defense UPDATE

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# FROM THE BENCH: INTERVIEW WITH CHIEF JUDGE DUANE E. HOFFMEYER, 3RD JUDICIAL DISTRICT

By: Kevin M. Reynolds and Tara B. Lawrence[2], Whitfield & Eddy, P.L.C., Des Moines, Iowa

## INTRODUCTION

This is the third in a series of articles to acquaint our membership with the chief judges of the various judicial districts around the state. Previous articles have been submitted by Judge Bobbi M. Alpers, Davenport, Chief Judge of the 7 Judicial District, and Arthur E. Gamble, Des Moines, Chief Judge of the 5th Judicial District.

Judge Duane E. Hoffmeyer resides in Sioux City, Iowa. He graduated from Creighton Law School in 1982. He became a District Court Judge in 2001. He was president of the Iowa Judges Association in 2006 - 2007. He became Chief Judge of the 3rd Judicial District in January 2008.

## THE THIRD JUDICIAL DISTRICT

I have been the Chief Judge of the Third Judicial District since January of 2008. The Third Judicial District is located in northwest Iowa and is composed of 16 counties. The Third Judicial District has the second largest number of counties of any district in the state. We are divided into two subdistricts. We have thirteen District Judges, seven District Associate Judges and two Associate Juvenile Judges along with fifteen Magistrates. We also have the pleasure of having seven senior judges assist since the beginning of my time as Chief Judge. The Third Judicial District lost Joe Straub when he reached the mandatory retirement age and Charles Barlow has announced he will be stepping down as Senior Judge at the end of October of this year. The senior judges have been a tremendous asset to the Third Judicial District and have offered us a great deal of flexibility in getting cases heard when there might not have otherwise been a judge available to hear the case.

A recent article stated the 2000 census indicated eight counties in the state of Iowa had a Hispanic population of more than five percent. Three of those eight counties were in the Third Judicial District. The 2007 census now reveals fifteen counties in the state of Iowa with a Hispanic population of more than five percent. Five of those counties are within the Third Judicial District. Three of those five counties have a Hispanic population greater than ten percent. A total of seven counties in the state of Iowa have a Hispanic population exceeding ten percent. This cultural diversity challenges the judicial branch. In order to provide access to these individuals, we have had to make greater use of interpreters and the hearings correspondingly take a longer length of time to resolve. It was pointed out while the original immigrants are working in the meatpacking plants and agricultural areas, their children are continuing to reside nearby. As this Hispanic population and other minority population continues to grow, we can anticipate some greater needs of these individuals until those second generation immigrants are more fully able to adapt to our language and judicial system.

### Pro Se Cases

As with other judicial districts, we in the Third District continue to experience a growth in the self-represented litigant, whether by their TV observation or the access to forms. It is clear there is a distinct group of individuals who have chosen to represent themselves, for better or worse, in our court system. My observation would be most of these are financially driven decisions - poor individuals who cannot afford to hire an attorney.

### Electronic Filing

Also, the Third Judicial District is anxiously looking forward to the implementation of the Electronic Documents Management System (EDMS). After some vendor contract issues, the process

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## Inside This Issue

# MESSAGE FROM THE PRESIDENT

**Martha L. Shaff**

Dear IDCA Members:

Thank you for the opportunity to serve as your president. The IDCA started 44 years ago and continues to thrive today. The board works hard to address the needs of the members new and longstanding. I hope that you will continue to belong to the IDCA but more importantly, get involved. If you don't want to get involved, tell us what we can do to make the organization better.

Change is a difficult thing but a good thing. Some changes have happened this year at IDCA and will in the years to come. The biggest change upon us now is the Annual Meeting. The event will take place for the first time in West Des Moines. So many law firms have moved out of downtown Des Moines, the parking is easy and access is simple so it will be a good thing. While we are moving things around we have booked the Marriott in Coralville to host the Spring Seminar. We aren't abandoning Des Moines, we will be back there in the Fall of 2009 but it seemed like we should take advantage of some other locations.

Location is not the only change to come to IDCA. We will have our first Webcast in early December 2008. Board member, Jerry Goddard has been busy putting together a great 1.5 hour CLE over lunch. You can earn CLE while sitting at your desk. The face to face contact at the annual meeting and spring seminar are invaluable but the opportunity to bring you a quality CLE at your desk is the only way to keep up with our members wants and needs. Just think, no driving, no parking, just at your desk earning a little CLE.

IDCA has reached out to the law schools over the past two years to increase the exposure of the IDCA and to increase the awareness of the defense practice and the opportunities it offers. We hope to attract some law school members and encourage you to meet and greet those students who take advantage of the benefit. These are just a few of the changes in the works at IDCA, please let us know what you think.

The organization will be under the leadership of Megan Antenucci this next year. Megan has so many leadership qualities, I have no doubt that she will lead this organization to another successful year. Please give Megan and IDCA your support and get involved.

While we have introduced new ideas to the organization, one of the best benefits this organization offers it members is the Defense Update. The Update can only survive if members give back. We need articles. Anyone can write an article for the update. Here are some suggestions but by no means limitations to articles: recap a recent case, write about a supreme court case, tell us about committee activity that is of interest to the defense bar. Your imagination is the only limitation. If you don't have time to write an article, give the board an idea for a topic. Your name will look amazing in bold print by the article headline!

Thank you for the privilege to lead this fine organization. Past presidents have provided me with much insight and support. The board has been great to work with. Bob Kreamer and Lynn Harkin have really made this position a joy.

Best wishes.

Martha L. Shaff

# WELL-REASONED OPINION EXCLUDING EXPERT TESTIMONY AND DISMISSING IOWA CASE AFFIRMED BY EIGHTH CIRCUIT UNDER *DAUBERT*

By: Kevin M. Reynolds, Whitfield & Eddy, P.L.C., Des Moines, Iowa

The Eighth Circuit Court of Appeals recently affirmed the dismissal of a lawsuit based on the exclusion of plaintiff's expert under the standards enunciated in *Daubert*, its progeny and Federal Rule of Evidence 702. *Bland v. Verizon Wireless, LLC et.al.*, 2008 U. S. App. LEXIS 17265 (August 14, 2008). This decision is helpful to defense practitioners, as the Court methodically went through the *Daubert* analysis and critically evaluated typical bases (temporal proximity, differential diagnoses) of expert witness opinion evidence from a treating physician.

In *Bland*, the plaintiff alleged that she ingested freon after a Verizon Wireless employee sprayed canned air containing freon into a water bottle that she had left in a retail store. Store employees apparently put the freon in the bottle as a joke. Bland claimed that this exposure caused her to suffer exercise-induced asthma. Bland initially filed suit in state court, which was thereafter removed by defendant to federal court. Bland sought to have the testimony of her treating physician, Dr. Sprince, admitted to establish a causal link between Bland's inhalation of freon and Bland's exercise-induced asthma. The district court, Magistrate Celeste Bremer, presiding, excluded Dr. Sprince's testimony because Dr. Sprince's proferred testimony as to causation did not satisfy the standards for admission of expert scientific testimony under *Daubert*. The district court then granted defendant's motion for summary judgment, because without the doctor's testimony, Bland was unable to set forth sufficient evidence of medical causation. On appeal of the dismissal in favor of the defendants, the court of appeals affirmed.

**Treating doctors are "experts" just like other "experts"**

Many times plaintiffs will attempt to bootstrap treating physicians as "experts" in order to supply medical causation, or to demonstrate a causal link between a particular event or exposure and a resulting medical condition. *Bland* is helpful to defendant's since in its ruling, the court of appeals noted that "a treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation." (citing *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1201, 1207 (8th Cir. 2000)). Although *Daubert* challenges are typically leveled at retained expert witnesses, treating physicians can be experts in the case offering opinion testimony just as important to the case as testimony from so-called "retained" experts. *Bland* makes it clear that with respect to treating physicians and their causation opinions, they are subject to the admissibility standards set forth by *Daubert*, its progeny and Rule 702.

**Grounds for the ruling excluding the evidence in the trial court**

Magistrate Judge Bremer had several reasons for excluding the testimony at issue. These reasons were discussed in detail and cited with approval by the appellate court. They can be summarized as follows: 1) the doctor had failed to scientifically eliminate other possible causes as a part of her differential diagnosis; 2) the doctor did not know "what amount of exposure to the difluroethane-containing Freon causes, or involves an appreciable risk of causing asthma; 3) the doctor "had no good grounds for determining whether Bland was exposed to a sufficient dose of difluroethane-containing Freon to have caused her asthma, because the doctor could not determine or estimate the amount of Freon Bland was actually or probably exposed to when she smelled the water in her bottle; 4) the doctor could not extrapolate from the existing data because the gap between the data identified and the doctor's proffered opinion was "simply too great an analytical gap to support admissibility"; 5) the doctor did not offer any evidence of personal experience with "treating other patients following similar exposure to difluroethane, Freon, or Freon with difluroethane"; and 6) the doctor's reliance on temporal proximity, without more, is insufficient to establish causation.

**The plaintiff's arguments**

Bland argued generally that the trial court abused its discretion in holding that Dr. Sprince's causation opinion was scientifically unsupported, since it was the product of reliable principles and methods. Bland also asserted that the trial court had legally erred because it had abused its discretion by applying a burden of proof tantamount to scientific certainty, rather than the "preponderance of the evidence" standard. Both of these general arguments were ultimately rejected by the Eighth Circuit.

**Differential diagnosis**

Bland more specifically argued that because Dr. Sprince had conducted a "differential diagnosis," the causation opinion should have been admitted. A differential diagnosis is the methodology used by physicians to arrive at a medical diagnosis. On this point, the court of appeals analyzed the issue as follows:

> Dr. Sprince's attempt to use a differential diagnosis to establish the inhalation or ingestion of freon caused Bland's exercise-induced asthma fails because Dr. Sprince's own testimony acknowledged the cause of exercise-induced asthma in the majority of cases is unknown. Where the cause of the condition is unknown in the majority of cases, Dr. Sprince cannot properly conclude, based upon a differential diagnosis, bland's exposure to freon was

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# WELL-REASONED OPINION EXCLUDING EXPERT TESTIMONY AND DISMISSING IOWA CASE AFFIRMED BY EIGHTH CIRCUIT UNDER *DAUBERT*

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> "the most probable cause" of Bland's exercise-induced asthma. As a practical matter, Dr. Sprince's causation opinion could not possibly be based upon a reasonable degree of medical certainty.

The court of appeals also noted that the plaintiff's expert had failed to scientifically eliminate other possible causes as a part of her differential diagnosis. Even if a link could be drawn (often referred to as "general causation") between freon inhalation and exercise-induced asthma, the physician must also rule out other possible causes. *Id*., at 1209 (recognizing "an expert must 'rule in' the suspected causes as well as 'rule out' other possible causes")(citing *Nat'l Bank of Commerce of El Dorado v. Associated Milk Producers, Inc.*, 22 F.Supp.2d 942, 963 (E. D. Ark. 1998), aff'd, 191 F.3d 858 (8th Cir. 1999). The court of appeals in *Bland* noted:

> Dr. Sprince appears to have focused on the temporal link between Bland's exposure to the freon and subsequent diagnosis of exercise-induced asthma. It does not appear Dr. Sprince ever conducted an investigation or analysis of Bland's home or other environments to determine other possible causes of Bland's exercise-induced asthma."

To conclude, since general causation was not shown and other possible causes were not eliminated, a proper differential diagnosis had not been established, and under *Daubert* and Rule 702, the proferred opinion testimony was not shown to be reliable and was therefore, inadmissible.

**Lack of Data**

The court of appeals also based its affirmance on the "lack of data." The data that was absent was: 1) what amount of exposure to freon causes, or involves an appreciable risk of causing, asthma; and 2) what amount of freon "Bland was actually or probably exposed to when she smelled the water in her water bottle." "Critical to a determination of causation is characterizing exposure." Federal Judicial Center, *The Reference Manual on Scientific Evidence* 472 (2d. ed. 2000). Without this data, there was nothing to support the doctor's opinion, and without support, the court was unable to conclude that the opinion was reliable.

**Temporal Proximity**

The appellate court also addressed the argument of "temporal proximity." Defense counsel are oftentimes confronted with "fuzzy" causation testimony from a plaintiff's treating physician that appears to be nothing more than "she didn't have it before, she has it now, thus, the incident caused the condition" testimony. Defense counsel have battled "physician advocates" on this type of testimony for years. The appellate court noted, however, that this is not enough: "[I]n the absence of an established scientific connection between exposure and illness, or compelling circumstances. . . the temporal connection between exposure to chemicals and an onset of symptoms, standing alone, is entitled to little weight in determining causation." (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998). Although the court went on to note that "under some circumstances, a strong temporal connection is powerful evidence of causation," citing *Bonner v. ISP Techs.*, 259 F.3d 924, 931 (8th Cir. 2001), in this case all other factors were properly discounted by the trial court, leaving only a temporal relationship. Even then the "proof" of temporal relationship was weak, as Bland waited two or three weeks before making an appointment with the doctor, and didn't see Dr. Sprince until five weeks after the incident.

Once the evidentiary ruling was affirmed, the court, in a *de novo* review, *see Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 910 (8th Cir. 2006), affirmed the grant of summary judgment to the defendants.

**Conclusion**

Here are the primary "practice pointers" for defense counsel to take away from *Bland*:

1. Removal of the case to federal court ultimately proved to be very helpful to the defense. As of this time, the Iowa Supreme Court has not adopted *Daubert* despite having several opportunities to do so since 1993. With the removal of *Bland* to federal court, this meant the *Daubert* standards for the admissibility of expert witness testimony, as well as amended Fed. R. Evid. 702 would be applied with rigor. One can only wonder whether the result (either the exclusion of the doctor's causation opinion, or dismissal of the case, or both) would have been the same had the matter been litigated in state court.
2. Just because an opinion is expressed by a licensed physician does not mean that the specific opinion is automatically admissible. This is especially true where *Daubert* applies. To argue otherwise is to argue in favor of an impermissible "*ipse dixit*." Defense counsel should carefully isolate the opinion at issue and the asserted bases for that opinion.
3. If a plaintiff's treating doctor might be called upon to express causation opinions in a toxic exposure or similar case in deposition, defense counsel should always be prepared to lay the foundation for a later, potential *Daubert* motion.
4. Conclusory reference to temporal proximity by a physician ("A happened, then B happened, therefore, A caused B to happen"), in a case where general causation is not proven by the available medical or scientific literature, is not enough, standing alone, to prove causation under Rule 702 and *Daubert*. On the other hand, temporal proximity alone may be enough to establish causation in a clear case, e.g., a car's bumper strikes a pedestrian's leg and the

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# THE LAW OF REBUTTAL AND SURREBUTTAL: A "SECOND BITE AT THE APPLE"

By: Robert L. Fanter, Kevin M. Reynolds and Tara B. Lawrence[1], Whitfield & Eddy, PLC, Des Moines, Iowa

**Introduction**

The circumstances under which "rebuttal" and "surrebuttal" evidence or testimony is permitted by the court can be difficult to define. For example, problems may arise when a plaintiff misses an expert witness designation deadline, and then tries to circumvent the consequences of that failure by designating the expert as a "rebuttal" expert. If the testimony is not true rebuttal, it should not be permitted. If it is proper rebuttal, then it may be critically important to convince the court to allow limited and focused "surrebuttal" testimony and evidence by the defendant. Even so, most trial court judges are understandably reluctant to allow what can devolve into a "ping pong" match among counsel to proceed unabated. Reported Iowa cases and authorities on these and related issues are rare. *See, e.g., Spahr v. Kriegel*, 617 N.W.2d 914 (Iowa 2000)(rebuttal testimony not concerning a new issue was not allowed; affirmed on appeal); *Klein v. Chicago Cent. & Pac. R. R. Co.*, 596 N.W.2d 58 (Iowa 1999)(trial court's decision to disallow testimony of witness on rebuttal affirmed on appeal; no abuse of discretion found); *In re Estate of Dankbar*, 430 N.W.2d 124, 132 (Court's refusal to allow surrebuttal evidence proffered by defendants after four weeks of testimony was not an abuse of discretion); *but see Hartman v. Norman*, 112 N.W.2d 374, 378(Iowa 1961)(Where the testimony was newly discovered and its admission would not have required any change in the jury instructions, the court held it was proper surrebuttal). This article will highlight some of the issues and precedents in this area.

**Discussion**

In a typical civil trial the plaintiff begins by presenting his or her case in chief followed by the defendant presenting his or her case. Most often, at the close of the defendant's case the plaintiff is allowed an opportunity to present rebuttal testimony. Some federal courts (including all in Iowa) have a specific deadline in the scheduling order for the designation of "rebuttal" experts. This is one way in which rebuttal issues may enter a case. In addition and in the furtherance of justice, the court may also allow the defendant to present evidence in reply to that called forth by the rebuttal testimony. *Walker v. Distler*, 296 P.2d 452 (Idaho 1956). The defendant's response to the plaintiff's rebuttal is called "surrebuttal." Surrebuttal evidence is evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence. *Carolan v. Hil*l, 553 N.W.2d 882 (Iowa 1996); *see also Green v. Louder*, 29 P.3d 638 (Utah 2001).

Surrebuttal testimony is appropriate when new matter or new facts are injected for the first time in rebuttal; especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by the plaintiff in rebuttal. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 459 (2nd Cir. 1975)("For matters *properly not evidential until the rebuttal*, the proponent has a right to put them in at that time, and they are not subject to the discretionary exclusion of the trial court"). However, as a general rule, in a civil case, a party does not have *a right* to reply to evidence given on rebuttal or to introduce evidence by way of surrebuttal. *First Nat'l Bank v. Vagi*, 212 P. 509 (Mont. 1922); *but see People v. Strait*, 47 N.E. 1090 (N.Y. 1896)(A defendant in a *criminal* case is entitled as of right to put in evidence strictly in surrebuttal after the complainant has closed his or her case on rebuttal). Upon a request from the defendant, the court may, in its discretion, allow the admission of surrebuttal evidence.

The plaintiff's burden of proof is real, and not imagined or fanciful. Rebuttal testimony must rebut testimony advanced by the other side and should not consist of testimony which might have been advanced as proof in chief. Most courts have held that the plaintiff must present all evidence in support of the party's position when the issue is first presented, rather than on rebuttal. *Moran v. Phila. Trans. Co.*, 162 F. Supp. 106, 107 (E.D. Penn. 1958)(Where plaintiff's counsel had every opportunity to make his offer in his case in chief and failed to do so, the court's refusal to permit into evidence in rebuttal was not an abuse of discretion); *see also Gossett v. Weyerhaeuser Co.*, 856 F.2d 1154, 1156 (8th Cir. 1988)("Normally parties are expected to present all of their evidence in their case in chief"); *but see Bell v. AT&T*, 946 F.2d 1507, 1512 (10th Cir. 1991)("Where evidence rebuts new evidence or theories proffered in the defendant's case-in-chief, that the evidence may have been offered in the plaintiff's case-in-chief does not preclude its admission in rebuttal"). Therefore, the plaintiff should put forth all of its evidence satisfying the burden of proof in its case in chief. Absent a sufficient excuse for not introducing the evidence in the party's case in chief at the proper time, the court should refuse to admit the evidence on rebuttal. Furthermore, the plaintiff should also present all of his or her evidence rebutting the defendant's defense theories in his or her case in chief. *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1224 (10th Cir. 2000)("When plaintiffs seek to rebut defense theories which they knew about or reasonably could have anticipated, the district court is within its discretion in disallowing rebuttal testimony"); *see also Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 664 (10th Cir. 1991)("Because plaintiffs were warned that rebuttal evidence would be restricted and because they reasonably could have anticipated defendants' evidence it was within the

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district court's discretion to disallow plaintiff's rebuttal evidence"). Presenting the proper argument in the trial court, either for or against rebuttal or surrebuttal, is critical as the standard of review on appeal is "abuse of discretion." *Moran*, at 107.

The same holds true for the defendant. A defendant is not entitled to put forth, at the stage of surrebuttal, evidence on an essential point whereon he failed to give evidence in his original case. *Reis v. CSX Transportation, Inc.*, 2000 U.S. Dist LEXIS 4763, *12 (E.D. Penn. Mar. 29, 2000)("Surrebuttal evidence is permissible only where a party in rebuttal introduces subject matter not previously raised in its case-in-chief"). Evidence in plaintiff's case in chief is not "new matter" to be counteracted with surrebuttal evidence.

As contrasted with federal court practice in Iowa, most scheduling order forms used by district court judges in Iowa do not have a separate pretrial deadline established for the designation of "rebuttal" experts. The authors would argue that any attempt by a plaintiff to call, as a witness at trial, an expert that has not been previously identified as an expert to give opinion evidence in the case, should be denied, even if it is claimed that the witness is a so-called "rebuttal" expert. Otherwise the public policy basis underlying pretrial discovery of expert witness opinion, as embodied in Iowa Rule of Civil Procedure 1.508, is significantly undermined. Since federal court practice typically includes a separate deadline for the designation of such "rebuttal" experts via a Rule 26 expert witness disclosure, this issue is not present. As a practical matter, any expert designated in federal court as a "rebuttal expert" will have to provide a Fed, R. Civ. P. 26(a)(2)(B) expert witness disclosure, and will be deposed prior to trial. This will give the defense the advantage of knowing the precise nature of the rebuttal testimony before even the defense case is placed before the jury. A defendant can anticipate this proof and strategize the defense case accordingly. This aspect of federal court practice militates in favor of defendants and against plaintiffs.

In state court, if a plaintiff "holds back" an expert witness under the guise of calling the expert as a rebuttal witness, only, there is a risk that the testimony will not be allowed by the court at all, for failure to meet the pretrial expert witness disclosure requirements of Iowa R. Civ. P. 1.508(1). Further, expert disclosures in state court must be supplemented no later than 30 days before trial. Iowa R. Civ. P. 1.508(3). The Court even has the power to compel disclosure of experts in advance of trial. Iowa R. Civ. P. 1.508(5). The Iowa Rules of Civil Procedure do not differentiate between experts called in a party's case-in-chief, and "rebuttal" experts.

The federal rules do not contemplate surrebuttal experts. *Houle v. Jubilee Fisheries, Inc.*, 2006 U.S. Dict. LEXIS 1408, *3 (W.D. Wash. Jan. 5, 2006). Ordinarily, if expert B rebuts expert A, expert A will be able to address the defects in expert B's testimony. *Id*. at 5. If the circumstances in the case make it impossible for expert A to address expert B's rebuttal testimony, it is incumbent upon the party who wishes to certify an additional expert to seek a stipulation or leave of the court to name a new expert. *Id*. The only experts exempted from the court's pretrial scheduling order are rebuttal experts, those who offer opinions "solely to contradict or rebut evidence on the same subject matter identified by another expert witness." *Id*.; Fed. R. Civ. P. 26(a)(2)(c)) (2008). A rebuttal expert must disclose his or her report within 30 days of the report that he or she is rebutting. *Id*. Many courts will not allow late-disclosed experts to provide testimony. *Id*. at *6. *See also* Iowa R. Civ. P. 1.508(3)(if an expert's identity or opinions are not disclosed "the court in its discretion may exclude or limit the testimony of the expert. . ."); *Leet v. Burbridge*, 682 N.W.2d 81, 2004 WL 573798 (unreported)(Iowa Ct. App. 2004 (40% disability rating by plaintiff's treating physician, given less than one month before trial, excluded from testimony, by reason of plaintiff's failure to disclose in discovery prior to trial); *Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629 (Iowa App. 1995)(decision to exclude expert's testimony not an abuse of discretion, where party failed to supplement answers to expert witness interrogatories). Consequently, there are significant risks in not timely designating an expert witness. Also, a party would be well advised to obtain the judge's ruling on the matter of his or her right to present a rebuttal witness before resting his or her case in chief.

Evidence that is properly part of the party's case in chief ordinarily should not be reserved until rebuttal, but this general rule may be relaxed at the discretion of the court and in a proper case the court may admit evidence later in the trial that more properly should have been introduced in the case in chief. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 458 (2nd Cir. 1975)(While a trial judge has discretion to exclude rebuttal evidence which would have been admissible if offered as evidence in chief, such discretion should be tempered greatly where the probative value of proffered evidence is potentially high and where such evidence, though admissible on the case in chief, was unnecessary for the plaintiff to establish in its prima facie case); *see also Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 808 P.2d 919 (Nev. 1991)(Failure to allow plaintiff to offer rebuttal testimony, or to reopen case in chief in order to offer testimony was reversible error where proffered testimony was the only substantial evidence in support of plaintiff's claim and defendant would not have been unfairly prejudiced by its admission).

Surrebuttal should also be limited to a "true rebuttal." The plaintiff's rebuttal is not a reiteration of plaintiff's earlier point, but is limited to a response to the defense evidence that is new. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 459 (2nd Cir. 1975)("Matters of true rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission"). The plaintiff on rebuttal should

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only address the issues raised in the defendant's original case and if the defendant is allowed to present surrebuttal evidence, it should be limited to only new evidence the plaintiff presented in rebuttal. *McVey v. Phillip Petroleum Co.*, 288 F.2d 53, 54 (5th Cir. 1961)("[R]ebuttal evidence is generally admissible only to meet the evidence brought out in defendant's case in chief"). A party is not entitled to put in, at the time of rebuttal or surrebuttal, evidence not strictly rebutting, but merely cumulative or confirmatory. *State v. Knight*, 165 N.W. 1039, 1041 (Iowa 1918) (the court may very properly exclude a witness on "surrebuttal," when called for no other purpose than to repeat that to which he has already testified.); *see also U.S. v. Portis*, 542 F.2d 414, 417 (7th Cir. 1976)("[S]urrebuttal evidence must meet and reply to evidence presented by the plaintiff in rebuttal"). Therefore, most courts hold that the purpose of rebuttal and surrebuttal is not to bolster the party's case in chief but to allow the party an opportunity to address all of the issues. *Faigin v. Kelly*, 184 F.3d 67 (1st Cir. 1999) (The principle objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case).

Once a party goes beyond presenting a "true rebuttal" the door is opened and the adverse party may be afforded an opportunity to respond to the new issues in surrebuttal. *Id*. Therefore, if the plaintiff presents testimony regarding new facts or evidence, most courts would allow the defendant to respond to those new issues in surrebuttal. What is considered a new issue and what it takes to "open the door" is unclear. A party must toe the line if they do not want the adverse party to have the last word. The court may allow the plaintiff to have the right to close the trial because the plaintiff has the burden of proof. *Splendor Form Brassiere, Inc. v. Rapid-Amer. Corp.*, 1975 U.S. Dist. LEXIS 12368, *15 (S.D. N.Y. May 13, 1975); *see also Hendershott v. Western Union Tel. Co.*, 87 N.W. 288, 289-90 (Where defendant brings out a matter on cross-examination of plaintiff's witness, it is not competent to introduce evidence on surrebuttal to explain such matter). There are strategic decisions to be made regarding whether a party may want to have the last word or whether the party may not want to take advantage of an opportunity to present rebuttal or surrebuttal testimony.

As a defendant, it can be exceedingly risky to "assume" that a trial court will allow surrebuttal testimony, and to "hold back" the evidentiary presentation of the evidence based on that assumption. In the author's view this should never be done. Instead, as a trial strategy, defense counsel would be best advised to present a full and complete defense as a part of its case¬in-chief, and to request the privilege of presenting surrebuttal testimony only as a last resort, in those truly unique and rare circumstances where unforeseen rebuttal evidence is placed in the record by plaintiff.

There are no hard and fast rules regarding rebuttal and surrebuttal testimony. The Iowa Rules of Civil Procedure, the Iowa Rules of Evidence, the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not provide any explicit guidance or restrictions on the admission of "surrebuttal" testimony. The trial court has wide discretion and its discretion will not be disturbed on review unless there is an abuse of discretion. *Gossett v. Weyerhauser Co.*, 856 F.2d at 1156 ("Allowance of a party to present additional evidence on rebuttal depends upon the circumstances of the case and rests within the discretion of the trial judge"); *see also Smith v. Conley*, 584 F.2d 844, 846 (8th Cir. 1978)(An appellate court "may reverse a trial court's determination of the admissibility of rebuttal testimony only where there has been a clear abuse of discretion"). However, a court may not arbitrarily refuse to hear surrebuttal testimony. *U.S. v. Compania Cubana De Aviacion*, 224 F.2d 811 (5th Cir. 1955).

One of the authors was involved in a trial in federal district court where a troublesome issue arose in the context of the plaintiff calling an expert witness as a "rebuttal" expert in a product liability case. *See Zeigler v. Fisher Price*, 2003 U. S. Dist. LEXIS 11184 (N. D. Iowa 2003). In *Zeigler*, plaintiffs' proposed rebuttal expert was excluded from testifying prior to trial, based on a failure of plaintiff to provide a timely Rule 26 expert witness disclosure. Nevertheless, plaintiff's counsel had the excluded expert testify during trial, but outside the presence of the jury on an "offer of proof." To complicate matters even further, the so-called "rebuttal expert" testified *out of order* based on a scheduling conflict, *i.e*., he testified at a time prior to the testimony of the defense liability expert in the defense case-in-chief. When the defense expert testified later in the presence of the jury, based in part on information disclosed in the testimony of the plaintiff's "rebuttal" expert, plaintiff's counsel objected and moved for sanctions. One of the sanctions ultimately ordered by the court was the exclusion of a significant portion of the defense expert's testimony. The trial court found that under a peculiar provision in the court's final pretrial order, no witness (including even expert witnesses) were to be told or informed of the testimony of any other witness testifying at the trial.[2]

The unusual problem in *Zeigler* was created by a "Perfect Storm" of factors: (1) plaintiff's designation of an expert as a

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2 This aspect of the Court's final pretrial order was contrary to how a majority of federal courts interpret Federal Rule of Evidence 615, *i.e*., most courts do not apply the rule relating to the "exclusion of witnesses" to experts. This makes sense as Rule 703 explicitly provides that "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to the expert at or before the hearing*." (emphasis added). Experts typically give opinions based on facts provided to them by others; rarely do they have personal knowledge of any facts that they have relied upon to give their opinions. Thus, "cross¬pollinization" of their testimony is not a real problem. Finally, the time-honored vehicle of a "hypothetical question" could be used to elicit opinion testimony based on a certain set of facts.

# 2008 LEGISLATIVE REPORT

By: Robert M. Kreamer, Des Moines, IA

The Iowa Democrat Party in 2008 controlled the legislative process in Iowa with a 54-46 margin of control in the Iowa House of Representatives and a 30-20 margin in the Iowa Senate. Additionally, with Democrat Chet Culver as Governor, the Democrat Party had total control of the legislative process, something that had not occurred since 1965.

With this control by the Democrat Party, several 2008 IDCA legislative initiatives became jeopardized because they had been historically opposed by organized labor and by the Iowa Trial Lawyers Association, two key support groups of the now-majority party. These IDCA legislative initiatives were:

1. Comparative Fault Caps—IDCA opposes the current cap contained in Iowa's Safety Belt and Safety Harness Law (Iowa Code Section 321.445) that restricts the ability of a jury to assess fault in actions brought under this section of Iowa law. IDCA supported Senate File 166 which eliminates the 5% cap on the jury's ability to reduce the amount of a plaintiff's recovery when the plaintiff's failure to wear a seat belt or safety harness in violation of the Iowa law contributes to the plaintiff's claimed injury or injuries. Senate File 166 received no consideration in 2008.
2. Consistent, Fair Interest Rates on Judgments—The interest rate applied to Worker's Compensation judgments is separate and higher than the interest rate imposed on other judgments. IDCA supported House File 383 which eliminated the separate, higher interest rate so that interest on Worker's Compensation judgments would bear the same rate of interest as other judgments in the State of Iowa. House File 383 received no consideration in 2008.
3. Offers to Confess Judgment—Iowa law has long recognized the benefits of an Offer to Confess Judgment, statutorily precluding a party who rejects an Offer to Confess Judgment from recovering court costs after the date of the Offer if that party fails to recover more than that amount at trial. In addition to court costs, a party who fails to recover more than the amount of the Offer to Confess Judgment at trial should not recover prejudgment interest from the date of the Offer. IDCA supported House File 378 but it received no consideration in 2008.

While none of the above IDCA legislative initiatives received any consideration by the Iowa Legislature, 2008 was another extremely active and successful year for IDCA in resisting numerous proposals to increase or expand the theories and recoveries available to plaintiffs. IDCA joined forces with other interest groups and played a major role in successfully resisting the following plaintiff-oriented proposals:

1. HF 2608 (successor to HSB 771)—This legislation would allow an injured employee the right to select their own doctor and health-care in Worker's Compensation cases. HF 2608 was approved by the Iowa House Committee on Labor and placed on the House Debate Calendar. There, this bill received no attention and would have been funneled but for an extra-ordinary effort by the House majority leadership team to refer HF 2608 to the House Appropriations Committee. Legislation in the Appropriations Committee is exempt from all funnel rules for the duration of the legislative session but fortunately AHF 2608 received no further consideration and died with the adjournment of the session.
2. HF 2583 (successor to HSB 668)—This bill would require an insurance company to disclose the policy limits to a claimant or the representative of a claimant within 30 days of the request. This legislation was approved by the House Judiciary Committee but did not survive the funnel rule. Megan Antenucci, representing IDCA, gave excellent testimony at a legislative hearing opposing this legislation.
3. HF 2590 (successor to HF 2142)—HF 2142 would allow a private cause of action for a violation of the Iowa Consumer Fraud Act. This legislation was drafted by the Iowa Attorney General and was generally recognized, if enacted, to be one of the most liberal laws of its type in the nation. David Phipps, representing IDCA, appeared at a legislative hearing, along with numerous other lobbyists representing organizations opposed to this legislation. HF 2142 did not have a sufficient number of votes to pass the House Judiciary Committee. In order to avoid the funnel deadline, the committee leadership was successful in winning approval of HF 2590, a "shell bill" to keep the concept of HF 2142 alive. HF 2590 received no further action and eventually failed to survive a funnel deadline date.
4. HF 797—This legislation would have repealed our prior successful legislative efforts that require an apportionment of the damages in instances where there has been a second injury in Worker's Compensation cases. This legislation received little attention and did not survive the funnel.
5. SF 2343—This legislation relates to the imposing of liability on social hosts where alcohol is made available to underage guests. SF 2343 was unanimously approved by the Iowa Senate and unanimously approved by the House Judiciary Committee but failed to receive the attention of the Iowa House of Representatives before final adjournment of the Iowa Legislature.

While the above five legislative proposals failed to become law because of the efforts by IDCA and other organizations sharing our beliefs and values, I am confident

*continued on page 10*

## FROM THE BENCH: INTERVIEW WITH CHIEF JUDGE DUANE E. HOFFMEYER, 3RD JUDICIAL DISTRICT

. . . *continued from page 1*

has begun again and there are two finalists. One should be selected by September and the hope is that this process will begin in earnest the first part of the year. Plymouth County in subdistrict 3B is a pilot county and will lead off this initiative. We are confident that we have the staff and judges in place that will make this successful. Having formerly sat on the Judicial Technology Committee, I am convinced lawyers will find this a benefit. Firms should keep in mind in their budgeting process for year 2009 some of the subdistricts will begin implementation of this project and you may need some upgrades, though most attorneys polled have everything needed to start off with this project.

**Trial Skills**

Last, some of the judges in my district and elsewhere have commented on what they perceive as an eroding of our trial attorney skills. Experienced trial attorneys who don't get into court regularly lose some of those skills or become apprehensive about the work and effort needed to get ready for a trial. Also, firms need to mentor the younger litigators in their firm and give them the opportunity to become involved in some of these cases so they can improve their skills. As the number of jury trials decrease, it is important that firms take steps to ensure the litigators in their office will be ready and well prepared when the opportunity to try cases presents itself. I would suggest firms consider allowing some of the litigators to do criminal defense work. While I understand it may not be completely cost effective to do so, it does provide an opportunity for attorneys to get trial experience and be ready for those civil cases that may come their way. This is evident in how some of the young attorneys do not know the Rules of Evidence and many find it difficult to ask questions that are not in some way leading, suggestive, or argumentative. Sometimes when a case is in equity and while arguably it is suggested we should reserve ruling, it does not mean we need to ignore the Rules of Evidence or permit this type of questioning. I am also convinced that the manner in which some inexperienced and some not so inexperienced attorneys ask questions is unprofessional and causes the conflict between the parties in the courtroom to escalate when it need not do so. Some attorneys seem more intent on doing what their clients expect or try to make themselves look good as opposed to simply presenting their cases, informing their clients of the law, and trying to make their clients have reasonable expectations

I am proud of the judges and employees of the Third Judicial District. I think we are a conscientious and hard-working group. We are seeing more and more attorneys from throughout the state appear in our courts. We look forward to seeing good and well-prepared trial attorneys. ■



## IDCA SCHEDULE of EVENTS

**December 4, 2008**
**IDCA Webinar**
12:00 noon – 1:30 p.m.

**December 11, 2008**
**IDCA Board Meeting**
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

**February 4, 2009**
**IDCA Board Meeting**
Executive Committee
Board Meeting/Luncheon

**February 5-6, 2009**
**IDCA Trial Academy**
9:00 a.m. -5:00 p.m.
Drake University Law School
Des Moines, IA

**April 3, 2009**
**IDCA Spring CLE Seminar**
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA
8:30 a.m. – 4:30 p.m.
Topic: TBD

**April 3, 2008**
**IDCA Board Meeting**
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA
11:30 a.m. Full Board Meeting/Luncheon

**June, 2009**
**DRI Mid-Region Meeting**
Des Moines, IA
Hosted by Iowa

**Summer, 2009**
**IDCA Board Meeting**
Executive Committee
Full Board Meeting/Luncheon

**September 16, 2009**
**IDCA Board Meeting & Dinner**
TBD – Des Moines, IA
4:00 p.m. – 6:00 p.m.

**September 17-18, 2009**
**44th Annual Meeting & Seminar**
TBD - Des Moines, IA
8:00 a.m. – 5:00 p.m. both days

**October 7-11, 2009**
**DRI Annual Meeting**
Chicago, IL

**WELL-REASONED OPINION EXCLUDING EXPERT TESTIMONY AND DISMISSING IOWA CASE AFFIRMED BY EIGHTH CIRCUIT UNDER *DAUBERT*** *. . . continued from page 4*

***THE LAW OF REBUTTAL AND SURREBUTTAL: A "SECOND BITE AT THE APPLE"*** *. . . continued from page 7*

***2008 LEGISLATIVE REPORT*** *. . . continued from page 8*

leg is fractured; clearly the impact with the car was the "medical cause" of the fractured leg; *Daubert* is not implicated in such a case.

5. A self-serving statement by a doctor that an opinion has been stated "to within a reasonable degree of medical certainty" does not foreclose the possibility that the expert's opinion is not, in fact, based on a sound scientific or medical methodology and is therefore, relevant, reliable and admissible under *Daubert*. Defense counsel should always keep in mind that the court determines what is or what is not admissible, not the physician.
6. A physician's conclusory or vague testimony that she has employed a "differential diagnosis," standing alone, is not enough to insure the reliability of the opinion. Instead, the various causes of the claimed condition must be known, and where the majority of the causes are unknown, a physician cannot conclude that an exposure to a particular agent was "the most probable cause" of a condition. *A fortiori*, such an opinion is not based on a "reasonable degree of medical certainty," is therefore not reliable, and is therefore inadmissible under *Daubert*.
7. Defense counsel should argue that a basis for both "general causation" ("A can cause B") and "specific causation" ("A caused B in this particular case") must be demonstrated in every case in order for a medical causation opinion to be admissible.
8. An expert's "lack of data" to support an opinion or inference may create "too great an analytical gap" to support admissibility. (quoting *General Elec. Co.v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997)).
9. If the testifying doctor does not have any experience treating patients with the same or similar conditions, this fact will be helpful in establishing the lack of reliability (and the potential inadmissibility) of the proffered opinion. ■

"rebuttal" expert: (2) exclusion of the witness as a "rebuttal" expert prior to trial; (3) plaintiff's counsel calling the expert out-of-order to testify on an "offer of proof" outside the presence of the jury; and (4) an unusual provision in a federal court pretrial order that was at odds with Federal Rules of Evidence 615 and 703.

**Conclusion**

The use of rebuttal and surrebuttal experts, evidence or testimony is a matter that is reserved to the sound discretion of the trial court. Since the standard on appeal will be governed by "abuse of discretion," it is critically important that these issues be handled by defense counsel forcefully (and correctly) at trial. Defense counsel should be sensitive to potential situations where a plaintiff's expert is designated as a "rebuttal" expert, merely because a prior expert witness designation deadline has been violated. This should raise a "red flag" and warrants intense scrutiny. Unless the witness' testimony, or the subject evidence, is in the true nature of rebuttal, it should not be permitted. If it is a rare situation where the proffered testimony is true rebuttal and is permitted, then if appropriate, defense counsel should move the court, in an appropriate case, to exercise its broad discretion and allow limited and specific, surrebuttal evidence by the defendant. ■

these proposals wills surface again, along with other troublesome issues, in 2009. Our opposition will be working hard this fall to elect legislative candidates sympathetic to their position. It is critical that you inform your legislative candidates where you stand on these critical issues, know what their positions are on these issues, and then vote accordingly if we are going to continue enjoying a level playing field in civil litigation.

In closing, I would like to thank President Martha Shaff, President-Elect Megan Antenucci, and Legislative Committee Chair Greg Witke for their constant support and assistance in making this difficult session so successful.

Finally, thanks to you, the members of IDCA, for allowing me the opportunity to represent you everyday at the Capitol. Thank you very much!

Bob Kreamer

# IOWA DEFENSE COUNSEL ASSOCIATION

*FOUNDED 1964*

## *STUDENT MEMBERSHIP*

### HISTORY & PURPOSE

The Iowa Defense Counsel Association was founded in 1964 with the express purpose of improving our civil justice system. This encompasses efforts to support proposals within the legislature and the court system which are designed to maintain a fair balance between plaintiffs and defendants, and at the same time avoid excessive, unreasonable, and emotional verdicts that are so costly to the public at large.

### IDCA TODAY

Since 1964, membership has grown to nearly 400 active members. The IDCA has carefully selected persons for membership who have demonstrated a genuine concern for the Defense Bar in general, recognizing outstanding legal talent, high moral and professional standards.

### COMMITTEES

The IDCA has several active, influential, and productive committees whose task is to carry out the objectives of the organization:

- Amicus Curiae
- CLE Committee
- Commercial Litigation
- E-Discovery
- Editorial/*Defense Update*
- Employment Law
- Fair & Impartial Courts
- Jury Instructions
- Law School Programs/ Trial Academy
- Legislative
- Membership
- Product Liability
- Professional Liability
- Public Relations/Website
- Rules
- Tort and Insurance Law
- Workers' Compensation
- Young Lawyers *(10 years or under in practice)*

### ACCOMPLISHMENTS

The IDCA has, through its committees and paid lobbyists, established and maintained an effective and beneficial dialogue with legislators.

The IDCA maintains educational programs for the membership in an attempt to satisfy all state, federal and ethical continuing legal education requirements.

The IDCA has facilitated goodwill and understanding between insureds, insurers and counsel.

### MEMBERSHIP REQUIREMENTS

***LAWYERS***

Any person who is a member of the bar who is actively engaged in the practice of law, who is of high professional standing and:

- Who devotes a substantial portion of his/her professional time to the representation of persons or entities on assignment by insurance companies, associations, corporations, professional or governmental entities or like clients in advice concerning, or defense of claims shall be eligible for membership;
- Who devotes a substantial portion of his/her professional time to the representation of an insurance company, corporation or governmental entity in the office of such organization shall be eligible for membership.
- Law students in good standing working toward being admitted to the bar.

***CLAIMS PROFESSIONALS***

Any person who is actively engaged in work relating to the handling of claims or defense of legal actions for an insurance company as an employee shall be eligible for membership.

### HOW TO BECOME A MEMBER

Complete a membership application either on-line, www.iowadefensecounsel.org, or contact the IDCA office for a hard copy at (515) 244-2846, or staff@iowadefensecounsel.org. All applications will be reviewed by the Board of Directors at the next meeting, and approval of the application by the board is all that is required for you to join.

Student Dues are $25 per year.

Each member will receive a membership certificate and will remain a member in good standing each year that dues is paid, or unless a membership is terminated by the Board. With any questions, visit the website, or call the IDCA office at the number listed above. Student members are not allowed to serve as officers.

**Iowa Defense Counsel Association**

100 East Grand Avenue, Suite 330
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(515) 244-2847 phone
(515) 243-2049 fax
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www.iowadefensecounsel.org


**The 2008 DRI Annual Meeting** is set for **October 22 - 26** in beautiful and jazzy New Orleans, Louisiana. The Annual Meeting will be held at the Sheraton New Orleans which is on Canal Street directly across from the historic French Quarter. DRI returns to New Orleans for our Annual Meeting for the first time since Hurricane Katrina. The Crescent City is back, clean and better than ever with all your favorite restaurants, jazz clubs, and antique stores.

The Annual Meeting brochure can be found at www.dri.org under the Annual Meeting Link, as you can see, there is a blockbuster lineup of speakers and programs, and quite clearly, something for everyone.

Join your pals in the **Big Easy for the 2008 DRI Annual Meeting** and you will have fun, pick up some new clients and earn over 20 hours in CLE credit. Now, that's the way to multi-task!

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