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The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publication at Pretrial *Daubert* Hearings and at Trial

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Professor Carlson and Mike Carlson will speak on the topic of evidentiary objections, evidence law and practice under the Iowa and Federal Rules during the IDCA Annual Meeting & Seminar on September 14, 2017. Meeting details and registration are online, www.iowadefensecounsel.org/AnnualMeeting2017

I. INTRODUCTION

American courtrooms are awash in experts. It has been remarked that courtroom trials have become trial by expert.[1] The array of expert and technical services available to the nation's lawyers is staggering. A recent expert witness directory circulated to attorneys lists over 1,200 expert witnesses indexed by over 7,000 categories.[2] The back pages of lawyer magazines are filled with advertisements and listings for technical services, with experts ranging from standard professional fields to the innovative and exotic.[3] Trial judges face the task of determining which experts may testify at trial.[4]

Continued on page 3

WHAT'S INSIDE

IDCA President's Letter

Richard Whitty
IDCA President

Dear Colleagues,

Early one Saturday morning I spent a couple of hours reviewing all of the IDCA President's letters that have been published in the Defense Update since its inception in 1989. Aside from historical curiosity, my ultimate goal was to create the finest President's letter ever written.

I discovered that President David L. Phipps had already authored such, in the inaugural edition of the Defense Update in 1989. And with his permission, I set forth his cogent and timeless analysis of "*the Defense Identity.*"

> *'Just what is the Iowa Defense Counsel Association?' That is a question which all of us as officers or members of the Association are frequently asked. There are several popular misconceptions about our group and its purposes. It is tempting at time to seek our identity by describing what we are not – or by contrasting our organization to other groups.*
>
> *Upon closer examination, however, we find real pride in our own positive identity. We are a professional group of persons who handle claims and defend persons who have been sued in civil litigation. We seek to recognize those whose skills and experience have distinguished them as leaders in the trial arena. We seek to share those skills in training, education, and demonstration. We provide the opportunity for sharing mutual concerns, questions and interests. We provide a forum for sharing contemporary developments in the defense arena and for professional fellowship with our peers. We pursue legislation which promotes the rights of defendants in civil litigation and which recognizes the interests of all citizens.*
>
> *While the foregoing specifics are all good, in and of themselves, the goal of the Iowa Defense Counsel Association really transcends those functions. Above all else, our organization seeks to exemplify those qualities which make the practice of 'trial law' a true and time-honored profession. We seek to cultivate those skills and personal qualities which make the phrase 'my lawyer' one of the most fulfilling descriptions that any person can enjoy in their personal or professional lives. While recognizing the validity of business, economic, and scientific factors in the practice of defense law we seek to preserve that quality of advocacy that permits the judicial system in general, and the jury system in particular, to remain strong and functional.*
>
> *As our group continues to increase in size and strength, we salute the members who have created and preserved the organization and we welcome those who share this commitment. It is great to have such an opportunity for service and for action! I trust that our organizational activities this year will accomplish those goals.*

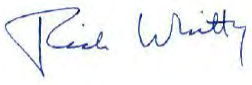
David L. Phipps, President (1989 Vol. 1, Series 1).

http://www.iowadefensecounsel.org/IDCAPdfs/DU/1988_Vol1_No1-IDCA_Defense_Update.pdf

My thanks to the hundreds of men and women, who conceived, gave birth, raised and educated the child named the Iowa Defense Counsel Association, now 53 years old. I challenge each of you to promote the health and longevity of this child for another half century.

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

Best personal regards,



Richard Whitty

Continued from Page 1

There is not only a large number of experts available to litigants but also a large body of scientific literature experts may draw upon to support their testimony. One commentator observes that "the volume of expert literature is awesome."[5] He states:

> Even apart from the number of published texts and treatises devoted to expert topics, the regular periodicals dealing with such subjects now number in the thousands. The National Institutes of Health's Library of Medicine covers thousands of biomedical journals dating back to 1948. The Library includes Index Medicus, a database indexing domestic as well as international medical literature; 4,945 journals are currently indexed in Medicus.[6]

Just as they must decide which witnesses qualify as experts, judges must decide which texts and periodicals these experts may cite during their testimony to solidify their opinions. Of course, in modern litigation the proponent of expert testimony must often present the expert's testimony at two different hearings: a pretrial *Daubert* hearing determining the threshold question of the admissibility of the expert's testimony and again at the trial on the merits. Initially, one might suppose that the proponent would generally make the same presentation at both hearings. More specifically, one might assume that if the expert relied on a text at the pretrial hearing, the expert's proponent would want the expert to cite the same material at the subsequent trial. As a trial practice professor, I have frequent occasion to consult with practicing litigators. Although my occasional conversations hardly amount to a systematic empirical study, those conversations lead me to believe that even litigators who make extensive use of scientific literature at pretrial hearings rarely resort to that material during the trial on the merits. That observation raises a key question. What explains the phenomenon that experts and their proponents make much less use of scientific texts and periodicals at the subsequent trial?

The first part of this Article focuses on the pretrial *Daubert* hearing. Although neither the Federal Rules of Evidence nor the Supreme Court mandate that judges rule on the admissibility of expert testimony before trial, judges often conduct such hearings. That practice is sensible as well as understandable. Suppose, for instance, that in a toxic tort case the judge conducts a hearing to determine the admissibility of the plaintiff's expert evidence regarding general causation. If the judge bars the evidence after a one-day hearing, the plaintiff's case will probably be disposed of by summary judgment, and the court may have avoided a two-week trial. Modernly, in federal court and a majority of the states, the judge's pretrial admissibility ruling will be governed by some variation of the Supreme Court's 1993 *Daubert* decision. In that decision, the Court announced that to be admissible, expert testimony must qualify as reliable "scientific . . . knowledge" within the meaning of that expression in Rule 702.[7] The Court defined science in a methodological fashion and indicated that the proponent must establish that the proponent's expert's theory is supported by adequate, methodologically sound empirical reasoning and data.[8] The Court then provided a nonexclusive list of factors[9] that the judge should consider in determining whether the expert has provided enough validation for the expert's general theory or technique. One of those factors is whether there is published support for an expert's methodology.[10] As will become apparent, this factor explains in part why proponents use scientific literature so extensively at the pretrial hearing.

Part II of this Article will explain that it is easy for proponents to use scientific publications at the *Daubert* hearing and that the published opinions make it imperative for proponents to submit such publications at that stage in the proceeding. The second part of this Article turns to the related question of the use of such publications at the subsequent trial on the merits. If the judge, acting as gatekeeper, rules that the proponent's expert testimony is admissible, the proponent may submit the testimony to the trier of fact at the later trial. However, scientific literature is used much less extensively at the trial stage. Part III attempts to account for this phenomenon. Part III explains that the evidentiary rules in force at the final trial make it much more difficult to introduce the publications at this stage. Part II adds that, as a matter of trial advocacy, it is often counterproductive for the litigator to present the jury with the same detailed presentation submitted at the pretrial *Daubert* hearing. Those considerations, described in Part III, account for the much more sparing use of scientific publications during trial.

II. THE PRETRIAL *DAUBERT* HEARING

An opponent's in limine motion raising a *Daubert* challenge is the most common reason for the judge to calendar a pretrial hearing on the admissibility of the proponent's expert testimony. These proceedings are often referred to as "*Daubert* hearings" because the opponent contends that that the proponent cannot lay an adequate foundation to satisfy *Daubert*'s prescriptions. As the introduction noted, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court announced that the test for the admissibility of purportedly scientific evidence is whether the underlying methodology has been empirically validated.[11] The Court not only imposed that foundational requirement on the proponent of the testimony; it also prescribed a gatekeeping role for the trial judge.[12] "The Court instructed trial judges to consider such factors as whether the proposition is testable, whether it has been tested, whether there is a known margin of error, and whether the research has been subject to peer review."[13] The last factor, peer review, has received substantial attention in the published opinions.[14]

Of course, the Court's mere mention of the peer-review factor counsels litigators to pay attention to it. However, several other considerations have prompted both litigators and judges to pay special attention to that factor. One is that at the pretrial hearing, relaxed evidentiary rules make it very easy for the proponent to introduce peer-reviewed publications. In his opinion in *Daubert*, Justice Blackmun specifically stated that the judge's ruling is governed by the preliminary fact-finding procedure codified in Federal Rule of Evidence 104(a).[15] Restyled Federal Rule of Evidence 104(a) reads:

> The court must decide any preliminary question about deciding whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.[16]

At first glance, the statute's second sentence might appear heretical-an evidence code provision dispensing with the necessity to comply with evidentiary rules. However, as the accompanying Advisory Committee Note argues, the provision is readily defensible.[17] The received orthodoxy is that the common law courts developed the technical exclusionary rules to compensate for the perceived limitations of lay jurors' competence to critically evaluate certain types of testimony. However, those concerns are irrelevant here because the judge, not the jury, makes this determination. In fact, the judge may rule pretrial before a jury has been selected. To the point, the courts have construed Rule 104(a) as meaning that the hearsay rule does not apply to foundational testimony proffered under that provision.[18] Hence, when at the *Daubert* hearing the expert's proponent invites the expert to quote a text or article supporting the expert's position, the opponent cannot object on hearsay grounds. The passage may be assertive and the proponent may be offering the passage to prove the truth of the assertion, but the hearsay objection is nonetheless unavailable at this stage. If the publication is relevant, the opponent cannot invoke the hearsay rule to block its use at the hearing.

Soon after the rendition of the *Daubert* decision, it became clear that scientific publications are highly relevant at the hearing. The contents of such publications are potentially relevant to all of the factors that the *Daubert* Court tasked trial judges to consider. One factor is whether the expert's methodology has been tested.[19] A publication can document the controlled laboratory experimentation and systematic field observation conducted to test the expert's hypothesis. Another factor is whether the expert's methodology has been subjected to peer review and publication.[20] Scientific texts and articles bear directly on that factor. Still another factor is whether the technique has a known rate of error.[21] The publication may describe a study conducted for the very purpose of ascertaining the error rate. A further factor is whether the methodology enjoys general acceptance in the relevant scientific circles.[22] The publication may have introduced the hypothesis to the wider scientific community, or it may describe a later test, confirming the original research and strengthening the case for widespread acceptance of the methodology.

The proponent must do more than simply introduce scientific publications at the pretrial hearing. Two post-*Daubert* Supreme Court decisions have sent the signal that it is critical that the proponent make the strongest possible showing at the hearing. It is true that in the original 1993 *Daubert* decision, the Court described the Federal Rule provisions governing expert testimony as "liberal" [23] and "permissive."[24] However, by the time of its 2000 *Weisgram* decision, the Court had adopted a very different tone, alluding to "the exacting standards of reliability" mandated by Rule 702.[25] Moreover, in its 1997 *Joiner* decision,[26] the Court stated that the trial judge may reject the expert's ipse dixit as adequate validation.[27] When the expert can point to corroborative texts and articles, doing so demonstrates that the expert's position rests on more than his personal assertion. The *Joiner* Court also declared that even when the judge's ruling excludes vital evidence that the proponent needs to avoid summary judgment, the reviewing court must use the deferential "abuse of discretion" standard.[28] Together, *Weisgram* and *Joiner* sent the bar the unmistakable message that the proponent must make the strongest possible showing at the pretrial hearing. If the proponent fails to do so, the chances of obtaining relief on appeal are remote in the extreme. And, as we have seen, it is both relatively easy and highly probative for the proponent to make a powerful showing at the hearing by marshaling respected texts and articles bolstering the expert's testimony.[29]

These lessons have not been lost on the lower courts. Both the federal and state decisions bear out the critical role that the use of scientific publications can play under *Daubert* and state variations of that admissibility standard. As a practical matter, the courts often demand that the proponent present corroborative publications, and when the proponent does so, the courts closely scrutinize the contents of the publications.

A. FEDERAL OPINIONS

With great regularity, the federal courts render opinions emphasizing the need for published support for an expert's theories. The decision in *Hendrix ex rel G.P. v. Evenflo Co.*[30] is illustrative. The issue was whether a blow to the brain can cause autism. The trial court excluded a causation expert because the expert "presented no medical literature, described no relevant physiological process, and provided no other support for his

conclusion that traumatic brain injury can cause autism."[31] Another expert was excluded, in part because of the court's view that the medical literature did not support his theory of causation.[32] The court wrote: "The medical literature indicates that there are [sic] a dizzying array of other factors that have been mentioned as possible causes" of autism.[33] The focus of this court on published research is apparent.

In *Wells v. SmithKline Beecham Corp.*,[34] the Fifth Circuit struck expert testimony due to lack of support in published literature. There, the plaintiff proffered expert testimony to establish that the cause of the plaintiff's excessive gambling was ingestion of defendant's drug to treat Parkinson's disease.[35] The plaintiff was prescribed a drug called Requip, classified as a dopamine agonist. After he lost $10 million gambling during trips to Las Vegas, he told his doctor about the gambling problem. The plaintiff stopped taking Requip and apparently did not return to Las Vegas.

The plaintiff sued the drug maker, alleging that it did not warn patients about the side effect of pathological gambling. Although a scientific study called the Weintraub Poster suggested that Parkinson's patients medicated in the same fashion as the plaintiff exhibited impulsive behavior, including pathological gambling, the court decided that plaintiff's proof did not satisfy *Daubert*.[36] The court carefully dissected the study. "Perhaps Requip is a cause of problem gambling, but the scientific knowledge is not yet there."[37] In explaining its decision, the court critiqued the Weintraub study at length, engaging in a careful analysis and concluding that the proffered literary support did not adequately buttress the plaintiff's theory:

> Only one study – the Weintraub Poster – reached statistical significance. The Poster suggests that Parkinson's patients medicated with dopamine agonists exhibit increased impulsive behavior, including pathological gambling. But the study has other scientific problems making it insufficient as a basis for expert opinion. First, "submission to scrutiny of the scientific community is a component of 'good science,'" but the Weintraub Poster was never peer-reviewed or published. Second, the study explains that its results "represented a class association, as opposed to a specific medication, finding." In other words, the Weintraub Poster does not report a "controlled" test for Requip, a drug that functions differently than other dopamine agonists. Finally, its authors conceded that the very "nature of the study precluded determination of causality."[38]

The federal courts emphasize scientific literature in criminal as well as civil cases. A recent federal decision from Texas barring voiceprint testimony is a case in point.[39] In criticizing voice spectrographic expert testimony, the court cited several published studies. "The studies, by different researchers, performed over decades, show that the voice spectrographic technique has been tested and found wanting in aspects critical for admission under Rule 702. The studies emphasize the subjective nature of the voice spectrographic analysis, even when combined with an aural analysis component, which is subjective."[40] The publications clearly had an impact, prompting the court to bar expert testimony based on voiceprints. "Although aspects of the voice spectrographic method have been subject to review in published studies, many of the studies conclude that voice spectrographic analysis is of questionable scientific validity as a method of identifying an unknown speaker."[41] The court granted the government's motion challenging the defense's expert proof and excluded the opinions of the voice analyst.[42]

Like the Fifth Circuit, the Eighth Circuit has recognized the relevance of published academic articles. Its decision in *United States v. Larry Reed & Sons Partnership,*[43] a case raising questions about the process of computer analysis of images, is illustrative. The government claimed that the defendants had submitted a false insurance claim for a loss of almost 200 acres of cotton. The jury found the claim violated the False Claims Act because the land in question was not planted during the year of the alleged loss.[44] The government's expert, John Brown, was prepared to testify that the cotton fields in question had not been planted. He rested his opinion on a computer analysis of satellite images.[45] To validate his scientific methodology, Brown referred to " 'hundreds and hundreds' " of academic articles published about the process, the use of this method by NASA and by major universities for the purpose of enhancing agricultural productivity, and the application of computer analysis of satellite images in assessing crop hail damage.[46] The *Reed* case demonstrates that in *Daubert* battles, scientific publications cut both ways. In the prior federal cases, the lack of supportive scientific literature played a significant role in the courts' decision to exclude. In *Reed*, the large body of supportive literature was probably the most important factor influencing the court to admit Brown's expert testimony.

B. STATE OPINIONS

At this point, a majority of the states have opted for some variation of the *Daubert* standard.[47] Moreover, an even larger majority have adopted a provision similar to the last sentence of Federal Rule 104(a), rendering the hearsay rule inapplicable to foundational testimony proffered under that statute.[48] Given those substantive and procedural similarities, it is expectable that, like the lower federal courts, the state courts attach a good deal of significance to scientific publications in their rulings on the admissibility of scientific testimony.

Lack of published support for an expert's methodology was a major factor in the court's decision to reject a causation opinion in *Ranes v. Adams Laboratories, Inc.*[49] The plaintiff claimed that a prescription medication caused his brain injury, and an expert opined to that effect. The appeal to the Supreme Court of Iowa centered around "the admissibility of testimony from an expert witness that the injuries allegedly suffered by the plaintiff were caused" by the drug.[50] The trial court excluded the causation opinion of an expert, a specialist in toxicology who primarily practiced medicine as a pediatrician. The plaintiff appealed.

Citing the *Daubert* factors, the Iowa court tested the reliability of the evidence.[51] The decision observed that the facts of the case presented a methodology based upon "a somewhat novel scientific procedure characteristic of 'scientific knowledge.'"[52] The court stated that in drug cases, the "[f]ailure to . . . 'rule in' the defendant's drug as a cause of the injuries in a particular case is commonly fatal" to the plaintiff's case.[53] The court concluded that the expert did not employ a reliable methodology in reaching his opinion that the drug was the cause of the injuries.[54] The court characterized his analysis as "inconsistent with the accepted methodology."[55] The decision underscored that the methodology the expert had used was "contrary to the methodology described by the scientific literature."[56]

Iowa is not the only state court to confront such issues. The Michigan courts have done so on several occasions. The Michigan Supreme Court analyzed a challenge to an expert in *Edry v. Adelman*.[57] The battle of the experts in *Edry* turned on a narrow but significant point: Can a cancer patient's odds of survival be correctly predicted from the number of lymph nodes to which the cancer has spread? The defendant's expert opined that a prediction on that basis is impossible and insisted that the opinion of Dr. Singer, the plaintiff's expert-that the larger the number of lymph nodes involved, the poorer the chances of survival-was not based on recognized scientific or medical knowledge.[58] When the Michigan Supreme Court reviewed the merits of the dispute in *Edry*, the court itself canvassed the peer-reviewed, published literature. The court inquired whether any textbook or journal passages supported the testimony of Dr. Singer who advocated the lymph node theory. In the court's opinion, the paucity of published research supporting the lymph node theory was fatal to Dr. Singer's theory.[59] "[I]n this case the lack of supporting literature, combined with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible. . . ."[60] While the *Edry* court cautioned that peer-reviewed, published literature is not always necessary to meet the requirements of the expert evidence rules, in this case the lack of supporting literature was critical. The court observed:

> Here, Dr. Singer's testimony failed to meet the cornerstone requirements of MRE 702. Dr. Singer's opinion was not based on reliable principles or methods; his testimony was contradicted by both the defendant's oncology expert's opinion and the published literature on the subject that was admitted into evidence, which even Dr. Singer acknowledged as authoritative. Moreover, no literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, plaintiff failed to produce that literature, even after the court provided plaintiff a sufficient opportunity to do so. Plaintiff eventually provided some literature in support of Dr. Singer's opinion in her motion to set aside the trial court's order, but the material consisted only of printouts from publicly accessible websites that provided general statistics about survival rates of breast cancer patients. The fact that material is publicly available on the Internet is not, alone, an indication that it is unreliable, but these materials were not peer-reviewed and did not directly support Dr. Singer's testimony.[61]

A year later in *Krohn v. Home-Owners Ins. Co.*,[62] the Michigan Supreme Court revisited the topic. Krohn involved an experimental surgical procedure. The plaintiff had suffered a severe spinal fracture in a two-vehicle collision. He filed an action against his no-fault insurer to recover for surgical benefits. A medical expert for the plaintiff claimed that the experimental procedure was reasonably necessary. However, the court faulted the medical evidence offered to support the claim. "Whatever research [the doctor] may have conducted, it was unsupported by any controlled studies, it had not been subjected to peer review, and the medical evidence had not been debated in scholarly publications."[63] In the court's assessment, the expert testimony failed to provide an objective basis by which a jury could conclude that the experimental surgical procedure was reasonably necessary for plaintiff's care and recovery.[64]

Like the Michigan and Iowa courts, Georgia courts have addressed the issue. When Georgia recently installed the new Georgia Code of Evidence, it retained for civil cases an admissibility test similar to *Daubert*.[65] In a 2010 Georgia case, *HNTB Georgia Inc. v. Hamilton-King*, the testimony of an engineering expert was excluded due to the lack of support in peer-reviewed and published scholarship for his theories.[66] The expert had stated that a construction design plan was flawed, leading to injuries. The trial judge specifically noted the engineer's "failure to cite any treatise or authority supporting his belief that . . . the construction design plan was below standard."[67]

Hamilton-King involved a serious accident on a bridge at night where people were injured and killed. A car had become disabled on the bridge, and three people exited the vehicle. A van allegedly traveling close to 70 m.p.h. on the darkened interstate highway approached the disabled car. All three people standing on the bridge were struck, and one was killed. Because the tragedy occurred in a construction zone where work was being done on the bridge, the injured plaintiffs sued the designer of the bridge-widening project and the general contractor. One of the claims was that the defendants failed to implement proper lighting in the bridge construction zone. In addition, they alleged that the design of the construction project was faulty. The plaintiffs called an engineering expert to substantiate that allegation, and the defendants challenged the expert's proposed testimony. Ultimately, the case reached the Georgia Supreme Court. In its opinion, court took the opportunity to remind trial judges of their responsibilities under *Daubert*: "In determining the admissibility of expert testimony, the trial court acts as a gatekeeper, assessing both the witnesses' qualifications to testify in a particular area of expertise and the relevancy and reliability of the proffered testimony."[68] The court concluded that the trial judge had acted within his discretion when he excluded the expert.[69] The court cited a prior Georgia decision, *Mason v. Home Depot U.S.A.*,[70] as authority for the principle that expert testimony based solely on the witness's personal experience and unsupported by scientific journals or reliable testing procedures does not pass muster under *Daubert*.[71]

In the very next year, another Georgia court reinforced the importance of scientific literature in *Daubert* litigation. In *Butler v. Union Carbide Corp.*, the Georgia Court of Appeals upheld a lower court decision that had barred expert opinion, holding that the expert's theory was not adequately supported by scientific literature.[72] In *Butler* a plaintiff's expert advanced a theory of asbestos injury that would allow the plaintiff to recover. In sustaining the trial judge's exclusion of this expert testimony, the court analyzed the scientific literature that the expert used to support the theory, reviewing his research sources one by one.[73] In each instance, the court found that the source furnished inadequate support for the expert's causation theory.[74] The court concluded that even considered cumulatively, the scientific literature cited by the plaintiff's expert did not justify the admission of the expert's causation opinion.[75]

In another decision by an intermediate appellate court in Georgia, a burial expert concluded that concrete burial vaults stand up better in wet soil than steel caskets do.[76] Approving the trial judge's admission of this expert's opinion, the court observed that the expert under attack had been a funeral director and a vault manufacturer.[77] The court noted that the expert had pointed to research articles relating to the shelf life of steel vaults in marine and underground environments. The articles established the reliability of his conclusion.[78]

Cases from New York fit the same general pattern as the decisions from Iowa, Michigan, and Georgia. In *Ratner v. McNeil-PPC, Inc.*,[79] the plaintiff proffered expert testimony about a novel theory of medical causation. Plaintiff claimed that the ingestion of acetaminophen caused liver cirrhosis.[80] In barring the testimony, the court observed that

> [t]he plaintiff did not put forward any clinical or epidemiological data or peer reviewed studies showing that there is a causal link between the therapeutic use of acetaminophen and liver cirrhosis. Consequently, it was incumbent upon the plaintiff to set forth other scientific evidence based on accepted principles showing causal link. We find that the methodology employed by the plaintiff's experts, correlating long term, therapeutic acetaminophen use to the occurrence of liver cirrhosis, primarily based upon case studies, was fundamentally speculative . . . .[81]

The court concluded:

> We emphasize that when an expert seeks to introduce a novel theory of medical causation without relying on a novel test or technique, the proper inquiry begins with whether the opinion is properly founded on generally accepted methodology, rather than whether the causal theory is generally accepted in the relevant scientific community. Here, the plaintiff failed to meet that burden.[82]

III. THE SUBSEQUENT TRIAL

Suppose that after the proponent's expert cites supportive scientific publications at the pretrial hearing, the judge rules that the expert's testimony is admissible. The case proceeds to trial. Can the expert reference the same studies and research used in open court in front of the jury? At first, one might suppose that the expert should be entitled to do so and that the expert's proponent would want the expert to do so. However, as previously stated, conversations with veteran litigators led me to believe that experts cite scientific publications at trial far less often than they quote them at the pretrial hearing. A review of the published judicial opinions tends to confirm that belief; although we see a large number of federal and state opinions mentioning the citation of scientific texts and articles at pretrial *Daubert* hearings, the cases which mention the use of learned treatises at trial under Federal Rule of Evidence 803(18) are few and far between. What could possibly account for this phenomenon?

I submit that the phenomenon is explicable. To be specific, the evidentiary standards in force at trial make it more difficult for the expert to expressly rely on scientific publications, and practical trial advocacy considerations make it inadvisable to cite a large number of publications during the trial on the merits.

A. THE EVIDENTIARY RULES MAKING IT MORE DIFFICULT TO CITE SCIENTIFIC PUBLICATIONS DURING THE SUBSEQUENT TRIAL

1. Rule 104(a). As Part II noted, at the pretrial *Daubert* hearing the expert's proponent can take advantage of the last sentence in Federal Rule of Evidence 104(a). By virtue of that sentence, the proponent need not comply with the technical requirements of the hearsay rule. Thus, so long as the expert can authenticate a scientific text or article and the publication's contents are logically relevant, the trial judge will liberally allow the expert to refer to and quote from such publications. However, the proponent cannot rely on Rule 104(a) to surmount a hearsay objection during the trial on the merits. The passage in the scientific publication is ordinarily assertive under Rule 801(a), the author of the publication is an out-of-court declarant under Rule 801(b), and the proponent usually wants to put the passage to a hearsay use under Rule 801(c). A hearsay objection is not well taken at the pretrial hearing, but at the subsequent trial it can be a formidable barrier to utilizing the scientific text or article.

2. Rule 703. Pressed by a hearsay objection, the expert's proponent might turn to Federal Rule of Evidence 703. Restyled Federal Rule of Evidence 703 now reads:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data informing an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

The last sentence was added in 2000. Although most states have adopted a version of Federal Rule 703,[83] to date many have yet to amend their version of the rule to incorporate the last sentence. Especially in those jurisdictions, there would appear to be a strong argument that Rule 703 allows the expert to cite during trial the same publication she relied on at the pretrial hearing. The argument runs that the scientific texts and articles are "data" that the expert may "reasonably rely on."

Although the argument initially seems plausible, ultimately such an argument rests on a flawed interpretation of the statute. Rule 703 is part of Article VII governing the admissibility of opinion testimony. It must be construed in context. As the Supreme Court has repeatedly noted, statutory interpretation is a contextual process.[84] As one commentator has explained, the key to understanding the interrelationship of the provisions in Article VII is the realization of the syllogistic structure of the typical expert's testimony.[85] Of course, an expert can be used for several purposes at trial. An expert could: (1) simply testify to observed facts under Rule 602, (2) express a lay opinion under Rule 701, or (3) give the jury an overview lecture about a theory or technique under Rule 702. However, in the vast majority of cases when the proponent calls an expert to the stand, the proponent wants the expert to do more. To wit, the proponent wants the expert to derive an opinion about the specific facts in the case by applying a general theory or technique to the specific facts.

The following syllogism is illustrative:

- Major Premise: If a patient displays symptoms A, B, and C, the patient is suffering from illness D.
- Minor Premise: This patient's case history includes symptoms A, B, and C.
- Conclusion: This patient is suffering from illness D.

The most sensible construction of the expert opinion provisions of Article VII is that *Daubert* and Rule 702 govern the major premise, Rule 703 regulates the minor premise,[86] and Rule 704 controls the wording of the final conclusion. Under *Daubert*, the proponent must demonstrate that the expert's general theory or technique qualifies as reliable "scientific, technical, or other specialized knowledge" within the meaning of that expression in Rule 702. In contrast, the reference to "facts or data" in Rule 703 encompasses case-specific information such as a particular patient's case history or the physical evidence analyzed in the laboratory. Lastly, Rule 704, partially abolishing the ultimate issue prohibition, governs the propriety of the phrasing of the expert's ultimate opinion.

If this is the correct construction of Article VII, the expert's proponent cannot short circuit the hearsay objection to the expert's citation of scientific literature by invoking Rule 703. The expert is citing these texts and articles for the precise purpose of establishing the reliability of his major premise, that is, the expert's general theory or technique. Rule 702-not Rule 703-is apposite. Rule 703 would apply if the expert forensic pathologist contemplated relying on a toxicology laboratory's report of the level of toxin in a decedent's body. However, Rule 703 is inapplicable when the pathologist attempts to cite a toxicology text's discussion of the validity of the gas chromatography/mass spectrometry technique employed by

the laboratory. In this setting, Rule 703 does not provide an escape from the hearsay objection.

3. Rule 803(18). By process of elimination, when the proponent confronts that hearsay objection, she must comply with Rule 803(18). Rule 803(18) fashions a hearsay exception for learned treatises. Restyled Rule 803(18) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> (18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:
>
> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
>
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
>
> If admitted, the statement may be read into evidence but not received as an exhibit.[87]

When the proponent cannot invoke Rule 104(a) but rather must satisfy Rule 803(18), he or she must overcome a significant challenge to defeating the hearsay objection. Without the benefit of Rule 104(a), it is no longer enough for the proponent to demonstrate that the scientific publication is authentic and relevant. In addition, the proponent must establish that the publication qualifies as a standard "reliable" authority in the field. The upshot is that at the trial, the expert may be precluded from citing texts or articles that he or she was allowed to rely on as a matter of course at the pretrial hearing.

B. THE TRIAL ADVOCACY CONSIDERATIONS THAT OFTEN MAKE IT INADVISABLE FOR THE PROPONENT TO UTILIZE SCIENTIFIC PUBLICATIONS AS EXTENSIVELY AT TRIAL AS AT THE PRETRIAL *DAUBERT* HEARING

It may be difficult for the expert's proponent to overcome a hearsay objection when the expert wants to cite chapter and verse from a scientific publication to support his or her position. There are also practical trial advocacy considerations that make it inadvisable for the proponent to widely employ scientific publications at the subsequent trial.

To begin with, while the solitary focus of the pretrial hearing may be the reliability of the theory or technique that the publications substantiate, at trial that issue is only one of the questions to be decided by the trier of fact. To be sure, just as the trial judge must decide the admissibility of testimony based on the theory or technique, the jury must determine the weight of that testimony. However, there are other issues in play, and the testimony relating to the theory or technique is only part of a much larger mosaic of evidence. At trial, in addition to resolving the question of general causation to the publications are relevant, the jury may have to grapple with questions of credibility, special causation, and damages. The proponent may need to present a considerable amount of testimony on those other issues. Given the volume of information relevant to those other issues, the expert's proponent may quite rightly fear that eliciting the same detailed discussion of twelve corroborative articles that the expert presented at the pretrial hearing will be counterproductive. The presentation of the additional, detailed testimony may pass the point of diminishing returns.[88]

That risk is especially acute when, at trial, the attack on the validity of the expert's general theory or technique is not the opponent's primary point of attack. During the pretrial *Daubert* hearing, the focal point is the validity of the expert's methodology. However, even if the judge denies the opponent's in limine motion to exclude, under amended Rule 103(b)that issue is adequately preserved for appeal so long as the trial judge makes clear that the ruling is definitive or final. Knowing that that issue has been preserved for appeal, at trial the opponent may shift to another point of attack. If the proponent's expert has detailed a large body of corroborative literature at the pretrial hearing, at trial it would be foolish for the proponent to go into the same detail. And that is so, even assuming that the proponent can lay a complete Rule 803(18) foundation for every text or article cited pretrial. At this point in the proceeding, the proponent knows that under Joiner,[89] she can be relatively confident of victory on appeal; as previously stated, Joiner teaches that on appeal the court will apply the deferential "abuse of discretion" standard.[90] In that light, it is safe- and prudent-for the proponent to devote most of the evidentiary presentation to meeting the issue that the opponent has made the central controversy at trial.

Finally, any experienced litigator appreciates that at trial, the primary demon requiring exorcism is unnecessary complexity and detail. In an American Bar Association Litigation Section survey of jurors, their primary complaint about the trial attorneys was that the attorneys deluged them with an excessive amount of information.[91] At trial, the attorney must minimize the unnecessary noise and "clutter."[92] In the words of one commentator, "The key to winning is being able to simplify in a clear and powerful way. It's the single most important thing to accomplish at trial."[93] It is particularly important for the litigator to bear in mind the need for simplicity when presenting expert testimony. As the *Daubert* Court itself acknowledged, the

arcane nature of some expert subjects can create a heightened risk that the jury will find the expert testimony confusing.[94] For that reason, the conventional wisdom among experienced trial attorneys is that unless the proponent knows that the validity of the expert's general methodology will be the opponent's principal attack in trial, it is important to [p]are the direct examination down to the bare minimum. If the expert, for example, is going to testify about experiments, have her testify to the impressive, overall numbers: 50 experiments worldwide, 10,000 subjects, and a 99% accuracy rate. Confine the direct to such eye-popping numbers and eye-catching names such as "Harvard" and "the Mayo Clinic." All the other details can be saved for redirect examination.[95]

Rather than inviting the expert to go into the same exquisite detail about the scientific literature as during the pretrial hearing, the expert's proponent ordinarily confines the expert's direct examination to "the tip of the iceberg."[96] If the opponent mounts an unanticipated cross-examination attack on the validity of the expert's general methodology, the proponent can respond on redirect examination or in a later rebuttal stage of the case. However, as a general rule, veteran litigators are not regularly observed presenting the same extensive testimony about the relevant scientific literature that they feel compelled to offer at the pretrial *Daubert* hearing.

IV. CONCLUSIONS

Today pretrial practice is the center of gravity of modern litigation.[97] Civil trials are "vanishing."[98] In 1962, 11.5% of the cases filed in federal court culminated in trial.[99] By 2002, that figure had fallen to 1.8%.[100] In some states, that figure is now 0.6%.[101] Simply stated, in the overwhelming majority of cases there is no trial.

It should therefore come as no surprise that the pretrial *Daubert* admissibility hearing has assumed such central importance in litigation posing scientific issues. That hearing is often where the case is won or lost. In many instances the case will settle after the hearing, and the judge's ruling at the hearing will largely determine the terms of the settlement agreement.

Just as it is clear that the hearing is important, it is evident that at the hearing the proponent's ability to marshal scientific publications supporting the expert's theory or technique is vital. Concededly, in *Daubert*, the Court listed several factors that the trial judge should consider,

> including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training.[102]

Nevertheless, the survey of the case law in Part II of this Article strongly suggests that the existence of a large body of corroborative scientific literature is often the most influential factor-the first among "equals." As the Michigan Supreme Court commented, "while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony."[103] If anything, the Michigan court understated the significance of the publication factor. As Part II explained, the availability of corroborative texts and articles is pivotal because the proponent can often use the contents of those very publications to prove up the other factors in the *Daubert* calculus. As we saw in Part III, litigators tend to make sparing use of such publications at trial. However, at the pretrial hearing the dispositive question is often whether the theory rests on more than the expert's ipse dixit.[104] In that setting, the proponent's very best proof can be the corroborative views of impartial giants in the technical field, stated in prestigious scientific texts and articles.

ENDNOTES

1 Edward J. Imwinkelried, Rationalization and Limitation: The Use of Learned Treatises To Impeach Opposing Expert Witnesses, 36 Vt. L. Rev. 63, 63 (2011).

2 Seak 2013 Expert Witness Directory (2013), available at http://www.seakexperts.com/content/expertdirectory.pdf.

3 Brian Benner & Ronald Carlson, The Literary Arm of Michigan's *Daubert* Rule, Mich. Bar J. 24, 24 (May 2012).

4 John B. Mitchell & Rick T. Barron, Skills and Values: Evidence 77 (2009) ("[I]n addition to the list of 'non-exclusive' factors specifically noted in *Daubert*-i.e. ability to test for accuracy, known error rate, any peer journaled review, evidence of standards, and 'general acceptance,' . . . courts have looked at [other features as well].").

5 Imwinkelried, supra note 1, at 63.

6 Id.

7 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 580 (1993).

8 Id.

9 Id. at 592-95.

10 Id. at 593.

11 Id. at 590.

12 Id. at 592-93.

13 Myron H. Bright, Ronald L. Carlson & Edward J. Imwinkelried, Objections at Trial 74 (5th ed. 2008).

14 See, e.g., *HNTB Ga., Inc. v. Hamilton-King*, 697 S.E.2d 770, 774 (Ga. 2010) (holding that an expert's testimony failed to satisfy *Daubert* and emphasizing that expert could not cite any other publication to support his opinion).

15 509 U.S. at 592.

16 Fed. R. Evid. 104(a).

17 See Fed. R. Evid. advisory committee's note (providing "practical necessity" as one justification for dispensing with "the exclusionary law of evidence" when courts decide preliminary questions of admissibility).

18 E.g., *United States v. Moya-Matute*, 735 F. Supp. 2d 1306, 1316 (D.N.M. 2008) (finding that the rules of evidence, except those with respect to privileges, do not bind the court when deciding preliminary questions relating to the admissibility of evidence); see also *Summers v. Dretke*, 431 F.3d 861, 875 (5th Cir. 2005) ("[T]he Constitution does not prevent a state court from considering possibly inadmissible evidence to determine the admissibility of other evidence.").

[19] 509 U.S. at 593.

[20] Id.

[21] Id. at 594.

[22] Id.

[23] Id. at 587, 588.

[24] Id. at 589.

[25] *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

[26] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

[27] Id. at 146.

[28] Id. at 143.

[29] See supra notes 15-18 and accompanying text.

[30] 609 F.3d 1183 (11th Cir. 2010).

[31] Id. at 1202-03; see also Benner & Carlson, supra note 3, at 25 (explaining the Hendrix court's evidentiary exclusion).

[32] 609 F.3d at 1202.

[33] Id.

[34] 601 F.3d 375, 381 (5th Cir. 2010).

[35] Id. at 378.

[36] Id. at 381.

[37] Id.

[38] Id. at 380 (citations omitted).

[39] *United States v. Angleton*, 269 F. Supp. 2d 892 (S.D. Tex. 2003).

[40] Id. at 899.

[41] Id.

[42] Id. at 905; see also *United States v. Bahena*, 223 F.3d 797, 810 (8th Cir. 2000) (approving trial court's exclusion of voice spectrography evidence from a particular expert witness); *State v. Morrison*, 867 So.2d 740 (La. App. 2003) (citing uncertainty regarding the reliability and admissibility of expert voice identification evidence). However, some decisions go the other way. The Alaska Supreme Court found voiceprint techniques reliable. *State v. Coon*, 974 P.2d 386, 402-03 (Alaska 1999). The court did so even while acknowledging that the "scientific literature cited by the [defendant] permits a conclusion that there is significant disagreement among experts in the field of voice spectrographic analysis regarding the reliability of the technique." Id. at 402. In addition to the publication factor, which the court considered significant, Professor Julie Seaman has suggested an added consideration. She references data that suggest that in criminal cases, controversial evidence is more likely to be admitted on behalf of the prosecution than in favor of the defense. Using handwriting identification as an example, she documents numerous cases where prosecutors successfully presented expert handwriting proof. That experience contrasts with the record of plaintiffs who offered this sort of evidence in civil cases and were effective at only a 36% rate. Julie A. Seaman, A Tale of Two *Daubert*s, 47 Ga. L. Rev. 889, 900-01 (2013).

[43] 280 F.3d 1212 (8th Cir. 2002).

[44] Id. at 1214.

[45] Id. at 1215.

[46] Id.

[47] 1 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence §§ 1.14-.15 (4th ed. 2007) (listing states using factors and representative cases).

[48] 1 Gregory P. Joseph & Stephen A. Saltzburg, Evidence in America: The Federal Rules in the States § 4.2, at 1-3 (1989)(discussing state adoption of and variations on Federal Rule 104(a)).

[49] 778 N.W.2d 677 (Iowa 2010).

[50] Id. at 681-82.

[51] Id. at 686.

[52] Id. at 687.

[53] Id. at 690.

[54] Id. at 695 ("Dr. Thoman's purported methodology in reaching his diagnosis was also unreliable.").

[55] Id. at 696.

[56] Id. at 697. For another authority that stresses the importance of publication, see *Fugate v. Commonwealth*, 993 S.W.2d 931, 937 (Ky. 1999) ("It is clear that the PCR method of DNA analysis has been subjected to extensive peer review. One court has estimated that over 4,000 published scientific articles exist addressing the merits of the method.").

[57] 786 N.W.2d 567 (Mich. 2010); see Benner & Carlson, supra note 3, at 24-25.

[58] 786 N.W.2d at 569.

[59] Id. at 570-71.

[60] Id. at 571.

[61] Id. at 570 (footnote omitted).

[62] 802 N.W.2d 281 (Mich. 2011).

[63] Id. at 296-97.

[64] Id. at 296.

[65] O.C.G.A. § 24-7-702 (2013). Criminal case experts are controlled by *Harper v. State*, 292 S.E.2d 389 (Ga. 1982). See *Williams v. State*, 312 S.E.2d 40, 48 (Ga. 1983) (citing *Harper* as authority for judging scientific evidence in a criminal use). As reported in Paul S. Milich, Georgia's New Evidence Code-An Overview, 28 Ga. St. U. L. Rev. 379, 409 (2012), there was opposition to adopting *Daubert* in criminal cases.

[66] *HNTB Ga., Inc. v. Hamilton-King*, 697 S.E.2d 770, 775 (Ga. 2010).

[67] Id. at 773.

[68] Id. at 772 (citation omitted).

[69] Id. at 775.

[70] 658 S.E.2d 603 (Ga. 2008).

[71] *Hamilton-King*, 697 S.E.2d at 773-74. The court observed that the plaintiff's expert could not cite "any other publication, standard, statute, or regulation" requiring the use of shoulders on the roadway or lighting that the expert recommended. Id.at 774.

[72] 712 S.E.2d 537, 544 (Ga. Ct. App. 2011).

[73] Id. at 542.

[74] Id. at 542-43.

[75] Id.

[76] *Savannah Cemetery Grp., Inc. v. Depue-Wilbert Vault Co.*, 704 S.E.2d 858, 865 (Ga. Ct. App. 2010).

[77] Id.

[78] Id. at 866.

[79] 933 N.Y.S.2d 323, 325 (N.Y. App. Div. 2011).

[80] Id.

[81] Id. at 334.

[82] Id.

[83] See 2 Joseph & Saltzburg, supra note 48, § 52.2 (noting that twenty-five states have adopted verbatim rules and three others have adopted similar rules).

[84] E.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

[85] Edward J. Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C. L. Rev. 1, 23-24 (1988).

[86] Id. at 5.

[87] Fed. R. Evid. 803(18). In Georgia there is an additional barrier to the use of treatises on direct examination. The Georgia statute limits the use of learned treatises to cross-examination and impeachment. O.C.G.A. § 24-8-803(18) (2013).

[88] Kenneth Graham, "There'll Always Be an England": The Instrumental Ideology of Evidence, 85 Mich. L. Rev. 1204, 1211-12(1987).

89 *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

90 See supra notes 26-29 and accompanying text.

91 Daniel H. Margolis, Jury Comprehension in Complex Cases, 1990 A.B.A. Sec. Litig. 27-28, 31.

92 James W. McElhaney, Clutter, 77 A.B.A. J. 73, 73 (Mar. 1991).

93 Margaret C. Fisk, Juries Need Guidance Without Condescension, Nat'l L.J., Feb. 3, 1992, at 23.

94 509 U.S. at 595.

95 Ronald L. Carlson & Edward J. Imwinkelried, Dynamics of Trial Practice: Problems and Materials § 11.5(B), at 334 (4th ed. 2010).

96 Edward J. Imwinkelried, A Minimalist Approach to the Presentation of Expert Testimony, 31 Stetson L. Rev. 105, 120 (2001).

97 John W. Cooley, Puncturing Three Myths About Litigation, 70 A.B.A. J. 75, 76 (Dec. 1984).

98 Patricia Lee Refo, The Vanishing Trial, 30 Litig., Winter 2004, at 1, 1.

99 Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 461 (2004).

100 Id.

101 Refo, supra note 98, at 2.

102 *Hamilton-King*, 697 S.E.2d at 772-73 (paraphrasing *Daubert*, 509 U.S. at 580).

103 Edry, 786 N.W.2d at 570.104 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999);

104 *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Expedited Civil Actions: Where We Are and Where We Could Go

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Joshua R. Strief

Iowa's expedited civil action procedure has now been in place for over two-and-a-half years. Some younger attorneys, such as myself, only began to practice law around the time the expedited action was adopted. To other, more seasoned litigators, the expedited civil action represented a significant change to their civil law practice. Just like any other change to a long-established procedure, the expedited civil action generated questions and unknowns for Iowa practitioners, regardless of experience. Now, more than two-and-a-half years later, a growing number of attorneys have had an opportunity to litigate expedited civil actions from start to finish. This article relies on the experiences of some of those attorneys, myself included, in examining some of the differences between expedited civil actions and regular civil actions at trial, suggesting practice pointers for attorneys handling expedited civil actions, and discussing proposed changes to improve expedited civil actions for future cases.

Differences In Trial Practice

A. Flexible Trial Date

While it's common knowledge that expedited civil actions generally must be tried within one year of filing, it is less well known that the trial date itself is somewhat flexible even after it has been set with court administration. Iowa Rule of Civil Procedure 1.281(4)(b) provides ". . . the court may later reschedule the [expedited civil action] trial for another day during the same week." In other words, if your expedited action is set for trial on a Monday, the court could enter an order a week before trial moving the trial start date to later in the week on Tuesday, Wednesday, or Thursday. The Johnson County Court Administration recently noted this as a justification for their preference of scheduling expedited civil actions earlier in the week.

B. Offering Evidence without Custodian Certification or Testimony

One of the more significant differences between expedited civil actions and regular civil actions is the ability of parties in expedited actions to offer evidence without custodian certification or testimony. This particular procedure is governed by Iowa Rule of Civil Procedure 1.281(4)(g)(2), which provides that authenticity and hearsay objections to a document may be overruled, despite the absence of testimony or certification from a custodian or qualified witness, if:

1. The party offering the document gives notice to all other parties of the party's intention to offer the document into evidence at least 90 days in advance of trial. The notice must be given to all parties together with a copy of any document intended to be offered;
2. The document on its face appears to be what the proponent claims it is;
3. The document on its face appears not to be hearsay or appears to fall within a hearsay exception; and
4. The objecting party has not raised a substantial question as to the authenticity or trustworthiness of the document.

However, even when one party follows these procedures, the other side may make authenticity or hearsay objections to proposed documents. Those objections must be made within 30 days after the party receives notice of the intention to offer the documents at trial. Iowa R. Civ. P. 1.281(4)(g)(2)(7).

Both plaintiffs and defendants may benefit from this procedure. From the defendant's perspective, being able to admit past medical records becomes much easier and does not require stipulation of the parties to admit such records. The same can be said of employment files, social security files, and tax or income documentation.

In practice, this rule has resulted in the parties being able to admit documents that may not have otherwise been admissible. For example, Michael Treinen of Klatt Law Firm in Waterloo utilized the notice of intent to offer evidence procedure to admit documents that would otherwise have been objectionable at trial. Because the opposing party in his case failed to submit an objection before trial objection, the judge overruled a trial objection to the document. In my own expedited civil action trial, the plaintiff was

able to leverage the procedure to admit medical records and medical bills. More concerning was the court's decision to also admit part of the plaintiff's expert witness's medical report into evidence due to this procedure, despite the fact I submitted timely written objections before trial and objections on the record at trial. Thus, there is some concern that parties may be able to use this procedure to admit documents into evidence that would not otherwise reach a jury regardless of the presence of the custodian of the document.

C. Healthcare Provider Statement in lieu of Testimony

Instead of being required to call a doctor to testify about injuries and treatment at trial, a plaintiff in expedited civil actions may simply have a health care provider fill out and sign a form approved by the Iowa Supreme Court. Iowa Rule of Civil Procedure 1.281(4)(g)(3) governs these statements.

At first glance, this procedure is concerning for defendants. If a plaintiff offers such a statement, Rule 1.281(4)(g)(3)(4) requires the defendant to pay any expenses for cross-examining the healthcare provider either at trial or via deposition. Some attorneys, like Matt Craft of Dutton, Braun, Staack, and Hellman, P.L.C., in Waterloo, find the healthcare statement is a major advantage for plaintiffs. However, other plaintiff attorneys have found health care provider statements are not useful due to difficulties in obtaining and using these healthcare provider statements. Ty Logan of Ty Logan Law in Keokuk is one such attorney, and he explains:

> "The clients I have had don't really have regular doctors. They might see emergency room doctors on the day of injury and some follow up at the same hospital, but those providers have not been interested in filling out the questions in the statement. If as the attorney you try to push them to do so, you have to keep track of those efforts and disclose them with the statement, which pretty much negates any value you hoped to gain by getting the testimony. If you send them to a provider you know is willing to complete the statement - I had a Judge rule that the provider was then my expert (you are only allowed one) and the healthcare provider statement was expert testimony. My planned expert on the whiplash affects of low speed impacts was then precluded from testifying."

Other plaintiffs' attorneys, like Paul Lundberg of Lundberg Law Firm in Sioux City, have foregone the use of healthcare provider statements during their expedited civil actions, instead preferring to have healthcare providers like his client's chiropractor testify live at trial. However, Mr. Lundberg also recognized the fact healthcare provider statements have the potential to save considerable costs for plaintiffs in certain cases.

D. Joint Jury Instructions and Verdict Forms

In regular civil trials, each party submits its own proposed jury instructions, but the expedited civil action rules require greater coordination and, to some degree, cooperation between the parties. Iowa Rule of Civil Procedure 1.281(4)(c) requires the parties to "file one jointly proposed set of jury instructions and verdict forms." When the parties disagree about an instruction, "each side must include its specific objections, supporting authority, and, if desired, a proposed alternative instruction or verdict form for the court's approval, denial, or modification." Iowa R. Civ. P. 1.281(4)(c).

In practice, the joint jury instructions requirement provides several challenges. One challenge is in deciding who drafts the initial version of the proposed jury instructions. In my case, which was a relatively straightforward personal injury claim resulting from a vehicle accident, I thought it was advantageous to convince opposing counsel to use my draft of the joint jury instructions for our baseline. Drafting the joint jury instructions means you are able to set the tone for the jury instructions and shape how the instructions will frame the case for the jury, even if the instructions are later changed to some degree by the parties. However, in retrospect, it may have been beneficial to discuss who would draft the initial version with opposing counsel at some earlier point in the case, as it turned out that the plaintiff's attorney had also drafted his own version of joint jury instructions.

Another challenge is the actual process of revising the proposed jury instructions. When the opposing attorney or party is easy to work with and responsive, revising the proposed jury instructions can be an easy task. When there are disagreements that you are unable to resolve, each side is able to submit its objections, supporting legal arguments, and any proposed modifications as part of the joint jury instructions. However, dealing with an opposing attorney or party who is unresponsive or difficult to work with makes compliance with the Iowa Rules of Civil Procedure much more difficult. For instance, if the opposing attorney is unresponsive to your requests to review proposed joint jury instructions and verdicts, submission of jointly proposed instructions is impossible. Also, a difficult opposing attorney could disagree with each of your proposed instructions, meaning each side would essentially be submitting its own set of jury instructions to the judge under the guise of a "joint" document. The Iowa Rules of Civil Procedure fail to provide adequate remedies to these potential issues in preparing joint instructions and verdict forms.

E. Time Limits and Timekeeping

Unlike regular civil actions, expedited civil actions are subject to two time limits. First, Iowa Rule of Civil Procedure 1.281(4)(f) provides expedited actions "should ordinarily be submitted

to the jury or the court within two business days from the commencement of trial." Second, Rule 1.281(4)(f) provides "each side is allowed no more than six hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments". However, objections, bench conferences, and challenges for cause to a juror are not included in the time limit.

Several attorneys who have tried expedited civil actions found that the biggest difference between expedited civil action trials and regular trials is the timekeeping aspect for both sides. Paul Lundberg found "with 6 hours to put on your case you need to edit your witness list and streamline direct examination." Matt Craft found timekeeping was the biggest practical difference between regular civil actions and expedited civil actions and had the following effect: "You get right to it in voir dire and direct/cross. The number one complaint I hear from judges or juries is 'we've got it, move on.' Even if they don't have it they think they do, and the timed aspect of the case makes you hit the high points and move on."

Time limits can also impact the decision of whether or not to use the expedited civil action in the first place. For instance, Brad Schroeder of Hartung and Schroeder in Des Moines dismissed a regular civil case and re-filed it as an expedited civil action upon learning opposing counsel intended to call fifteen witnesses at trial. In doing so, he believes his case became more limited to the essential evidence at the heart of the case. In a similar vein, Matt Craft also observed the time limits have the effect of spotlighting credibility due to the limited number of witnesses, meaning one side with a particularly credible client may gain a significant advantage in an expedited civil action.

Because each side has an interest in how much time has been used, the issue of who keeps track of time in expedited civil actions is important. In discussing this issue with attorneys around the state, it appears judges, who are naturally situated as a neutral party, have taken up the duties of timekeeping for most expedited civil trials. In my own expedited action, the judge kept track of time and notified the parties how much time each side had remaining during breaks outside the presence of the jury. However, it is possible that a judge could require the parties themselves to keep track of their own time. This is because there appears to be no rule as to how time is to be kept for each side. Thus, the issue of timekeeping may be one to address during a pretrial conference or pretrial discussion with opposing counsel and/or the judge.

F. Jury Selection

In regular civil actions, juries are composed of eight jurors selected from a panel of sixteen prospective jurors, and each side is required to strike four jurors from the panel. In expedited civil actions, the jury is smaller in that it consists of six jurors selected from a panel of twelve prospective jurors. Each side must strike three jurors. However, when there are more than two sides, the court may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. Iowa R. Civ. P. 1.281(4)(d). The reduced number of jurors makes voir dire take less time, which is beneficial since voir dire is included in each side's time allotment for presentation of the case.

G. Judicial Decisions in Non-Jury Trial

If your expedited civil action is a bench trial, the judge may decide to base the decision on a general verdict, special verdict, or answers to interrogatories rather than the typical findings of fact and conclusions of law. Under Iowa Rule of Civil Procedure 1.281(4)(e), when the judge elects to dispense with the findings of fact and conclusions of law, the parties are required to submit a joint set of jury instructions and verdict forms under the same procedure utilized in jury trials. According to the Comment to Rule 1.281(4)(e), the intention of this rule is to conserve judicial time and resources by allowing the court to act as a "jury of one" in rendering the verdict. It is unclear at what point a judge would need to make this decision, so it may be beneficial to coordinate with the judge and opposing counsel well before trial so that you're not scrambling to put together instructions and verdict forms close to trial.

Practice Pointers for Attorneys Handling Expedited Civil Action Cases

Litigating an expedited civil action involves some significant differences from regular civil actions, but some of those differences are not initially apparent. Below are a few tips provided by attorneys who have handled these expedited cases from start to finish:

1. Know Your Schedule: Because expedited actions must generally be tried within one year of filing, scheduling these trials may be difficult for attorneys with busy trial calendars. Thus, it's important to know your schedule before you agree to take an expedited civil action.
2. Timing is Key: Due to the time restrictions in expedited civil actions, your trial plan may be more important than normal. Attorneys end up speaking for a considerable amount of the six hours they have to present their client's case, as voir dire, opening statements, and closing statements are all included in the six hour time limit. Thus, a windy attorney may find a client's ability to present evidence harmed if not enough time is devoted to direct and cross examination of witnesses.
3. Attach Documents with Your Notice of Intention to Offer Evidence: This piece of advice is an explicit requirement

> of the rules, but parties are not consistent in following it. When you serve your notice of intention to offer evidence, be sure to include with it a copy of all documents named in the notice, or you risk not being allowed to admit those documents without proper authentication at trial.

The Future of Expedited Civil Actions

As a relatively young procedure, the expedited civil action is not without its flaws. At this juncture, there is a question as to whether or not the expedited civil action should be revised or discarded. Several attorneys suggest the expedited civil actions should remain. Attorneys Brad Schroeder and Paul Lundberg both suggest there are lower value cases that are better suited for expedited civil actions. They believe the expedited civil action allows plaintiffs' attorneys to accept lower value cases they would otherwise hesitate to accept due to the costs and time involved for litigating low-value cases through trial. Other attorneys suggest the cap on damages should be moved to a higher limit than $75,000.00. This is because when a plaintiff's attorney evaluates the case at $60,000.00, that attorney runs the risk of capping his client's damages if the jury returns with a verdict that exceeds his valuation and ends up above the $75,000.00 cap on damages. Thus, both Paul Lundberg and Matt Craft suggest plaintiffs with higher valuations, such as $50,000.00 or more, should not file their cases as expedited civil actions.

On the other hand, some attorneys have suggested the expedited civil action is a solution in search of a problem. First, regular civil actions could benefit by adoption of some aspects of expedited civil actions, such as the notice of intention to offer evidence procedure. One proponent of this view, Michael Treinen, makes the following observation:

> "I think initial disclosures, provider statements, and notices of intent to offer evidence would all be workable in a 'standard' case. I have talked to many attorneys about these new cases – both plaintiff and defense attorneys – and most agree that the cases are taking every bit as much work and time to litigate as a 'standard' case."

In my own expedited civil action, litigating the case and preparing for trial ended up taking just as much time as a regular civil action as Mr. Treinen suggests. Instead of having this separate procedure, all civil cases would likely benefit from time and cost savings if some of the expedited action procedures were adopted. Further, the expedited civil action includes requirements that may result in unnecessary additional time and costs, such as the preparation of joint jury instructions in a hotly contested case rather than each side simply submitting its own proposed instructions.

In addition to implementing some aspects of the expedited case in regular civil cases, Mr. Treinen raises another interesting solution for keeping litigant costs low while discarding expedited civil actions: "The real solution, in my opinion, is to expand small claims jurisdiction to $15,000.00-$20,000.00. That is where a litigant can really save money." The issue of raising the cap on small claims jurisdiction has been a source of discussion among Iowa lawmakers recently, having been considered by the Iowa legislature as recently as the 2017 session via a proposal to raise the small claims jurisdiction to $10,000.00.

Innovative ideas, like those in the expedited civil action, are important to our profession's desire to better serve our clients in the wake of shifting social landscapes and constantly changing technology. Regardless of whether or not the expedited civil action stays, goes, or is revised, there is no denying that its adoption has resulted in some important changes to civil litigation practice in Iowa.

Joshua R. Strief is an associate attorney at Elverson Vasey Law Firm. His practice areas include insurance defense and subrogation, personal injury, family law, probate law, business and corporate law, and general civil litigation.

Case Law Update

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

Andrea D. Mason

Spencer James Ludman v. Davenport Assumption High School, No. 15–1191 (June 2, 2017).

Why it matters: Premises liability and negligence claims are commonplace. This, alone, justifies the reading of *Ludman*. More broadly, *Ludman* examines the recurring, and forever confusing, issue of duty. Adopting yet another section of the Restatement (Third) of Torts, the Court goes on to analyze some contours of premises liability, including the contact-sports exception and the doctrine of primary assumption of the risk. This analysis, wherein the Court modifies and limits duty, can be useful for defense counsel: the Court is still willing to accept the no-duty rule and, in some cases, deny or limit liability "when an articulated countervailing principle or policy warrants" the same. This no-duty rule can, too, be found in the Restatement (Third) of Torts at § 7(b). Thus, defense counsel can cite to the no-duty rule in the much-loved Restatement, and to *Ludman*, which quotes and recognizes the no-duty rule. *Ludman* also clarifies the primary assumption of the risk doctrine, more commonly referred to as open and obvious risks. The Court makes clear the doctrine does not negate a finding of duty, but rather the plaintiff's knowledge of an open and obvious risk applies to contributory fault. Additionally, if your case involves evidence of custom or usage, *Ludman* provides an outline of how the evidence relates to the negligence analysis. Importantly as well, *Ludman* provides a practical outline of how such evidence is introduced and how it is limited.

Summary: Ludman, a high school baseball player, brought a premises liability action against a high school. Ludman, who was a member of the visiting baseball team, was located in the visiting team's dugout along the first-base side. The dugout was located thirty feet from the first-base foul line, and was below the playing field. There was a fence in front of the majority of the dugout, with the exception of five feet on each end of the dugout, which allowed players' ingress and egress. Ludman was "in the hole;" he was to bat after the current batter and the batter on deck. Ludman grabbed his glove and hat in preparation of retaking the field, and turned to watch the game. Ludman stood in the opening of the dugout furthest from home plate. Ludman saw the pitch, heard the hit, and saw the ball in his peripheral vision before the line-drive foul ball entered the opening where he stood and struck him in the head. Assumption's coach saw Ludman react and try to defend himself, but witnesses describe the passage of time as a split second. Ludman's skull was fractured, leading to lasting physical, psychological, and behavioral issues. Ludman alleged negligence in building, maintaining, and using a facility which failed to conform to accepted standards of protection for players; in failing to erect a protective fence between home plate and the dugout where players were expected to emerge from the dugout; and, knowing the dugout was extremely close to home plate, failing to take reasonable steps to prevent foul balls from entering the dugout at high speed.

Among other defenses, Assumption alleged it owed no duty to Ludman because the contact-sports exception applied, as getting hit by a foul ball is inherent in baseball, and because Ludman assumed the risk of getting hit by a foul ball. On Ludman's motion in limine, the court excluded evidence of other high school dugouts in the same conference as proof of due care or as a standard of safety.

At trial, Ludman's expert testified the American Society for Testing and Materials promulgated standards for the fencing of baseball dugouts, recommending protective fencing should cover the entire opening from ground level to the top of the dugout roof or overhang. Ludman also introduced evidence the National Federal of High Schools recommends a distance of sixty feet from the foul line to the dugout. The jury found in favor of Ludman and found Ludman 30% at fault based upon his unreasonable failure to avoid injury.

On appeal, Assumption argued it was entitled to directed verdict on the duty element of the negligence claim; it was entitled to directed verdict because Ludman's evidence was insufficient to create a jury question; the court erred in barring evidence concerning the custom and standard practice in the design and construction of dugouts at schools in the same conference; and the court erred in failing to give the requested jury instruction concerning proper lookout. On the duty element, Assumption made two arguments: 1. The contact sports exception to liability precluded a finding it owed a duty to Ludman; and 2. The doctrine of primary assumption of the risk precluded a finding it owed a duty to Ludman because the risk of injury was open and obvious to him.

Reminding the reader of *Koenig*, wherein the Court abandoned the distinction between invitees and licensees and instead adopted a general negligence standard for possessors of land to such persons, the Court examined the Restatement (Third) of Torts § 51 and the commentary thereto, which adopts the same factors the Court adopted in *Koenig*. As such, the Court adopted the duty analysis contained in the Restatement (Third) of Torts § 51. However, the Court recognized and quoted the Restatement (Third) § 7(b), no-duty rule which, in some cases, denies or limits liability "when an articulated countervailing principle or policy warrants" the same.

One such limitation to duty is the contact-sports exception. The Court determined this exception, however, is of use only to participants in a contact sport to claims of their co-participants. It could not be used by the possessor of the premises to limit the duty element in a premises liability claim.

Primary assumption of the risk doctrine, which the Court described as "'an alternative expression for the proposition that defendant was not negligent, *i.e.*, either owed no duty or did not breach the duty owed,'" is "'based on the concept that a plaintiff may not complain of risks that inhere in a situation despite proper discharge of duty by the defendant.'" This doctrine the Court examined by noting Iowa caselaw, which has limited the scope of the rule, and the position of the Restatement (Third), which notes a move to abandon a no-duty rule in circumstances where the plaintiff knows of an open and obvious risk inherent in an activity.

Noting the Court has now adopted § 51, the Court noted comment k, which explains, in part: "'[D]espite the opportunity of entrants to avoid an open and obvious risk, in some circumstances a residual risk will remain. Land possessors have duty of reasonable care with regard to those residual risks. Thus, the fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability. … Because of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence. The rule that land possessors owe no duty with regard to open and obvious dangers sits more comfortable—if not entirely congruently—with the older rule of contributory negligence as a bar to recovery.'" Thus, the primary assumption of the risk doctrine, better described by defendants as open and obvious risks, does not act to terminate the duty analysis. Rather, the doctrine supposes the defendant's negligence will be determined, the plaintiff's negligence will be independently determined, and contributory fault will prevent plaintiff's recovery in appropriate cases. Thus, the primary assumption of the risk doctrine does not speak to a finding of no duty; rather, the doctrine speaks to the plaintiff's contributory fault.

After discussing the sufficiency of the evidence, the Court moved to the alleged error in barring evidence concerning the custom and standard practice in the design and construction of dugouts at schools in the same conference. Noting first evidence of what is usual and customary is generally admissible on the issue of negligence, the Court noted Restatement (Third) § 13, which states compliance with custom is evidence an actor's conduct is not negligent but does not preclude a finding of negligence.

Importantly as well, the Court noted testimony relating to custom and usage is a matter of fact, not a matter of expert opinion, and outlined the means by which such evidence is introduced and limited. A party can prove negligence by evidence of expert testimony or of custom, and a party is not precluded from using a different method of proof than its opponent. Because Assumption's proposed evidence was within the confines of evidence of custom and practice, the district court abused its discretion in not allowing such testimony. However, such evidence is not conclusive on the lack of negligence; the evidence must be evaluated by the jury in light of the other evidence.

Lastly, Assumption argued the court erred by refusing a jury instruction on proper lookout, which it advanced as part of its comparative fault defense. Contrary to common belief, maintenance of proper lookout "means more than merely to look straight ahead, or more than seeing the object." Rather, "[a] proper lookout 'implies being watchful of the movements of one's self in relation to the things seen and which could have been seen in the exercise of ordinary care.'"

After describing the maintenance of proper lookout, the Court described the circumstances under which a party is entitled to a requested jury instruction. Because a reasonable person could have found Ludman failed to follow the ball from the pitcher to the batter's bat, and because the Court could not determine the failure to give the instruction did not cause Assumption prejudice, it was error for the instruction to not be given.

Ultimately, failing to allow Assumption to present evidence of custom and failing to instruct the jury on the failure to maintain a proper lookout required a new trial.

NEW LAWYER PROFILE

Marshall Tuttle

In every issue of ***Defense Update***, we will highlight a new lawyer. This issue, we get to know Marshall Tuttle, Peddicord Wharton Law Firm in West Des Moines, Iowa.

Marshall was born and raised in Sioux City, Iowa, where he also attended Morningside College. He played football for Morningside, earning NAIA All-American honors and the Great Plains Athletic Conference Defensive Player of the Year award. He graduated with degrees in history and political science. After college, he worked with first-generation high school students through the government-funded TRiO program as an Educational Talent Search Advisor before attending Drake University Law School. While in law school, Marshall was the Student Bar Association President and received the Timothy N. Carlucci and Martin Tollefson awards for outstanding leadership, civility, and professionalism in his dealings with fellow students and others in the law profession. He is currently an associate attorney at Peddicord Wharton in West Des Moines, Iowa, and primarily practices in the areas of workers' compensation and personal injury.

IOWA DEFENSE COUNSEL ASSOCIATION

53RD ANNUAL MEETING & SEMINAR

SEPTEMBER 14–15

2017

Stoney Creek Hotel & Conference Center

5291 Stoney Creek Court, Johnston, IA 50131

This year's program was approved for 12.75 State CLE Hours (Includes 1.0 Ethics Hours) Activity Number 256672, and 3.25 Federal CLE Hours.

REGISTER ONLINE TODAY
Register by August 30, 2017, to receive early-bird pricing!

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 August 30.

Be sure to join IDCA at our final year at Stoney Creek! 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 more than 175 of your peers!

Schedule of Events
Learn about the exciting programs, speakers and networking events on the Annual Meeting event website, www.iowadefensecounsel.org/AnnualMeeting2017

Thursday's Speaker Highlights

Keynote Speaker: How Do You Want to be Remembered?
Kent Stock, Motivational Speaker, Marion, Iowa

A teacher, coach, principal, banker and powerful speaker, Kent Stock is also the man who coached the Norway baseball team during their now-famous final season. As depicted in the 2007 film, "The Final Season," the nationally recognized Norway baseball team came together under head coach Kent Stock to defy the odds and win Norway's 20th state title in what would become the team's final season before being forced to merge with a bigger, neighboring school district. This experience and the motivation he used to guide Norway, has given him the insight to develop leaders in organizations across the country. Speaking about how to live your life on a daily basis, Kent's story is a testimony to the power of following your dreams. Many doors in Kent's life have been closed, but it has always been the next door that leads to something greater. Kent is a firm believer in taking risks. He is a natural leader who strives to constantly excel and inspire others to do the same. His magical story will captivate and motivate audiences to think about, "How They Want To Be Remembered!"

Evidentiary Objections and Evidence Law and Practice Under the Iowa and Federal Rules
Professor Ronald L. Carlson and Mike Carlson, University of Georgia Law School, Athens, Georgia


Ron Carlson


Mike Carlson

Winning Objection and Evidence Strategy under Federal and Iowa Rules. Ron and Mike Carlson will explore critical evidence points and objection tactics for Iowa lawyers dealing with experts, hearsay, and the law of cross-examination. Evidentiary principles will be presented in the context of practical and fast-moving trial scenarios.

Professor Carlson taught at the University of Iowa law school for eight years, so he has ties to this area and enjoys coming back to the Hawkeye state. Professor Carlson draws upon his writings and background as a trial lawyer when lecturing to lawyers and judges about litigation and evidence. He has spoken at countless CLE seminars across the country. Along with U.S. Court of Appeals Judge the late Myron Bright, they presented the program "Objections at Trial" in over 70 cities, from Boston to San Francisco.

Mike Carlson is the Deputy Chief Assistant District Attorney, Cobb Judicial Circuit, a Judge on the Georgia Court Martial Review Panel and an Adjunct Professor of Law, Atlanta's John Marshall Law School. He received his A.B. degree from the University of Georgia and his J.D. degree from Washington and Lee University in 1992, where he earned, among other distinctions, the Virginia Trial Lawyers Association Award for his "excellence in demonstrating the talents and attributes of the trial advocate."

Damages: The Proper Evaluation of Personal Injury Claims for Defense Counsel and the Adjuster
Panel Discussion: Lisa Simonetta, EMC Insurance Companies, Des Moines, Iowa;
Gregory Witke, Patterson Law Firm, L.L.P., Des Moines, Iowa;
Kami Holmes, Grinnell Mutual Reinsurance Company, Grinnell, Iowa;
David Riley, McCoy, Riley & Shea, P.L.C., Waterloo, Iowa

A fundamental aspect to being an effective defense attorney is the ability to judge the value of any given case. To many institutional clients who may be domiciled outside of Iowa, this is one of the services they are paying you for: your professional judgment as to the value of the case. This segment of the Annual program was specifically requested by many members. Four very experienced lawyers and practitioners (two in house, and two "outhouse") will present their time-tested methodologies for evaluating personal injury claims. You won't want to miss this portion of the program.

Techniques for Confronting and Defeating the Plaintiff's Reptile Strategy
Sharon Greer, Cartwright Druker & Ryden, Marshalltown, Iowa;
René Lapierre, Klass Law Firm, L.L.P., Sioux City, Iowa;
Mark Wiedenfeld, Elverson Vasey Wiedenfeld Abbott, Des Moines, Iowa

Much has been written in the past few years about the strategy of plaintiffs to pull on the heartstrings of jurors and cause them to render a verdict based on emotion, rather than facts. The result can be a lawless, runaway verdict. This modality is no longer a feature of cases tried on either coast or in the historical judicial hell-hole jurisdictions of downtown St. Louis or the Rio Grande Valley. The Reptile has reared its ugly head in Iowa. How should defense counsel respond? File a plethora of motions in limine before trial? Fight fire with fire? What is effective and what is not? Doing nothing or trying to ignore it does not appear to be an effective strategy. The presenters have each dealt with the Reptile in litigation and trial and will let you in on their secrets for dealing with, confronting and defeating this scourge.

Case Law Updates:
Torts/Negligence: *Andrea Mason, Lane & Waterman, LLP, Davenport, Iowa*
Employment/Civil Procedure: *Alex Grasso, Hopkins & Huebner, P.C., Des Moines, Iowa*
Contracts/Commercial: *Stephanie Koltookian, Bradshaw Fowler Proctor & Fairgrave PC, Des Moines, Iowa*

One responsibility of any effective defense litigator is to be current on the law. An experienced trial lawyer once said: "You know, all of us probably don't spend as much time in the law library as we should." Some of the brightest young stars and members of IDCA will bring us all up to date on Iowa cases over the past year. Rather than present a rapid fire, hodge-podge of citations, the presenters will focus on a few selected cases, concentrating on the detail and the importance of the particular cases reviewed. The overall thrust of the cases will be discussed and you will learn why the cases are worth the read so you can keep current with developments in the law.

ADR and Mediation from Differing Perspectives
Honorable Justice David Baker, Cedar Rapids, Iowa;
Paul Thune, Thune Law Firm, West Des Moines, Iowa; and
Noel McKibbin, NKM Consulting, Adel, Iowa

Mediation and alternative dispute resolution are key elements to any defense practice. We would be remiss in having a program that does not address this aspect in some major fashion.

Mediators come from various backgrounds: judge, practitioner and in-house counsel. On this part of the program, we have all of these bases covered. What makes an effective mediator? Are opening statements worthwhile? Are pre-mediation statements by the parties helpful or not? What can the defense lawyer do to maximize the chances of a successful mediation? Will an aggressive defense stance at mediation, e.g., a PowerPoint presentation of the defense arguments, risk "blowing up" the case? Justice Baker, Paul Thune and former IDCA President Noel McKibbin will provide their perspectives on these and other issues.

Session: Attorney Client Privilege in the Corporate Setting
Susan Hess, Hammer Law Office, Dubuque, Iowa

Where do the protections afforded by attorney-client privilege end, and the confines of business advice begin? Who are the individual employees actively representing the legal interests of the Corporation for purposes of invoking the privilege? What are the means in which a Corporation can best preserve Attorney-Client Confidentiality? Which law is used to answer these questions – the Control Group Test, the Subject Matter Test or the Upjohn Test? In-house counsel grapple with these questions on nearly a daily basis. Susan Hess, an experienced trial lawyer and IDCA Board member, will guide us through this important area of the law and will discuss some of the major cases and concepts.

Friday's Speaker Highlights
A Primer on Bad Faith Litigation in Iowa
Peter Sand, Peter Sand Law Office, Des Moines, Iowa

In the last year there was a punitive damage, bad faith jury verdict in western Iowa of approximately $20 million dollars. Although the award was ultimately reversed on appeal, the reality that something like this could happen in Iowa should be more than enough to grab any defense attorney's attention! Bad faith has become a cottage industry for a cadre of aggressive plaintiff's lawyers. This is a particular interest of Pete Sand's, and Pete will discuss this case in detail and will give us a primer on bad faith and offer up some strategies for dealing with this area of the law. Potential liability for bad faith seems to be expanding over the past few years; can we stem the tide? How do we best defeat these claims? Pete will guide us through this area of the practice.

Tales from the Dark Side: The Top 10 Things a Plaintiff's Lawyer Uses Against an Employer
Tom Foley, Spies, Pavelich & Foley, LLC, Iowa City, Iowa

This summer three Iowa juries (two in Polk County, one in Poweshiek County) returned seven figure verdicts in employment cases. Tom will provide a brief summary of each case, including the specific amounts awarded, and then discuss both the factors common to the four cases that made them so explosive and other things plaintiff's lawyers use against employers. Tom Foley has a unique perspective: his practice initially was, for many years, on the defense side of the table, but more recently he has "gone over to the dark side" and now litigates primarily on behalf of employment law claimants.

Session: 2017 Legislative Update
Brad Epperly, IDCA Lobbyist, Nyemaster Goode, P.C., Des Moines, Iowa
Stephen Doohen, IDCA Legislative Committee Chair, Whitfield & Eddy, P.L.C., Des Moines, Iowa

Historic 2017: the Governor, the Legislature, the Policies and the Special Session. 2017 saw the resignation of the nation's longest serving governor and the swearing in of Iowa's first female governor. What does the mid-term change in the Governor's office mean for the future? The largest combined Republican majorities in Iowa for over 50 years passed numerous policy shifting laws. What do they want to do next and will they have any money in order to do it?

Defense Strategies and Utilization of the Expedited Civil Action
Michael Moreland, Harrison, Moreland & Webber, P.C., Ottumwa, Iowa

Mike Moreland has probably tried more expedited civil cases than anyone else in the state. He will give us an early report on the new rules allowing for expedited civil actions in Iowa. He has tried several cases using this format, and has some pretty strong observations about this new procedure. Not all of us have had the benefit of his experience, so make sure you attend this session and learn about specific defense strategies that can be employed to use these procedures to the benefit of your defense clients.

Session: Use of Event Data Recorders for the Defense Litigator
Dr. Alan G. Lynch, Wandling Engineering, P.C., Ames, Iowa

Dr. Lynch will focus on the use of Event Data Recorders (EDRs) in motor vehicle accident reconstructions. EDRs, also known as airbag control modules or black boxes, are a useful tool for investigators in evaluating vehicle accidents. This presentation will discuss the history, federal regulations, consent to download requirements, usage, and real-world application of EDRs in vehicle accidents.

Session: 20 Tech Tips to Strengthen Your Law Practice
Session: Modern Trends in Legal Malpractice and Ethics Complaints
Todd Scott, Minnesota Lawyers Mutual Insurance Company, Minneapolis, Minnesota

The ethics portion of the IDCA Annual Meeting and Seminar is one of the most popular presentations. This year is no exception. Todd Scott from MLM is a prolific writer and speaker on the subjects of lawyer ethics, professionalism and avoiding claims of attorney malpractice. If you think this can never happen to you, beware. Is technology a "boon" or a "bane" of the law practice? Listen to Todd as he discusses ways in which technology can be used to make you a more efficient lawyer and avoid malpractice claims. For many years, MLM has had a close relationship with the Iowa Defense Counsel Association and Todd Scott has been a very big part of that.

Session: Succession Planning and Retirement
Tré Critelli, Director, Office of Professional Regulation

Tré will give a presentation regarding issues arising from the end of one's law practice, be it voluntary or involuntary. He'll discuss the new exempt and retirement classification which takes effect on January 1, 2018, as well as the designated successor requirement and changes to the client security questionnaire.

Networking Events
IDCA Hospitality Room

Wednesday, September 13, 8:00 p.m.
Thursday, September 14, 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.

Thursday Evening Networking Event

Des Moines Art Center
Thursday, September 14
6:00–8:00 p.m.
Included in Full and Thursday Only Registration options. Additional tickets, $50.

The Des Moines Art Center is a museum and school, with a world class art collection housed in extraordinary architecture. Join us for a light dinner, drinks and networking in an exquisite atmosphere. Transportation provided.

DES MOINES ART CENTER

IDCA Schedule of Events

September 14—15, 2017

53RD ANNUAL MEETING & SEMINAR

September 14–15, 2017
Stoney Creek Hotel & Conference Center
5291 Stoney Creek Ct.
Johnston, IA 50131
Register online, www.iowadefensecounsel.org/AnnualMeeting2017

October 27, 2017

DEPOSITION BOOTCAMP-THE RULES AND GOALS OF TAKING A DOCTOR'S DEPOSITION

October 27, 2017
Grinnell Mutual Reinsurance Company
Grinnell, IA
Only 24 spots available!
Registration opens early September!

September 13—14, 2018

54TH ANNUAL MEETING & SEMINAR

September 13–14, 2018
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA

September 12—13, 2019

55TH ANNUAL MEETING & SEMINAR

September 12–13, 2019
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA