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IOWA DEFENSE COUNSEL ASSOCIATION

# DEFENSE UPDATE

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## Understanding the Changing Nature of Walking and Driving

by David M. Cades, Ph.D., Robyn S. Brinkerhoff, Ph.D., and Emily Skow, Ph.D., Exponent



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Join David M. Cades, Ph.D., during the 2016 IDCA Annual Meeting & Seminar. Dr. Cades will discuss "The Distracted Driver: Science, Application, Investigation" on Thursday, September 22. Meeting details and registration are online, [www.iowadefensecounsel.org/AnnualMeeting2016](http://www.iowadefensecounsel.org/AnnualMeeting2016)

The proliferation of mobile technology and its use while performing other everyday tasks has become increasingly widespread. It seems that each day we become more and more reliant on our devices to simply get through the day – with use that spans across our personal and professional lives. It is now commonplace to use a mobile device while engaging in other, often safety-critical, activities, such as driving and walking. Think about how often you have observed a driver or pedestrian staring at or talking on a cell phone or some other mobile device while driving or walking. Due in part to the increasing use of these devices, as well as evidence of significant adverse consequences of mobile device use during other tasks, research, regulations, and litigation related to driver and pedestrian distraction are also becoming more common. Decades of research have demonstrated behavioral detriments associated with distracted driving (e.g., slower reaction times, poorer visual scanning), and accident data reveals that approximately a quarter of automobile accidents are associated with cell phone usage.<sup>1</sup> Further, almost every state has some form of regulation limiting the use of mobile devices while driving.

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## IDCA President's Letter



Noel McKibbin  
IDCA President

How time does fly...we are fast approaching the IDCA annual meeting which will be held September 22–23, 2016, at the Stoney Creek Hotel & Conference Center in Johnston, Iowa. As we members have grown accustomed, this year's agenda will be outstanding. President-Elect Richard Whitty and a host of members including our Executive Director, Heather Tamminga, have done an exceptional job in designing and planning the meeting. This is an excellent opportunity to gain substantive knowledge and to renew or create new friendships. The agenda includes an evening reception at the State Historical Museum which is another great opportunity for networking.

We are featuring two articles in this edition of the *Defense Update* authored by two of our speakers who will appear at the meeting. Dr. David Cades, a human factors scientist with Exponent, will be presenting Thursday afternoon on "The Distracted Driver: Science, Application, Investigation." His article in this issue explains the effects that mobile devices have upon drivers and pedestrians. It's an excellent review of human factors which may have an impact on your fact finding requirements on a given case. Be sure to attend the presentation for additional practice pointers.

The second article is authored by presenter Robert Kirtley of Robert N. Kirtley Consulting. Mr. Kirtley has over 20 years of management consulting experience on a range of information governance, information management and security and

compliance issues with law firms, corporate and government clients. He will present Friday morning and share "20 eDiscovery Warnings in 60 Minutes." His article reviews the threat of data breaches and the means to prevent/mitigate the consequences of a breach.

The Annual Meeting also will include presentations on: Federal Rules of Civil Procedures, Client Trust Accounts, Ethical Preparation of Witnesses, Rules of Evidence, PTSD, Attorney-Client Security Measures, Affordable Care Act, and our case law updates.

A great program that we request each of you to be a part of the experience.

I would also like to take this opportunity to thank our sponsors and exhibitors to-date:

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### DEPOSITION BOOT CAMP

Another event we are proud to sponsor is our Deposition Boot Camp which will be held Friday, October 28, 2016, at the campus of Grinnell Mutual Insurance Company, Grinnell, Iowa. As the name implies, this will be a practical training experience on the art of taking a deposition. Kami Holmes and Diane Reinsch have developed an excellent curriculum which is worthy of becoming an annual event for IDCA. Registration is limited to 24 attendees, so please register at [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org) to reserve your seat.

### IDCA

At our June 2016 Board meeting our discussion agenda item was our committee organization model. The conversation explored a review of the committee concept and specific issues as follows: do we need more/less committees; what are the expectations/responsibilities of the committees; what are member's expectations of the committee(s); how do we improve committee communications with each other and the organization; how do we improve committee activity/functions; being a committee member is intended to be a resume builder; do we have the right committees; should committee work be project driven only.

The discussion was participative, lively, and generated worthy ideas for the Board of Directors to consider. If you have a suggestion/comment on the topic please submit to me.

Relatedly, a special acknowledgement to Dustin Zescheke and Katie Graham, co-chairs of the New Lawyers Committee, for planning and hosting a social at Malo in Des Moines. Special guests included Judge John Jarvey and Judge Ebinger. The event was well attended and much appreciated.

An additional agenda item at our June meeting was IDCA's process for amicus briefs. Currently, the Executive Committee receives and reviews the request for an amicus. We then make a decision whether or not to pursue the request. We do not budget funding for amicus work so the decision to participate in an amicus is one that seeks volunteer performance. One suggestion we have received is to publish the amicus request to our members and seek input on performing the work. If IDCA needs to be involved the Executive Committee will confer with the member making the request. We also formed a committee to review the process and to make recommendations as to a solution to the issue. If you have input on this topic, please advise me.

On behalf of the organization, I would like to acknowledge and thank Sharon Greer for her work in serving as our DRI Representative. Her term is expiring and she has done an outstanding job in representing us at the DRI level as well as assisting us locally.

The Board of Directors welcomed a new member, Mike Gibbons. Mike is a graduate of Creighton Law School and practices in Iowa and Nebraska. His firm is Woodke & Gibbons and he has been a member of IDCA for a number of years and represents several insurers in the State of Iowa. Mike, welcome to the Board.

Finally, it is with sadness that I report on the passing of Judge Harold D. Vietor, a US District Court Judge of the Southern District of Iowa. Judge Vietor was a judicial treasure, intelligent with a marvelous demeanor who was truly one of the best Judges this State ever had the good fortune to have on its bench. He will be missed by all.

Best,

Noel McKibbin

## IN MEMORIAM

Hon. Harold D. Vietor

1931-2016

Hon. Harold D. Vietor, Senior U.S District Judge for the Southern District of Iowa, passed away on July 23, 2016.

Judge Vietor was born in Parkersburg, Iowa. He served in the U.S. Navy from 1952 to 1954. He graduated from the University of Iowa Law School in 1958 after which he was a law clerk to the Hon. Martin Van Oosterhout of the Eighth Circuit United States Court of Appeals. Thereafter, he was in private practice until he was appointed an Iowa District Court Judge in 1965 and served as the Chief Judge of the sixth Judicial District until he was appointed a United States District Court Judge in 1979. In 1996 he assumed Senior Judge status.

*Continued from Page 1*

More recently the effects of distracted walking have garnered increased attention. For example, in 2015 the National Safety Council added distracted walking to its annual report of unintentional deaths and injuries.<sup>2</sup> In addition, there have been a number of reports in the media about people walking into or tripping over objects and even falling off train or subway platforms while using mobile devices, as well as reports of serious injuries and deaths related to mobile device use – for example, a man falling off a cliff to his death while taking a photo with his phone in California.<sup>3</sup>

The potential for accidents and safety implications resulting from distracted behavior underscore the importance of providing insight and understanding regarding underlying human factors principles relevant to our ability to successfully engage with mobile technology while driving and walking. This article will detail those principles, provide results from recent human behavioral research, and discuss their implications for accident investigation and litigation involving distracted driving and walking.

## Principles and Effects of Distracted Driving and Walking

As described above, accumulating evidence relating adverse outcomes and accidents to distracted driving and walking has begun to gain attention; a human factors analysis can help explain how and why distraction leads to these accidents. To accomplish this, human factors scientists investigate the cognitive and perceptual underpinnings upon which successful driving and ambulating rely. For example, in order to operate a motor vehicle or walk in the world, human behavior is guided by a number of cognitive processes including visual perception, attention, and motor control. Both walking and driving require the ongoing processing and integration of visual information while moving – i.e., an individual must attend to and scan the environment for hazards and determine how to navigate safely within the environment while maintaining certain parameters such as intended speed, position and path. People are only able to attend to a limited amount of information at any given time and distraction can cause failures in the ability to notice or detect even conspicuous objects. For example, sometimes an individual can focus his or her eyes on an object or a hazard, but still not “see” or detect it because mental resources are occupied elsewhere, and thus not adequately engaged in the additional perceptual processing required to become aware of the object.<sup>4</sup> While successful deployment of attention is a necessary component of accident and injury avoidance; it alone is not sufficient. There must also be adequate time, such that in the event that a hazard or obstacle is detected, the person will have time not only attend to the obstacle, but also to decide on and execute an appropriate response to avoid accident or injury.

The human factors principles discussed above generally apply to driving and walking as well as many other activities, and are affected by distraction. However, for walking specifically, additional factors must be considered in light of distraction, including how looking behavior, foot falls, or gait change in light of both environmental obstacles and reductions in attention and how these changes contribute to the potential for slips, trips, and falls, or their avoidance. For example, pedestrians often change their point of visual fixation, scanning the environment for such information as the presence and attributes of obstacles, surface characteristics (e.g., water/ice), path identification, and lighting conditions;<sup>5</sup> and based on the acquired information, such as detected obstacles or hazards, necessary modulations and corrections to gait can occur. Such modifications include avoidance maneuvers such as adjustments to step length, width, and/or ground clearance and changing direction of gait, rotation of the body, or stopping.<sup>6</sup>

Any time that a driver or pedestrian is engaged in another potentially distracting task, including interacting with mobile technology, there is a reduction in the cognitive resources available to focus on the primary task (i.e., driving or walking). For example, previous research has shown that a distracted driver has slower responses and higher non-response rates to critical events and hazards, decreased ability to safely negotiate gaps in traffic, and reduced scanning behavior.<sup>7</sup> Likewise, research has demonstrated that pedestrians engage in less safe intersection crossing behaviors while engaged with their mobile devices, including crossing more slowly, looking at traffic and other environmental obstacles (e.g., curbs) less often, and exhibiting poorer foot position consistency from stride to stride.<sup>8</sup> Taken as a whole, the cognitive, perceptual, and attentional detriments associated with distraction manifest in similar ways for both driving and walking behavior.

## Reactions to Distracted Driving and Walking

In response to the increasing incidence of accidents involving distraction due to mobile device use, laws have been enacted aimed at discouraging such behavior, particularly for drivers. According to the Insurance Institute for Highway Safety<sup>9</sup>, as of July 2016, 14 states and the District of Columbia have banned talking on a hand-held cellphone while driving, 46 states and the District of Columbia have banned text messaging while driving, and many localities have enacted their own bans on cellphone use or text messaging while driving. According to news reports, bills to similarly prohibit texting while walking have been proposed in New York, Arkansas, Illinois, and Nevada but were not successful.<sup>10</sup> Hawaii has a pending bill proposing a \$250 fine for pedestrians crossing the street while using an electronic device, while another bill proposed by a New Jersey congresswoman would punish text-walkers with a \$50 fine

and persistent offenders with 15 days in jail.<sup>11</sup> One New Jersey town (Fort Lee) established a law in 2012, allowing tickets for “dangerous walking” to be issued, to include texting and walking.<sup>12</sup> As a playful commentary on the phenomenon of cellphone-distracted pedestrians (sometimes referred to as “pedtextrians”), several locales have introduced separate painted lanes on the ground for pedestrians using phones.<sup>13</sup> For example, a university in Utah painted their student center’s staircase so that it was divided into three sections, one for walkers, one for runners, and one for texters. A similar idea was implemented on the sidewalks of a Chinese city, by National Geographic Television in Washington, D.C., and by a mobile phone repair company in Antwerp, Belgium. Notably, officials for those projects noted that most people did not obey the lanes, and many did not even notice them (often, ironically, due to being occupied by their phones).

### Exponent’s Distracted Driving and Walking Research

In line with the increased attention to distraction from mobile devices for walking and driving, our own human factors research programs at Exponent have also recently focused on expanding knowledge of not only the effects of distraction on driving and walking, but also on the utilization of technology aimed at mitigating the deleterious effects associated with distraction. We have conducted research specifically aimed at characterizing the changing nature of driving, with the advent of Advanced Driver Assistive Systems (ADAS) in vehicles (e.g., collision warning and autonomous braking, lane departure warning, adaptive cruise control, etc.), as well as how the constant and ubiquitous use of mobile technology while walking can lead to changing behavior on foot.

With respect to driving, the issue of distraction has been long-studied; however, recent advances in autonomous and semi-autonomous vehicle technology are changing the role of the driver in the vehicle. Specifically, safety systems are being introduced into vehicles aimed at combatting the negative effects of driver distraction by having the vehicle take over if and when the driver does not respond quickly enough. For example, if a driver fails to brake in response to hazard in front of his vehicle, whether because he is distracted or for any other reason, a vehicle with autonomous braking can automatically apply the brakes and either avoid or minimize the severity of a collision. Our on-road, closed-course experiments, which required participants to drive with ADAS technologies while performing different types of distracting tasks (i.e., talking or texting on a cell phone), showed that these technologies are helpful at mitigating some, but not all of the effects associated with distractions. Overall, our findings indicate that ADAS have the potential to reduce the number and severity of collisions on the roadway, but are not a replacement for attentive driving. As an example, in our study of distracted driving with

collision warning and autonomous braking, participants who were not distracted were able to respond to a lead vehicle braking in front of them before the warning system in the vehicle provided an alert. In contrast, those who were utilizing a cell phone did not respond until after the warning system in the vehicle alerted them to the impending collision (Figure 1). Interestingly, most drivers (distracted and attentive) were able to apply the brakes prior to the vehicle’s automatic braking system engaging.

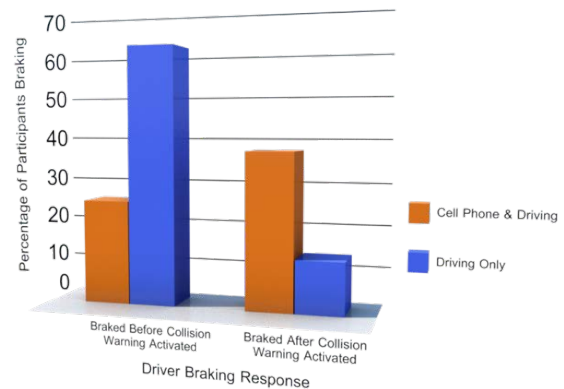


Figure 1. Driver response in ADAS equipped vehicle to a simulated lead vehicle braking event

In another study, the use of lane departure warnings (a system that alerts drivers if their tires touch the lane lines without a turn signal activated) was not sufficient to help distracted drivers maintain their lane position – distracted drivers did not show an improvement in lane-keeping while using the lane departure warning system. Our research program has confirmed many of the negative effects associated with distracted driving and shown that recent advances in vehicle assistive and safety technology may help mitigate some of these effects, but it also demonstrates that systems such as these are not a replacement for alert and attentive drivers.<sup>14</sup>

Human factors scientists at Exponent have also been studying how mobile device use affects ambulation. These studies have demonstrated that walking while using mobile devices leads to changes in how we walk – both in terms of visual behavior, as well as motor behavior, and gait.

In one set of experiments, pedestrians were outfitted with a wireless eye-tracking device as well as a motion capture suit to capture their motor behavior, gait and eye movements as they approached a variety of obstacles (e.g., a short staircase, a curb) while either texting or not texting (Figure 2).<sup>15</sup>

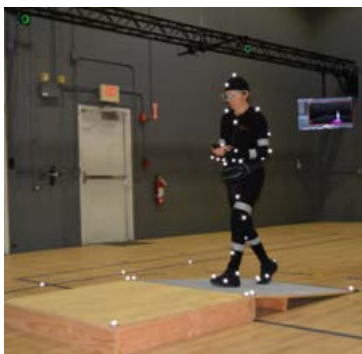


Figure 2. Participant texting while traversing an obstacle in our motion capture laboratory with head mounted eye-tracker.

While texting, the participants scanned a narrower area ahead of them, and spent significantly less time looking at the obstacles as they approached them (Figure 3). These findings suggest that mobile device use can reduce pedestrians’ visual attention to important areas along their future travel path, which may lead to a reduced awareness of the characteristics of the environment, and sometimes, a failure to detect an obstacle in time to avoid it. Another study utilizing a different set of wireless motion capture technology to characterize pedestrians’ movements and gait while either texting, talking on a cell phone, or without using a cellphone.<sup>16</sup> Texting was found to produce a more conservative walking pattern – for example, slower walking speeds and shorter strides than the user’s typical pattern – while talking on the cell phone did not (Figure 4). These results suggest that pedestrians may adjust their walking behavior in an effort to counteract the visual impairments introduced by texting. Taken together, studies, such as these, provide valuable insight into how mobile device use affects human behavior relevant to ambulation and obstacle avoidance, and can be used to help understand why falls happen, the role of the human in those accidents, and how they may be prevented.

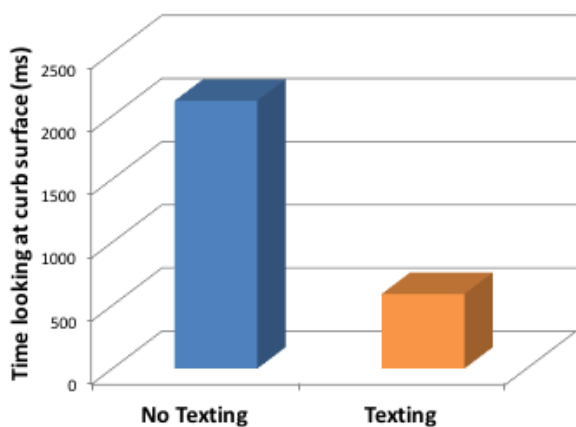


Figure 3. Average time spent looking at a curb surface ahead when walking without texting (blue) and when walking while texting (orange)

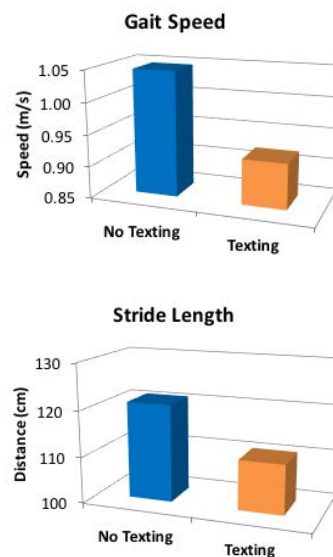


Figure 4. Average pedestrian gait speed (top) and stride length (bottom) when walking without texting (blue) and when walking while texting (orange).

### What this means for accident investigation and litigation?

Traditionally, human factors investigations of accidents delve into areas including the role of lighting, age, conspicuity, visibility, attention, perception, decision making and many more. Understanding the effects of distraction is actually the application of a combination of many of these traditional human factors principles. The proliferation of mobile technology, combined with people’s tendency to constantly be using that technology, has dramatically increased the prevalence and opportunity for distraction-related accidents, leading to an increase in public attention to this area and intensifying the need for human factors investigation. Our own research has shown how new technology and mobile device use is changing the nature of driving and walking, in such areas as movement control and visual scanning behavior. As human factors scientists, we can integrate this understanding of the role and consequences of mobile device use into our analyses of accident causation, and use such knowledge to help explain to juries how these human factors may have contributed to the cause of an accident. It is becoming increasingly important in investigations of accidents where mobile device use or distraction may be a factor to preserve the devices themselves and request detailed phone records that often go beyond the standard billing records. This type of information can assist in the human factors assessment of either use or non-use of a device at critical points in time. Understanding the effects of mobile device use on attention and perception is essential for understanding the human factors of a case.

<sup>1</sup> National Safety Council, 2016

<sup>2</sup> National Safety Council, 2016

<sup>3</sup> Tatro & Fleming, 2015

<sup>4</sup> Lanagan-Leitzel, Skow & Moore, 2015; O'Regan et al., 2000

<sup>5</sup> Patla, 1997

<sup>6</sup> Patla & Vickers, 1997; Marigold & Patla, 2007; Marigold, 2008; Patla, 1991

<sup>7</sup> Strayer et al., 2003; Strayer et al., 2011; McKnight & McKnight, 1993; Brown et al., 1969; Copper & Zheng, 2002; Recarte & Nunes, 2000;

<sup>8</sup> Neider et al., 2010; Hatfield & Murphy, 2007; Schabrun et al., 2014; Perlmutter et al., 2014

<sup>9</sup> IIHS, 2016

<sup>10</sup> IIHS, 2016

<sup>11</sup> E.g., Matyszczyk, 2016

<sup>12</sup> E.g., Ngak, 2012

<sup>13</sup> E.g., Kaplan, 2015

<sup>14</sup> For reviews and more details on this research see: Crump et al., in press; Cades et al., 2016; Barakat et al., 2015; Crump et al., 2015; Crump et al., 2014.

<sup>15</sup> Kim et al., (in press); Lester et al., 2016

<sup>16</sup> Perlmutter et al., 2014; Hashish et al., 2016

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The Iowa Defense Counsel Association presents the

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# DEPOSITION BOOTCAMP

For attorneys with five or fewer years of experience.

**Friday, October 28, 2016**

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- Drills Session 2 - Depose Accident Scene Investigator
- Drills Session 3 - Depose Treating Physician





## Ethical Considerations of Cybersecurity

by Robert Kirtley, St. Charles, Illinois



Join Mr. Kirtley during the 2016 IDCA Annual Meeting & Seminar as he provides "20 eDiscovery Warnings in 60 Minutes," on Thursday, September 22. Meeting details and registration are online, [www.iowadefencelaw.org/AnnualMeeting2016](http://www.iowadefencelaw.org/AnnualMeeting2016)

### Background

Over the last 10 years, technology has dramatically impacted how

businesses operate and how we work. The launch of the iPhone in 2007 created a consumer market for the smartphone, and, coupled with the emergence of cloud computing and internet-connected systems, has led to a world where we can be connected 24/7 and access literally everything from everywhere. The acceleration of computer processing power, the introduction of new devices like smartphones and tablets combined with the proliferation of high speed internet access has been transformative, allowing attorneys to be more productive and more responsive to their clients without needing to be tethered to their desks. As the old saying goes though, with great power comes great responsibility, and those responsibilities now include an ethical obligation to understand and manage cybersecurity risks.

### The Threat

Hardly a week goes by without the revelation of a new incident involving hackers and the compromise of sensitive data. In the past week alone, Omni Hotels announced a breach of involving more than 50,000 credit card records and Wendy's disclosed that more than 1,000 of their restaurant's point-of-sale terminals had been compromised. The number of data breaches continues to climb, with the first half of 2016 setting new records for the number of data breaches. Virtually everyone has had to have a credit card or two reissued or has gotten a letter from their healthcare provider offering free credit monitoring services as a result of a data breach.

Law firms are not immune to the risks presented by hackers. In fact, in March of this year the FBI issued a warning indicating that cyber criminals were specifically targeting law firms. While the breach of Mossack Fonseca & Co of Panama earlier this year made headlines, lesser known breaches have occurred at some of the largest and most prestigious law firms like Cravath Swaine & Moore and Weil Gotshal & Manges, at midsized firms like Wiley Rein in Washington DC, and at hundreds of small firms across the country. Bloomberg News last year cited a conversation between the FBI and law

firm managing partners that noted that virtually all big firms had encountered some sort of issue and that up to 80% of the largest firms had suffered through a breach.

The motivation for attackers to target law firms is clear. Law firms house their clients' most critical and sensitive information, ranging from HR data, intellectual property, merger and acquisition information and litigation records. Attackers can use this data for direct financial gain or as part of a broader effort to conduct identity theft. In addition to the obvious value of the information they possess, there is the widely held perception that law firms are soft targets, with less technical resources and understanding of the risks of inadequate cybersecurity. The value as a target combined with a weaker perceived defensive perimeter add up to an inviting target for hackers.

### Sources of Risk

The image of the prankster teenager or lone wolf hacker sitting in a basement is not the greatest threat law firms face. Current outside threats are typically far more sophisticated. State sponsored actors such as China's People's Liberation Army often get the headlines, but the reality is that cyber criminals are the largest part of a growing wave of organized crime on the internet. These professional criminals employ sophisticated tools to extort money from their victims through "ransomware" that denies you access to your own files. They steal industrial secrets and intellectual property for sale to your client's rivals here and abroad. These criminals are able to infiltrate a target network invisibly and remain undetected for years.

In addition to the outsider threat, there is always the risk of a malicious insider. Insiders have been responsible for some of the most spectacular data breaches of all time (think Edward Snowden), though it is as likely to be due to negligence as it is to malicious intent. There have been a number of instances where law firm employees downloaded sensitive information to sell or profit from that data, compromising the firm and their clients. Remember that insiders can include contractors or temps as well as current or former employees.

It is becoming routine now for law firm clients to conduct assessments of their law firms. Those firms with inadequate security risk the loss of these clients and potential future clients that are unsatisfied with a law firm's information security program. Any data breach could be extraordinarily damaging for a firm and could threaten its existence.

## Ethical Obligations

The implementation of robust and effective information security is not just good business, it is part of a broader collection of ethical obligations covered by both the ABA Model Rules of Professional Conduct and the Iowa State Bar Association's recommendations on Ethics and Practice Guidelines.

First and foremost, ABA Rule 1.6 notes that, "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." In addition, the Iowa State Bar noted in Rule 32:1.6, comment 17 that, "We believe the Rule establishes a reasonable and flexible approach to guide a lawyer's use of ever-changing technology. It recognizes that the degree of protection to be afforded client information varies with the client, matter and information involved. But it places on the lawyer the obligation to perform due diligence to assess the degree of protection that will be needed and to act accordingly."

The bottom line is that while neither the ABA nor the Iowa State Bar Association has specific rules or requirements for exact security precautions, the language at both levels mirrors the language in cybersecurity laws and regulations at the state and Federal level. Therefore, in essence, the obligation to ensure the protection of client information becomes a cybersecurity requirement.

The ABA suggests that attorneys should either have assistance in-house or retain consultants to assist them with ensuring the security of client data. Per the *ABA Cybersecurity Handbook*, "...if a lawyer is not competent to decide whether use of a particular technology (e.g., cloud storage, public Wi-Fi) allows reasonable measures to protect client confidentiality, the ethics rules require that the lawyer must get help, even if that means hiring an expert information technology consultant to advise the lawyer."

## Implementing Information Security

The level of security a firm must aspire to is not specifically delineated in the state or Federal rules. Attorneys are obligated to make "reasonable efforts" to ensure the safety and confidentiality of client data. The type of data your firm handles and how work is performed will influence the level of security required. In many instances, law firms will have requirements given to them by their clients, especially those who serve financial services firms or handle protected health information ("PHI"), where there are specific legal requirements in HIPAA.

This article is not intended to lay out in detail the activities required to secure your firm's infrastructure and client data. That said, the approach to implementing an Information Security Program consists of four basic elements:

- Create an Information Security Policy, with a supporting policy framework – spell out what people in the firm need to do. Examples would include Acceptable Use and Encryption policies.
- Develop Processes and Procedures to support those policies – document what people in the firm need to do in order to comply with the policies. Examples might include how to work from home or how to encrypt a CD.
- Implement Appropriate Information Technology Tools – implement the basic hardware and software tools to maintain a secure environment, such as anti-virus software and firewalls.
- Training and Awareness – ensure that everyone is trained on the policies, processes and procedures and that they are updated on a regular basis. At a minimum, there should be annual training with employee acknowledgement that they have received and understand the training.

## Conclusion

The design and implementation of an effective Information Security Program is vital given the exponential proliferation of electronic data and the increasing aggressiveness of cyber attackers. The implementation of a policy framework with the supporting processes and procedures, along with end-user training on how to follow those policies, can help ensure that people know what to do and how they can comply. When that is married with an investment in the appropriate IT infrastructure, attorneys can comply with their ethical duty to protect the confidentiality of client information.

## Case Law Update

by Jonathan Foley, Nyemaster Goode, PC, Des Moines, IA



*Brenda J. Alcalá v. Marriott International, Inc. and Courtyard Management Corporation d/b/a Quad Cities Courtyard by Marriott, \_\_ N.W.2d \_\_ (Iowa June 10, 2016) (No. 14-1058).*

**Why it matters:** The case provides important guidance on when the jury should be instructed on “negligent training” and on private safety codes. It also clarifies that correction for errors at law is the proper standard of review for refusal to give a requested jury instruction.

**Summary:** While staying at the at the Marriott hotel in Bettendorf, Brenda Alcalá (Alcalá) slipped and fell on an icy sidewalk, sustaining injuries to her ankle. She sued Marriott International, Inc. and Courtyard Management Corporation d/b/a Quad Cities Courtyard by Marriott (Marriott), claiming negligence in failing to maintain the premises and failing to warn. The jury returned a verdict in her favor of over \$1.2 million. Marriott appealed.

The Court of Appeals held the district court (1) abused its discretion by denying Marriott’s requested jury instruction on the continuing-storm doctrine, (2) erred by submitting a negligent-training theory without substantial evidence, and (3) erroneously instructed the jury on private industry safety codes. The Court of Appeals remanded for a new trial. The dissent invited the Iowa Supreme Court to clarify whether the standard of review for refusing to give requested instructions is for abuse of discretion or correction of errors at law. Alcalá sought further review by the Iowa Supreme Court.

The Supreme Court vacated the opinion of the court of appeals, reversed the district court judgment, and remanded the case for a new trial. First, it clarified that the standard of review applied to a district court’s refusal to give a requested jury instruction is for correction of errors at law. Next, it concluded the district court erred by submitting a negligent training theory to the jury without any testimony on the standard of care for training or its breach. Finally, it concluded the district court erred in giving the particular instruction it gave on private industry safety codes. As to this last point, the Court determined the district court went beyond unduly emphasizing certain evidence when it outright adopted the position of the plaintiff’s expert—who

had testified that the industry standards were applicable under the circumstances of the case even though they are voluntary, and that one of the standards was violated by the icy condition of the sidewalk at issue—over conflicting testimony of the defense expert—who had testified that neither of the industry standards at issue were applicable, and even if they were they were not violated by Marriott.

Case Law Updates will be presented throughout the 2016 IDCA Annual Meeting & Seminar. Meeting details and registration are online, [www.iowadefensecounsel.org/AnnualMeeting2016](http://www.iowadefensecounsel.org/AnnualMeeting2016)

## Case Law Update

by Ryan Stefani, Nyemaster Goode, PC, Des Moines, IA



*National Surety Corporation v. Westlake Investments, LLC, \_\_ N.W.2d \_\_ (Iowa June 10, 2016) (No. 14-1274).*

**Why it matters:** In a decision which represents a substantial departure from prior Iowa case law, the Iowa Supreme Court considered the issue of what constitutes an “accident” within the meaning of a modern standard-form commercial general liability (CGL) insurance policy. The court also considered whether defective work by an insured’s subcontractor may constitute an “occurrence” under a modern standard-form CGL policy.

**Summary:** In 2002, developers and a general contractor began constructing an apartment complex in West Des Moines. While construction was ongoing, Westlake Investments, LLC purchased the complex. The developers and general contractor purchased a primary commercial general liability (CGL) insurance policy with a \$1,000,000 policy limit from Arch Insurance Group (Arch) and an excess CGL insurance policy with a \$20,000,000 limit from National Surety Corporation (NSC).

When construction defects caused widespread water penetration issues throughout the complex, Westlake sued the developers and general contractor for lost profits, repair costs, and other damages. The developers and general contractors in turn sued

several third-party defendants. The parties reached a settlement, and the court entered a consent judgment for \$15,600,000 in favor of Westlake. Arch contributed its policy limit (\$1,000,000) toward the judgment, and the third-party defendants contributed \$1,737,500, which left \$12,762,500 unsatisfied. The developers and general contractor assigned their claims against NSC on the excess CGL policy to Westlake. NSC filed a declaratory judgment action seeking a declaration that it had no liability to Westlake under the excess CGL policy.

In *Westlake*, the Iowa Supreme Court found that NSC was liable to Westlake under the terms of the excess CGL policy. First, the Court concluded that in the context of a modern standard-form CGL policy, the term “accident” means “an unexpected and unintended event.” The Court also found that an intentional act resulting in property damage that an insured did not expect or intend qualifies as an “accident” amounting to an “occurrence” as defined in a modern standard-form CGL policy so long as the insured did not expect and intend both the act itself and the resulting property damage. This holding represents a substantial departure from *Pursell Construction, Inc. v. Hawkeye-Sec. Ins. Co.*, 596 N.W.2d 67, 70 (Iowa 1999) and its progeny, which had focused on whether the event causing an accident was accidental. Under the *Pursell* line of cases, defective construction was never to be considered an accident, regardless of who performed the defective work. Following the Court’s holding in *Westlake*, the issue will now be whether the damages were expected or intended from the standpoint of the insured. If the insured is a general contractor, damages resulting from defective construction performed by a subcontractor may be accidental, provided that the general contractor did not expect or intend the damages that resulted from the subcontractor’s defective construction. On the facts of *Westlake*, the Court found the contractor did not expect or intend the damages that resulted from the subcontractor’s defective construction, and thus NSC was liable to Westlake under the terms of the excess CGL policy.

## New Lawyer Profile

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Margaret Hanson, Davis Brown Law Firm in Des Moines, Iowa.



Maggie is an associate attorney with the Davis Brown Law Firm in Des Moines and is a member of the firm’s litigation division including employment law, insurance defense, business litigation, construction litigation, personal injury, and products liability. Maggie earned her Bachelor of Science degree in Cell & Developmental Biology from the

University of Iowa in 2010 and her J.D. from the University of Iowa College of Law in May of 2013, where she served as a contributing editor for the Iowa Law Review. During law school, she was awarded the Dean’s Award for Academic Excellence, was a member of the Organization for Women Law Students and participated in the University’s study abroad law program in Arcachon, France. She was admitted to the Iowa bar in 2013.

This year Maggie was recognized as a 2016 Great Plains Super Lawyers “Rising Star” in Business Litigation.

Maggie has given several public presentations on topics related to employment law.

Maggie is a member of the Iowa Defense Counsel Association, the American Bar Association, the Iowa State Bar Association, the Polk County Bar Association, Polk County Women Attorneys, Iowa Organization of Women Attorneys, Defense Research Institute, and the C. Edwin Moore Inn of Court. Maggie is also an active member of the community and has volunteered her time to several local non-profit organizations including Big Brothers Big Sisters, Meals of the Heartland, Habitat for Humanity, House Build and Restore Project, the University of Iowa Hospitals and Clinics, DeGowin Blood Center and the Make-A-Wish Foundation. She also volunteers her time coaching middle school and high school mock trial teams.

Maggie was born and raised in Des Moines, Iowa. In her spare time, she enjoys playing volleyball, running, biking, reading, and following Iowa Hawkeye sports.



## IOWA DEFENSE COUNSEL ASSOCIATION

### 52<sup>ND</sup> ANNUAL MEETING & SEMINAR

September 22–23, 2016

Stoney Creek Conference Center, Johnston, Iowa

IDCA is back at the Stoney Creek Conference Center, and we invite you to join us! We have planned one and a half days of engaging speakers addressing trending topics that affect you and your clients. Between CLE sessions, connect and develop relationships with over 200 of your peers!

#### **12.0 State CLE (includes 2.0 Ethics Hours) and 7.0 Federal Hours offered**

**Networking events include New Lawyers Breakfast, Past Presidents Breakfast, Woman in Law Breakfast, Hospitality Room and an evening at the State Historical Museum enjoying views of the Des Moines skyline and excellent food.**

#### Schedule of Events

Learn about the exciting programs, speakers and networking events on the Annual Meeting mobile event website, [www.iowadefensescounsel.org/AnnualMeeting2016](http://www.iowadefensescounsel.org/AnnualMeeting2016)

#### Speaker Highlights

Thursday's line-up includes:

##### **Horse-Shedding 101: The Ethical Preparation of Witnesses for Deposition and Trial**

*E. Todd Presnell, Bradley, Arant, Boult, Cummings, LLP, Nashville, Tenn.*

Witness preparation can be critical in presenting a witness' testimony both in depositions and in trials. But, it must be done within the bounds of the ethical rules. Learn what you can and can't do.

##### **Evidentiary Issues with Electronically Stored Information**

*Barry Lindahl, Dubuque City Attorney, Dubuque, Iowa*

Learn how to authenticate electronically stored information—from e-mails, chat rooms and texting to social media and computer-generated records. Mr. Lindahl is a trial advocacy instructor and the author of the Iowa Practice Series, Civil and Appellate Procedure.

##### **Trends in PTSD and TBI Claims, DSM – 5 and Beyond**

*David Price, Ph.D., The Forensic Network, Greenville, S.C.*

A leading forensic neuropsychologist will identify the red flags for malingering or fraud and share his thoughts on why PTSD and Mild Traumatic Brain Injury have an excellent prognosis.



##### **The Distracted Driver: Science, Application, Investigation**

*David Cades, Ph.D., Exponent, Chicago, Ill.*

Hear a human factors scientist explain how human performance is adversely affected by distractions and how a driver's perception and attention can provide insight about the causal effects of vehicular and pedestrian accidents.

##### **The Affordable Care Act and Defendant's Burden of Proof on Damages**

*Ralph Valitutti, Jr., Kitch Attorneys and Counselors, Mt. Clemens, Mich.*

You can't always win catastrophic damage cases but you can put enough anchors on plaintiff's damage claims to keep the verdict low and encourage your clients to let you try the case. Find out how from an attorney who has defended quadriplegic cases with \$60-70 million dollars at risk but came in at less than \$5 million dollars.

Friday's line-up includes:

##### **Escaping from Lawyers' Prison of Fear**

*Professor John Lande, Columbia College, Columbia, Mo.*

Why are lawyers afraid and what can they do to manage their fears constructively? Professor Emeritus and Senior Fellow of the University of Missouri Center for the Study of Dispute Resolution explains.

##### **Best Practices for Addressing Smart Phones in Civil Discovery and Reasonable Attorney-Client Communication Security Measures**

*Larry Lieb, Scarab Consulting, Chicago, Ill.*

Everyone has a smart phone and every smart phone has evidence embedded within it. If you as a lawyer and as a user wish you knew more, Larry Lieb is the expert in computer forensics and electronic discovery who will grant your wish.



##### **20 eDiscovery Warnings in 60 Minutes**

*Robert Kirtley, St. Charles, Ill.*

Identify and avoid the risks, booby traps and land mines inherent in the discovery and production processes. You will learn from an expert who has managed discovery and production processes in such projects as an investigation of a Swiss bank's holdings of Holocaust-era assets and the fight to recover assets from Bernie Madoff.



**Networking Events**

**State Historical Museum Evening Reception**

*Thursday, September 22, 6:00–8:00 p.m.*

Join us for a beautiful evening on the 3rd floor Terrace of the State Historical Museum. Enjoy wonderful food and the view of the State Judicial Building and Des Moines skyline while you network in a casual environment. Transportation provided.

**IDCA Hospitality Room**

*Wednesday, September 21, 8:00 p.m.*

*Thursday, September 22, 8:30 p.m.*

Registered attendees are welcome to meet up and exchange stories at the end of each day in the Hospitality Room. This is a great opportunity to get to know other members in a relaxed atmosphere.

**New Lawyers Breakfast**

*Thursday, September 22, 7:00 a.m.*

All lawyers admitted to the Bar four years or fewer are invited to attend the New Lawyers Breakfast. This is a great place to meet, connect and ask questions before the Annual Meeting gets started.

**Past Presidents Breakfast**

*Thursday, September 22, 7:00 a.m.*

IDCA's esteemed Past Presidents are encouraged to attend this opening event. It's a great time to reconnect and hear from the Executive Committee what new initiatives are on the horizon.

**Women In Law Breakfast**

*Friday, September 23, 7:00 a.m.*

All of IDCA's Women in Law are invited to attend.

**REGISTER ONLINE by September 7 and save!**

**Hotel Reservations/Rates**

Don't forget to book your room at the [Stoney Creek Hotel and Conference Center](#) directly at (515) 334-9000. Ask for the Iowa Defense Counsel Association group room rate (\$109/night plus tax). The room block ends September 7.

**IDCA Webinar Schedule**

August 25, Noon–1:00 p.m.  
 "Discussion on the New DOL Overtime Rule: Impact on Attorneys and Clients"

Presented by Frank Boyd Harty, Nyemaster Goode P.C., Des Moines



Harty will explain the Administration's new overtime rule, effective December 1. Under the new rule, no employee who has a guaranteed salary of less than \$47,476 will qualify as exempt under the executive, administrative, or professional exemptions. That's more than double the current minimum salary level of \$23,660. Learn what you need to know in your firm, and how you can help your client's prepare for implementation.

October 19, Noon–1:00 p.m.  
 "Reviewing the New ECA Rule and Civil Discovery Amendments"

Presented by Greg Lederer, Lederer Weston Craig, P.L.C., Cedar Rapids



Lederer will review the new discovery rules and the expedited case rules, and discuss how they are working in practice one year after they became effective.

[CLICK HERE TO REGISTER](#)

**IDCA Gives Back!**

The facts are staggering:

- 1 in 8 Iowans are food insecure;
- 1 in 5 Iowa children does not have enough to eat;
- Nearly 400,000 Iowans live at or below the poverty level.

Last year, IDCA partnered with the Food Bank of Iowa and together we collected 679 meals that were distributed to food pantries across the state.

This year, IDCA issues a new challenge to our attendees: we want to more than double our effort and collect 1,500 meals to be distributed!

Meet the need and bring five or more items to the Registration Desk when you arrive. All those who donate five or more items—or make a monetary donation—will be entered into a drawing for a complimentary registration to the 53rd Annual Meeting & Seminar in 2017. Two registrations will be given-away on Friday morning. This is a \$275 value!

*The most needed items include: high protein foods (canned meats and peanut butter), canned soup, instant oatmeal, boxed meal kits, 100% fruit juice, and paper and personal care products.*



## IDCA Schedule of Events

August 25, 2016

Noon–1:00 p.m.

### **Webinar: Discussion on the New DOL Overtime Rule: Impact on Attorneys and Clients**

Presented by Frank Boyd Harty, Nyemaster Goode PC, Des Moines, IA

Register online, [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org)

Harty will explain the Administration's new overtime rule, which will be effective December 1.

Learn what you need to know to help your clients prepare for implementation.

September 22–23, 2016

Stoney Creek Hotel & Conference Center  
5291 Stoney Creek Ct  
Johnston, IA 50131

### **52<sup>nd</sup> Annual Meeting & Seminar**

Register online, [www.iowadefensecounsel.org/AnnualMeeting2016](http://www.iowadefensecounsel.org/AnnualMeeting2016)

October 19, 2016

Noon-1:00 p.m.

### **Webinar: Reviewing the New ECA Rule and the Civil Discover Amendments**

Presented by Greg Lederer, Lederer Weston Craig, P.L.C., Cedar Rapids, IA

Register online, [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org)

Lederer will discuss the new discovery and expedited case rules, and comment on how they are working so far.

October 28, 2016

Grinnell Mutual Reinsurance Company  
Grinnell, IA

### **Deposition Bootcamp**

**Only 24 spots available!**

Register online, [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org)

September 14–15, 2017

Stoney Creek Hotel & Conference Center  
Johnston, IA 50131

### **53<sup>rd</sup> Annual Meeting & Seminar**