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An Overview of Electronically Stored Information (ESI) and the Use of "Claw-Back" Provisions

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Technology is advancing at an exponential rate. These advances are impacting the manner in which we practice law as well as the manner in which we conduct discovery. The purpose of this article is to provide insight into the availability of electronically stored information (ESI), the inter-relationship and application of the applicable rules of civil procedure and evidence, and to provide practice tips for use in litigating "claw-back" issues as well as in preparing "claw-back" agreements to govern the inadvertent disclosure of material which is non-discoverable by virtue of attorney-client privilege or the work-production doctrine.

I. Electronically Stored Information

ESI sources can include servers, desk tops, laptops, magnetic disks (e.g. computer hard drives or floppy disks), backup and archival magnetic tapes, USB flash drives, zip drives, optical disks (e.g. DVDs and CDs), PDAs (e.g. Smart Phones, Blackberries), pagers, cell phones, copiers, and home computers.1 ESI encompasses metadata pertaining to electronic files. Metadata includes information regarding electronic files such as the date it was created, its author, when and by whom it was edited, what edits were made, and e-mail transmission history.2 Systems data includes user log on and off data for computers and networks, applications and passwords utilized by individual users, and what websites particular users used may also be available.3 It is critical to not lose sight of the fact that there is virtually no limit to the nature and type of electronic footprints that clients and witnesses are leaving which are accessible to counsel with a properly formulated ESI discovery strategy.

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The volume of ESI which is available has lead to a dramatic increase in the cost and the complexity of discovery. See generally, Moore v. Publicis Groupe, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012); Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003). Concomitantly, with the increase in cost and complexity of ESI discovery, a significant effort has been put forward to study computerized assisted discovery methodologies and the management of ESI discovery by the Federal Judicial Center, The Sedona Conference, and others. The Sedona Conference is a "think tank" devoted to cutting edge legal issues. The Sedona Conference developed database principles for use in the management of ESI discovery.

1. Absent a specific showing of need or relevance, a requesting party is entitled to only database fields that contains relevant information, not the entire database in which the information resides or the underlying database application or database engine.
2. Due to differences in the way that information is stored or programmed into a database, not all information in a database may be equally accessible, and a party's request for such information must be analyzed for relevance and proportionality.

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3. Requesting and responding parties should use empirical information, such as that generated from test queries and pilot projects, to ascertain the burden to produce information stored in databases and to reach consensus on the scope of discovery.
4. A responding party must use reasonable measures to validate ESI collected from database systems to ensure completeness and accuracy of the data acquisition.
5. Verifying information that has been correctly exported from a larger database or repository is a separate analysis from establishing the accuracy, authenticity, or admissibility of the substantive information contained within the data.
6. The way in which a requesting party intends to use database information is an important factor in determining an appropriate format of production.

The Sedona Conference®, The Sedona Conference® Database Principles i, iii (March, 2011).

There has been reluctance by attorneys to fully utilize computerized predictive coding technology to identify documents for purposes of relevance, attorney-client privilege, and work-product protection. Predictive coding technology is the use of software to search databases to identify material which is non-discoverable. This is due to the fact that a significant number of attorneys consider manual (traditional) review of documents to be the "gold standard" despite empirical evidence to the contrary. Moore, 2012 WL 607412, at * 9. See also, Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, XVII RICH. J.L. & TECH. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf. The e-discovery study which, in part, utilized computerized predictive coding conducted by Grossman and Cormack demonstrated significant variance in the human effort engaged in the manual review of documents in the manner of how each document was coded. It also demonstrated that computerized predictive coding technology did a superior job, as compared to the human effort, of correctly coding documents for relevance, attorney-client privilege and work-product protection. Id. at 18, 23, 37, and 43. Herbert L. Roitblat, Anne Kershaw, and Patrick Oot conducted a study which yielded similar results to the Grossman, et al. study.4 Importantly, there are no studies which demonstrate empirical support for the proposition that manual review of documents for purposes of privilege and relevance should be the "gold standard" to which attorneys should aspire to reach.

II. Federal Rules of Civil Procedure 16 and 26 & Federal Rule of Evidence 502

The complexity and the cost of e-discovery provided the impetus for the enactment of far reaching amendments to Federal Rules of Civil Procedure 16 and 26 in addition to Federal Rule of Evidence 502.5 The overarching purpose of these amendments is to facilitate cooperation and coordination between the parties and the court in the conduct of discovery and the preparation of the case for trial in an expeditious manner that is mindful of the needs of the case and the resources of the parties.6 It is also designed to effectively address issues of subject matter waiver, attorney-client privilege, work-product protection in a cost effective manner.7 Federal Rule of Civil Procedure 16 has been amended, in part, to address issues pertaining to scheduling. Specifically, Federal Rule of Civil Procedure 16(b) has been amended as set forth below:

(a) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f);

or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event, within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may: (emphasis added)

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information; (emphasis added)

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced; (emphasis added).

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

Key subsections of Federal Rule of Civil Procedure 26 including (b)(2), (b)(5), and (f) have been amended, as set out below, to address the conduct of e-discovery, and the preservation and assertion of attorney-client privilege and work-product doctrine.

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(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. (emphasis added)

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. (emphasis added)

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (emphasis added)

(i) expressly make the claim; and (emphasis added)

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. (emphasis added)

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. (emphasis added)

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). (emphasis added)

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. (emphasis added)

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed,

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when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; (emphasis added)

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order; (emphasis added)

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (emphasis added)

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Study of the attendant Advisory Committee's notes is instructive as to the inter-relationship between these sections of the Federal Rules of Civil Procedure. The totality of Federal Rules of Civil Procedure 16 and 26 require that counsel meet and confer early on in the litigation regarding discovery, attorney-client privilege, and work-product protection. In so doing, it requires counsel to give due consideration to the following matters concerning ESI discovery:

- what databases need to be searched,
- what keyword searches are appropriate,
- how is the search process going to conducted,
- whether proprietary systems are involved,
- are legacy systems involved,
- what is the process of computerized predictive coding going to involve,
- what kind of validation system is appropriate,
- what kind of test queries and pilot projects are appropriate,
- does metadata need to be produced,
- how accessible is this information,
- what steps need to be taken regarding database preservation,
- what are the costs involved,
- in what form is the data going to be produced in (e.g. PDF, TIFF, Word, etc…),
- is it appropriate to enter into a contract with a technology advisor, and
- begin giving some consideration to the issue of authenticity for foundational purposes.

In designing the manner in which the predictive computerized coding will be employed, Mt. Hawley Ins. Co. v. Felman Production, Inc., 271 F.R.D. 125 (S.D.W.V. 2010) is instructive. In addressing the issue of whether Felman took reasonable steps to avoid the disclosure of e-mails which were protected by attorney-client privilege, the court focused on the process by which the e-discovery was conducted. Id. Specifically, the court focused on whether appropriate sampling was conducted. Id. In so doing, the court cited Victor Stanley for the proposition that "[t]he only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive." Mt. Hawley Ins. Co., 271 F.R.D. at 134–35 (quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 257 (D. Md. 2008)). In Mt. Hawley, the court held that Felman did not engage in the necessary sampling, andtherefore, had not taken reasonable steps to avoid the disclosure of the e-mails in question. Id. at 136. There is additional discussion of the Mt. Hawley decision concerning the issue of "claw-back" infra.

The Advisory Committee's notes to Federal Rule of Civil Procedure 26(b)(2)(C) reflect that the traditional factors that the court is to consider in proportionality have been retained.

The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

FED. R. CIV. P. 26(b)(2)(C) advisory committee's notes. Further, the Advisory Committee Notes to Federal Rule of Civil Procedure 26(b)(5)(A) reflect traditional notions of notice and the use of a privilege log.

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so

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as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

FED. R. CIV. P. 26(b)(5)(A) advisory committee's notes. A privilege log8 contains the following elements: a) the general nature of the document; b) the identity and position of its author; c) the date it was written; d) the identity and position of its addressee; e) the identities and positions of all persons who were given or have received copies of it and the dates copies were received by them; f) the document's present location and the identity and position of its custodian; and g) the specific reason or reasons why it has been withhold from production or disclosure. Doe v. Nebraska, 788 F. Supp. 2d 975 (D. Neb. 2011). In litigating the issue of whether a disclosure should be subject to claw-back, the maintenance of the privilege log can be an important factor in the court's analysis under Federal Rule of Evidence 502(b).

Federal Rules of Civil Procedure 16 and 26 afford you the opportunity to enter into "quick peek" or "claw-back" agreements with your opposing party and/or have specific provisions entered into a court order which bind third parties concerning inadvertent disclosure of material which is protected by attorney-client privilege or the work-product doctrine.

Central to the effectiveness of the amendments to Federal Rules of Civil Procedure 16 and 26 is the amendment to Federal Rule of Evidence 502. Key subsections of Federal Rule of Evidence 502 including (b), (d), and (e) have been amended as set out below to address subject matter wavier, the conduct of e-discovery, and the preservation and assertion of attorney-client privilege and work-product protection.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent; (emphasis added)

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

FED. R. EVID. 502(b), 502(d), and 502(e). One of the purposes of the amendments to Federal Rule of Evidence 502 is to establish that inadvertent disclosure will not establish subject matter waiver of all communications. FED. R. EVID. 502 advisory committee's notes. This provision is not intended to "alter federal or state law on whether a communication or information is protected under attorney-client privilege or work-product immunity as an initial matter. Id. Importantly, the Advisory Committee's Notes also set forth non dispositive factors for the court's consideration under FED. R. EVID. 502.

The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

FED. R. EVID. 502 advisory committee's notes. Courts apply the non dispositive factors set out in Advisory Committee's notes in widely varying ways. This wide variance in the application of the rules is undermining the enumerated purposes of the amendment of uniformity, efficiency, and reduction of costs. See generally, Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kreauter, Federal Rule of Evidence 502: Has it Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8 (2011), http://jolt.richmond.edu/v17i3/article8.pdf. This will result in an issue of first impression before the various circuit courts as to the meaning of "inadvertent" in the context of Federal Rule of Evidence 502.

Coburn Group, LLC. v. Whitecap Advisors, LLC, 640 F. Supp. 2d 1032 (N.D. Ill. 2009) is the seminal case for one of the two lines of authority that is being developed under Federal Rule of Evidence 502. In Coburn, the court held that the amendment to the rule was intended to make FED. R. EVID. 502(b)(1) simpler. Id. The Court cited the transmittal letter from the Committee to Senator Leahy which stated in part that "the Judicial Conference had been urged to devise a rule to 'protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake.'" Id. at 1038. Therefore, the court looked to whether it was clear that Whitecap did not intend to produce the e-mail to Coburn and found that the element of inadvertence was met. Id. The court then went on to apply the factors set forth in the Advisory Committee's notes to determine whether reasonable steps were taken to prevent the disclosure and

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whether reasonable steps were taken to rectify the disclosure as required by FED. R. EVID. 502(b)(2) and 502(b)(3). The Coburn court found that reasonable steps had been taken to avoid the disclosure and to rectify it; therefore, Coburn was required to return the e-mail discovery in question. Id. at 1041.

The court in Amobi v. D.C. Dep't of Corrections., 262 F.R.D. 45, 53 (D.D.C. 2009) defined "inadvertent" as "mistaken" which is the common dictionary definition of the word. The Amobi court found that defining "inadvertence" in any other manner "melds two concepts "inadvertence" and "reasonable efforts" that should be kept distinct. Id. "One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it." Id. The court then applied the factors enumerated in the Advisory Committee's notes to find that reasonable efforts were not taken to prevent the disclosure. Id.

Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. 2009) is the central case for the opposing line of authority. The Heriot court adopted a test whereby the first step was to determine if the material in question was privileged. Id. at 655. If so, the court would apply pre 502 factors which were similar to the factors set out in the Advisory Committee's notes to each prong of the test set forth in Federal Rule of Evidence 502 in an effort to determine if the privileges being asserted had been waived. Id. The approach by the Heriot court has been criticized by commentators as making the analysis more difficult than necessary.9 In addition, Heriot has been criticized for not being consistent with the purpose of the rule as articulated in the Advisory Committee's notes.10

In contrast, the approach taken by the Coburn and Amobi courts been has met with the approval of commentators as being consistent with the overriding purpose of the rule of creating uniform standard and reducing the costs of discovery.11 It has also been observed that applying the same factors to each part of the three part test in Federal Rule of Evidence 502(b) results in what is, in essence, a duplication of the same analysis.12 The query is the distinction in the application, the first prong of the test being of a subjective nature vis-à-visthe second and third prongs of the test which are, in essence, an application of a "reasonable man" (objective) standard utilizing factors which are designed to be flexible to enable the court to focus on which factors are more pertinent in each case. Importantly, if a universal approach to inadvertent waiver is not achieved in our jurisprudence, parties will never experience the efficiency and the cost savings that Federal Rule of Evidence 502 was designed to facilitate.

A number of courts have addressed the issue of the clawback of disclosed materials since the amendment to Federal Rule of Evidence 502. The Coburn and Mt. Hawley decisions are instructive as to the factual circumstances that courts have used in applying the test set forth in Federal Rule of Evidence 502(b) and the factors set out in the Advisory Committee's notes to determine whether material should be subject to claw-back under Federal Rule of Evidence 502(b).

In examining whether an e-mail, which had been disclosed, should be subject to claw-back, the Coburn court focused its attention on determining whether the e-mail was subject to attorney-client privilege, the process by which electronic discovery had been conducted, and the amount of time in took defense counsel to attempt to rectify the disclosure. Coburn Group, LLC, 640 F. Supp. at1032. The court found that the e-mail was subject to attorney-client privilege, the process by which e-discovery was conducted was reasonable to avoid the disclosure, and counsel was prompt in efforts to rectify the disclosure. Id. Therefore, Whitecap was allowed to claw-back the disclosure in question. Id. The court in Mt. Hawley applying the Heriot test, focused on the pre-production review process, and in particular, the amount of material produced which was subject to attorney-client privilege and the failure to perform sampling, failure to perform keyword searches to locate a particular e-mail to hold that Felman had not taken reasonable steps to avoid the disclosure. Mt. Hawley Ins. Co., 271 F.R.D. at 125. Therefore, the court held that Felman should not be permitted to claw-back material pursuant to an ESI Stipulation. Id.

III. Practice Tips

Courts have focused on a number of factual circumstances in their respective applications of the factors set out in the Advisory Committee's notes to Federal Rule of Evidence 502(b) in determining whether material, which has been disclosed, should be clawed back. I recommend that you formulate your arguments utilizing the following factual circumstances set forth below in concert with factors set out in the applicable notes:

- did the parties enter into a "claw-back" agreement, and if so, were the terms complied with,
- did the court include a "claw-back" provision in a case management order or protective order, and if so, were the terms of the order complied with,
- if there is an agreement or an applicable court order, does the disclosed material fall within its scope,
- did the party comply with The Sedona Conference® Database Principles,
- were appropriate test quires and sampling conducted,
- is the material in question entitled to protection under attorney-client privilege or the work-product doctrine,
- did the party keep an adequate privilege log,
- how much material was involved and how much of the material produced is at issue,
- was the party sloppy in how the material was handled,
- were there indications that the party should have known that he inadvertently produced material that was entitled to protection,
- was the pre-production review process adequate,
- once the party recognized that material had been

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produced that was subject to protection were prompt steps taken to retrieve it,

- was computer assisted predictive coding used,
- was the background and experience of the individuals involved in the privilege review, and
- timely objection to the use of the material in question.

Courts have utilized the amended rules to permit the entry of protective orders which include claw-back provisions over the objection of the opposing party. See generally, Rajala v. McGuire Woods, LLP, 2010 WL 2949582 (D. Kan. July 22, 2010); S2 Auomation LLC v. Micron Technology, Inc., 2012 WL 3150387 (D.N.M. July 23, 2012); Potomac Electric Power Co. v. United States, 2012 WL 4127637 (Fed. Cl. Sept. 19, 2012). Such orders are binding as to third parties. Id.

The following terms that should be addressed in drafting of a "claw-back" agreement, a case management order, or a proposed protective order:

- define the term "inadvertent",
- determine what steps a party must take to be found to have taken "reasonable steps to avoid the disclosure",
- define the time frames in which a party must act if either he discovers that he inadvertently disclosed material or received material that is subject to protection under the attorney-client privilege or the work-product doctrine,
- if the an issue arises, what will be done with the material in the interim,
- what information must the privilege log contain,
- what pre-production review of material is required,
- specially address the proportionality factors of Federal Rule of Civil Procedure 26(b)(2)(C),
- define the elements of attorney-client privilege and work-product doctrine,
- address what are the respective parties pre and post disclosure obligations,
- if there a need to bind third parties to the terms of the agreement, have the agreement set forth in a court order,
- is an outside vendor going to be retained to produce the material, and if so, who will pay for these services,
- if computer predictive coding will be used, outline the process that will be followed,
- address how The Sedona Conference® Database Principles will be applied,
- address which databases will be searched and in what form the data will be produced (e.g. PDF, TIFF, Word, etc..),
- address what, if any, metadata will be produced and precisely what that will consist of,
- define what precisely what actions must be taken to be in compliance with Federal Rule of Civil Procedure 26(b)(5), and
- carefully define the scope of the agreement.

See generally, Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kreauter, Federal Rule of Evidence 502: Has it Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8 (2011), http://jolt.richmond.edu/v17i3/article8.pdf. In drafting such an agreement, be wary of provisions which waive all pre-production review of material as the court may not enforce such a provision for public policy reasons. See United States v. Sensient Colors, Inc., 2009 WL 2905474 (D.N.J. Sept. 9, 2009).

IV. Conclusion

Discovery involving electronically stored information is an ever expanding area of our practice. It is important to monitor the changes in technology to understand what information is available and how it can be accessed. It is also important to monitor how this area of jurisprudence develops, because there is not a universally accepted methodology to apply the test set forth in Federal Rule of Evidence 502(b) and the factors set forth in the notes. Finally, in addressing claw-back issues, attention to minute details and understanding of the technology as well as the pre-production review process are key, in drafting agreements and orders which meet your client's needs and in presenting arguments to the court.

NOTES

1. Gary L. Beaver, Meeting Your Duties Regarding Electronically Stored Information, The Brief, Fall 2012, 61, 62–63.
2. FED. JUDICIAL CTR., Managing Discovery of Electronic Information: A Pocket Guide for Judges (2007), http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.
3. Id.
4. Herbert L. Roitblat, Anne Kershaw, and Patrick Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review, J. AM. SOC. INF. SCI. TECHNOL., 61(1):1–11 (2010).
5. FED. R. CIV. P. 16 advisory committee's note; FED R. CIV. P. 26 advisory committee's note; FED R. EVID. 502 advisory committee's note. See also, Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules Of Evidence Manual §502.04 [4] (10th ed. 2011); J.M. Moore, Moore's Federal Practice § 26.49[5][h] (3d ed. 2005).
6. Id.
7. Id.
8. A privilege log is frequently referred to as a "Vaughn Index." Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
9. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kreauter, Federal Rule of Evidence 502: Has it Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8 (2011), http://jolt.richmond.edu/v17i3/article8.pdf; Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, FEDERAL RULES OF EVIDENCE MANUAL § 502.04 [4] (10th ed. 2011).
10. Id.
11. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kreauter, Federal Rule of Evidence 502: Has it Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8 (2011), http://jolt.richmond.edu/v17i3/article8.pdf; Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, FEDERAL RULES OF EVIDENCE MANUAL § 502.04 [4] (10th ed. 2011).
12. Id.

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IOWA DEFENSE COUNSEL ASSOCIATION

A message from the president ...

To all members of the IDCA,

Bruce Walker

You may recall in my most recent President's Letter, I mentioned I would follow-up to implement a SOLACE program in Iowa. The SOLACE program is our chance to help friends in the legal community in need. The Iowa State Bar Association also is considering adopting this program. The defense organizations in Nebraska and Louisiana have started the program as well. I feel comfortable recommending this program to you. In case you are concerned about receiving a substantial amount of email, we give you the opportunity to opt out of the program.

The Support of Lawyers/Legal Personnel All Concern Encouraged Program allows you to report situations that involve a lawyer, judge, law student, courthouse or law firm employee who has suffered a loss, illness, or injury which has been unmet or has an unmet need. IDCA will distribute the request through a blast email to all participating IDCA members. It can be a need for transportation, lodging, or any of a myriad of other unique or unusual needs. This will not be a listserv or a prayer list. It also will not serve as a cash fundraiser or employment recruiting tool. The sole purpose is to serve immediate needs that have risen as a result of a sudden, unexpected tragedy in a colleague's life.

From talking to Mike Kinney, the Past President of the Nebraska State Bar Association and Regent for the American College of Trial Lawyers, I learned that there are many people who know someone, who knows someone else, who could use some help. All they have to do is ask and, as lawyers, we try to help others. Unfortunately, people don't tend to make their needs known or ask for help. That is why the program has been so successful in other states.

Please take a few seconds to think of anyone who comes to mind who could use this type of help and let us know by emailing Heather Tamminga at staff@iowadefensecounsel.org. All requests will be sent to the Board of Directors for review before we send the request out to the IDCA membership. I suggest you also include direct contact information for the person in need with their permission.

If you have any questions, please contact me. If you wish not to be included to receive SOLACE emails, please send an email to Heather Tamminga at staff@iowadefensecounsel.org.

The Americans With Disabilities Act Amendments Act: An Interesting Tool For Iowa Or A Mandate?

By Frank Harty and Debra Hulett, Nyemaster Goode, P.C., Des Moines, IA

INTRODUCTION

The Iowa Supreme Court was recently presented with an opportunity to refine the relationship between Iowa and federal disability discrimination law. In *Stotler v. Delavan, Inc.*, a federal judge certified a question to the Iowa Supreme Court regarding the impact—if any—that recent statutory amendments to federal law would have on the Iowa Civil Rights Act (ICRA). The certified question asked:

> In the absence of any applicable amendment to the Iowa Civil Rights Act (ICRA) regarding claims of disability discrimination, will the Iowa courts adopt the structure of the revised federal law enacted by Congress in the 2008 Americans with Disabilities Act Amendment Act (ADAAA), specifically 42 U.S.C. §§ 12101 and 12102, and federal regulations promulgated thereunder, when reviewing disability discrimination claims under the ICRA?

The certified question appeal was fully briefed. The Iowa Supreme Court scheduled oral argument for January 23, 2013. Days before the scheduled argument, the court granted the parties' joint motion to continue the argument based on a report that the case had been settled.

In early January, the Iowa Court of Appeals decided the same issue in *Knudsen v. Tiger Tots Community Child Care Center*, No. 12-0700, 2013 WL 85798 (Iowa Ct. App. Jan. 9, 2013). In that split decision, two judges on the panel decided that even though the Iowa General Assembly did not amend the ICRA regarding disability discrimination claims, Iowa would engraft on the ICRA the ADAAA and related federal regulations promulgated thereunder. In a dissenting opinion, one judge disagreed, concluding that "[b]ecause the Iowa legislature has to date chosen not to act by expanding the definition of disability" to mirror the ADA Amendments Act, the ADAAA did not impact and expand Iowa law. *Knudsen*, 2013 WL 85798, at *4.

This article discusses the interplay of the Iowa Civil Rights Act and federal disability discrimination laws. The authors believe the Iowa Supreme Court will reject attempts to federalize Iowa discrimination law by engrafting the ADA Amendments Act on the ICRA.

THE IOWA CIVIL RIGHTS ACT: AN IOWA LAW

Nearly two decades before the federal Congress enacted legislation outlawing disability discrimination in private-sector employment, the Iowa General Assembly approved an Iowa Civil Rights Act amendment that prohibited disability-based discrimination in employment. 1972 Iowa Acts ch. 1031 (codified at Iowa Code § 105A.2 (Supp. 1971)). As first enacted, the Iowa Act defined "disability" as "the physical or mental condition of a person which constitutes a substantial handicap." Iowa Code § 105A.2 (Supp. 1971). That same statutory language remained in place until a 1996

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amendment by the Iowa General Assembly that substituted the word "disability" for the word "handicap." See 1996 Iowa Acts ch. 1129, § 113. The Iowa Act now defines "disability" as "the physical or mental condition of a person which constitutes a substantial disability." Iowa Code § 216.2(5) (2011).

Long before the ADA's enactment, the Iowa Supreme Court interpreted the Iowa Act's disability discrimination provisions. The Court determined that by implication, the Iowa Act requires that an employer reasonably accommodate an employee's disability. *See Foods, Inc. v. Iowa Civil Rights Comm'n,* 318 N.W.2d 162, 167 (Iowa 1982); *Cerro Gordo Cnty. Care Facility v. Iowa Civil Rights Comm'n,* 401 N.W.2d 192, 197 (Iowa 1987). In *Sommers v. Iowa Civil Rights Commission,* 337 N.W.2d 470 (Iowa 1983), the Iowa Supreme Court approved the Iowa administrative rules in place at the time that defined "substantially handicapped person" and the terms contained within that definition. *Id.* at 475.

The Iowa Supreme Court acknowledged that comparable federal law could provide a useful analytical tool, but clearly recognized that the Iowa Civil Rights Act is an *Iowa* law. For example, the Court qualified the reasonable-accommodation obligation by noting that "[w]hile we require accommodation by implication under our statutory scheme, our requirements are not as stringent as those imposed by federal programs." *Cerro Gordo Cnty. Care Facility,* 401 N.W.2d at 197. Drawing from the federal Rehabilitation Act of 1973, the Court determined that under the Iowa Act, "the phrase 'substantially limits' must be interpreted to mean the degree to which the impairment affects an individual's employability." *Probasco v. Iowa Civil Rights Comm'n,* 420 N.W.2d 432, 436 (Iowa 1988). The Court also concluded that "[a]n impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not substantially limiting within our statute." *Id.* Many years later, the U.S. Supreme Court interpreted the ADA in a similar manner. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492–94 (1999). And in *Boelman v. Manson State Bank*, 522 N.W.2d 73 (Iowa 1994), the Iowa Supreme Court drew from federal cases

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interpreting the Rehabilitation Act to analyze an Iowa Act disability discrimination claim. *Id*. at 79.

In 1990, nearly two decades after Iowa outlawed disability discrimination, the federal Congress enacted the ADA. Because the ADA's language and implementing regulations tracked the Iowa Act in many respects, federal cases interpreting the ADA provided another source for the Court to consider when interpreting the Iowa Act. Both required proof of a disability. 42 U.S.C. § 12112(a) (1990); Iowa Code § 216.6(1)(a) (2011); *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997). Both allowed recovery under a "regarded as" theory. Iowa Admin. Code r. 161-8.26(1); 42 U.S.C. § 12102(2) (1990). Both allowed an award of actual damages, costs, and attorneys' fees to a prevailing plaintiff. Iowa Code § 216.15(9)(a)(8) (2011); 42 U.S.C. § 12117(a) (1990) (referencing 42 U.S.C. § 2000e–5(k)).

Given these similarities, for many years, the Iowa Supreme Court loosely followed ADA case law to analyze the Iowa Act's disability discrimination provisions. The vast body of federal case law interpreting the ADA has provided useful but not mandatory guidance to the Iowa Supreme Court as it interpreted the Iowa Act's provisions regarding employment practices and persons with disabilities. But the Iowa Supreme Court never let the federal ADA define the Iowa Act. Decisions from the Iowa Supreme Court noted the similarity in statutory text between federal law and the Iowa Act, and considered decisions analyzing comparable issues under the ADA useful—but not binding. *See Fuller,* 576 N.W.2d at 329; *see also Schlitzer*, 641 N.W.2d at 529; *Howell*, 585 N.W.2d at 280; *Vincent*, 589 N.W.2d at 59–60; *Bearshield*, 570 N.W.2d at 918.

The rationale for the Iowa Supreme Court's approach has been premised on two core principles: differences between the ADA's and the Iowa Act's statutory text, and federalism. The Iowa Supreme Court always recognized that Iowa is a sovereign state. The "concept of federalism assumes power, and duty, of independence in interpreting our own organic law." *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 446 (Iowa 2002). And the Iowa Civil Rights Act of 1965 is a local, Iowa law. Recognizing the General Assembly's authority to enact an *Iowa* civil rights act, the Court staved off efforts to encroach on this State's sovereign authority. *See, e.g.*, *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 378 (Iowa 1986); *Franklin Mfg. Corp. v. Iowa Civil Rights Comm'n*, 270 N.W.2d 829, 834 (Iowa 1978).

APPLYING THE ADAAA TO THE IOWA ACT WOULD INVALIDATE IOWA PRECEDENT

In *Stotler*, the plaintiff argued that the Iowa Supreme Court should engraft the ADAAA on the ICRA. In short, the plaintiff asked Iowa courts to invalidate stare decisis.

Fuller provides an apt illustration. In *Fuller*, the Court analyzed an issue of first impression under the Iowa Act: "whether, and to what extent, the mitigating effects of medication and other assistive devices may be considered in analyzing a disability discrimination claim." 576 N.W.2d at 331. Among other sources, the Court considered the Tenth Circuit Court of Appeals' decision in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997). The Iowa Supreme Court concluded that under the Iowa Act, "the mitigating effects of medication or other assistive devices *may be considered* in determining whether *the impairment substantially limits a major life activity.*" *Fuller*, 576 N.W.2d at 333 (emphasis in original). After the Iowa Supreme Court's *Fuller* decision, the Supreme Court granted certiorari in *Sutton*. *Sutton v. United Air Lines, Inc.*, 525 U.S. 1063 (1999). The Supreme Court adopted an analytical approach regarding the ameliorative effects of mitigating measures that was comparable to the Iowa Supreme Court's approach in *Fuller*. *Sutton*, 527 U.S. at 482.

With the ADAAA, Congress expressly overruled *Sutton*. In part, the ADAAA states as its purpose:

> to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures

Pub. L. No. 110-325 § 2(b)(2), 122 Stat. 3553, 3553.

So applying the ADAAA to the Iowa Act would expressly overrule *Fuller* without any coinciding material change to the Iowa Act's statutory text.

Similarly, in *Bearshield*, the Iowa Supreme Court interpreted the term "disability" under the Iowa Act. 570 N.W.2d at 921. Key in this interpretation was whether the plaintiff was "substantially limited" in a major life activity, and the Court considered EEOC regulations that implemented the ADA in deciding this issue. *See id.* at 921–22 (applying 29 C.F.R. § 1630.2(j)(3)(i)–(ii)). Based on this ADA-reliant analysis, the Court reversed the district court's summary judgment ruling that held the plaintiff was not "substantially limited." *Id.* at 922.

Twelve years later, Congress enacted the ADAAA to change and broaden the very meaning of "substantially limited" that the Iowa Supreme Court relied on when it decided *Bearshield*. *See* Pub. L. No. 110-325 § 2(a)(1), (7), 122 Stat. 3553, 3553 (stating that Congress rejected the interpretation of "substantially limits" because it "require[d] a greater degree of limitation than was intended"). Following the ADAAA's enactment, the EEOC rewrote the regulation that the *Bearshield* court relied on and fundamentally altered the definition of "substantially limits." *See, e.g.*, 29 C.F.R. § 1630.2(j)(1)(vi) (stating that the "substantially limits" analysis may not consider "the ameliorative effects of mitigating measures"); 29 C.F.R. § 1630.2(j)(1)(v) (stating that analysis of an impairment's "substantial limitation" "usually will not require scientific, medical, or statistical analysis.").

Applying the ADAAA to the Iowa Act would expressly overrule *Bearshield* without any coinciding material change to the Iowa Act's statutory text.

The Iowa Supreme Court has explained its approach to stare decisis. The Court stated that stare decisis is "especially applicable"—

> where the construction placed on a statute by previous decisions has been long acquiesced in by

continued on next page

> the legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature.

In re Vajgrt, 801 N.W.2d 570, 574 (Iowa 2011).

Yet the plaintiff in *Stotler* offered no textual reason for the Iowa Supreme Court to depart from stare decisis. Instead, the plaintiff offered a plea that the Court should mechanically follow federal law.

If given the opportunity, it seems clear that the Iowa Supreme Court will not invade the province of the Iowa legislature by engrafting the ADAAA on the ICRA. Adopting the ADAAA would concomitantly overrule Iowa Supreme Court precedent.

THE IOWA GENERAL ASSEMBLY'S ROLE

The General Assembly had long acquiesced in the Iowa Supreme Court's decisions interpreting the Iowa Act's disability discrimination provisions. In the face of prolonged legislative inaction, the Iowa Supreme Court infers legislative assent to its precedent. *See State v. Sanford*, 814 N.W.2d 611, 619 (Iowa 2012) (quoting *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 600 (Iowa 2011)); *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 813 (Iowa 2011). As the Court has reasoned, if the legislature disagrees with its interpretation of statutory text, "they will by additional legislation state the real intention." *Sanford*, 814 N.W.2d at 619 (quoting *Welch*, 801 N.W.2d at 600).

The General Assembly implicitly assented to the Iowa Supreme Court's decisions that looked to the ADA for guidance in interpreting the Iowa Act. *See Sanford*, 814 N.W.2d at 619. The interpretation of the Iowa Act proposed by the plaintiff in *Stotler* involved a broader scope of application of the disability discrimination provisions in accordance with the ADAAA. *See* Pub. L. No. 110-325, § 2(a)(4)–(7), 122 Stat. 3553, 3553. The approach ignored the fact that since the ADAAA's enactment in 2008, the General Assembly has not amended the Iowa Act to follow the ADAAA. Given the General Assembly's inactivity, "[t]he court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used." *See Moulton v. Iowa Emp't Sec. Comm'n*, 34 N.W.2d 211, 216 (Iowa 1948). So the General Assembly's inaction implies assent to the Court's decisions interpreting the Iowa Act's disability discrimination provisions.

The Iowa Supreme Court has recognized that it is "not in the business of rewriting statutes." *Lewis v. Jaeger*, 818 N.W.2d 165, 184 (Iowa 2012). That type of lawmaking is the General Assembly's constitutional prerogative. Iowa Constitution, Article III, Section 1. And given the extent of the ADAAA's sweeping changes, adopting the ADAAA is the type of statutory amendment that the General Assembly should make. *See Vajgrt*, 801 N.W.2d at 574.

Congress—rather than the United States Supreme Court—enacted the ADAAA. *See* Pub. L. No. 110-325, § 1, 122 Stat. 3553. And Congress clearly amended the ADA because it disagreed with the United States Supreme Court's decision interpreting the ADA's statutory text. *See* Pub. L. No. 110-325, § 2(a)(4)–(7), 122 Stat. 3553, 3553. The Iowa General Assembly has not made a similar effort to reject the Iowa Supreme Court's decisions in *Fuller*, *Bearshield*, or any other precedent regarding disability discrimination under the Iowa Act.

CONCLUSION

This issue gets to the heart of states' rights. The Iowa Supreme Court has departed from comparable federal statutes when appropriate based on the Iowa Act's statutory text. *See Hulme v. Barrett*, 449 N.W.2d 629, 631–32 (Iowa 1989). It seems obvious that the Iowa Supreme Court would recognize that engrafting the ADAAA on the ICRA would usurp the General Assembly's constitutional prerogative. Whether in *Stotler*, *Knudsen* or a different case, the Iowa Supreme Court will ultimately have to resolve these efforts to "federalize" an Iowa law.

NOTES

1. No. 4:11-cv-00036-JEG (S.D. Iowa).
2. Iowa Supreme Court No. 12-1006.
3. 29 U.S.C. § 701, et seq.
4. See, e.g., Schlitzer v. Univ. of Iowa Hosps. & Clinics, 641 N.W.2d 525, 529 (Iowa 2002); Vincent v. Four M Paper Corp., 589 N.W.2d 55, 59–60 (Iowa 1999); Fuller v. Iowa Dep't of Human Servs., 576 N.W.2d 324, 329 (Iowa 1998); Howell v. Merritt Co., 585 N.W.2d 278, 280 (Iowa 1998); Bearshield, 570 N.W.2d at 918.

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IDCA launches member LISTSERV

The Iowa Defense Counsel Association is excited to launch the IDCA Member Listserv! The purpose of the IDCA listserv is to provide IDCA members an additional opportunity for networking outside of IDCA meetings and other functions. The listserv is available to members to quickly ask for help, tips and advice from other members and to provide ongoing communication opportunities.

The IDCA listserv is open to IDCA members only. If you are receiving this email, you have already been subscribed to the listserv. Read further to learn how to use the listserv. If you have questions, please contact IDCA Headquarters at staff@iowadefensecounsel.org.

HOW TO SEND AN EMAIL THROUGH THE LISTSERV

1. Open your email program.
2. In the To: field, type members@iowadefensecounsel.org *(Only subscribers can send to the list.)*
3. In the Subject field, type LIST and then the subject of your question. **Example:** LIST: Expert Witnesses in Central Iowa
4. In the body of your email, include your name and contact information.

HOW TO UNSUBSCRIBE FROM IDCA'S LISTSERV

To be removed from the listserv, send an email to members@iowadefensecounsel.org with "Unsubscribe" in the subject line.

CODE OF CONDUCT

Violating antitrust regulations, selling, or marketing are not permissible. Please take a moment to acquaint yourself with the guidelines listed below. If you have questions, contact IDCA Headquarters at staff@iowadefensecounsel.org. IDCA reserves the right to suspend or terminate membership on all lists for members who violate these rules.

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3. Do not post commercial messages. The cyberspace term for this is spamming. Contact people directly with products and services that you believe would help them.
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7. Messages should not be posted if they encourage or facilitate members to arrive at any agreement that either expressly or impliedly leads to price fixing, a boycott of another's business, or other conduct intended to illegally restrict free trade. Messages that encourage or facilitate an agreement about the following subjects are inappropriate: prices, discounts, or terms or conditions of sale; salaries; profits, profit margins, or cost data; market shares, sales territories, or markets; allocation of customers or territories; or selection, rejection, or termination of customers or supplies; or potential violation of current antitrust laws.

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IDCA Congratulations Members Elected to the State Judicial Nominating Commission

The following IDCA members were elected to the State Judicial Nominating Commission:

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McCoy, Riley, Shea and Bevel, Waterloo

Christine L. Conover
Simmons Perrine Moyer Bergman PLC, Cedar Rapids

3rd CONGRESSIONAL DISTRICT

Connie Diekema
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Des Moines

Jeffrey L. Goodman
Goodman & Associates, P.C., West Des Moines

4th CONGRESSIONAL DISTRICT

John C. Gray
Heidman Law Firm, Sioux City


Henry J. Bevel


Christine L. Conover


Connie Diekema


Jeffrey L. Goodman


John C. Gray

IDCA UPCOMING EVENTS

CLE Webinar *Registration form found in this issue!*	**May 8, 2013** Noon – 1:00 p.m.
49th Annual Meeting & Seminar	**Sept. 19–20, 2013** 8:00 a.m. – 5:00 p.m.
50th Annual Meeting & Seminar	**Sept. 18–19, 2014** 8:00 a.m. – 5:00 p.m.

IDCA NEW MEMBERS

Bruce L. Gettman, Jr., Redfern Mason Larsen & Moore, PLC
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Phone: (319) 277-6830
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mmskram@johnson-condon.com

Chuck Rosenberg Confirmed for Annual Meeting:

Learn about the trial of the 20th 9/11 Hijacker

Save the dates of September 19–20, 2013, for our 49th Annual Meeting! Chuck Rosenberg, the former U.S. Attorney for the Eastern District of Virginia was involved in the prosecution of the alleged "twentieth" 9/11 hijacker, Zacaris Moussaoui, has agreed to speak at our meeting. Mr. Rosenberg will speak on many of the issues associated with the successful prosecution and sentencing of Moussaoui (i.e.: trial procedure, discovery, evidence). Other IDCA members have seen his presentation and stated:

"Best legal seminar presentation I have ever seen!"

"To learn about the 9/11 hijacking from the inside out was an amazing and emotional experience!"

Mr. Rosenberg has served in several senior positions at the Department of Justice including Counselor to Attorney General John Ashcroft and Counsel to the Federal Bureau of Investigation Director Bob Mueller. You will not want to miss this year's Annual Meeting & Seminar.

IOWA DEFENSE COUNSEL ASSOCIATION

IOWA DEFENSE COUNSEL ASSOCIATION WEBINAR

"Working Effectively and Efficiently with Technical Experts in Litigation"

Presented by Steve Arndt, Ph.D., Principal, Exponent's Human Factors, Chicago, Ill.

WEDNESDAY, MAY 8, 2013 - Noon to 1:00 p.m.

About the Webinar: This webinar is a primer and refresher for attorneys to illustrate (from the expert's perspective) the relationship between the attorney and expert in accident analysis and investigation. Attorneys practicing personal injury or products liability law frequently employ technical experts to assist with the engineering and scientific issues of their cases. Knowledge of the process that an expert uses and the resources that can assist the expert in providing the highest quality work product can lead to much more effective development and use of the expert's testimony.

Participants will access the webinar from their computers for video and audio. **A unique link for the webinar will be distributed to you on May 7, 2013.**

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COST: $75 per member; $100 for non-members

Deadline to register: May 6, 2013. Payment must be received prior to webinar in order for you to participate and receive access. Written cancellation must be made before May 6, 2013. No refunds will be made after May 6, 2013.

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