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IOWA DEFENSE COUNSEL ASSOCIATION

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Proper Objections to Written Discovery

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Introduction

Commentators have written many articles over the past few years complaining about "boilerplate objections" in pre-trial discovery in civil litigation. *See, e.g.*, Stanley P. Santire, *Discovery Objections Abuse in Federal Courts: ". . . Objecting to Discovery Requests Reflexively—But Not Reflectively. . .*," 54-AUG Hous. Law. 24 (2016); Matthew L. Jarvey, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913 (2013). One Iowa federal district court judge, the Honorable Mark W. Bennett of the United States District Court for the Northern District of Iowa, has issued several opinions addressing the subject of sanctions for discovery objections that violate the Federal Rules of Civil

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WHAT'S INSIDE

IDCA President's Letter

Richard Whitty
IDCA President

Dear Colleagues,

5,750 years.

There comes a time when you realize you have become quite comfortable with the practice of law. Your first-hand experience gives you the confidence to attack each day's challenges. Sure, there are nights when you find it hard to fall asleep but those nights become fewer and farther apart.

The sooner you reach this stage in your professional career, the sooner you will not only enjoy more fully the practice of law but grow into the role of rainmaker. The value placed on your opinion, both within your firm and your client base, will increase. Your relationship with the bench will mature. You will more fully experience the satisfaction of being a professional.

Thus, it is in your best interest to do what you can to acquire experience and knowledge. There are several ways you can do this. I remember many years ago trying a case with former IDCA President Pat Roby. We were at dinner one evening during trial and I began to ask Pat about his obvious comfort in the courtroom. He informed me that as a young practitioner he used to walk around the office asking if anybody had a dog-of-a-case that they did not want to try. He wanted to try every case he could get his hands on, and he did. That conversation taught me at least two things: seek out opportunities to gain experience as soon as you can and discuss the practice of law with your peers.

The Iowa Defense Counsel Association brings together many practitioners from whom you can learn something. Through our committee structure, attendance at the Annual Meeting (including the hospitality room), attendance at our regional socials and participation in webinars, you have an opportunity to make acquaintances and thereafter friendships. Your active membership in the Association allows you to establish relationships with others outside your firm; attorneys with whom you can discuss issues you find on your desk as well as issues they find on their desk. Developing professional relationships is as important to the success of your career as demonstrating a willingness to work as many hours as it takes to do the project right.

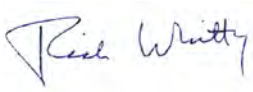
And the benefits can run from young to old as much as they can from old to young. The practice of law is ever changing and, along with it, the technology of practicing law. Our younger members are a resource of untapped proportions especially when it comes to technology in and out of the courtroom.

5,750 years.

That is my best estimate as to the combined number of years of experience held by the members of the Iowa Defense Counsel Association. This wealth of experience is at your fingertips. Do yourself, your clients and the administration of justice a favor by developing a professional and personal network with Association members. The sooner you do this, the sooner you will reach that point in your professional career where you realize that you are rather comfortable with the practice of law!

Thank you for your membership. Thank you for your attendance at our events. Thank you for your service. And thank you for your collegiality and camaraderie.

Best personal regards,



Richard Whitty

In Remembrance

LeRoy R. Voigts, IDCA Past President

1927–2017

LeRoy R. Voigts, 89, of Waverly, passed away on April 20, 2017. He was born on the family farm in rural Greene on Oct. 2, 1927. He graduated from Wartburg College in 1948. Following a brief stint in the Navy, he graduated from Drake Law School in 1955 and joined the Nyemaster Goode Law Firm. During his law career, Roy served as president of the Iowa Defense Counsel Association from 1981–1982, the president of the Polk County Bar Association and served on the Drake Law School Board of Governors. He was a member of the Board of Governors of the Iowa Bar Association, the House of Delegates of the American Bar Association and the International Association of Defense Counsel. In addition, Roy was a fellow of the American College of Trial Lawyers, a fellow of the Iowa Academy of Trial Lawyers and a member of the Board of Regents of Wartburg College.

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Procedure. *See, e.g., Security Nat'l Bank of Sioux City v. Abbott Lab.,* 299 F.R.D. 595 (N. D. Iowa 2014)(requiring an attorney to write and produce a training video that addressed the impropriety of her obstructionist deposition conduct as a sanction for such conduct), *rev'd*, 800 F.3d 936 (8th Cir. 2015)(vacating the sanction for failure to give adequate advance notice of the unusual nature of the sanction being considered); *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.,* 197 F.R.D. 620 (N. D. Iowa 2000)(a party's continued assertion of privileges, after once being warned of the impropriety of the assertions, was "without substantial justification," and warranted the payment of the opposing party's attorney's fees and expenses in bringing the motion to compel as a sanction); and *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508 (N. D. Iowa 2000)(requiring an attorney to write an article regarding why his objections to discovery requests were improper and submit such article to bar journals).

On March 13, 2017, Judge Bennett authored a 45-page opinion on this subject. This opinion is essentially a law review dissertation on counsel's responsibilities under the federal rules when drafting responses and objections to written discovery. *See Liguria Foods, Inc. v. Griffith Laboratories, Inc.,* --F.R.D.--, 2017 WL 976626 (N. D. Iowa Mar. 13, 2017). All counsel should read this opinion for their own good. Although no sanctions were ordered in *Liguria Foods*, Judge Bennett concluded his opinion as follows:

> NO MORE WARNINGS. IN THE FUTURE, USING "BOILERPLATE" OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS.[1]
>
> (All caps in original)

Liguria Foods Opin., p. 45.

Judge Bennett's admonition has been a long time coming. The bar's implementation of his advice to eradicate boilerplate objections is probably well overdue. Although discovery can certainly be abused, we should not forget that overly broad, irrelevant, improper and, frankly, frivolous discovery requests can be just as abusive, and many times merit good faith objections in response. In the authors' view, the *manner* in which discovery objections are made, their conclusory nature, the absence of specific facts, the failure to provide privilege logs now required under the rules and the failure to state whether any information is being withheld, is what often gets counsel "sideways" with the courts. But these are easy fixes.

This article will not address conduct in depositions. There are at least two federal court cases in Iowa that discuss that issue. *See Security Nat'l Bank of Sioux City v. Abbott Lab.,* 299 F.R.D. 595 (N. D. Iowa 2014); *Van Pilsum v. Iowa State Univ.,* 152 F.R.D. 179 (S. D. Iowa 1993)(plaintiff's counsel ordered to hire "minder" to babysit his obstreperous conduct at deposition). Instead, we will focus on conduct with respect to written discovery (interrogatories, requests for production, requests for admissions and the like). With *Liguria Foods* as a backdrop, the purpose of this article is to: 1) drive a stake into the heart of boilerplate objections and kill them off, once and for all; and 2) assist defense counsel in crafting ethical, specific, rule-based and substantive objections to improper discovery that will withstand court muster in the face of a motion to compel discovery or motion for sanctions.

Liguria Foods v. Griffith Laboratories

Liguria Foods was a commercial litigation case. Plaintiff contended that the Defendant supplied it with unmerchantable food flavorings and spices which, in turn, caused the Plaintiff's product, pepperoni sausage, to spoil. Both parties were represented by capable out-of-state counsel and local Iowa counsel; in fact, the court said they were ". . . very honorable, highly skilled, extremely professional and trustworthy lawyers." *Liguria Foods* Opin., p. 40.

During the course of litigation, Griffith brought a discovery issue to the court's attention by filing an "[E]mergency Motion to Address Potential Discovery Abuses." (In retrospect, counsel may have been better served by filing a motion with a less attention-grabbing title, but then again, that may have been part of their strategy: to garner the trial court's attention. It appears to have succeeded.) In considering this motion, the court reviewed Liguria's responses to written discovery served by Griffith. Going one step further, the court, *sua sponte*, undertook a detailed review of *Griffith's* responses to *Liguria's* written discovery. (The authors are familiar with this as "the goose and gander rule.") Showing obvious concern for the conduct of both parties, the court ordered both parties to file, under seal, all of their responses to written discovery.

The court then methodically went through each discovery request and response, for both parties, and created a detailed table of discovery objections and rule violations. The table comprised eight full pages of the opinion. The table outlined how the court felt that very nearly all the objections were contrary to the Federal Rules of Civil Procedure. The court then directed the parties to file briefs in response to the court's "Show Cause Order" as a precursor to a finding of potential sanctions. After a hearing, the court declined to award sanctions, but made it abundantly clear, with the statement quoted above in all caps, that future litigants appearing before him, if engaged in the same type of conduct, would not be so fortunate.

Boilerplate objections have been rejected by Iowa district court judges as well. *See, e.g., HS Heartland Development, LLC v. Healthsource of Cedar Rapids, PC et al.*, in the Iowa District Court for Linn County, No. LACV083280, "Ruling on Healthsource's Motions to Determine Validity of Objections and to Compel Discovery," filed July 5, 2016 ("Having reviewed the interrogatories and the answers, the Court finds that Plaintiff's objections that are set forth above are boilerplate objections and should be overruled, because Plaintiff has not stated with specificity in these objections its grounds for objecting to the interrogatories. In resisting the discovery requests, Plaintiff has the burden of establishing with specificity its objections to the interrogatories. Merely stating that the interrogatories are broad, vague, etc. does not successfully voice an objection.") Opin., p. 4 (Judge Marsha Bergan).

Counsel's Obligations Regarding Discovery

Judge Bennett's erudite opinion in *Liguria Foods* gives us a good reason to be introspective and review our written discovery practice in Iowa. The obvious starting point is the express language of the applicable rules. Changes to the Iowa Rules of Civil Procedure, which came into effect on January 1, 2015, serve to bring the Iowa discovery rules more in line with the federal rules. This has made counsel's job easier. Since the discovery practice in state and federal court is more uniform, any discovery objections well-stated in federal court will most likely withstand scrutiny by an Iowa state court judge, and vice-versa. Federal court precedent will also be persuasive in state court given the similarity of the rules.

Written discovery must be done in good faith and with an eye on the substantive merits of the case. Iowa Rule of Civil Procedure 1.501(2) provides:

> The rules providing for discovery and inspection shall 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.

See Sioux Pharm., Inc. v. Eagle Laboratories, Inc., 865 N.W.2d 528 (Iowa 2015)(discovery rules are to be liberally construed to effectuate the disclosure of relevant information). The federal rules have a parallel provision. Fed. R. Civ. P. 1. It is designated as Rule 1 for good reason.

Iowa R. Civ. P. 1.501(3) specifically governs counsel's conduct in discovery:

> Discovery must be conducted in good faith, and responses to discovery requests, however made, must fairly address and meet the substance of the request.

Iowa Rule of Civil Procedure 1.503(6) sets forth counsel's obligations when signing discovery requests, responses and objections. The federal courts have a similar rule. *See* Fed. R. Civ. P. 26(g)(1). Both of these rules heighten counsel's duties during discovery.

Iowa Rule of Civil Procedure 1.503(6) provides as follows:

> *Signing disclosures and discovery requests, responses, and objections.*
>
> a. *Signature required; effect of signature.* Every disclosure under rule 1.500 and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's name, law firm, or name of partnership, association, corporation, or tribe on behalf of which the filing agent is signing, and mailing address, telephone number, and electronic mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after 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 nonfrivolous 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 or 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.
>
> * * *
>
> c. *Sanction for improper certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, shall 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 fees, caused by the violation.

Any discovery request, response or objection that does not meet these baseline standards is improper and *per se* sanctionable.

Rule-Based Objections to Written Discovery and Some "Practice Pointers"

Both the Iowa and Federal Rules expressly permit objections to written discovery. Any claim that discovery objections are not proper or not permitted is flatly contradicted by the express language of the applicable rules. In the authors' view, so long as there is a good faith legal and factual basis, counsel is reasonably specific and the rules are followed, there is nothing wrong with objecting to an improper discovery request.

The rules in both state and federal court provide an explicit basis for objections to written discovery. Taking them in order as they appear in the rules, the objections that are permitted are the following:

1. A matter is privileged. *See* Iowa R. Civ. P. 1.503(1); Fed. R. Civ. P. 26(b)(1).

PRACTICE POINTER: Any time a privilege objection is made, the privilege must be identified specifically, and an appropriate privilege log must be prepared. The failure to provide any kind of a privilege log is commonly encountered. This situation was present in *Liguria.* If counsel does not provide a privilege log, counsel runs the risk that the court might find that the privilege objection is *waived*.

It may be difficult to prepare the privilege log within the 30-day response period. This is especially true if voluminous ESI is involved. If this is the case, either provide a partial privilege log, or state very clearly that a log is being prepared, and produce the log at the earliest opportunity so that discovery will not be unreasonably delayed. The authors note that the rules do not explicitly require that the privilege log be produced within 30 days in every circumstance.

2. A matter is not relevant to the subject matter involved in the pending action. *See* Iowa R. Civ. P. 1.503(1); Fed. R. Civ. P. 26(b)(1).

In order for a matter to be discoverable, it must be relevant in the discovery sense, which is exceedingly broad. Iowa Rule of Civil Procedure 1.503(1) provides the standard:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, the identity and location of persons having knowledge of any discoverable matter, and the identity of witnesses the party expects to call to testify at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

See also Fagen v. Grand View University, 861 N.W.2d 825 (Iowa 2015)(a party is permitted to discover inadmissible information as long as the request is reasonably calculated to lead to the discovery of admissible evidence).

PRACTICE POINTER: When objecting based on relevance, in order to preserve the objection and avoid waiver, explain in detail *why* the request is not relevant. Absent this, *waiver* of the objection will likely be found.

See, e.g., Sentis Group,Inc. v. Shell Oil Co., 763 F.3d 919 at 925(8th Cir. 2014)(a "lack of relevance" objection, without explanation, is contrary to the rules).

3. A matter is not reasonably calculated to lead to the discovery of admissible evidence. *See* Iowa R. Civ. P. 1.503(1).

PRACTICE POINTER: The authors note that this is no longer a proper objection in federal court, since Federal Rule of Civil Procedure 26 was amended effective December 1, 2015. Amended Rule 26(b)(1) now provides as follows:

> Unless otherwise limited by court order, the scope of discovery is as follows:
>
> > Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

4. The discovery sought is outside the scope of discovery. *See* Iowa R. Civ. P. 1.503(1); Fed. R. Civ. P. 26 (b)(2)(C)(iii).

5. Discovery sought is unreasonably cumulative or duplicative. *See* Iowa R. Civ. P. 1.503(8)(a); Fed. R. Civ. P. 26(b)(2)(C)(i).

6. Discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive. *See* Iowa R. Civ. P. 1.503(8)(a); Fed. R. Civ. P. 26(b)(1).

PRACTICE POINTER: This objection should specifically state facts which show that the discovery sought causes the problems identified. If a motion to compel discovery is filed, a factual affidavit from a witness with personal knowledge would likely be required to sustain the objection.

7. The party seeking the discovery has had ample opportunity to obtain the information by discovery in the action. *See* Iowa R. Civ. P. 1.503(8)(b); Fed. R. Civ. P. 26(b)(2)(C)(ii).

8. 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. *See* Iowa R. Civ. P. 1.503(8)(c); Fed. R. Civ. P. 26(b)(1).

PRACTICE POINTER: Although lack of proportionality has always been a part of both the Iowa and federal rules, it is often overlooked. An objection based on disproportionality has taken on additional significance in the recent amendments to Fed. R. Civ. P. 26(b)(1). Now the issue of proportionality is a part of the overall basic scope of discovery. Depending upon the facts, when making a proportionality objection you may need to support it with an affidavit from a witness with personal knowledge, to explain why the discovery is disproportional. At the very least the specific facts that point to the disproportional nature of the discovery should be specifically stated and the affidavit can be provided later if a discovery motion ensues.

9. The discovery sought asks for trade secret or other confidential research, development, or commercial information. *See* Iowa R. Civ. P. 1.504(1)(a)(7); Fed. R. Civ. P. 26(c)(1)(G). *See also Mediacom Iowa, LLC v. Incorporated City of Spencer,* 682 N.W.2d 62 (Iowa 2004)(a district court may prevent or restrict discovery when the information sought is a trade secret or other confidential information, even though the requirements of the rule governing the discovery of information relevant to the subject matter of the lawsuit are met).

PRACTICE POINTER: Since this ground for an objection appears within the rule entitled "[P]rotective Orders," counsel would be well advised to also seek protection from disclosure by filing a Motion for Protective Order with a factual affidavit from a witness with personal knowledge to prove the nature of the material sought to be protected. At any hearing on the issue counsel should have the material available to be shown to the court *in camera,* if necessary.

10. The request asks for electronically stored information (ESI) that is not reasonably accessible because of undue burden or cost. *See* Iowa R. Civ. P. 1.504(2); Fed. R. Civ. P. 26(b)(2)(B).

PRACTICE POINTER: In order to preserve this objection, it may be necessary to provide a factual affidavit from an information technology (IT) person specifying the burden or cost of complying with the discovery request. Without this information the objection will likely be overruled. At least the facts should be presented and if this issue is the subject of a later motion, an affidavit can be provided.

11. The discovery request violates the discovery moratorium in that the discovery conference of the parties has not yet taken place. *See* Iowa R.Civ. P. 1.505; 1.507; Fed. R. Civ. P. 26(d)(1).

PRACTICE POINTER: This can happen as counsel becomes accustomed to the "new" initial disclosures requirement of Iowa R. Civ. P. 1.500. Rather than objecting and delaying discovery, the better practice would be for counsel to propose to the other side to allow you 30 days to respond *from and after the time that the initial disclosures are served.*

12. The discovery seeks material protected by the attorney work product privilege. *See* Iowa R. Civ. P. 1.503(3); Fed. R. Civ. P. 26(b)(3).

PRACTICE POINTER: Whenever a privilege is asserted as a ground for an objection, a privilege log specific enough to allow opposing counsel (and the court) to determine whether the privilege applies must be produced. As a practical matter, it may take some time to prepare the privilege log, and it certainly might take more than the 30 day time period pursuant to which responses are due. This is often true if ESI is involved. The authors note that there is nothing in either the federal rules or Iowa rules that would prevent a responding party from responding like this: "Defendant will provide an appropriate privilege log as soon as practicable." In the alternative, request in writing (e-mail can suffice) an extension of time from opposing counsel within which to respond. Finally, if a hearing is necessary on this issue, the protected materials should be brought to the hearing for *in camera* review by the court if necessary.

13. The discovery request is seeking a draft of an expert's report, which is not discoverable. *See* Iowa R. Civ. P. 1.508(1)(d); Fed. R. Civ. P. 26(b)(4)(B) and (C).

PRACTICE POINTER: Recent changes to both the Iowa and federal rules have clarified the law in this area. Under prior law, some courts would permit discovery of "draft" expert reports, while others would not pursuant to the attorney work-product privilege. Now, in both state and federal court, such drafts are clearly not discoverable. This is a welcome change given the important role that experts play in today's litigation practice.

14. The discovery request asks for communications between counsel and a retained expert, and is not discoverable. *See* Iowa R. Civ. P. 1.503(3); 1.508(1)(e); Fed. R. Civ. P. 26(b)(4)(C).

15. The discovery request asks for the identity of consulting expert witnesses whose work product does not form a basis, in whole or in part, of the opinions of an expert who is expected to testify at trial, and is not discoverable absent a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. *See* Iowa R. Civ. P. 1.508(2); Fed. R. Civ. P. 26(b)(4)(D).

16. The interrogatories are objectionable because the requesting party has not provided them in an electronic word processing format. *See* Iowa R. Civ. P. 1.509(1)(b); *see also* LR 33 for the Southern and Northern Districts of Iowa in federal court, where a local rule "encourage[s]" the propounding party to provide discovery requests in Word format.

PRACTICE POINTER: Instead of filing a formal objection which will only delay discovery, contact opposing counsel's office and request a Word version of the discovery requests to be supplied to facilitate responses. This avoids unnecessary motion practice.

17. The opposing party has submitted more than 30 interrogatories, including discrete subparts, without agreement or court permission. *See* Iowa R. Civ. P. 1.509(1)(e); Fed. R. Civ. P. 33(a)(1)(25 interrogatories in federal court).

PRACTICE POINTER: If the case involves significant injury or damages, this objection may not ultimately prevail, since the court has the power to permit more than 30 interrogatories upon a showing of good cause. *See, e.g., Roberts v. DeKalb Agr.Ass'n., Inc.,* 143 N.W.2d 338 (Iowa 1966)(where questions propounded in 64 interrogatories were not clearly outside the scope of the case, and they appeared reasonably necessary to allow plaintiffs to prepare for trial, trial court properly found that there was good cause for asking more than 30 interrogatories).

In order to avoid delay and unnecessary motion practice or court involvement, counsel may want to go ahead and answer the additional discovery, unless they are so numerous or prolix as to be abusive. Also, if there is significant abuse of this rule, counsel would be advised to file a Motion for Protective Order in order to seek affirmative relief without delay.

18. The opposing party has submitted more than 30 requests for admission without agreement or court permission. *See* Iowa R. Civ. P. 1.510(1).

PRACTICE POINTER: See comments to No. 16 above. In an "abusive" situation, an objection in conjunction with a Motion for Protective Order may be advisable. Note: in federal court there is no stated limit to the number of Requests for Admissions that may be propounded.

How Objections to Written Discovery Should Be Made

There are also rules that govern *how* objections are to be properly made. This is where counsel often find themselves in trouble. Lack of specificity in making the objection is typically the culprit. Objections to interrogatories ". . . must be stated *with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure*." *See* Iowa R. Civ. P. 1.509(1)(c)(emphasis added); *see also* Fed. R. Civ. P. 33(b)(3) and (4). The terms "*with specificity*" and "*waiver*" are manifestly clear and do not need to be defined. Not only will the objection be overruled, but a judicial finding of waiver may be entered.

With respect to requests for admissions, Iowa Rule of Civil Procedure 1.510(2) provides:

> *Time for and content of responses*. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may on motion allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the original notice upon defendant.
>
> If objection is made, the reasons therefore shall be stated. The answer *shall specifically* deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the party's answer

> or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for a failure to admit or deny unless the party states that the party has made reasonable inquiry and the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of rule 1.517(3) deny the matter or set forth reasons why the party cannot admit or deny it.
>
> (emphasis added)

See also Fed. R. Civ. P. 36.

Requests for production of documents are governed by Iowa Rule of Civil Procedure 1.512. That rule provides in pertinent part as follows:

> For each item or category, the response must state that inspection and related activities will be permitted as requested *or state the grounds for objecting to the request with specificity*, including the reasons. If the responding party states that the party will produce copies of documents or electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection state in the request or a later reasonable time stated in the response.
>
> (emphasis added)

See also Fed. R. Civ. P. 34. Again, *specificity of objection* is the common denominator.

Objections to responses to requests for production of documents or entry upon land for inspection, must be made in a timely fashion or else it is waived. *See* Iowa R. Civ. P. 1.512(2)(b)(3); Fed. R. Civ. P. 34(b)(2)(A); *Cargill, Inc. v. Ron Burge Trucking, Inc.,* 284 F.R.D. 421 (D. Minn. 2012)(insurer failed to comply with its obligations to timely respond or object to written discovery; thus, objections to discovery were waived). This raises an important point. All too often written discovery is served, and no response is made within 30 days (or 33 days, if Iowa Rule of Civil Procedure 1.443(2) or Federal Rule of Civil Procedure 6(d) applies). The responding party might think that "oh well, the court would likely grant a 30-day extension in any event;" or "the requesting party will have to file a motion to compel, and that will take some time; I can use that time to fashion responses and, in any event, serve the responses before the motion to compel is heard. In that way I can render the motion "moot" and avoid sanctions." (Please don't ask us how we know.) However, the rules clearly provide that objections *shall* be made within 30 days, or else *they are waived.* Given the rule, it should come as no surprise that Iowa district court judges have often enforced a waiver of objections under such circumstances. *See, e.g., Vivone v. Broadlawns Medical Center,* Iowa District Court, Polk County, No. CL 93691, Nov. 29, 2005 ("However, if the party does not object within 30 days of service of such answers, then the objection is waived."). The same waiver rule applies for late objections to interrogatories, *see* Iowa R. Civ. P. 1.509(1)(d). The "waiver" of untimely served objections is also followed in federal court. *See* Fed. R. Civ. P. 33(b)(4)(interrogatories); *Cargill, Inc. v. Ron Burge Trucking*, 284 F.R.D. 421, at 424 (D. Minn. 2012)(although not explicitly a part of Rule 34, "[T]he court agrees that the same waiver provision found in Rule 33(b)(4) applies to document requests under Rule 34.")

PRACTICE POINTER: If the 30-day deadline approaches and a delay in responding cannot be avoided, either obtain an extension in writing from the other side, or at least make sure you serve, in writing, a list of specific objections to the discovery, in order to forestall any argument that you have *waived* those objections under the rule.

If an Objection is Made, State Whether Any Information or Documents are Being Withheld

It is common for a responding party to make an objection, and then neglect to state whether any materials or information are being withheld by reason of the objection. Recent changes to the Iowa rules provide that:

> *An objection must state whether any responsive materials are being withheld on the basis of the objection*. An objection to part of a request must specify the part and permit inspection of the rest. When a response is provided subject to an objection, the responding party must specify the extent to which the requested information has not been provided.
>
> (emphasis added)

See Iowa R. Civ. P. 1.512(2)(b)(4)(requests to produce); 1.509(1)(c)(interrogatories); *see also* Fed. R. Civ. P. 34(b)(2)(C). If this rule is not followed, it is impossible to determine if any documents or information is being withheld. This was a rule that both parties violated in *Liguria Foods*.

Sample Incorrect and Correct Discovery Objections

Sample Improper Discovery Request:

> "Please produce all documents or tangible items of evidence that are relevant to any claim or defense in this case."

Typically Incorrect, "Boilerplate Objection:"

> "Defendant objects in that the request is overbroad, vague, insufficiently specific, unduly burdensome, unlimited as to time, requests items beyond the scope of discovery, requests items protected by the attorney-work product privilege, requests items protected by attorney-client privilege, and requests items that are not reasonably calculated to lead to the discovery of admissible evidence. Without intending to waive the foregoing objections, Defendant produces the following items:_____"

Preferred, More Correct Objection:

> "Defendant objects to this request for the following reasons. The request is overbroad in that it requests items that are not within the possession, custody or control of the Defendant. The request is vague and insufficiently specific because it requests items that are "relevant" without stating the nature or type of materials requested. This is merely a restatement of the generalized scope of discovery as set forth in Iowa Rule of Civil Procedure 1.503(1). The request is unduly burdensome since Defendant has possession of ESI that may relate to the product in issue, numbering approximately 150,000 separate electronic records. It is our estimate that the cost of searching, organizing and producing those records would be in excess of $50,000 (*see* affidavit supplied with this response by Mr. John Q. Public, IT Director), which is significantly disproportionate to the issues involved in this case, where Plaintiff has sustained a broken arm with no permanent injury. Alternatively, if Plaintiff's counsel would agree to reimburse Defendant for the cost of that search, then Defendant would produce these documents. The request is further objected to as being unlimited as to time. The subject product was not designed until approximately 2010; Defendant believes that only design documents from 2010 to the end of production, 2012, would be relevant, although the request is not so limited. Further, Defendant objects based on attorney client privilege and attorney work product privilege. Defendant produces herewith its privilege log regarding these documents. Finally, the Defendant objects because the request asks for items that are not reasonably calculated to lead to the discovery of admissible evidence, because there is literally no scope or limitation as to time that pertains to Plaintiff's request. If Plaintiff could be more specific, Defendant would endeavor to respond further. Defendant specifically states that it is withholding production of materials from Plaintiff by reason of these objections. Without intending to waive the foregoing objections, Defendant produces the following (Bates #s 00001-00879):
>
> 1. Exemplar owner's manual.
> 2. Written warranty that applies to vehicle.
> 3. Exemplar window sticker.
> 4. Recall notices applicable to this vehicle.
> 5. Design layout drawing of roof structure.
> 6. Manufacturer's roof crush certification to NHTSA.
> 7. Videos of roof crush certification tests."

Drafting a proper objection to an improper written discovery request takes more effort than the simple, knee-jerk reaction of a cut-and-paste "boilerplate objection." Because of the specific information provided in a proper objection, the case is actually advanced toward resolution and the issues are narrowed. This in turn reduces the cost and expense of litigation to everyone's benefit, in keeping with Iowa Rule of Civil Procedure 1.501(2)'s goal ". . . to secure the just, speedy, and inexpensive determination of every action and proceeding and to provide the parties with access to all relevant facts."

Other Concerns About Written Discovery

1. The use of "instructions" and "definitions."

It seems as though nearly every set of interrogatories or requests for production of documents received within the last 10 years also includes a lengthy set of "instructions" and "definitions." Word processors inject these into every set of written discovery. Sometimes the "duty to supplement" is tortuously described, which usually bears no resemblance to the duty to supplement discovery automatically provided for under the rules. *See* Iowa R. Civ. P. 1.503(4); Fed. R. Civ. P. 26(e). If the rules set forth the duty to supplement, then why on earth does it need to be addressed in instructions, for heaven's sake! The rules make no reference to "instructions" or "definitions." This flotsam often is borne from a "lawyer paranoia" (a term used by Judge Bennett in *Liguria Foods*) about discovery: that if the proponent doesn't include definitions of the terms used in the discovery requests, the response will simply be a "non-response:" "X is undefined and therefore Defendant refuses to answer."

From the respondent side definitions and instructions also present a problem. The answering party may feel as though

some other rules are being trickily employed, as opposed to the federal or Iowa rules. As a result, and purely as a rearguard action, responses often include a just-as-worthless, "general objection" such as: "Plaintiff's interrogatories are objected to for the reason that they include instructions and definitions that may be interpreted to employ a duty to respond to discovery beyond that which is required by the applicable rules. These responses are made in accordance with the Iowa Rules of Civil Procedure and no other rules." The problem is that none of this unnecessary verbiage (verbiage=verbal garbage) serves to move "the ball down the field," nor does it assist the court or litigants.

PRACTICE POINTER: Leave out the instructions and definitions. Be clear in your discovery requests by using common, everyday plain-English language. If technical terms need to be defined in a complex case, define those terms within the interrogatory or request for production itself.

2. Correspondence between counsel and client in the pending litigation protectable by attorney-client privilege.

Some discovery requests are broad enough to literally encompass correspondence between counsel and client (*e.g.*, litigation status reports) during the pendency of the litigation at bar. Although this material is clearly protected by the attorney client privilege, it may still fall within the bounds of an overbroad discovery request such as: "[P]lease produce any and all documents or tangible things relevant to Plaintiff's claim or Defendant's defenses." Is it really necessary to prepare a privilege log for this material? Does this advance the case or clarify the issues? The authors think not. Since it doesn't help the court or litigants, get rid of it.

PRACTICE POINTER: The authors have had success in seeking a "gentleperson's agreement" that this material is obviously privileged, not discoverable in the case and *does not* have to be listed in a privilege log. Stipulations like this are allowed by the rules. Iowa Rule of Civil Procedure 1.506(2) provides that "Unless the court orders otherwise, the parties may by written stipulation do the following: . . . Modify the procedures provided by these rules for other methods of discovery." Federal Rule of Civil Procedure 29 provides likewise, with the additional proviso that: ". . . but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

3. Answering, responding or producing documents "subject to" objections.

Some federal courts have criticized this practice. *See, e.g.,* Chief Justice Menis E. Ketchum II, *Impeding Discovery: Eliminating Worthless Interrogatory Instructions and Objections*, 2012-JUN W. Va. L. 18, 19 (2012); *Network Tallahassee, Inc. v. Embarq Corp.,* 2010 WL 4569897 (N. D. Fla. 2010); R. Jason Richards, *Answering Discovery "Subject To" Objections: Lessons from Florida's District Courts,* 35 S. Ill. U. L. J. 127 (2010). They forcefully argue that this language is of no force or effect, and is sanctionable. This position is not without some rational appeal: how can you object, but nevertheless proceed to answer without waiving the objection just made? Can you imagine objecting based on attorney-client privilege, and then, turning over the very information you sought to protect? Once you turn over the information, how is that *not* a waiver?

Part of the confusion on this may be due to the fact that in state court in Iowa, as well as some other states, this form of response is permitted by the explicit language of the discovery rules. Iowa Rule of Civil Procedure 1.509(1)(c) provides that, with respect to responding to interrogatories, that "[A] party may answer an interrogatory in whole or in part subject to an objection without waiving that objection." With respect to document requests, Iowa Rule of Civil Procedure 1.512(2)(b)(3) provides that "[A] party may respond to a request in whole or in part *subject to an objection without waiving that objection*." Interestingly, neither federal court Rule 33 nor 34 have this language. But in the deposition setting Federal Rule of Civil Procedure 30(c)(2) states in pertinent part that ". . . *the testimony is taken subject to any objection*." The Iowa rule regarding deposition practice is the same. *See* Iowa R. Civ. P. 1.708(1)(b)("Evidence objected to shall be taken *subject to the objection*."). Why deposition discovery in federal court is governed by a different procedure than Rule 33 interrogatories or Rule 34 document requests is unclear.

PRACTICE POINTER: If responding to a written discovery request in state court and this phraseology is used, clearly and specifically state whether any materials or information are being withheld by reason of the objection. *See* Iowa R. Civ. P. 1.509(1)(c); 1.512(1)(b)(4). If a privilege is involved, a privilege log should also be supplied. All too often, this information is left out and can lead to an unnecessary motion to compel discovery, and will raise the ire of the court.

Local Counsel's obligations

A complete description of local counsel's ethical duties in litigation is beyond the scope of this article. Suffice it to say, Iowa counsel will sometimes be called upon by out-of-state, so-called "lead" counsel to serve as local counsel in a matter litigated in either Iowa state or federal court. This was of particular concern to the court in *Liguria Foods,* where it had ". . . ascertained that local counsel for both parties had acted essentially as "drop boxes" for filings, but did not have any active role in formulating

the discovery responses in question." Opin. p. 17. Under the Iowa Rules of Professional Responsibility, local counsel has an affirmative ethical obligation to "actively participate" in the litigation. *See* Rule 32:5.5(c)(1). If local counsel is merely a "drop box," this is antithetical to the ethical duty and professional obligation to *actively participate* in the litigation.

Another trap for the unwary is the signing of discovery responses by an attorney who has not been involved in the search for documents, or in the preparation of the responses. What if lead, out-of-state counsel presents discovery responses to local counsel for signature on the date they are due to be served? Should local counsel sign the responses? What if they later turn out to be incorrect or incomplete? Our advice to local counsel is to *refuse* to sign discovery requests where local counsel has not been directly involved in preparation of the responses, or you have been put unwittingly into the bind, by lead counsel, of having to sign them on the date they are due.

PRACTICE POINTER: If necessary, get an extension of time from opposing counsel to respond to the discovery, so that you can do your homework and confirm the responses before signing them.

A rule in Iowa addresses the obligations of counsel in signing discovery responses or objections. *See* Iowa R. Civ. P. 1.503(6) (previously cited and discussed, *supra*); *see also* Fed. R. Civ. P. 26(g). Rule 26(g) superimposes "Rule 11-like" responsibilities on counsel, whether they are propounding, responding to or objecting to written discovery requests. These rules have *teeth* and every practitioner in Iowa should be aware of them.

Does refusing to sign the responses, and letting lead counsel sign them, let local counsel off the hook? In our view, it does not. Local counsel's name is printed on the discovery response and local counsel has appeared as counsel of record for the party in the case. The rules recognize no distinction between "lead" or any other counsel in the matter. Further, if local counsel was *not* involved in preparation of the discovery responses, that could be viewed as affirmative evidence that local counsel was *not* "actively participating" in the litigation as required by the rules. Local counsel might still be sanctioned, depending upon the facts. There is a chance, though, however slight, that the court might have some leniency towards local counsel if counsel had refused to sign off on discovery responses that he or she was not directly involved in preparing. The admonition is clear: your signature means something, so be careful what you sign!

Finally, with respect to your signature obligations sanctions are *mandatory* if a violation is found, and the court may act on its own to order sanctions, *see* Iowa R. Civ. P. 1.503(6)(c) and Fed. R. Civ. P. 26(g)(3), even without any motion or complaint of a litigant.

Conclusion

Counsel has an obligation to engage in written discovery in good faith and according to the rules that apply. All of this must be done in a professional and ethical manner. Where proper and specific objections are warranted they should and must be made. Attorneys have an ethical duty to represent their clients zealously. Counsel should take care to meet each requirement of the rules. Although sanctions were not actually awarded in *Liguria Foods*, it would be a mistake to think that the underlying law of discovery objections would not be applied by other courts in other cases in Iowa involving a "boilerplate objection" situation. It would also be wrong to conclude that only aggressive, out-of-state counsel from litigious jurisdictions who engage in "Rambo" discovery tactics are the only lawyers who can run afoul of the discovery rules and risk sanctions.

"Boilerplate" discovery objections and obstructionist tactics are anathema to the practice of law and the fair administration of justice. They should be chloroformed and euthanized. This may take some effort on the part of counsel to educate clients, especially those involved in pattern litigation in other jurisdictions. All of us would be well advised to heed the admonition of Judge Bennett in *Liguria Foods,* jettison the boilerplate and tighten up our written discovery objections.

[1] One of the authors was involved in a case where a federal magistrate judge, upon noticing that part of opposing counsel's argument was typed in ALL CAPS (presumably for emphasis), remarked, "[C]ounsel, the part of your argument that is in ALL CAPS—does that mean you are yelling at me?"

IDCA Legislative Update

by Brad Epperly, IDCA Lobbyist, Nyemaster Goode PC, Des Moines, Iowa

Brad Epperly

The 2017 Session of the 87th Iowa General Assembly proved to be one of the most substantial policy sessions in recent history. The Session came on the heels of significant Republican gains across the country that resulted in Republican control in both the Iowa House and the Senate, along with the Governor's office, for the first time in Iowa since 1998. The majorities in the House (59-41) and the Senate (29-20-1) were substantial and the two Chambers addressed most of their priorities.

Before any policy was passed, the legislature was faced with a budget shortfall in the current 2017 budget. As such, the first three weeks of the session were consumed with discussions and negotiations between the two chambers and the Governor's office on de-appropriating some $130 million from the current year budget. The impact on the Judicial Branch budget was a $3 million reduction in funding. This reduction compounded the funding problems of the Judicial Branch that began the 2017 budget year already $5 million short of the amount needed to maintain the current level of service.

After the de-appropriation bill was passed, the Senate took up Chapter 20 reforms, collective bargaining for public employees. The bill in large part guts Chapter 20, taking away most of the subjects that could be bargained over and terminated the union's ability to withhold dues and PAC contributions from members' paychecks. As the bill worked its way through the committee process, there was significant public attendance and objection, culminating in a public hearing that filled the Capitol. When the Senate finally took up the bill for debate, Senators debated through the night and into the afternoon on the next day. In the end, the final vote would be a sign of things to come in the Senate: 29-21, with every Republican voting for the bill.

On the other side of the rotunda, the House took up what was referred to as an omnibus gun rights bill. Most of the issues contained in the bill had been worked on and in many instances, passed in one form or another over the last few years by the House. Among the many sections of the bill, perhaps the most controversial was the stand your ground provisions as it relates to civil causes of action.

The legislature went on to pass bills on voter identification, workers' compensation, medical malpractice, minimum wage preemption, statute of repose, restricting project labor agreements, asbestos litigation protections, alcoholic beverage laws, texting and driving, restrictions on abortions and expansion of medical marijuana. Despite bipartisan support from the legislature, Governor and Secretary of Agriculture, as well as environmental groups, cities and business and industry, the legislature failed to pass legislation addressing water quality. Both the House and the Senate passed different bills in the waning days of session, but ran out of time to reach a compromise.

After years of attempting to persuade the legislature, the legislature made changes to the Statute of Repose for improvements to real property. The final bill reduces the years from 15 to 8, but included certain exceptions in an effort to find compromise with the Bar Association and the Association for Justice. Despite these concessions, both remained against the bill to the end. The following are the exceptions: any action related to a nuclear power plant was kept at fifteen years; residential construction was reduced only to ten years; intentional misconduct or fraudulent concealment of an unsafe or defective condition was left at fifteen years.

Medical malpractice reform has been a periodic topic of legislative efforts over the years primarily spearheaded by the Iowa Medical Society. This session legislation was finally passed over the strenuous opposition by the Association for Justice and the Bar Association. The original bill was significantly amended, striking limitations on contingent attorney's fees and evidence-based medical practice guidelines. The bill adds a number of providers to the definition of "health care provider" in the confidential open discussions chapter (Chapter 135P) passed in 2015, to now include osteopathic physicians, chiropractors, nurses, dentists, optometrists and pharmacists. The bill also provides standards for expert witnesses, requiring the expert be a licensed health care provider, in good standing and in the five years preceding has not had a license revoked or suspended. The expert must have practiced or instructed in the same field in

the preceding five years. The bill establishes a certificate of merit affidavit for the expert witnesses.

The most controversial provision contained in the bill was the section providing for a cap on noneconomic damages of $250,000. The Senate passed its version of the bill with a straight $250,000 cap. Meanwhile, the House Judiciary Chair Chip Baltimore stripped out the section on caps when it was voted out of committee. Both bills sat in the House with no movement and appeared to be in jeopardy until leadership in the House got involved the next to last week of the session. Despite Representative Baltimore's opposition to caps, he was asked to attempt to find compromise language that would keep caps in the legislation. The following is the amendment to the Senate bill regarding caps:

> unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

The IDCA registered opposed to the caps. The bill passed the House 65-32, with ten Democrats voting with the majority. The Senate accepted the House amendment and passed the bill by an even greater percentage margin, 37-12.

Amongst all the tort related reforms of medical malpractice, worker's compensation and asbestos litigation, the IDCA again worked to pass changes to the mitigation of damages limitations contained in code for the failure to wear a seat belt. Filing the bill initially as a straight comparative fault analysis, the bill met heavy resistance from both the Association for Justice and the Bar Association. After a contentious subcommittee, the IDCA worked with the Association for Justice in order to forge a compromise that would simply move the percentage limitation from 5% up to 25%. Despite this agreement, the Bar Association remained against the bill and it was not until the Board of Governors met on March 22nd, that the decision was made for the Bar to change their registration to neutral. This occurred the week prior to the second funnel.

We worked the House that week, vote counting (50 confirmed Republicans) and meeting with the Majority Leader to put our bill back on the debate Calendar. However, in the end we were held up in the House Republican caucus by an influential member who prevented us from getting back on the debate calendar and the bill died in the second funnel. Thereafter, efforts were made to be included in the Standings Bill at the end of session and we received favorable responses from leadership, but in the end it was extremely difficult to get policy language in the Standings Bill. Given the compromise reached with the Association for Justice this session, the Bar Association's newfound neutrality and all of the other tort reform issues seemingly out of the way, I would expect significant support from leadership on this bill next year.

The final tally was 174 bills passed by the legislature this session and sent to the Governor. Next year I can sum up what to expect in two words: Tax Reform.

Workers' Compensation Update

by Thomas B. Read, Elderkin & Pirnie P.L.C., Cedar Rapids, Iowa

Thomas B. Read

The Iowa legislature made significant changes to the Iowa Workers' Compensation Act during the past session. The following is an overview of those changes. It is not intended to be an exhaustive detailed analysis of all the changes or the nuances of the Act. You are encouraged to read the entire Bill for complete details on all changes.

The effective date of this Act is July 1, 2017. The Act applies to all injuries that happen on or after July 1, 2017 and the Acts provisions that modify commutations apply to Applications for Commutations filed on or after July 1, 2017.

Under the new law, if an employee tests positive for drugs or alcohol at or immediately following an injury, it will be presumed the employee was intoxicated and the intoxication was a substantial factor in causing the injury. The burden then shifts to the employee to prove he or she was not intoxicated or that the intoxication was not a substantial factor in causing the injury.

For the purpose of the 90-day notice of injury pursuant to Code of Iowa Section 85.23 and the two-year statute of limitations on filing a contested case proceeding, the "date of the occurrence" is the date the employee knew or should have known the injury was work-related.

Under Section 85.33(3), when an employee travels away from the employer's principal place of business more than 50% of the time, work offered to the employee at the employer's principal place of business or where the employee previously worked is presumed geographically suitable for an employer offering suitable work to an employee who is temporarily, partially disabled. The employer must communicate this offer in writing to the employee and tell the employee that if the employee refuses to accept the work the employee must communicate this refusal and the reasons for the refusal and that the employee will not be compensated with weekly benefits during the period of refusal unless the work offered is actually unsuitable. If the employee refuses to communicate the reason for the refusal the employee can not raise the issue of unsuitability until the employee communicates the reason for the refusal.

Section 85.34(2) is amended to provide that compensation for PPD benefits no longer begins at the end of the healing period. Rather, it begins when the employee reaches MMI and the extent of the loss or percentage of permanent impairment can be determined by the AMA Guide to the Evaluation of Permanent Impairment. Note, many times, the "rating" of a doctor both ends the healing period and starts the PPD. But, the healing period can also end when the employee returns to work. If that happens and the employee reaches MMI at a later date, PPD benefits start at that later date and the employer doesn't have to pay back benefits and interest back to the date when the employee returned to work.

The shoulder becomes a scheduled member, the loss of which equals 400 weeks. Query, where does the shoulder end and the body begin?

Evaluation of body as a whole injuries and permanent impairment has new considerations:

1. A determination of reduction of earning capacity shall take into account the number of years in the future it was reasonably anticipated the employee would work.

2. If the employee either returns to work or is offered work at the same or greater earnings than at the time of the injury, the employee is compensated only upon the functional impairment and not based upon a loss of earning capacity.

3. But, if the employee returns to work with the employer he or she was working for at the time of the injury AND receives the same or greater earnings as at the time of the injury and, therefore, is compensated only at the functional rating AND is later fired by that employer, then the employee can file for Review-Reopening of the award or agreement for settlement and seek a determination of the employee's loss of earning capacity.

The evaluation of the functional rating for a scheduled member will be limited solely to the AMA Guide. Lay testimony or agency expertise cannot be used when determining the rating of a scheduled member.

Compensation for PPD benefits will end when permanent total benefits begins. No longer can an employee simultaneously receive PPD benefits and permanent total benefits.

Permanent total benefits are payable until the employee is no longer permanently and totally disabled, not just "during the period of the employee's disability."

An employee cannot receive PPD benefits if the employee is receiving permanent total benefits. Nor can an employee receive permanent total benefits when the employee receives unemployment compensation.

An employee will forfeit a week of permanent total disability benefits for each week during which the employee receives gross earnings or payments for services equal to 50% or more of the statewide average weekly wage.

If an employer overpays TTD, TPD or HP benefits, the employer will be able to claim a credit for the excess paid against any future weekly benefits due, not just PPD benefits as is the case currently.

If an employee is overpaid, the overpayment will be credited against future weekly benefits not only for subsequent injuries but also for any current injuries the employee might have. Also, the new law removes the requirement that the only way an overpayment can be established is when the overpayment is recognized in a settlement agreement or in a contested case proceeding. The new law eliminates the eight year limitation on the availability of the credit and eliminates the availability of a method for the employee to repay the overpayment back to the employer.

The new law addresses pre-existing disabilities. Currently, an employer is not liable for preexisting disabilities that arose out of employment with a different employer or from causes unrelated to employment. The new law expands this to include no liability for a preexisting disability that arose out of a prior injury with the employer to the extent that the employee has already been compensated for that preexisting disability.

If an employee refuses to submit to an examination by a doctor of the employer's choice under Section 85.39, the employee's right to any compensation will be forfeited during the period of refusal, not just suspended as it is currently.

If an employee has a "second opinion" by a doctor of his or her choosing under Section 85.39, the employer will be liable to reimburse the employee only if the injury is later determined to be compensable. The reasonableness of the fee for such an examination will be determined by the "typical fee charged by a medical provider to perform an impairment rating in the local area where the exam is conducted." (Emphasis added.) Query—a simple impairment rating should be less expensive than an examination where the claimant's doctor reviews a lot of medical records and gives an opinion about causal connection in addition to giving an impairment rating.

Commutations will require the consent of all parties to the commutation (as well as the satisfaction of the current conditions listed in Section 85.45). Commutations will still need to be approved by the Commissioner. Medical benefits can be left open under a commutation under terms that the parties agree upon.

Section 85.70 currently provides that the employee may apply for and the Commissioner may approve an additional $100 per week payment to the employee if the employee is participating in a vocational rehabilitation program. This additional benefit continues for 13 weeks with the possibility that the Commissioner could order an additional 13 weeks if the additional training will accomplish rehabilitation. The new law makes a separate provision just for shoulder injuries in which the employee cannot return to gainful employment. First, the Department of Workforce Development will evaluate the employee regarding career opportunities the employee has and determine if the employee would benefit from vocational and educational programs offered by area community colleges. If the employee is a candidate for such programs the Department will refer the employee to the community college. The employee has six months to enroll in the program to remain eligible for this program. The employer is liable for up to $15,000 of tuition, fees and the purchase of supplies. The employer can get a status report from the community college each semester verifying the employee's continuing participation in the program. The employee must continue to meet the attendance requirements of the college and receive passing grades to remain eligible for the program. Finally, the new law requires the Department of Workforce Development to annually report to the general assembly information about the results that this new program is seeing. Caveat—There are a number of details about this new law that can only be learned from a careful review of the statute itself.

The new law amends the applicability of the Iowa Workers' Compensation statutes to injuries that happen out of state. Currently, the Iowa workers' compensation law will cover such extraterritorial injuries if certain conditions are met. See Section 85.71. The new law eliminates one of those conditions. No longer will the Iowa law apply to employees who are injured out of state just because the employer has a place of business in Iowa and the employee is domiciled in Iowa.

The new law provides that enforcement of a decision by the Workers' Compensation Commission can be stayed after the

filing of a petition for judicial review by the posting of a bond in an amount determined by the district court. Either party has a short time to object to the amount of the bond fixed by the district court and the court can modify the amount of the bond.

Attorneys who represent claimants may not recover fees based upon the amount of compensation that is being voluntarily paid to the employee and can only recover a fee based upon the amount of compensation paid to the employee that is due to the efforts of the attorney.

The interest rate on weekly benefits that are not paid when due is reduced from 10% to the same interest rate that is used for judgments in civil tort cases in Iowa which equals the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of the injury plus 2%. The rate in any particular case will be determined by the date of the injury.

NEW LAWYER PROFILE

Cyrstal Pound

In every issue of *Defense Update,* we will highlight a new lawyer. This issue, we get to know Crystal Pound, Simmons Perrine Moyer Bergman PLC in Cedar Rapids, Iowa.

Crystal is a litigation attorney with Simmons Perrine Moyer Bergman PLC. Ms. Pound was raised in Remer, Minnesota. She graduated from Minnesota State University Moorhead in 2011 before earning her Juris Doctor at the University of Iowa College of Law in 2016. While at the University of Iowa, she was President of the Black Law Student Association, an articles editor for the *Journal of Corporation Law* and volunteered with Iowa Legal Aid. Upon graduation, Ms. Pound received the Boyd Service Award for her commitment to community service and the Philip G. Hubbard Human Rights Award. Ms. Pound was a clerk for SPMB in 2015. Prior, she clerked for the Iowa State Public Defender's Office and was an Equal Justice Foundation Volunteer for Southern Louisiana Legal Services.

Case Law Update

by Andrea D. Mason, Lane & Waterman, LLP, Davenport, Iowa

Andrea D. Mason

Estate of Michael G. Cox II by Executors Joleen Cox and Michael G. Cox Sr. and Joleen Cox, Individually and Michael G. Cox Sr., Individually v. Dunakey & Klatt P.C. n/k/a Klatt, Odekirk, Augustine, Sayer, Treinen & Rastede, P.C., No. 16–0649 (April 7, 2017).

Why it matters: We do it every day: negotiate. And, in a lot of our cases, we are able to come to a resolution by way of settlement. This case reminds us of the importance of ensuring we have a clear understanding of and proposal for all the terms of a settlement agreement, particularly as we negotiate back and forth by way of email. Because questions can often arise, this case provides a good outline of contract law as it relates to settlement agreements. The case also includes two side issues: the sealing of records; and the appointment of an out-of-district judge in a legal malpractice case.

Summary: This legal malpractice case proceeded to settlement negotiations, including mediation. The parties eventually agreed on the payment to settle the case, and exchanged versions of a confidentiality provision. The defendant's adjuster sent to plaintiffs' counsel "a couple of releases," requesting plaintiffs' review. Plaintiffs' counsel replied with a recommendation to replace one paragraph, concerning confidentiality of the agreement, with alternate language. Defendant's counsel then emailed plaintiffs' counsel a document titled "Settlement and Full and Final Release" which incorporated the requested confidentiality language; this language provided the release shall be confidential between the parties and shall not be disclosed by the releasors. Defense counsel asked for plaintiffs' counsel to advise as to their agreement, and the defendant's adjuster added they would also need the insured-defendant's approval. Defense counsel then added they expected the insured-defendant to agree, but such was "one last moving piece."

Plaintiffs' counsel replied the Settlement and Full and Final Release was agreeable. However, at that time, the insured-defendant had not confirmed acceptance of the agreement. The next day, defense counsel emailed plaintiffs' counsel a different version of the settlement, with changes to the confidentiality provision to include prevention of disclosure by the releasors but also by their "agents, assigns, wards, executors, successors, administrators, and attorneys." Plaintiffs' counsel objected to the new language, maintaining it was overly broad and unethical, and said plaintiffs wanted the Settlement and Full and Final Release to which they had agreed or they wanted to try the case. Defense counsel offered to remove the word 'attorneys,' but not 'agents,' which counsel said included attorneys. Defense counsel also questioned why the parties would try the case if they had already agreed to a settlement.

When plaintiffs requested a new trial date, defendants moved to enforce the settlement. The district court concluded, drawing upon the language of the Settlement and Full and Final Release relating only to the releasors, the parties reached a final settlement agreement, reasoning the settlement was of sufficient specificity to make it binding upon the parties and it is the norm confidentiality clauses would be binding on both the parties and counsel.

The Court found no settlement agreement existed because the parties never mutually assented to the same agreement. When plaintiffs agreed to the Settlement and Full and Final Release, the defendant had not yet assented. When the new version was sent to plaintiffs, it, as a counteroffer, terminated the pending offer to the Settlement and Full and Final Release. The Court found no need to address the claim that a confidentiality clause binding counsel would violate the Rules of Professional Conduct.

Estate of Mercedes Gottschalk by Coexecutors Richard Gottschalk and Rebeca Rassler v. Pomeroy Development, Inc. d/b/a Pomeroy Care Center, State of Iowa, No. 14–1326 (April 14, 2017).

Why it matters: This case concerns the complex issue of duty in tort law. Regardless of the specific facts of this case, it is helpful for any who practice in this area, particularly if one is attempting to delineate the general duty of care from duties of care relating to special relationships. Additionally, there is ample discussion of preservation of issues on appeal. If this is of any concern to you, *Gottschalk* provides a useful outline, discussing both when error is and is not preserved.

Summary: William Cubbage was convicted of assault with intent to commit sexual abuse in 2000; indecent contact with a child in

1991 and again in 1997; and lascivious acts with a child in 1987. He was diagnosed with pedophilia and a personality disorder not otherwise specified with antisocial and narcissistic features. In 2002, Cubbage was adjudicated a sexually violent predator, and he was committed to the custody of the Iowa Department of Human Services for placement with the civil commitment unit for sexual offenders ("CCUSO") until his "'mental abnormality has so changed that he is safe to be placed in the transitional release program or discharged.'" Four years later, Cubbage was diagnosed with dementia of the Alzheimer's type, declining mental functioning, and other physical and mental conditions.

CCUSO staff, in the 90-day patient assessment, indicated the "'best avenue for Mr. Cubbage would be to place him in secure care for the rest of his life…pending DHS Directors approval.'" For the annual report, a CCUSO psychologist determined Cubbage did not meet the criteria for transitional release but Cubbage did not then meet the legal definition for a sexually violent predator. As such, the district court held a hearing, finding Cubbage was seriously mentally impaired and, due to his dementia and executive dysfunction, Cubbage was a danger to himself and others. The district court then ordered Cubbage be placed in the Pomeroy Care Center for appropriate treatment. Cubbage's public defender then requested the court discharge Cubbage from civil commitment, stating the director of human services, the Iowa attorney general's office, and the Iowa public defender's office mutually agreed Cubbage was "'unable to obtain further gains from his civil commitment at CCUSO' and [was] 'seriously mentally impaired and in need of full-time custody and care.'" A second district court discharged Cubbage from commitment under the Code and committed him to the Pomeroy Care Center pursuant to the Code and the previous district court order.

Before Cubbage arrived at Pomeroy, the administrator and director of nursing at Pomeroy met with CCUSO staff members to discuss Cubbage's history as a sex offender and his diagnoses of pedophilia and dementia. CCUSO staff told the Center's administrator it was not likely Cubbage would be a risk. The Center's administrator was not aware CCUSO doctors had previously opined Cubbage was a danger to others at the time he was committed to Pomeroy. The administrator understood Cubbage was being transferred because his physical condition had advanced to the point where he could no longer participate in active treatment; the Center's director of nursing understood Cubbage was a "child predator" and CCUSO staff told her Cubbage would be "no risk at all" to "older folks." The parties discussed Cubbage's access to children and the Center's ability to monitor Cubbage while in the presence of children. While at the Center, however, Cubbage sexually assaulted Gottschalk.

Gottschalk, who was substituted as her estate after her death, claimed negligence against the Center and the State, and the Center brought a cross-claim against the State for contribution and indemnity. The State moved for summary judgment, arguing it owed no duty of care to the estate's decedent or the Center. Specifically, the State argued once Cubbage was discharged from CCUSO, it owed no duty of care to supervise and monitor Cubbage, to create or supervise any safety plan related to Cubbage, or to inspect the Center and follow-up with regard to safety precautions. The State also argued Iowa Code Section 669.14(4) prohibited the Center from suing the State based on the State's alleged misrepresentations concerning Cubbage's risk to other residents in the Center. The district court determined because Cubbage was unconditionally discharged from the CCUSO, the State had no duty to supervise, monitor, or approve a safety plan and, without a duty, any claim of negligence fails. The district court further held the doctrine of sovereign immunity prevented any claim of misrepresentation pursuant to Section 669.14(4).

After examining the case law, including *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) and *Leonard v. State*, 491 N.W.2d 508 (Iowa 1992), and the Restatement (Third) of Torts, the Court determined no duty to the estate existed because it was the court, not the State, which made the ultimate decision to release Cubbage from CCUSO and commit him to the Center.

More specifically, the Court examined the essential element of duty, looking to §§ 40–41 of the Restatement (Third), addressing the issue of a defendant's liability for the actions of a third party based upon a special relationship with the person posing risks. Section 41 provides:

(a) An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(4) a mental-health provisional with patients.

Restatement (Third) of Torts: Liab. For Physical & Emotional Harm § 41. In *Leonard*, a pre-*Thompson* case, the Court found a special relationship existed between a psychiatrist and patient, giving rise to a duty to control the behavior of the other person or to protect a third party; however, the duty of care did not apply to the general public. *Leonard*, supra. The *Leonard* court, however, did not decide what duty, if any, would attach to the discharge decision if the psychiatrist had reason to believe a particular person would be endangered by the patient's release. Differentiating this case from *Leonard*, the Court noted the hospital in *Leonard* made the

discharge decision; in this case, however, it was not the State which made the decision to release Cubbage or to commit him to the Center.

It was the district court, not the State, which made these decisions. In turn, the district court found good cause to discharge Cubbage from his civil commitment; in so doing, the court found the State could not "'show beyond a reasonable doubt that [Cubbage's] mental abnormality or personality disorder remains such that [Cubbage] is likely to engage in predatory acts that constitute sexually violent offenses if discharged.'" Therefore, the court was required by the Code to discharge Cubbage. Because it was the courts, and not the State (who had no authority to release or discharge Cubbage), who discharged Cubbage and committed him to the Center, there was no special relationship to invoke § 41.

Because there was no special relationship between the State and the residents of the Center to invoke § 41, the State had no duty to warn the residents of Cubbage's alleged dangerous propensities and no duty to assure safety protocols were in place to protect the residents from harm.

With regard to the Center's appeal, again the Court found no special relationship existed between the State and Cubbage because the courts made the decision to discharge Cubbage, not the State. The Center argued because the State had a special relationship with Cubbage, the State had a duty to accurately warn the Center of Cubbage's dangerous propensities.

The Court acknowledged the representations made by the State to the Center were made while Cubbage was in the State's custody. However, at the time any representations were made, said the Court, only a court could release Cubbage, not the State. Thus, because there was no special relationship between the State and Cubbage when the courts discharged him from CCUSO and committed him to the Center, the State owed no duty of care to the Center. Similarly, there could be no genuine issue of material fact as to the State's alleged negligence in discharging Cubbage from CCUSO; in performing its role in the civil commitment of Cubbage to the Center; or in failing to supervise and monitor Cubbage. Because it was the court, not the State, which discharged Cubbage, no duty existed.

IDCA Welcomes Our Newest Member!

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IDCA Schedule of Events

July 13, 2017

DISTRICT I SOCIAL
Hammer Law Firm, PLC
590 Iowa Street, Suite 2
Dubuque, IA
5:30 - 7:30 p.m.
Join us for drinks and appetizers.

September 14–15, 2017

53RD ANNUAL MEETING & SEMINAR
Stoney Creek Hotel & Conference Center
Johnston, IA