defense UPDATE

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YOUR SERVE: A SURVEY OF RECENT DECISIONS INVOLVING FAILURE TO SERVE A DEFENDANT WITHIN 90 DAYS

By: Ted Wallace, American Family Insurance, Davenport, IA

"The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass."[1]

A lawsuit begins with the filing of the petition in the district court. After filing, the Plaintiff has the obligation to serve notice upon the Defendant that such a petition has been filed. This is done through serving the Defendant, or the Defendant's representative, an original notice. "An original notice is the formal writing, issued by authority of law, for the purpose of bringing defendants into court to answer plaintiff's demands in a civil action."[2]

Prior to 1998, former Iowa Rule of Civil Procedure 49(b) required that an original notice and petition must be "promptly" delivered by the clerk to the sheriff or another appropriate person for service upon the Defendant. If, however, such service was not done promptly, or otherwise considered abusive as to time, then the Court could and would dismiss the petition.[3] A two-step analysis was required for a dismissal. First, the Court would be required to determine if the delay in service was presumptively abusive. Second, if a delay was presumptively abusive, then the court was required to determine if the delay was justified. If the delay was justified, dismissal by reason of abusive delay would be inappropriate. If the delay was not justified, the case must be dismissed.[4]

The first question under former Rule 49(b), then, was the amount of time it took for a delay to become presumptively abusive. While there was never any specific guidepost date, the Courts took a fairly uniform approach that anything over 125 days would be presumptively abusive. For example, in *Henry v. Shober*, the Court found that a 169-day delay was presumptively abusive.[5] In *Turnbull v. Horan*, a 126-day delay was deemed abusive.[6] In *Alvarez v. Meadow Lane Mall Ltd. Partnership*, a 159-day delay was considered abusive.[7] Seven and eight month delays were found inappropriate in *Mokhtarian v. GTE Midwest Incorp.*[8] and *Bean v. Midwest Battery & Metal, Inc.*[9]

On October 31, 1997, with an effective date of January 24, 1998, Rule 49 was amended.[10] Perhaps with an eye toward eliminating some of the subjectivity in determining what time frame for service was presumptively abusive, the new rule provided that if service was not made within 90 days after the filing of the petition, the court upon motion

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1 *Esterdahl v. Wilson*, 252 Iowa 1199, 1208, 110 N.W.2d 241, 246 (1961).
2 *Jacobsen v. Leap*, 249 Iowa 1036, 1040, 88 N.W.2d 919, 921 (1958).
3 *See e.g. Henry v. Shober*, 566 N.W.2d 190, 192 (Iowa 1997).
4 *Alvarez v. Meadow Lane Mall Ltd. Partnership*, 560 N.W.2d 588, 590 (Iowa 1997).
5 566 N.W.2d 190, 193 (Iowa 1997).
6 522 N.W.2d 860, 861 (Iowa App. 1994).
7 560 N.W.2d 588, 590 (Iowa 1997).
8 578 N.W.2d 666, 670 (Iowa 1998).
9 449 N.W.2d 353, 355 (Iowa 1989).
10 *Mokhtarian*, 578 N.W.2d at 668.

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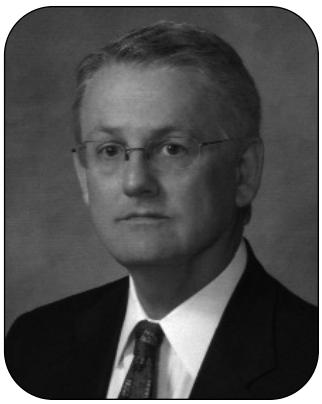
MESSAGE FROM THE PRESIDENT



Mark S. Brownlee

As all of you know, the 2006 election drastically altered the balance of power in the Iowa Legislature. Instead of a Republican majority in the House and an evenly divided Senate, Democrats now enjoy a majority in both chambers along with a Democrat governor for the first time since 1965. Putting aside the matter of who influences the current majority, it can fairly be said that this shift of power has produced an abundance of bills constituting a different species of tort reform than previously expected from-but largely unaccomplished by-Republicans on the state and national levels. Indeed, rather than curbing or limiting tort actions, much of the pending tort-related legislation serves to increase or expand the theories and recoveries available to plaintiffs. Whether you agree or disagree with certain legislative proposals, they are largely reflective of the current political landscape in Iowa and are of potential significance to the defense practice.

My knowledge of the legislature process is limited, but at the time of this writing, my understanding is that most of the notable tort-related bills have not yet been considered on the floor of both chambers. The status of certain bills may well change by the time this issue of *Defense Update* goes to print, but nonetheless, I think it is worthwhile to briefly summarize some of the pending legislation of interest to those toiling as defense counsel. Time and space do not allow for a thorough discussion of each bill. They include the following (in no particular order):

SF 552	-repeals six-month dram shop notice prescribed in Iowa Code §123.93
SF 424/ HF 743	-gives injured workers the right to choose their own medical providers
HF 743	-enhances worker's compensation benefits for scheduled injuries when injury produces greater loss of earning capacity than contemplated by the schedule
SF 520	-creates private cause of action for certain consumer fraud violations
SF 538	-allows parents to recover loss of consortium damages for injury or death of a minor child
SF 522	-prescribes fee schedule for the cost of copying medical records
HF 107	-increases statutory minimum automobile insurance coverage to 20/40/15
HSB 127/ SSB 1146	-repeals statute of repose in product liability cases and cases arising out of unsafe or defective conditions on improvements to real property
SSB 1145/ HSB 122	-addresses or clarifies the statute of limitations for medical malpractice actions
SSB 1094	-relates to certification of experts testifying in medical malpractice actions
HSB 73	-specifies expenses and actual losses relating to loss of consortium, services, companionship or society to be considered when determining fault of injured person and damages

Again, the status of certain bills will likely be different by the time you receive this issue of *Defense Update*. Our IDCA lobbyist is Bob Kreamer. As you might imagine, he is extremely busy keeping up with the avalanche of legislative proposals of interest to our organization, but you may contact him with your comments and questions. His telephone number is 515-271-0608; fax number is 515-274-5223. You are also encouraged to contact your own legislators to share your thoughts.

Mark S. Brownlee
IDCA President

PROPOSED SUPREME COURT RULES

By: Martha L. Shaff, Beatty, Neuman and McMahon, PC., Davenport, IA

On December 6, 2006, the Iowa Supreme Court requested public comment on the rules related to case processing, dismissal for want of prosecution and time standards for case processing. Comments were due by March 14, 2007. "The proposed changes to the court's rules and forms are intended to expedite civil case scheduling and to simplify the rules for dismissal for want of prosecution."

Rule 1.906 Civil trial–setting conference. As proposed the new rule provides that within 90 days after the case is filed the notice of trial–setting conference is sent out. A trial–setting conference shall be set within 150 days of the filing date. The parties are responsible for obtaining a trial–setting conference even if notice is not sent out. The rule is intended to coincide with the service rule. As a practical matter, many times when a defense attorney receives notice of a lawsuit there may already be a trial–setting conference scheduled or possibly a trial date. You will want to follow up on that issue immediately if the case has been on file more than 90 days. The rule does not provide for extending the time to set a trial because of extensions of time to answer the lawsuit. Regardless of whether an answer or other motion has been filed, the trial will be set.

Rule 1.944 Uniform rule for dismissal for want of prosecution. As proposed, the current Rule 1.944 will be completely rewritten. New rule 1.944(1) provides that, "[i]n the exercise of reasonable diligence" all cases will be tried within the guidelines of the rewritten chapter 23. Cases will now be subject to dismissal if they are not set for trial and if they are not tried. Rule 1.944(2) provides that if a case is not set for trial within 180 days of the date filed, it "shall be deemed dismissed without prejudice…". The court may reinstate a case in its discretion and shall reinstate "upon a showing that the dismissal was the result of oversight, mistake or other reasonable cause…." The request must be made within 30 days from the date of dismissal and may not be made ex parte. A case will also be dismissed if trial does not go forward on the date set. Rule 1.944(3).

Rule 1.944(9) addresses the application of this rule to new filings as well as those cases already on file. The rule will apply to all cases filed from the date adopted forward. It also applies to cases on file without a trial date (allowing 180 days from the new date of the rule, to secure a trial date). For all cases with a trial date, the parties will be given notice that if they do not try the case as scheduled, the action will be dismissed as provided in the rule.

Iowa Court Rule, Chapter 23, Time Standards for Case Processing. Chapter 23 replaces rules 23.1 – 23.4 in their entirety. Under the new rule 23.1, civil cases identified as regular torts (jury and non jury) shall be tried within 18 months. Complex civil cases, defined as medical and professional liability, product liability, class actions etc., shall be tried within 24 months. Other law and equity cases shall be tried within 12 months. Rule 23.2 allows the court, upon a showing of good cause, to exceed those limits as follows: regular torts 24 months; complex civil cases 36 months; other law and equity, 18 months.

Rule 23.5 provides for a uniform scheduling order to be used when setting trials. The parties may complete the form and submit it prior to the trial setting conference. The court administrator may not set a trial date that exceeds the times set forth in rule 23.1. The court may set a trial within the guidelines of 23.2. The rule allows the parties to decide on deadlines within the framework of the rule. Note, "[t]he deadlines in the uniform scheduling order are the enforceable deadlines unless a new order has been entered or an appropriate stipulated amendment has been filed with the clerk." Therefore, if there is an agreement to extend any deadlines, you will need to file a stipulation reflecting the new deadlines.

The court noted in its proposal that, "[t]he proposed time standards are better aligned with the current judicial workload and resources of the district courts and are to be utilized as guidelines in moving cases forward toward timely disposition." To keep track of new rules proposed by the Supreme Court log on to www.judicial.state.ia.us/. The Supreme Court web site lists all rules that are proposed including the deadline for comment. They also list all new rules adopted by the Court. Through their web site you can also obtain a current copy of the rules. ■

STRUCTURING ATTORNEY FEES: AN OVERLOOKED OPPORTUNITY

By: Jerry C. Lothrop and Christine D. Phillips, Capital Planning, Inc., St Louis Park, MN

The subject matter of this article is an alternative funding payment for attorney fess generated from a personal injury case. It also provides an interesting defense strategy option for settlement negotiation discussion. The concept, on the right case, may be a valuable option to conclude the case.

With interest rates continuing to rise, the increase in the usage of settlement annuities for settlement purposes is also rising. Annuity settlements also present the opportunity for attorneys to structure all or part of their fees, regardless of whether or not the client structures. Some of the great innovations in the structured settlement industry have come in the areas of using structured settlements for attorney fees. For several years, advisors recommended that attorneys not structure their fees until a 1994 tax court ruling clarified the ability of attorneys to defer income taxes. Now structured attorney fees are common and acceptable.

This article is intended to provide information to assist attorneys and their advisors in identifying and addressing the issues relevant in structuring attorney fees, and does not constitute a legal opinion regarding the matters addressed herein. **No attorney should consider structuring his/her legal fees without the advice of a competent tax professional.**

What case allows attorneys to structure their fees and not be subject to immediate taxation?

In *Childs v. Commissioner*, 103 TC 634 (1994), (aff'd w'out publ. op. 89 F.3d 856 (11th Cir. 1996), the Tax Court held that the attorney was not subject to immediate taxation under I.R.C. §83 or the economic benefit doctrine as a result of an annuity contract being purchased to fund a periodic payment obligation where the attorney did not own the annuity contract. In addition, the court held that the attorney did not have constructive receipt of the funds because the agreement to receive periodic payments was executed before the attorney had the unconditional right to receive the funds.

What are the advantages to structuring fees?

- Defer all or any part of the fee, there is no limit.
- Reduce taxes by spreading out income over time.
- Provide a steady stream of income, either for a certain period or for life, and make overall income management easier.
- Choose when payments will commence. Immediate or deferred payments are reported (via Form 1099) as income in the years received.
- Arrange future lump sums to cover predictable needs such as college tuition.
- Supplement retirement with payments guaranteed for life.
- No initial or ongoing investment management costs.
- Predictable payments, unaffected by future market performance and guaranteed by one of the strongest financial institutions in the nation.
- Smooth out future cash flow.

Structured fees can help cash flow predictability which in turn assists in planning for upcoming years.

When can an attorney or law firm structure a portion (or all) of their fees?

- The attorney's or law firm's contingency fee agreement permits the structuring of all or part of attorney fees.
- The attorney or law firm does not have constructive receipt of the funds.
- The requirements and/or guidelines of the issuer of the attorney fee annuity contract are followed.

May the fee structure portion of the settlement be assigned?

- Yes, the attorney fee structure can be assigned under a qualified assignment.

May the fee be structured if the plaintiff(s) decide to take cash at settlement?

- Yes, stand-alone attorney fees may be structured even when the plaintiff chooses not to take a structured settlement.

What tax reporting to the Internal Revenue Service will be done on the attorney fee payments?

The life insurance company will report any annuity payments, identified as attorney fees, made during the calendar year to the attorney (or his/her firm) and the Internal Revenue Service on IRS Form 1099.

What are the steps to structuring an attorney fee?

1. Reach a tentative settlement on the client's claim, making sure a negotiated part of it is that the fees are structured.
2. Contact a structured settlement consultant and give them the amount that will be structured and how you would like it paid out.
3. The structure company will quote various life insurance companies that issue settlement annuities to ensure the best rate of return

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RULE 35
EXAMS IN SEXUAL HARASSMENT CASES

By: Deborah M. Tharnish, Davis, Brown, Koehn, Shors and Roberts, PC., Des Moines, IA

Defendants in sexual harassment cases often face a plaintiff with emotional distress claims. On occasion, these emotional distress claims reach the level of significant mental health claims, including claims of posttraumatic stress disorder. In those circumstances in which a plaintiff's mental condition is at issue, defense counsel may decide to seek an examination of the plaintiff under Rule 35 of the Federal Rules of Civil Procedure.

Rule 35(a) of the Federal Rules of Civil Procedure provides:

> Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons to whom it is to be made.

Many courts have recognized that Rule 35 is intended to "level the playing field between parties in their respective efforts to appraise a specific medical condition." *The National Institute for Trial Advocacy*, Notre Dame Law School, G. Leroy Street, Rule 35 (2006); *Ragge v. MCA/Universal*, 165 F.R.D. 605 (C.D. Cal. 1995) (holding that one of the purposes of Rule 35 is to "level the playing field" between parties in cases in which a party's physical or mental condition is in issue); *Tomlin v. Holecek*, 150 F.R.D. 628, 633 (D. Minn. 1993) (holding that the purpose of Rule 35 is to "level the playing field" and that "granting a request for a psychiatric examination pursuant to Rule 35 is to preserve the equal footing of the parties to evaluate the plaintiff's mental state…"); *Hardy v. Raser*, 309 F. Supp. 1234 (N.D. Miss. 1970) (holding that the purpose of Rule 35 is to inform the court and parties of the true facts as to the condition of the party claiming injury).

The validity of Rule 35 was initially challenged by plaintiffs, but its validity has been upheld and it has been used in many federal court contexts, including personal injury and employment cases. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (holding that Rule 35 is free of constitutional difficulty regarding the invasion of privacy and is within the scope of the Rules Enabling Act, which provides that rules "shall not abridge, enlarge or modify any substantive right"); *Countee v. United States*, 112 F.2d 445 (7th Cir. 1940) (holding that rule regarding physical and mental examinations does not violate right of privacy or any rights under the constitution of the United States); *Sibbach v. Wilson*, 312 U.S. 1 (1940) (upholding Rule 35 as constitutional and concluding that it does not violate the "inviolability of the person").

The court in *Hardy v. Raser* noted the general acceptance of the use of Rule 35:

> In spite of the criticisms initially leveled at Rule 35, it appears to have worked, and now has the approval of the great majority of both bench and bar. Its purpose to inform the court and the parties of the true facts as to the physical condition of the party claiming injury, has largely been achieved. Only a few scattered cases have attempted to criticize or limit the rule. Rule 35 in fact helps to further an important federal policy, i.e., securing the "just, speedy, and inexpensive determination of every action." As a vital part of the whole liberal discovery policy of the federal rules, Rule 35 should not be lightly set aside…
>
> *Hardy v. Raser*, 309 F. Supp. 1234, 1241 (D. Miss. 1970).

While Rule 35 has been widely accepted by the courts, there is no automatic right to obtain a Rule 35 exam. The propriety of a Rule 35 exam in an individual case rests in the discretion of the trial court after application of the Rule's requirements. As an initial matter, the trial judge must determine whether the party requesting a mental or a physical examination has adequately demonstrated the existence of the rule's requirements of "in controversy" and "good cause". *Schlagenhauf v. Holder*, 379 U.S. 104, 118-19 (1964).

These initial requirements often are at issue in sexual harassment cases. When examining these issues to determine whether to permit a Rule 35 examination, many courts will not find

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or its own initiative, after notice to the filing party "shall dismiss the action without prejudice as to the Defendant."[11] The court was, however, left with the opportunity to extend the time for service upon a showing of good cause for the failure to obtain service in the first 90 days.[12] Accordingly, the amended rule seemed to eliminate the subjective ability of the court to determine what was or was not abusive delay in service by specifying 90 days as the cut-off. In 2002, pursuant to the renumbering of the rules of civil procedure, this provision became Rule 1.302(5).

Despite now being provided with the exact date by which a plaintiff must accomplish service, a significant number of cases are being dismissed and appealed under the new rule. One of the more important of these cases is *Meier v. Senecaut III*[13], decided by the Supreme Court in 2002. In *Meier*, the Court was reviewing on interlocutory appeal a lawsuit arising out of a motor vehicle accident. The accident took place on January 20, 1997, and involved Loretta Meier and Voltaire Senecaut III. On May 13, 1997, Meier filed a petition naming as a defendant "Voltaire Senecaut" without the "III" designation. The original notice was similar. The address of the Defendant listed was that of Voltaire Senecaut, who was the grandfather of Senecaut III. Senecaut III did not live with his grandfather at any time during the proceedings.[14] Although the police report had listed the address of Senecaut III, the attorney for Plaintiff apparently got the address out of the telephone directory. A process server unsuccessfully attempted to serve the papers at the address of Senecaut (the grandfather) 13 times between January 21, 1999 and March 27, 1999. On April 19, 1999, the attorney for Meier discovered that Senecaut was in Florida and directed that the papers be served upon him there. When served with the papers, Senecaut informed the sheriff serving the papers that they were intended for his grandson. He also provided the sheriff the grandson's address in Iowa. Further, counsel for Meier served Senecaut (the grandfather) upon his return to Iowa on May 18, 1999, and was again informed that he was not the proper party. The address for Senecaut III in Norwalk was provided. More than a dozen attempts were undertaken to serve Senecaut III until success was achieved on August 25, 1999.[15] This was more than seven months after the original notice was filed.

The Court began its analysis of the service issue with a recitation of Rule 49(f) which, of course, contained the language requiring service to occur within 90 days. It noted that under the prior rule a two-step analysis existed and the first step was to determine if the delay in service was presumptively abusive. According to the Court, "it is no longer necessary for the Court to engage in the first step of the analysis when service has not been made within ninety days and no extension was granted."[16] *Meier* therefore establishes that any delay in excess of 90 days is presumptively abusive. The only question remaining is whether the delay was justified.[17]

In determining whether or not a delay in service is justified, the Court uses a "good cause" standard. This standard requires that:

> "[t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause."[18]

In *Meier*, the Court noted that Plaintiff made repeated efforts to serve Senecaut and, after realizing the mistake in identity, several more attempts to serve Senecaut III. The Court also noted that "the initial confusion over the identity of the names could support some delay in service."[19] However, the Court noted that when the confusion over the identities was learned in early May of 1999, that there was still more than a 90–day period from then until Senecaut was actually served. The only explanation offered was that he was not at home when they attempted to serve him. However, there was no evidence in the record to suggest that Senecaut III was attempting to avoid service or was absent from his home for long

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[11] Iowa R. Civ. P. 49 (f) (1998).
[12] *Id.*
[13] 641 N.W.2d 532 (Iowa 2002).
[14] 641 N.W.2d at 535.
[15] 641 N.W.2d at 536.
[16] 641 N.W.2d at 542.
[17] *Id*.
[18] *Id*. (quoting *Henry v. Shober*, 566 N.W.2d 190, 192-3 (Iowa 1997).
[19] *Id.* at 542.

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stretches of time. The Court noted that rule 49 mandated service within 90 days and "*requires* the Plaintiff to take affirmative action to obtain an extension or directions from the Court if service cannot be accomplished." (emphasis added) [20] Accordingly, the decision reversed the lower court finding that good cause existed for the delay in service and remanded the case to the district court for entry of an order of dismissal.

In *Wilson v. Ribbens*,[21] the Supreme Court addressed a case where an insurance adjuster and an attorney for the Plaintiff made an agreement to delay service. The case provides an excellent analysis of the purposes behind the rules in regard to service. Factually, the Plaintiff filed her lawsuit alleging the Defendant's negligence caused her injury but waited for thirteen months to serve the petition. Plaintiff contended that there was no service because her attorney and the adjuster for Defendant's insurance company made an agreement to hold service pending possible settlement, and correspondence between them supported this contention.[22] Settlement negotiations broke down and service was finally performed. Defendant's counsel filed a motion to dismiss for failure to timely serve the petition, which was granted.[23]

On appeal, *Wilson* alleged that there was "good cause" for the failure of service and that the district court erred in dismissing the petition. The Supreme Court recognized that the new rule *required* a court to grant an extension to the 90-day requirement upon a showing of "good cause."[24] The question, then, became one of defining "good cause" under the new rule.

The *Wilson* Court noted that in interpreting "good cause" that it looks to the decisions of other courts construing statutes similar to the Iowa rule, including Federal Procedural Rules.[25] In interpreting the meaning of "good cause," the Court repeated the standard that was previously enunciated in *Meier*: the Plaintiff has to have taken some affirmative action to effect service or been prevented from doing so through no fault of her own. Inadvertence, neglect, mistake, ignorance or meager attempts at service are not adequate. The Court furthered the standard of "good cause" as follows:

> "[W]e also now find [g]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in a timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances. ..."[26]

Under this criteria, it appears that a plaintiff can, and shall, avoid the dismissal for failure of service if at least some effort of service is made and the failure of service can be laid at the feet of another. In *Wilson*, because the Plaintiff and the insurance carrier agreed to delay service, the Court held that this *may* constitute "good cause" under the statute and reversed for further proceedings.[27]

In 2005, the Supreme Court was again faced with a service failure question in *Brubaker v. Estate of Long*.[28] The *Brubaker* case involves a lengthy series of Orders granting the Plaintiff additional time in which to effect service. The lawsuit involved an accident that occurred on April 11, 2001. The alleged tortfeasor, Arthur DeLong, died on August 20, 2002.

On December 19, 2002, Brubaker filed a petition against DeLong seeking damages as a result of the collision.[29] On March 23, 2003, with no proof of service on file, the district court filed a notice of hearing to review Brubaker's

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[20] *Id.*
[21] 678 N.W.2d 417 (Iowa 2004).
[22] *Id*. at 417-18.
[23] 678 N.W.2d at 418.
[24] Iowa R. Civ. P. 1.302 ("If the party filing the papers shows good cause for the failure of service, the court *shall* extend the time for service for an appropriate period.")
[25] Fed.R.Civ.P. 4(m) imposes a 120-day rule for service.
[26] 678 N.W.2d at 421 (quoting 4B Charles A. Wright & Arthur R. Miller*, Federal Practice & Procedure* at 342).
[27] At first blush, it would seem that this decision is at odds with *Henry v. Shober*, 566 N.W.2d 190 (Iowa 1997). In *Henry*, the Court held that plaintiff's failure to serve a petition for 169 days was not excused by the alleged justification that the parties were engaged in on-going settlement negotiations. The Court there held that "settlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service." 566 N.W.2d at 193. The crucial distinction between *Henry* and *Wilson*, at least in my mind, is the purported written agreement between the parties. In *Wilson*, the Court noted that the failure there was not due to inadvertence, neglect or misunderstanding but was due to the conduct of the adjuster. In contrast, the decision not to serve during negotiations in *Henry* appeared to be the decision of the attorney alone.
[28] 700 N.W.2d 323 (Iowa 2005).
[29] 700 N.W.2d at 324.

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failure to obtain service. The court entered an order granting additional time for service to May 29, and if no service was shown, it would be dismissed. On May 29, the court entered another order giving the plaintiff until June 30. On July 1, a third order was entered granting additional time. On July 31, a fourth order was issued. On September 3, a fifth order was entered allowing additional time. On September 17, the day before the additional time ran out, an acceptance of service was signed by an attorney purporting to act on behalf of the estate. However, the estate was not actually opened until September 18, and the attorney who accepted service on the 17th was not qualified as the administrator until September 19th. Of note, Plaintiff again served the attorney for the estate who accepted service again on December 4th.[30] The estate, naturally, filed its motion to dismiss.

On appeal the *Brubaker* Court first noted that Rule 1.302(5) "*requires*" a court to dismiss an action without prejudice for untimely service of the original notice. The Court determined that the efforts made to comply with the good cause standard were not met in this case. It stated that the district court was exceedingly generous in granting five extensions which allowed more than nine months to effect service. It also made specific note of the fact that at any time during the nine months when the plaintiff failed to serve the petition she "could have petitioned the probate court to open an estate for DeLong. *See* Iowa Code § 633.227."[31]

In 2006, the Supreme Court began its seemingly yearly foray into this field with *Crall v. Davis*.[32] *Crall* involved a slip-and-fall incident between next door neighbors. The incident occurred on February 16, 2002, and the suit was filed on February 16, 2004. On April 30, Davis filed a pre-answer motion alleging that there was no personal jurisdiction over Davis because she had not been personally served.[33] In that pre-answer motion, Davis provided her Des Moines address. The Cralls had filed an affidavit of a process server who stated that he had left a copy of the lawsuit with the Davis's daughter in Vacaville, California. The 90-day deadline for service expired on May 16, 2004, and the Defendant filed a motion to dismiss. The motion alleged that there was ample time for Crall to have served Davis, that Davis gave her address to Crall in the pre-answer motion filed on April 30, that Davis informed a process server where she could be found, and that at no time was she ever a resident of California.[34] Additionally, it was noted that Crall never requested the trial court for any additional time to serve the petition or to approve an alternate means of service.[35]

In response to the motion to dismiss, the trial court found that there was "good cause" for the failure of Crall to serve Davis. On interlocutory appeal the Supreme Court noted that although Crall took affirmative steps to serve Davis, there was no substantial evidence in the record to support the district court determination that these steps equated to "good cause." The Court found that the first attempt at service was 50 days after filing and there was no explanation for this delay.[36] The Court also noted that the first attempt was directed to the Davis's daughter which had no legal significance. Based upon this finding, the first actual attempt at service was approximately 80 days after filing. The Court noted that the pre-answer motion contained Davis address in Des Moines and an attempt to serve her at that address was only made four days before the expiration of the 90 day period. There was also no motion by Crall for an extension of time for service.

This last point, that no motion was filed within the 90 day period, seems to be very important in the final analysis. Consider the following in the decision:

> In interpreting comparable Federal Rule of Civil Procedure 4(m), federal courts have held that a failure to move for an extension of time may be construed as an absence of good cause for the delay. [citation omitted] Interestingly, the district court noted in its ruling that "it would have been preferable for plaintiffs' counsel to apply to the Court for an extension of time for service if there were any question as to whether service could be accomplished." We conclude in these circumstances such action was not merely preferable, but required. The Cralls' failure to take such affirmative action further supports our conclusion that there was not substantial evidence to

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30 *Id*. at 324-25.
31 *Id*. at 327.
32 714 N.W.2d at 616 (Iowa 2006).
33 *Id*. at 617.
34 *Id*. at 618.
35 *Id*.
36 *Id*. at 621.

YOUR SERVE: A SURVEY OF RECENT DECISIONS INVOLVING FAILURE TO SERVE A DEFENDANT WITHIN 90 DAYS . . . *continued from page 8*

support the district court's finding of good cause.[37]

The Iowa Court of Appeals has also visited this issue with some recent frequency. In *Ryder Truck Rental, Inc. v. Shaffer Trucking, Inc.*,[38] the Court of Appeals found that a clerical error by plaintiff's counsel was insufficient justification for failure to serve a petition. More specifically, "[o]versights in counsel's organizational system are not sufficient justification to constitute good cause for the delay." Similarly, in *O'Harrow v. Haupert*,[39] service was not obtained for 128 days because plaintiff's counsel was unaware of the 90–day requirement. The attorney's staff, in fact, erroneously told him that there was not a 90-day requirement. This was insufficient to constitute "good cause" to avoid dismissal.

In *Langfeldt v. Genesis Medical Center*,[40] a failure to serve within 90 days was conceded. However, it was claimed that on-going settlement negotiations provided good cause for the failure to do so. There was, unlike *Brubaker*, no written agreement to extend the deadline for service. The *Langfeldt* decision noted that settlement negotiations did not constitute justification or good cause for delay of service. Further, *Langfeldt* rejected the argument that there was no prejudice to the Defendant as a basis for refusing to dismiss the case.[41]

In *Davidson v. Hurst*,[42] the Defendant was not served with the petition for nine and one half months and, even though all attempts at service were unsuccessful, no motion to enlarge the time to serve pursuant to Rule 1.302 was filed. The Court determined that the delay was not justified and upheld the trial court dismissal.

In *Streed v. Flanagan Corp.*,[43] the decision made clear that prejudice was not a relevant consideration in determining whether or not a delay would result in dismissal. It specifically stated that, "[t]here is no requirement that the defendant demonstrate prejudice." This position was reiterated more recently in *Elsberry v. Tucker*.[44]

In *Waddy v. Lumbard*,[45] the plaintiff's attorney sent to the attorney for the defendants a copy of the petition along with an acceptance of service form. This form was never returned. It was noted that, "[s]ending opposing counsel a form for acceptance of service for his clients is, at best, a 'half-hearted' attempt at service, rather than an affirmative action to effectuate service of process."

In *Grout v. Lawrence*[46] the Plaintiff obtained an extension of time in which to make service. Despite allegations that numerous attempts at service had been made, the Court dismissed the petition. The *Grout* Court here found it significant that plaintiff "did not notify the court of her difficulties and request an extension until after the 90–day limitation had expired." Further, the district court's initial grant of an extension to serve the suit did not create a basis to avoid dismissal. The Court determined that "revisiting its prior order [to extend the time for service] was within the district court's province," and that "[a] party cannot claim a vested interest in a prior erroneous ruling." A district court's power to correct an error "has always been recognized by this court."

In one of the few decisions to find that a petition should not be dismissed, the court in *Moyer v. Johnson*[47] determined that the case should not have been dismissed because the Plaintiff had taken affirmative steps to effectuate service, but it was not accomplished only due to a miscommunication from the sheriff's office to the attorney for the Plaintiff. Notably, the record showed that the petition was sent to the sheriff for service the day after it was filed and, when the mistake was discovered, service was promptly obtained.

What these cases set forth, then, seems to be a guideline for determining when a defendant should prevail in filing a motion to dismiss due to service of a petition beyond the 90–day period provided by Rule 1.302(5). First, if service is not done within 90 days, then it is presumptively abusive.

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37 *Id*. at 621-22.
38 Unreported. Westlaw citation - 2002 WL 987951 (Iowa App.).
39 662 N.W.2d 372 (Table), 2003 WL 118603 (Iowa App.)
40 Unreported. Westlaw citation - 2000 WL 1289098 (Iowa App.)
41 The decision stated: "The point is not whether Genesis suffered prejudice from the delay in service or whether the delay in service was intentional, but rather whether the Langfeldt's can show justification for the delay."
42 690 N.W.2d 463 (Table), 2004 WL 1252686 (Iowa App.)
43 Unreported. Westlaw citation - 2003 WL 22900380 (Iowa App.)
44 Unreported. Westlaw citation - 2007 WL 257621 (Iowa App.)
45 Unreported. Westlaw citation - 2007 WL 248093 (Iowa App.)
46 Unreported. Westlaw citation - 2001 WL 1205344 (Iowa App.)
47 Unreported. Westlaw citation - 2001 WL 912836 (Iowa App.)

YOUR SERVE: A SURVEY OF RECENT DECISIONS INVOLVING FAILURE TO SERVE A DEFENDANT WITHIN 90 DAYS . . . *continued from page 9*

Second, absent a showing of good cause, the case is required to be dismissed. Upon a showing of good cause, the trial court is required to grant additional time or make other orders in regard to service as are appropriate. Third, "good cause" means more than a half-hearted or ho-hum attempt at service. Inadvertence, neglect, misunderstanding or ignorance of the rule are insufficient bases to establish good cause. Further, as suggested in *Brubaker* and more forcefully in *Crall*, it is incumbent upon the Plaintiff to take steps to complete service within the 90 days or to file a motion within the 90 days to request additional time for service.[48] Furthermore, prejudice to a defendant is not a relevant consideration and that, absent "good cause," a dismissal is mandatory.

Such a dismissal, of course, can have drastic consequences. Particularly for the Plaintiff that has waited until close to the statute of limitations to file their petition in the first instance. Even though the dismissal operates without prejudice as required by the plain language of Rule 1.302(5), a dismissal will effectively be with prejudice when it comes after the running of the applicable statute of limitations.

Because of the drastic nature of the remedy, plaintiffs may attempt to argue other bases for reinstatement. For instance, in those cases with a nonresident defendant, a plaintiff may allege that the time in which the nonresident is absent from the state will toll the limitations period and extend it beyond the two years for personal injuries.[49] The problem with this argument is how the courts have interpreted the applicable statute. In *Kokenge v. Holthaus*,[50] the Supreme Court was looking at the question of how a nonresident motorist's absence from the state affected the tolling of the limitations period. The trial court in *Kokenge* concluded that the Defendant was not a nonresident of Iowa within the meaning of § 614.6 "because at all times since the accident . . . he was subject to the jurisdiction of the district court of Iowa under the provisions of the nonresident motorist service act...[51] and, hence, the statute was not tolled."[52] Although it was not specifically worded as such, the Supreme Court agreed. They found "prior to the enactment of the nonresident motorist service act by the legislature of Iowa, this court has enunciated the doctrine of inescapability from service as the test of the tolling of the statute of limitations and it may be inferred the Legislature deemed it unnecessary to place in the act any direct language to the same effect."[53]

The decision in *Kokenge* was revisited in *Fulmer v. Debel*.[54] In *Fulmer*, the alleged tortfeasor was an Iowa resident that moved to Minnesota prior to being served and prior to the statute of limitations running. The Plaintiffs asserted that the Defendants removal from the state tolled the statute of limitations pursuant to § 614.6. The Court, in following the principle laid down in *Kokenge*, applied the "inescapability test."[55] In essence, the Court held that the Defendant clearly could not escape service while a resident of Iowa, and could equally not escape service when they became a resident of Minnesota because they were subject to service under the Nonresident Motorist Service Act.[56] Because they were at all times amenable to service for their motor vehicle tort, there was no tolling of the statute under § 614.6.

Under the law established under these two cases, although the language of the statute impliedly suggests that the limitations period is tolled for a nonresident defendant, it is not.

A second statutory provision under which a dismissed plaintiff may attempt to have an action reinstated is § 614.10, which provides:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

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[48] In *Brubaker*, recall that the Supreme Court made specific note of the fact that the plaintiff there could have taken action to open an estate for purposes of service under Iowa Code § 633.227. In *Crall*, as just discussed, the Court concluded that the filing of an application for extension of time was *required*.

[49] Iowa Code § 614.6 deals with service upon a nonresident or unknown defendant. It reads, in pertinent part, relative to a limitations period: "The period of limitation above described shall be computed omitting any time when: 1. The defendant is a nonresident of the state…"

[50] 243 Iowa 571, 52 N.W.2d 711 (1952).

[51] The non-resident motorists service act was found at Iowa Code § 321.498 et seq.

[52] 243 Iowa at 572, 52 N.W.2d at 711.

[53] 243 Iowa at 574, 52 N.W.2d at 712.

[54] 216 N.W.2d 789 (Iowa 1974).

[55] "The test thus established was named 'inescapability from service' by Judge Graven in *Denver-Chicago Trucking Co. v. Lindeman*, D.C.Iowa, 73 F.Supp. 925. In *Kokenge v. Holthaus* . . . we adopted this apt description."

[56] 216 N.W.2d at 791.

YOUR SERVE: A SURVEY OF RECENT DECISIONS INVOLVING FAILURE TO SERVE A DEFENDANT WITHIN 90 DAYS . . . *continued from page 10*

Under the language of this statute, a plaintiff can seemingly refile a dismissed petition after the statute of limitations and have it relate back to a date prior to the limitations period expiring. However, the statute requires that the petition cannot be dismissed for "negligence in its prosecution," or the rule does not apply.

The meaning of this phrase was at issue in *Central Construction Co. v. Klingensmith*,[57] where the Plaintiff filed a foreclosure action on a mechanic's lien. On its face, the petition was outside the statute of limitations and the Defendant filed a motion to dismiss. The Plaintiff responded by noting that it had brought a previous action on the same lien which was within the time limit and dismissed by the Court under Rule 215.1.[58] They cited § 614.10 as the basis for allowing them to file the action beyond the statute period and relating back to the original date the petition was filed.[59]

In reviewing the issue, the Court first noted that it was the Plaintiff's obligation to show that the petition came within the sphere of the rule. In other words, the Plaintiff was obligated to show that it was free of negligence in the dismissal of the original action.[60] In discussing the question of negligence in prosecution, the *Klingensmith* Court stated:

> We have many times indicated that failure to prosecute an action diligently is negligence. Section 215.1 provides methods whereby a case may be removed from the operation of the dismissal rule set forth there. A motion for continuance may be made, before the dismissal; and there is no showing, not even any suggestion that this procedure was not readily available to the plaintiff. . . . Our cases decided under Rule 215.1, supra, seem to indicate clearly that failure to prosecute an action or to take the permitted steps when it is noted under the rule amount to negligence.[61]

Because the original action was dismissed pursuant to Rule 215.1 under the facts of the case, it was held that the dismissal was due to negligence and the Plaintiff could not claim the benefit of § 614.10 upon the refiled petition.

The *Klingensmith* case is analogous to a situation in which a plaintiff has their case dismissed due to a want of service. In fact, a dismissal for want of service seems to be even more negligent in its prosecution than a dismissal under Rule 215.1. Under Rule 215.1, it would appear that the Plaintiff at least attained service, while a plaintiff who has been dismissed under Rule 1.302 (5) cannot even claim that accomplishment.

CONCLUSION

Rule 1.302(5) requires a petition to be served within 90 days. If it is not, under the plain language of the Rule, it shall be dismissed by the Court. This end result can be avoided only by an affirmative showing by a plaintiff that "good cause" exists for the failure of service in that period. Such good cause cannot include inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service. Further, it may well be that a plaintiff needs to take action within the 90–day period to have the service time extended for good cause if they will be unable to complete service within that time frame. It has, at least to the author, become clear that the appellate courts are taking a vigorous approach in application of this Rule.■

[57] 256 Iowa 364, 127 N.W.2d 654 (1964).
[58] This provision has been renumbered 1.944. This is the provision relating to dismissal for want of prosecution.
[59] 256 Iowa at 366, 127 N.W.2d at 655.
[60] 256 Iowa at 367, 127 N.W.2d at 655-56.
[61] 256 Iowa at 369, 127 N.W.2d at 657.

IDCA WELCOMES NEW MEMBERS

Thomas M. Braddy
Locher, Pavelka, Dostal, Braddy & Hammes, LLC
Omaha, NE

Maggie R. Manternach
Betty, Neuman & McMahon, P.L.C.
Davenport, IA

John H. Moorlach
Whitfield & Eddy, P.L.C.
Des Moines, IA

Mark Parmenter
Lederer Weston Craig PLC
Cedar Rapids, IA

Amanda G. Wachuta
Ahlers & Cooney, P.C.
Des Moines, IA

Todd D. Witke
EMC Insurance Companies
Des Moines, IA

Christopher S. Wormsley
Bradshaw, Fowler, Proctor, & Fairgrave
Des Moines, IA

STRUCTURING ATTORNEY FEES: AN OVERLOOKED OPPORTUNITY . . . *continued from page 4*

currently available.

4. You select the plan design and/or life company you want.
5. The structure company will prepare all documents required for the annuity and will work with you in drafting the Settlement Agreement and Release, ensuring that the language required to structure the plan is included.
6. Once all documentation is completed and signed, the structure company will request issuance of the annuity policy and will provide copies once received.

All of the above is good information, but from a financial viewpoint, give me examples of how this works:

Compare an attorney fee structure with an alternative taxable investment account. This comparison assumes a 10-year deferral and a 15-year level payout. The taxable account would require an additional 2.9% rate of return to match the structured settlement annuity level payout.

Example #1

Current Annuity Rate of Return:	5.3%	Comparable Rate of Return:	8.2%
Assumed Federal Rate:	35.0%	Assumed Federal Tax Rate:	35.0%
Annuity Premium:	$300,000	Cash:	$300,000

Year*	Payment Pre-Tax	Total Tax Amount	Payment After Tax	Year*	Payment After Tax	Interest Earned	Total Tax Amount	Account Value
					$0	$0	$105,000	$195,000
1	$0	$0	$0	1	$0	$16,029	$5,610	$205,419
2	$0	$0	$0	2	$0	$16,886	$5,910	$216,394
3	$0	$0	$0	3	$0	$17,788	$6,226	$227,957
4	$0	$0	$0	4	$0	$18,378	$6,558	$240,136
5	$0	$0	$0	5	$0	$19,739	$6,909	$252,967
6	$0	$0	$0	6	$0	$20,794	$7,278	$266,483
7	$0	$0	$0	7	$0	$21,905	$7,667	$280,721
8	$0	$0	$0	8	$0	$23,075	$8,076	$295,720
9	$0	$0	$0	9	$0	$24,308	$8,508	$311,521
10	$47,250	$16,538	$30,713	10	$30,713	$25,607	$8,962	$297,453
11	$47,250	$16,538	$30,713	11	$30,713	$24,451	$8,558	$282,633
12	$47,250	$16,538	$30,713	12	$30,713	$23,233	$8,131	$267,022
13	$47,250	$16,538	$30,713	13	$30,713	$21,949	$7,682	$250,576
14	$47,250	$16,538	$30,713	14	$30,713	$20,597	$7,209	$233,252
15	$47,250	$16,538	$30,713	15	$30,713	$19,173	$6,711	$215,033
16	$47,250	$16,538	$30,713	16	$30,713	$17,673	$6,186	$195,778
17	$47,250	$16,538	$30,713	17	$30,713	$16,093	$5,633	$175,526
18	$47,250	$16,538	$30,713	18	$30,713	$14,428	$5,050	$154,192
19	$47,250	$16,538	$30,713	19	$30,713	$12,675	$4,436	$131,718
20	$47,250	$16,538	$30,713	20	$30,713	$10,827	$3,790	$108,043
21	$47,250	$16,538	$30,713	21	$30,713	$8,881	$3,108	$83,103
22	$47,250	$16,538	$30,713	22	$30,713	$6,831	$2,391	$56,831
23	$47,250	$16,538	$30,713	23	$30,713	$4,672	$1,635	$29,155
24	$47,250	$16,538	$30,713	24	$30,713	$2,397	$839	0
Total	$708,750	$248,063	$460,688	Total	$460,688	$408,750	$248,063	

*Settlement Date Tax Upon Receipt of Cash

Assumptions:

1. 10-year deferral, with 15-year level, annuity payout guaranteed by claims paying ability of Hartford Life Insurance Company, an A.M. Best's "A+ (Superior)"-rated annuity carrier.
2. Actual structure of annuity payments is determined at issuance and can be designed to meet each attorney's needs.
3. Actual rate of return for structured settlement annuity determined at issuance. Rates above current as of 08/08/2006.
4. The Hartford's Attorney Fee Program is only available for qualified IRC 104(a)(1) or (2) damages.
5. Structured settlement uses an individual annuity contract issued by Hartford Life and owned by Hartford

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STRUCTURING ATTORNEY FEES: AN OVERLOOKED OPPORTUNITY . . . *continued from page 12*

Comprehensive Employee Benefits Service Company (Hartford CEBSCO).

6. Example does not include applicable state and local income taxes.

Let's assume that the attorney fee structure and taxable account both offered the same rate of return. This comparison also assumes a 10-year deferral and a 15-year level payout. Payouts for the taxable account would be $7,838.00 less than the structure payout each year, which totals $117,560.00 less.

Example #2

Current Annuity Rate of Return:	5.3%	Comparable Rate of Return:	5.3%
Assumed Federal Rate:	35.0%	Assumed Federal Tax Rate:	35.0%
Annuity Premium:	$300,000	Cash:	$300,000

Year*	Payment Pre-Tax	Total Tax Amount	Payment After Tax	Year*	Payment After Tax	Interest Earned	Total Tax Amount	Account Value
					$0	$0	$105,000	$195,000
1	$0	$0	$0	1	$0	$10,335	$3,617	$201,718
2	$0	$0	$0	2	$0	$10,691	$3,742	$208,667
3	$0	$0	$0	3	$0	$11,059	$3,871	$215,856
4	$0	$0	$0	4	$0	$11,440	$4,004	$223,292
5	$0	$0	$0	5	$0	$11,834	$4,142	$230,984
6	$0	$0	$0	6	$0	$12,242	$4,285	$238,942
7	$0	$0	$0	7	$0	$12,664	$4,432	$247,173
8	$0	$0	$0	8	$0	$13,100	$4,585	$255,688
9	$0	$0	$0	9	$0	$13,551	$4,743	$264,497
10	$47,250	$16,538	$30,713	10	$22,875	$14,018	$4,906	$250,733
11	$47,250	$16,538	$30,713	11	$22,875	$13,289	$4,651	$236,496
12	$47,250	$16,538	$30,713	12	$22,875	$12,534	$4,387	$221,768
13	$47,250	$16,538	$30,713	13	$22,875	$11,754	$4,114	$206,533
14	$47,250	$16,538	$30,713	14	$22,875	$10,946	$3,831	$190,773
15	$47,250	$16,538	$30,713	15	$22,875	$10,111	$3,539	$174,469
16	$47,250	$16,538	$30,713	16	$22,875	$9,247	$3,236	$157,605
17	$47,250	$16,538	$30,713	17	$22,875	$8,353	$2,924	$140,159
18	$47,250	$16,538	$30,713	18	$22,875	$7,428	$2,600	$122,112
19	$47,250	$16,538	$30,713	19	$22,875	$6,472	$2,265	$103,444
20	$47,250	$16,538	$30,713	20	$22,875	$5,483	$1,919	$84,132
21	$47,250	$16,538	$30,713	21	$22,875	$4,459	$1,561	$64,155
22	$47,250	$16,538	$30,713	22	$22,875	$3,400	$1,190	$43,490
23	$47,250	$16,538	$30,713	23	$22,875	$2,305	$807	$22,113
24	$47,250	$16,538	$30,713	24	$22,875	$1,172	$410	$0
Total	$708,750	$248,063	$460,688	Total	$343,128	$227,889	$184,761	

*Settlement Date Tax Upon Receipt of Cash

Assumptions:

1. 10-year deferral, with 15-year level, annuity payout guaranteed by claims paying ability of Hartford Life Insurance Company, an A.M. Best's "A+ (Superior)"-rated annuity carrier.
2. Actual structure of annuity payments is determined at issuance and can be designed to meet each attorney's needs.
3. Actual rate of return for structured settlement annuity determined at issuance. Rates above current as of 08/08/2006.
4. The Hartford's Attorney Fee Program is only available for qualified IRC 104(a)(1) or (2) damages.
5. Structured settlement uses an individual annuity contract issued by Hartford Life and owned by Hartford Comprehensive Employee Benefits Service Company (Hartford CEBSCO).
6. Example does not include applicable state and local income taxes.

What are the documentation requirements?

When structuring attorney fees, the following is required.

- Attorney fee periodic payments listed in the Settlement Agreement.

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RULE 35 EXAMS IN SEXUAL HARASSMENT CASES . . . *continued from page 5*

good cause to require the plaintiff to submit to an examination in a sexual harassment case unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of the claim for emotional distress damages; or (5) plaintiff concedes that her mental condition is in controversy within the meaning of Rule 35(a). *See Javeed v. Covenant Medical Center, Inc.*, 218 F.R.D. 178 (N.D. Iowa 2001).

In general, claims for "garden variety" emotional distress do not entitle a defendant to obtain a Rule 35 examination. "Garden variety" emotional distress damages are those for which the plaintiff seeks no diagnosis or treatment. "They are accurately characterized as being claims of generalized insult, hurt feelings, and lingering resentment. These claims do not involve a significant disruption of the plaintiff's work life and rarely involve more than a temporary disruption of the claimant's personal life." *See Javeed*, 218 F.R.D. at 179. In *Javeed*, the court found that plaintiff's testimony that she experienced weight loss and weight gain, insomnia, rashes, diarrhea, and some panic attacks as a result of the sexual harassment, and that she saw a psychologist for anxiety and lack of confidence following her employment at defendant, exceed the magnitude of symptoms associated with a "garden variety emotional distress claim". *Id.* at 179-80. Thus, the defendant was entitled to seek an independent medical examination of the plaintiff.

If the plaintiff either concedes that a Rule 35 examination is appropriate or the court allows an exam, there are additional Rule 35 requirements that must be satisfied. The party requesting the examination must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to made. *See* F.R. Civ. P. 35(a). While the general scope of the examination must be provided, the defendant is not necessarily required to provide advance notice of the psychological testing that is to be performed, since that may lead to the possibility of numerous additional problems that could affect the validity of the testing itself. *See Navara v. Swift & Co.*, Civil No. 4-05-cv-00528 (S.D. Iowa Dec 6, 2006).

Recently, some plaintiffs' counsel have sought court enforcement of numerous conditions for a Rule 35 examination. For example, a request for payment to plaintiff for expenses for her time in submitting to the Rule 35 examination was recently denied. In *Navara v. Swift & Co.*, the court found that plaintiff's participation in the procedure is part of the requirements of litigation. The court also denied the plaintiff's request that she be allowed to bring a support person along to the exam. The doctor performing the examination had objected to the request for an accompanying support person at the exam because of the doctor's belief that the presence of a third party could skew test results and impact the issues discussed during other portions of the exam. The court also denied a request that the examining physician be required to perform the examination, evaluation and testing at the offices of a "neutral" psychologist. Magistrate Judge Thomas Shields concluded that the examining physician could perform the examination at his own office. *See Navara*.

Courts in Iowa have also recently considered requests that plaintiffs be allowed to audio tape the examination, videotape the examination, or have a court reporter record the examination. The doctors performing the Rule 35 exams had raised ethical issues surrounding allowing third parties to be present during the exam. The presence of third parties or the recoding by audiotape raises ethical issues for the examiner. *See Standards for Educational and Psychological Testing* (APA 1985); *APA's Ethical Principles of Psychologists and Code of Conduct* (APA 1992). In *Drake v. Hinds*, No. C05-0015 (N.D. Iowa March 23, 2006), Magistrate Judge Jarvey denied the plaintiff's request to videotape the exam and to have a court reporter present. And in *Navara v. Swift*, the court refused to require the audio taping, noting "the court believes that the parties ought to be in the same position regarding the efficacy, reliability and statutory or ethical grounds regarding any independent psychological examination performed upon the plaintiff. Thus, the court denies plaintiff's request to audio tape any or all of any evaluation or examination…".

Other Rule 35 issues have arisen with respect to whether a defendant may obtain more than one Rule 35 exam and whether the plaintiff can depose or call as a witness the doctor who performed the Rule 35 exam if the defendant decides not to call the doctor as a witness. Courts have considered requests for more than one Rule 35 exam by balancing the interests of the plaintiff (including the potential

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STRUCTURING ATTORNEY FEES: AN OVERLOOKED OPPORTUNITY

. . . continued from page 13

- Attorney fee periodic payments listed in the Qualified Assignment.
- Traditional assignment language within the Settlement Agreement or a three-party Qualified Assignment document.
- Insertion in all settlement agreements and qualified assignment documents (in the benefits section or addendum) the following acknowledgement language: "The Plaintiff authorizes and instructs payments to be made to his/her attorney as provided herein. The Plaintiff acknowledges and agrees that these payment instructions are solely for the Plaintiff's convenience and do not provide the Plaintiff's attorney with any ownership interest in any portion of the annuity or the settlement other than the right to receive the payments in the future as more specifically set forth herein."
- Completion of the life company's Acknowledgement and Hold Harmless Agreement for Attorney Fees.
- Completion of the Income Tax Withholding & Substitute IRS Form W-9.

Conclusion and summary as to why this option may be considered:

Structuring attorney fees is a solution for attorneys who desire tax consequence relief and prefer future cash flow predictability. The decision in *Childs v. Commissioner* held that attorneys can receive fees as future periodic payments. By structuring your attorney fees, you can enjoy the low risk and competitive rate of return offered by structured settlements. ■

RULE 35 EXAMS IN SEXUAL HARASSMENT CASES

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painfulness or invasion of privacy of an additional medical exam) with the interests of the defendant and the reason for the request for the second exam (the nature of the injuries and whether there are multiple bases for the injury, the timing of the related tests). In *Peters v. Nelson*, 153 F.R.D. 635, 637 (N.D.Iowa 1994), the court concluded that whether more than one examination was permitted depended on the facts and circumstances of the individual case, and the circumstances of that case allowed exams by both a psychiatrist and a neuropsychologist.

One danger of Rule 35 exams is the potential use of the test results by the plaintiff. In *House v. Combined Insurance of America*, 168 F.R.D. 236 (N.D. Iowa 1996), Judge Bennett considered whether the plaintiff could call as a witness the psychiatrist who had performed a Rule 35 exam on behalf of the defendant. Pursuant to Rule 35(b)(1), the report of the exam must be shared with the Plaintiff. The defendant in *House* decided not to call the Rule 35 examiner as a witness, and the plaintiff then sought to do so. The court applied a discretionary standard in determining whether the plaintiff would be allowed to call the examiner, and the court allowed the plaintiff to call the examiner, with the proviso that if the plaintiff calls the examiner, the plaintiff had to pay the expert witness fee and neither party nor the examiner could tell the jury that the examiner's initial involvement in the case resulted from his hiring by the defendant.

Rule 35 provides defendants in sexual harassment cases with significant emotional distress claims an opportunity to gain information about the nature and extent of the plaintiff's alleged injuries. However, plaintiffs' counsel may be increasingly likely to seek conditions or limitations on the Rule 35 exam. ■

Drake University Law School held its 70th Annual Supreme Court Celebration

Drake University Law School held its 70th Annual Supreme Court Celebration in March to honor and celebrate academic excellence, leadership and service as well as the school's historical and strong relationship with the Iowa Supreme Court.

Alumni, students, faculty, staff and members of the Des Moines community gathered for a series of recognition dinners, luncheons and other events. Nearly 500 attended the Supreme Court Celebration Banquet featuring a keynote address by former Iowa Governor Tom Vilsack.

At the banquet, the Iowa Defense Counsel Association sponsored the Timothy N. Carlucci Award presented to third-year students Claire Gagnon of Edina, MN., and Jennifer Gumble of Sioux Falls, SD. This award recognizes the law students who best exemplify civility and professionalism in their dealings with fellow students and others in the legal profession. It was established in honor and memory of Timothy N. Carlucci, a 1987 alumnus of Drake Law School.

Timothy N. Carlucci Award presented to Claire Gagnon

Timothy N. Carlucci Award presented to Jennifer Gumble

SCHEDULE OF EVENTS

JULY 20, 2007
IDCA Board Meeting
Fort Dodge Country Club, Fort Dodge, IA
9:00 a.m. Full Board Meeting/Luncheon

AUGUST 9-10 , 2007
IDCA Trial Academy
Drake Law School Legal Clinic
2400 University Avenue, Des Moines, IA
11:30 a.m. Full Board Meeting/Luncheon

SEPTEMBER 19, 2007
IDCA Board Meeting & Dinner
Des Moines Marriott Downtown, Des Moines, IA
4:00 p.m. – 6:00 p.m.

SEPTEMBER 20-21, 2007
43rd Annual Meeting & Seminar
Des Moines Marriott Downtown , Des Moines, IA
8:00 a.m. – 5:00 p.m. both days

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

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