Dedicated to improving our civil justice system

IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

APRIL 2015 VOL. XVII, No. 1

Find us on Facebook, Twitter & LinkedIn

Changes to Civil Rule Procedure

by Thomas B. Read, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA

Thomas B. Read

New pre-trial procedure and discovery rules of civil procedure took effect on January 1, 2015, for all cases filed after January 1.

The Discovery Conference

Discovery now starts out with the Discovery Conference. The new rules require that the parties all participate in a Discovery Conference within 14 days after any defendant has filed an Answer. No discovery may take place before the Discovery Conference "except in a proceeding exempt from initial disclosure under Rule 1.500(1)(e) or when authorized by these rules, by stipulation or by court order." IRCP 1.505(1). The plaintiff has the duty to notify all parties of the discovery conference deadline. The filing of a pre-answer Motion does not relieve a party from either participating in the Discovery Conference or from making the initial disclosures, unless the parties stipulate otherwise or the court orders differently.

Continued on page 3

WHAT'S INSIDE

IDCA President's Letter

Should the Des Moines Water Works sue county supervisors in Calhoun, Buena Vista and Sac Counties over allegations the counties have failed to properly manage drainage districts, thereby violating the federal Clean Water Act? Heated debates among Iowa's citizens and elected officials as well as local and national media coverage about this issue abound.

Society is complex. Citizens, governmental entities and businesses encounter contentious disputes daily. Should an injured automobile passenger sue the driver, his best friend? Should a business sue over a contract breach? These are difficult questions for those involved. Most disputes do not end up in litigation. Nonetheless, courts provide a forum when our citizens, businesses and governmental bodies cannot find a satisfactory resolution on their own.

Academic courses such as Cornell University's spring 2013 seminar entitled "Conflict Resolution in Medieval Europe"[1] explored the history of dispute resolution. Historical methods of trial by ordeal (subjecting the accused to ordeals of water, fire or boiling oil), trial by combat (battles with swords and other deadly weapons to declare a victor), or personal duels depicted in western film genre certainly brought resolution to conflicts—but not in the manner our society finds to be fair, impartial or just.

Our founders recognized a need for a better system. Not only does the judicial branch balance governmental power, it also provides an important forum for conflict resolution, which, in turn allows us to live in a more civilized society. The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Attorneys involved in civil claims are buried in piles of daily work, responding to calls from clients and opposing counsel, or drafting motions and pleadings to meet deadlines. We can lose sight of the fact that our courts and our own legal work are crucial to why we no longer resolve disputes by subjecting wrongdoers to vats of boiling oil or epic swordfights. Certainly, the public at large often fails to appreciate the importance of our judicial system.

Patrick J. Geary, a medieval historian and professor at the Institute for Advanced Study in Princeton, New Jersey, once observed:

> "Along with keeping the peace, administering justice has been a paramount function of government in the western political tradition. Public justice is a keystone of modern social and political order, and for over six centuries has been both the goal of and often the mechanism for the creation of the nation state. . . . [T]he West has become accustomed to seeing more or less centralized, formal institutions of justice within which the normal disputes and frictions of living in complex society can be ironed out. . . . [W]hether the judicial system is actually engaged to resolve a conflict or simply invoked, overtly or tacitly, to press for a conclusion, courts capable of rendering relatively impartial, definitive decisions and of enforcing those decisions are an essential part of the fabric of western society."

Geary, "Living in Conflict in Stateless France: Conflict Management Mechanisms, 1050-1200", tr. from Annales 41 (1986).

Reading this passage reaffirms my belief in the necessity of a strong judicial system. Ours is a noble profession that helps to make not only our country but the world more civilized, though some may fail to understand how some lawsuits have no merit. Generally, our system successfully weeds those out. The majority of suits arise from a legitimate dispute and the parties need a mechanism to generate a solution. Lawyers supply the wide array of skills necessary to help the clients, juries and judges through the process of reaching that civilized solution.

Christine Conover
IDCA President

---

[1] *The fascinating syllabus is still viewable online at http://www.arts.cornell.edu/prh3/436/.*

Continued from Page 1

The purpose of a Discovery Conference is for the parties to agree upon a discovery plan. Rule 1.507(3) contains a list of matters that need to be discussed and included in a discovery plan:

a. Changes that should be made in the timing, form, or requirement for disclosures under rule 1.501(1), including a statement of when initial disclosures were made or will be made.

b. Subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

c. Issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

d. 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 under Iowa Rule of Evidence 5.502.

e. Changes that should be made to the limitations on discovery imposed under these rules, and other limitations that should be imposed.

f. Any other orders that the court should issue under rule 1.504 or under rule 1.602

If there are issues upon which the parties cannot agree any party may request that the court convene a pre-trial conference under Rule 1.602 to resolve any disputes.

The Initial Disclosures

The next step in the lawsuit is the initial disclosures. IRCP Rule 1.500. All parties now have an obligation to disclose to the other parties certain information. Before these new rules took effect, much of this information was divulged to other parties in response to interrogatories and requests for production of documents. Now, a party gives this information to the other parties without having formal written discovery propounded.

What is disclosed? Here's the list:

1. The name and, if known, the address, telephone numbers, and electronic mail address of each individual likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

2. All documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment. Note that the documents and electronically stored information must be served with the disclosure unless the party states good cause for not actually producing the documents and electronically stored information. If there would be undue burden or expense to produce the documents or information, "the disclosing party must provide a description by category and location and the name and address of the custodian of the document or electronically stored information." "A party who provides documents in disclosure must produce them as they are kept in the usual course of business."

   Defendants must produce the declarations page of the applicable insurance policy.

In addition, the plaintiff must produce a computation of each category of his or her claimed damages and the documents supporting the computation. Typically, this would include medical bills and health provider accounts showing the payments on the bills. This would also include wage information such as pay stubs and the plaintiff's employer's records showing the plaintiff's attendance records. The rule also provides that the plaintiff must divulge "materials bearing on the nature and extent of injuries suffered." This should include photos of the injuries as well as any video of the plaintiff before or after the accident. Note that this rule by itself does not require a plaintiff to specify the dollar amounts claimed for noneconomic damages. Presumably *Gordon v. Noel* is still good law so that this information can be pinned down in interrogatories.

Also, the plaintiff in a personal injury action must disclose:

1. His or her name and date of birth.

2. His or her Medicare health insurance claim number (HICN)

3. The names and addresses of the health care providers he or she consulted in the five years before the date of the injury.

4. Patient's waivers so that the opposing party can get the records. The rule provides the defendant must give "contemporaneous notice to the plaintiff when the defendant uses the patient's waiver, which means copying in plaintiff's counsel on the letters you send requesting copied of medical records. The rule also provides the defendant must give the plaintiff and all other parties copies of the records. So you don't want to get the records on a DVD but you'd rather have them the old fashioned way on paper? No problem, but the rule specifically provides that you will pay the cost of having a party produce the records in a non-electronic manner.

The plaintiff in a personal injury case must also disclose wage loss information. This includes:

1. The plaintiff's federal and state tax returns for the previous five years.
2. The names and addresses of the plaintiff's employers for the previous five years.
3. Written waivers so the defendant can obtain the plaintiff's employment files and pay records. Again, the defendant must give the plaintiff "contemporary notice" when the defendant requests this information from the employers and must give copies of the records to the plaintiff and all other parties. And, any party who wants paper copies instead of a DVD can pay for the cost of printing paper copies.

There is a specific rule for initial disclosures in domestic relations cases. For those of us who do these types of cases you are directed to Rule 1.500(1)(d).

Certain civil actions are exempt from these initial disclosure requirements. They are actions for certiorari or for judicial review of administrative agency actions, actions for forcible entry and detainer, adoption proceedings, name change proceedings, actions under Iowa Code Chapter 236, actions initiated by the Iowa Child Support Recovery Unit, domestic relations proceedings in which there are no contested claims, actions for post-conviction relief or any other proceeding to challenge a criminal conviction or sentence, probate proceedings in which there are no contested claims, juvenile proceedings, mental health proceedings, actions under Iowa Code chapters 229 and 229A and actions to enforce an arbitration award or an out-of-state judgment

The time to make these disclosures is at or within 14 days after the discovery conference. The parties can stipulate (or, the court can order) a different time for disclosure. If a party is first served with the Petition after the discovery conference or is added as a party after the discovery conference must make the initial disclosures 30 days after being served or joined, unless the parties stipulate to a different time or the court orders a different time.

Parties must make disclosure "based on the information then reasonably available to it." A party is not excused from making these disclosures because it hasn't investigated the case, yet, or because another party's disclosures are insufficient or nonexistent, or because the party's insurance company has the information.

New rule 1.500(4) provides, "Unless the court orders otherwise, all disclosures under rule 1.500 must be in writing, signed, and served." This Rule requires that the disclosing party create a document, probably similar to answers to interrogatories and responses to requests for production, that not only provides the required information, but also, lists the documents and other material that the party is disclosing.

Basically, the parties have obligations to turn over the relevant information they have at the time the initial disclosures are due. The plaintiff has more of a burden in this regard than the defendant, especially in the preparation of a computation of damages. But, the rule also provides that these initial disclosures must be supplemented as required by rules 1.503(4) and 1.508(3). This means that as the discovery proceeds throughout the case and the facts become more fully developed, there needs to be an ongoing supplementation of these disclosures

Discovery of Experts

Experts must be disclosed but not as part of the initial disclosures. Rather the timing and sequence of expert disclosures is to be set by either a stipulation of the parties or a court order. If there is no stipulation of the parties or a court order, the rule provides a default time for these expert disclosures: at least 90 days before the trial and rebuttal experts within 30 days after the disclosure of the expert whose evidence is being rebutted.

The rule divides experts into two groups—experts who must provide a written report and experts who do not need to provide a written report. An expert who must prepare a written report is an expert who is "retained or specially employed to provide expert testimony in the case or *one whose duties as the party's employee regularly involve giving expert testimony."* The written report must be prepared and signed by the witness. All other experts, such as treating physicians, do not need to provide a written report.

For expert witnesses who are required to provide a written report, the disclosure of the expert must be accompanied by the expert's written report. That report must contain:

1. A complete statement of all opinions the witness will express and the basis and reasons for them.
2. The facts or data considered by the witness in forming the opinions.
3. Any exhibits that will be used to summarize or support the opinions.
4. The witness's qualifications, including a list of all publications authored in the previous ten years.
5. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
6. A statement of the compensation to be paid for the study and testimony in the case.

For experts who are not required to provide a written report, the disclosure of the expert must state "the subject matter on which the [expert] witness is expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, and 5.705 and a summary of the facts and opinions to which the witness is expected to testify.

In addition to the disclosure rules concerning experts, the new rules govern additional discovery from experts. "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If rule 1.500(2)(b) requires a report from the expert, the deposition may be conducted only after the report is provided." IRCP Rule 1.508(1).

The new rules also protect from disclosure "drafts of any report or disclosure required under rule 1.500(2), regardless of the form in which the draft is recorded." IRCP 1.508(1). New rule IRCP 1.508(1) protects "communications between the party's attorney and any witness required to provide a report under rule 1.500(2)(b) regardless of the form of the communications, except to the extent that the communications:

1. Relate to compensation for the expert's study or testimony.
2. Identify facts or data that the party's attorney provided and that the expert considered informing the opinions to be expressed.
3. Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."

The committee comments point out that these new provisions follow the 2010 amendments to the federal rules

There is a new duty to supplement expert discovery, both as to information given in the expert's report and to information the expert gave in the expert's deposition. "For an expert whose report must be disclosed under rule 1.500(2)(b), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed no later than thirty (30) days before trial. Failure to disclose or supplement the identity of an expert witness or the information described in rule 1.500(2) is subject to sanctions under rule 1.517(3)(a)." IRCP 1.508(3). To conform to the concept of disclosures as a method of discovery, Rule 1.508(4) was amended to provide, "The expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's *disclosures,* report, deposition testimony, or supplement thereto."

Discovery

The new rules provide that the rules "should be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding and to provide the parties with access to all relevant facts." IRCP 1.501(2). This rule continues to provide that, "Discovery must be conducted in good faith, and responses to discovery requests, however made, must fairly address and meet the substance of the request."

Trial Witnesses

The scope of discovery has been expanded to specifically include "the identity of witnesses the party expects to call to testify at the trial. IRCP 1.503(1). Although the current rules provide that a party can discover through interrogatories the names of persons the other party intends to call as witnesses, according to the comments of the committee that drafted the new rules, "Presumably, this amendment would prohibit the practice of refusing to answer interrogatories seeking trial witnesses until required by rule 23.5—Form 2 [rule 1.500(3) if amended]. It would similarly assist counsel in determining whom to depose out of the potentially numerous "persons with knowledge of discoverable facts" disclosed by the opposing party." The new rules, however, do not expressly include discovery of an opposing party's trial exhibits until the pre-trial disclosure deadline a few weeks before trial

Interrogatories

There are a few new additions to the rules on interrogatories. First, "Each interrogatory, unless the court has ordered otherwise, must be provided electronically in a word processing format. An interrogatory that does not comply with this requirement is subject to objection." IRCP 1.509(1). Second, the new rules specifically allow a party to answer an interrogatory in whole or in part subject to an objection without waiving the objection. A party still has the duty to supplement the interrogatory the party objects to, but the supplementation of such an interrogatory does not waive the objection. Note that new rule requires if a party provides some information but withholds other information because of the objection the party must in some fashion "specify the extent to which the requested information has not been provided." IRCP 1.509(1)(c).

New rule 1.509(4) foreshadows the coming to Iowa of pattern interrogatories. "The supreme court, by administrative order, may approve pattern interrogatories for different classes of cases. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any discrete subpart to a non-pattern interrogatory shall be considered as a separate interrogatory."

Requests for Production

There are new rules for requests for production. "If the responding party states that it will produce copies of documents or of electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated

in the response. IRCP 1.512(2)(b). A response that documents will be produced at some unspecified time in the future is no longer acceptable. Objections to a request for production, in whole or in part, must be stated specifically. Like interrogatory answers. "A party may respond to a request in whole or in part subject to an objection without waiving that objection. Any response so provided is subject to the duty to supplement set forth in rule 1.503(4), but the party does not waive the objection by supplementing." IRCP 1.512(2)(b)(3). Also like objections to interrogatories, "Where a response is provided subject to an objection, the responding party must specify the extent to which the requested information has not been provided." IRCP 1.512(2)(b)(4).

The new rules provide to some extent rules for electronically stored information.

1. The response may state an objection to a requested form for producing electronically stored information. IRCP 1.512(2)(b)(5).
2. If the responding party objects to a requested form for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. IRCP 1.512(2)(b)(5).
3. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. IRCP 1.512(2)(d).
4. If a request does not specify the form for producing electronically stored information, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable. IRCP 1.512(2)(d).
5. A party need not produce the same electronically stored information in more than one form. IRCP 1.512(2)(d).

Finally, like interrogatories, look for pattern requests for production in the future. "The supreme court, by administrative order, may approve pattern requests for production for different classes of cases." IRCP 1.512(3).

Supplementation of Responses

Parties continue to have a duty to supplement and correct discovery responses concerning the identity of persons having knowledge of discoverable matters, the identity of person who are expected to be called as a witness at trial, and any other matter that bears materially upon a party's claim or defense. IRCP 1.503(4). But, the former rule also required to supplement a discovery response if the party learns the response was incorrect when made or, even though it was correct when made, it is no longer correct and a failure to amend the response amounts to a "knowing concealment." The new rule eliminates the "knowing concealment" requirement and the distinction between responses that were correct when made and responses that are no longer true and simply states, "supplement or correct its disclosure or a prior response if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. Thus, the new rule conforms to the federal practice. Note that the new rule applies to supplementing the initial disclosures as well as other discovery responses.

Counsel's Certification by Signing Discovery Responses

Previous Rule of Civil Procedure 1.413 provides that, by signing a motion, pleading, or other paper, counsel certified that the motion or pleading was well grounded in fact and not interposed for an improper purpose.

The new rules create a separate certification requirement for discovery. The committee's rationale for doing this was, "Having a separate certification requirement tailored specifically to discovery might more effectively deter the types of discovery abuse reported by the Task Force."

Attorneys must sign not only discovery responses but the disclosures required by new Rule 500 as well. The new rule provides, "By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

1. The disclosure is complete and correct as of the time it is made.
2. The discovery request, response, or objection is:
    1) Consistent with these rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law.
    2) Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
    3) Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

There are penalties for violating this rule. "If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." IRCP 1.503(6)(c).

Reliance on Other Party's Disclosures

New Rule 1.503(7) provides, "Any party can rely on any other party's disclosures or discovery responses to the extent permitted by otherwise applicable evidentiary rules and regardless of when that party is joined." The rule continues, "Unless a remaining party requests the responding party to do so, the responding party has no duty to supplement its responses to discovery requests after the propounding party has been dismissed from the case.

Court Orders that Limit Discovery

Rule 1.503(8) is the rule that allows a court to control excessive discovery. It is patterned after the Federal Rule. Previously, a party could seek a protective order to limit the frequency of the various discovery methods because of cumulative or duplicative discovery or because the burden of proposed discovery outweighed its likely benefit. The committee decided to remove this language from the rule on protective orders and give it its own separate rule of procedure. The committee comment says, "Moving the provision to the general discovery provisions emphasizes the proportionality principle and imposes an independent obligation upon the court to police the proportionality of discovery." The analogous federal rule is Fed. R. Civ. P. 26(b)(2).

Specifically, IRCP 1.503(8) provides:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:
>
> a. 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,
>
> b. The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> c. 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.

The committee's comments about this rule quote the federal committee's comments to the federal rule. "The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision(b)(2) to control excessive discovery."

Rule 1.504, the rule on protective orders,now allows the court to allocate expenses for discovery conducted under a protective order. Under the new rule the Court may order, "That the discovery may be had only on specified terms and conditions, including a designation of the time or place, *or the allocation of expenses*. According to the committee comments, "This is a new proposal based on the proposed amendment to Fed. R. Civ. P. 26(c). The federal proposal explicitly recognizes the court's existing authority to issue protective orders that allocate expenses for disclosure or discovery."

A new provision in the protective order rule requires that the parties try to agree upon a protective order before seeking court intervention, exactly like the requirement that the parties try to resolve discovery disputes before filing a discovery motion. "A motion for protective order must include a certification that the movant has in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action. The certification must identify the date and time of the personal conference and of any attempts to confer." IRCP 1.504(3).

Court Orders that Compel Discovery

A new requirement is added for discovery motions. Previously, the rules required a party who files a discovery motion to allege that there has been a good faith attempt to resolve the issue before having to file a motion. Now, before filing a discovery motion the movant must have "in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action." The motion, itself, "must include a certification that the movant has "in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action." The certification must identify the date and time of the personal conference and of any attempts to confer." No longer can you simply send out a letter or an e-mail with the tag line about how the letter or the e-mail constitutes a good faith effort to resolve the dispute. You have to pick up the phone and call opposing counsel to try to work things out. IRCP 1.503(3).

Penalties for Violating the Rules

There are new rules for the failure to abide by the disclosure or discovery rules. Any party can move to compel the initial disclosures or for sanctions. 1.517(1)(b)(1). A party who fails to actually produce documents is subject to a motion to compel. IRCP 1.517(1)(b)(2).

If a party files a motion to compel and no timely resistance is filed, the court may grant the motion without a hearing. IRCP 1.517(1)(b)(4).

The new rules broaden the provisions on the award of expenses when a motion to compel is granted. Previously, the rule required the granting of a motion to compel to trigger the requirement that the court award the expenses incurred, including attorney fees, in obtaining the order (unless the court finds that the opposition to

the motion was substantially justified or that other circumstances make an award of expenses unjust). Under the new rule, even if the disclosure or requested discovery is provided after the motion to compel is filed, the movant may still have its expenses incurred in filing the motion awarded. IRCP 1.517(1)(d).

Former rule 1.517(3) governed the award of expenses against a party who failed to admit the genuineness of any document or the truth of any matter as requested. The new rule 1.517(3) adds possible sanctions if a party fails to provide information or identify a witness as required by the rules. The first sanction is, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial. An escape clause in the new rule allows a party to use the non-disclosed information or witness if the failure to disclose was "substantially justified or is harmless."

In addition to this sanction, or in lieu of it, the Court may, upon motion:

1. order payment of the reasonable expenses, including attorney's fees, caused by the failure.

2. inform the jury of the party's failure.

3. impose other appropriate sanctions, including any of the orders listed in rule 1.517(2)(b).

Rule1.517(2)(b) lists the sanctions a court may impose when a party fails to obey an order to provide or permit discovery. These sanctions remain unchanged.

There is an addition to the Rules for conduct of counsel during a deposition. Rule 1.708(1) now explicitly provides, "An objection must be stated concisely in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 1.708(2)."

Rule 1.708(2) deals with the prospect of sanctions against counsel or other persons at a deposition. 1.708(2)(a) deals with "a person who impedes, delays, or frustrates the fair examination of the deponent." Such a person is subject to "an appropriate sanction, including the reasonable expenses and attorney's fees incurred by any party." No specific sanctions are mentioned in this new rule.

The former Rule 1.708(2), now renumbered 1.708(2)(b), deals with a deposition "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party". This rule remains unchanged.

Pretrial Disclosures

Finally, the new rules provide for additional disclosures a few weeks before trial. New rule 1.500(3) requires a party to provide to the other parties and file the following information:

1. The name and, if not previously provided, the address, telephone numbers, and electronic mail address of each witness—separately identifying those the party expects to present and those it may call if the need arises.

2. The page and line designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition.

3. An identification of each document or other exhibit, including summaries of other evidence— separately identifying those items the party expects to offer and those it may offer if the need arises.

Unless the Court otherwise orders, the parties must make these disclosures at least 14 days before trial. Also, unless the court otherwise orders, within seven days after a party makes these disclosures, the opposing party or parties must respond to both the deposition designation and the list of exhibits. If an opposing party has an objection under Rule 1.704 to the use of the deposition, that objection must be made in that party's response. Also, an opposing party must make "any objection, together with the grounds for it, that may be made to the admissibility of materials identified under rule 1.500(3)(a)(3). An objection not so made—except for one under Iowa rule of evidence 5.402 or 5.403 [relevancy]—is waived unless excused by the court for good cause."

Note that the requirement of disclosing witnesses and exhibits shortly before trial does not excuse from timely supplementing disclosures and discovery responses pursuant to Rule 1.503(4)(a)(2) as the case proceeds. IRCP 1.500(3)(c).

We hope this article has given you an alert to the new rules that took effect as of January 1, 2015. As always there is no substitute for reading the actual rules themselves.

Casenote: Iowa Supreme Court Offers Up Dueling Standards For The Discovery Of Medical Records

by Ryan Koopmans, Nyemaster Goode, P.C. Des Moines, IA

Ryan Koopmans

The discovery of medical records is in limbo after the Iowa Supreme Court's recent decision in Fagen v. Iddings. Three justices (Wiggins, Hecht, and Appel) voted to create a new "protocol" for obtaining a medical waiver under Iowa Code section 622.10; three justices (Cady, Waterman, and Mansfield) voted not to adopt that protocol; and Justice Zager concurred "in result only."

Because of the 3-3 split, Justice Zager's concurring opinion would normally have been the controlling one. But since he didn't file an opinion, the law will likely be unsettled until the Supreme Court considers the issue again.

A patient's medical records are privileged under Iowa law, but Iowa Code section 622.10 states that the patient waives that privilege if he files a lawsuit and puts his medical condition at issue. The plaintiff in this case, Cameron Fagen, filed a lawsuit against his college dormmates for injuries that Fagen suffered when he fell to the ground while wrapped in carpet. (Fagen's dormmates did the wrapping.) Because Fagen alleged that he suffers from mental pain and mental disability as a result of the accident, the defendants asked Fagen for his mental health records. Fagen resisted, saying that his allegations of mental pain and disability were just "garden variety" emotional distress—the kind that any person in his shoes would suffer—and thus he had not waived the patient-physician privilege by bringing the lawsuit.

The district court disagreed, ruling that there is no "garden-variety" exception under Iowa law, and thus the defendants could have access to the medical records. Fagen asked the Iowa Supreme Court to review that decision on interlocutory appeal, and the Supreme Court granted that request.

On April 3, the Iowa Supreme Court issued its decision. At first glance, it looks like Fagen won. But that's not clear, and it's less clear what the law is going forward.

Justice Wiggins, joined by Justices Hecht and Appel, reversed the district court's decision (which required Fagen to sign the patient waiver). The three justices didn't adopt the garden-variety exception (which is the only argument Fagen made on appeal), but instead adopted a new "protocol," under which a party does not waive the patient-physician privilege unless the person requesting the records makes a "showing that he or she has a reasonable basis to believe the specific records are likely to contain information relevant to an element or factor of the claim or defense of the person or of any party claiming through or under the privilege." The defendants had not made that showing in the district court (because the standard didn't exist at the time), so Justices Wiggins, Hecht, and Appel voted to send the case back for a redo. The concluding paragraph of Justice Wiggins's opinion states in full:

> We reverse the district court's order requiring Fagen to sign a patient's waiver for his mental health records concerning his anger-management counseling and remand this case to the district court to follow the protocol contained in this opinion pertaining to the release of a party's mental health records in a civil action.

Three other justices–Chief Justice Cady and Justices Waterman and Mansfield–dissented. They disagree with the new protocol and don't think it should be applied in this case. The dissenters, through an opinion by Justice Mansfield, accused the plurality of "disregarding the question we are supposed to answer"–i.e., whether there is a garden-variety exception under Iowa law–"and instead answering a question nobody asked us to answer." This new protocol, Justice Mansfield wrote, "may force a defendant to spend time on extra depositions trying to find indirect evidence of the plaintiff's mental health condition" and "may cause trial dates to be postponed because the district court will be unable to rule on whether mental health records should be produced until fact discovery is largely complete—i.e., on the eve of trial." Because Fagen pleaded that he suffered damages for mental anguish and mental disability, they voted to affirm the district court.

That left Justice Zager. He concurred with the first three justices (Wiggins, Hecht, and Appel), but "in result only." And he didn't say anything else. He didn't explain what part of Justice Wiggins's opinion he disagreed with. And he didn't say what test he would apply.

So three justices voted in favor of using Justice Wiggins's protocol; three justices voted against using Justice Wiggins's protocol; and one justice concurred in result only. What's the law?

That depends, it seems, on what the "result" is, since that's what Justice Zager is concurring in. At its highest level, the result is that the court is reversing the district court's decision and remanding

the case. But what happens on remand? What test is the district court supposed to apply? If Justice Zager isn't signing onto Justice Wiggins's protocol, then that protocol didn't get a majority vote. It's not the law. Of course, neither is the dissent's position, and we don't know what Justice Zager thinks, so we have no majority rule. Just a 3-3 split.

At the same time, the "result"—as framed by Justice Wiggins—was to reverse and "remand this case to the district court to follow the protocol contained in this opinion pertaining to the release of a party's mental health records." But if that's the result that Justice Zager was concurring in—meaning that Justice Zager is on board with Justice Wiggins's new test—then what part of the opinion does he disagree with?

Those are the questions that district court judges will have to answer in dozens of cases to come. It'll be interesting to see if the answers are consistent.

Malpractice Risks Remain High for Litigators

by Todd C. Scott, VP Risk Management, Minnesota Lawyers Mutual Ins. Co., Minneapolis, MN

Todd Scott

Practicing law and representing clients is fraught with risk. Much time and money is invested in resolving people's problems, and if mistakes are made the effects can be costly. But what is the riskiest practice area? Who are the lawyers that are most likely to have upset clients and get sued for malpractice?

For years, if you answered, "Litigation," or more specifically, "litigators who represent plaintiffs in personal injury matters," you wouldn't get much argument out of anyone. And the numbers support that view.

In fact, in 1985 when the American Bar Association Standing Committee on Lawyers Professional Liability began surveying insurers and gathering data on malpractice claims against attorneys, the lawyers involved in litigation representing plaintiffs in personal injury matters reported over 25 percent of all the claims in the study—and that's comparing the litigators to lawyers in 24 other areas of practice. In the years since, that same group of attorneys have nearly always held on to the lead in having the most malpractice claims over their legal peers.

There are several contributing factors that lead to litigators being the group of attorneys most likely to get sued by their clients. Having a malpractice claim doesn't always mean that the responsible attorney made a mistake in judgment. But simply put, litigators seem to be a magnet for claim activity because in their world, there is more opportunity for things to go wrong.

When examining the list of mistakes and errors that are often alleged against litigators, the standout ones (and usually the most difficult to defend) involve an indisputable error where there is little or no hope of correcting the matter. Errors such as missing a statute of limitations deadline, or the failure to timely name a proper party in an initial pleading, frequently happen and can be costly if it lessens the value of the client's case and there is no opportunity for rectifying the matter. When these types of claims arrive on the desks of the defense-minded insurance adjusters, often the only question that can be asked at that point is, "Was there any value to the underlying matter?"

Equally troubling are the types of claims asserted against litigators where it may not be so clear whether the attorney committed an error, but proving the litigator acted appropriately is still an expensive and arduous task. Claims, such as communication errors, where the client alleges they were not properly informed about the effects of accepting a settlement, often involve murky facts where the lawyer has difficulty disproving the allegation. Or errors where the client alleges the final case result was not a good one, and the outcome could have been a lot better had the attorney followed the client's strategy for the handling of the case.

Even if things were communicated properly to the client during the course of the representation, clients "misremember" things, and unless the attorney memorialized the conversation in a note to the file or a client memo, proving that the lawyer gave the right advice to the client during the course of the litigation is sometimes impossible.

The list of things that could go wrong at any phase in a law suit seems endless, but compounding the litigator's troubles is the concern that, not only do litigators report the most number of malpractice claims, but the claims they report tend to be the most expensive matters to resolve. In other practice areas such as family law, real estate, and commercial practice, the damage total when things go wrong can vary significantly. However, litigation claims more consistently involve high-value cases, and as the dispute involving the lawyer's error becomes more protracted, the cost of settlement can be very high.

Despite this assessment of the minefield that awaits aspiring litigators, there is a glimmer of hope on the horizon. In the ABA Standing Committee's most recent survey published in 2012, the number of claims asserted against attorneys representing plaintiffs in personal injury matters took a significant downward turn when measured against the previous four-year study. Malpractice claims involving litigators in personal injury practice saw a drop of 8.44 percent between 2006 and 2011, and the 2012 report had this group at an all-time low of 15.14 percent of all claims reported during the study period.

AMATEUR NIGHT: EVERYONE THINKS THEY'RE A LITIGATOR

Craig, an attorney in the Midwest who specializes in estate planning, has experienced firsthand how something that appears to be a routine lawsuit can quickly transform into every lawyer's nightmare. Adding to the rub for Craig was the fact that he never wanted to take on an accident case to begin with, but was urged on by a distraught family friend who convinced the attorney that he was the only lawyer he could trust to handle a case involving the death of his high-school aged daughter.

Craig's client lost his daughter when the driver of a car she was

traveling in failed to yield to a train, late at night at a dimly lit railroad crossing. Craig and his spouse knew the client well before the accident, and frequently spoke with the client's family at church events and school activities, so Craig was acutely aware of the pain the client was experiencing when he asked Craig to represent the family in a case against the railroad. Although the attorney's initial instinct was to refer the matter to a lawyer familiar with railroad accidents, he reluctantly agreed to represent the family and "get the litigation started," but only after advising the distraught parents that if at some point they needed to associate with a specialist, Craig would have their permission to do so.

Craig had some previous experience with accident cases, but what Craig didn't know is that claims involving railroad crossings can differ significantly in complexity, and because of varying notice requirements and statutes of limitations, they are not like your everyday car accidents. Getting all of the parties before the court in time can be a real challenge because there are issues of who owns the track, who operates the train, who's maintaining the cross warning devices, and who's responsible for the sight line at the scene of the accident.

When Craig finally sought additional help, two years after the accident from an attorney familiar with the proper handling of claims involving railroad crossings, he was informed by the specialist in a memo that his, "Failure to name the necessary defendants [in the client's matter] may negatively impact the plaintiff's recovery since the statute of limitations has already run as to those missing parties."

To make matters worse, the horrible realization that his failure to timely include certain defendant's in the litigation only caused Craig to freeze up and enter a state of mental paralysis, where he avoided the client for weeks because he had no idea about how to inform him that the attorney's negligence might have caused him to make a fatal error in the case. The attorney simply couldn't believe that he had screwed up one of the most important cases in his office—one that involved the unfortunate death in the family of a close friend.

Craig's case is troubling on many levels because there were so many warning signs that things might go wrong. The informality of the attorney client relationship, along with Craig's initial reluctance to handle the matter, should have been a clue to Craig that he was not the right attorney for the job. Handling cases for close friends and family members can be problematic because often the attorney's sense of good judgment goes out the door as they desperately seek a good outcome for their close friend or family relative.

Craig had previous experience handing personal injury matters but not complex cases involving a railroad defendant and an accident scene on federal government property. *ABA Model Rule 1.1 Competence* allows for lawyers to take on new types of matters that they have not handled before—after all, if taking on new types of cases wasn't allowed under the Rules, no attorney would have a chance to expand their knowledge base. But attorneys are not absolved from understanding the complex aspects of their cases. In other words, you need to know what you don't know. In this case, Craig would have been wise to associate with a more experienced attorney early on in the matter to make sure all proper defendants were included in his initial court pleading.

Malpractice is not like a fine wine. It doesn't get better with age. Craig's hesitancy to consult with his client about the bad news was not only a likely violation of the attorney's responsibilities to keep the client fully informed of all important aspects of the case (*ABA Model Rule 1.4 Communications)* but the delay could have jeopardized Craig's ability to secure insurance coverage if the client had brought a malpractice claim against him.

Your professional liability insurance policy typically includes a definition of a claim, and often the insurer will reserve the right to deny coverage if the policyholder knew of a claim but failed to report it to the carrier. Such policy language is included to encourage lawyers to report claims early, thus giving the insurer a chance to step in and possibly correct the situation before the damages in the underlying matter get worse.

Finally, Craig's case is a good example of how sometimes having a serious malpractice claim doesn't always mean that there is no hope for fixing the matter and the attorney's world has come to an end. In this case, one of the defendants that was previously included in the suit successfully impleaded the party that Craig had negligently omitted. With the court approving the addition of the defendant that Craig had failed to include in his initial pleadings, Craig's railroad case was back on track.

AVOIDING THE MOST COMMON LITIGATOR MISTAKES

Despite all the complexities of modern day litigation, most of the errors litigators make involve missed deadlines and failing to properly communicate with clients. This means there are a lot of good litigators who are still very vulnerable to having a malpractice claim because of deficiencies in their docket control and tickler systems. Fortunately, these types of claims are very preventable with the implementation of good file management procedures in the firm.

The key to any good file management system is to enter key client information as soon as it is available and to have total participation by everyone in the firm. There are many software applications available to assist lawyers with docket control tasks, and they contain features that are attractive to all types of computer users. The following are a few key topics litigators should examine for avoiding malpractice claims in their law practice:

Docket Control. The most common malpractice error in litigation continues to be missing court deadlines. Make sure you have a

thorough calendar and docket control system, as well as good procedures to prevent calendar errors. Case management software continues to be one of the best tools lawyers can use to stay on top of calendar deadlines. The docket control features found in case management software will alert the attorney to check the file regularly, and provide multiple notices when an important deadline is approaching. By having all members of the firm involved in the case management process, the team can be notified when a key deadline is approaching. Docket control reporting features found in the software also makes it easier for supervising attorneys to keep an eye on all the open files in the firm to see if any one of them may be close to approaching a critical deadline.

Dabbling. Lawyers often think of an attorney dabbler as someone who has no knowledge of a practice area but decides to give it a try to see if he or she can successfully expand their knowledge base—and perhaps create a new source of revenue for the firm in the process. It is especially tempting for attorneys to become dabblers if they recognize a potentially lucrative case walk in the door and they feel the litigation will be "a slam dunk." But dabblers sometimes come in a different form, such as the attorney who understands a practice area but doesn't have the experience handling such cases in a neighboring jurisdiction. Or the type of attorney who understands litigation, but may not have the experience handling highly specialized matters such as railroad claims, patent prosecution, or medical malpractice. In all cases, attorneys should avoiding taking on new matters that they recognize they don't have the qualifications or experience to handle.

Communicating With Clients. You may give good advice to your litigation clients, but if your most crucial advice—such as whether the client ought to settle a case—is misunderstood or completely ignored, proving that you ever gave that advice is a difficult task if there is no record of it in the file. There are many examples of "settler's remorse" where a party to a matter regrets agreeing to a settlement long after the case is concluded. As the upset client starts to see the effects of their decision they sometimes accuse their attorney of, leaving out crucial information or otherwise not properly advising them during the settlement period. By taking the time to put your advice in writing, you are providing an important service for the client and you will also have a record of the advice for your file. This is especially important if a client is inclined to reject your advice and you feel they may very much regret their decision.

Phone Calls. You should always return phone calls promptly. Returning phone calls within 24 hours is a good rule of thumb. A lawyer's failure to return phone calls continues to be one of the most common ethics complaints received by state bars and disciplinary boards. It also happens to be one of the things that many lawyers do that frustrate clients the most. A law firm should have standard policies in place regarding returning and handling phone calls. If you are unavailable for a long period of time, ask your staff to assist you in contacting your clients, but don't use your staff as a substitute for personal contact.Perhaps a difficult but necessary way to stay on top of your client communication responsibilities is to have the first call of the day be the one that you are dreading the most.

Informality. Where an attorney is representing a family member, a friend or someone with whom he or she has had a long-standing relationship, it is common for the working relationship to be more casual. When this occurs, the typical office procedures and formalities that would normally be applied to handling the client's matter are often not maintained. This has the potential to be harmful to both the client and the lawyer. If you feel you must represent the friend or family member, try to maintain formal case handling procedures that you have already established for yourself—such as meeting the client in your office to discuss the matter rather than at a family gathering. By maintaining your formal client handling processes you're more likely handle the matter using the same kind of reserve and judgment that you would apply to your cases involving non-family clients. A better choice would be to provide initial counseling to the friend or family member if you feel qualified to do so, with the goal of getting them connected with a dispassionate attorney who could successfully take over the handling of the matter.

Associating with Counsel. Whether it is an association or a referral, the lawyer should, pursuant to *ABA Model Rule 1.5 Fees*, discuss the arrangement involving multiple attorneys with the client. Particularly:

- Whether the division is in proportion to the services performed by each lawyer;
- To determine if the client agrees to the arrangement (including the share each lawyer will receive) and the client's agreement is confirmed in writing.

A client who is not fully aware that their lawyer is associating with another attorney on the matter is almost always likely to get upset. Moreover, if they feel the division of fee is unreasonable there is a good chance they will challenge the fee and bring a claim against you. That is why it is important to have a clear understanding with the client at the outset that more than one attorney will be involved in the case, and to memorialize the client's understanding in writing. Also, it is important to remember that association of counsel does not terminate the attorney's representation and duty to the client; typically, both attorneys continue to have responsibility for the case. However, pursuant to *ABA Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer*, the attorneys should try to clearly define their individual duties in writing to the client. Thus, the association of counsel can shift responsibility and legal liability to the attorney commensurate with that attorney's agreement to undertake the matter.

YOUNG LAWYER PROFILE

In every issue of Defense Update, we will highlight a young lawyer. This month, we get to know Dustin T. Zeschke, Swisher & Cohrt, P.L.C, in Waterloo.

Dustin Zeschke is an associate attorney at Swisher & Cohrt P.L.C where he practices in Civil Litigation. Dustin's primary focus is Personal Injury and Insurance Defense.

Dustin was born and raised in Waterloo. He graduated from the University of Iowa in 2008 with a degree in finance and earned his law degree from Drake University in 2011. While in law school, Dustin was a student intern at Swisher & Cohrt P.L.C for two years.

Dustin sits on the IDCA Board of Directors and co-chairs the IDCA's Young Lawyers Committee. He also is a member of the Black Hawk County Bar Association, Iowa State Bar Association and Defense Research Institute. He is licensed to practice in the U.S. District Court Northern & Southern Districts of Iowa

Dustin enjoys fishing, boating, golfing and spending time with family and friends. Dustin looks forward to recruiting new IDCA members. Feel free to contact him at zeschke@s-c-law.comfor more information about IDCA's Young Lawyers Committee.

IDCA Welcomes 7 New Members

ATTORNEYS

Ryan F. Gerdes
McDonald, Woodward & Carlson, PC
3432 Jersey Ridge Road
Davenport, IA 52807
(563) 355-6478
rgerdes@mwilawyers.com

Nathan J. Rockman
DeKoter, Thole & Dawson, PLC
315 9th Street, Box 253
Sibley, IA 51249
(712) 754-4601
nrockman@sibleylaw.com

Ryan Stefani
Nyemaster Goode, PC
700 Walnut Street, Suite 1600
Des Moines, IA 50309
(515) 283-8172
rstefani@nyemaster.com

Darwin Scot Williams
Jardine, Logan & O'Brien, PLLP
8519 Eagle Point Blvd., Suite 100
Lake Elmo, MN 55042
(651) 290-6500
dwilliams@jlolaw.com

CLAIMS PROFESSIONALS

Grinnell Mutual Reinsurance Company
4215 Highway 146
Grinnell, IA 50112

Contacts:
Kevin Dowling, Assistant Vice President
(641) 269-8804
kdowling@gmrc.com

Scott Sharp, Vice President - Claims
(641) 269-8634
ssharp@gmrc.com

Paul Bishop, Director - Claims
Grinnell Mutual Reinsurance Company
pbishop@gmrc.com

New IDCA Website

The Iowa Defense Counsel Association is proud to officially announce the launch of our new website, www.IowaDefenseCounsel.org. This is a fully-integrated and interactive membership website. Log in to access several new features for members only!

Log In

As an IDCA member, you already have an IDCA website account. Your Username is your first initial of your first name combined with your last name. (ie: John Smith's Username would be JSmith.)

Your Password is your IDCA membership ID followed by a zero (0). (ie: if your membership number is 12345, your Password would be 123450.) If you need your Password sent to you, click "Forgot my password" and it will be emailed to you.

We encourage you to check the box **Remember me on this computer.** This will keep you signed in between sessions, saving you time when you wish to access resources.

When you sign-in, you will be taken to the **Member Home Page.** The Member Home Page is your central resource for IDCA announcements, events and things to do!

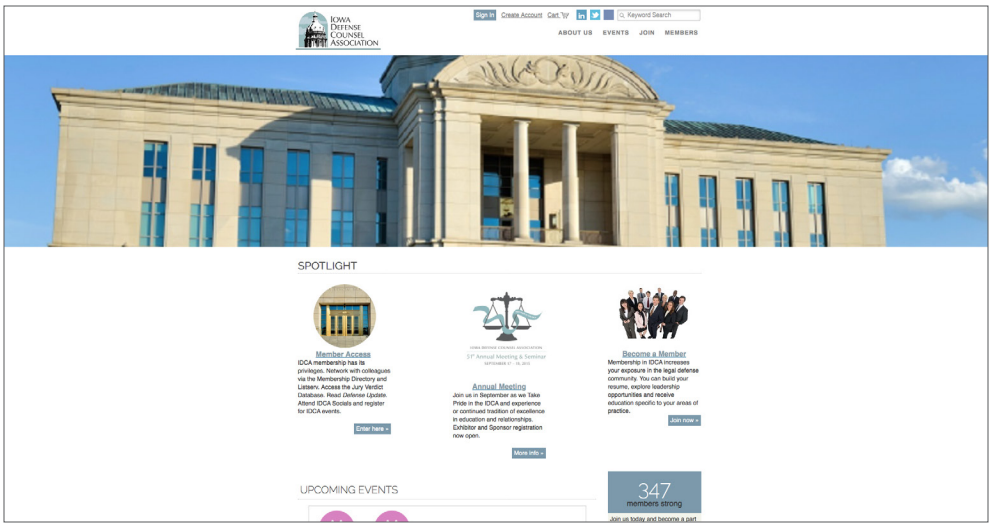
Your first step is to edit your profile. Be sure to update your practice or specialty areas and add your photo. Other IDCA members will be able to view your Public Profile in the Membership Directory.

Now that you are logged in, explore!

- **Membership Directory** – You can now search the Membership Directory for lawyers, claims professionals and students. You can narrow down your search further by name, location or practice areas.
- **Jury Verdict Database** – A searchable, user-friendly database allowing you to search for verdict information AND to add in your own! This can be a powerful database for IDCA members, but we need you to add your information in order for this tool to be effective! We encourage you to add your own jury verdict information through the simple online form.
- **Listserv** – We moved the listserv to the website and are now archiving discussion threads. When you send an email to members@mailinglist.iowadefensecounsel.org, your email is sent to all IDCA members. Members may reply to you directly, or the thread. Your original email and those that reply to the tread will be kept in the Listserv Archives for other members to access at a later date.
- **Defense Update** – Are you looking for a past Defense Update article? Look no further than IDCA's website. You can read the most recent issue of the newsletter online, and you can search the Defense Update Index and access archived articles.
- **FAQs** – To learn more about the power of this new website, be sure to read the FAQs! Be sure you read the section on How do I view my CLE credits!

The website effort was huge, and IDCA thanks all those who worked diligently on this project. We believe immediate access to resources will enhance your membership experience for years to come.

If you have questions or technical issues, please contact Heather Tamminga at staff@iowadefensecounsel.org.



IDCA Schedule of Events

September 17 – 18, 2015

51ST ANNUAL MEETING & SEMINAR
Stoney Creek Hotel & Conference Center
Johnston, IA