defense UPDATE

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# FROM THE BENCH: INTERVIEW WITH CHIEF JUDGE ARTHUR E. GAMBLE, 5TH JUDICIAL DISTRICT

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

Judge Arthur E. Gamble is a resident of Clive, Iowa. He received his bachelor and law degrees from the University of Iowa, the latter in 1978. Following admission to the Bar, he practiced with the Des Moines firm of Gamble, Riepe, Webster, Davis & Green until 1983 when, at the age of 30, he was appointed an Iowa District Court Judge for the Fifth Judicial District by Governor Terry Branstad. He has served as Chief Judge of the Fifth Judicial District since 1995. Recently, Kevin Reynolds, one of the editors of *Defense Update*, had a chance to sit down and talk with Judge Gamble about issues and concerns from his unique perspective as chief judge of a judicial district with the most rural and metropolitan counties of Iowa. Here are some of his comments:

**Q. (Kevin Reynolds) Judge Gamble, first of all, on behalf of the Iowa Defense Counsel Association, thank you for taking time from your busy schedule to talk with us. Are we in an age of "the vanishing jury trial?"**

A. (Judge Gamble): The Iowa Judiciary is consistently rated by the United States Chamber of Commerce as one of the top five court systems for fairness and competency of our judges. However, the so-called "vanishing jury trial" is a disturbing trend.

The American Judicature Society has observed that a steady decline in jury trials, particularly in civil cases in Iowa. The AJS believes the increasing cost and complexity of civil litigation, including excessive discovery and expert witness costs, discourage the use of the traditional jury trial as the primary method of civil dispute resolution.

It is true that in the rural courts of the Fifth District, we are seeing fewer jury trials. But in Polk County the number of jury trials, both civil and criminal, has been steadily increasing. In 2006, Polk County judges conducted 171 jury trials including 85 civil trials. In 2007, we conducted 193 jury trials in Polk County. Eighty-nine of these trials were held in civil cases, about half of those were civil trials. I believe the same trend is evident in the other population centers of Iowa. This is an indication that the trial bar is still robust in this state. Nevertheless, there is cause for concern.

Chronic under-funding of the courts reduces the ability of state court judges to manage complex civil litigation. State court judges do not have enough law clerks and support staff to handle the demands of complex litigation in a manner the litigants have a right to expect. Judges are increasingly faced with voluminous discovery motions, motions for summary judgment and protracted proceedings. When it comes to research and writing time, trial judges are at a distinct disadvantage compared to the lawyers and law firms trying these cases. Often the result is a reduction in the quality of the judges' written work and erosion in the quality of justice our courts are able to produce.

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# MESSAGE FROM THE PRESIDENT

**Martha Shaff**

Dear IDCA members,

In May of 2007 several officers of IDCA attended the Mid Region meeting of DRI in Kansas City, Kan. One of the topics discussed was diversity. Tim Schimberg from Denver, Colorado, put on a great presentation about diversity. DRI sent a directive to all state organizations to adopt a diversity statement. The Iowa Defense Counsel Association adopted a diversity statement at its meeting in July 2007. The statement is included on our website and we are adding it to more of our publications. The diversity statement adopted reads:

The Iowa Defense Counsel Association is the State organization of lawyers involved in the defense of civil litigation. As such, IDCA expresses its strong commitment to the goal of diversity in its membership. Our member attorneys conduct business throughout Iowa, the United States, and around the world, and IDCA values the perspectives and varied experiences that are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of our organization as a whole, as well as our respective professional pursuits. Diversity brings to our organization a broader and richer environment that produces creative thinking and solutions. Thus, IDCA embraces and encourages diversity in all aspects of its activities. IDCA is committed to creating and maintaining a culture that supports and promotes diversity in its organization.

The IDCA took the first step by adopting this statement but now we must go the next step and make sure that we are implementing it.

I received a survey recently from one of our insurance carriers asking about diversity of our attorneys. The survey asked about four categories. The first was female partners and associates. The second category was ethnic minority defined as African American, Asian American, Hispanic/Latino; Native American and Bi-racial/Mixed Races. The third category referred to GLBT: gay, lesbian, bisexual and/or transgender. The fourth category was physically challenged attorneys. I was able to say that out of 13 attorneys we have two female partners and two female associates but I had to answer the rest of the questions "no." In the history of our firm we have had one Asian American associate but no other ethnic minorities. Take a look at your firm and the make up of it. I suspect that most firms are similar to mine.

DRI is committed to diversity. They recommend that state organizations reach out to minority bar committees, minority student bar associations and any other organization that will promote the goals of DRI and the IDCA with regard to diversity. The challenge to the IDCA will be to follow through on this goal. The survey I received is not unique. Many companies are challenging their law firms to be more diverse. We must recognize that many of our client's employees, customers and communities are diverse. To represent those clients in the most effective way we must recognize that our law firms must reflect the diversity of our clients.

I hope that the IDCA and its membership can step up to the challenge.

Martha Shaff
IDCA President

# IOWA DEFAMATION LAW–
## RECENT DEVELOPMENTS WITH A REFRESHER COURSE

By: Thomas B. Read, Crawford, Sullivan, Read and Roemerman, PC, Cedar Rapids, Iowa

The Iowa Supreme Court changed the definition of "actual malice" in defamation cases.[1] There is a new uniform instruction to conform to the new definition.[2] Time for a refresher course on the law of the twin torts – libel and slander.[3]

Defamation is an invasion of a person's reputation and good name. A person's reputation is the collective opinion that people have about a person's integrity and moral character, his good citizenship, and how much the public respects and admires a person. This collective opinion is usually based upon the experiences people in the community have had with the person and his deeds and what people have heard about the person through the media and from conversations with others. Just as the law allows a recovery for a broken arm or neck, the law allows a recovery for a broken reputation. We can't see, feel, touch or x-ray a reputation, but it is there, nonetheless. The written or printed word is called libel. The spoken word is called slander.

Specifically, libel has been defined as the "malicious publication, expressed either in printing or in writing, or by signs or pictures, tending to injure the reputation of another person or to expose that person to public hatred, contempt, or ridicule or to injure the person in the maintenance of a business."[4]

A brief history lesson. In the beginning, defamatory words charging someone with a crime punishable by imprisonment were actionable in themselves. That is, the law legally and conclusively presumed the words to be defamatory. *Pierson v. Steortz, Bradf.* 48 (Iowa.Terr. 1841). A few years later the Iowa Court held words calling a married woman a whore were actionable in themselves both because the words accused her of moral turpitude and because the law made adultery a crime. *Cox v. Bunker*, Morris 269 (Iowa.Terr. 1844).

In 1851, the Iowa legislature made libel a crime. The statute defined the crime of libel as:

"A libel is a malicious defamation of a person, made public by printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." See Code §§2767 to 2772 (1851) (repealed Acts 1976).

Notice that malice was an element of the crime.

Although it never appeared in the statute, the Courts held that words that tended to damage a person's business reputation were libelous, also.[5] "Among statements that became libelous per se were those that charged business incompetence or lack of skill in the trade, occupation, profession or office by which one earns his living." *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968).

The tort of slander – the spoken defamation – evolved differently. At first, the plaintiff had to prove special, actual damages. There was no presumption of damages to aid the plaintiff. Over time, the Courts carved out exceptions to this rule – statements imputing (1) certain indictable crimes, (2) loathsome disease, (3) incompetence in occupation, and (4) unchastity.[6] If spoken words by themselves were about one of these categories, the law deemed them to be slander per se.

There are three types of defamatory words. The first type is words that by themselves, that is, *per se*, "the court can presume as a matter of law that publication will have a libelous effect." *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 295 (Iowa App. 1985) "Libel per se is not limited to certain charges. Statements of any nature can be libelous per se." *Kelly* at 295. For example, "John Doe sells defective products because he's too incompetent to put them into fit condition before they go out the door" or "John Doe was convicted of tax evasion." These are words that on their face fit the definition of libel. "If the reasonable import of such language is to work defamation of the reputation of another by imputing to him a condition, or acts or conduct such as that in common experience entail public hatred, contempt, or ridicule, or which in the natural and or-

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[1] *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004)

[2] Iowa Civil Jury Instruction 2100.5.

[3] There are many, many topics and nuances in the law of defamation that are beyond the scope of this article.

[4] *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996).

[5] Morse v. Times-Republican Printing Co., 100 N.W. 867, 869 (Iowa 1904).

[6] See Patrick J. McNulty, The Law of Defamation: A Primer for the Iowa Practitioner, 44 Drake L.Rev. 639, 650-52 (1996), in which the author lists the four types of slanderous statement where the plaintiff did not need to prove special damages. Those who venture into the area of defamation should study this outstanding law review article carefully.

# IDCA TRIAL ACADEMY

By: Christine Conover, Simmons, Perrrine, Albright & Ellwood PLC, Cedar Rapids, Iowa

On August 9 – 10, 2007, the Iowa Defense Counsel Association sponsored a Trial Academy at the Neal and Bea Smith Legal Clinic at Drake University. Twenty-five lawyers attended to perfect their trial skills in a hands-on seminar designed to give them constructive feedback and suggestions for their mock direct and cross examinations of expert and lay witnesses. The participants reviewed hypothetical cases ahead of the seminar to prepare for a direct and cross examination of a lay or expert witness.

Nine experienced Iowa trial attorneys donated significant time and talent to serve as faculty members: Jim Craig (Lederer Weston Craig PLC), Heidi DeLanoit (American Family Mutual Insurance Company), Randy Stefani (Ahlers & Cooney, P.C.), Dave Luginbill (Ahlers & Cooney, P.C.), Greg Witke (Bradshaw, Fowler, Proctor and Fairgrave, P.C.), Deb Tharnish (Davis, Brown, Koehn, Shors & Roberts, P.C.), Ken Winjum (American Family Mutual Insurance Company), Michelle Hoyne (American Family Mutual Insurance Company) and Kevin Caster (Shuttleworth & Ingersoll, PLC).

During the plenary session on the first day of the seminar, Randy Stefani shared tips on direct examinations. Following Stefani's lecture, faculty member Heidi DeLanoit conducted a direct examination of Eva Starr, a plaintiff in a medical negligence case. Jim Craig cross-examined Ms. Starr. Afterwards, Stefani, DeLanoit and Craig had a spirited panel discussion reviewing the techniques used in the demonstrations and answering questions from the audience. Following the panel discussion, Greg Witke provided further suggestions for direct examinations and other trial techniques.

In the afternoon session, the participants broke into small groups to conduct their own mock direct and cross examinations. Faculty members Jim Craig, Heidi DeLanoit, Greg Witke, Deb Tharnish and Ken Winjum provided constructive feedback and suggestions to the participants in the small groups.

Both days, faculty members videotaped the small group sessions. Participants viewed themselves on the videotapes and discussed with their faculty members what they did well and what they could improve upon.

IDCA hosted a reception for faculty and participants at the conclusion of the first day's events at the Drake Legal Clinic.

On the second day of the seminar, Jim Craig lectured on cross examinations. Dave Luginbill demonstrated a direct examination of an economist on behalf of a plaintiff in a personal injury case. Greg Witke cross-examined the economist. Afterwards, Dave Luginbill, Greg Witke and Jim Craig answered questions from the audience about the techniques used during the demonstration. Kevin Caster followed with a technology demonstration.

Participants then returned to their small groups for the afternoon session to perform more direct and cross examinations for faculty members David Luginbill, Jim Craig, Heidi DeLanoit and Michelle Hoyne.

Special thanks to Sharon Greer, Mike Ellwanger and the Colorado Defense Counsel Association for providing materials for the hypothetical cases. Drake University provided excellent facilities and support for the seminar. Many others assisted with the seminar, including Hannah Rogers, Brent Ruther, medical students from Des Moines University, law students and law clerks serving as lay and expert witnesses, Associate IDCA Director Lynn Harkin and others.

Frequently, experience is our best teacher. The seminar required participants to commit time and effort to prepare for their direct and cross examinations. Faculty members, particularly those with a mock demonstration, also committed significant time to preparing for the seminar. Ultimately participants left with a greater understanding of their own abilities and areas in which they can improve their trial skills. As is inevitable in these situations, participants and faculty members undoubtedly formed new friendships that will make the practice of law in this great state even better in the future. IDCA hopes to continue this tradition and sponsor additional trial seminars in the coming years.■

## FROM THE BENCH: INTERVIEW WITH CHIEF JUDGE ARTHUR E. GAMBLE, 5TH JUDICIAL DISTRICT . . . *continued from page 1*

Historic courtrooms constructed at the turn of the 20th Century do not accommodate modern trials of complex litigation. Many of our courtrooms are not large enough for multi-party, document intensive cases requiring computer assisted trial presentations. Due to budgetary constraints, the courts do not always provide the type of furniture and equipment necessary for the effective presentation of these cases to a jury.

Both plaintiffs and defendants, and particularly insurers and corporate parties, are increasingly using ADR methods of mediation and arbitration. Commercial transactions often include arbitration clauses, and this likely cuts down on the number of civil lawsuits filed.

Twenty-first Century societal breakdowns require courts to spend more time and resources on domestic, juvenile, criminal and mental health dockets. All of these types of cases have statutory priority over civil litigation. The courts have not grown with the caseload. As a result, courts have less time for civil cases.

The decline of civil litigation in the state court system results in fewer well-trained trial lawyers and judges. This compounds the problem of the court system's inability to handle complex cases.

There is a critical need for better, more targeted CLE and judicial education on evidence, procedure, complex torts and commercial cases and trial management. The Judicial Branch has responded to this need in recent years by sponsoring regional seminars for judges on targeted topics to help us maintain our competency in all aspects of the law including civil litigation.

As corporations, insurance companies, banks and other institutional parties rely less on the courts for civil dispute resolution and as the courts deal more with criminal, juvenile, domestic and mental health cases resulting from societal ills, the courts lose an influential constituency necessary to support technology facilities, security, legal services, salaries and support staff. We need to dedicate more resources to the judiciary to reverse this trend.

Our metropolitan courts would be swamped without mediation and arbitration. But the civil justice system must remain the primary source of civil dispute resolution. It must not be replaced by ADR or private courts. If that is allowed to happen, our citizens will lose access to the court and many of the fundamental rights guaranteed by the Iowa constitution. We need to be vigilant in securing proper funding for the courts in order to preserve our well regarded civil justice system.

**Q. What is your view of the present state of court security in the Fifth Judicial District?**

A. We have made significant progress in improving court security throughout the state over the last decade. In 1999, I chaired the Iowa Supreme Court's Court Security Task Force that surveyed the status of security in all 99 counties and made recommendations for improvement. Today there is an increased awareness for the need for security. Following the tragic courthouse shootings in Atlanta and the murders of a federal judge's family in Chicago, the Iowa State Bar Association appointed a second task force to study the problem. I was fortunate to serve on that task force as well. The Dec. 6, 2005, Final Report of the Court Security Task Force of the Iowa State Bar Association concluded:

". . . expanding pro se litigation, the explosion of domestic relations and domestic violence cases, the exponential growth of juvenile cases and the onslaught of drug-related criminal prosecutions and methamphetamine-fueled hostility within the civil docket . . . all coalesce to heighten volatility within courthouses and present special challenges to courthouse security."

Iowa Code Sections 602.1303(4) and 331.653(4) provide that it is the county sheriff's duty to provide court

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security through bailiff and other law enforcement services upon the request of a judge. This presents budget challenges for the sheriffs of small and large counties alike.

Iowa Code Section 356.7(5) requires counties to re-invest 60 percent of revenue collected by county sheriffs for reimbursement for the costs of room and board of prisoners for three earmarked county functions, including courthouse security. However, this section has not been a reliable mechanism for county funding of court security and there is no earmark of state funds for this purpose. Both of the task forces that have studies court security have recommended that the legislature find a way to assist counties in properly funding courthouse security.

We could do better in many ways, but it is all a matter of making the best use of scarce resources. Several the counties of the Fifth District have taken significant steps to improve court security. For example, Dallas County plans to limit access to one entrance and add airport style security when its historic courthouse reopens. Several counties including Dallas and Marion assign deputies to the courthouse whenever court is in session. This enhanced security has been in place in Polk County for several years. It is an unfortunate reality that enhanced security is necessary in modern courts. Security necessarily imposes a certain amount of inconvenience upon all of us. But security is there for the protection of the public as well as court and county staff.

In the future, state government needs to establish a grant program or some other method of sharing the cost of improved court security with counties, both rural and urban.

The Iowa legislature and Iowa counties need to make courthouse security a high priority. We should not wait until a tragedy occurs before we invest in the safety and security of the citizens attending our courts. In order for our citizens to have true access to justice, they must have a safe refuge in our courthouses. The public deserves both state and local investment in a safe and secure environment in county courthouses.

**Q. What is your view of the present condition of the courthouses in the Fifth District?**

A. The space crunch in Polk County is well documented. Polk County's architects tell us that our century-old courthouse is overcrowded, obsolete, and unsafe. The courthouse was originally designed for county offices and only four judges. Today, all of the county offices have moved out of the courthouse and we have 30 full-time judicial officers and seven part-time magistrates. The magistrates hold court in leased office space. The rest of us are crammed in to every nook and cranny of this beautiful old building.

Over 2,000 people a day come through the secure entrances of the Polk County Courthouse. Three Mondays a month we summon approximately 200 jurors to hear our trials. We have 180 employees including the clerk's office, court administration and court reporters. Office space for our employees is substandard. The juror lounge is too small to keep the jurors from mixing with litigants and witnesses. There is no space for confidential attorney-client consultation.

There are only two elevators in the Polk County Courthouse. One of the elevators is used by the sheriff's office to deliver prisoners to crowded public corridors where deputies escort them in chains to courtrooms throughout the courthouse. Some criminal courtrooms are adjacent to juvenile court. The aging infrastructure of the courthouse including HVAC, plumbing and electrical systems cannot meet modern demands. The building does not meet current fire and life safety codes.

It is important to note that Iowa Code Section 602.1303 states a county shall provide courtrooms and physical facilities "which in the judgment of the board of supervisors are suitable for the district court . . ." Supervisors and the courts may have differing views of what facilities are suitable for the

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service of the public by the courts. We are actively cooperating with the Polk County Board of Supervisors to review several options offered by the architects to accommodate the current and future needs of the court.

Many of our courthouses throughout the district share the same condition to a greater or lesser extent. The infrastructure of many of our county courthouses is aging due to lack of maintenance and investment by counties. Many are in need of renovation or remodeling. There is an obvious need to accommodate growth, technology and security. County courthouses are a financial burden for local taxpayers. Sometimes the Judicial Branch of state government is seen as a non-paying tenant by county supervisors. As a result, court facility updates are not always the highest priority for county boards.

Structural failures of the floors in Dallas County and the roof and bell tower in Marion County resulted in expenditure of millions to rehabilitate historic buildings. Jasper County added a third courtroom. Warren County has added court space as well, but there is work remaining to be done there. Rural counties like Ringgold, Clarke and Decatur in southern Iowa are making improvements to their courthouses. These counties should be commended for their investment in their courts.

Unfortunately, voters recently rejected a bond issue referendum for the renovation of the Madison County Courthouse. This is an indication of the challenges facing the courts regarding the funding of adequate facilities. Perhaps this bond issue will pass next time. There is room for optimism regarding court facilities in Iowa, but a long-term solution will require commitment and a significant investment by our citizens in their local courthouses. The bench and bar must work together to lead our communities to support suitable facilities for our courts.

**Q. Are state courts using current technology?**

A. Historically, that has not been the case but efforts are underway to catch up. In the 1980s I wrote an article for the IDCA *Defense Update* under the banner "From the Bench." In that article I said, "We write many of our orders longhand because our typing is done by the court reporters and court attendants who must fit clerical work in around their other duties. We are maintaining our correcting selectrics. There is no Lexis, no fax, and some of our telephones still have dials." We have come a long way since my early days on the bench. Today, all of our judges and court staff have laptops loaded with state-of-the-art office software, internet access, e-mail and electronic legal research capabilities. We are coming kicking and screaming into the 21st century.

Through the award winning Judicial Branch website, citizens have the ability to pay fees, costs, fines and child support online through E-Pay. This may increase the efficiency of collections. This year, the court established E-Juror, a new online service for citizens called to jury duty. The second version of our electronic docketing system, ICIS, has been implemented in every clerk's office. Iowa Courts Online provides access to the dockets of the Clerks of Court to anyone with a personal computer and internet access.

The Iowa Supreme Court is prepared to test and implement our Electronic Data Management System known as EDMS. A vendor for the EDMS system was selected by the court. Unfortunately, there has been a set back. Contract negotiations with the first place vendor have broken down. The Judicial Branch is in the process of negotiating with the second place vendor. This will delay testing and implementation for several months. The court hopes the system will be installed in the pilot counties by late 2008.

EDMS will be tested in pilot counties. Story and Plymouth counties have been selected as test cites for EDMS. Testing will be followed by state-wide implementation first in the appellate courts and gradually to all of the district courts over the next five years. Polk County and the counties

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surrounding Polk in Election District 5A are scheduled for implementation early in the roll out of EDMS. The anticipated cost of the EDMS state-wide is approximately $19 million.

EDMS will create a nearly paperless court system prospectively. It will feature electronic filing of pleadings and court documents and electronic court files. It will increase efficiency of judges by allowing faster, easier and more accurate document processing.

Electronic filing will be the primary method of filing documents in the clerk's office. Perhaps some paper filing will still be accepted but the goal is to reduce need for scanning and storage of paper. A circuit riding judge will have access to court files in any county from his or her chambers in any other county or from home 24/7. Attorneys licensed to practice law in Iowa will have remote access to all non-confidential electronic files. Abstractors also will have remote access. All other access will be available at the courthouse where the case is filed.

Electronic filing will be created as a virtual substitute for paper flies. Judges will be able to highlight, annotate and even use electronic yellow sticky tabs on electronic files at their desk using tablet PCs. EDMS will employ state-of-the-art technology throughout the judiciary.

This will have an historic impact on the practice of law. Lawyers will have to adjust their business practices to take advantage of electronic filing in the state court system. This will be a web-based system. The transition should not be difficult for most law offices. It may be quite an adjustment for some lawyers. But if you can send an e-mail with an attachment or place an order for merchandise on the internet, you will be able to do EDMS. EDMS promises some advantages for the practicing bar. It will certainly save shoe leather by eliminating trips to the courthouse to file pleadings. Lawyers will be able to manage a multi-county practice electronically and more efficiently. Law offices could become paperless in the future.

EDMS creates new privacy issues regarding personal information and identifiers in court records. The Supreme Court is adopting rules for EDMS. The court has appointed a Business Advisory Committee to establish workflow and business practices for EDMS consistent with the new rules.

Court Technology increases access to the courts beyond the "bricks and mortar" of the county courthouse and the business hours of the Clerk's office. This technology may contribute a long-term solution to the aging infrastructure of the county court system.

**Q. Is *pro se* litigation a concern in the Fifth District?**

A. The May 18, 2005, Report of the Joint Task Force of the Iowa Judge's Association and the Iowa State Bar Association on Pro Se Litigation noted a dramatic increase in self-represented litigants in Iowa courts. Some of the issues highlighted by the Task Force include:

1. Whether by economic necessity or by choice, more Iowans are coming to court without the benefit of counsel, particularly in the domestic relations arena.

2. This creates a myriad of problems for overburdened courts and opposing counsel.

3. Pro se litigants are often frustrated by substantive law and procedures that they do not understand. They often demonstrate a lack of respect for the court and a lack of civility to court staff, judges and lawyers. They can be very demanding litigants. Disgruntled *pro so* litigants also are a potential security risk, particularly in domestic abuse cases.

The Task Force recommendations include:

1. Accessible forms, instruction and information.

2. Clear directions for *pro se* parties and flexibility for judges.

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3. Limited legal representation and unbundled legal services.

4. Full funding of Legal Aid services.

The Iowa Supreme Court has accepted these recommendations. The court has amended our code of professional responsibility, specifically Iowa Rule of Professional Conduct 32:1.2(c), to allow unbundled legal services. The court appointed a committee to promulgate forms for use in family courts. This year, the court approved self-help forms for divorcing couples who choose to represent themselves in family court without the assistance of an attorney. These forms are intended for use by couples in dissolution of marriage cases who do not have dependent children. The approved *pro se* forms are available in the Clerk's offices throughout the Fifth District. These measures are intended to:

1. Facilitate *pro se* litigation.

2. Encourage more people to secure professional legal help.

3. Lessen *pro se* litigant's dependence on judges and court staff.

4. Eliminate delays in court proceedings involving *pro se* litigants; and

5. Hopefully, encourage more *pro bono* work by attorneys.

There is no reason to believe that self-represented litigants will go away. Legal services will likely continue to be underfunded. Domestic violence victims will seek immediate court intervention in increasing numbers. The poor and disadvantaged will continue to go unrepresented. Middle class and sophisticated people will download legal training from the internet and choose not to pay attorney's fees. In summary, the practice of law will have to find innovative ways to deal with the issue of *pro se*. The work of the Pro Se Task Force is an excellent first step.

**Q. What advice would you give counsel appearing before you to make a district court judge's life easier?**

A. That's an interesting question. Many years ago, in my "From the Bench" article for IDCA, I suggested:

1. File a trial brief but keep it short and simple. Include a concise summary of the pleadings and the facts. Address only the most important legal issues and evidentiary problems. Have highlighted copies of controlling appellate decisions available for the court, but don't overwhelm the judge with piles of paper.

2. File a short set of requested jury instructions. Leave out the stock or refer to them only by number. Defense counsel should submit proposed duty instructions, marshaling instructions and verdict forms. Cite authorities at the foot of every numbered requested instruction. Have unnumbered typed originals without citations available for use by the judge and court reporter. A CD or disk with the requested instructions and verdict forms in Word® format can be very helpful as well. [Today, lawyers can e-mail their pre-trial papers to the judge. Soon they will be electronically filed through the EDMS system.]

3. Pre-mark all exhibits. File an exhibit list in a format that can be readily used by the judge and court reporter to keep track of offers, objections and exhibits admitted into evidence. Put copies of all documentary exhibits and photographs in an organized three ring binder for the judge. If objections are anticipated, include a brief reference to the evidence rule and proper foundation supporting the admissibility of the exhibit.

4. File concise motions *in limine* regarding anticipated evidentiary problems that might cause argument outside the presence of the jury during the trial. Bring these matters to the attention of the court before the jury arrives. Briefly state the nature of the evidence, the objection and the rules of evidence relied upon for exclusion of the

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evidence. Again, have authorities available, but use them sparingly.

5. Defense counsel should prepare a written motion for directed verdict. Incorporate the trial brief by reference. Hand it to the judge at the close of the plaintiff's case. Make it easy for the judge to follow along through the required elements of plaintiff's case as defendant's motion for directed verdict is dictated into the record.

6. If a witness will testify by depositions, edit the transcript before trial to exclude inadmissible evidence and colloquy between counsel. Bring evidentiary problems to the attention of the court in a timely manner so the judge can make informed ruling without wasting jury time. For video depositions, use video equipment that will allow electronic editing.

These comments were relevant 20 years ago and they are still true today. For many trial attorneys, all of this is elementary. Many lawyers already use these techniques and others to assist their judges in trial preparation. But maybe this can serve as a primer for young lawyers or attorneys that don't try cases very often.

The judges truly appreciate the help. But from the bench I can see that some trial lawyers involved in the rush of their own trial preparation worry only about the jury and forget the judge. If there can be more coordination between the court and counsel before and during the trial, everyone involved in the process will benefit our common goal of quality dispute resolution will be more easily achieved.

**Judge, thank you very much for your time and effort on this. I believe this discussion will be of great interest to our readership. Kevin M. Reynolds – for the editors of *Defense Update*.**■

## REGISTER FOR IDCA'S SPRING SEMINAR

**"Hot Topics in Workers Compensation"**

**Friday, April 4, 2008**
**8:30 a.m.–4:30 p.m.**

**Des Moines Golf and Country Club**
**West Des Moines, Iowa**

***Log onto www.iowadefensecounsel.org for more information.***

## IDCA WELCOMES NEW MEMBERS

**Sarah C. Alden**
McDonald, Woodward & Ivers, P.C.
Davenport, IA

**Jace T. Bisgard**
Shuttleworth & Ingersoll
Cedar Rapids, IA

**Erika Eckley**
Wiedenfeld & McLaughlin LLP
Clive, IA

**Matthew R. Eslick**
Nyemaster Law Firm
Des Moines, IA

**Michael T. Gibbons**
Woodke & Gibbons P.C.
Omaha, NE

**Jay D. Grimes**
Drake Law School
Urbandale, IA

**Samantha C. Norris**
Lederer, Weston, Craig , P.L.C.
Cedar Rapids, IA

**Nicholas SJ Olivencia**
Whitfield & Eddy, P.L.C.
Des Moines, IA

**Alison Schroder**
Betty, Neuman & McMahon, P.L.C.
Davenport, IA

**Amanda R. Smith**
Cartwright, Druker & Ryden
Marshalltown, IA

**Amy R. Teas**
Bradshaw Fowler Proctor & Fairgrave PC
Des Moines, IA

**Paul C. Thune**
Thune Law Firm, P.L.C.
West Des Moines, IA

## IOWA DEFAMATION LAW– RECENT DEVELOPMENTS WITH A REFRESHER COURSE . . . continued from page 3

dinary course of things operate to deprive him of the benefits of public confidence and social intercourse, the publication must be regarded as actionable *per se*." *Sheibley v. Ashton*, 106 N.W. 618, 619 (Iowa 1906).

The second type is words that are capable of two meanings. The words are ambiguous. They may or may not fit the definition of libel or slander. "Does Jane Doe have a drug or alcohol problem?" "John Doe burned his barn." "I can't do business with John Doe on a handshake. He does about-faces."

The third type is words that require extraneous evidence to explain why they fit the definitions of libel or slander in a particular situation. "Garments Cleaned at Half-Price are only Half Cleaned." These are words that on their face do not appear to fit the definition of libel but, with some additional background information and explaining, a plaintiff could demonstrated how they damaged his reputation.

When the words are actionable *per se*, "the law will presume the falsity of the matter charged, that the publication was with malice, and that some damage followed. And the burden is upon the defendant to overcome such presumption." *Sheibley v. Ashton*, 106 N.W. 618, 619 (Iowa 1906).[7] Where the words are defamatory on their face, the plaintiff does not need to plead or prove special damages.[8] Rather, the law presumes that the plaintiff suffered damages because damages naturally flow from these types of words. These are called general damages.

What if the words are ambiguous? For example, "Jane Doe was terminated for recording the incorrect time on time cards." One meaning of this statement is Jane Doe made honest mistakes recording some of her time on time cards, a meaning that would hardly damage Jane's reputation in the community. Another meaning, however, is that Jane Doe dishonestly falsified her time records. In this circumstance, the jury decides if the words would be understood as being libel *per se*.[9] If the jury decides the words would be understood as being libelous on their face, then the jury would not need to decide the issues of malice or falsity and would not need to find the plaintiff incurred any special damages.

What if the words, standing alone, appear harmless to someone's reputation but when evidence is introduced to explain the words or to show the broader context in which the words operate and how they relate to the plaintiff, this extrinsic evidence reveals the defamatory nature of the words? That is, the words themselves appear innocuous but, with further explanation, it is shown how they relate to the plaintiff and portray the plaintiff in a bad light. Then, the words are not libel *per se*.[10] Rather, they are libel *per quod*. "*Per quod*" means, "Requiring reference to additional facts" or, in the case of defamation "actionable only on allegation and proof of special damages." Black's Law Dictionary (8th ed. 2004). "A statement is libelous *per quod* if it is necessary to refer to facts or circumstances beyond the words actually used to establish the defamation." *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Words that are defamatory per se do not need an innuendo, and words that need an innuendo are not defamatory *per se*. *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club*, et.al., 215 Iowa at 1130, 245 N.W. at 231 (1932).

For example, in *Suntken v. Den Ouden*, 548 N.W.2d 164 (Iowa App. 1996) Dr. Den Ouden divorced his wife, Marlene. The Court ordered him to pay child support and alimony through the Friend of Court. Dr. Den Ouden's second wife, Sue, worked as his office manager. Each month Sue drafted Dr. Den Ouden's support checks. Apparently, Sue became somewhat vindictive toward Marlene because she started to write catty remarks on the memo lines of the checks. On one check she wrote, "$4000 child support; $2250 unemployment ex-wife." On another she wrote, "$4000 child support; $2250 breast implants." On yet another check she wrote, "$4000 kids; $2250 psycho." The Court held there was no presumption these words hurt Marlene's reputation. The words were not defamatory *per se*.

When the words on their face do not appear to be capable of hurting someone's reputation, in addition to proving how the words did, in fact, defame the plaintiff, the plaintiff must prove malice, falsity and damage. *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 115-116 (Iowa 1984). That is, if the words require additional facts to demonstrate or explain why they fit the definition of defamation then the law does not give the plaintiff the benefit of the doubt but, rather, puts the plaintiff to his proof of malice, falsity and damages. In many circumstances, it could be hard or impossible for a plaintiff to prove specific monetary damages.

*continued on page 12*

[7] "*Per se*" means, "Of, in, or by itself; standing alone, without reference to additional facts." Black's Law Dictionary (8th ed. 2004).
[8] Special damages are, "Damages that are alleged to have been sustained in the circumstances of a particular wrong." Black's Law Dictionary (8th ed. 2004).
[9] *Vinson v. Linn-Mar Community School Dist*., 360 N.W.2d 108 (Iowa 1984).
[10] *Vinson*, supra.

## IOWA DEFAMATION LAW– RECENT DEVELOPMENTS WITH A REFRESHER COURSE . . . *continued from page 11*

Thus, to prove a case of defamation per quod, the plaintiff must prove[11]:

1. The defendant made written or printed (oral) statement(s) concerning the plaintiff.
2. The statement(s) [was] [were] false.
3. The defendant made the statement(s) with malice.
4. The defendant communicated the statement(s) to someone other than the plaintiff.
5. The statement(s) tended to [injure the reputation of plaintiff] [expose plaintiff to public hatred, contempt or ridicule] [injure the plaintiff in [his] [her] efforts to maintain [his] [her] business].
6. The statement(s) caused damage to the plaintiff.
7. The amount of damage.

In instructing the jury, the first matter a Court must decide is if the words on their face are capable of only one meaning and that meaning is defamatory. "[I]f the language is of such a nature that the court can presume that publication will have libelous effect, it is for the court to rule that the publication is libel *per se*. *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 296 (Iowa App. 1985). In such a situation, the Court gives Uniform Jury Instruction 2100.1. If the Court decides the words on their face are capable of two meanings, one of which is defamatory, the Court gives Uniform Jury Instruction 2100.2 and lets the jury decide if the meaning of the words is defamatory *per se*.

If the Court decides that extraneous evidence is necessary to explain how the words were defamatory or how they defamed the particular plaintiff in the case, then the Court gives Uniform Jury Instruction 2100.3 (per quod).

In the recent case of *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823 (Iowa 2007) the Court adopted the principle of defamation by implication. "Defamation by implication arises, not from what is stated, but from what is implied when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts." *Stevens* at 827. Often, but not always, defamation by implication involves multiple factual assertions. The individual factual assertions may be quite true standing alone, but the way they are logically coupled leads the reader to jump to an unwritten conclusion that is defamatory. In other words, the author doesn't explicitly tell the reader the defamatory matter. Rather, the author lets the reader "discover" the defamatory point himself.

Here's an example of juxtaposition of facts. A newspaper article reported that unscrupulous internet online pharmacies operate from multiple sites that can be moved at a moment's notice. The article advised readers to avoid sites that fail or refuse to provide a United States address and phone number. The newspaper imbedded within the article an edited version of a printout of "ABC Pharmacy's" website with ABC's phone number and address deleted. Adding salt to the wound, the article named certain prominent national chain drug stores, "traditional brick-and-mortar drugstores," and said they operated legally. The article failed to include ABC on the list as a lawful pharmacy. Yet, the article used ABC's website printout as an illustration of unlawful practices.

Here's an example of a one-line defamation by implication. A sign hanging in the window of a gas station read, "No checks accepted from John or Jane Doe from any bank."

Finally, here's an example of defamation by omission of facts. The newspaper reported that Jane Doe shot at her husband and Mary Roe after Jane arrived at Mary's home and found her husband there with Mary. The implication was that Jane's husband and Mary were having an affair. Omitted from the story was the fact that Jane's husband and Mary were in the living room with Mary's husband and two others just sitting and talking.

The question is whether defamation by implication falls within the category of defamation *per se* or *per quod*. In making this determination, perhaps the focus should shift from the words themselves to the implication itself. In other words, if the Court can presume as a matter of law that the implication will have a libelous effect, then it would be defamation *per se*. If the implication is capable of two meanings, then a jury will need to decide if the implication is defamatory *per se*. If the implication requires extraneous evidence to explain why it fits the definition of defamation, then it would be *per quod*.

Iowa recognizes the *affirmative defenses*[12] of absolute privilege and qualified privilege. An absolute privilege is a complete immunity from liability for defamation.[13] For example, statements made in judicial proceedings enjoy an absolute privilege.[14] Likewise, statements made in legislative proceedings. Certain high-ranking officials in the

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[11] See Iowa Uniform Jury Instruction 2100.3.
[12] An affirmative defense must be both *pled* and proved.
[13] For an excellent discussion of absolute privilege see *Mills v. Denny*, 245 Iowa 584, 63 N.W.2d 222 (1954).
[14] See *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991) for details of the absolute privilege in judicial proceedings.

## IOWA DEFAMATION LAW– RECENT DEVELOPMENTS WITH A REFRESHER COURSE . . . *continued from page 12*

executive branch of government have an absolute privilege to make defamatory statements.[15] An absolute privilege is a complete defense to a defamation case, even where the words are spoken with malice.[16] Whether or not a privilege exists is for the court.[17]

On the other hand, a person has a qualified privilege in making a defamatory statement when:

(1) the statement was made in good faith;
(2) the defendant had an interest to uphold;
(3) the scope of the statement was limited to the identified interest; and
(4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.[18]

In cases where either the Court decides or lets the jury decide if words are defamatory *per se*, if the defendant has generated a jury question on the affirmative defense of qualified privilege, then the Court instructs on this defense,[19] obviously, and, simultaneously, adds the element of malice to the list of things for plaintiff to prove. If the jury finds the defendant didn't prove the qualified privilege defense, then the plaintiff doesn't need to prove malice to win.

If, however, the jury finds the defendant did prove the qualified privilege defense, then the jury must decide if the plaintiff proved malice. If the jury finds the plaintiff proved malice, the defense of qualified privilege fails and the jury moves on to the next issue in the verdict form. In other words, malice trumps and cancels out the qualified privilege. If the jury finds the plaintiff did not prove malice, the plaintiff losses.

Instructing a jury in a *per quod* case is much easier. The court simply gives Uniform Instruction 2100.3 and, if pled and proved, the affirmative defense instruction about truth. The Court would not instruct on the qualified privilege defense under any circumstance because there's no point in giving such an instruction.[20] Why not? Remember, malice is an element of plaintiff's proof in a *per quod* case. Proof of malice trumps qualified privilege. So, if plaintiff proves malice, such proof would beat the qualified privilege defense. If plaintiff doesn't prove malice, plaintiff looses, anyway.

There are two kinds of malice. The first is called "implied malice" or "malice in law." A person acts with "implied malice" when he does something without a legal excuse or, in the defamation context, he makes a statement knowing it is false or with reckless disregard if the statement is true or false. The second type of malice is "actual malice." This is malice that involves ill-will or wrongful motive.

The type of malice the plaintiff must prove in a *per quod case* (and, likewise, the type of malice the law presumes in a per se case) is the first type – knowing it is false or with reckless disregard if the statement is true or false. *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984)

But, until *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004), it took the "ill-will or wrongful motive" type of malice to defeat the affirmative defense of qualified privilege.

Summarizing the above, in a *per se* case, the "knowing or reckless disregard of falsity" type malice is presumed. In a *per quod* case, plaintiff must prove it. In a *per se* case, if the defendant proves the affirmative defense of qualified privilege, then, until *Barreca*, plaintiff had to prove the "ill-will" type of malice to overcome the qualified privilege defense.

*Barreca* held, "[W]e discard the old common law wrongful motive standard, and adopt-by analogy-the *New York Times*[21] "knowing or reckless disregard" definition of "actual malice" as the standard to be applied to determine whether a defendant has abused a qualified privilege." *Barreca* at 121. The Court noted that, unfortunately, one could find prior Iowa cases for support for either type of malice defeating the qualified privilege.[22]

The Court gave two reasons for merging the two types of malice into one. First, the law of privilege protects speech in certain conditions. See the elements of qualified privilege above. As long as those conditions are met,

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[15] *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989).
[16] *Robinson v. Home Fire & Marine Ins. Co.*, 242 Iowa 1120, 1125, 49 N.W.2d 521, 524 (1951).
[17] *Higgins v. Gordon Jewelry Corp.*, 433 N.W.2d 306, 308-309 (Iowa App. 1988).
[18] *Kiray v. Hy-Vee, Inc.* 716 N.W.2d 193, 199-200 (Iowa App. 2006).
[19] There is no Iowa uniform instruction on qualified privilege.
[20] If appropriate, the Court would instruct on the affirmative defense of *absolute* privilege.
[21] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[22] See, e.g., *Caveman Adventures UN, Ltd. v. Press-Citizen Co.*, 633 N.W.2d 757 (Iowa 2001), et.al. versus *Taggart v. Drake University*, 549 N.W.2d 796 (Iowa 1996).

## IOWA DEFAMATION LAW– RECENT DEVELOPMENTS WITH A REFRESHER COURSE . . . *continued from page 13*

the motive of the speaker is irrelevant. The speaker can be hopping mad at the plaintiff but, if he speaks in good faith, has an interest to uphold, and limits his statements to the matter at hand and doesn't spread the words beyond what is necessary, he's privileged to do so. Only if he knew he was telling lies about the plaintiff or he recklessly disregarded if he was telling lies will the qualified privilege be defeated.[23]

The second reason the Court gave was simplicity. There was no good reason for having a Constitutional standard and a different common law standard. The Constitutional standard for defamation cases involving public officials, as announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (U.S. 1964), is, "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[24]

In commenting on the "reckless disregard" prong of malice the Court in *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 831(Iowa 2007) quoted the U.S. Supreme Court at length:

> "A "reckless disregard" for the truth [under the *New York Times*] requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one-there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562, 589 (1989) (citations omitted)."

In response to the *Barreca* case, the Iowa Uniform Instructions Committee revised uniform instruction 2100.5 as follows:

> **2100.5 Actual Malice - Definition.** The defendant made statements with actual malice if the statements were made with knowledge that they were false, or with reckless disregard for their truth or falsity. *(emphasis added)*

**Authority**

*Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004)
*Haldeman v. Total Petroleum, Inc.*, 376 N.W.2d 98 (Iowa 1985)
*Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108 (Iowa 1984)
*Kelly v. Iowa State Education Association*, 372 N.W.2d 288 (Iowa Ct. App. 1985)

**Comment**

Note: The court would provide this definition of actual malice in the limited context when plaintiff has alleged libel (slander) per se and the court has determined a qualified privilege applies. In this limited context, actual malice would be an additional element of proof which must be established by plaintiff in order to recover on a libel (slander) per se theory.

The "knowing or reckless disregard" definition will now be used both in cases where the plaintiff has a per quod case and must prove malice and in per se cases where the defendant has raised the qualified privilege defense. Although Uniform Instructions 2100.4 and 2100.5 are worded differently, their meanings are identical.■



[23] It is baffling how someone could act "in good faith" while simultaneously either knowingly spread a lie or recklessly disregarding if he was lying.
[24] *Sullivan* supra, at 279-80.

# IOWA DEFENSE COUNSEL ASSOCIATION

## 2007 ANNUAL MEETING A BIG SUCCESS

By: Brent R. Ruther, Aspelmeier Fisch Power Engberg & Helling P.L.C., Burlington, Iowa

The Iowa Defense Counsel Association held its Annual Meeting in Des Moines, Iowa, on Sept. 20–21, 2007 at the Downtown Des Moines Marriot. The Seminar was an overwhelming success, featuring nationally known speakers as well as attorneys and judges from across Iowa. Attendees heard presentations on persuasion in the courtroom, alternative dispute resolution, cutting edge trial technology and ethics as well as a number of other substantive and procedural areas. The highlight of the two-day Seminar was the presentation by James McElhaney, a nationally known speaker and widely published author on litigation and persuasion in the courtroom. Iowa Supreme Court Justices Marsha K. Ternus and David Wiggins as well as the newly appointed Judge John A. Jarvey of the Iowa Federal District Court were among the presenters.

The Iowa Defense Counsel Association's 2008 Annual Meeting and Seminar has been scheduled for Sept. 18–19, 2008, at the West Des Moines Marriot. Information about the Association's events held throughout the year, including its Spring CLE Seminar which will be held in Des Moines, as well as membership information can be obtained by calling the Association at (515) 244-2847 or at www.iowadefesecounsel.org.

Mark Brownlee presents Michael Thrall with the Edward F. Seitzinger Award

Newly Elected President, Martha Shaff thanks Mark Brownlee for his service as 2007 IDCA president

McElhaney makes a point to the IDCA Audience

Outgoing IDCA President, Mark Brownlee, was recognized for his outstanding service to the IDCA. The 2007–2008 IDCA officers were installed and will include Martha Shaff - President, Megan M. Antenucci - President Elect and James Pugh - Secretary. Noel McKibben will remain the Association's Treasurer.

2005–2006 IDCA President Michael Thrall was honored as the winner of the Edward F. Seitzinger Award for the outstanding IDCA Board member for his dedication and exceptional service to the organization. This years presentation makes Mike a three-time winner of this award.

During the meeting, Mike Weston, the Iowa DRI representative and Dan McCune, the outgoing DRI MidRegion Director also highlighted the benefits of DRI membership and shared personal accounts of how membership in DRI has benefitted their practice.■

**Mark your calendar**

**IDCA Annual Meeting & Seminar**

**September 18-19, 2008**

***West Des Moines Marriott***
***West Des Moines, Iowa***

# 2008 DRI YOUNG LAWYERS SEMINAR

Mark your calendar and register today for the 2008 DRI Young Lawyers Seminar, June 5-6, 2008 at Disney's Yacht & Beach Club Resort in Orlando, Florida. On the heels of a hugely successful seminar in San Diego this past summer, the 2008 seminar will feature all the things you've come to know and love in DRI seminars including outstanding CLE presentations from the nation's best trial lawyers, seasoned in-house counsel and young lawyer superstars along with ample opportunities for networking, dine-arounds a public service project and, of course, the big Friday night party! If you thought this year's Padres game in San Diego was cool, just wait until you see what we have planned for 2008! You won't want to miss it!

Check out the DRI website, download the seminar brochure and register today! Then mark your calendar for June 5-6, 2008 for this fabulous event. Here's a link for the seminar webpage: **http://www.dri.org/DRI/open/ CLE.aspx?sem=20080240**

**MARK YOUR CALENDAR AND REGISTER TODAY FOR THE 2008 DRI YOUNG LAWYERS SEMINAR, JUNE 5-6, 2008 AT DISNEY'S YACHT & BEACH CLUB RESORT IN ORLANDO, FLORIDA.**

If you are not yet a member of DRI, you can join right now. Go to **www.DRI.org** and download a membership application. On the left hand side of the DRI home page, about half way down, you will see "Membership Applications." If you are a member of your local defense organization (and you probably are if you are reading this) and you have never been a member of DRI, select the "SLDO Promotion" application from the dropdown menu. You can join DRI free for one year and get a certificate for one free seminar if you are a young lawyer. If you have been a DRI member in the past, but would like to re-join, choose the "Individual Membership" application. Young Lawyers dues are only $130 per year and include a subscription to DRI's outstanding monthly magazine.

If you would like get involved in spreading the word about this great seminar or if you need more information about joining DRI, contact Laurie Miller **lmiller@jacksonkelly.com** or Kevin Baltz **kbaltz@millermartin.com**. We hope to see you in Orlando this summer!■

# IOWA SUPREME COURT ADOPTS E-DISCOVERY AMENDMENTS TO RULES OF CIVIL PROCEDURE

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

The Iowa Supreme Court has adopted Amendments to the Iowa Rules of Civil Procedure addressing the discovery of electronically stored information ("ESI"). The Iowa amendments take effect on May 1, 2008.

The Iowa amendments closely track the recent amendments to the Federal Rules of Civil Procedure, which were discussed in Michael Thrall's article "New Federal Rules Addressing Electronic Discovery" that appeared in the Fall 2004 issue of the Defense Update. The new Iowa Rules incorporate the two-tier approach to the production of ESI that is not reasonably accessible. See Iowa R. Civ. P. 1.504(2). The new Iowa amendments further adopt the federal procedure for asserting claims of privilege after protected documents had inadvertently been produced. See Iowa R. Civ. P. 1.503(5). Notably, the amendments completely rewrite the Iowa Rules on the production of documents so that they more closely mirror provisions of Fed. R. Civ. P. 34.

**Comparison of the Proposed Iowa Amendments with the Federal Rules of Civil Procedure on the Discovery of Electronically Stored Information**

| PROPOSED IOWA AMENDMENTS | FED. R. CIV. P. | SUBJECT | ANALYSIS |
|---|---|---|---|
| 1.503(5) | 26(b)(5) | Procedure for asserting claims of privilege | Identical |
| 1.504(2) | 26(b)(2)(B) | ESI that is not reasonably accessible | Substantially identical. Rule 1.504(1)(b) was also amended and the factors are now the same as 26(b)(2)(C). |
| 1.507(1) | 16(b) | Discovery Conference | Language on ESI is essentially the same. Discovery conference, pretrial procedures are different reflecting the difference between the Iowa and Federal Rules |
| 1.602(2) | 16(b) | Pretrial Conference | Language on ESI is the same. Discovery conference, pretrial procedures are different reflecting the difference between the Iowa and Federal Rules |
| 1.509(3) | 33(d) | Interrogatories | Identical |
| 1.512 | 34 | Production of Documents | Strikes Iowa Rules 1.512 and 1.513 in their entirety and adopts all of Fed. R. Civ. P. 34, including recent amendment |
| 1.517(6) | 37(e) | Sanctions – Safe Harbor | Identical |
| 1.1701 | 45 | Subpoenas | Substantially the same |

# HOT TOPICS IN WORKERS COMPENSATION

**Des Moines Golf & Country Club • 1600 Jordan Creek Parkway • West Des Moines, IA • April 4, 2008**

## AGENDA

| | |
|---|---|
| **8:30 am - 8:45 am** | **Welcome and Introduction**—Megan Antenucci, Whitfield & Eddy, P.L.C. |
| **8:45 am - 9:30 am** | **"Who Knew What, When?" Bad Faith Within Workers Compensation**<br>Maureen Roach Tobin, Whitfield & Eddy, P.L.C., Des Moines, IA |
| **9:30 am - 10:15 am** | **"It Isn't Over Until It Is Over" Settlement Approvals and the Process**<br>Helenjean Walleser, Iowa Deputy Workers Compensation Commissioner |
| **10:15 am - 10:30 am** | **Break** |
| **10:30 am - 11:15 pm** | **"A Look From the Inside" Writing Workers Compensation Coverage**<br>Ron Wood, NCCI |
| **11:15 am - Noon** | **Blue v. Lakeside Casino—A New Twist On "Arising Out Of..."**<br>Donna Miller, Grefe & Sidney, P.L.C., Des Moines, IA |
| **Noon - 1:00 pm** | **Lunch** |
| **1:00 pm - 1:45 pm** | **"On the Air, Live" Video Hearing Demonstration for Alternate Care Issues**<br>James Elliott, Iowa Deputy Workers Compensation Commissioner |
| **1:45 pm - 2:30 pm** | **"Functional Capacity Evaluations—The Therapist's Perspective"**<br>Gina Boomershine, Accelerated Rehabilitation Center, Des Moines, IA |
| **2:30 pm - 2:45 pm** | **Break** |
| **2:45 pm - 3:30 pm** | **"Insight, Ideas, and Experiences" Best Defense Practices**<br>Jean Dickson Feeney, Betty, Neuman and McMahon, P.L.C., Davenport, IA |
| **3:45 pm - 4:30 pm** | **"What's New Out There that You Should Know?" Case and Legislative Update, including Smithburg v. J & B Plastics**<br>Peter Sand, Scheldrup, Blades, Schrock, Sand, Aranza, P.C., Des Moines, IA |

**Registration fee includes: Continental Breakfast, Lunch and Printed Materials**

**Seminar Date and Location:** Friday, April 4, 2008 - Des Moines Golf & Country Club
1600 Jordan Creek Parkway, West Des Moines, IA

**Cancellation Policy:** Written cancellations received by March 27, 2008 will receive a full refund.
No refunds will be processed after March 27, 2008 and no refund for no-shows.
Seminar materials will be forwarded to registrant.

If you plan to arrive the night before, IDCA has secured a special discounted rate of $82.00 single/double at the Fairfield Inn & Suites. Room reservations must be made by March 21, 2008, to receive the discounted rate.
Be sure to mention **Iowa Defense Counsel Association** to receive the discounted rate.
Fairfield Inn & Suites, 7225 Vista Drive, West Des Moines, IA 50266.
Phone (515) 225-6100 or (800) 228-2800.

**CLE: Federal applied for; 6.0 State CLE Activity #49223 approved**

# HOT TOPICS IN WORKERS COMPENSATION

**Des Moines Golf & Country Club • 1600 Jordan Creek Parkway • West Des Moines, IA • April 4, 2008**

## REGISTRATION FORM

**Name:** _____

**Street Address:** _____

**E-mail:** _____

**Company:** _____

**City, State, Zip:** _____

**Phone:** _____

**Fax:** _____

☐ **Special Needs (vegetarian meal, wheel chair, etc.):** _____

_____

☐ **YES, will be staying for lunch** ☐ **NO**

| | |
|---|---|
| **IDCA Member Rate** | **$185.00** |
| **Non-Member Rate** | **$225.00** |
| **Insurance Co. Representative** | **$185.00** |
| **IDCA Member Materials Only** | **$ 75.00** |
| **Non-Member Materials Only** | **$100.00** |

**Total: $** _____

**Method of Payment:** ☐ **Check** ☐ **VISA/MC**

**Name:** _____

**Exp Date:** _____ **#**_____

**Iowa Defense Counsel Association**
100 East Grand Ave., Suite 330
Des Moines, IA 50309
Phone: (515) 244-2847
Fax: (515) 243-2049

***Registrations must be received, with payment, by March 27, 2008.***
***Space is limited to the first 80 registrants.***

# SCHEDULE OF EVENTS

## April 4, 2008
**IDCA Spring CLE Seminar**
Des Moines Golf & Country Club
1600 Jordan Creek Parkway. West Des Moines, IA
8:30 a.m. – 4:30 p.m.
Topic: Workers Compensation

## April 4, 2008
**IDCA Board Meeting**
Des Moines Golf & Country Club
1600 Jordan Creek Parkway, West Des Moines, IA
11:30 a.m. Full Board Meeting/Luncheon
*(Please dial 800/228-2800 or 515/225-6100 for the Fairfield Inn & Suites, 7225 Vista Drive, West Des Moines, IA and state "IDCA" room block for $85 room rate.)*

## May 9-10, 2008
**DRI Mid-Region Meeting**
Homestead Resort in Midway, Utah
Hosted by Utah

## June 5-6, 2008
**IDCA Board Meeting**-TBD
Davenport, IA
9:00 a.m. Full Board Meeting/Luncheon
Golf Outing

## September 17, 2008
**IDCA Board Meeting & Dinner**
West Des Moines Marriott
West Des Moines, IA
4:00 – 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





**Iowa Defense Counsel Association**
100 East Grand Avenue, Suite 330
Des Moines, IA 50309

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