the data themselves are the best evidence for showing a legitimate conclusion is supported. In cases where a psychologist's conclusion, or honesty, is questioned, revealing the solid supporting data is the most effective defense.

Placing Expert in an Advocacy Role. Requiring that psychological test data and materials be available only to other psychologists precludes attorneys from fully implementing their responsibilities of being zealous advocates. Potentially more problematic, however, is that requiring that other psychologists be the only keepers of psychological information potentially places psychologists in the position of being advocates. Forensic psychologists advocate for the data, not for a particular legal position. See, e.g., Specialty Guidelines for Forensic Psychologists, sec. VII. D. The problematic perception of dueling experts might diminish if data was freely available for cross examination, rather than required to be admitted through the mouth of another psychologist. In situations of mistake or fraud, without the ability to analyze the underlying data and to draw the jury's and the court's attention to missteps, counsel has no other option but to present a dueling expert.

Protective Orders and Proprietary Information. Although test data should be available for use in litigation, protection of test security remains a serious concern. Once test information (administration procedures, questions, scoring protocols) is available in the public domain, the validity and utility of the measure is compromised. The proprietary interest of test developers is also an important consideration; some measures spend years in development before being released for public use. However, the courts are often faced with the problem of using sensitive, private, valuable information in the course of litigation. Trade secret and commercial litigation frequently requires courts and litigants to implement protective orders and abide by measures designed to maintain the security of sensitive information. These mechanisms are equally and appropriately available for the protection of psychological testing data and materials. Disclosing psychological testing data under the protection of an appropriate and scrupulously-adhered-to protective order should not only permit counsel to zealously defend a claim, obtain all bases of the expert's opinion in accordance with applicable rules, but it also protects the security of the measure, preserving the measure's utility for future use.

Publicly Available Material. Not all psychological tests are restricted. Although many measures are restricted, other measures are available to any interested purchaser. Additionally, infor-

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mation is publicly available in published research articles. Methods of scoring and interpreting existing measures, calculating subscales, or complete measures are published in professional psychological research articles. PubMed and the Iowa State Library websites provide free internet search access to psychological and medical research articles. The articles themselves can be accessed through local universities or directly from the publisher for a fee.

For those measures to which access is restricted not only by Iowa law but also by test publishers, secondary sources provide a wealth of information about the test construction, scoring, administration, relevance for particular populations or questions, and interpretation. This material is often unrestricted and available to anyone with a credit or library card.

Information regarding the psychometric properties and uses of a particular measure – in other words, how appropriate the test is for particular questions, what are its strengths and weaknesses – is available in several sources. First, the primary source, the manual for the measure typically contains information on the properties of the test. Next, peer-reviewed research discussed above can provide insights into particular measures. The Mental Measurements Yearbook, now in its sixteenth edition, provides comparative information on a wide variety of psychological assessment tools. It is used by practitioners to select and use measures appropriate to the situation, and can be used by attorneys to investigate and understand the test selection process. Also, Dr. McKinzey publishes reviews of measures, empirical papers, reprints of work published in traditional paper journals at the Web Psych Empiricist, www.wpe.info. The on-line format provides timely access and a forum for debate.

Other traditional and useful textbook sources can provide explanatory information essential for understanding psychological assessments and permitting meaningful cross-examination. Muriel Lezak's handbook on neuropsychological assessment is a highly-regarded resource on neuropsychological testing. Sattler's work on Assessment of Children provides strong information on the types of measures and appropriateness of those measures in assessing children. There are many good works explaining the MMPI, MMPI-2, and MMPI-A, including the works of Drs. Butcher, Graham, and Archer. Although not frequently used in forensic contexts, if the Rorschach is employed, Exner is one of the most highly-regarded authors on the subject. These works are available to anyone who seeks them out.

A final thought on working with psychological testing data, anyone -- consultant, psychologist, attorney, or judge -- can either access information regarding, or question an expert on, the relevance and appropriateness of using a particular test for a particular purpose. Is this measure relevant to the question being asked? Has this measure been standardized on the type of population to which it is now being applied? For example, the MMPI was designed as a diagnostic measure and standardized on a population of seriously mentally ill persons receiving treatment in an inpatient setting. Since that time, the MMPI, and the MMPI-2 and MMPI-A, have been applied to many other populations and relevant research is available on the applicability of this particular measure to such distinct populations as, for example, parents involved in child custody litigation. Separate norms are available for child custody litigants. So, if the MMPI-2 was administered, was it used appropriately and were appropriate comparisons to relevant literature made? Other measures have not been so widely tested. It is worth asking the question, not only what do the data say, but was this test appropriately selected in the first instance. ■

IDCA
SCHEDULE OF EVENTS
2006 Meeting Dates

April 7, 2006
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.
Insurance Defense Practice Seminar

April 7, 2006
IDCA Board Meeting
Des Moines Golf & Country Club
1600 Jordan Creek Parkway,
West Des Moines, IA
10:45 a.m. Executive Committee
11:00 a.m. Full Board Meeting/Luncheon

July 13-14, 2006
IDCA Board Meeting
The Suites of 800 Locust, Des Moines, IA
10:00 a.m. Board Meeting/Luncheon

September 27, 2006
IDCA Board Meeting
Hotel Fort Des Moines, IA
10:45 a.m. Executive Committee
11:00 a.m. Full Board Meeting/Luncheon

September 27-29, 2006
42nd Annual Meeting & Seminar
Hotel Fort Des Moines, IA

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A simple example will illustrate the concept. Assume an accident that occurs because an operator has left the seat of a corn picker with the engine running, activates a control from outside the operator's cab, and gets injured. Plaintiff alleges as an reasonable design an operator presence control integrated into the seat ("seat switch") and claims that . . ."had the seat switch been used, once the operator left the seat the power to the machine would have been shut off." Plaintiffs would argue, not surprisingly, that such a machine without a seat switch could not possibly be "state of the art" in design. Plaintiffs would argue that a seat switch is simple, has been around for years in various applications, and is technologically possible and practically feasible and is "just a matter of utilizing already established engineering concepts." However, simply because some device might be added to a product, does not necessarily mean that the product's design is not state of the art, merely because the device is not present.

In *Hughes*, a judgment on a jury verdict of dismissal based on state of the art was affirmed, where the proposed alternative design was the simple concept of *additional handrails* on the front of a combine immediately above the corn head. 522 N.W.2d at 298. The farmer in *Hughes* fell into an operating cornhead after he left the cab to check something in the engine compartment. He did not use the cab's platform and ladder, however. Instead, he took the shortcut of climbing over the platform handrails and attempting to cross in front of the cab on a narrow ledge, with no footholds or hand holds. He lost his footing and the inevitable accident occurred. *Id*. at 295. The *Hughes* Court correctly found that although handrails were not a complicated "device," and were technologically feasible, they were inappropriate in that application for several reasons including, but not limited to: 1) handrails invited users to approach a hazardous area; 2) this assumed the accident occurred in a way that the user grabs the handhold; 3) the handrail created other hazards not otherwise present (*e.g.*, visibility or servicing issues); 4) and the purported safety device created "real world" functionality problems not encountered without it. *Id*. at 296, 298. The same reasoning applies to the seat switch example. It may be scientifically possible, and it may be technically doable, but from the standpoint of engineering and design, it may be a bad application of the idea for a host of reasons. Just because a proffered design alternative is simple and feasible does not mean that the product without the device is *not*, in fact, "state of the art" in design If *Hughes* stands for anything, it stands for this proposition.

The Jury Instruction Committee of the Iowa State Bar Association formerly had a uniform civil jury instruction that defined "state of the art." It was numbered Jury Instruction No. 1000.11. It provided as follows:

> Even if the plaintiff has established a design defect, you must still consider whether the product conformed to the state of the art. Defendant claims it complied with the state of the art.
>
> "State of the art" is what feasibly could have been done. It means what technologically and practically could have been done at the time, based on the latest scientific knowledge and discoveries in the field, to design the passenger restraint system that would have prevented plaintiff's injuries while meeting the user's needs. Custom in the industry is not necessarily state of the art, nor is every alternate design or safety device for which technology exists necessarily feasible.
>
> To establish this defense, the defendant must prove its product conformed to the state of the art in existence at the time the product was designed and manufactured with respect to the specific claims that plaintiff has made.
>
> If a defendant proves its product conformed to the state of the art with respect to plaintiff's specific claims, then that defendant is not at fault and you should answer the appropriate interrogatory accordingly.
>
> If the defendant fails to prove its product conformed to the state of the art, you will consider whether the plaintiff is entitled to recover under the other instructions.

Even though this language may not be entirely perfect,[3] at least it was a good-faith attempt by the volunteer members of the committee to explain the state-of-the-art defense to the jury.

This instruction was abandoned in September of 2003. The reason why this was done is not completely clear, but it

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[3] For example, it is troublesome that the term "feasible" is defined merely by what is technologically possible. This is inconsistent with *Hughes*. A lay person jury could simply conclude that so long as some other design was "possible" technologically, and was "feasible" in the sense that it was possible to do it, then the product is *per se* non-compliant with the applicable state of the art. This is not correct. There are many products in the marketplace that could be designed differently, in terms of technology, but that does not mean that a product without such "features" is not state of the art in design.

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appears to be tied to the adoption of the Restatement Third of Torts, Products Liability in the *Wright* case in late 2002, discussed below. In any event, there currently is no standard jury instruction that defines state of the art, notwithstanding the fact that Section 668.12 continues as a valid enactment of the Legislature. Curiously, trial courts and litigants alike are left without guidance on how to apply section 668.12 in defense of a products case.

III. PRIMARY CASES AND ISSUES

One of the first decisions to discuss state of the art was *Fell v. Kewanee Farm Equip. Co., Div. of Allied Products*, 457 N.W.2d 911 (Iowa 1990). In *Fell*, the court submitted the defense of state of the art in a case involving the allegedly defective design of a guard over a gearbox on a portable farm elevator. *Id*. at 913. The guard was missing and Anne *Fell*, a farm wife, got her hand caught in the meshing gears. *Id*. The trial court in *Fell* did not submit plaintiff's "post-sale duty to warn" theory based on the second sentence of the statute, despite plaintiff's claim that there was evidence in the record to support this claim. *Id*. at 920-21.The Iowa Supreme Court found that reversible error had occurred and remanded for a retrial. *Id*. at 921.

Although it was not a determinative issue on the appeal, the trial court in Fell also gave the jury a special verdict interrogatory on state of the art. Notably, since this is a complete defense, the interrogatory was placed first among the instructions. In *Fell*, the jury answered the question "[W]as the design of the product state of the art?" "[Y]es", went no further, did not answer any other interrogatories and signed the instructions at the end. *Id*. at 921. The propriety of doing so was confirmed in *dicta* in a later case, *Hillrichs v. Avco Corp.*, 478 N.W.2d 70 (Iowa 1991). In *Hillrichs*, the trial court failed to use a special verdict form even though the state-of-the-art defense was submitted and addressed in general instructions. The Iowa Supreme Court stated:

> As a final matter, we wish to discuss the method by which the district court submitted the state-of-the-art defense provided in Iowa Code section 668.12. The court merely instructed as to the basic elements of that statute and told the jury that if those elements were established by Avco no percentage of fault should be assigned to that defendant. Unfortunately, the court did not submit a special verdict form on the state-of-the-art defense. Had it done so, we would have known if the jury's ultimate assessment of percentages of fault was dictated by its belief that the state-of-the-art defense had been established. If this had been the basis for the jury's verdict, it might have greatly changed the issues on appeal and perhaps prevented a retrial of any issue. Because a special verdict was not submitted, we have no way of knowing the basis on which the jury arrived at the relative percentages of fault.
>
> We believe it is preferable, in the absence of compelling reasons not to do so, that issues involving the state-of-the-art defense under section 668.12 be submitted by way of special verdict. Rather than giving only a general instruction on state of the art, the court should instruct that the defendant must first establish this defense with respect to the specific claims that the plaintiff has made. ***Preferably, the instructions would be cast in an "even if" format. The jury should be advised that, even if the plaintiff has established a particular design defect, no percentage of fault should be assigned to a manufacturer if that party has established that the design was consistent with the state of the art (emphasis added)***

478 N.W.2d at 76. *Compare* Iowa Uniform Jury Instruction 300.9 (Verdict Form - Product Liability - State of the Art).

Clearly, state of the art, if alleged as a defense with factual support in the record, should be submitted to the jury in a special verdict form. However, the *Hillrichs* Court suggested the following in a footnote:

> The "even if" format will facilitate the jury's consideration of the state-of-the-art issue within the context of the specific claims in the case. We believe this is preferable to requiring the jury to consider the state-of-the-art defense first and to go no further if that defense has been established.

Id. fn. 4.

The "even if" approach has superficial appeal at first blush, but may be problematic since it could cause an inconsistent verdict. What if the jury finds a defect, causation and damages, but also finds that the product's design was state of the art? The defendant in that case would argue that a defense verdict should be entered. Plaintiff, on the

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other hand, would claim that the "defect" finding somehow "trumps" the state-of-the-art finding, or that the verdict itself is inconsistent, since no defect can exist if the product's design is "state of the art." The Court in *Hillrichs* does not discuss this possibility or resolve this question, and its "even if" suggestion is *dicta* that trial courts are not bound to follow.

Section 668.12 clearly provides that it is a complete defense to all product liability claims, however designated. If this be true, then the trial judge's decision in *Fell*, to list the state-of-the-art defense verdict form *first*, and to preempt answering of any remaining issues if that one be answered "yes," would appear to be correct.

In *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994), the Iowa Supreme Court held that "state of the art" would not be a complete defense to an action based on failure to warn. *Id.* at 291. The basis for this holding, however, is subject to serious question. The decision appears to have been based on two erroneous premises: First, that there is a "conduct-product" distinction, and second, that "state of the art" is identical with the concept of industry custom and practice. Regarding the "conduct-product" distinction, the Court abandoned it in *Olson* itself, in the course of holding that all failure to warn claims are negligence-based. This is consistent with what most courts have done so well. In doing so, the *Olson* Court correctly described this distinction as "of little practical significance," "illusory," "a vain effort" and "error." *Id.* at 289. Yet, when it came to the issue of whether the state-of-the-art defense applied to an action based on failure to warn, it relied upon the very conduct-product distinction that it had discarded earlier in the very same opinion! *Id.* at 291. In this respect *Olson's* analysis is internally inconsistent and illogical.

Second, *Olson* also noted the following:

> It is also illogical to excuse negligent conduct by a state-of-the-art defense based on the reasoning that all other manufacturers were equally negligent.

Id. at 291. "All manufacturers" being "equally negligent" is directly referable to the concept of industry custom and practice, and *not* state of the art. This view is legally incorrect and the Court itself has since noted on multiple occasions that these concepts are distinct from one another. Yet, the Court's erroneous conclusion, that state of the art is *not* a defense to a failure-to-warn claim, persists.

No matter the reasons for the Court's holding in *Olson*, it is difficult if not impossible, to square it with the express language of the state-of-the art statute. The statute explicitly provides that "state of the art" is a complete defense for an action based on "warning" or "labeling" that accompanies a product. It is simply impossible to read or interpret this language in any other way. *Olson's* holding may give a defendant an appealable issue in any product liability case where a jury finds fault based on a theory of failure to warn, and the trial court follows *Olson* and refuses to instruct on the state-of-the-art defense. A trial court will follow *Olson* because it is duty-bound to do so.[4] The existence of this issue militates in favor of a defendant alleging state of the art as a complete defense to a failure to warn claim. In any case where a plaintiff's verdict is based on failure to warn, but the trial refuses to instruct on the state-of-the-art defense in light of *Olson*, a strong constitutional separation of powers doctrine argument can be made on appeal. An argument can be made that the *Olson* Court in effect has violated the constitutional separation of powers doctrine by disregarding (or *de facto* rewriting) the legislature's statutory mandate in section 668.12. Compare *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294, 298 (Iowa 1994)(Ternus, J., concurring)("The suggestion to abandon state of the art as a distinct concept is tempting. However, that alternative is not available to us in design defect cases because the legislature has codified state of the art as an affirmative defense in Iowa.")(citing Iowa Code § 668.12 (1993)).

The Court in *Olson* also held (correctly, in the authors' view) that because all failure to warn claims are negligence-based claims, there is only one such claim, and failure to warn based on strict liability in tort no longer exists in Iowa. *Id.* at 289.[5] This holding is consistent with the majority view on this subject in other jurisdictions.

In *Huber v. Watson*, 568 N.W.2d 787 (Iowa 1997), the Court held that the state-of-the-art defense did not apply to a claim that a manufacturer

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[4] As our partner and former President of the Iowa Defense Counsel Association, David Phipps, once quipped, "[D]istrict court judges are not 'independent contractors' when it comes to following Supreme Court decisions."

[5] This holding of *Olson* is completely consistent with the Restatement Third of Torts, Products Liability, Section 2(c). Section 2(c)'s use of the term "reasonable" unmistakably connotes a "negligence" based standard of conduct.

THE "STATE" OF THE "STATE-OF-THE-ART" DEFENSE IN IOWA . . . *continued from page 9*

breached a duty to warn based on subsequently acquired knowledge about its product. *Id*. at 792. Defense counsel should be careful not to read *Huber* too broadly. A jury might find that a post-sale warning was not required under the facts. In such a case, a defendant might prevail in arguing that its design was, in fact, state of the art at the time the product was manufactured or sold. In other words, the jury might refuse to accept plaintiff's post-sale warning claim, and ultimately find that the product was state of the art in design. As a result, defense counsel should be cautioned against "jettisoning" this defense in the face of a *mere allegation* of a post-sale duty to warn by plaintiff.

In a recent federal court case interpreting Iowa law, it was held, *inter alia*, that state of the art is not a defense to a negligence claim based on general negligence or *res ipsa loquitur*, since the statute does not mention negligence. *McGuire v. Davidson Mfg. Corp.*, 398 F. 3d 1005 (8th Cir. 2005). *McGuire* involved a ladder that collapsed and fell, injuring plaintiff. Davidson Manufacturing made the ladder. In *McGuire*, however, the affirmance of the district court's decision on appeal was based on the fact that appellants failed to preserve error on this issue in post-trial motions. *Id*. at 1009. Yet, the *McGuire* court went on to state, "[W]e believe that, if the Iowa Supreme Court were to consider the question, it would likely find that proof of the state-of-the-art defense does not automatically exonerate a defendant from liability for general negligence." *Id.* at 1010. The Eighth Circuit panel reasoned that the statute does not mention negligence (note: it doesn't mention strict liability, either), and that in *Olson*, the Iowa Supreme Court had held that state of the art does not apply to a failure to warn case, which is a negligence-based claim. The potential problems with the *Olson's* court's analysis are discussed above; the soundness of the *McGuire* court's conclusion on this issue is thus also subject to serious question. In cases based on any theory of product defectiveness, a plaintiff is suing a product manufacturer for an allegedly defective product. As a result, given a proper factual foundation, state of the art should apply as a complete defense to the action, based on the broad and unlimited language of Section 668.12. In any event, a federal court decision on this question of Iowa law is not binding on state courts.

IV. THE IMPACT OF THE RESTATEMENT THIRD OF TORTS, PRODUCTS LIABILITY

The Iowa Supreme Court adopted the Restatement Third of Torts, Products Liability in *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002). Certain aspects of Section 2 may bear upon the state-of--the-art defense in Iowa, and warrant further analysis.

A. Defective Design

Design defect cases in Iowa are no longer governed by the common law of strict liability in tort, or the former Restatement (Second) of Torts, section 402A. Instead, the new rules in a design defect case are set forth in Section 2(b) of the Restatement Third, which provides as follows:

> A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe. . .

Clearly, Section 2(b) requires a plaintiff to prove a "RAD," or reasonable alternative design, as a part of its *prima facie* case of design defect. It would seem that if a product's design is truly "state of the art," then no reasonable alternative design would be feasible. It is plaintiff's burden to prove RAD, but defendant's burden to prove state of the art. These respective burdens must be kept straight by defense counsel. To this limited extent, there is some overlap between the Iowa state-of-the-art defense and the elements of plaintiff's design defect case. However, this overlap is not incapable of reconciliation.

Simply put, a RAD and state of the art are akin to being the "opposite sides of the same coin." For example, if a RAD is proven, this should render "moot" any state-of-the-art defense in the case. A product cannot be state of the art in design, yet allow the existence of a RAD. How could a product's design possibly be "state of the art" when a reasonable alternative design, under the standards enunciated in Section 2(b) of the Restatement Third, is available? To ask the question is to answer it.

Conversely, if a jury or fact finder concluded that a product's design was state of the art, then by definition, there could be no RAD available. To conclude, in a design defect case the fact finder would essentially be presented with a choice: either an RAD is available

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THE "STATE" OF THE "STATE-OF-THE-ART" DEFENSE IN IOWA . . . *continued from page 10*

and the product's design is defective; or the product's design is state of the art and, by definition, no RAD is available. But, once again, defense counsel should understand that a third result is possible: that plaintiff's failure to prove an RAD equals failing to prove an essential element of a *prima facie* case, requiring dismissal of the allegation at the threshold. The result is a defense verdict. A judgment for defendant could obtain in the presence or absence of the state-of-the-art defense, and even in the presence of an *unsuccessful* state-of-the-art defense.

B. Failure to Warn

In a defective warnings case, the Restatement Third, Products Liability, Section 2(c), requires a plaintiff to prove that "the foreseeable risks of harm could have been reduced or avoided by the provision of reasonable instructions or warnings. . ." Many plaintiffs and "human factors" experts like to argue that a product's warnings are "defective" simply because they could have been different, with different verbage, colors, location, graphics, size of type, foreign language, and so forth. Defense counsel should not forget the second element in Section 2(c): that the absence of the desired verbage, etc. renders the product not reasonably safe. Various standards, such as ANSI Z535, can be applied to address the adequacy of a given warning. If a product's warnings or instructions comply with such standards, and otherwise are "state of the art," then there should be no liability for failure to warn. If a warning exemplifies reasonable knowledge in this rather vague and undeveloped area of science, and cannot be improved upon, then it cannot be "defective.[6] Although the elements of plaintiff's warnings case can overlap with the state-of-the-art defense in Iowa, they are not inconsistent.

C. Defective Manufacture

Under the Third Restatement, Section 2(a), there is no RAD requirement in a product defect case based on a manufacturing defect. Therefore, there does not appear to be any inconsistency between Section 2(a) and Iowa Code Section 668.12.[7] In addition, in *McGuire v. Davidson Mfg. Corp.*, 398 F.3d 1005 (8th Cir. 2005), the Eighth Circuit Court of Appeals held, in a case applying Iowa law, that state of the art is a proper defense to a claim based on manufacturing defect. *Id.* at 109-10. *McGuire* should be cited by defendants as persuasive authority for this proposition, along with the explicit wording of the statute itself.

After *Wright*, the Iowa State Bar Association Jury Instruction Committee deleted the state-of-the-art instruction, and replaced it with this quizzical statement:

> This instruction is withdrawn. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002) makes "State of the Art" an element of the plaintiff's proof in product liability cases, but remains an affirmative defense under Iowa Code section 668.12.[8]

As noted above, why this was done is unclear. A close and detailed examination of *Wright* reveals no discussion of the state-of-the-art defense, although clearly the view of the Restatement Third was adopted. It can be speculated that the RAD requirement in Section 2(b) of the Restatement Third, which was adopted by *Wright*, was thought to contradict Section 668.12 and the instruction such that the Committee simply decided to "punt" on the issue pending further clarification by the Iowa Supreme Court. Nevertheless, Section 668.12 is still a part of Iowa law, and in a product liability case with the right facts, it presents issues which must be addressed to the jury in the form of instructions on the law in the jury charge. It would seem beyond argument that if a legal defense is provided by Iowa statute, then the jury must consider that defense while being guided by proper instructions from the trial court. The "excise" of the former instruction and the unclear statement that remains in its wake provides no helpful guidance to the

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[6] A convincing argument can be made that the "state of the art" with regard to warnings and instructions is an area of "technology" in its infancy. Many experts opine that there has yet to be a study which has proven, to within a reasonable degree of scientific certainty, that a specific warning on a particular product would have avoided an accident, or affected an operator's behavior. *See, e.g.*, William H. Hardie, "A Critical Analysis of On-Product Warning Theory," *Product Safety & Liability Reporter*, February 11, 1994, pp. 145-163.

[7] Importantly, it should be noted that Section 668.12 of the Iowa Code may provide more protection for a product liability defendant than that afforded by Section 2(a) of the Restatement Third, in a manufacturing defect case. This is because under Section 2(a), "due care" is not a defense, but under Section 668.12, if the defendant can prove that the manufacturing methods of the defendant were "state of the art" as of the time of manufacture, then there is no legal liability for manufacturing defect. Section 668.12 affords a complete defense to a claim based on manufacturing defect, as it explicitly applies to defects in the "manufacturing" of a product and protects "manufacturers." In this way the Iowa state of the art statute does away with true "strict liability" in the case of manufacturing defects. *But see Falada v. Trinity Industries, Inc.*, 642 N.W.2d 247, 251-52 (Iowa 2002)(distinguishing state of the art in design and in manufacturing process; holding fact question as to proper welding precluded summary judgment under § 668.12). *Falada* was decided prior to *Wright v. Brooke Group*.

[8] This is not entirely correct. "State of the art" is not technically an element of plaintiff's case; instead, a RAD is.

THE "STATE" OF THE "STATE-OF-THE-ART" DEFENSE IN IOWA . . . *continued from page 11*

bench and bar.

V. JUSTICE TERNUS' CONCURRING OPINION IN *HUGHES V. MASSEY- FERGUSON*

Perhaps the most important case on state of the art is *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294 (Iowa 1994). In *Hughes*, a defense verdict was affirmed on appeal based solely on the jury's finding that a farm combine's design was "state of the art." *Id.* at 298. This was done even though the alternative design at issue (handrails in front of the combine's cab and directly above the cornhead) was simple and clearly was technologically feasible. *Id.* Justice Ternus filed a separate concurrence with a detailed discussion of the nature of the state-of-the-art defense in Iowa. This opinion should be "required reading" for any defense practitioner considering the use of this defense.

In her special concurrence in *Hughes*, Justice Ternus raises the issue of whether the assertion of this defense by a defendant in a products case shifts the burden of proof. *Id.* at 298. This question is not answered in *Hughes* and has not been directly confronted by any Iowa appellate decision since. The allocation of the burden of proof in a products case is more than a mere academic issue; parties who fail to carry their burden, lose. Justice Ternus' concerns were framed in the context of the former Restatement (Second) of Torts, Products Liability, section402A. Although section 402A has now been abandoned in light of *Wright v. Brooke Group*, as discussed above, this tension remains. Under the Restatement Third in defective design cases, if plaintiff fails to prove a reasonable alternative design, or "RAD," then the case fails at the threshold. RAD is a critical element of plaintiff's *prima facie* case. On the other hand, state of the art would appear to be an "affirmative defense" in that "such persons" (*i.e.*, defendants) are required to "plead and prove" the defense. See §668.12. Defendants in Iowa generally have the burden of proof to establish an affirmative defense. *See, e.g.*, Iowa Code § 619.17 (2005)(defendant has the burden of pleading and proving the fault of the plaintiff, if any). Thus, if a defendant fails to carry its burden, the defense of state of the art is not established. Mindful of Justice Ternus' observations, defense counsel should be careful to point out to the court that a plaintiff's burden of proof to show a RAD is not carried *merely because the defendant has not come forward with sufficient proof to support its affirmative defense of state of the art.*

Just how the respective burdens operate given section 668.12, the Restatement Third, and Justice Ternus' observations in her *Hughes* concurrence, remains to be seen. One approach would be the following. Plaintiff has the burden to prove a RAD in a design defect case. If a *prima facie* case is not made, the case is dismissed at the threshold. If, on the other hand, a *prima facie* case including a RAD is made, the case proceeds. Defendant may attempt to show that the design at issue is state of the art. If defendant's burden on state of the art is met, then the burden shifts back to plaintiff to put forth sufficient evidence to overcome the affirmative defense of state of the art. If plaintiff does not overcome the affirmative defense, then a defense judgment should be entered.

VI. DANGER LURKING: THE SO-CALLED 'CONTINUING DUTY TO WARN'

The "complete defense" nature of state of the art is inherently attractive to product manufacturers defending a product defect case. It is unique as one of the very few "complete" defenses left in the products arena.[9] Many former so-called "complete" defenses have gone by the wayside in the last twenty years. *See, e.g., Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 546 (Iowa 1980)(product misuse no longer a complete defense to a products claim). But ". . . the Lord gave, and the Lord taketh away." *See* Job 1: 20-21 (King James Version). The second sentence of the statute is the genesis of the potentially troublesome "continuing duty to warn" under Iowa law. *See Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999). In *Lovick*, the Iowa Court adopted the Restatement Third of Torts, Section 10, which is entitled "Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn." The Court in *Lovick* was forced to adopt post-sale duty to warn in Iowa because of the second sentence in Section 668.12, even though state of the art was not pursued as a defense in *Lovick*. A distinct minority of jurisdictions have refused to adopt a post-sale duty to warn. *See, e.g., Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879 (Ill. App. Ct. 1999)(Illinois chooses to refuse to adopt such a concept; a manufacturer's duties should be measured at time of sale, and not based on later events). There is some logic to measuring a product seller's duty

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[9] The only other complete defense which readily comes to mind is the Iowa statute of repose for products, Iowa Code Section 614.1(2A)(2005).

THE "STATE" OF THE "STATE-OF-THE-ART" DEFENSE IN IOWA . . . *continued from page 12*

at time of sale, as opposed to information based on 20/20 hindsight or later-acquired information. Nevertheless, post-sale duties are now entrenched in Iowa law, as well as in a majority of jurisdictions having reached the issue, and in Section 10 of the Restatement Third.

Regarding the continuing duty to warn, one strategic concern for defense counsel is alleging or pursuing state of the art as a defense, only to prompt plaintiff's counsel to look more closely at the statute and "morph" a garden-variety products case into a potentially more troublesome post-sale duty to warn claim. Given this, in any situation where state of the art might be pursued as a defense, a careful risk-benefit analysis should be undertaken to determine whether the potential benefits of pursuing the defense substantially outweigh the risks inherent in defending a continuing-duty-to-warn case. For example, is it likely the case may involve post-sale product history, which was acquired later, of other substantially similar accidents, claims or lawsuits? Do competitor's products have the design feature that plaintiff is advocating in your particular case? If so, and if plaintiff has not already alleged a continuing-duty-to-warn claim, a product defendant might be better served to steer clear of alleging the state-of-the-art defense to avoid discovery into these areas. It is posited that in many situations, the basic facts of the case will not really allow a victory based on state of the art. In such a case, alleging state of the art may do more "harm" than "good" and defense counsel may be better off avoiding the issue altogether.[10]

VII. CONCLUSION

Although "state of the art" is a "complete" defense to a product liability case in Iowa, its use in practice is subject to severe practical limitations. This area of the law has been unduly complicated by the Court's holdings in *Olson*, by the failure to resolve the overlap between this defense and plaintiff's proof as pointed out by Justice Ternus in *Hughes*, by the lack of a uniform jury instruction on the defense, and by the adoption of the Restatement Third. Defense practitioners should not be lured by the attraction of the "complete defense" aspects of this doctrine without being mindful of the potential pitfalls of having to defend against a post-sale duty to warn claim. A greater understanding of the state-of-the-art defense in Iowa by defense practitioners will go a long ways toward establishing the original intent of the Legislature in enacting this statute: to reduce and limit the potential liability of product sellers and suppliers in product liability cases.■

[10] Of course, there is nothing to prevent a plaintiff from making a post-sale duty claim on their own and at the outset of the litigation irrespective of what might be alleged in defense of the claim. For example, this was the situation in *Lovick*, which involved a piece of farm equipment that had been previously retrofitted and had been the subject of prior litigation in other jurisdictions where post-sale duties were established. *See Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993). In a situation like this, there would appear to be nothing to lose to allege state of the art as a complete defense to the action.

GREER AWARDED DRI'S FRED H. SIEVERT AWARD

Sharon Soorholtz Greer of the Cartwright Druker & Ryden Law Firm in Marshalltown, Iowa, was awarded the Fred H. Sievert Award by the Defense Research Institute (DRI).

The Fred H. Sievert Award recognizes an outstanding defense bar leader. The nominee is an individual who has made significant contributions toward achieving the goals and objectives of the organized defense bar. The nominee must be the president or immediate past president of a state local defense organization.

Greer has been a member of the Iowa Defense Counsel Association since 1991. Greer has served on the board since 1998 and is currently the immediate past president.

Greer was presented the award at the October 2005 DRI Annual Meeting in Chicago, Ill.

DRI is widely recognized as the largest and most active national association of lawyers and others concerned with the defense of civil actions. Its membership includes more than 22,000 individuals, in addition to corporations, insurance companies and other groups.

FROM THE EDITORS . . . THE "DUTY" TO TEACH YOUNGER TRIAL LAWYERS

Long, cold, snowy winters in Iowa bring to mind favorite past-times–for example, searching the want ads in the local newspaper, regarding pet adoptions. One ad I recall went something like this:

> "Lost: mixed breed dog; white and black; deaf, blind in one eye; broken tail; 3 legs; recently castrated- answers to the name of LUCKY."

As a defense trial lawyer in Iowa, I feel extremely lucky and fortunate. I'm confident thatmany of the members of the Iowa Defense Counsel Association share the same feeling. Withthat fortunate feeling, however, comes a solemn sense of responsibility.

The Preamble to the Iowa Rules of Professional Conduct, subsection (1), provide asfollows:

> A lawyer, as a member of the legal profession, is a representative of clients, an officerof the legal system, and a public citizen having special responsibilities for the quality of justice.

Subsection (6) of the Preamble states in pertinent part as follows:

> As a public citizen, a lawyer should seek improvement of the law, access to the legalsystem, the administration of justice, and the quality of service rendered by the legalprofession. As a member of a learned profession, a lawyer should cultivate knowledgeof the law beyond its use for clients, employ that knowledge in reform of the law, andwork to strengthen legal education.

Much has been written lately, and rightly so, about the "vanishing civil jury trial."[1]

Chief Judge Mark Bennett of the Northern District in Iowa has written and spoken on this topic extensively and with great erudition. According to recently-published statistics, in state courtsonly 7.5% of civil cases go to trial.[2] More than 98% of all cases that are filed in federal court are settled and resolved short of trial.[3] Mediation and arbitrations (and the people that do them) are at an all-time high in terms of popularity with clients. Smaller insurance-based liability cases do not exist any more, as these claims are settled quickly by the carrier before any referral to outside trial counsel is made. Clients are increasingly sensitive to "over lawyering" in a case; advanced, express permission is required before an associate can do important legal research, attend a deposition, or second-chair a trial. Litigation costs have skyrocketed. Discovery is lengthy, complex and costly. The "fear" of lay-person juries abounds. Daubert motions have had a significant impact in cutting the number of trials in federal courts. Against this backdrop, how do we train young trial lawyers? Do partners really serve the interests of their clients by effectively leaving associates "out of the loop?" How do associates gain needed, valuable trial experience, but yet meet their billable hour requirements? Must a person work in a D.A.'s office to get trials? Is getting trial experience something more than 'blind luck?'

Every experienced trial lawyer owes a debt of gratitude to the sage practitioners in the past who had the wisdom and foresight to introduce them to clients, take them along to expert witness depositions, and second-chair jury trials. Whenever these types of things are on our schedule, we must automatically think: who can I take along for "education" purposes? We must redouble our efforts, within the confines of the current system, to get this valuable experience to our younger colleagues. One method for doing so is this: if an associate attends a jury trial, have the associate show all of their time on their time entry sheets; this will give the associate the basic benefit of the billable hours. When it comes time to charging the client for the services rendered, show all of this time on the billing. However, mark some of this time as "No Charge" or "N/C," and explain to the client in the cover letter that this represents no charge to the client as it involved the training of a younger, associate lawyer. In this manner, the associate can get the benefit of the billable hours, and the billing partner can obtain the "marketing" benefit, if you will, of showing the client how the firm is committed to the practice of training its young lawyers.

I have had clients respond quite favorably to the notion that a law firm is concerned about training its younger lawyers. This is not to mention the benefit to the younger lawyer in knowing that the firm cares enough about them to include them in the intricacies of trying or litigating a case. In this day and age, the assignment of "tasks" is not good enough. The historic legacy of an informal apprenticeship program through "learning by doing," which many of us have benefitted from greatly, must be strengthened and continued,

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[1] Chief Judge William G. Young said this to the American College of Trial Lawyers in 2002: "The American jury system is dying. It is dying faster in the federal courts than it is in the state courts. It is dying faster on the civil side than on the criminal side. . . but it is dying nonetheless."

[2] Litigation News, November 2005, Mark A. Drummond, "Where Have All the Trials Gone?" Vol. 31, No. 1, p. 7.

[3] Source: Professor Mark Galanter, Univ. Of Wisconsin School of Law: only 1.8% of civil cases filed in federal court go to trial.

THE "DUTY" TO TEACH YOUNGER TRIAL LAWYERS . . . *continued from page 14*

despite the everpresent economic pressures of the trial practice.

Second, assigning an associate to a file serves to "share the stress." Trying a case with an associate, and getting the advantage of their thoughts, suggestions and insight, can be a truly enjoyable experience. Also, heaven forbid, if the case goes to post-trial motions or on appeal, this can be a major project for a younger lawyer. Besides, if you are crossing the street tomorrow and are run over by the proverbial city bus, an informal "succession plan" has been put into effect!

Some people might suggest that the relative infrequency of trials means that we no longer have to train trial lawyers. Instead, train them to "negotiate" or "mediate." I reject that thesis. In my experience, the only way to obtain a reasonable settlement for your client is to show the other side that you are ready, willing and able to try the case. How can we do this if our young lawyers haven't been trained as trial lawyers?

Associate lawyers have a responsibility in this scheme as well. My advice to an associate: make your wishes known to the member/partners. Be persistent. Let them know that you want and need trial experience. Inform them if you haven't yet had a chance to depose a plaintiff in a personal injury case, or have no experience in deposing an expert witness. Let them know if you haven't tried a case in federal court. Ask a more experienced lawyer to "second chair" your deposition of a difficult technical witness.

By the same token, senior counsel should avail themselves of every opportunity to introduce younger lawyers to the esteemed members of the bench. I have never had a judge not respond favorably to any effort of mine to include a younger associate in a trial or argument on a motion. In some sense, efforts like this serve to "humanize" us and helps us to realize that the world out there is much bigger than our own selves. After an introduction, I've seen judges regale all present with interesting stories of "their first jury trial." To the extent possible, experience should be gained by allowing the younger lawyer to examine witnesses or introduce exhibits into evidence in a real, honest-to-goodness trial. A few kind words explaining what is being done to the members of the jury has also, in my experience, been well-received. That way, the jury doesn't think: "Who is that person, and what are they doing?" Other lawyers and judges certainly can recall, with fondness, times when more senior practitioners had given them an opportunity to "learn by doing" by taking part in a real trial.

We are, indeed, lucky that other opportunities for young lawyers to get experience in Iowa abound. For example, the Volunteer Lawyer's Project of the Iowa State Bar Association affords ample opportunity for young lawyers to volunteer their time and efforts in support of worthy legal causes on behalf of indigent clients. There is no higher calling in the law than helping those in need. Our federal court system also has a very successful program in place which is designed to link up indigent or prisoner clients with appointed lawyers who practice in private law firms. As members of firms, we must fully support these efforts. The experience gained by an associate in taking part in activities such as these, simply cannot be matched by a legal research project on some esoteric issue done by wearing "green eye shades" camped out in a carrel in the corner of some musty old law library.

The "bottom line" is this: if we allow the ever-present economic pressures to thwart our ability (or inclination) to train new lawyers, effectively no new lawyers will be trained and our clients (not to mention our profession) will suffer greatly as a result. Most folks "learn by doing," as opposed to "by saying." Experienced practitioners must keep in mind at all times that younger eyes are upon us, and that we, in many ways, can serve as a "role model" for a younger lawyer. We all would distinguish ourselves if we took the time, trouble and effort to help educate and train the new generation of trial lawyers in Iowa, and pass the "luck" on. ■

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REGISTRATIONS MUST BE RECEIVED BY MARCH 31, 2006.
Space is limited to the first 80 registrants.

Iowa Defense Counsel Association
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INSURANCE DEFENSE PRACTICE SEMINAR

APRIL 7, 2006

DES MOINES GOLF & COUNTRY CLUB • 1600 JORDAN CREEK PARKWAY • WEST DES MOINES, IA
APPROVED FOR: 6.0 FEDERAL HOURS (FILE#06-005) - 6.0 STATE HOURS (ID#35443)

AGENDA

8:30 am	**Registration Open & Continental Breakfast**
8:45 am	**Opening Remarks**
9:00 am - 9:45 am	**Bad Faith After Belleville** *James A. Pugh, Morain & Pugh P.L.C., West Des Moines, IA*
9:45 am - 10:30 am	**Binding Arbitration - When, Why and How** *David J. Blair, David J. Blair, P.C., Cherokee, IA*
10:30 am - 10:45 am	**Break**
10:45 am - 11:45 am	**Uninsured and Underinsured Motorist Claims** *Bill H. Roemerman, Crawford Sullivan Read & Roemerman PC, Cedar Rapids, IA*
11:45 am - 12:45 pm	**Lunch**
12:45 pm - 1:30 pm	**Mediation Trends/Effective Techniques** *Paul C. Thune, Thune Law Firm, P.L.C., West Des Moines, IA*
1:30 pm - 2:15 pm	**Discovery of Claim Files** *Ted J. Wallace, American Family Mutual Insurance Company, Davenport, IA*
2:15 pm - 2:30 pm	**Break**
2:30 pm - 3:30 pm	**Alternative Risk Transfers** *Don J. Heinrich, Innovative Captive Strategies, West Des Moines, IA*
3:30 pm - 4:30 pm	**Effective Communication Between Insurer and Defense Counsel** **Panel Discussion** - *Mark Brownlee Moderator*

Registration fee includes: Continental Breakfast, Lunch and Materials

CANCELLATION POLICY:

Written cancellations received by March 31, 2006 will receive a full refund.
No refunds will be received after March 31, 2006 and no refund for no-shows.
Seminar materials will be forwarded to registrant.

If you plan to arrive the night before, IDCA has secured a special discounted rate of $72.00 single/double at the Fairfield Inn & Suites. Room reservations must be made by March 24, 2006 to receive the discounted rate.

Be sure to mention **Iowa Defense Counsel Association** to receive the discounted rate. Fairfield Inn & Suites, 7225 Vista Drive, West Des Moines, IA 50266. Phone (515) 225-6100

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