defense UPDATE

The Iowa Defense Counsel Association Newsletter Fall 2009 Vol. XVIII, No. 4

ELECTRONIC DISCOVERY: "COOPERATION IN DISCOVERY IS CONSISTENT WITH ZEALOUS ADVOCACY"

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Introduction

The amendments to the Federal Rules of Civil Procedure (December 1, 2006) and to the Iowa Rules of Civil Procedure (May 1, 2008) regarding electronic discovery and electronically stored information (ESI) have not produced, to date, the minefield and "parade of horribles" for Iowa practitioners predicted by many. Based on reported cases, Iowa practitioners appear to be adapting fairly smoothly to the new rules regarding electronic discovery. This article will address recent e-discovery cases in the Eighth Circuit, United States District Court for the Southern District of Iowa, and the Iowa District Courts subsequent to the amendments and highlight several illustrative cases from other jurisdictions.

***Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888 (8th Cir. 2009): Clients (and Lawyers) Behaving Badly.**

This case involved several bitter discovery disputes between the parties. One of the disputes was over an email and its attachment—a draft agreement between the parties—that the plaintiff's owner and principal officer, Mr. Barazi, sent to one of the defendants' employees from a public computer in an internet café using a Yahoo email account (or so he testified). *Sentis Group, Inc.*, 559 F.3d at 896. Both the plaintiff and the defendants had several copies of subsequent revisions of the draft agreement, but neither retained a copy of the original draft as sent from Mr. Barazi. *Id.* The defendants sought the email with its attachment, the original draft agreement, in discovery. *Id.* The plaintiff claimed the Yahoo account from which the email was sent did not retain files long enough to cover the date in question (August 7, 2003), and Mr. Barazi claimed he could not remember from which Chicago internet café he sent the email. *Id.*

The issue regarding the email came before the district court in the context of the defendants' motion for sanctions, which was based not only on the email, but several other alleged discovery abuses by the plaintiff. *Id.* at 894, 897. At the hearing, the district court judge was obviously very upset with the plaintiff; as the Eighth Circuit put it, he was "provoked . . . into making untempered comments, using profane language, and taking actions that created an appearance of partiality." *Id.* at 891. At the hearing, the court repeatedly said on the record "hell yes," "goddamn," and "Jesus Christ." *Id.* at 897. The court concluded the hearing:

> That's it. I'm done. I'm granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. [Defendants' counsel], I direct you to prepare a proposed order with everything you've just put on that presentation. I'll refine it and slick it up. Mr. Barazi has abused this court, has misled you, has lied on his deposition. It's obvious he's lying about that e-mail. This case is gone. I'm dismissing it. What a disgrace to the legal system in the Western District of Missouri. Prepare the proposed order. We're done. We are done, done, done. What a disgrace. It's not your fault, it's your client. He's coached, he's ducked, and he's hid documents. We're done. Be in recess. *Id.*

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Id. Shortly after the hearing, the plaintiff filed a motion for recusal, which the court denied. *Id.* at 898. The plaintiff appealed the order dismissing its case and the order denying recusal to the Eighth Circuit. *Id.*

The Eighth Circuit reversed on the recusal issue, vacated the order of dismissal, and remanded for reassignment and reconsideration of the defendants' motion for sanctions. *Id.* at 891. The Eighth Circuit noted, however, that it was "neither unsympathetic toward the district court nor blind to the course of conduct that triggered the court's frustration." *Id.* The court opined, "neither party behaved in a manner consistent with the spirit of cooperation, openness, and candor owed to fellow litigants and the court and called for in modern discovery," and "it seems clear that at some point in the proceedings, defendants' goal shifted from conducting effective discovery to fanning the flames of the court's frustration and building a case for sanctions." *Id.*

With respect to the issue of the email from Mr. Barazi, the Eighth Circuit found little support for the district court's conclusion that it was "obvious he [was] lying about that email." *Id.* at 901. The court said "Barazi's purported lie regarding the email . . . amounted to nothing more than his inability to recall the precise location from which he had sent an email three years earlier." *Id.* The court continued, "To the extent Barazi was not lying, it is not clear why the sender of an email should be held any more accountable than the recipient for failing to produce an original, unamended copy of the email or an attachment three years after it was sent." *Id.* Therefore, since it was not clear Mr. Barazi was lying, the Eighth Circuit did not view the email issue "as offering substantial support for the sanction decision." *Id.*

On remand, the case was reassigned. On September 11, the defendants filed a motion for further briefing on their motion for sanctions, which the plaintiff has resisted. The newly assigned district court judge has not yet ruled on this latest dispute.

***Executive Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562 (8th Cir. 2009): Distrust of Your Adversary Does Not Entitle You to a Forensic Investigation of Their Computers.**

The plaintiff in this case sought discovery of archived emails from the defendant city. The plaintiff wanted to be allowed to have a service (Kroll Ontrack) use a special software retrieval program on city employees' individual hard drives to access erased information. The city resisted, maintaining it had already provided hard copies of all discoverable e-mails and that there would be substantial privileged and confidential information on the hard drives, making the plaintiff's request simply unworkable. (Dist. Ct. Order of Apr. 10, 2006 (accessed on PACER)). The district court framed the issue before it as "what measures are reasonable to assure that all relevant e-mail communications have been produced?," and explained:

> Electronic discovery is a new and developing area of the law. A number of commentators and judges have written on the issue of retrieving information from a computer although it has been "deleted." A proposed amendment to the Federal Rules of Civil Procedure will address this issue by presumptively treating deleted information as "not reasonably available." Further efforts to access the information will be available only upon a good cause showing that the information is highly relevant and not available by other means. Further, the Sedona Conference on Electronic Discovery proposes that litigants are entitled to discovery in only one form. The court finds that both of these approaches are reasonable and adequately protect the interests of the parties.
>
> In this case, the City has represented to the court that it has already produced all the nonprivileged e-mail communications in hard copy. Thus, plaintiff already has its one form of discovery of these e-mail communications. It has not shown that further efforts will lead to discovery of other relevant communications, or that further information is unavailable through depositions or other means of discovery. Plaintiff simply assumes that because access to the information is technically possible, that access must be afforded. The court finds the requested access must be reasonable as well as possible. The access plaintiff seeks through the retrieval service provider is highly invasive and would expose confidential or privileged materials without adequate protection or a sufficient showing of need for the information. Further, the effort simply is not warranted as a means to verify that the e-mail communications already produced by the City are complete.
>
> The City was also required to prepare a privilege log listing withheld emails which existed in hard copy but was excused from producing a privilege log of deleted materials as "not reasonably available."

On appeal, the Eighth Circuit affirmed the district court's ruling, with little explanation. *Executive Air Taxi Corp.*, 518 F.3d at 569. The court simply said the district court's factual finding that the city had produced all discoverable emails in hard copy and that forensic discovery could expose privileged or confidential materials were not clearly erroneous, and that, therefore, the court's ruling was not an abuse of discretion. *Id.*

Polk County District Court Judge Blink addressed a similar issue in ***Stoneking v. Federated Mutual Ins. Co., et al.*, No. CL103499 (Polk County, Iowa 2008)**. In this case, plaintiff moved for sanctions asserting that Federated had failed to produce copies of all electronic records in its possession relating to communications between

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Federated and its local agent concerning the plaintiff. The court denied plaintiff's request for personal access to search certain computer files maintained by Federated, stating that such request was "unwarranted and tantamount to a 'fishing expedition.' " The court ordered Federated to tender for deposition a person with knowledge of the carrier's file maintenance system to enable plaintiff to discover with more specificity the manner and means by which files were maintained by the defendant. Finally, in an apparent "old school" approach, the court ordered Federated to convert all documents previously produced in electronic format into hard copy to be produced to plaintiff. Plaintiff's request for sanctions was denied. For unknown reasons, plaintiff's counsel determined not to proceed with the deposition of Federated's IT person.

Similarly, in ***Johnson v. American Family Mutual Ins. Co.*, No. 93796 (Scott County, Iowa 2001)**, the plaintiff moved to compel production of attorney Patrick Woodward's computer in order to have a computer expert retrieve emails Mr. Woodward allegedly sent to a Mr. Eric Jennings, whom Mr. Woodward represented in another matter involving the plaintiff, regarding Mr. Jennings' litigation with the plaintiff. Attorney Woodward maintained the emails did not exist on his computer. The District Court Judge denied the plaintiff's motion, stating that were the plaintiff's request granted, the plaintiff would "have access to information that clearly goes beyond the scope of discovery in this case and much of which is likely confidential under the Rules of Professional Conduct. Plaintiff has failed to establish with any specificity why he needs the alleged information," or how he would ensure the protection of personal and confidential information not related to the case.

***Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032 (8th Cir. 2007): Failure to Preserve Electronic Evidence Does Not Necessarily Warrant Sanctions for Spoliation.**

Greyhound sued Archway Cookies and Wade, the driver of an Archway truck that rear-ended a Greyhound bus as it was driving in the right-hand lane on I-80, with its hazard lights flashing, below the speed limit, due to a mechanical failure. *Greyhound Lines, Inc.*, 485 F.3d at 1034. The bus was equipped with an electronic control module (ECM) that electronically stored information about the bus's operation, including speed and the time and type of mechanical failures. *Id.* Ten days after the collision, Greyhound removed the ECM from the bus and learned that a speed-sensor failure had caused the bus's slow speed. *Id.* Greyhound then sent the ECM to the manufacturer of the bus' engine, who erased the information from the device. *Id.*

Although Greyhound produced hard copies of the data obtained from the ECM, Archway argued Greyhound had a duty to preserve the ESI on the ECM because after the collision, litigation was likely, and the ECM contained relevant data. *Id.* at 1035. The case was tried to the court, but Archway claimed Greyhound should be sanctioned for spoliation of evidence. *Id.* The district court denied sanctions, and the Eighth Circuit affirmed. *Id.* The Eighth Circuit explained, "[t]he ultimate focus for imposing sanctions for spoliation of evidence" is not the prospect or likelihood of litigation, but rather, "the intentional destruction of evidence indicating a desire to suppress the truth." *Id.* (citing *Morris v. Union Pac. R.R.*, 373 F.3d 896, 902 (8th Cir. 2004)). The Eighth Circuit held the district court "did not err in finding spoliation did not occur." *Id.* The court also noted that " '[t]here must be a finding of prejudice to the opposing party before imposing a sanction for destruction of evidence' " and concluded there was no prejudice to Archway because it received the data from the ECM that Greyhound obtained from the device (that the bus's slow speed was caused by a speed-sensor defect) three months before trial, and "several bus passengers testified how the bus acted before the collision." *Id.* (quoting *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745 (8th Cir. 2004)).

***Books Are Fun, Ltd. v. Rosebrough*, No. 4-05-cv-00644-JEG-CFB (S.D. Iowa 2007): Enough Is Enough.**

Magistrate Judge Bremer described the contentiousness of the discovery disputes in this complex commercial litigation as follows: "Generally speaking, there is a sense of mistrust, ill will and hostility between the parties, which at times spills over into counsels' approach as they advocate their client's positions." She also likened the case to Dickens' *Jarndyce v. Jarndyce*:

> *Jarndyce and Jarndyce* drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in *Jarndyce and Jarndyce* without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when *Jarndyce and Jarndyce* should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but *Jarndyce and Jarndyce* still drags its dreary length before the court, perennially hopeless.

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Charles Dickens, *Bleak House* 4 (Everyman's Library 1966) (1853).

The plaintiff, Books Are Fun (BAF) and one of the defendants, Imagine Nation (IN), both filed motions to compel the other to do more in the area of electronic discovery. Pursuant to Court order, each party had previously provided counsel for the opposing party with the search terms utilized for its electronic discovery records search. BAF argued IN's searches of its electronically stored information (ESI) were too narrow because it limited keyword searches to the phrases "Books Are Fun" and "Reader's Choice." IN resisted, explaining it not only did keyword searches, but it also asked its management employees to search their files for responsive documents. The court was satisfied with IN's response and denied BAF's motion to compel.

Similarly, IN claimed "BAF arbitrarily limited the files it searched and failed to take adequate steps to preserve responsive documents." BAF claimed it applied agreed-upon search terms, but only to a subset of the available ESI—that held by "persons with knowledge." IN claimed BAF's definition of "persons with knowledge" was too narrow, and initially Judge Bremer agreed, opining IN's request to broaden the scope of the search was overbroad and burdensome. In an attempt to address the concern, a sampling protocol was ordered and implemented to determine whether BAF's definition of "persons with knowledge" allowed the searches to capture all relevant documents. After the sampling protocol disclosed additional electronic records, Judge Bremer determined, "Now it is clear there are more, 'persons with knowledge,' " and ordered BAF to respond to the discovery request. The court explained "although BAF is free to file a supplemental status report relating to the costs and time involved in developing the response to this request for production, it should be expending its resources on answering the discovery, rather than further delay."

The court denied IN's request that BAF produce a "data dictionary" for its database. BAF maintained no such data dictionary existed. The court also rejected IN's argument, in moving for sanctions, that BAF's vice president's practice of overwriting certain financial files constituted spoliation of evidence. The court explained the vice president's duties required him to regularly generate spreadsheets, and the fact that the program he used automatically overwrote working copies did not amount to spoliation. Therefore, sanctions were denied.

***Vision-1, LLC v. Wal-Mart Stores, Inc.*, No. 4:08-cv-00434-RP-CFB (S.D. Iowa 2009): Turnabout is Fair Play.**

In this patent infringement case, Judge Bremer entered a stipulated Protective Order that addressed disclosure of confidential information and ESI. Keep in mind that the Federal Rules provide that the parties may specify the form or forms in which ESI is to be produced. Fed. R. Civ. P. 34(b)(1)(C). The Protective Order provided that ESI would be produced in PDF or hard copy format prior to a certain historical date and in TIFF format, black and white, thereafter. The Protective Order further provided that the defendant reserved the right to request TIFF files of any ESI produced in PDF or hard copy format and that Plaintiff reserved the right to object to the request for production. Further, the court stated that, "[I]f a party reasonably in a good faith concludes that an electronic document should be produced in color or with higher resolution, the producing party shall reasonably provide the document in such manner." The parties were encouraged to work together in good faith to resolve any dispute over ESI prior to seeking the court's assistance. The parties were given the option to produce non-ESI documents in either hard copy format or, in their discretion, as imaged files in single-page (black and white) TIFF format.

Rule 34(b)(2)(E)(ii) states that if the requesting party fails to specify a form of production, the producing party must produce the documents in the format in which the documents are maintained or in a reasonably usable form. *See* ***Goodbys Creek, LLC v. Arch Ins. Co.***, 208 WL 4279693 (N.D. Fla. Sep. 15, 2008) (requiring the producing party to either reproduce documents previously produced in TIFF format in their native format, or to provide the documents in another comparably searchable format, or to supply the requesting party with the appropriate software for searching the TIFF images that had been produced).

In contrast, a different result was reached in ***OKI Am., Inc. v. Advanced Micro Devices, Inc.***, 2006 WL 2547464 (N.D. Cal. Aug. 31, 2006). In this patent litigation, AMD moved to compel the production of certain financial documents Plaintiff had produced on a disk containing 29,000 pages of materials that were not in electronic format and not searchable. In response, Plaintiff argued that it had produced its financial records in the same TIFF format in which AMD had produced its records and that the Defendant was now demanding exactly the format AMD itself had refused to provide. Accordingly, the Court denied the motion in part because the requesting party was asking the producing party to do something that it had refused to do and because the request was untimely.

In ***Pass & Seymour, Inc. v. Hubbell, Inc.***, 255 F.R.D. 331 (N.D.N.Y. 2008), the plaintiff attempted to rely upon Rule 34(b)(2) allowing a party to produce documents "as they are ordinarily maintained." In this patent infringement case, plaintiff produced over 400,000 pages of documents produced in digital format, sorted among over 200 unlabeled folders, which were capable of being made text-searchable, but were neither indexed nor labeled. Defendant sought an order compelling plaintiff to organize the documents produced to indicate which documents were responsive to each of the 72 document requests. Plaintiff argued that the documents had been produced "as they were ordinarily maintained."

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According to the court, Rule 34 requires the producing party to "do more than merely represent to the court and the requesting party that the documents had been produced as they are maintained." *Id.* at 334. The party electing to produce documents as they were "ordinarily maintained" must "disclose information to the requesting party regarding how the documents are organized in the party's ordinary course of business." *Id.* at 335. The court ordered the plaintiff to produce an index of the documents revealing the custodian, location, and a general description of the filing system under which each document was maintained in the ordinary course of plaintiff's business, further including an indication whether the documents were kept in digital format, hard copy, or both. *Id.* at 338.

Conclusion

The absence of high-profile disputes and sanction orders subsequent to the amendments to the Rules is a testament to the professionalism of the Iowa Bar. For those who might find themselves involved in an e-discovery dispute, keep in mind the recommendations of the Sedona Conference to encourage cooperation on electronic discovery issues, which include:

- Utilize an e-discovery "point person" to assist in preparing requests and responses;
- Exchange information on relevant data sources, including those you will not be searching;
- Work together to develop search terms and retrievable methods to cull relevant information;
- Meet and confer regarding forms of production at an early stage;
- Consider alternative dispute resolution to resolve discovery disputes.

http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf. As stated in the Sedona proclamation:

"Cooperation in discovery is consistent with zealous advocacy."

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interest of their clients and to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict. ■

IDCA SCHEDULE OF EVENTS

December 3, 2009
IDCA Audio Conference
12:00 – 1:30 p.m.
See this issue for registration details.

December 4, 2009
IDCA Board Meeting & Lunch
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting
Location: IDCA Headquarters Office

February 5, 2010
IDCA Board Meeting & Lunch
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting
Location: Suites of 800 Locust

April 9, 2010
IDCA Board Meeting & Lunch
12:00 p.m.
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA

April 9, 2010
IDCA Spring CLE Seminar
8:30 a.m. – 4:30 p.m.
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA

September 14, 2010
IDCA Board Meeting & Dinner
3:45 p.m. Executive Committee
4:00 p.m. – 8:00 p.m. Full Board Meeting/Dinner
West Des Moines Marriott, 1250 Jordan Creek Pkwy.,
West Des Moines, IA

September 15–16, 2010
46th Annual Meeting & Seminar
8:00 a.m. – 5:00 p.m. both days
West Des Moines Marriott, 1250 Jordan Creek Pkwy.,
West Des Moines, IA

MESSAGE FROM THE PRESIDENT

James A. Pugh

IDCA'S GOAL: 400 MEMBERS STRONG IN 2010

Almost 30 years ago, I became a member of the Iowa Defense Counsel Association. I did so, not because of some overriding dedication to the principles of the defense-bar, but because it was "highly recommended" by one of my clients (Farm Bureau Mutual Insurance Company). Since that time, I have become a true believer.

Over the years, I have seen the IDCA grow from a small, collegial group of friends to one of the pre-eminent bar organizations in the state. This growth has come in fundamental steps: the establishment of a sound budget; creation of the Defense Update Newsletter; hiring of an Executive director; increased CLE offerings; establishment of a website and internet communications. I'm proud to say that I was personally involved in many of these steps. Over the years, though, it has been the growth of our membership that has kept us strong and viable. Unfortunately, that growth has stagnated in recent years. While we have often described our organization as a group of the 400 top defense attorneys in the state, I do not believe our membership numbers have ever reached that level. As of this writing, our membership stands at 367.

Consequently, I have made it my number one goal to reach the 400 level in members over the next year. This is obviously a very significant objective, and will require the efforts of all members, directors and our Executive Director. I am confident, however, that we can achieve this target. This increased membership will bring three substantial benefits: 1) an infusion of "new blood" into our membership body; 2) the cementation of our position as one of the pre-eminent bar organizations in the state, and 3) the financial benefit of increased membership dues and fees.

Let's all roll up our sleeves and get to work.

INNOVATIVE *VOIR DIRE* TECHNIQUES FOR DEFENSE COUNSEL

by Kevin M. Reynolds, Whitfield & Eddy, PLC, Des Moines, IA

Kevin M. Reynolds

"As long as I count the votes, what are you going to do about it?" --William M. "Boss" Tweed, The Ballot

INTRODUCTION.

With the advent of ADR, mediations and arbitrations, and relatively few numbers of cases going to jury trial, it is easy for defense counsel to fall out of practice with good, solid jury selection techniques. This article will touch upon some traditional methods, but will emphasize some innovative approaches that may seem counterintuitive yet can be extremely effective in an appropriate case.

THE PURPOSE OF *VOIR DIRE*.

Contrary to law school teachings, the purpose of *voir dire* is not to select a "fair and impartial jury." That goal is impossible to achieve. Instead, defense counsel should focus the *voir dire* effort on de-selecting any and all "poison apple" jurors from the panel. In every trial you will identify jurors that would make excellent defense jurors. The only problem is, those "dream" defense jurors will be the first peremptory challenges made by plaintiff. And this assumes that plaintiff's counsel cannot artfully exclude those "defense" jurors from the panel on a challenge for cause. The advantage to striking a juror for cause is it allows you to "bank" your peremptory challenges that you may to use later to strike "borderline" jurors.

FORM OVER SUBSTANCE?

Although the substantive purpose for *voir dire* is important, defense counsel must not lose sight of the "form" element of jury selection. In valid scientific studies going back to at least 1966, when Kalven and Zeisel's seminal work, *The American Jury* was published, and perhaps even earlier, we have known that juries tend to make up their minds very early on in the trial of a case; if not in *voir dire*, then by opening statement. *Voir dire* is the opening stage of the case. This is the only time you will be permitted to speak with the jurors directly during the entire trial. How many times have we heard the old adage "you have only one chance to make a good first impression." The effects of primacy and recency are important. Take advantage of these studies and carefully choreograph and plan your *voir dire* in every case. The time immediately before trial is typically marked by a flurry of activity: *Daubert* motions, motions *in limine*, detailed and extensive proposed final pretrial orders, exhibit lists, witness lists, *subpoenas* and the like. It is easy to overlook your preparation for *voir dire*, but you should not to do so. You are engaged in the critical enterprise of selecting the judges that will hear and decide your case. We have all heard of seemingly "defensible" cases that, for some reason, "went south" and result in a tremendously surprising large adverse verdict. I would posit that in more cases than not, the cause of such a surprise was inadequate or ineffective jury selection, which allowed a "poison apple" juror to get onto the jury by "stealth" and push that decision-making body forcefully in the wrong direction.

BASIC TECHNIQUES.

The time-honored techniques used by successful defense lawyers are well known and beyond the central theme of this article. Most courts will allow juror questionnaires to be obtained a few days before trial. Particular issues of interest to defense counsel are: prior jury duty; prior service as a jury foreperson; any claims or lawsuits filed by that person; their age; education; and occupation. If the questionnaires can be obtained a few days before, you can review these in detail and separate them into three groups: "the good, the bad and the ugly."

Sometimes it helps to formulate a "model juror" for your case. During *voir dire*, make sure you pay attention to plaintiff's counsel's questions, as she will ask many of yours and you can cross those off. In the author's experience, brevity at this stage is welcome, both by the jurors and the court. "Good morning, ladies and gentlemen, my name is Mr. Reynolds. I represent the defendant. By my watch we've been here discussing things for over two hours. In my book, that's about an hour and 45 minutes too long. So let's get right to it." Then spend 15 minutes on good, solid questions and sit down. I even heard of one case where the plaintiff's attorney took so ridiculously long in *voir dire*, that defense counsel stood up and said "Your Honor, we've been here a long time. I've paid attention to this and these folks look just fine and dandy to me. We pass these jurors for cause" whereupon he sat down. Although it was pretty "gutsy," judicial observers present felt that the defense attorney "won" that case at that precise moment in time.

Here is a sampling of some basic techniques that can be used effectively by defense counsel in trying a personal injury or product liability case.

A. "This for That."

For every "thrust" of the plaintiff, there should be a defense "parry." A defendant must keep the case on an even "keel" throughout the first several days of trial when plaintiff is presenting their case. "Steam-rolling" or "freight-training" by the plaintiff, or a situation where the case builds so much momentum that it is difficult if not impossible to arrest, must be avoided at all costs.

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INNOVATIVE *VOIR DIRE* TECHNIQUES FOR DEFENSE COUNSEL ... *CONTINUED FROM PAGE 7*

Here are two examples:

1. The "million dollar verdict."

Plaintiff's question ("this"): "Is there anyone on the panel that, for whatever reason, believes they could not return a verdict in seven figures, i.e., over one million dollars, if the evidence in fact supported that result?"

Defense question ("that"): "It is my pleasure and honor to represent the good folks, the women and men of ABC Corp. We have come to court this day because we honestly believe that we did nothing wrong to cause this accident. Let me ask you this: if, at the end of day, you believed that plaintiffs did not meet their burden of proof under the law, would any one here, have any hesitation at all, to find in favor of ABC Corp. and send this plaintiff home with a $0 verdict? If that gives anyone substantial heartburn, please speak up and let's discuss that, everyone here will respect your forthrightness."

"Okay, let me ask the question this way. Suppose you are in the deliberations room. Assume further that the discussion reveals that everyone thinks the plaintiffs have not met their burden of proof. But suppose one juror says "heh, this guy was injured, he deserves something." If that happened, would you have the constitution to speak up and say "but that's not what we are supposed to do, according to the instructions. The instructions say that if he doesn't meet the burden of proof, then defendant wins."

2. The "scales of justice."

Plaintiff's question (the 'thrust'): "The burden of proof in this case is by a "preponderance of the evidence." It is not 'guilt beyond a reasonable doubt.' That standard is for criminal cases. The standard in this civil case is much, much lower. To illustrate, consider the scales of justice. If those scales of justice are tipped ever so slightly in favor of the plaintiff, then under the law your verdict must be in favor of the plaintiff. Is there any one on this jury panel that, for whatever reason, feels that they could not follow the law in this respect? Could you find a substantial verdict in my client's favor, even though the scales of justice were tipped ever so slightly in favor of my client?"

Defense counsel's questions (the 'parry'): "Plaintiff's counsel talked with you a little bit about the burden of proof. The burden of proof is critical in a court of law; otherwise, cases would be decided by speculation and conjecture. Plaintiffs are required under the law to prove their case to a legal certainty. Opposing counsel used an example of the scale of justice. I'd like to use the same example. Picture in your mind's eye the scales of justice being in exactly an even balance. Picture in your mind the scales perfectly even, perfectly horizontal. If, at the end of this case and at the end of all the evidence, those scales of justice are evenly balanced, then under the law as it will be instructed to you by this Honorable court, that your verdict must be for the defendant. Why is this? It is simply because this means that plaintiffs have not carried their burden of proof as required by law. They have not proven their claims to a legal certainty. Is there anyone on the panel that, for whatever reason, believes that they could not follow to the letter this aspect of the jury instructions?

INNOVATIVE TECHNIQUES.

Plaintiff's counsel are constantly implementing new and innovative trial techniques. But there is no reason why plaintiffs should have a "monopoly" on innovation. One purpose of this article is to highlight some more innovative approaches to *voir dire* that a *defendant* can use. Just because time-honored techniques have worked over the years for defendants, does not mean that defendants should cease thinking of new and unusual ways to gain a tactical advantage early on in the case. Defense counsel should consider thinking "outside the box" during *voir dire*. The undersigned has employed some of these techniques over the past several years. It has been observed that these techniques can be very effective at: 1) locating the "poison apple" juror(s); and 2) in keeping the case on an even keel during its early days, so that when it is time to present the defense case, the defense witnesses will "clean up" and the trial will be best postured for entry of a defense verdict.

A. "Stealing Plaintiff's Thunder."

It has long been known that an effective way in which to "blunt" a potentially effective cross examination of your witness by your opponent, is to cover those areas that are problematic *first*, before your opponent does, and therefore "steal the thunder" of the opponent's anticipated cross. This tactic can also be effective in *voir dire*. If you know there will be a particularly damaging piece of evidence proffered by the other side, this matter can be broached in jury selection in attempt to de-sensitize the potential jurors with regard to that piece of evidence.

Let's take a common example. Most personal injury or product liability cases involve severe and grievous injury to bones, tissues and flesh. Treating surgeons often take graphic pre- and post-operative photographs of the injury for purposes of medical student training. Lay person jurors are not use to such graphic presentations. As a result, they can have an emotional impact that can be very harmful to the defense case. Even in cases with solid liability defenses, the bloody photographs may give the plaintiff an unfair emotional appeal that can seem nearly impossible to overcome.

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INNOVATIVE *VOIR DIRE* TECHNIQUES FOR DEFENSE COUNSEL ... *CONTINUED FROM PAGE 8*

Unbridled, raw emotion by a lay person jury is likely one component of a "runaway" adverse verdict. Although Rule 403 and pretrial motions *in limine* will be filed in an attempt to exclude this unfairly prejudicial evidence with minimally probative value, more often than not at least some of the gory, bloody, trauma injury photographs will find their way into evidence.

Here is suggested line of inquiry during *voir dire* which has proven to be effective:

Defense counsel questioning: "Does anyone on the jury panel have any medical education, experience, background or training? On a related issue, does anyone here get a little bit 'queasy' or lightheaded at the sight of blood? I wanted to ask you these questions for a specific reason. In this case, the plaintiff's have listed as exhibits some blow-ups and enlargements of trauma injury photographs that were taken by the EMTs who responded to the accident scene. Other operative photographs were taken later by the surgeons. Some of them show the decedent's body at the scene. I did not want you to be frightened or become sick at the sight of this evidence. The decedent, Mr. Johnson, died of mechanical asphyxiation. His body was crushed between the front body of the machine and cross member for the lift arms. One such photograph is a close up of decedent's face. His face and entire head are bright bluish purple, and that is because he had a lack of oxygen in his blood. The same photograph depicts a bloody mucosal discharge from his left nostril. I apologize for going into this specific detail, but I feel that I have to represent the legal interests of my client. Now, having heard about this, is there anyone on the jury panel, that, for whatever reason, believes that they could not be fair to my client given that this type of evidence may be presented in this case? If so, please speak up and we'll discuss it a little further."

During these questions, defense counsel (and the client representative) should monitor the jury closely for non-verbal cues. Follow-up questions may be directed to jurors who appear to be "bothered" by this type of evidence. Persons who might have trouble with this type of evidence will have: flushed red face; on the contrary, white or pasty complexion; rubbing their head or chin; or looking around nervously, or putting their head down, as if they are light-headed or going to faint. Be aware of these non-verbal cues. But if this line of questioning is carried out effectively, it serves two purposes: 1) it steals plaintiff's thunder; and 2) it renders their "smoking gun" emotional evidence less impactful. At the very least a powerful, emotional issue has been identified and its ability to push the jury to a certain result (in favor or plaintiff, based on emotion) has been reduced.

B. Dealing with "sympathy."

Virtually every civil jury case involving a personal injury carries with it a significant sympathy component. The issue of sympathy must be confronted forcefully and artfully in *voir dire*.

One way in which this can be done, is by: 1) highlighting for the jury the sympathetic issues in the case; and 2) comparing to this "evidence" the "law," i.e., the jury instruction that will be given by the Court that states in clear terms that "sympathy cannot be considered This kind of questioning is totally counterintuitive. "Conventional wisdom" dictates that defense counsel is to avoid, at all costs, talking about or addressing plaintiff's injury. Using this counterintuitive approach requires that defense counsel actually spend a portion of the limited time allotted for *voir dire* actually "highlighting" the sympathy aspects of the case. However, in the author's view it is more effective for defense counsel to explain and discuss this aspect of the case, in lieu of leaving it totally up to plaintiff's counsel alone to talk about damages with no meaningful rebuttal from the defendants.

This can be done as illustrated below:

Defense counsel questioning: "At the end of this case, the court will give you the instructions. The instructions are the law that you are duty-bound as jurors, under your oath, to follow in reaching your verdict in this case. All of the instructions are equally important, but I want to take a moment to speak with you about a very important jury instruction and aspect of Iowa law. You will be instructed as follows: "You are the judges of the facts. The court is the judge of the law. *You are not to decide this case based on bias, sympathy, passion or prejudice*." In this case you will hear evidence that will tug on your heart strings. Plaintiff's decedent, Mr. Johnson, was survived by two daughters, Mary and Susan. Mary is 14 years old and Susan is 21. Both Mary and Susan have "special needs," and are considered to be mentally retarded. I believe that you will meet both of them, and they will either testify rather briefly or be introduced to you in person. They are beautiful girls. You will love them. You will feel sorry for them. Your heart will go out to them. And you know what, there's nothing at all wrong with those feelings That's human nature. But, you know what? This case is not about that. Instead, this case is about two things: 1) what happened at the time of this unfortunate accident; and 2) who is legally responsible for this accident. Now, having heard this, is there anyone on the panel that, given what I've outlined here, could not follow the court's instruction that "*you are not to decide this case based on bias, sympathy, passion or prejudice?* Please raise your hand if you have a concern with that, and we'll discuss it a little bit further. Everyone here will respect you for your candor."

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INNOVATIVE *VOIR DIRE* TECHNIQUES FOR DEFENSE COUNSEL ... *CONTINUED FROM PAGE 9*

In a recent trial in which this strategy was employed, counsel for co-defendant remarked later to the manufacturer's defense counsel that: "the issue of emotion and sympathy has just been taken right out of this case." Despite the significant sympathy aspects involved in the case, the jury assessed 100 percent of the causative fault to plaintiff's decedent, and a defense verdict was entered. There were no post trial motions and there was no appeal.

C. Recalls.

Some products cases involve recall evidence that may, at first blush, appear to be impossible to overcome. After all, if the product was not initially "defective," then why would the manufacturer recall it? In the right kind of case, it may be wise to broach this subject in jury selection, in order to see whether this kind of evidence is so overwhelming as to prevent to putative juror from being selected to fairly hear and decide the case.

For example, suppose your product is an electrical toy that is subject to a CPSC11 ordered recall. The recall was instituted because the toy had been implicated in causing fires while it was plugged into a re-charger. The recall itself was designed to address the possibility of frayed wiring or bad fuses. All pre-trial efforts by the defense on motions *in limine* and under rule 403 to keep this recall out of evidence have failed. A fire has occurred and your toy is being blamed in a fire and property damage, product-liability subrogation action by the homeowner's fire insurance carrier. Your defense to the case is that the fire's cause and origin was somewhere else in the home, and that the problems intended to be fixed by the recall were never seen in this toy. Defense counsel might ask some questions generally regarding "recalls" in the following fashion, during *voir dire*:

Defense counsel's questions: "Does everyone on the panel drive a car? Does anyone own a car? As an owner of a car, have you ever received, through the mail, a recall notice? What did you do? Did you immediately make an appointment with a dealer to get the recall work done? Has there ever been a situation when you may have waited some period of time before getting that work done? For example, just wait until the next scheduled service date or oil change? What if your car, although it was subject to a recall, did not actually have that problem? Do you think that, in general terms, it is the good, responsible thing for manufacturer to do, and that is, to do a recall if they think there may be a problem? To err on the conservative side? Ladies and gentlemen, we don't come into court and spend a bunch of money to defend a case, without having a defense to present to you. *In this case, although the product that was involved in the accident was technically subject to a recall, it is our position that the subject product did not show the signs or symptoms of a product that actually had the problem covered by the recall or "fix." Although the recall was designed to fix frayed wiring and bad fuses, we believe that the evidence will show that the wiring on this toy was not frayed and there was no problem with the fuses.* We are not looking for any commitment on any issue that would be involved in this case. That would not be proper. However, would all of you pledge to do your level best to listen to the evidence on this recall issue?"

D. A Good Closing Question in Voir Dire.

At the end of your *voir dire*, on more than one occasion I have seen this general question yield truly fruitful information. Thus, it is advisable to ask the jury panel a question similar to this:

Defense counsel questioning: "Both parties and the court have asked a great many questions of you this morning. Nevertheless, it may not be possible to ask every single question that should be asked. So please allow me to ask one final question: *does anyone on the jury panel know of any reason why it would not be proper, or why they should not be selected to sit as a juror in this case?*"

It is amazing as to how many times this "generic" question raises a hand or two, identifying issues and concerns that had not been previously identified. On even a few occasions, grounds for *challenges for cause* have been revealed. Quite obviously, if this question is not asked, then this information may be missed, to the potential detriment of your case.

CONCLUSION

There are as many ways to select a jury and conduct *voir dire* from the defense side of the table as there are defense lawyers. Carefully planning and strategizing your defense *voir dire* will get you off to a fast start and give you the best chance of choosing those jurors who will be at least amenable to a defense verdict in the case. ■

FUNCTION OF THE IOWA BAR ASSOCIATION JURY INSTRUCTION COMMITTEE

by Michael P. Jacobs, Rawlings, Killinger, Ellwanger, Jacobs, Mohrhauser, Nelson & Early, LLP, Sioux City, IA

For decades, the Iowa Bar Association has had a committee dedicated to the preparation of uniform jury instructions to be available for use throughout the state. In the mid 1980's, the Board of Governors authorized the committee to review the entire set of bar association instructions and to redraft them using "plain English". The "Plain English Redraft of the Iowa Civil Instructions" was approved by the Board of Governors on December 2, 1986.

On May 6, 1987, the Iowa Supreme Court unanimously adopted a resolution regarding those instructions. The resolution noted that the right of litigants to challenge all jury instructions on appeal was not affected and that the court could not, and would not, officially approve or disapprove any instructions proposed by the bar association. Nonetheless, the resolution proclaimed that the quality of justice would be improved and that litigants would benefit from the committee's work. The court commended the committee for its remarkable achievement and commended those instructions "for consideration by the trial bench".

Lest there be any confusion, the plain English instructions were not binding on the bench when the Iowa Supreme Court passed its resolution and they are not binding on the bench today. They are intended only to provide succinct, accurate, understandable models for use by lawyers and trial courts so as to avoid the need to constantly "reinvent the wheel".

I have had the distinct honor and privilege of serving on the Iowa Bar Association Jury Instruction Committee since April of 2002. The committee is made up of a diverse group of lawyers and judges from across the state. Each member is allowed to serve up to three three–year terms so that there is a certain amount of stability but also some fresh perspectives brought to the workings of the committee. The same committee considers both civil and criminal instructions and all members are encouraged to participate in the debate regardless of the primary focus of their practice.

The chairman of the committee when I first became a member was the Honorable James E. Kelley of Davenport, Iowa. An agenda item at my first meeting was Civil Jury Instruction 400.7 on mitigation of damages and what, if anything, could be done with that instruction in light of the Iowa Supreme Court's decision in *Greenwood v. Mitchell*, 621 N.W.2d 200 (Iowa 2001).

The Honorable Paul R. Huscher, Waukee, Iowa, succeeded Judge Kelley as the chairman of the committee in the spring of 2003. Under his leadership, the committee tackled numerous civil instruction issues. These included what, if any, changes should be made to Instruction 210.1 on punitive damages following the U.S. Supreme Court's decision in *State Farm v. Campbell*, 538 US 408, 123 S.Ct. 1513 (2003). We also addressed "concert of action" comparative fault issues following the Iowa Supreme Court's decision in *Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2007). In the area of defamation, we considered the definition of actual malice in response to the Iowa Supreme Court's holding in *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004) and we explored the concept of defamation by implication following *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823 (Iowa 2007).

Since July 2008, the committee has been chaired by the Honorable Kellyann Lekar of Waterloo, Iowa. Under Judge Lekar's direction, the committee's work on concert of action issues and mitigation of damage special interrogatories, has continued. The committee also approved a modification to Instruction 700.8 (the mere fact an accident occurred does not mean the party was negligent instruction) following the Iowa Supreme Court's decision in *Smith v. Koslow*, 757 N.W.2d 677 (Iowa 2008). The committee will undoubtedly consider the instructions regarding premises liability cases at its fall 2009 meeting as a result of the recent decision in *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009).

The goal of the committee has not changed over the past several decades. It is simply to provide courts and practitioners with proposed uniform jury instructions that will avoid the necessity to redraft new instructions at each trial. The committee considers changes when decisions by the Iowa Supreme Court or new legislation by the Iowa Legislature dictate the creation of a new instruction or a change in an existing instruction. The committee also willingly reviews jury instructions at the request of judges or practitioners whenever asked to do so. Finally, the committee is always reviewing the instructions as written to consider grammatical, administrative or procedural modifications as necessary to achieve the committee's goal.

The committee meets two times a year. When considering a modification, addition, deletion, or change in a jury instruction, the committee chair appoints a cross–section of members as a subcommittee to study the issue. This subcommittee does research, holds conferences (usually telephonically) and drafts proposals. The issue is then vetted by the entire committee. Regardless of whether the issue at hand is a civil jury instruction or a criminal jury instruction, all members of the committee are encouraged to participate in the discussion and make suggestions on appropriate action to be taken. The debate is always educational, lively, and professional. The results are not always unanimous.

In any event, if the committee reaches a consensus, the proposed addition, deletion or modification is presented to the Board of Governors. In recent years, all proposals have been posted for scrutiny and comment on the ISBA website. Following the time for comment, the Board of Governors reviews the committee's proposals. It is the

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THE STATUTE OF LIMITATIONS FOR DRAMSHOP ACTIONS—*DAVIS V. R&D DRIFTWOOD, INC.*

by Anna Moyers Stone, Phelan, Tucker, Mullen, Walker, Tucker & Gelman LLP, Iowa City, IA

Anna Moyers Stone

In order to check whether you have been following the developments in recent Iowa law, I would like to begin this case note with a quiz:
When does the statute of limitations begin to run for a dramshop claim?

(a) From the date of plaintiff's alleged injury

(b) From the date plaintiff gives written notice required under Iowa Code § 123.93

(c) I don't know; this has never come up in my practice

(d) I don't know; I visit dramshops, but I don't defend them

If your answer was (a), you are, at least for now, incorrect. Based on a recent Iowa Court of Appeals case, the statute of limitations for a dramshop claim begins to run from the date of giving written notice, because that is when the claim "accrues." *Davis v. R & D Driftwood, Inc*., No. 08-0833, 2009 WL 606477 (Iowa Ct. App. March 11, 2009). For those of you slightly concerned, or at least scratching your heads, please allow me to explain the history of the case.

On September 1, 2005, plaintiff, Michael H. Davis (Davis) was a patron at defendant's dramshop, The Driftwood Inn (the Driftwood) in Keokuk, Iowa. Davis claimed he was assaulted by another patron of the Driftwood. Davis' petition alleged that he was stabbed multiple times by the alleged intoxicated patron (AIP) on September 1, 2005, and that the Driftwood was at fault for over-serving the assailant. Davis sent a written notice, required by Iowa Code Section 123.93, of his dramshop claim on January 10, 2006, which was received by the insurer on January 13, 2006 and also received by the dramshop's licensee. Section 123.93 provides that:

> [w]ithin six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury.

On September 12, 2007, Davis filed his petition against the Driftwood asserting a dramshop claim. Those keen on dates and statutes of limitation may notice something odd about this filing. The date of filing this petition is eleven days more than two years after the date of the alleged incident and injury, but less than two years from the date when the required written notice was given. Because of this, the Driftwood raised the defense of the statute of limitations, arguing that the plaintiff could not maintain his suit because he had not filed the petition within two years from the date of his claimed injury. The Driftwood relied on Iowa Code Section 614.1(2), which provides a two-year period in which to bring actions founded on injuries to the person. Davis resisted, arguing that, since the notice must be timely given in order to preserve the right to pursue this statutory cause of action, the statute of limitations does not begin to run until the notice date, and therefore his petition was timely filed.

After a hearing on the matter, the trial court agreed with the Driftwood and dismissed the suit. The court's reasoning was in part based on a comparison with the Municipal Tort Claims Act, an argument advanced by plaintiff, which is a cause-of-action against a municipality created by the legislature. That statute used to have a provision that extended the time for filing a petition based on the filing of the required notice, similar to a dramshop claim. (This was former Iowa Code Section 613A.5, now Section 670.5, which specifically provided that "[n]o action therefore shall be maintained unless such notice has been given and unless that action is commenced within two years after such notice.") However, the legislature has since eliminated the provisions from the Municipal Tort Claims Act. Plaintiffs must now commence actions under the Municipal Tort Claims Act within two years from the injury. The legislature did not include such limitations language in the dramshop statute. As Judge Brown found in her ruling at the trial court, "[c]learly, the legislature could have included an extension for filing the lawsuit if it had determined that was appropriate. Because no such additional extension was included in the statute for extending the period of time in which the lawsuit can be brought, no such additional time exists."

Davis appealed the trial court's ruling. The case was routed to the Court of Appeals, where it was considered without oral argument. Davis argued that the issue of the case was when an action "accrues" for statute of limitation purposes. The dramshop statute creates a cause of action, and provides its exclusive remedy against a liquor licensee or permittee for its violation. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002). Furthermore, the statute required that notice be given to the defendant prior to instituting a lawsuit (presumably because, in the dramshop context, the person actually causing the injury is not the dramshop, but rather one of its patrons, so the dramshop deserves a "heads up" as to the impending claim). The written notice, Davis maintained on appeal, is a condition precedent to filing the lawsuit, that without it a dramshop plaintiff cannot perpetuate his claim. *Spencer v.*

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THE STATUTE OF LIMITATIONS FOR DRAMSHOP ACTIONS—
DAVIS V. R&D DRIFTWOOD, INC. **...** *CONTINUED FROM PAGE 13*

Truro Tavern, Inc., No. 06-1178, 2007 WL 253529 (Iowa Ct. App. Jan. 31, 2007). The dramshop statute does not prescribe a particular time in which to bring an action, so we must look to the general statute of limitations. Iowa Code Section 614.1 provides that "[a]ctions may be brought within the times herein limited, respectively, *after their causes accrue*, and not afterwards, except when otherwise specially declared . . ." (emphasis supplied). A cause of action "accrues" when the "aggrieved party has a right to institute and maintain a lawsuit." *Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999). Davis argued that he could not "institute and maintain" his suit until he had given the required written notice, therefore it is the notice that accrues his claim. Since an action may not be brought until the cause accrues and, because the action had not accrued until the required notice was given, Davis' argument goes, his filing of the petition was within the statute of limitations.

The Driftwood's opposition brief in the appeal relied on the trial court's opinion and focused not on the accrual argument but a straightforward approach. As pointed out, the legislature could have provided a different statute of limitations when creating the dramshop cause of action, but did not, so the general statute of limitations found in Iowa Code Section 614.1(2) applies. That Section provides a two-year period in which to bring claims based on personal injury, such as Davis alleged, so Davis should have two years from the date of the injury, not two years from the date of giving notice. There was no reason that Davis could not have complied with this two-year limitations period. He filed the notice within six months and only missed the deadline to file suit by eleven days. Furthermore, the legislature should be in charge of determining changes in statutes of limitation, not the courts.

The Court of Appeals agreed with Davis and reversed and remanded the case. The appeal was considered by Judges Mahan, Miller, and Doyle. The opinion was written by Judge Doyle. The Court found that the dramshop action provides the exclusive remedy against a licensee or permittee for violation of the statute, and the statute prescribes the way in which to perpetuate that claim. *Grovijohn*, 643 N.W.2d at 202-203. The notice is required by the statute and, since the plaintiff must give the notice to bring the suit, the action does not accrue until the notice is given. Again, since the general statute of limitations provides that an action may not be brought until its cause of action accrues, "the action does not accrue until timely notice under section 123.93 is given. Therefore, Davis's action did not accrue until he served timely notice pursuant to section 123.93 on January 10, 2006. Since his lawsuit was filed within two years of the date of notice, his suit was timely filed." *Davis v. Driftwood*, No. 08-0833, p. 6.

The Driftwood applied for further review with the Supreme Court, contending the Court of Appeals' opinion conflicts with the Iowa Supreme Court's decision in *Harrop v. Keller*, 253 N.W.2d 588 (Iowa 1977). In *Harrop*, the Supreme Court held that "bringing the suit was itself sufficient notice under [Section] 123.93" if the petition was filed and served within the six months from the time of injury. *Harrop*, 253 N.W.2d at 593. The petition would provide the same information to the defendant that the notice would, so it was unnecessary. The *Harrop* case, therefore, did not require any prior notice to be given to "accrue" the action; the petition instituted the suit in those circumstances and the notice would be a "meaningless formality." The Driftwood argued that the Court of Appeals' opinion implicitly required a plaintiff to give notice to "accrue" the action, which is not necessary under the *Harrop* decision.

Furthermore, the Driftwood argued a "cause of action accrues when an aggrieved party has a right to institute and maintain a suit." *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 460 (Iowa 1989)(citing *Sandbulte v. Farm Bureau Mut. Ins. Co*., 343 N.W.2d 457, 462 (Iowa 1984)). This right, to institute and maintain a suit, "exists when 'events have developed to a point where the injured party is entitled to a legal remedy.'" *Sandbulte v. Farm Bureau Mut. Ins. Co*., 343 N.W.2d 457, 462 (Iowa 1984) (citing *Stoller Fisheries, Inc. v. American Title Ins. Co.*, 258 N.W.2d 336, 341 (Iowa 1977)). "It is well settled that no cause of action accrues under Iowa law until the wrongful act produces loss or damage to the claimant." *Bob McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). Thus, Davis' cause of action accrued on September 1, 2005, the date of the occurrence. At that time, events had developed to a point where the plaintiff may be entitled to a legal remedy. As alleged, a wrongful act had occurred that injured Davis. Accordingly, Davis had a right to institute and to maintain a lawsuit on September 1, 2005 based on the incident and his injury. Under *Harrop*, he could have filed his petition at any point up to March 1, 2006 (six months after the date of injury) without giving notice of his claim.

Moreover, the Court of Appeals' opinion had extended the statute of limitations without good reason and made a change that, as a matter of public policy, should be left to the legislature. Given that this was a case of first impression, the Driftwood urged the Supreme Court to consider the Application to clarify the confusion created by the Court of Appeals' decision.

Davis resisted the application, arguing that the Court of Appeals' opinion was not in conflict with *Harrop* because, in that case, the petition served as the notice required under Iowa Code Section 123.93. The *Harrop* court still required that notice be given, so the opinion was not in conflict with this case. Moreover, the *Harrop*

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Board of Governors that decides whether or not to approve or disapprove a committee proposal. If approved by the Board of Governors, the proposed change becomes a part of the Iowa Civil Jury Instructions published by the Iowa Bar Association.

All members of the IDCA are encouraged to submit proposed jury instruction changes or ideas for changes to any member of the committee. The committee members are listed on the Iowa Bar website. Further, you are encouraged to monitor the Iowa Bar Association website and make comments for the Board of Governors' consideration regarding changes proposed by the committee. Finally, if any member of this organization is interested in serving on the committee, you are encouraged to contact the bar association president and seek appointment to the committee. It will be worth your while. ■

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THE STATUTE OF LIMITATIONS FOR DRAMSHOP ACTIONS—*DAVIS V. R&D DRIFTWOOD, INC.*

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decision did not adjudicate the accrual date for dramshop claims, which was the issue in *Driftwood*. The notice is still required to "accrue" the cause of action. If the plaintiff does not comply with the requirement, then the result is waiver or relinquishment of the claim. *Arnold v. Lang*, 259 N.W.2d 749, 752 (Iowa 1977). The Court of Appeals did not extend or change the statute of limitations for dramshop claims in its opinion, Davis argued, because the question always turned on the accrual date for the cause of action.

The Iowa Supreme Court granted review of the application, and scheduled oral argument on the case. Unfortunately, this is where the story ends. The parties settled before the September 1 oral argument, and the Driftwood withdrew its Application. The Supreme Court issued procedendo, so the decision of the Court of Appeals stands.

The next time you defend a dramshop claim where the plaintiff gave the required written notice, but filed the petition over two years after the date of injury, plead the two-year statute of limitations as a defense and move for summary judgment. One can infer that the Iowa Supreme Court, having granted further review with oral argument, was receptive to vacating the Court of Appeals decision in *Driftwood*. The issue should be preserved for appeal in the next case. Meanwhile, with *Driftwood* still on the books, the next time you are asked when the statute of limitations begins to run on a dramshop claim, you'll know that, for now, the answer is (b), from the date the plaintiff gives the written notice required under Iowa Code § 123.93. ■

IOWA DEFENSE COUNSEL ASSOCIATION

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IDCA ANNUAL MEETING

EDDIE AWARD PRESENTED TO MARTHA SHAFF

L to R: Pam Nelson, Edward Seitzinger's daughter; Martha Shaff; Megan Antenucci, IDCA outgoing President.

In 1988, IDCA president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and its first president and for his continuous and complete dedication to the IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which was dubbed "The Eddie Award."

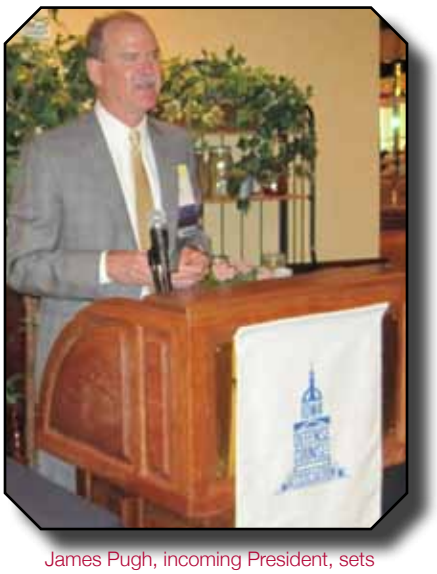
Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the board member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

The very deserving recipient of the Eddie Award for 2009 was Martha Shaff. Shaff has served in many ways for IDCA, including president and past president. She provides the board with ideas and follows through to get things done.

Congratulations Martha!

James Pugh presents Megan Antenucci with a President's Plaque.

Harold "Pete" Peterson presents Megan Antenucci with DRI's President's Plaque



James Pugh, incoming President, sets out his agenda for the year.

Larry Posner talks about killer cross-examinations