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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

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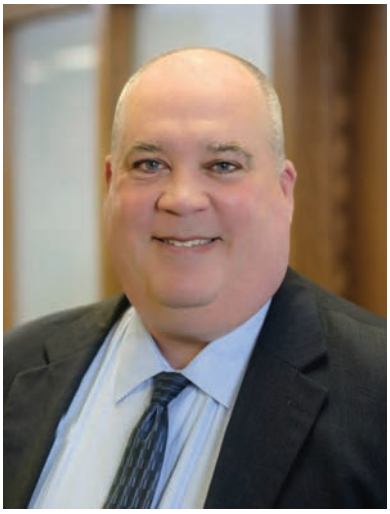
Conflicts Of Interest: Staying Out Of Hot Water

By Jason O'Rouke, of Lane & Waterman LLP[1]



Jason O'Rouke

Recent statistics show that alleged conflicts of interest are the most frequently cited basis for malpractice claims and a significant percentage of ethics complaints. To avoid these claims it is incumbent upon the lawyer to identify conflicts upfront, before accepting representation of a client.

The first step in avoiding conflicts of interest is to have a sufficient system in place to run conflicts checks. Comment 3 to Iowa Rule of Professional Conduct 32:1.7 advises that the lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. There are a variety of software options available to perform conflict checks. Even the most sophisticated software, however, does not solve the problem unless the lawyer (and others in the firm) have a strict process in place to provide the software with the tools to identify a potential conflict.

An important part of the process involves inputting the necessary information into the system at the appropriate time. Conflicts checks for litigation appear at first blush to be relatively simple: you run the plaintiff's name and the defendant's name at the outset and can determine whether there is a conflict based on the applicable Rules of Professional Conduct. Unfortunately, it is

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IDCA President's Letter

Susan Hess
IDCA President

Greetings everyone,

Happy New Year! As we began 2022, I had hoped that we would be finished talking about things like increased COVID numbers, virtual attendance for CLEs and jumpstarting jury trials. Unfortunately, that's not the case as positivity numbers for the Omicron variant are increased, cases are being bumped for various COVID-related issues, and the number of Zoom meetings on my calendar has made an unwelcome resurgence. Nonetheless, I remain optimistic that things will eventually turn around and we will figure out how to successfully navigate what seems to be the new "normal."

On a positive note, IDCA closed out 2021 by hosting the first in our new series of free CLE content for our members. The December topic was *Conflicts of Interest: Staying Out of Hot Water*, and our next Webinar is planned for February 23 over the noon hour. Please join us as we welcome our host, Kevin Reynolds, who will be sharing his review on *Daubert* in Iowa and recent developments. If you have ideas for Webinar topics or would like to volunteer as a presenter, we would welcome your thoughts and assistance.

The legislative session kicked off this month in Des Moines and your IDCA leadership was pleased to represent you at the annual Condition of the Judiciary presented by Chief Justice Christiansen and in meetings with the Iowa State Bar Association to discuss issues that may impact our practice in the upcoming session. We have been in regular contact with our IDCA lobbyist, Brad Epperly, and are working closely with him to anticipate what new legislation is being introduced, when that is going to happen and how we should represent our position, whether for or against, new laws. As you hear of legislation that is either proposed or introduced, please feel free to reach out to your IDCA leadership and share your opinions. We are most able to represent the interests of Defense Counsel members when we receive open communication regarding the issues that confront both our State and profession.

Oftentimes, the new year is a time for resolving focus upon our individual health and wellness. Perhaps you made such a resolution this year or perhaps you, like many, are attempting to keep on track with your targeted goals. When we think about health and wellness, our immediate thought goes to time on the treadmill, yoga, or bicycling. In our profession, however, we also need to be cognizant of our professional health and wellness, as well as diversity.

Remembering the new requirements that went into place last year, I wanted to add another plug for each of you to look for opportunities to focus upon these values, in word, action and deed. You can do that not only by fulfilling your CLE requirements in this regard but by also stepping up to volunteer in your community as well as embracing healthy habits that help to facilitate positive mental health.

As the days continue to grow longer, stay warm and healthy, knowing that Spring is just around the corner. If you have any thoughts, ideas for Webinar topics, want to share ideas on the legislative session or know someone who may benefit from joining IDCA, please reach out to me by phone or email at susan@hammerlawoffices.com.

Susan Hess

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not that simple. As defense attorneys, we often have cases where we may need to file a third-party petition for contribution or indemnification. It is prudent, if possible, to identify potential third-party defendants before accepting the defense of the case. Along the same lines, it is important to consider what third-party defendants may be added by a co-defendant. This allows a conflict check to be run at the outset and avoids the potentially awkward situation of a conflict being identified down the road when the third party is added to the case.

While these procedures are the ideal situation, we all know that the real world does not always allow for them to be followed. It is quite possible that neither you nor your client may be able to identify parties that a co-defendant might add. Thus, if the co-defendant adds parties during the case it is necessary to conduct a conflict check then. While it might be tempting to assume no conflict exists if another attorney enters an appearance for that party, it is not necessarily true. A party's insurer may have retained counsel for the party, or the party may have chosen to work with another firm for purposes of the case, but may be a client of your firm on other matters. Even if your defendant may not be specifically asserting a third-party claim against the new third-party defendant, it is possible you could take positions adverse to the party's interest and, therefore, it is better to know as soon as possible if a conflict exists.

Another situation to consider is the opening of "General" files for clients. Many members of this Association practice in firms that provide legal services to business clients in addition to litigation practice. It is not uncommon for lawyers to open a file such as "ABC Corp. General Business Matters 2022" and then use that file for all non-litigation matters performed for that client. Doing so potentially undermines the process to determine if a conflict exists. For instance, if ABC Corp. asks Attorney A to review a potential contract between ABC and XYZ, Inc. and Attorney A does not run a conflict check on XYZ, there will be no way of knowing whether XYZ is a client and whether Attorney A may be giving ABC advice that is contrary to XYZ's interests. This can create not only a legal conflict but a political conflict as well.

Implementing and following a proper process to identify potential conflicts is merely the first step in the process. If your conflicts check identifies a potential conflict the next step is to review the Iowa Rules of Professional Conduct to determine whether there is a conflict and whether it can be waived. The purpose of this article is not to go into an in-depth analysis of the Rules, but if a potential conflict exists the lawyer should review Rules 32:1.7 and 32:1.8 (current clients) and 32:1.9 (former clients). Additionally, two recent Iowa cases, *Iowa Sup. Ct. Atty. Disc. Bd. v. Willey*, 965 N.W.2d 599 (Iowa 2021), and *Deere & Co. v. Kinze Mfg., Inc.*, 2021 WL 5334212 (S.D. Iowa Oct. 1, 2021), are worth reading.

Willey was an attorney disciplinary proceeding that involved an attorney who entered into business venture dealings with his clients. The *Willey* case examines Iowa R. Prof'l Conduct 32:1.6, 32:1.7, and 32:1.8. The case also contains discussion regarding proper disclosure, consent and waiver of certain conflicts of interest. The *Kinze* case involved a motion to disqualify an Iowa attorney and his firm from a patent infringement case. The basis of the motion was that the attorney and his firm had previously represented the party moving for disqualification and in doing so, acquired confidential information. The case contains an informative discussion surrounding conflicts of interest with former clients.

Finally, even if you have determined no conflict exists, there is always the possibility that you will face a motion to disqualify you and your firm from a case. If you do, it is important to stress the legal standards. Courts have recognized that there is a "potential for abuse by opposing counsel" and, therefore, disqualification motions are subject to "particularly strict judicial scrutiny." *Deere*, 2021 WL 5334212 at *4. Thus, "[a] court must be "vigilant to thwart any misuse of a motion to disqualify for strategic reasons." *Id.* This is because "[a] party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." *Id*.

It is not uncommon for motions to disqualify counsel to vaguely allege that the attorney has confidential information about the former client. While that may be true, the question becomes whether the attorney has any information that might be used that is relevant to the specific dispute at hand. The attorney is allowed to disclose details of the prior representation to the extent necessary to fend off the motion. *See Willey*, 965 N.W.2d at 606 ("Where a legal claim or disciplinary charge alleges . . . misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." (*quoting* Iowa R. Prof'l Conduct 32:1.6, cmt 10)). My experience has been that judges will take a good look at the motion, consider the facts of the pending dispute and compare them to the facts of the prior representation and reach a reasoned decision. Thus, when the motion to disqualify is vague and conclusory, it is very helpful for the response to be detailed and precise. While there are certainly no guarantees, following these steps should help the attorney stay out of hot water and stay in the case.

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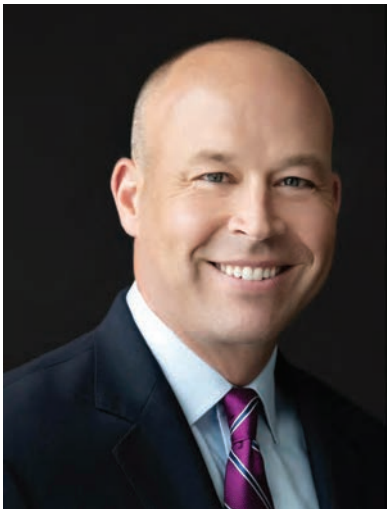
1 Jason O'Rourke is a partner at Lane & Waterman LLP, where his practice has involved professional liability, commercial litigation and construction litigation for nearly 25 years. Jason is a Fellow in the American College of Trial Lawyers, a Member of the American Board of Trial Advocates, and a Member of the Iowa Academy of Trial Lawyers.

While Many Legislative Updates Were Seen in 2021, Tort Reform Remains

By Brad C. Epperly of Nyemaster Goode, P.C., Des Moines, IA[1]



Brad C. Epperly

As the 2022 legislative session begins, Republicans continue to control both the House and Senate, as well as the Governor's office for the sixth year. Often referred to as the "Trifecta," single-party control often enables the majority party to enact legislative initiatives, changes and reforms that are important to the party's base. Since the 2016 election, Republicans in the Iowa legislature have enacted tax reforms lowering both individual and corporate rates, as well as capturing sales tax for internet sales. They have addressed imbalances in the worker's compensation system, made reforms to Chapter 20 concerning public sector unions, and have expanded gun rights and protections in the State. Additionally, Republicans have passed legislation focused on improving the security of elections. While there has been work done on various priorities over the past five sessions, one major area of focus that remains is tort reform.

The Republican majorities have enacted several legislative changes to tort law since taking control of both chambers. The 2017 session saw the most action taken on tort law. The statute of repose was reduced from fifteen to eight years and limits were enacted on compensatory damages due to a public or private nuisance caused by an animal feeding operation. There was also a law passed making fair authorities immune from liability for injuries or death alleged to be caused by a domesticated animal pathogen. Changes were made in medical malpractice, expanding the definition of "healthcare provider" in the confidential open discussions chapter, providing standards for expert witnesses and establishing a certificate of merit affidavit for experts. Also contained in the medical malpractice bill was a cap on noneconomic damages of $250,000, however, the cap contained a significant exception:

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

Legislators are likely to continue to push for changes to the non-economic damages cap during the current general assembly.

In 2021 two bills were advanced in the House concerning caps on noneconomic damages, but neither was able to garner sufficient votes. House File 592 would raise the cap for non-economic damages from $250,000 to $1 million in medical malpractice cases (the "**Med Mal Bill**") but would remove the exception language passed in 2017. A second bill, House File 772, concerning commercial motor vehicle accidents (the "**Trucker Bill**") and"), would limit the causes of action to respondeat superior and limit non-economic damages to $1 million with no exception language. Both bills were focused on the House primarily because the Senate had passed bills capping damages on noneconomic damages in prior sessions and advocates were confident the votes were still there to pass it again. While neither bill gained enough support to bring it to the House floor, the Trucker Bill was very close, only a few votes shy of the 51 needed.

Every session each majority caucus and the Governor's office develop priorities for the upcoming year. Iowa's revenues continue to remain strong, even more so with the federal stimulus money received. From the first year Republicans took the majority in the Senate, they have made it no secret that they want to lower taxes. Significant tax reform legislation was passed in 2018 and 2021, and we can expect further tax reductions to be on the Senate's list of priorities in 2022. Given the amount of work the Senate has done over the years, we also anticipate the tort reform will be on the shortlist of priorities. In fact, I believe it is possible the Senate may insist on passing a hard cap on noneconomic damages in order to adjourn the 2022 session.

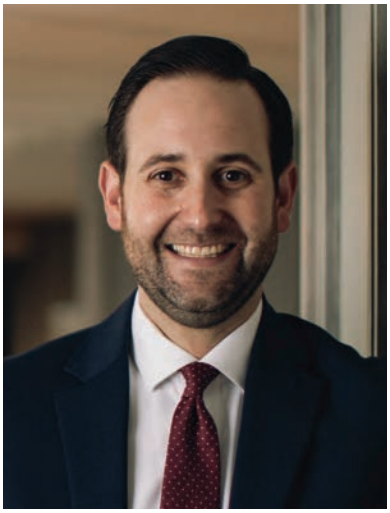
Among the other issues likely to be in play this session, it is reasonable to expect legislation related to the impacts of COVID-19. Both caucuses and the Governor's office will continue to work to attract workers. Iowa had a workforce shortage prior to the pandemic and it has only gotten worse. Incentives for businesses, child care and workforce housing will continue to be pursued through various legislative initiatives. Lastly, one cannot

forget this is an election year and with that comes campaign issues. Local elections saw a focus on curriculum in K-12 schools. It is likely an issue that will be debated at the state level as well.

1 Brad maintains a legal practice in the areas of creditors rights, construction law, and general civil litigation.

Brad has been active in industry and community associations, including serving on the boards of the local chapter of the Federal Bar Association and a West Des Moines youth baseball league. He currently serves on the board of directors of the Iowa Innovation Corporation.

New Member Profile



Brandon Bohlman

Brandon Bohlman is a civil litigator at Lederer Weston Craig PLC and works in its West Des Moines office. Brandon practices in tort and civil litigation, focusing on insurance defense, liability defense, personal injury, construction litigation, and medical malpractice. He is experienced in all phases of litigation and has first-chaired several jury trials to verdict.

Brandon is a native of Tempe, Arizona, and since moving to Iowa, he has made it through 11 winters relatively unscathed. He graduated from Arizona State University (Go Devils!) in 2010 with a bachelor's degree in finance and graduated from Drake Law School in December 2012.

Prior to joining Lederer Weston Craig, Brandon was an active member of the Plaintiff's bar at Shindler, Anderson, Goplerud & Weese in West Des Moines. In July 2021, Brandon found the "*light*" and decided to join the side of truth, justice, and billable hours.

Brandon lives in Des Moines with his wife Molly and their son Henry (3). He spends most of his free time running around Des Moines with his family, playing golf, and watching sports.

WELCOME NEW MEMBERS

Natalie DeRegnier Sieren
Harrison, Moreland, Webber & Simplot, P.C.
129 West Fourth Street
P.O. Box 250
Ottumwa, IA 52501

Case Law Update

By Spencer O. Vasey, Elverson Vasey, Des Moines, IA[1]

Spencer O. Vasey

PANGBURN V. ROOKIES, INC., NO. 20-1353, 2021 WL 4890988 (IOWA CT. APP. OCT. 20, 2021)

WHY IT MATTERS

The Court of Appeals outlines the requirements for liability under the Iowa Dram Shop Act and holds that a bar can be liable for the sale and service of alcohol even when it does not directly sell alcohol to the allegedly intoxicated person or physically serve the patron. In addition, the Court of Appeals explains when a bar can avoid premises liability for the misconduct of guests under the Restatement (Third) of Torts.

FACTUAL & PROCEDURAL BACKGROUND

The plaintiff was assaulted in the parking lot of Rookies Sports Bar by Anthony Keckler, another patron of Rookies. Keckler and a group of friends had arrived at Rookies four hours prior to the incident to celebrate one of the men's 21st birthdays. Rookies had a special whereby individuals celebrating a 21st birthday could obtain 21 pitchers of beer for just $21.00. One of the group members, Brandon Rheingans, ordered the special for the birthday boy and paid for the pitchers. Rheingans carried the pitchers to the group's table two at a time. The group shared the beers and when the pitchers ran dry, Rheingans ordered another round. Keckler drank from the pitchers and eventually became intoxicated.

Near the end of the evening, a fight broke out in Rookies's parking lot. The birthday group was not involved in the dispute but Keckler, nevertheless, decided to jump in and joined the altercation. He assaulted the plaintiff in the altercation, causing fractures and permanent brain damage.

The plaintiff brought suit against Rookies, asserting claims of dram shop and premises liability. The district court granted Rookies's motion for summary judgment. The district court found there was no evidence Rookies sold and served any alcohol directly to Keckler and, therefore, it could not be liable under the dram shop statute. It further held the plaintiff had failed to present sufficient evidence to establish Rookies had breached a duty of reasonable care to the plaintiff.

HOLDING

The Iowa Court of Appeals reversed the grant of summary judgment for Rookies on the plaintiff's dram shop claim, holding the district court had applied the wrong standard when it found the bar had not violated the dram shop act and there remained a genuine issue of material fact as to whether Rookies had sold and served alcohol to Keckler when Rookies knew or should have known Keckler was intoxicated or would become intoxicated.

The appellate court affirmed summary judgment on the plaintiff's premises liability claim, holding there was no evidence the bar was aware Keckler would become violent or that Rookies created an environment where misconduct was likely to occur.

ANALYSIS

The Court of Appeals first addressed the plaintiff's dram shop claim and the district court's determination that Rookies had not sold and served alcohol to Keckler because Rheingans, rather than Keckler, had ordered the beer and delivered it to Keckler's table.

The appellate court began with the "sold" requirement contained in the statute, noting that a direct sale to the allegedly intoxicated patron is not necessary. An indirect sale, the court explained, satisfies the statute when the bar has "reason to know" multiple people will consume the alcohol. The appellate court explained that the statute is "meant to encourage responsible business practices" and "because bars derive profit even if the sale was indirect, the statute appli[es] to patrons who dr[i]nk on someone else's tab."

The Court next addressed the "served" prong of the dram shop statute. It noted the "operative question" in evaluating the "served" requirement is whether the sale was made with the intent that the alcohol be consumed on the premises. Because Rookies sold the pitchers with the intent they be consumed at Rookies, the "served" requirement was established.

As for the premises liability claim, the Court analyzed whether there was sufficient evidence in the record to sustain the plaintiff's allegation that Rookies created an environment where instances of misconduct were *likely* to take place. The appellate court noted there was no evidence Keckler acted aggressively prior to the incident, nor was there evidence that a lack of security in the

parking lot prompted the altercation to commence. Because there was no evidence that Rookies had violated a duty of reasonable care, the plaintiff's premises liability claim failed as a matter of law.

BAILEY V. DAVIS & MONDELEZ GLOBAL, L.L.C., NO. 20-1717, NOVEMBER 3, 2021

WHY IT MATTERS

The Iowa Court of Appeals affirmed the district court's decision to vacate a no-fault jury verdict and grant a new trial for the plaintiff in this negligence action arising from an intersection accident. The decision outlines the standard and evidence necessary to grant a new trial in a simple negligence case. Interestingly, the appellate court places significant emphasis on the conclusions of the investigating officer, including the "contributing circumstance" codes assigned by the officer in his report, despite the fact these reports are generally inadmissible at trial.

FACTUAL & PROCEDURAL BACKGROUND

The plaintiff was allegedly injured in a motor vehicle accident that occurred at a controlled intersection in Burlington, Iowa. The plaintiff claimed the defendant had failed to obey a stop sign and had entered the intersection without yielding to the plaintiff's vehicle, which had the right of way.

At trial, the defendant testified he did not recall whether or not he had stopped at the stop sign but believed he had. He testified he did not see the plaintiff's vehicle until just before the collision and acknowledged that there was no evidence the plaintiff had been negligent.

The plaintiff and the plaintiff's mother, who witnessed the accident, testified the defendant had "absolutely not" stopped at the stop sign prior to entering the intersection The plaintiff's mother testified that after the accident, the defendant approached the plaintiff and apologized for not seeing the stop sign.

The investigating officer testified he had assigned "code 19" to the defendant, indicating the defendant was starting or backing improperly. He testified he assigned "code 88" to the plaintiff which meant "no improper action." He acknowledged that the defendant had reported he thought he stopped at the stop sign immediately following the accident.

The jury entered a verdict for the defendant, finding the defendant was not at fault. The plaintiff moved for a new trial, arguing there was not sufficient evidence to sustain the jury's verdict. The district court granted the plaintiff's motion and the defendant appealed.

HOLDING

The Iowa Court of Appeals affirmed the district court's decision to grant a new trial and held there was insufficient evidence in the record to support the jury's finding that the defendant was not at fault.

ANALYSIS

The appellate court began its fact-intensive analysis with a lengthy quote from the district court's decision. The lower court weighed the defendant's testimony that he believed he had stopped at the stop sign against the fact the defendant had left the stop sign and entered the intersection in front of the plaintiff's approaching vehicle. The district court noted, "whether [the defendant] stopped at the stop sign or not, the record is unrebutted he left the stop sign and traveled into the path of a vehicle that had the right of way."

In review of the district court's decision, the appellate court relied heavily upon the conclusions of the investigating officer. The court cited the coding contained in the investigating officer's report as evidence the plaintiff took no improper actions and the defendant entered the intersection in the path of the plaintiff.

Interestingly, the court noted "if the jury had returned a verdict finding [the defendant] five percent at fault and plaintiff 95 percent at fault, this court would not be reaching the same conclusion on the Motion for a New Trial. A determination of zero fault on the part of [the defendant] simply is not sustained by sufficient evidence."

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1 Spencer earned her undergraduate degree summa cum laude from Drake University and thereafter graduated with highest distinction from the University of Iowa College of Law. Upon being admitted to practice in 2018, she joined Elverson Vasey, the firm founded by her father, IDCA District V Officer Jon Vasey. Her practice focuses on insurance defense, subrogation, and coverage opinions.

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IDCA Annual Meetings

September 15–16, 2022

58TH ANNUAL MEETING & SEMINAR

September 15–16, 2022
Embassy Suites by Hilton, Des Moines Downtown
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