defense UPDATE

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EXPERT WITNESS DESIGNATIONS AND DEFENSE "STRATEGERY[1]" IN IOWA COURTS

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1. Introduction.

Nettlesome issues often arise regarding expert witness designations. Is it objectionable if a plaintiff's treating physician in a personal injury case is called to testify at trial and has not been specifically designated? What if Plaintiff's doctor offers opinions at trial that are beyond "the four corners" of the medical chart? Are plaintiffs required to serve an answer to expert witness interrogatory for any treating physician who may give opinion testimony at trial? In federal court does a separately written and signed report under Federal Rule of Civil Procedure 26(a)(2)(B) need to be provided by plaintiff? From the defense side, what about an in-house engineer who may want to give opinion testimony on a technical matter in defense of a product liability case? In state court does such a person need to be identified at the time of the expert witness "deadline?" Do you need to serve an answer to expert witness interrogatory for such a person? In federal court does a written report have to be provided for the in-house engineer or technical person? Do different rules apply in a medical malpractice case with a physician defendant or other matter involving a claim against a licensed professional, governed by Iowa Code section 668.11? Does section 668.11's special deadline apply to a case in federal court, where jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332(a)(1)?

The price for "guessing" wrong on these and related issues can be quite severe—the imposition of discovery sanctions, including but not limited to complete exclusion of the proferred witness' testimony. In a technical case where expert witness opinion testimony is required to generate a jury issue, if plaintiff's counsel has chosen the wrong course a dispositive motion and outright dismissal of the case may result. This article seeks to highlight some of these issues. Although the authors certainly do not profess to have all the answers, we will try to help you spot the issues and will be so bold as to posit some suggested strategies for both state and federal court defense practice in Iowa.

2. Expert Witness Designations in Iowa.

A. State Rules.

There are three key aspects to expert witness discovery in state court in Iowa: 1) the so-called expert witness "designation" deadline; 2) serving the expert witness interrogatory on plaintiff's counsel; and 3) deposing plaintiff's expert.

Regarding the designation deadline, most Iowa district courts require civil actions to proceed under the guidance of a scheduling order. This order typically includes a specific deadline for the "designation of experts." If it does not, it should. As a defense "practice pointer," the respective deadlines should be "staggered" at least 30, if not 60 days (or even more), so that discovery via oral deposition of plaintiff's expert can be completed before the defendant's expert designation is due. This avoids unnecessary (and costly) expert designations.

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[1] This term is borrowed from Bill Sammon's best-selling book by the same title.

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Inside This Issue

MESSAGE FROM THE PRESIDENT

Martha L. Shaff

Dear Colleagues:

As an organization we are constantly looking for new members. New members add energy to the organization and keep the organization moving forward. To move forward is not to forget where we have been, but rather to keep up with the times, technology and needs of our members. At the April 4, 2008, board meeting the board unanimously passed an amendment to our by-laws to add a new category of members. Law students are now eligible to be members of the Iowa Defense Counsel Association. DRI has long welcomed law student members and now the IDCA is jumping on board as well.

You may wonder why law students would want to be members of IDCA. IDCA has many benefits to offer law students, starting with meeting the members. What a great way to meet practicing attorneys, open a door for an interview and possible opportunity during law school or after graduation. We offer CLE's that can take the classroom learning up another notch, a newsletter addressing new and interesting subjects and a web site with information on verdicts, members and much more.

What does IDCA gain from law students? We gain members at the earliest possible time and introduce them to our organization for continued membership during his/her career. We also have the opportunity to meet potential candidates for positions in our firms. We gain fresh insight into the programs we offer and possible new and interesting ways we can keep current members interested in IDCA.

Our organization can only gain from the exposure to law students. IDCA has presented round table discussions at Iowa Law School and Drake Law School the past two years. At the law school level there is minimal knowledge of the existence of our organization and its purpose. This is a great opportunity for the IDCA to move forward by adding members and increasing its exposure. I hope that you will take the time to tell law students you encounter about the Iowa Defense Organization and the opportunities it offers to them. The best deal of all is the cost to student members is $20, what a great opportunity!

Once you have all the law students lined up for membership, make sure to mention to them the upcoming annual meeting on September 18–19, 2008. For the first time the meeting will be held in West Des Moines at the Marriott. For downtown people, the drive is short, for out of town people the parking is easy and the attractions in the area are many. One other significant change involves the dinner on Thursday night. We will be meeting at Des Moines Golf and Country Club, less than one mile down the road. The exciting part is a change from the traditional sit down dinner to food stations. This will allow for more social time and the opportunity to meet new friends and catch up with old friends. Please plan to attend. If I don't see you before, I look forward to seeing you in West Des Moines. ■

Martha L. Shaff

THE *SPEIGHT* CASE:
IOWA CODE SECTION 614.1(11), A STATUE OF REPOSE, TAKES ON ADDED SIGNIFICANCE TO BUILDERS

By: Michelle F. Ingle, Parker, Simons & McNeill, P.L.C., West Des Moines, Iowa

A recent Iowa Supreme Court case extended the implied warranty of workmanlike construction to remote purchasers. *Speight v. Walters Development Co., Ltd.,* 744 N.W.2d 108 (Iowa 2008). The implied warranty of workmanlike construction is a judicially-created doctrine implemented to protect an innocent home buyer by holding the experienced builder accountable for the quality of construction. *Id.* at 110. It requires that a building is constructed in a reasonably good and workmanlike manner, and is reasonably fit for the intended purpose. *Id.* at 111 (citing *Kirk v. Ridgway*, 373 N.W.2d 491 (Iowa 1985)). Underlying the theory are the practical concepts of the increased complexity of homes, the latent nature of many defects, and the public policy need for consumer protection in light of the inequities between the buyer and the builder. *Id.* While the implied warranty is contractual in nature, "it exists independently of the contract by it's very nature." *Id.* at 113. Extending the implied warranty of workmanlike construction to remote purchasers was a matter of first impression for the Court.

The Plaintiffs in the case, Mike and Bev Speight, on August 1, 2000, purchased a home that had been custom-built in 1995 by Walters for original buyers named Roche. The Speights were the third owners of the home; they paid $250,740 to the second owners, named Rogers, for the two-story, three-bedroom house in Clive.

> "The Speights noticed water trickling down a basement wall a few years later. Mike Speight filled every crack he could find with caulk, but the trickle grew into a stream when it rained, he said. Parts of the basement flooded. Mold formed. The couple noticed water streaks on the outdoor siding, followed by rot…[Mike Speight] was able to puncture the waterlogged siding with his fingertip…" We didn't know what was happening," Speight said. "By the time the damage started to manifest itself, it was too late." *Des Moines Register, Grant Shulte and Melissa Walker, Register Staff Writers, February 2, 2008.*

A building inspector determined that the damage was the result of a defectively constructed roof and defective rain gutters. *Speight* at 110. Nothing in the record before the court indicated that any of the owners between Walters and the Speights had actual or imputed knowledge of the defects. *Id.*

The Speights filed suit against Walters on May 23, 2005, alleging a breach of implied warranty of workmanlike construction, as well as general negligence in construction of the home. *Id.* The District Court granted Walters summary judgment on the implied warranty claim because the Speights were remote purchasers, and because, in any event, such claim would be barred by the applicable five-year statute of limitation, Iowa Code section 614.1(4) (2005). *Id.* The Court of Appeals upheld the District Court's rulings, and, with regard to the issue of the availability of the implied warranty claim to a remote purchaser stated, "[w]e leave it to the legislature or our supreme court to extend the law in this area." *Speight v. Walters Development Co., Ltd.*, 730 N.W.2d 210, 2007 WL 465572 (Iowa App. 2007).

The District Court had also granted Walters summary judgment on the general negligence claim because the Speights had not asserted an accompanying claim for personal injury. *Speight* at 110. Because the Speights did not challenge on appeal the District Court's grant of summary judgment on the general negligence claim, the only issues before the Supreme Court were whether a remote purchaser could pursue a claim for breach of an implied warranty of workmanlike construction against the builder of the home, and, if so, whether the Speight's cause of action was nevertheless time barred.

In extending the implied warranty cause of action to remote purchasers, the 6-0 Supreme Court decision stated, "…the purpose of the implied warranty of workmanlike construction is to ensure the home will be fit for habitation, a matter that depends upon the quality of the dwelling delivered not the status of the buyer." *Speight* at 113 (internal citations omitted). The court further found, "It is inequitable to allow an original purchaser to recover while, simultaneously, prohibiting a subsequent purchaser from recovering for latent defects in homes that are the same age." *Speight* at 114.

In so holding, the court also rejected Walters' argument that allowing sub-

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EVIDENCE IN ARBITRATION: "THE EVILS OF HEARSAY, GOSSIP AND BACKBITING"

By: David J. Blair*, David J. Blair, P.C., Sioux City, Iowa

The title of this article is taken from Leyla's Blog for November 4, 2007. Leyla describes the impact of hearsay on life's experience, as follows:

> There are many stories that highlight just how bad hearsay, gossip and backbiting can be. One such story was told to me by my grandmother who often sat by my bedside and nurtured my young soul. She told me of the stream that springs from the top of the mountain, pure and fresh. It is the essence of life-giving water itself. As it trickles down the mountain it collects some dirt, some rubble, a dead animal. People begin to wash themselves in the stream. They are cleansed, but each one may leave behind an impurity that adds up. By the time this stream reaches the bottom of the mountain, little of its purity is left. www.doubletake.tv/cms/blog/

I conclude that Leyla is not an arbitrator. It is true, of course, that we who drink from the evidentiary stream at the bottom of the mountain, after conflict and time and self interest (better words than dirt, rubble and dead animals) have wrought their changes, must do so with some caution. But it is our work as lawyers to make the water safe and useful.

Which brings me to hearsay and the vastly different treatments of that subject in the public justice system vs. arbitration. The Leyla Rule, quoted above, is the rule of the public justice system, i.e., that hearsay is broadly inadmissible unless it fits within a defined exception to the rule. The premise in court is that the stream at the bottom of the mountain is generally unsafe for human consumption. Compare arbitration, where hearsay is broadly admissible, see AAA Commercial Arbitration Rules 31(a) and 32(a); and NAF Code of Procedure, Rule 35(A & C), subject only to the arbitrator's power to determine probative worth. The premise in arbitration is that the mountain stream is generally safe for consumption after careful screening by an experienced arbitrator.

The differences between litigation and arbitration, dramatized by the contrasting approaches to hearsay, are quite profound. That's why it is incorrect to say, as do some (for comfort), that arbitration is just like a bench trial in an equity case. In truth, the differences go far beyond evidentiary niceties and relate directly to the differing objectives of the two systems. The public justice system, to its credit, promotes the objectives of broad bilateral discovery, high adjudicative quality, public scrutiny, reviewability and precedent. The private justice system (typified by arbitration), to its credit, promotes the objectives of speed, economy, privacy, predictability and finality. Both systems strive for the overall goal of fairness, but their objectives are very different. So are the systems.

As for arbitration, my colleagues: C'mon in – the water is fine.

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Some courts in some districts use a pre-printed form for the scheduling order that makes it clear that Iowa Code section 668.11 will apply to set the expert deadline for such designations if the case is one in which that statute applies. If the case you are defending involves a claim against a "licensed professional," you will want to carefully read this statute and the case law interpreting it. Any failure to comply with this statute may be fatal to plaintiff's case. Defense counsel also should be mindful that the same statute establishes a deadline for the identification of defense experts as well.

"Designation" in Iowa trial courts, as used in this context, is generally undefined but usually means that plaintiff's counsel will provide basic identification information such as "name, rank and serial number." In practice it normally does not include the serving of an answer to expert interrogatory, although defense counsel may want to request that this be made a part of the court's scheduling order. Also, there is no "separate written report" requirement under the Iowa Rules of Civil Procedure. In Iowa state court practice the equivalent of the written report in federal court is the answer to expert witness interrogatory.

Pretrial discovery of plaintiff's expert witness opinion testimony is governed by the Iowa Rules of Civil Procedure, most notably Iowa R. Civ. P. 1.508 (formerly designated Rule 125). Most defense practitioners in state court utilize standard or "form" expert witness interrogatories, and serve these with written discovery shortly after service of the Petition. Iowa R. Civ. P. 1.508 provides, *inter alia*, that "in the case of an expert *retained in anticipation of litigation or for trial*," the expert shall separately sign the answer to expert witness interrogatory. IOWA R. CIV. P. 1.508(1)(a)(2) (emphasis added). If not done, an objection may be lodged. However, if the objection is not made within 30 days, the right to object is waived. *Id*. In the case of both a treating physician and/or an "in-house" expert who may give opinion testimony at trial, such persons are not required under the Iowa rules to *separately sign* an answer to expert witness interrogatory. Nevertheless, the question remains as to whether such potential opinion testimony is required to be disclosed in discovery, such that it can be used at trial. The better practice is to disclose any and all proposed opinion testimony in response to a properly framed expert witness interrogatory, but not all plaintiff's counsel take this "conservative view." If the expert testimony is not so disclosed it may be completely barred from use at trial.

Iowa R. Civ. P. 1.508 provides further that "nothing in this rule shall be construed to preclude a witness from testifying as to knowledge of the facts obtained by the witness prior to being retained as an expert or mental impressions or opinions formed by the witness which are based on such knowledge." IOWA R. CIV. P. 1.508(1)(a)(3). The purpose of this language is clear: such information does not need to be specifically divulged by the testifying expert in the course of preparing the answer to expert witness interrogatory. Iowa's rule distinguishes between those facts and opinions which existed prior to the person being retained as an expert, and those acquired or developed in anticipation of litigation or for trial.

As a practical matter it may be difficult to distinguish between what was known by the witness before retention, and what became known after. Generally speaking, knowledge gained in the course of working on the litigation is specific and resulting opinions tend to be specific as well. Witnesses ordinarily learn facts in a case, but may have formed mental impressions or opinions, substantially before he or she is retained as an expert witness and often before the parties themselves anticipate litigation. *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991). "Only those opinions and facts acquired by an expert in anticipation of litigation or for trial are subject to discovery." *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998). To be clear, this information would be subject to discovery generally if properly framed questions are put to the expert witness in the oral deposition, or by a more generic written interrogatory. The primary point, however, is that this type of knowledge does not need to be specifically disclosed in the answer to the standard expert interrogatory. "Prior" opinions are certainly not privileged or otherwise protected from disclosure. Finally, Iowa R. Civ. P. 1.508(1)(b)(1) makes it clear that parties may take a retained expert's deposition in Iowa as of right and specific court permission is not required.[3]

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[3] This is notable because in some states, a deposition of the opposing party's expert is not permitted.

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Where the choice is available, tactical considerations may have an impact on whether counsel designates a particular witness as a testifying[4] expert. In particular, whether the witness will give "lay" opinion testimony or expert opinion testimony can influence the decision. Plaintiff's counsel may attempt to use the "lay opinion" rule to circumvent the more onerous requirements attendant to pretrial disclosure of expert witness opinion testimony. The precise distinction between "lay opinion" and "expert opinion" can be slippery and difficult to predict, and is beyond the scope of this article. Suffice it to say, opinion testimony governed by Iowa R. Evid. 5.701 (the lay opinion rule) is not subject to any kind of special designation or disclosure requirements applicable to experts. IOWA R. EVID. 5.701 (2007). Lay witnesses are not experts, by definition, and this is so despite the fact that a lay witness may give certain limited and circumscribed testimony in the nature of an opinion. Regardless, even a "lay" person's proposed opinion testimony will be subject to pretrial disclosure in response to a properly-framed discovery request from defendant.

Iowa R. Evid. 5.701 provides that lay opinion testimony is admissible if it is (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *Id*. An example of "lay opinion" would be a lay-person driver's estimate of another vehicle's speed just before a collision, based on factual observation of the vehicle's movement over a certain distance and driving experience.

Any discussion of state court practice in Iowa would not be complete without brief mention of Iowa Code section 668.11. This statute sets a specific expert witness designation deadline (180 days from the answer; defendant has 90 days after plaintiff's certification to designate their experts) in cases against "licensed professionals." The typical case is a medical malpractice action where a physician is a named defendant. Defense counsel should note in a case governed by this rule, this statute's deadline will "trump" an otherwise generic deadline in a pre-printed scheduling order form. This statute only provides a deadline, and does not specifically identify what kind of pretrial disclosure must be made for such experts. Those requirements would be set forth in the Rules of Civil Procedure relating to discovery of expert witness opinion before trial. *See* IOWA R. CIV. P. 1.508(1).

The Iowa Supreme Court has held, however, that § 668.11 applies to treating physicians who may give expert witness testimony at trial. *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991). However, if the treating doctor's opinion was formed before the litigation commenced, such as to the "cause" of a patient's back pain being related to a fall from a bed, the treating physician need not meet this designation deadline. *Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa 2004). The primary issue is whether the doctor's opinions arose from his treatment of the patient, or whether they came about as a result of being retained in the litigation. *Id*. The Iowa Court of Appeals has also applied this statute to a malpractice claim against a dentist and oral surgeon. *Hill v. McCartney*, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998).

B. <u>Federal Rules.</u>

There are two primary differences between expert designation in federal and state court: 1) a separately-signed, written report of opinions needs to be prepared by the expert witness, as well as other specified disclosures; and 2) *Daubert* and amended Federal Rule of Evidence 702 apply to arguably more strictly limit the admissibility of expert witness testimony at trial. It is also notable that Iowa Code section 668.11 applies in cases filed against "licensed professionals" that are venued in federal court. A potential trap for the unwary is a belief that this statute is "procedural" and as a result, does not apply in federal court. However, this conclusion is incorrect. A federal district court in Iowa has held that this statute applies even to a case brought in federal court based on diversity jurisdiction. *Connolly v. Foudree*, 141 F.R.D. 124 (S. D. Iowa 1992)(opinion by Bremer, Mag.). In *Connolly*, the specific deadline mandated by the Iowa Code was not followed, although the federal court's scheduling order "deadline" for experts was followed. Nevertheless, upon objection the plaintiff's expert was excluded for failure to comply with Iowa Code section 668.11. This was certainly a harsh result, and illustrates well the dangers of "guessing wrong" in this area.

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[4] The modifier "testifying" is used here, because experts or technical persons who are merely consulted and not used for testimony at trial are subject to different rules involving a qualified privilege. *See* IOWA R. CIV. P. 1.508(2). If the work of the non-testifying consultant forms a basis for the testifying expert's opinions, that information is discoverable. *See* IOWA R. CIV. P. 1.508(2).

EXPERT WITNESS DESIGNATIONS AND DEFENSE "STRATEGERY[1]" IN IOWA COURTS . . . *continued from page 6*

Fed. R. Civ. P. 26, the counterpart to Iowa R. Civ. P. 1.508, requires pretrial disclosure of expert testimony. So-called "lay" opinion testimony, of course, is controlled by Fed. R. Evid. 701, which Iowa's "lay opinion" rule is based on (in fact, the wording of Iowa R. Evid. 5.701 and Fed. R. Evid. 701 is identical).

With regard to designation of experts, the Federal Rules of Civil Procedure are markedly different than the corresponding Iowa Rules of Civil Procedure. In federal court a written report accompanying the disclosure of expert witnesses is required, and it must contain a statement of all opinions the witness will express and the basis for those opinions. *See* FED. R. CIV. P. 26(a)(2)(B). The rule also requires the following specific information in the designation: "any exhibits used as a summary of or support for the opinions;" "the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;" "the compensation to be paid for the study and testimony;" and "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." *Id*. This rule provides an incentive for full disclosure; namely, that a plaintiff will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. *See* FED. R. CIV. P. 26 advisory committee's notes (2000 amendment). Also, of interest is the fact that this rule applies only to those experts who are retained or specially employed to provide expert testimony in the case, but also explicitly includes persons "whose duties as an employee of the party regularly involve giving expert testimony. . ." *See* FED. R. CIV. P. 26(a)(2)(B). This "twist" is another potential trap for counsel unfamiliar with practice in federal court.

3. <u>Treating physicians: are they "experts" that have to be designated?</u>

The Iowa Supreme Court has held that a treating physician's factual knowledge, mental impressions and opinions do not stand on the same footing as those of retained experts. Day, 469 N.W.2d at 677 (held, in general, a treating doctor does not have to be designated as an expert witness). Therefore, the factual knowledge formed prior to trial and not in anticipation of litigation and the opinions and impressions based on that knowledge do not have to be disclosed in response to an expert witness interrogatory served under Iowa R. Civ. P. 1.508. Defense counsel may discover such opinions, however, in deposition or by an appropriately worded interrogatory directed to such opinions.

Federal practice is distinctly different. Unlike the Iowa rules, the Federal Rules of Civil Procedure do not allow an exception for treating physicians and other witnesses who formulated their opinions before trial and not in anticipation of litigation. Under Fed. R. Civ. P. 26, "expert testimony includes opinions based on scientific, technical, or other specialized knowledge, *regardless of whether those opinions were formed during the scope of interaction with a party prior to litigation." Navrude v. United States*, 2003 U.S. Dist. LEXIS 2173, *25 (N.D. Iowa Feb. 11, 2003)(emphasis added). Again, this is a potential "snare" for unwary plaintiff's counsel, that may be used to the defense's advantage.

For example, a treating physician, although designated as an expert, can be deposed or called to testify at trial without having to fulfill any requirement for a separate written report. *Garza v. Roger Henson Trucking L.L.C.*, 2006 U.S. Dist. LEXIS 23996, *3 (D. Neb. Apr. 26, 2006). The treating physician's testimony must be limited to opinions which naturally result from the physician's treatment and based on his or her personal observations at the time of treatment. *Id*. However, when the nature and scope of the witness' testimony strays from the core of the physician's treatment and ventures into more general expert opinion testimony, Fed. R. Civ. P. 26(a)(2)(B) requires the filing of an expert report from that treating physician. *Id*. Defense counsel needs to be ready to enforce this rule. By analogy, if an in-house design engineer or other technical person intends to only give limited testimony about his knowledge of facts, and the opinions he formed based on those facts before litigation and not in anticipation of litigation, disclosure of a written report of that witness' testimony would not be required. However, if the in-house design engineer is to give more specific expert opinions relative to "core" issues in the case, a written report disclosing that opinion testimony would be necessary. The defense can object and move to exclude proffered opinion evidence at trial that does not meet this test.

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4. <u>In-house engineers or technical persons: do they have to be designated?</u>

The Iowa Supreme Court has held that a city engineer's testimony was analogous to the testimony of a treating physician. *Graber v. City of Ankeny*, 616 N.W.2d 633, 647 (Iowa 2000). "The city engineer, even if giving opinion evidence that could not be the subject of lay testimony, was testifying as to facts obtained prior to the litigation and mental impressions and opinions formed upon the basis of such knowledge." *Id*. Therefore, the expert testimony presented by the city engineer, who had not been designated as an expert, was properly admitted. *Id*. In state court the defense can use this rule to elicit certain opinion testimony from in-house technical witnesses.

In federal court this dichotomy between matters known "before" the litigation versus opinions arrived at after the litigation has commenced is not present. The question about in-house experts or technical witnesses is partially answered by specific language in Fed. R. Civ. P. 26(a)(2)(B). Expert witness disclosures must be made "with respect to a witness who is retained or specially employed to provide expert testimony in the case *or whose duties as an employee of the party regularly involve giving expert testimony. . .*" *Id.* (Emphasis added). Thus, if the specific in-house engineer or technician typically gives expert testimony in defending litigation, then a separate report must be made and the other disclosure requirements of the rule must be met. Defense counsel must be mindful of this. Unlike state court practice, an in-house engineer or technician would not be able to avoid disclosure on an expert witness list in federal court merely by giving only opinions formed prior to litigation.

In certain limited situations, the "lay opinion" rule, Fed. R. Evid. 701, may also be used to admit the in-house expert's testimony. A federal district court has held that opinion testimony on matters within the witness' particularized knowledge by virtue of his position at his place of employment is admissible under Fed. R. Evid. 701. *Gregg v. Indian Motorcycle Corp.*, 2006 U.S. Dist. LEXIS 65360, *36 (N.D. Iowa Sept. 13, 2006)(opinion by Zoss, Mag.). In Gregg, the Director of Engineering of a motorcycle manufacturer was permitted to give opinion testimony regarding the causes of shock bolt failure and why a recall was instituted. *Id.* The court stated that such opinion testimony is admitted not because of experience, training, or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. *Id*. The court did not allow the lay witness to testify as to the effects of shock bolt failure or fender contact with the wheel on the stability and control of the motorcycle, holding that this was opinion testimony based on specialized knowledge outside the scope of lay opinion testimony. *Id*. If the manufacturer's in-house design engineer gives opinions based on his particularized knowledge due to his or her position within the business, the witness' testimony is within the scope of lay opinion testimony under Fed. R. Evid. 701.

5. <u>Sanctions: What happens if a plaintiff "guesses wrong?"</u>

Significant defense opportunities may be created when a plaintiff's counsel is sloppy in making the decision to "not" designate a particular witness as an expert to give opinion testimony at trial. In an appropriate case and upon a timely defense objection, the court may impose appropriate sanctions, including limiting or excluding the testimony of the expert, for failure to designate the witness as an expert. *Morris-Rosdail*, 576 N.W.2d at 611. In federal court, Rule 37 provides a panoply of sanctions, including the exclusion of evidence from trial, for failure to make the "disclosures" required by Fed. R. Civ. P. 26(a). *See* Fed. R. Civ. P. 37(a)(2)(A). In addition, there are risks in choosing to make a "vague" or less-than-complete expert witness disclosure. Iowa R. Civ. P. 1.508(4) specifically provides that if the testimony at trial is "inconsistent with" or "goes beyond the fair scope" of the expert's testimony in discovery, the testimony may be excluded from the trial. Fed. R. Civ. P. 37(a)(3) provides that "[F]or purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." Knowledge of these rules should be a part of every defense lawyer's "tool kit." On the other hand, the Iowa Rule also provides that the expert "may not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings." *See* Iowa. R. Civ. P. 1.508(4). Thus, it is essential that plaintiff's expert be thoroughly

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and completely cross-examined at oral deposition.

6. <u>Conclusions and recommendations.</u>

Here are some "practice pointers" that we have divined from the rules and cases:

A. First and foremost, the designation rules discussed herein apply equally to defendants and plaintiffs. When in doubt, designate. Although "over-designation" can create problems of its own, the risk of guessing wrong and having a defense expert excluded from testifying at trial because the person has not been designated is simply too great.

B. In state court, make sure that plaintiff gives a full and complete answer to the expert witness interrogatory. As a defense counsel, work closely with your own expert in preparing the answer and have the expert sign the answer to interrogatory. Be specific and inclusive in listing the subject matter areas of testimony. Make your expert available for deposition. When deposing an adverse expert make sure that you interrogate the witness about all of the subject matters identified in the interrogatory answer.

C. Federal court practice, and specifically Rule 26(a)(2)(B), requires a separately signed, written report of opinions from any expert seeking to offer opinion testimony at trial that would be governed by Fed. R. Evid. 702. The conclusory "name, rank and serial number" that suffices in state court is federal court practice. Defense counsel should watch for this as many plaintiff's lawyers are unfamiliar with federal court practice. Read and study the rule and follow it to the letter. Although Iowa practice currently has no "report" requirement, there is no rule against defense counsel requesting the plaintiff to produce in discovery a Fed. R. Civ. P. 26(a)(2)(B) disclosure of prior testimonies and articles, if the witness has already prepared them and has one currently available. The Iowa rules neither require nor prohibit such a request. This information would appear to be discoverable under the broad standards set forth in Iowa R. Civ. P. 1.503(1).

D. Primary discovery of plaintiff's expert witness opinion testimony in Iowa state court is through answers to expert witness interrogatory, followed by the expert's deposition. The oral deposition is the preferred method since the interrogatory answer will be drafted and "sanitized" by plaintiff's counsel. The expert's deposition should not be taken until a full and complete answer to the interrogatory has been provided. A few defense counsel even prefer a strategy that forgoes the deposition, in order to "surprise" the expert at trial. Before you select this strategy, however, discuss the pros and cons with your client and get their specific permission. Also, without the detailed record that a deposition transcript provides, you will be unable to level a "Daubert" attack on the expert before trial.

E. Because state-court practice does afford the advantage of a written report from plaintiff's expert, the answer to expert witness interrogatory is more important. Defense counsel should be on the lookout for situations where the subject matter area of the expert's proferred testimony at trial is not identified in the interrogatory answer. If this happens and proper objection is made by the defense at trial, any opinion that strays from the identified subject matter will be excluded.

F. Watch out for aggressive plaintiff's testifying experts serving as advocates and masquerading as "treating physicians." Treating physicians do not need to be designated as experts, unless: a) they offer opinion testimony at trial on the issue of causation not related directly to the

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EXPERT WITNESS DESIGNATIONS AND DEFENSE "STRATEGERY[1]" IN IOWA COURTS . . . *continued from page 9*

treatment of the patient; or b) they offer opinions not found "within the four corners" of the medical record. For example, opinion testimony regarding the appropriate standard of care would require designation of the expert witness. Defense counsel should be on the lookout for any doctor who opines at trial on matters or issues not disclosed in the medical records. If proffered opinion trial testimony was not disclosed in the answer to the expert witness interrogatory (in state court), or in a separately-signed and written report (in federal court), a motion to exclude should be made. On the other hand, if the opinion is contained in the medical records there is no problem because there is no "unfair surprise."

G. Experts "specially employed" for purposes of the litigation must be designated in state court. In federal court you are also required to designate any employees of the company if they will be offering opinion testimony on key issues in the case and it is part of their normal duties to testify. In addition, a written report is required (in federal court) or answer to interrogatory (in state court) if defense counsel wishes to "affirmatively" use an "in-house expert" to offer opinions in defending key issues in the litigation. Common examples of such issues would be: defect, causation, accident reconstruction, effectiveness of warnings, human factors and the like.

H. Defense counsel should be aware of claims governed by Iowa Code section 668.11. If applicable, it will preempt a court-imposed deadline and may provide the basis for a motion to exclude the expert entirely. This is even true in federal court. This statute also gives a specific deadline for identification of defense experts so defense counsel should be aware of its application to their case as well.

I. In certain limited situations an in-house technical person can give "lay" opinion admissible under Fed. R. Evid.701 or Iowa R. Evid. 5.701, without the necessity of a prior expert witness designation, answer to expert witness interrogatory, or a Fed. R. Civ. P. 26(a)(2)(B) report. Defense counsel should not, however, rely on the "lay opinion" rule to "bootstrap" a technical witness into giving opinions at trial on key issues that have not been previously disclosed. ■

IDCA
WELCOMES NEW MEMBERS

Kim Bartosh
Whitfield & Eddy, PLC
Des Moines, Iowa

Thad J. Collins
Pickens, Barnes, & Abernathy
Cedar Rapids, Iowa

Jay D. Grimes*
Drake Law School Student
Des Moines, Iowa

Kimberly K. Hardeman
Lederer Weston Craig, PLC
Cedar Rapids, Iowa

Douglas W. Krenzer
Locher, Pavelka, Dostal, Braddy & Hammes, LLC
Omaha, Nebraska

Amy L. Van Horne
Kutak Rock LLP
Omaha, Nebraska

* First IDCA Student Member

THE *SPEIGHT* CASE: IOWA CODE SECTION 614.1(11), A STATUE OF REPOSE, TAKES ON ADDED SIGNIFICANCE TO BUILDERS *. . . continued from page 3*

sequent purchasers to recover for a breach of the implied warranty would subject builders to unlimited liability. The court did so by confirming Iowa Code Section 614.1(11) which is a statue of repose that applies to an action for breach of the implied warranty of workmanlike construction in the purchase of a building. *Id* at 115. This statute of repose works to terminate any right of action after a specific time has elapsed, regardless of whether or not there has as yet been an injury. Pursuant to Section 614.1(11), the period of repose begins to run on the date of the act or omission causing the injury, which period begins upon the builder's completion of the construction of the home. *Id.* The court noted once the statue of repose has run, a builder is no longer liable on an implied warranty claim, regardless of who owns the home. *Id.* Therefore, the builder-vendor's risk is not increased by allowing subsequent purchasers to recover for the same latent defects for which an original purchaser could recover, as there is no increased time period within which a builder is subject to suit. *Id.*

With regard to Walters' time-barred argument, the court confirmed the five-year limitation provision of Iowa Code Section 614.1(4) did apply to the implied warranty of workmanlike construction cause of action, but that the discovery rule, instead of (UCC) Iowa Code Section 554.2725(2), was applicable for determining when the cause of action accrued. *Id.* at 116. Therefore, under the discovery rule, the Speights' cause of action did not accrue until the Speights had actual or imputed knowledge of the facts that would support their cause of action. *Id.* Because the Speights had owned the house for less than five years at the time they filed suit, it was not possible for them, as a matter of law, to have gained actual or imputed knowledge of the defect in their home more than five years prior to commencing their action. Therefore, the court held the Speights' suit was not time-barred under Iowa Code Section 614.1(4). *Id.*

While the facts of *Speight* did not give rise to this question, the author notes that it is consistent with *Speight* that a purchaser, whether original or remote, must file his implied warranty cause of action against a builder within five years of gaining actual or imputed knowledge of the home's defect, but in no case can the purchaser bring his cause of action more than fifteen years from the date of completion of the construction of the home. In other words, a purchaser who gains actual or imputed knowledge of a defect in the fourteenth year from the home's date of completion does not have five years to file his implied warranty cause of action; pursuant to Section 614.1(11), he has only until the expiration of the fifteenth year from the date of the home's completion to file his lawsuit.

Practitioners will also want to consider the issue of the liability of a builder to an innocent home buyer who, as the home's second owner, bought from the home's first owner who had knowledge of the defect such that the first owner's implied warranty claim against the builder would be barred by Iowa Code Section 614.1(4). Should an innocent home buyer's implied warranty claim against the builder be extinguished because the home's first owner did not exercise the right of recovery against the builder the first owner had pursuant to *Kirk v. Ridgway*? The equitable and public policy principles behind *Speight's* holding would appear to answer this question in the negative, as *Speight* seems to indicate the focus would be on the builder's accountability for the builder's work for fifteen years from the date of completion of construction, rather than on the buyer's status as coming after an owner who could have exercised a right of recovery but did not do so. "… [A]ny reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible." *Speight* at 113 (internal citations omitted). Of course, this outcome is clearer with regard to plaintiffs who are third and subsequent home buyers, as their vendors did not have, and therefore could not exercise, a right of recovery against the builder before the *Speight* ruling on February 1, 2008. ■

RAY STEFANI

As most of you know, Ray Stefani, passed away on March 9, 2008. Ray was a long time member of our organization and was our president in 1984–85. He had also served on our Board of Directors. Ray received his law degree in 1955 from Drake University and practiced law in Cedar Rapids most recently with the firm Gray, Stefani and Mitvalsky, PLC.

Ray was a member and past president of the Linn County Bar Association, the Iowa State Bar Association, the Defense Research Institute, the Iowa Academy of Trial Lawyers and the American College of Trial Lawyers. He served on the Federal Advisory Committee to the Eighth Circuit U.S. Court of Appeals from 1988 to 1992.

Ray was a true gentleman as well as a strong advocate for his clients. He had the ability of quiet persuasion through reason. He doggedly prepared his cases leaving no stone unturned in the process. Those of us who were fortunate to have been with him in a trial could only marvel at the rapt attention jurors would give to him. His clients could always rely on his wise and reasoned analysis. Sometimes it seemed he was almost too thorough, but if you went the distance, you would always see him recover some fact or circumstance that would play a vital part in the presentation of the case. Opposing counsel always knew there was no way to hide the warts of their case from him. Yet at the same time he never raised his voice and he never gloated when he scored a point. He was the kind of lawyer each advocate should strive to emulate.

Ray was very proud of his Italian heritage and it was always a pleasure to share an Italian meal with him. Anyone who got to know him very well understood his dedication and work ethic. He inherited that work ethic from his immigrant father. He passed this same work ethic to his sons and to his friends in the practice.

We will surely miss him. On behalf of the Iowa Defense Counsel Association we offer our deepest sympathy and best wishes to Ray's wonderful wife, Phyllis, and to Ray's sons and his grandchildren. ■

MARK YOUR CALENDAR

Mark your calendar for IDCA's Annual Meeting & Seminar, September 18 & 19, 2008.

Among our many great presentations scheduled for those two days, our featured speakers will be Lisa L. DeCaro and Leonard Matheo on "*The Lawyer's Winning Edge: Exceptional Courtroom Performance*."

Leonard Matheo and Lisa DeCaro are co-founders of Courtroom Performance, Inc., a trial consulting firm dedicated to improving oral advocacy. They are co-authors of the book, *The Lawyer's Winning Edge: Exceptional Courtroom Performance* (Bradford Publishing, 2004). Mr. Matheo and Ms. DeCaro have practical experience in hundreds of cases in the areas of civil plaintiff, civil defense, and criminal defense ranging from simple to complex litigation. With a national trial consulting practice that specializes in jury research (mock trials/focus groups), witness preparation, and trial strategy, they have assisted in victories involving many Fortune 100 companies in high-profile litigation, on both the Plaintiff's and the Defendant's side of the courtroom.

They have helped hundreds of attorneys and their witnesses prepare for deposition and trial, by employing the professional actor's techniques of effective story analysis, story structure, and persuasive presentation. Professional actors and directors, they have been working exclusively with attorneys for over a decade.

Mr. Matheo and Ms. DeCaro are active members of the Association for Continuing Legal Education, and Ms. DeCaro is active with the American Society of Trial Consultants. Both are frequent speakers at regional seminars and national conventions (including the annual conference of the ABA Litigation Leadership Section and many state bar programs), and have served as faculty for colleges and conferences nationwide. In addition to their book, Mr. Matheo and Ms. DeCaro have also authored popular papers and articles for national legal publications (including ALI-ABA's *Practical Litigator, ABA's Tips from the Trenches, The Brief*, and *Lawyers Weekly USA*).

Look for registration materials in July!

THE IOWA DEFENSE COUNSEL ASSOCIATION'S

The Iowa Defense Counsel Association's Spring Seminar "Current Hot Topics In Workers Compensation" was held April 4 at the Des Moines Golf and Country Club. More than 40 lawyers attended, with a record number of lawyers who were not yet members of IDCA. IDCA President-elect Megan Antenucci and Workers Compensation Committee Chair Pete Sand co-chaired the event.

Speakers included Iowa Deputy Workers Compensation Commissioner James Elliott who provided an interactive demonstration of the new videoconferencing technology required for alternate care hearings. Attendees had the opportunity to try out the conferencing with laptops set up around the room, and Deputy Elliott acting as the online host, as he would do in an actual hearing.

Deputy Helenjean Walleser also spoke and gave insight on topics such as issues in settlement approval, commutations, and major areas in which the Iowa workers compensation statute dictates certain actions or requirements of the deputies, and the commission.

Roy Wood of NCCI traveled to Des Moines from St. Louis to share information with the group about how workers compensation rates are determined, and many other issues related to NCCI's role with the Iowa Workers Compensation Department and various carriers. He discussed how NCCI reacts to pending legislative changes to workers compensation statutes, and how NCCI's actuaries and others develop information on how such legisla-

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James Elliott, Workers Compensation Commissioner, does a live video hearing demonstration for Alternate Care Issues.

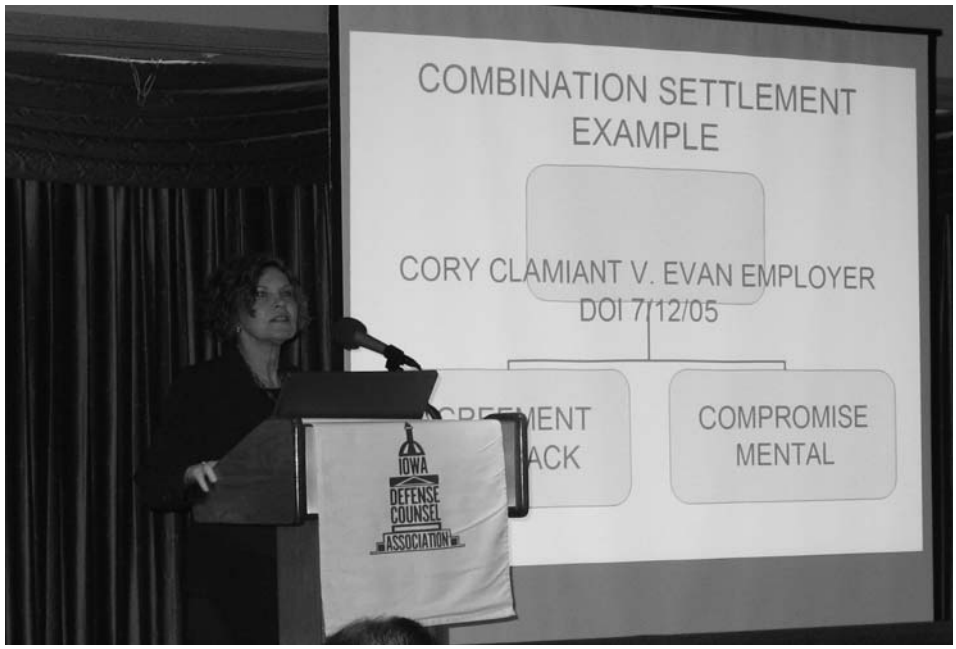
Pete Sand and Michael Trier demonstrate the live video hearing.

SPRING SEMINAR RECAP

tion might influence rates if passed. His presentation drew a lot of questions and input from the attendees.

Maureen Roach Tobin led a group discussion with lawyers in attendance on bad faith litigation in the work comp arena, and Pete Sand provided a case law and legislative update. Jean Dickson Feeney spoke on Best Practices and practice pointers from the defense perspective.

Gina Boomershine, a licensed physical therapist at Accelerated Rehabilitation Center, gave attendees valuable information about functional capacity evaluations. She had the lawyers in the audience learn a very short work break exercise routine designed to reduce injuries, which they practiced. It proved to re-energize the group for the final afternoon speakers.



HelenJean Walleser, Workers Compensation Commissioner discusses Settlement Approvals and the Process.

Maureen Roach Tobin discusses Bad Faith Within Workers Compensation

E-DISCOVERY AMENDMENTS

By: David H. Luginbill,Ahlers & Cooney, P.C., Des Moines, Iowa

May 1, 2008

RE: E-DISCOVERY AMENDMENTS

The amendments to the Iowa Rules of Civil Procedure regarding electronic discovery take effect on May 1, 2008. The amendments substantially follow the Federal Rules of Civil Procedure regarding discovery of electronically stored information (ESI). Under the amended Iowa Rules, the definition of "documents" now specifically includes electronically stored information. The text of the amendments can be accessed at www.judicial.state.ia.us.

The amendments increase the burden on litigants to preserve electronically stored information, but further provide that absent exceptional circumstances, a court may not impose sanctions for failing to provide ESI lost as a result of the routine good-faith operation of an electronic information system. I.R.C.P. 1.517(6). The amendments also cover the procedures for asserting claims of a privilege after protected documents have been inadvertently produced. I.R.C.P. 1.503(5).

The IDCA Board has established an Electronic Discovery Committee to keep Association members advised of unique issues raised by electronic discovery. Please let us know if you would like to participate on the E-Discovery Committee or if you have suggestions for E-Discovery topics that are important to your practice.

David H. Luginbill, Chair
Electronic Discovery Committee

SCHEDULE OF EVENTS

June 5-6, 2008
IDCA Board Meeting
Davenport Country Club
Davenport, IA

8:30 a.m. Executive Committee
9:00 a.m. Full Board Meeting/Luncheon
12:15 p.m. Driving Range & Golf

(Please dial (563) 289-9978 for the Holiday Inn Express, 1201 Canal Shore Drive, SW, Le Clair, IA and state "IDCA" room block; room rates are between $107.96-$134.96 depending on view.)

September 17, 2008
IDCA Board Meeting & Dinner
West Des Moines Marriott
West Des Moines, IA

4:00 p.m. – 6:00 p.m.

September 18-19, 2008
44th Annual Meeting & Seminar
West Des Moines Marriott
West Des Moines, IA

8:00 a.m. – 5:00 p.m. both days

October 21-25, 2008
DRI Annual Meeting
Sheraton
New Orleans, LA

EDITOR'S NOTE

University of Iowa Law School
Brown Bag Lunch

The Iowa Defense Counsel Association sponsored a lunch at the University of Iowa's Law School on April 10, 2008.

Representatives from IDCA, Mike Weston, Michael Thrall, Christine Conover, Jerry Goddard, and Noel McKibbin engaged the law students in conversation regarding the virtues of DRI and the IDCA as well as questions and answers relevant to the practice of law.

The IDCA has a law student membership opportunity now available. We encourage IDCA members to be active in the support of our law schools and encourage the student membership.

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