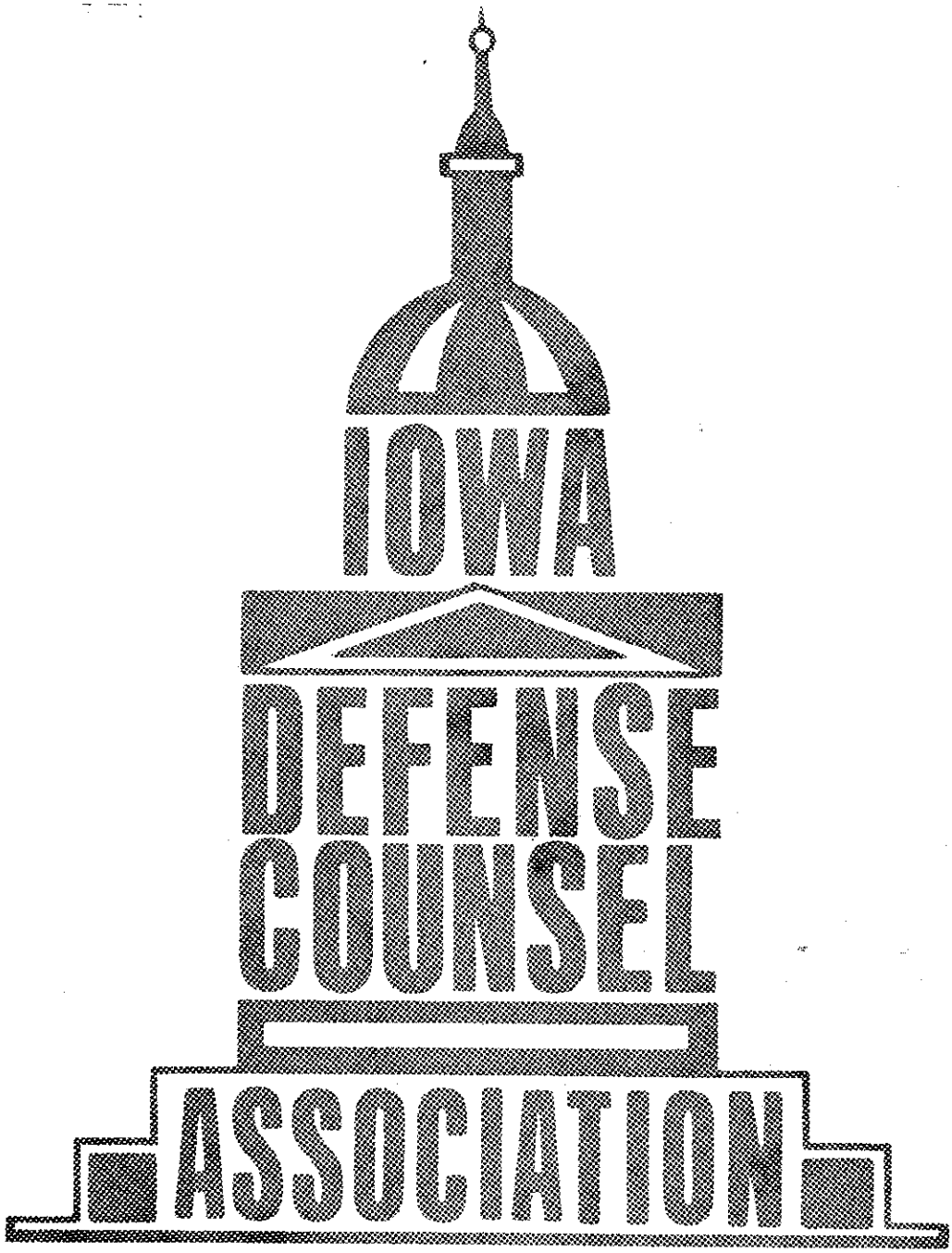

ANNUAL MEETING

October 26, 27 & 28, 1978

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Des Moines, Iowa

IOWA DEFENSE COUNSEL ASSOCIATION

1977 — 1978
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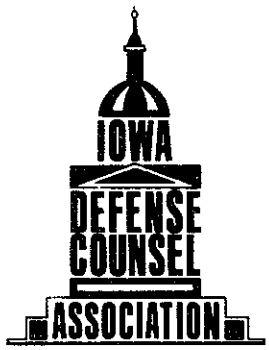

1978 Annual Meeting

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ARTFUL DISCOVERY

PHIL WILLSON
SMITH, PETERSON, BECKMAN & WILLSON
COUNCIL BLUFFS, IOWA

I. ABUSES OF DISCOVERY

A. Too many Interrogatories - Form Interrogatories

B. Excessive discovery - ordeal by pretrial procedures - trials at both the pretrial and the trial stages

C. Litigation becomes too costly

D Unfair settlements coerced

E. Failure of attorneys to administer discovery without court intervention

F Delays in disposition of cases

II. RECOMMENDED CHANGES IN FEDERAL RULES (77 F.R.D. 613)

A. Limiting the scope of discovery by allowing discovery only as to matters "relevant to the claim or defense" of a party rather than the present rule of "relevant to the subject matter"

B Adding a provision for discovery conferences at the request of a party

C Authorizing district judges to limit the numbers of Interrogatories

D. Reducing the cost of litigation by providing that the officer who administers the oath need not be present during the taking of the deposition, that depositions may be taken by telephone, that depositions may be recorded electronically without the necessity of a court order, and that discovery materials need not be filed with the court unless and until they are used in the proceedings.

III. FEDERAL JUDICIAL CENTER STUDY RESULTS (June 1978)

A. There is no discovery in half of the filings

B Less than 5% of the filings involved over 10 occasions for discovery

C ~~The~~ Court control of discovery through attorneys' initiative in using sanctions is ineffective

D. Discovery abuse is in the quality of discovery rather than the quantity

E. Control of discovery by judges can reduce discovery time

F. Strong judicial control over discovery reduces the total disposition time of cases

IV. JUDGMENT IS NEEDED TO KEEP THE EFFORT IN PROPORTION TO THE COMPLEXITY AND IMPORTANCE OF EACH LAW SUIT

A. The defense attorney has duties to both the insurer and the insured

B Excess cases require special consideration

V. A TENTATIVE DISCOVERY PROGRAM SHOULD BE ADOPTED AT THE TIME OF THE INITIAL FILE REVIEW

A Analyze the pleadings of the opponent.

B Outline all elements of proof required for a prima facie case as to each cause of action you think your opponent may claim

C Plan what discovery may be advisable as to each element of proof.

D. Outline all elements of proof of your possible defenses.

E Plan what discovery may be advisable as to each element of proof of your possible defenses.

F. Inform the insurance company of your proposed discovery program.

VI. CONSIDER STARTING DISCOVERY BEFORE FILING ANSWER

A. File an Appearance.

B. Consider filing Request to Produce and a preliminary set of Interrogatories immediately.

VII. REQUEST TO PRODUCE

A. May be served prior to Answer.

B. The appendix contains 4 forms for 4 Requests to Produce.

C. The form for the Request to Produce asks for information which the witness might not have available at the time of the deposition.

D. The Request to Produce asks for information which your opponent's attorney will probably be required to assemble.

E. It is helpful to have the information requested in order to prepare for the deposition. This results in a more effective deposition and reduces the time involved in taking the deposition and the length of the deposition thereby reducing the costs of defense.

F. The information requested is helpful in evaluation of the case and allows an earlier evaluation.

G The Request to Produce is a partial substitute for Interrogatories. Limits may be placed on the numbers of Interrogatories allowed. No limits have been suggested for Requests to Produce. Therefore, a Request to Produce may be used as partial substitutes for written Interrogatories.

VIII. INTERROGATORIES.

A. Principal functions.

1. Identify potential witnesses.

2. Identify existence and location of documents.

3. Narrow issues for trial.

(a) Obtain particulars about vague and uncertain pleadings.

(c) Obtain admissions of uncontroverted facts.

(d) Support Motion for Summary Judgment.

4. Pierce veil of corporate party.

5. Obtain information that requires advance notice and time to assemble.

6. Obtain information from files of attorney and insurer.

B. See appendix for suggested Interrogatories to be filed early in the case.

C. Supplemental Interrogatories should be used as close as possible to the trial.

1. At the Pretrial Conference request leave to file Supplemental Interrogatories and shorten the time for Answers to a period as close to the trial as reasonable.

2. See appendix for a form for Supplemental Interrogatories.

D. Consider possible adverse effects of Interrogatories.

1. May educate opponent.

2. May be used against you.

3. Answers tend to be evasive.

IX. REQUEST FOR ADMISSIONS

A. Proper subject matter of Request.

1. Genuiness of documents.

2. Truth of statements. Examples: Ownership, status, jurisidictional facts and any other facts as to which the opponent will not be prepared to offer any contrary evidence.

3. Request may relate to statements or opinions of fact or of the application of law to fact.

B. Improper subjects for Request for Admissions.

1. Admissions of law unrelated to the facts of the case.

2. Matters not relevant to the subject matter of a claim or defense.

3. Privilege may be used as an objection in some cases.

4. Conclusions of law.

C. Typical occasions for using Request for Admissions.

1. Analyze the elements of proof involved in the claims of your opponent and in your defenses to determine whether your opponent should admit some of the elements. If they are not otherwise admitted in the pleadings, consider filing Request for Admissions.

2. Genuiness of documents such as records of guilty pleas, blood tests, other claims or other litigation, reports of investigating officers, etc.

3. Requests relating to status including scope of employment, scope of agency, status of a passenger or guest, etc.

4. Ownership, possession, or control of property or premises.

D. A form for Request for Admissions is attached hereto in the appendix.

X. PRE-TRIAL CONFERENCE

A. The proposed rule changes in the federal rules allow a party to request a discovery conference to consider:

1. Identifying issues for discovery purposes.

2. Establishing a plan and schedule of discovery.

3. Setting limitations on discovery.

4. Determining allocation of expenses as needed for proper management of discovery in the case. (proposed rule 26(f), 77 F.R.D. 613, 624).

B. If unusual discovery problems are encountered, consideration might be given to requesting such a conference in the federal court before the rule is adopted.

1. Consider requesting such a conference under the present Iowa Rule 136 which provides for consideration of:

"(e) Stating and simplifying the factual and legal issues to be litigated. . . .

(g) any other matter which may aid, expedite or simplify the trial of any issue."

C. The Pre-trial Conference should also be considered as an opportunity for discovery.

1. Rulings may be obtained on pending discovery request.

2. The courts should help persuade the parties to stipulate to all but the differences upon which there will be an actual dispute in the evidence.

3. The court should be urged to require the attorneys to disclose the claims and defenses which will be supported by evidence and the pretrial order should then provide the resulting statement of issues which supersedes the pleadings and all other issues would be deemed waived.

(a) Such orders can be amended to prevent manifest injustice, but amendments are not easily obtained. See Case V. Abrams (10th Cir., 1965) 352 F.2d 193

(b) The Iowa court has held that a pretrial order can amend the pleadings and will control the subsequent trial. Gray v. Schlegel, (Iowa, 1978) 265 N.W.2d 156. See also Pacific Indemnity Company v. Broward County (5th Cir., 1972) 465 F.2d 99.

4. The Iowa rule is different from federal rule in providing that the conference "shall" be called at the request of any attorney.

(a) A request for pre-trial conference is set out in the appendix.

XI. DEVICES TO REDUCE COST OF DISCOVERY

A. The primary requirement is good judgment as to the amount and type of discovery required for the particular case.

B. Depositions by phone offer savings in travel time and expenses.

1. The rules make no specific provision for telephone depositions.

(a) Rule 153(F.R.C.P. 28(a)) requires that a deposition be taken "before" an authorized person, therefore the deponent must be physically present.

2 Electronic recording of a deposition may be considered if reporting fees are considered excessive and the attorney is willing to train staff to transcribe and certify depositions. In addition, there is a likelihood of a requirement for submitting the transcript to the witness for signing and the resulting time involved in this procedure.

(a) The rules now provide that the court may order recording of a deposition by means other than stenographic. Rule 148(a). F.R.C.P. 30(b)(4). Colonial Times, Inc. v. Gasch (C.A.D.C., 1975) 509 F.2d 517 shows the problems in providing safeguards for ~~the~~ electronic recordings where the parties cannot agree.

(b) If exhibits are to be identified by the witness, advance arrangement would probably need to be made to arrange for the operator of the recording device to mark the exhibit and to have some method to assure that the exhibit marked by the operator is the same document being referred to by the witness.

D. Broad powers to stipulate regarding discovery are granted in Iowa Rule 124.1.

E. Depositions need not be transcribed unless requested by a party. Rule 148(a) F.R.C.P. 30(c).

F. If transcribed, the deposition must be filed.

1. Query whether the parties could stipulate that the deposition not be filed. Rule 124.1 seems to permit such a stipulation.

G. The appendix contains suggested forms for stipulations for telephone depositions and electronically recorded depositions.

H Some discovery can be accomplished ~~carried~~ outside of the court rules.

1. Accident reports

2. Medical reports, if a patient's waiver is in the file.

3. Hospital records, if patient's waiver is in the file.

4. Employment records.

5. Worker's compensation file.

6. Weather reports.

7 News stories and photos

8. Highway plans and profiles.

9. Records concerning criminal charges.

XII. NEW DEVELOPMENTS RELATING TO EXPERTS

A. The advisory committee comment indicates that experts can be deposed in their capacity as actors and witnesses to the events giving rise to the suit. The case of Grinnel Corp. v. Hackett (D.C., RI., 1976) 70 F.R.D. 326 holds in addition that the restriction on discovery of facts known and opinions held by experts is limited to those facts and opinions "acquired or developed in anticipation of litigation or for trial."

B Quadrini v. Sikorsky Aircraft (D C., Conn., 1977) 74 F.R.D. 594 required the production of reports of experts, including reports embodying preliminary conclusions to be produced under a Request for Production in order to assist the attorney in preparing for the deposition of the expert and in order to "guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date."

C. An annotation at 31 A.L.R. Fed. 403 deals generally with the subject of pretrial discovery of facts known and opinions held by opponents' experts. The lead case of Herbst v. I.T. & T. (D.C., Conn., 1975) 65 F.R.D. 528, 33 A.L.R. Fed. 398 adopts what it considers the liberal view that discovery as to experts must be carried out in two stages including interrogatories and deposition. The court concludes that once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, oral depositions will be granted.

CAPTION

REQUEST FOR PRODUCTION

As authorized by (Iowa Rules 129 and 130/Federal Rule 34), the undersigned requests _____, to respond to the following requests:

1. That _____ produce and permit inspection and copying of each of the following documents:

a. True and complete copies of your federal income tax returns for the years 19____ to 19_____, inclusive.

b. All books, documents or other records showing your income from any source for the period stated in paragraph (a)

c. All copies of W-2's or other forms transmitted to you by all of your employers or by other persons or entities and reflecting payments made to you for the years set forth in paragraph (a).

d. Original or copies of all bills or statements, paid or unpaid, rendered to you or any other person or entity, for medical, hospital or other expenses incurred on account of the claim set forth in the petition.

e. Any photographs relating to the accident referred to in the petition.

f. Copies of records of any hospitalization for which recovery is sought herein.

g. Copies of any medical reports received by you or your attorney relating to the injuries claimed in the petition.

h. Copies of any statements as defined in (Iowa Rule 122(c)/Federal Rule 26(b)(3)) made by _____.

i. Photographs showing damage to your vehicle.

j. All records concerning the purchase price of your vehicle.

k. All estimates, bills, statements or opinions relating to the extent of damage to your vehicle and the costs of repairing it.

2. That said documents be made available at the office of the undersigned attorneys during the usual business hours of any day within 30 days from the date of service of this request.

ALTERNATE #1

(For production of something other than a document)

That _____ produce and permit _____ to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place and manner of making the inspection and performance of any related acts.)

ALTERNATE #2

(Inspection of premises)

That _____ permit _____ to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place and manner of making the inspection and performance of any related acts.)

CAPTION

REQUEST FOR PRODUCTION

Definition

As used herein, the term "Document" includes any writing drawing, graph, chart, memo, photograph, data compilation, report or any other tangible thing.

As authorized by (Iowa Rule 129/Federal Rule 34), the undersigned requests _____ to respond to the following requests:

1. That _____ produce and permit inspection and copying of each Document, which will be referred to or used as a source of information for preparation of answers to the interrogatories which are being served on you by the undersigned simultaneously herewith.

2. That said Documents be made available at the office of the undersigned attorneys during the usual business hours of any day within 30 days from the date of service of this request.

INTERROGATORIES--TABLE OF CONTENTS

Witnesses

1. Witnesses to incident
2. Witnesses to physical facts
3. Witnesses to admissions
4. Witnesses from whom statements obtained

Documents

5. Hospitals
6. Patient's waivers
7. Medical reports
8. Photographs and plats
9. Tax returns
10. Repair estimates
11. Repairs, actual

Information Requiring Assembling

12. Bills
13. Damages
14. Off work and amounts lost
15. Subrogation rights
16. Experts
17. Opinions
18. Experts not being called
19. Names

Authenticate Documents or Elicit Uncontroverted Facts

20. Guilty plea

Issues

21 Injuries
22. Present complaints
23. Acts relied on
24. Facts on which allegations based
25. Statutes, etc

1. State the names and addresses of all persons who witnessed the incident upon which your claim is based.

ANSWER:

2. State the names and addresses of all persons who observed physical facts at the scene.

ANSWER:

3. State the names and addresses of all persons who discussed any facts or opinions relating to said incident with any defendant (or representative of a defendant), or overheard any statements or opinions given by any defendant, and identify all persons present on each occasion.

ANSWER:

4. State the names and addresses of all persons from whom statements as defined in the discovery rules were obtained by or for you or by a representative of you (including your attorney, consultant, surety, indemnitor, insurer or agent), and state who has custody of each statement referred to in this answer.

ANSWER:

5. If you either have visited or been confined to a hospital, medical clinic, Xray laboratory, or any other medical institution following the incident alleged by you herein, either attach itemized bills or list the same indicating for each the date or dates visited or confined therein.

ANSWER:

6. Will you voluntarily sign patient's waivers authorizing all doctors who have treated you and all hospitals in which you have been a patient to give attorneys, or any representative thereof, all information relative to your physical condition, including photostatic copies of any records pertaining to your physical condition and, if so, will you sign the attached patient's waivers and return them with these interrogatories?

ANSWER:

7. (a) Set forth a list of the medical reports received by you or your attorney, indicating the name of the doctor, and the date of the report.

ANSWER:

(b) State whether you will voluntarily attach copies of said reports to these Answers.

ANSWER:

8. (a) List and describe any photographs, charts, plats, drawings, or other evidentiary items made or obtained by or on behalf of the parties as a result of the matter complained of in this action, and state whether you will voluntarily furnish copies thereof at our expense.

ANSWER:

(b) State any information known to you of the existence of any other photographs, plats or drawings, including a description of the same and information as to who has custody of each such item.

ANSWER:

9. (a) State whether you filed Federal income tax returns for the past five (5) years, and the names and addresses of any persons who have copies of the same.

ANSWER:

(b) Will you attach copies to your answers to these interrogatories or will defendant's attorneys be permitted to examine copies?

ANSWER:

(c) State the adjusted gross income reported thereon for each of said returns.

ANSWER:

10. State the names of each person or company making an estimate on the damages to your vehicle claimed and the amount of each estimate, if in writing, please attach a copy of each.

ANSWER:

11. State whether your vehicle has been repaired, and if so, state by whom it was repaired, the total amount paid for repairs, state by whom any payments were made in payment of said repairs and the amounts paid by each.

ANSWER:

12. Attach copies of itemized bills or list the name and office address of each such doctor or surgeon and the date or dates of each examination or treatment for injuries alleged herein

ANSWER:

13. List items and amounts claimed as special damages and as to each item indicate the amount of the item that has been paid and the name of the person or company making each payment. Also describe each element of all other claims for damages herein and describe and set forth the method of their computation and the computations used to arrive at the claim for damages herein.

ANSWER:

14. State dates, if any, you did not work, which you consider due to injuries alleged to have been sustained on the date of the incident alleged by you herein, and the amount of income claimed to have been lost on each date and the source of such income, if you had worked on said dates.

ANSWER:

15. Has an insurance company, or any person, firm, corporation or organization, any interest in this litigation, or in any recovery either by way of subrogation, assignment or otherwise, or have any such claims been asserted? If so, state the name and last known address of each, the nature and amount of any such claimed interest, and identify the document, if any, by which said interest is claimed.

ANSWER:

16. Please identify in complete detail each person whom you expect to call as an expert witness at the trial to testify as to facts or opinions acquired or developed in anticipation of litigation or for trial, stating as to each such person: (a) full name, home address and business address; (b) business name of the witness or employer; and (c) description of the specialized field in which it is claimed said witness will qualify as an expert in this case.

ANSWER:

17. As to each such person referred to in answer to the preceding interrogatory, please state in full detail: (a) the subject matter or area on which such person is to testify; (b) the substance of the facts and opinions on which such person is to testify; and (c) a summary of the grounds for each opinion

ANSWER:

18. Please state whether you have retained or specially employed any person relating to the alleged occurrence in anticipation of litigation or for trial preparation purposes who you do not expect to call as an expert witness at the time of trial.

ANSWER:

19. If your answer to the preceding interrogatory is in the affirmative, please identify each such person in detail, giving name, profession or occupation and address.

ANSWER:

20. State whether you have pleaded guilty to any violation of any law or ordinance arising out of the accident referred to in the pleadings herein, and if so, the nature of the violation charged and the court in which it was filed.

ANSWER:

21. Describe all injuries claimed to have been sustained by you in the incident complained of in the pleadings.

ANSWER:

22. Describe any present medical complaints relating to the incident referred to in the pleadings.

ANSWER:

23. **Point out in particular what act or acts or failure to act are being relied upon in connection with your allegation that . . .**

ANSWER:

24. **State what facts are the basis for your allegation that . . .**

ANSWER:

25. Do you contend that with reference to any claim in this lawsuit there is any relevant:

a. Governmental statute, ordinance, code, standard, or regulation? If so, describe in sufficient detail and give citations sufficient to identify each.

ANSWER:

b. Standard, recommendation, code, or similar statement adopted, issued, or published by any non-governmental organization or association? If so, describe in sufficient detail and give citations sufficient to identify each.

ANSWER:

CAPTION

SUPPLEMENTAL INTERROGATORIES

1. State whether you have acquired any information since answering the Interrogatories previously submitted to you by the undersigned which would make your answer different if answered at this time.

ANSWER:

2. State which Interrogatories would be answered differently and set forth in full your present answer to each Interrogatory referred to in the prior answer.

ANSWER:

CAPTION

REQUEST FOR ADMISSIONS

As authorized by (Iowa Rule 127/Federal Rule 36(a)), the undersigned requests _____, within 30 days after service of this request, to make the following admissions subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents with this request is genuine (List documents)

2. That each of the following statements is true. (List statements)

CAPTION

MOTION FOR PRETRIAL CONFERENCE

Pursuant to (Iowa Rule 136; Federal Rule 16), the undersigned request(s) a pretrial conference in this cause to consider the following:

1. The necessity or desirability of amending pleadings by formal amendment or pretrial order.

2. Agreeing to admissions of facts, documents or records not really controverted, to avoid unnecessary proof.

3. The simplification of issues.

4. Settling any facts of which the court is to be asked to take judicial notice.

5. Stating and simplifying the factual and legal issues to be litigated.

6. Specifying all damage claims in detail as of the date of the conference.

7. All proposed exhibits and proof thereof.

8. Determination of points of law.

9. Questions relating to voir dire examination of jurors and selection of alternate jurors, to serve if a juror becomes incapacitated.

10. Possibility of settlement.

11. Any other matter which may aid, expedite or simplify the trial of any issue.

12. Limiting the number of expert witnesses.

13. Rulings on objections to discovery or refusal to answer during depositions.

WHEREFORE, the undersigned pray(s) that the court enter an order fixing a time and place for immediate pretrial conference as provided by (Iowa Rule 136/Federal Rule 16).

OPTION 1

1. Identifying issues for discovery purposes.

2. Establishing a plan and schedule of discovery.

3. Setting limitations on discovery.

4. Determining allocation of expenses as needed for proper management of discovery in the case.

OPTION 2

1. To require the parties to state all claims and defenses they believe will be supported by the evidence. That the court include in the pretrial order a statement of such claims and defenses as representing the issues for trial and as superseding the pleadings herein.

STIPULATION FOR DEPOSITION BY TELEPHONE WITH COURT REPORTER

I request the following stipulation:

1. I will take the deposition of _____ by telephone commencing at _____ ___.m. on _____, 19___, (by a conference call including the following parties: _____) (by a telephone call originating from my office at said time, at which time you are requested to be present).

2. The oath shall be administered to the witness, and the deposition shall be reported by _____, an official court reporter or certified shorthand reporter of Iowa.

3. As provided in Iowa Rule 149(a), the deposition need not be submitted to, read, or signed by the deponent.

4. Long distance telephone charges shall be taxed as costs.

5. Upon compliance of the terms of this stipulation said deposition may be used by either party hereto for all uses permitted by the Rules of Civil Procedure.

STIPULATION FOR DEPOSITION
BY TELEPHONE WITHOUT COURT
REPORTER

I request the following stipulation:

1. I will take the deposition of _____ by telephone commencing at _____ ___ m. on _____, 19___, (by a conference call including the following parties: _____)(by a telephone call originating from my office at said time, at which time you are requested to be present).

2. The deposition shall be recorded electronically under my direction, and I will retain such recording until there has been a final disposition of the case.

3 The oath shall be administered to the witness by _____.

4. The deposition shall be transcribed by my staff. Such transcription shall be submitted to the witness for examination, unless such examination is waived by the witness and parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served by all parties by myself. The transcription shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive affirmation. If the transcription is not affirmed as correct by the witness within 30 days of its submission to the witness, reasons for the refusal shall be stated in a writing to accompany the transcription by the party desiring to use such transcription. The transcription may then be used as fully as though affirmed in writing by the witness, unless on a motion to suppress the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part. The person transcribing the deposition shall certify that such transcriber heard the witness sworn on the recording and that the transcript is a correct writing of the recording

5. It is agreed that cost of transcribing the original at the rate of $_____ per page shall be taxed as costs in favor of the undersigned, and it is further agreed that upon payment of $_____ per page the undersigned shall furnish a copy of the transcript to any party or to the deponent. Long distance telephone charges shall also be taxed as costs.

6. The form of the affirmation of the deponent shall be as follows:

"I affirm that the above transcript is correct.

_____

I want to change the transcript as set out below for the reasons I have given, and as changed I affirm the transcript as correct.

_____

Changes Reasons for Changes"

7. Upon compliance of the terms of this stipulation said deposition may be used by either party hereto for all uses permitted by the Rules of Civil Procedure.

DIVISION V. DISCOVERY AND INSPECTION

RULE 121. DISCOVERY METHODS

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under rule 123, the frequency of use of these methods is not limited.

RULE 122. SCOPE OF DISCOVERY

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature,

custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 134(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a

substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.** Except as provided in rule 133, discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 133 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

RULE 123. PROTECTIVE ORDERS

Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby,

and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 134(a)(4) apply to the award of expenses incurred in relation to the motion.

RULE 124. SEQUENCE AND TIMING OF DISCOVERY

Unless the court upon motion orders otherwise for the convenience of parties and witnesses and in the interests of justice, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

RULE 124.1 STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any qualified person at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules

for other methods of discovery, except that stipulations extending the time provided in rules 126, 127 and 130 for responses to discovery must be filed with the court and may be superseded by court order, in which event the time shall be extended to 20 days after notice of the court's action.

RULE 125. SUPPLEMENTATION OF RESPONSES

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

RULE 126. INTERROGATORIES TO PARTIES

(a) Availability—procedures for use. Except in small claims, any party may file written interrogatories to be answered by another party served or, if the other party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Copies of interrogatories and answers shall be filed for each adverse party. Interrogatories may, without leave of court, be directed to the plaintiff

after commencement of the action and upon any other party with or after service of the original notice upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. A party answering interrogatories must set out the interrogatory immediately preceding the answer thereto. A failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in Rule 134. The answers are to be signed by the person making them. The party to whom the interrogatories are directed shall file the answers, and objections if any, within thirty days after they are filed, except that a defendant may file answers or objections within forty-five days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 134 "a" with respect to any objection to or other failure to answer an interrogatory. Copies of answers shall be delivered as provided in rule 82.

(b) Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under rule 122, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

RULE 127. REQUESTS FOR ADMISSION

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 122 set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may on motion allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the original notice upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of rule 134 "c", deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall

order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of rule 131 "a" (4) apply to the award of expenses incurred in relation to the motion.

RULE 128. EFFECT OF ADMISSION

Any matter admitted under this rule is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of rule 138 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule may be used as an evidentiary admission only in any other proceeding.

RULE 129. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

Any party may serve on any other party a request

To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 122 and which are in the possession, custody or control of the party upon whom the request is served; or

Except as otherwise provided by statute, to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of

inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 122.

RULE 130. PROCEDURE UNDER RULE 129

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under rule 134 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

PERMISSIVE AND COMPULSORY COUNTERCLAIMS

By

Alanson K. Elgar
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Rule 29 of the Iowa Rules of Civil Procedure defines compulsory counterclaims as follows:

> "A pleading must contain a counterclaim for every cause of action then matured, and not the subject of a pending action, held by the pleader against any opposing party and arising out of the transaction or occurence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be acquired. A final judgment on the merits shall bar such a counterclaim, although not pleaded."

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . ." FRCP 13(a).

Rule 30 of the Iowa Rules of Civil Procedure defines permissive counterclaims as follows:

> 'Unless prohibited by rule or statute, a party may counterclaim against opposing party on any cause of action held by him when the action was originally commenced, and mature when pleaded."

> "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." FRCP Rule 13(b).

I. Compulsory Counterclaim

A(1) The Iowa Rule 20 is based on Federal Rules of Civil Procedure Rule 13(a), and the Iowa Supreme Court has stated that interpretations of the Federal Courts of Rule 13 are highly persuasive in defining what constitutes a compulsory counterclaim. In re Estate of Hoelscher, 249 Iowa 444, 87 N.W.2d 446, 1958 case.

(2) Same transaction or occurrence. A counterclaim is compulsory under Rules 29 of the Iowa Rules of Civil Procedure and 13(a) of the Federal Rules of Civil Procedure if it arises out of the transaction or occurrence of the subject matter of the opposing party's claim. Moore vs. New York

Cotton Exchange, 270 U.S. 593, 1926 case. See also "Claim Proclusion by Rule," by Allan D. Vestal, Carver Professor of Law, University of Iowa, in Volume 2, Indiana Legal Forum, page 25, (1968). Mid-Continent Refrigerator Co. vs. Harris, 248 N.W.2d 145, (Iowa 1976).

(3) The U.S. Supreme Court, in the Moore case, defined transaction as a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connections as upon their logical relationship. The Iowa Supreme Court, in Harrington vs. Polk County Federal Savings & Loan Ass'n. of Des Moines, 196 N.W.2d 543 (Iowa 1972), stated: Although several tests have been suggested to determine whether a claim arises out of the same transaction or occurrence, the Iowa court has followed just one: Is there any logical relation between the Plaintiff's claim and the counterclaim?

(4) The logical relationship test is reached only after determination that the counterclaim is (1) matured, (2) is not subject of pending action, (3) it was held by the pleader against the opposing party, and (4) adjudication on the counterclaim does not require the presence of an indispensable party, of whom jurisdiction cannot be acquired by the Court.

B. Purpose of compulsory Counterclaim Rules

1. Judicial Economy The U.S. Supreme Court stated, in Cherry Cotton Mills, Inc. vs. United States, 327 U.S. 536 and 539, (1946 case), that legislation regarding compulsory counterclaim rules have long been favored and encouraged because it accomplishes, among other things, such useful purposes as avoidance of security of action, inconvenience, expense and consumption of the Court's time and injustice. United States vs. Heyward-Robinson Co., Inc., 430 F.2d 1077 (2nd Cir. 1970); Semmes Motors, Inc. vs. Ford Motor Co., 429 F.2d 1197 (2nd Cir. 1970); Diamond vs. Terminal Railway Alabama State Docks, 421 F. 2d 228 (5th Cir. 1970); Koufakis vs. Carvel, 452 F.2d 892 (2nd Cir. 1970).

2. As further defined by the Iowa Supreme Court, in Employers Mutual Casualty Co. vs. Hanshaw, 176 N.W.2d 653 (Iowa 1970), the objective of Rule 29 is to discourage separate litigations covering the same subject matter by requiring that all logically related claims be brought in the same action through the penalty of precluding the latter assertion of the claim. Mercoid Corp. vs. Mid Continent Investment Co., 320 U.S. 661 (1944), W.L. Hailey & Co. vs. County of Niagara, 388 F.2d 746 (2nd Cir. 1967).

3. Effect of failure to raise compulsory counterclaim is as stated in Rule 29, a final judgment on the merit shall bar such counterclaim although not pleaded. The rational and purpose of compulsory counterclaims have been often associated with claim preclusion, res judicata and collateral estoppel. United States vs. Eastport Steamship Corp., 255 F.2d 795 (2nd Cir. 1958); Dindo vs. Whitney, 451 F.2d 1 (1st Cir. 1971); Kennedy vs. Jones, 44 FRD 52 (E.D. Va. 1968); LaFollette vs. Herron, 211 F.Supp. 919 (E.D. Tenn. 1962). See Vestal "Claim Preclusion," Ibid.

4. Exploring terms defined under what constitues a final judgment on the merits as barring such counterclaim.

   a. Motions to dismiss on counterclaims raised.

   b. Default Judgments - Under default judgments, see Rule of Civil Procedure 217, also In re Estate of Hoelscher, Ibid., Employers Mutual Casualty Co. vs. Hanshaw, Ibid., Mensing vs. Sturgeon, 250 Iowa 918, 97 N.W.2d 145, (1959). See also Charles Wright, "Estoppel by Rule: The Compulsory Counterclaim under Modern Pleading," 39 Iowa L.Rev. 255 (1954).

5. The effect of the compulsory counterclaim rules is that if a defendant counterclaims, and it is deemed to be compulsory, and he has had an opportunity to raise the issue in the prior litigation and has failed to assert his claim, he has been barred from the opportunity to raise that claim in a separate litigation.

6. Although there has been understandable reluctance by Courts to cut off a cause of action on a procedural technicality, the Courts are becoming more uniform in carving out extraneous and unnecessary litigation by limiting multiplicity of litigation - (1) one form can probably do a better job - piecemeal litigation prevented; (2) provide for certainty and finality by preventing litigation of the same or relating evidence; (3) saves expense and time; (4) speeds up the judicial system, claims logically connected, facts are before the Court, and therefore it is not necessary to have a second proceeding; (5) prevents a party, either through negligence or design from withholding issues, and requires them to litigate the issues in the successive action which minimizes confusion and uncertainty in reaching final conclusions and adjudication of rights on the merits.

7. Liberal construction by Courts of compulsory counterclaim rules, See Moore's Federal Practice, Volume 3, Section 13.

II. Permissive Counterclaims

A. All permissive counterclaims are not necessarily the opposite of compulsory counterclaims. Permissive counterclaims are those which do not meet the tests of compulsory counterclaims. They involve different issues of fact and law. However, sometimes and in most instances, there is a very fine line between what constitutes a permissive counterclaim as opposed to a compulsory counterclaim. One of the tests is a negative test - whether or not it will require a duplication of effort by the Court to reach a determination on the merit. See Darr vs. Thorp Credit, Inc., 73 Federal Rules Decision 127, (Iowa 1977). See also Kissell Company vs. Sparling, 417 F.2d 1180. The major effect of a claim which is deemed to be a compulsory counterclaim and those which are deemed merely to be permissive counterclaims is that failure to raise permissive counterclaims does not affect the defendant in that he will not be barred in raising that issue in a different action. Normally, Courts will not prevent a party from raising permissive counterclaims, although the occasion may not have arisen out of the same transaction or occurrence and is neither logically related to the opposing party's claim. Mercoid Corp. vs. Mid Continent Investment Co., 320 U.S. 661 (1944), W.L. Hailey & Co. vs. County of Niagara, 388 F.2d 746 (2nd Cir. 1967).

B. Distinction between Opposing Parties and Co-Parties.

ACTIONS BETWEEN CO-EMPLOYEES

By David L. Phipps
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I. Exclusive jurisdiction:

A. The Workmen's Compensation Act has taken cases by employees against employers for industrial injuries out of the general jurisdiction of the district court and placed that class of cases exclusively in the jurisdiction of the Industrial Commissioner.
Bridgmon v. Kirby Oil Industries, 93 N.W.2d 771 772 (Iowa, 1958).
Steffons v. Proehl, 171 N.W.2d 297, 300 (Iowa, 1969);
Jansen v. Harmon, 164 N.W.2d 323, 326 (Iowa, 1969);
Graves v. Donohue, 118 N.W.2d 65, 69 (Iowa, 1962).

B. Chapter 321.493 of the Iowa Code which might have permitted one to maintain an action against his employer based upon common-law liability as a result of an automobile accident is superceded by the Workmen's Compensation Act which provides the exclusive remedy against employees for work connected accidents.
Steffons v. Proehl, 171 N.W.2d 297, 298-300 (Iowa, 1969).

II. Exceptions to exclusive jurisdiction:

A. A district court has jurisdiction of suit by an employee who is suing the employer and the workmen's compensation carrier for damages due to alleged negligence of said carrier, and the carrier's claim that (1) the plaintiff's rights were limited to workmen's compensation coverage and that (2) statutory provisions relating to injuries caused under circumstances creating legal liability against someone other than the employer was not applicable, were defensive matters which could not defeat jurisdiction.
Fabricuis v. Montgomery Elevator Company, 114 N.W.2d 297 (Iowa, 1962).

B. In order that the district court have jurisdiction in such cases, it was necessary for the employee to allege the rejection of Chapter 85 as provided in former sections 85.4 through 85.15, or the failure of the employer to insure as provided in section 87.21.
Jansen v. Harmon, 164 N.W.2d 323, 327 (Iowa, 1969);
Graves v. Donohue, 118 N.W.2d 65, 69 (Iowa, 1962).

C. Where a special statute has placed a particular class of cases in the Industrial Commissioner's jurisdiction unless certain conditions precedent occur, such condition precedent must be so alleged before the district court has subject matter jurisdiction. Graves v. Donohue, 118 N.W.2d 65, 70 (Iowa, 1962).

D. The exclusive jurisdiction of the Industrial Commissioner takes effect unless the employee is excluded from coverage or the act has been rejected. Fabricuis v. Montgomery Elevator Company, 121 N.W.2d 361, 362 (Iowa, 1963).

III. Common law liability of co-employees: (Pre-July 1, 1974)

A. At early common law, the "fellow servant" rule would have precluded an action in tort between co-employees for injuries sutained by one of them while said employees were working within the scope of their employment.
Hysell v. Iowa Public Service Co., 534 F.2d 775, 783 (8th Cir., 1976).

B. The Workmen's Compensation Law does not abolish common law actions in tort except those between employees and employers.
Price v. King, 146 N.W.2d 328, 330 (Iowa, 1966);
Bradshaw v. Iowa Methodist Hospital, 101 N.W.2d 167, 174 (Iowa, 1960).

C. The Workmen's Compensation Act does not deny an employee the common law right to recover damages caused by negligence of third parties even though he has received benefits provided by the act for the same injuries.
Price v. King, 146 N.W.2d 328, 329 (Iowa, 1966).

D. The statutory immunity of the employer under section 85.20 of the Workmen's Compensation Act does not extend to other employees.
Hysell v. Iowa Public Service Co., 534 F.2d 775, 733 (8th Cir., 1976);
Craven v. Oggero, 213 N.W.2d 678, 680-681 (Iowa, 1974).

E. Statutes involved:

1. Section 85.20, 1977 Code of Iowa (Exclusive jurisdiction)

2. Section 85.22, 1977 Code of Iowa (Subrogation).

IV. Actions against co-employees; supervisors (Pre-July 1, 1974)

A. The statutory definitions of "employer" and "workman or employee" are controlling when dealing with the

Workmen's Compensation Act.
Price v. King, 146 N.W.2d 328, 331 (Iowa, 1966).

B. "Workman" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer.
Price v. King, 146 N.W.2d 328, 331 (Iowa, 1966).

C. The mere fact that two individuals are employed by the same employer does not, of itself, impose a duty on one of them to act for the safety of the other.
Craven v. Oggero, 213 N.W.2d 678, 682 (Iowa, 1974).

D. Where one employee has been assigned the duty to act for the safety of other employees, he has a personal duty to such other employees to so act and neither the fact that he is a supervisor nor that the duty has been assigned in implementation of the employer's duty to provide all employees a safe working place will exculpate him from liability for breach of such duty.
Craven v. Oggero, 213 N.W.2d 678, 679 (Iowa, 1974); See Moose v. Rich, 253 N.W.2d 565, 571 (Iowa, 1977).

E. An employee held liable for injuries sustained by a co-employee could be required to indemnify another actor also held liable or to contribute to recovery had by a co-employee against said actor.
Hysell v. Iowa Public Service Co., 534 F.2d 775, 783 (8th Cir., 1976).

F. A corporation, being a ficticious entity, necessarily advances its objectives only through its employees, however not all such employees become liable when in the progress of corporate operation negligence causes injury to another employee.
Kerrigan v. Errett, 256 N.W.2d 394, 396 (Iowa, 1977).

G. Generally, a co-employee will be personally liable for injury to another employee only if there is neglect or violation of duty with which the co-employee is personally charged.
Kerrigan v. Errett, 256 N.W.2d 394, 396 (Iowa, 1977).

H. In order to impose individual common-law liability on co-employees for injury to an employee, the following criteria must be met:

1. the employer must owe a duty of care to the injured employee, breach of which caused the damage for which recovery is sought;

2. the duty must have been delegated by the employer to the co-employee;

3. the co-employee must have breached his duty through personal as contrasted with technical or vicarious fault; that is, personal liability cannot be imposed simply because of the co-employee's general administrative responsibilities for performance of some function of the employment; rather, he must have some personal duty toward the injured employee, breach of which specifically caused the employee's injury.
Kerrigan v. Errett, 256 N.W.2d 394, 396 (Iowa, 1977);
See Davis v. Cook, 261 N.W.2d 500 (Iowa, 1978).

I. In order to determine whether a co-employee supervisor has been delegated and has accepted a personal "duty" so as to render him personally liable for injuries to another employee, "duty" must be distinguished from authority; "duty" denotes an obligation and is compulsory while "authority" denotes capacity and is permissive.
Kerrigan v. Errett, 256 N.W.2d 394, 399 (Iowa, 1977);
See Davis v. Cook, 261 N.W.2d 500, 503 (Iowa, 1978).

J. While the language of Kerrigan is absolute, the common-law duties would seem to still exist on behalf of a co-employee in addition to the "job related" or "supervisory" duties discussed therein.

V. 1974 amendment

A. The Workmen's Compensation Act, specifically section 85.20, has been amended to provide a limited immunity for a co-employee. Section 85.20, the Code, 1977; see Acts, 65 G.A. Ch. 111, section 1 (1974).
Kerrigan v. Errett, 256 N.W.2d 394, 396 (Iowa, 1977);
Hysell v. Iowa Public Service Co., 534 F.2d 775, 783 (8th Cir., 1976).

B. Section 4.5 of the Iowa Code requires a presumption of prospective application and because the Supreme Court of Iowa has evolved a strict rule of construction against retrospective operation, the 1974 amendment must, in absence of contrary indications, be held to have only prospective application.
Hysell v. Iowa Public Service Co., 534 F.2d 775, 784 (8th Cir., 1976);
Moose v. Rich, 253 N.W.2d 565, 572 (Iowa, 1977).

C. The amendment serves to limit the right of an employee to receive compensation from a co-employee, a limitation which is substantive rather

than procedural. It is not remedial, in that it does not provide for redress of wrongs, but rather makes a policy decision to limit the redress available. Moose v. Rich, 253 N.W.2d 565, 572 (Iowa, 1977).

VI. Gross negligence and wanton negligence defined

A. "Gross negligence" has not, to date, been defined in any context by the Iowa Supreme Court.

B. The Wisconsin Supreme Court has defined the term as follows:

"To constitute gross negligence there must be either a willful intent to injure, or that reckless or wanton disregard of rights and safety of another or his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure." Twist v. Aetna Casualty and Surety Co., 81 N.W.2d 523, 525-526 (Wis., 1957).

C. "Wanton neglect" has not been well defined in any jurisdiction, however, a reasonable definition of "wanton negligence" follows:

Conduct is wanton if the defendant intentionally does or fails to do an act, knowing or having reasons to know facts which would lead a reasonable man to realize his conduct not only creates unreasonable risk of harm to another but involves a high degree of probability that such harm would result. Southern Pacific Transportation Co. v. Leuck, 535 P.2d 599, 601 (Arizona).

D. "Wanton negligence" is of an even higher degree than "gross negligence" being defined as marked by a manifestly arrogant recklessness of justice, or the rights or feelings of others, ruthless or inhuman. Big Stone Gap v. Johnson, 135 S.E.2d 71, 73 (Va.).

VII. Actions by supervisory personnel against co-employees

A. To date, the appellate courts of Iowa have not been involved in cases brought by supervisory personnel against co-employees, however, note that roles may be switched and duties applied to contributory negligence.

VIII. Specific Iowa cases brought by employees against co-employees

A. Price v. King, 146 N.W.2d 328 (Iowa, 1966).

1. Facts: Plaintiff sought damages from a co-employee defendant alleging said defendant negligently operated a motor vehicle causing personal injury and damage to the plaintiff. Defendant asserted that the accident arose out of and in the course of employment of both parties by a common employer.

2. Issue: Whether a co-employee is entitled to the same immunity from such an action as that accorded by law to an employer.

3. Holding: Under the Workmen's Compensation Act a co-employee is "some person other than the employer" against whom negligence actions may be maintained by co-employees.

B. Craven v. Oggero, 213 N.W.2d 678 (Iowa, 1974).

1. Facts: Subsequent to a fatal fall by the plaintiff's decedent at a construction site in 1968, suit was brought against two supervisory co-employees. The defendants were the safety director and the job superintendent. Trial court held co-employees are immunized from liability under the Workmen's Compensation Act in an employee's action when the duties they are alleged to have breached have been assigned to them in implementation of the employer's duty to provide his employees a safe place to work.

2. Issue: Whether the action is barred by the Workmen's Compensation Act.

3. Holding: When the co-employee holds a supervisory position and has allegedly breached duties assigned to him in that capacity, he is not immune from suit by the employee by reason of the Workmen's Compensation Act.

   a. Rationale: When a co-employee accepts a safety duty assigned to him, he has a personal duty to other employees.

C. Moose v. Rich, 253 N.W.2d 565 (Iowa, 1977).

1. Facts: An employee brought suit against his foreman who had provided him with scaffolding which gave way causing his injuries in 1971. The Plaintiff received benefits from his employer via the Workmen's Compensation Act and subsequently obtained a judgment against the foreman. The defendant argued that the release of the employer also acted as a

release to any actions by the plaintiff against the defendant. This was rejected by the trial court. Upon defendant's motion for directed verdict, the court ruled the jury could find a personal duty owed by defendant to the plaintiff, thus overruling the motion. Defendant, among other assignments of error, argued that the 1974 amendment applied retrospectively to the date of the accident involved.

2. Issue: Whether the amendment was retroactive.

3. Holding: The amendment is substantive rather than procedural and would not be given retroactive application.

D. Kerrigan v. Errett, 256 N.W.2d 394 (Iowa, 1977).

1. Facts: Employee and his wife filed a common-law negligence action for personal injuries to said employee after a form on a press fell, severing his right hand and four fingers on his left hand, all occurring in 1969. An inspection of the press indicated a weld holding the form broke causing it to fall. Plaintiff alleged the Defendant co-employee supervisor had specific responsibilities concerning plant and employee safety and that the defendant was negligent in carrying out said duties. Defendant's motion for directed verdict was overruled. The jury returned a verdict in excess of $200,000. Defendant contended that there was insufficient evidence that plaintiff relied upon defendant's discharge of a duty owed by their common employer and a personal duty owed to the plaintiff.

2. Issue: Whether individual liability could be imposed on the co-employee.

3. Holding: Personal liability cannot be imposed simply because of the co-employee's general administrative responsibilities for performance of some function of the employment; rather, co-employee must have had a personal duty toward the injured employee, breach of which specifically caused the employee's injury.

E. Davis v. Cook, 261 N.W.2d 500 (Iowa, 1968).

1. Facts: Plaintiff sued the president and the vice president of the company which employed him after he suffered an amputation of his finger in an unshielded shearing machine. Plaintiff alleged

the defendant co-employees assumed and breached a company imposed duty relating to the safety of employees. Verdict was returned in the amount of $140,000. Defendants asserted that a directed verdict should have been granted as plaintiff failed to prove they owed a duty to him.

2. Issue: Whether plaintiff had generated a jury issue as to personal duties owed by defendants to plaintiff.

3. Holding: The evidence created a jury issue as to whether or not the operating officers had personally charged themselves with responsibility for safety measures to protect their fellow employees.

F. There have been no cases reviewed by the appellate courts of Iowa wherein the tortious events occurred subsequent the 1974 amendment of section 85.20.

INDEPENDENT MEDICAL EXPERTS

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I. AUTHORITY FOR INDEPENDENT PHYSICAL AND MENTAL EXAMINATIONS AND USE OF INDEPENDENT MEDICAL EXPERTS.

A. State Court

R.C.P. 132, 1977 Code of Iowa

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. Federal Court

F.R.C.P. 35

Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

II. REPORT OF EXAMINING PHYSICIAN.

A. Both State and Federal Court

R.C.P. 133, 1977 Code of Iowa

F.R.C.P. 35(b)

If requested by the party against whom an order is made under Rule 132 (Rule 35(a)) or the person examined, the party causing the examination to be made shall deliver to him a copy of the detailed written report of the examining physician setting out his findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request, to recieve from the party against whom the order is made, a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

This rule applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This rule does not preclude discovery or a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule or statute.

III. MEDICAL PRIVILEGE

A. State Court

No practicing physician, surgeon, or the stenographer or confidential clerk of any such person who obtains information by reason of his employment shall be allowed, in giving testimony, to disclose any confidential communication entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

Section 622.10, 1971 Code of Iowa

This statute creates a privileged communication between doctor and patient where the doctor obtains information from the patient which is necessary to treat the patient. However, this privilege can be waived under the Iowa law in a number of ways. The most common method of waiving this privilege is by the patient filing a lawsuit for personal injury in which he is seeking to recover damages for the condition for which he was treated by the physician.

Section 622.10 of the 1971 Code of Iowa specifically provides that such a waiver of right occurs when the person in whose favor the prohibition applies brings a civil action to recover damages for personal injuries or wrongful death. However, the evidence sought must be related to the condition referred to in the civil action for damages.

If a party to a lawsuit is examined by an independent medical examiner and that party later requests and obtains a copy of the examiner's medical report or takes the examiner's deposition, he again waives any privilege in that action or any other action involving the same controversy regarding the testimony of any physician or other person as to the condition for which the examination was ordered.

Iowa Rule of Civil Procedure 133

Prior to its amendment in 1967, Section 622.10 simply provided for the confidential communication without making specific provision for the manner in which the privilege

could be waived. A number of cases in Iowa have interpreted that statute, and the reasoning given in those cases would undoubtedly still be applicable in situations where medical testimony is being elicited from a doctor in a case not involving a civil action to recover damages for personal injuries or wrongful death.

Prior to the amendment of the statute, the Iowa court was somewhat strict in its interpretation and application in favor of the patient. The general rule for its application was stated in the case of State of Iowa v. Tornquist, 1963, 254 Iowa 1135, 120 NW2d 483. In that case, the court indicated that the essential elements of communication privileged under the doctor-patient relationship are:

1. The relationship of doctor and patient;
2. Information acquired during this relationship;
3. The necessity and propriety of the information to enable the doctor to treat the patient skillfully in his professional capacity.

The Iowa court, as is true of many other jurisdictions, has extended the privilege under this statute to cover not only communications as such from patient to doctor, but also all "information" which the physician might gain by observation and personal examination of the patient in the discharge of his duties.

Newman vs. Blom, 1958, 249 Iowa 836, 89 NW2d 349

It is not required that a physician actually see and examine the patient for privilege of communication to exist, but it is absolutely essential that communication, alleged to be privileged, was related to medical diagnosis or treatment of patient.

State v. Bedel, 1971, 193 NW2d 121

The court in the Newman vs. Blom case, supra, also extended the privilege to cover hospital records. However, it would appear from the language in that case that the privilege would extend only to those portions of hospital records which were made pursuant to actual diagnosis or treatment by the doctor himself. In speaking about the medical records librarian in that case, the court stated:

> "Plaintiff's contention that the records clerk of such a hospital is the stenographer or confidential clerk of the attending physician and that records taken in a professional capacity or information gained while acting in such a capacity in her charge are privileged, has much merit."

The Tornquist case, supra, indicates that the Iowa court does not feel that a nurse is within the prohibited category of witnesses unless she was acting as an agent of or assistant to the physician in charge. This would seem to support the proposition that statements made to a nurse or observation made by a nurse independent or any treatment or examination by a doctor would be admissible as against a patient. Furthermore, it would seem reasonable that entries made by a nurse in hospital records as a result of her regular visits and checks on a patient in the absence of the treating doctor would be admissible and not subject to the privilege. However, any record entry or observation made by the nurse in conjunction with a regular visit by the treating doctor would probably not be admissible under Iowa law.

In addition to the methods of waiver already stated, it is possible for the patient to waive his privilege in several different ways, according to Iowa cases. Of course, if he does not lodge an objection at trial to the testimony of the doctor, the doctor has no standing to himself object. However, even if the patient does object, it is possible for him to waive the privilege in other ways.

The case of Woods v. Town of Lisbon, 1911, 150 Iowa 433, 130 NW 372, indicates that a wavier may be made by failing to object, by the patient calling the physician himself to testify as to privileged matters, by calling other witnesses to testify to the same facts to which the doctor himself would testify, or by the patient himself testifying as to the matter in question.

However, a patient's testimony on cross-examination regarding privileged communications to his physician will not be construed as a waiver of the privilege.

Howard v. Porter, 1949, 240 Iowa 153, 35 NW2d 837

For the calling of one physician to amount to a waiver as to another physician, the physicians must be consulting physicians engaged in a unified course of treatment. The calling of one of a number of physicians acting independently and successively on the same injury or illness does not constitute a waiver.

Brown v. Guiter, 1964, 256 Iowa 671, 128 NW2d 896

Barnard v. Cedar Rapids City Cab Company, 1965, 257 Iowa 734, 133 NW2d 884

It is generally held that information given in the presence of third parties who are not within the scope of the privilege destroys the confidential nature of the disclosure and renders them admissible.

State v. Flaucher, 1974, 223 NW2d 239

The party asserting a claim of privilege should raise the objection at the time that the matter is first inquired into, especially if an evidentiary deposition is being taken for later use at trial.

B. Federal Court

The doctor-patient privilege has virtually been eliminated in Federal Court under the recently enacted Federal Rules of Evidence. The only privilege which now exists under Article V of those Rules is a physcotherapist-patient privilege as set forth in Rule 504. The Advisory Committee's comments on Rule 504 indicate that the exclusions from the old doctor-patient privilege are so numerous as to leave little, if any, basis for the privilege.

IV. PRE-TRIAL DISCOVERY OF MEDICAL INFORMATION AND HOSPITAL RECORDS.

Generally, most medical information related to the care and treatment of a party to a lawsuit may be produced through the discovery procedures allowed under the Iowa Rules of Civil Procedure, provided the medical privilege discussed previously is not in effect. Under Section

622.10 of the 1971 Code of Iowa, a party may take the oral deposition, either discovery or evidentiary, of any physician or surgeon or the stenographer or confidential clerk of any such physician or surgeon and question them in connection with the injuries claimed by the plaintiff in a civil action to recover damages for personal injuries or wrongful death. Such depositions may be taken after application is made to the court and a hearing is held which cannot be ex parte. The statute specifically provides that the court shall grant permission to question these witnesses unless the court finds that the evidence sought does not relate to the condition alleged. The court is also required under the statute to fix a reasonable fee to be paid to the physician or surgeon by the party taking the deposition.

Under Iowa Rule of Civil Procedure 132, a party may make application to the court to have an adverse party examined as to any physical or mental condition of said party which is in controversy in the action. The party examined is entitled to have a representative present throughout such examination.

The party examined is entitled to have a copy of the examiner's reported findings and conclusions, and he must be provided with such a copy if he requests it. However, if he does request a copy of the examiner's findings, he then must deliver to the examining party a report of all other medical findings from any of his other treating physicians.

R.C.P. 133

The party wishing the independent medical examination is not always entitled to select the doctor to make the examination. The court may select a doctor other than that chosen by the defendant to conduct the independent physical examination.

Main v. Tony L. Sheston - Luxor Cab Company, 1958, 249 Iowa 973, 89 NW2d 865

Under the Iowa Rule of Civil Procedure dealing with the production of books and documents, the Iowa court has held that this right of discovery extends to hospital records and that such records can be produced for inspection by an adverse party.

Hampton Clinic v. District Court of Franklin County, 1941, 231 Iowa 65, 300 NW 646

It is also felt that this right of pre-trial production and inspection should be extended to include the production of x-rays taken by the plaintiff's treating physician so that these x-rays may be utilized by the independent examining physician. The Iowa Court did indicate that such action was taken in the Main v. Sheston - Luxor Cab Company case, supra, and expressed no disapproval of that action.

V. ADMISSIBILITY OF HISTORY TAKEN FROM PATIENT BY DOCTOR.

A. State Court.

Allowing a doctor to testify as to the history of a particular case is an exception to the hearsay rule based upon a probability that the patient will not falsify statements made to his physician at a time when he is expecting and hoping to receive medical aid and benefit from the doctor.

Mitchell v. Montgomery Ward and Company, 1939, 226 Iowa 956, 285 NW 187

However, history taken by a doctor from a patient must bear some substantial relation to the patient's condition and treatment to be rendered in order that the history be admissible into evidence as an exception to the hearsay rule. The mere statement by a physician that certain history is necessary to his diagnosis and treatment does not make it so.

State v. Pilcher, 1968, 158 NW2d 631

History and complaints of a patient are not admissible when the examination of a physician is made solely for the purposes of testifying as an expert witness and not for treatment of the patient's condition.

Devore v. Schaffer, 1954, 245 Iowa 1017, 65 NW2d 553

Mitchell v. Montgomery Ward and Company, 1939, 226 Iowa 956, 285 NW 187

B. Federal Court.

Rule 803(4), Federal Rules of Evidence.

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
. . .

"(4) Statements for purposes of medical diagnosis or treatment. --

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

The new Federal Rule of Evidence dealing with the hearsay exceptions would appear to have eliminated the distinction between treating and nontreating physicians. Therefore, provided the history is relevant to the diagnosis of the patient's physical condition, statements made by the patient to either a treating or nontreating physician are probably admissible.

VI. OPINION EVIDENCE BY MEDICAL WITNESSES

A. State Court

Generally, physicians can be asked opinions which are within the realm of their medical expertise. The most common form of question asked by a physician is that dealing with the causation of a particular injury or condition. Although there is a general feeling among many lawyers that the testifying physician must give an opinion with reasonable medical certainty, that is not necessarily the case. The Iowa court in the case of Dickinson v. Mailliard, 1970, 175 NW2d 588, stated:

> "Almost all courts have held the opinion of experts need not be couched in definite, positive or unequivocal language. The use of the terms like 'I believe'; or 'I think'; or 'It appears to me' have all been held permissible if it is apparent such language is meant to express the witness' professional opinion."

Testimony of a physician that there could be a causal connection between a party's condition and an injury previously sustained is sufficient to warrant submitting to the jury the issue of proximate cause when it is coupled with other testimony, non-expert in nature, that the party was not afflicted with any such condition prior to the accident in questions.

Bradshaw v. Iowa Methodist Hospital, 1960, 251 Iowa 375, 101 NW2d 167

Reed v. Harvey, 1961, 253 Iowa 10, 110 NW2d 442

A medical witness may give an opinion as to future pain and suffering and permanency of an injury. However, opinion testimony of a physician as to future consequences or effects of an existing injury or condition is admissible only as to those which are reasonably certain to occur, or which are medically probable. Consequences or effects which are a mere possibility are not admissible.

Bostian v. Jewell, 1963, 254 Iowa 1289, 121 NW2d 141

B. Federal Court.

Rule 702, Federal Rules of Evidence

"Testimony by Experts.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Rule 703, Federal Rules of Evidence.

"Basis of opinion, testimony by experts.

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Rule 704, Federal Rules of Evidence.

"Opinion on Ultimate Issue.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because

it embraces an ultimate issue to be decided by the trier of fact."

Rule 705, Federal Rules of Evidence.

"Disclosure of Facts or Data Underlying Expert Opinion.

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The experts may in any event be required to disclose the underlying facts or data on cross-examination."

Under Rules 702, 703, 704 and 705 of the Federal Rules of Evidence, a medical expert witness may give testimony concerning any medical issue in the case which would be of assistance to the trier of facts. This includes giving opinions on ultimate issues to be decided by the trier of fact. The medical witness need not base his opinion upon any first hand information, but rather may rely upon hearsay information, provided it is of a type reasonably relied upon by other physicians. Therefore, it would appear that an independent medical expert could utilize and rely upon medical reports and summaries prepared by other treating physicians, as well as all pertinent hospital and laboratory records.

VII. HYPOTHETICAL QUESTIONS

When an expert witness has no first hand knowledge of the situation at issue, and has made no investigation of the facts, the most convenient way of securing the benefit of a scientific skill is to ask him to assume certain facts and give his opinions for inferences in view of such assumptions.

Hedges v. Conder, 1969, 166 NW2d 844

The facts stated in a hypothetical question must have support in the evidence, but the question need not contain all the facts shown by the evidence.

In re Telsrow's Estate, 1946, 237 Iowa 672, 22 NW2d 792

An expert witness may not base an opinion in whole or in part upon opinions of others, whether lay or expert, even though such opinions appear in the evidence.

Ipsen v. Ruess, 1948, 239 Iowa 1376, 35 NW2d 82

Poweshiek County National Bank v. Nationwide Mutual Insurance Company, 1968, 156 NW2d 671

Lovely v. Ewing, 1971, 183 NW2d 682

Entries in hospital records and charts prepared by attending physicians, nurses and laboratory personnel are facts, rather than opinions, and can properly serve as the basis for hypothetical questions posed to a medical expert.

In re Scanlan's Estate, 1954, 246 Iowa 52, 67 NW2d 5

A treating physician may also testify as to hypothetical questions.

Robertson v. Mutual Life Insurance Company of New York, 1942, 232 Iowa 743, 6 NW2d 153

In connection with hypothetical questions, also see 71 ALR 2d 6

VIII. CROSS-EXAMINATION OF A MEDICAL WITNESS

A. State Court.

When cross-examining a medical witness, an attorney may examine and use any paper or document, including records and findings and conclusions, which the doctor uses to refresh his recollection during his direct examination.

Barnard v. Cedar Rapids City Cab Company, 1965, 257 Iowa 734, 133 NW2d 884

Where a medical witness bases an opinion upon some medical authority, rather than his personal experience and education, he may be cross-examined in regard to the teachings of recognized authorities in order to test the accuracy of his knowledge.

Morton v. Equitable Life Insurance Company, 1934, 218 Iowa 846, 254 NW 325

84 ALR 2d 1338

In order to test and challenge the qualifications of a medical witness it is sometimes advisable to inquire into the background and training of the witness on cross-examination. This would be especially true where a medical witness is holding himself out as a specialist in a particular area of medicine but has not been certified by the particular specialty board in that field. Under these circumstances, it can be brought out on cross-examination the requirements for certificate by the board and what board certification entails, and then establish the fact that the particular witness has not been board certified.

B. Federal Court.

Rule 803, Federal Rules of Evidence.

"Hearsay Exception; Availability of Declarant Immaterial.

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness; . . . . (18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in public treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or adminssion of the witness or other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits."

Rule 803(18) substantially changes the previous law dealing with the inadmissibility of learned treatises. Although portions of texts could be used for cross-examination of medical witnesses, they were normally not admitted as substantive evidence.

PUNITIVE DAMAGES

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I. Introduction.

Punitive damages are allowed in all but four states (Louisiana, Massachusetts, Nebraska and Washington). As with compensatory damage verdicts, awards for exemplary damages have seen some dramatic increases in recent years. In the much publicized case of Richard Grimshaw v. Ford Motor Co., No. 197761, Orange County Superior Court, California, February 6, 1978, the jury awarded $125 million punitive damages. This was later reduced by Trial Judge, Leonard Goldstein, to $3.5 million and when added to the $2.5 million compensatory damage verdict resulted in a total award of $6 million. (Understandably, Ford Motor Company Vice-President and General Counsel, H. R. Notle, Jr., said Ford would appeal.) In Iowa the awards have not yet been quite so dramatic, but it may be noted that a federal court jury in Iowa did award punitive damages of $650,000.00, although upon review, this was found excessive. Bankers Life & Cas. Co. v. Kirtley, 307 F.2d 418 (8th Cir. 1962).

II. Theory.

A. Punishment and deterrence.
"...as a punishment for the particular party involved and as a warning and an example to him in the future, and to all others who may offend in like manner." Sebastian v. Wood, 66 N.W.2d 841, 844 (Iowa, 1954).

B. Revenge.
Judge Hanson stated: "Though seldom cited by courts, revenge and compensation encourage principle-oriented lawsuits and justify making this largely windfall award to the plaintiff as opposed to the state." Hon. William C. Hanson, Selected Aspects of Punitive Damages, 1976 Annual Meeting of the Iowa Defense Counsel Association.

C. Compensation for Attorney Fees.
In Alexander v. Staley, 110 Iowa 607, 611, 81 N.W. 803, 804 (1900) the Court stated:

> "But, where the act complained of is tainted with fraud, the jury, which has the power to punish, has necessarily the right to include the consideration of probable counsel fees in its estimate of exemplary damages."

(Note: This case probably should not be relied upon for legal authority, but may illustrate what actually does occur in a jury room.)

III. Elements.

In an excellent article by Tom Riley of the Iowa Bar, it is stated:

> "Therefore, the necessary elements for the recovery of punitive damages in Iowa would seem to be:
>
> 1. conduct by the defendant consisting of either
>   a. gross negligence,
>   b. fraud,
>   c. a criminal act, or
>   d. a wrongful act done either intentionally, maliciously, wantonly, recklessly, without just cause or with complete indifference to or disregard of the rights of others, and
> 2. injuries to the plaintiff proximately caused by the defendant's conduct, which could give rise to actual or compensatory damages and not mere nominal damages, and
> 3. that the imposition of a punitive damage award will punish the defendant so as to deter him and others from committing similar future misdeeds." Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-1978)

IV. General Principles

A. Malice.

Generally, if gross negligence, recklessness or fraud cannot be shown, then some form of malice must be proven to justify an award of exemplary damages. Judge Graven in Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953) states that Iowa has recognized three terms for malice. They are as follows:

1. Express Malice or Actual Malice.
This is malice in the popular sense of ill will, hatred or personal spite. It is also said that this is where the defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred toward the plaintiff. Amos v. Prom, Inc., supra at p. 135.

2. Malice In Fact.
This is where malice may be found by the jury from the evidence in the case and may be inferred from want of probable cause where the plaintiff has acted illegally or improperly. Amos v. Prom, Inc., supra at pp. 135 and 136. The classic example of this type of malice may be the malicious prosecution case where the defendant did not properly investigate the facts prior to bringing his action and thus lacked probable cause or other justification.

3. Malice In Law.
This is where malice may be established by legal presumption from proof of certain facts. Amos v. Prom, Inc., supra at p. 135. The classic example of this type of malice may be the drunken driving case where the defendant's conduct was wanton and in complete disregard for the rights of others. See generally, Sebastian v. Wood, 66 N.W.2d 841 (Iowa 1954).

4. Legal Malice.
This term is used to describe both malice in fact and malice in law and is probably a better term to distinguish express or actual malice from malice in its enlarged legal sense. Judge Graven states: "Therefore,

when the law reaches this last stage, as it has in Iowa, it is no longer 'malice' which is required but the 'something else' from which malice is said to be presumed. (citations omitted) 'It is enough (for legal malice) if it be the result of any improper or sinister motive and in disregard of the rights of others.' (citation omitted) The rule would seem to be: exemplary damages may be awarded where defendant acts maliciously, but malice may be inferred where defendant's act is illegal or improper; where the nature of the illegal act is such as to negative any inference of feeling toward the person injured, and is in fact consistent with a complete indifference on the part of defendant...." Amos v. Prom, Inc., supra at pp. 136 & 137.

B. Necessity of Actual Damages.

1. Actual or compensatory damages must be found before a litigant may recover exemplary damages. Although fairly small compensatory damage awards have been found to justify a punitive damage verdict ($40.00 actual and $500.00 punitive was affirmed in International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N.W. 951 (1909), the general rule is that "an award of only nominal damages will not support an award of exemplary damages." Amos v. Prom, Inc., supra at p. 132. There must be "substantial damages." Sebastian v. Wood, 66 N.W.2d 841 (Iowa 1954); see also Golden Sun Feeds, Inc. v. Clark, 140 N.W.2d 158 (Iowa, 1966).

2. Exception to Rule - stockholders derivative actions. In Holden v. Construction Machinery Co., 202 N.W.2d 348, 359 (Iowa, 1972) the Court stated: "Ordinarily, actual damage must be established as a condition precedent to an allowance of punitive damages. (citations omitted) On the other hand, in a stockholder's derivative action an equity court may, in its discretion, award exemplary damages upon a showing that some legally protected right has been invaded, such as an intentional act of fraud or other wrongful conduct."

3. Although stockholder derivative actions provide the only

judicially established exception which has come to the attention of this writer, the legislature has by statute created several instances where an award is allowed in the nature of a punishment even though the party wronged has no actual damages. (For example, see § 537.5201 and § 537.7103 providing for a civil penalty of $100.00 to $1,000.00 based on prohibited debt collection practices under the Iowa Consumer Credit Code.)

C. Nature of Award.
"They are not recoverable as a matter of right and are only incidental to the main cause of action,....in no way compensatory,....yet whatever benefit he so receives comes to him not as compensation for the wrong done him but as purely incidental and by the grace and gratituity of the law...." Sebastian v. Wood, 66 N.W.2d 841, 844 & 845 (Iowa, 1954). Note - Since punitive damages are not a matter of right, it would seem that the failure of a jury to award them in a proper case, or an inadequate award, would not be grounds for appeal.

D. Interest.
"Interest as such upon exemplary damages is not recoverable." Dunshee v. Standard Oil Co., 152 Iowa 618, 631, 132 N.W. 371, 376 (1911). Thus interest may not be recovered from the time of the injury until judgment has been entered, but "It does however run on the judgment itself." Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 426 (Iowa, 1977).

V. Pleading and Proof.

A. The Petition.

1. Actual Malice.
Iowa R. Civ. P. 69 states: "A party intending to prove malice to affect damages must aver the same." Thus, if the claim is based on actual malice as opposed to legal malice, then words to that effect should appear in the petition to properly place defendant on notice."

2. Legal Malice.
In the leading case of Sebastian v. Wood, supra, the

Court noted that there was no express allegation of malice but the petition did contain allegations using the words "willfully," "reckless," "wanton," and "grossly negligent," and this was sufficient. Under the present rules of notice pleading it is probably true that a plaintiff could get the issue of exemplary damages submitted despite some rather vague pleading, but is is suggested that at least some of the language noted previously in this Outline under Elements should be present.

3. Amount.
Iowa Uniform Jury Instruction 3.21 states in part as follows: "In no event may you allow the plaintiff as exemplary damages more than is asked for...." This would seem to indicate that the plaintiff must ask for punitive damages in a specific amount, either in the original petition or by way of an amendment thereto. However, in the case of Morrow v. Scoville, 206 Iowa 1134, 221 N.W. 802 (1928) it was stated that a court is warranted in submitting the question of exemplary damages to the jury even though no claim is made for them in the petition, at least so long as there were allegations in the petition to support proof of exemplary damages.

B. Proof

1. Inferences and Presumptions.
Direct proof of either actual malice or legal malice rarely occurs unless the defendant makes an admission against interest. Use of circumstantial evidence is thus the norm for proving a case for exemplary damages. In this regard, the Courts have developed various rules where a jury will be allowed to infer malice. Malice may be inferred in the following situations:

a. Where the defendant acted illegally or improperly without justification. Amos v. Prom, Inc., supra.

b. Lack of just or probable cause for defendant's actions. (This is generally seen in malicious

prosecution cases.) See generally, Lukecart v. Swift & Co., 256 Iowa 1268, 130 N.W.2d 716 (1964).

c. Defendant's use of criminal process for a private purpose. Ashland v. Lapiner Motor Co., 247 Iowa 596, 75 N.W.2d 357 (1956).

d. The mere act of committing an intentional tort such as fraud, assault and battery, libel or slander raises a presumption that the actor intended the natural consequences of his act, Kinney v. Cady, 232 Iowa 403, 4 N.W.2d 225 (1942).

e. Where defendant's conduct is wanton or in willful disregard of plaintiff's rights. Sebastian v. Wood, supra.

f. Defendant's conduct was wrongful and committed or continued with a willful or reckless disregard of plaintiff's rights. McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362 (Iowa, 1972); Hagenson v. United Tel. Co. of Iowa, 209 N.W.2d 76 (Iowa, 1973); Meyer v. Nottger, 241 N.W.2d 911 (Iowa, 1976); Claude v. Weaver Construction Company, 261 Iowa 1225, 158 N.W.2d 139 (1968).

g. Defendant guilty of gross negligence. Sebastian v. Wood, supra.

2. Corporations.
Exemplary damages may be recovered from a corporation based on the wrongful acts of its employees, but it must be proved that they were "acting within the course of, or in connection with, their duties or employment." Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 859 (Iowa, 1973).

3. Other Employers.
Although there do not appear to be any Iowa cases on point, the above rule would also appear to hold for other employers such as partnerships and individuals. See generally, 22 Am Jur 2d, Damages, § 257.

VI. Proof of Damages.

A. Wealth of Defendant.

In 1977 the Iowa Supreme Court overruled prior decisions which had held that the defendant's pecuniary condition could not be shown although the plaintiff asks smart money. In Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa, 1977) the Court stated:

> "The rationale employed in these decisions is that the jury needs to know the extent of the defendant's holdings in order to know how large an award of damages is necessary to make him smart."

The Court then went on to state:

> "In adopting the rule of admissibility, we caution trial courts to confine plaintiffs carefully to the proper use of such evidence -- to the issue of the amount of exemplary damages which is necessary to punish the particular defendant." 252 N.W.2d at 424.

In making the above statement, the court was apparently concerned that, if not handled properly, the jury could get the issues of liability and damages intermixed. It has also been suggested that defense counsel may want to make a motion in limine to restrict the plaintiff from introducing evidence of defendant's wealth until the necessary elements for a punitive damage case have been proven. Otherwise the mere allegation of malice would allow such evidence and if not proved this evidence could have a devastating effect on the jury's consideration of the actual damage claim.

B. Evidence of Defendant's Financial Condition.

1. Balance sheet and operating statement.

These documents were admitted in the Ward's case. It is suggested that other forms of evidence may also be admissible, but this will have to await further clarification by the Iowa Supreme Court. See generally, Charles v. Epperson & Co. Inc., 258 Iowa 409, 137 N.W.2d 605 (1965) where defendant's farm and corporate ownership interests were noted.

2. Other jurisdictions have held that it is proper to show the defendant's wealth at the time of trial as opposed to the time of injury. It is also stated that a plaintiff is not confined to showing defendant's actual wealth, but may show the reputed wealth of defendant. In such a situation, the defendant would then want to show his actual wealth if this were smaller than the plaintiff's evidence would indicate. See generally, 22 Am Jur 2d Damages § 322 at p. 423.

3. Defendant may show evidence of his relative poverty. Hall v. Montgomery Ward & Co., supra.

4. Other Considerations for Defense Counsel.
Particularily in the context of a product's liability case or a negligence action which has the possibility of further lawsuits by potential plaintiffs not a party to the present action, it would seem relevant to show the probability of future judgments against the defendant as affecting the amount of punitive damages to be awarded. Also a defendant may want to inject insurance into the case, at least where it does not exist to pay an award for exemplary damages.

5. Recommendation.
There should be a separate hearing to establish the amount of punitive damages, and evidence of defendant's wealth should not be presented until a finding of liability and the amount of compensatory damages has been made.

VII. Effect of Party's Death.

A. Death of Plaintiff.

1. After action commenced but before trial.
Iowa has long held that the cause of action for punitive damages will survive and may be continued by the administrator for an estate if the action was commenced prior to death. Boyle v. Bornholtz, 224 Iowa 90, 275 N.W. 479 (1937).

2. Before action commenced.
There has not been a recent Iowa Supreme Court decision

where the survival issue concerned death of the injured party prior to commencement of an action for punitive damages. The rule in Iowa has been that the action does not survive in that situation. De Moss v. Walker, 242 Iowa 911, 48 N.W.2d 811 (1951); Boyle v. Bornholtz, supra. However, in Leahy v. Morgan, 275 F.Supp. 424 (N.D. Iowa, 1967), the Court held that if the Iowa Supreme Court were again presented with this question, it would construe § 611.20-.22 to "include all the original causes of action of the administrator's decedent, regardless of whether the action is started before or after the death." Likewise, the 8th Circuit Court of Appeals held in 1975 that while the issue had not been squarely faced by the Iowa Supreme Court, it would now construe the Iowa wrongful death statute to allow the cause of action. Koppinger v. Cullen-Schiltz & Associates, 513 F.2d 901 (8th Cir., 1975).

B. Death of Defendant.

Iowa law is clear concerning the effect of the defendant's death. In such a case, a punitive damage claim may not be pursued against his estate. Wolden v. Rohm, 249 N.W.2d 630 (Iowa, 1977); Sheik v. Hobson, 64 Iowa 146, 19 N.W. 875 (1884). In Amos v. Prom, Inc., supra, Judge Graven stated the rationale as follows: "And where the defendant dies and the action is continued against his personal representative, no exemplary damages may be awarded because they are not a 'right' of the injured party, but a punishment and so may be exacted only from the wrongdoer." 115 F.Supp. at p. 134.

VIII. What Persons or Entities May Be Liable.

A. Individuals but not their estate.

B. Private Corporations.

In Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa, 1973) the court clearly held that a corporation may be assessed exemplary damages. That Court further stated at p. 859:

"Of course, to recover exemplary damages from a corporation for the wrongful acts of its employees, the employees must have been acting within the course of, or in connection with, their duties or employment."

C. Municipal Corporations.
In Young v. City of Des Moines, 262 N.W.2d 612 (Iowa, 1978) the Iowa Supreme Court held that the same legal principles should apply to municipal corporations as in cases against private corporations. The Court rejected arguments that "Since punishment is the objective, the people who would bear the burden of the award - the citizens - are the self-same group who are expected to benefit from the public example which the punishment makes of the wrongdoer." Id. at p. 621. Instead, the Court felt that "if a governmental subdivision be held answerable in punitive damages, more care will go into the selection and training of its agents and employees." Id. at p. 621 & 622. See also Wilson v. City of Cedar Rapids, (Iowa, 1978).

D. Partnerships and Individual Employers.
No Iowa cases have been found dealing with these situations, but other jurisdictions have found partners liable for acts of copartners, and individual employers liable for acts of their employees. See generally, 22 Am Jur 2d Damages, § 255 at p. 348.

E. Infants.
No Iowa cases have been found but other jurisdictions have allowed recovery where the infant was capable of knowing the wrongfulness of his act. See generally, 22 Am Jur 2d Damages § 255 at p. 349.

F. Incompetents.
No Iowa cases have been found but the general rule appears to be that exemplary damages may not be found against an incompetent. See generally, 22 Am Jur 2d Damages § 255 at p. 349. This rule would seem logical as an incompetent is presumed to not understand the consequences of his actions and hence could not form the requisite intent for malice.

G. The State.
Punitive damages are prohibited by the Iowa Tort Claims Act. Iowa Code § 25A.4; Speed v. Beurle, 251 N.W.2d 217 (Iowa, 1977).

IX. What Types of Cases Will Support Punitive Damages?

A. Several writers have compiled lists of the types of cases which will support an award of exemplary damages. See generally, 8 Drake L. Rev. 36, 39-48; and 27 Drake L. Rev. 195, 224-235. For purposes of this outline, it is sufficient to note that almost any underlying cause of action may be a proper subject for punitive damages and they may be sought in both equity as well as in law cases. The major exception is noted below.

B. Breach of Contract or Warranty.

1. The general rule is that punitive damages are not allowed in an action based solely on breach of contract or breach of warranty, and that punitive damages may be allowed in such a case only where there is also involved an independent tort, See generally, 8 Drake L. Rev. 36, 41-43.

2. Golden Sun Feeds, Inc. v. Clark, 258 Iowa 678, 140 N.W.2d 158 (1966) was an action based solely on a claim for liquidated damages pursuant to an oral contract. The court merely noted that the claim for exemplary damages must fail because actual damages were not shown. The implication from this case is that had actual damages been proven then punitive damages might also have been proper. However, the defense, that this was a pure contract case and did not involve an independent tort, apparently was not raised.

3. Jacobson v. Benson Motors, Inc., 216 N.W.2d 396 (Iowa, 1974) involved a claim for both breach of warranty and negligence. The case was reversed and remanded for a new trial because of the receipt of inadmissible evidence and there was no clear holding as to whether punitive damages could be based on the warranty claim. But the Court, after discussing both breach of warranty and tort, then states: "It is to be understood however, punitive damages in either of the above fields must bear

a reasonable relationship to actual damages allowed." 216 N.W.2d at pp. 405 & 406. Thus, the Court seems to imply that breach of warranty would support a claim for punitive damages.

4. Meyer v. Nottger, 241 N.W.2d 911 (Iowa, 1976) the claim was based, in part, upon breach of contract to perform funeral services according to acceptable standards. As the case was reversed on other grounds, the Court did not squarely address the matter of punitive damages, but merely stated: "Finally, with regard to the matter of allowance of exemplary damages upon a theory of breach of contract, we direct attention to Kiuken v. Garrett, 243 Iowa 785, 799-800, 51 N.W.2d 149, 157-158."

5. Conclusion. The rule would seem to remain that some sort of tort claim or tortious conduct must be coupled with the claim for breach of contract or warranty to allow an award of punitive damages. However, the court may now require less of a tort claim showing than was once the case.

X. Defenses and Defense Considerations.

A. Statute of Limitations.

Since recovery of punitive damages depends upon an award of actual damages, it is logical to assume that the applicable statute of limitations for the underlying cause of action will likewise govern the claim for punitive damages. A related question is whether a petition timely filed may then be amended to claim punitive damages once the statute of limitations has run. Although no Iowa cases have been found on this point, it is suggested that the amendment would be allowed to add a prayer for exemplary damages at least where the original petition contained allegations of malicious, reckless or grossly negligent conduct. However, if for example the original pleadings were based on breach of contract and after running of the statute an amendment were offered to add tort allegations and a claim for punitive damages, then a defense based on the statute would seem proper.

B. Good Faith Efforts by Defendant.

As noted earlier in the outline, legal malice may be established by showing wrongful conduct committed or continued with a willful or reckless disregard of another's rights. McCarthy v. J. P. Cullen & Son Corp., supra. In that case, substantial water damage was caused to plaintiff's property because of a contractor's negligence in failing to provide for proper drainage from a school construction site. There problems continued for about two years despite repeated protests from plaintiffs. Accordingly, punitive damages were upheld.

Likewise, the case of Claude v. Weaver Construction Company, supra, concerned a nuisance claim based upon defendant's operation of an asphalt plant. The evidence showed that representatives of defendant met several times with plaintiffs and promised to take corrective measures whenever notified. At the trial, defendant argued that its use of modern equipment and efforts to eliminate or reduce the offensive dust and smoke would bar plaintiff's right to recover punitive damages. The Supreme Court was unimpressed with this argument as apparently defendant's efforts had produced little if any results. At page 146 (Northwestern Reporter) the Court stated:

> "That which an offending party says or professes may be important, but is quickly obliterated by counter-prevailing conduct of such nature as to disclose the declarations made were in fact meaningless. In a case such as that here presented, it is actual conduct which controls, not statements of interest, sympathy, or concern."

In the case of Earl v. Clark, 219 N.W.2d 487 (Iowa, 1974) the plaintiffs main cause of action was for nuisance against the owner of a feedlot based upon drainage of waste materials onto plaintiff's property. Defendant testified he had been aware of the problem for some time, and that promptly, after being notified by plaintiffs, he sought Soil Conservation Service assistance and applied for a State Health Department feedlot permit. He also offered to either rent or purchase that part of plaintiff's land covered by the waste materials. Apparently the problem still had not

been corrected at the time of trial but defendant was then in the process of placing a diversion ditch to prevent flowage from the offending feedlot. The trial court did not allow punitive damages and this was affirmed by the Supreme Court apparently on the basis of defendant's good faith efforts to correct the problem. However, it should be noted that once all damages have been sustained, it is probably too late for the defendant to offer to correct the situation. See generally, Hagenson v. United Telephone Co. of Iowa, 209 N.W.2d 76 (Iowa, 1973).

C. Advice of Counsel.
In Schnathorst v. Williams, 240 Iowa 561, 36 N.W.2d 739 (1949) action was brought for malicious prosecution and the principle defense was that defendant had acted upon the advice of the county attorney. At pages 577 & 578 of the Iowa Reports the Court stated:

> "The fact that defendant took such counsel before acting is not an absolute or conclusive defense. It may or may not rebut malice and want of good cause. To be a good defense the advice of counsel must have been sought in good faith, from honest motives and for good purposes, after a full and fair disclosure of all matters having a bearing on the case, and the advice received must have been followed in good faith...."

See also, Ashland v. Lapiner Motor Co., 247 Iowa 596, 75 N.W.2d 357 (1956).

D. Provocation or Unlawful Conduct by Plaintiff.
While not a bar to an award of punitive damages, provocation, unlawful conduct or criminal action by the plaintiff may be considered in mitigation of the award. Federal Prescription Serv., Inc. v. Amalgamated Meat Cutters, 527 F.2d 269 (8th Cir. 1975); Gronan v. Kukkuck, 59 Iowa 18, 12 N.W. 748 (1882); see generally Katko v. Briney, 183 N.W.2d 657 (Iowa, 1971).

XI. Review of Awards - General Principles.

A. Primary Test - Whether the verdict is so large as to shock

the conscience of the court. Bankers Life & Cas. Co. v. Kirtley, 307 F.2d 418 (8th Cir. 1962).

B. No set mathematical ratio between actual and exemplary damages. Syester v. Banta, 257 Iowa 613, 133 N.W.2d 666 (1965).

C. Punitive damages should be in a reasonable relationship to the actual damages. McCarthy v. J. P. Cullen & Son Corp. 199 N.W.2d 362 (Iowa, 1972).

D. To be effective in their purpose to punish the defendant and deter future conduct, the amount awarded must be relatively large. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa, 1973).

E. The amount of the award is peculiarly within the discretion of the trier of fact. Grefe v. Ross, 231 N.W.2d 863 (Iowa, 1975). This case essentially involved a fraud claim against a franchisor, and a former officer of the franchisor testified that $100,000.00 profit could have been realized by plaintiff if the project had been carried out according to franchisor's promises. Exemplary damages of $100,000.00 were awarded.

F. No remittitur of part of an award of exemplary damages is permitted, but either the entire amount must be set aside or affirmed, Amos v. Prom, Inc., 115 F.Supp. 127 (N.D. Iowa, 1953).

G. Exception to no remittitur rule. Apparently in the case of a lump sum award to cover both compensatory and punitive damages, the Supreme Court will, at the election of the plaintiff, allow a remittitur of that part found excessive or order a new trial on all issues. Hall v. Wright, 261 Iowa 758, 156 N.W.2d 661 (1968).

ETHICS: WHAT IS A CONFLICT
(Differing Interests)

INTRODUCTION

A. The practice of law is not what it used to be.

B. Statutory law has changed drastically - so have the methods of practice.

1. Iowa Code of Professional Responsibility for Lawyers with Advertising Amendments

2. Grievance Commission: S.C.R. 118

3. Client Security and Attorney Disciplinary Commission: S.C.R. 121

4. Continuing Legal Education: S.C.R. 123

5. Establishment: National Organization of Bar Counsel

6. American Bar Association: National Center for Discipline

7. Advent of legal speciality: Ethics Enforcement

8. Ethical Area of Present Concern: CONFLICT

BODY

A. What is Conflict?

1. Webster's Dictionary: at variance; come into collision with; disagreement; one interest can only be advanced at the expense of another.

2. Differing Interests (Code definition): "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest".

3. Code Sections:

a. EC5-3 and DR5-101(A) - cannot accept

employment if exercise of professional judgment on behalf of client will be impaired by own financial interests.

b. EC5-8 and DR5-103(A) - cannot acquire proprietary interest in the cause of action.

c. DR5-104(A) - cannot enter into business transaction with client if they have differing interests.

d. DR5-105(A) - cannot accept or continue employment if exercise of independent judgment adversely affected in any way.

e. EC5-14 and DR5-105(B) - cannot accept or continue employment of multiple clients if they have differing interests.

f. DR5-107(A) - cannot accept compensation from another except with consent of client.

g. EC5-23 and DR5-107(B) - another who pays the fee cannot control the lawyer's actions - only the client can do this.

h. EC5-5 - cannot name self as executor or beneficiary in a will that you draft.

i. FULL DISCLOSURE - and client consent creates an exception.

j. EC7-9 and DR7-101(A)(1),(2) and (3) - cannot fail to seek lawful objectives of client, carry out a contract of employment, or prejudice client in course of employment.

B. The lawyer's duty: Supreme Court

1. Healy v. Gray, 184 Iowa 111, 168 N.W. 222 (1918)

a. FACTS: Defendant lawyer buys piece of real estate from (uncle) that client's deceased father was living on after being consulted about opening an estate and being told the price.

b. HELD: (1) Duty to render honest and faithful service; (2) Relationship is in the highest degree confidential; (3) Client assumes no risk in communicating freely; (4) Attorney will not be permitted to make use of knowledge or information acquired in the conduct of client's business to his own advantage or profit; (5) Duty . . .one of great delicacy and responsibility and sometimes of apparent hardship; (6) Every consideration of personal advantage or profit must be subordinated to interest and welfare of client; (7) Cannot . . . thus deal with property of client. . . or in which interest is asserted. . . which may become subject of litigation (claim, controversty, etc) . . . use information derived during course of employment relating to subject matter to own advantage.

2. In Re Boyer, 231 Iowa 597, N.W.2d 707 (1942)

a. FACTS: Defendant lawyer with another secured financing for business venture from a client that they "milked dry" and business goes into bankruptcy.

b. HELD: Attorney instead of honestly advising and protecting client. . . deceived and defrauded her. . . causing financial ruin. . . DISBARRED.

3. In Re Brown, 559 P.2d 884 (Ore. 1976)

a. FACTS: Brown and another form a partnership with Brown providing legal services as his capital contribution. . . later incorporated with shares split 50/50. . . partnership gives Brown $3,000 and Brown prepares a buy and sell agreement. . . Brown writes will (bank executor - others beneficiaries) . . . partner dies and Brown discloses his interest. . . bank had named Brown as attorney now replaces him and moves to liquidate. . . appraised value $46,000 - settle with Brown for $41,000.

b. HELD: (1) Brown violated DR5-104(A); (2) Partner had no independent counsel; (3) Brown should have declined employment; (4) Previous joint business ventures now outlawed; (5) Any disclosure should be in writing.

4. CAVEAT

a. Need attorney-client relationship - Whey v. Graham, 554 P.2d 498 (Ore. 1976); may also apply when a lawyer has reason to believe he is being relied upon - Matter of Hurd, 354 A.2d 78 (N.J. 1977).

b. Need some evidence of fraud (overreaching); McCoy v. Weinberg, 340 N.E.2d 518 (Mass. 1976).

c. This evidence can be circumstantial: Hamon v. Preston, 186 Iowa 1292, 173 N.W. 894 (1919) - client, 77 yrs. old, had been sick, executes her will a week before her death giving everything to lawyer's wife. . . lawyer drew will and signed as witness. . . NO direct evidence of fraud or undue influence. . . AFFIRMATIVE evidence that lawyer, over the years, had performed numerous services for little pay and that testatrix wanted to now reward the lawyer: HELD: submissible case even without proof of misconduct (lawyer lost).

C. Context in which problem arises

1. Lawyer represents both sides

a. Dissolution - NOW SPECIFICALLY PROHIBITED

b. Real Estate transactions

2. Lawyer and client engage in business venture where lawyer provides legal services.

3. Laywer buys or loans money with security to a financially troubled client

4. Lawyer arranges for one client to borrow from another or enters into contractual

agreement.

5. Lawyer receives gift from client or is named as beneficiary in client's will.

D. Examine these within the context of the exception - client contest after full disclosure - WHAT IS FULL DISCLOSURE?

1. Full means everything - probably more than what is reasonably foreseeable - all possible (speculate).

2. Disclosure of sufficient intensity - fully explain how conflict will arise and its ramifications - MUST BE PROPERLY EMPHASIZED.

3. Client must be mentally capable and of sufficient age to understand.

4. Client must, in fact, understand.

5. Any client consent, must be an informed one.

E. Examples

1. In Re May, 538 P.2d 787 (Idaho 1975)

a. FACTS: May retained to represent wife in a divorce. . . attempted reconcilliation led to attempted suicide by wife and placing her under psychiatric care. . . she needed money to make house payments . . . May took an assignment of her interest and made house payments. . . didn"t discuss ramifications because of her emotional state. . . later May said assignment was for security for house payments and attorney fees. . . client said she didn't know she would have to pay attorney fees to get house back.

b. HELD: (1) Mandate of DR 104(a) is absolute. . . absent full disclosure no business transaction with client; (2) client emotionally incapable of comprehending implications; (3) bad intent is not needed. . . resulting conflict is evil the Disciplinary Rule was designed to avoid; and

(4) 60 day suspension and $2,000 fine.

2. In Re Lanza, 322 A.2d 445 (N.J. 1974)

   a. FACTS: Lanza represented seller and buyer. . . representation of buyer not discussed with seller. . . closing date moved up at seller's request but buyers couldn't secure financing by that date . . . gave a posted check for balance . . . buyers then refused to pay check because they discovered a serious water condition.

   b. HELD: (1) Lawyer failed to explain to seller, (a) all facts and indicate in specific detail areas of potential conflict that were foreseeable and (b) if arise and not subject to ready solution, he would have to withdraw; (2) failed to adequately protect seller by not insisting on cash or a second mortgage for the $1,000; (3) necessary disclosure is important. . . must know at least the common problems and explain with considerable specificity; (4) concurring. . . absolute ban because of universal appearance of impropriety; (5) reprimanded.

3. In Matter of Bretz, 542 P.2d 1227 (Mont. 1975)

   a. FACTS: Lawyer always took blanket power of attorney in representing clients. . . never gave an explanation thereof. . . clients did not understand. . . clients never consulted. . . clients never kept advised. . . accounting never made. . . co-mingling of funds. . . attorney fees appeared excessive.

   b. HELD: (1) Evidence shows lawyer profitted at expense of client. . . then lawyer by clear and satisfactory evidence: (a) no unfairness (undue influence); (b) client had all information and advice reasonably necessary to comprehend and understand the details: (2) Disbarred.

4. In Re Bovin, 533 P.2d 171 (Ore. 1975)

   a. FACTS: Lawyer owned building. . . lessee desired to sub-lease. . . lawyer had prepared articles of incorporation and represented lessee. . . he prepared contract between lessee and sub-lessee . . . then suggested he "handle the matter" for both parties and they could split the fee. . . both parties knew lawyer represented both. . . lawyer never suggested lessee seek other counsel.

   b. HELD: (1) Improper to represent buyer and seller - absent express consent - after full disclosure; (2) Full disclosure means (a) more than knowledge by both parties of dual representation; (b) explain to both nature of conflict . . . in detail . . . so that they understand reasons why it is desirable they have independent counsel; (3) Full disclosure may be not enough when client unsophisticated; (4) carefully explain in detail the possible pitfalls; (5) can't represent client in business transaction with lawyer; (6) Reprimanded.

5. Matter of Levinsohn, 367 A.2d 431 (N.J. 1976)

   a. FACTS: Clients owned 40% of a business and were in financial trouble. . . consult lawyer about stockholder litigation against them. . . client could obtain no credit so lawyer borrows from his relatives and loans it to clients taking a conveyance of their home as security. . . leases home back to clients with option to repurchase and continues to make payments . . everything fails and business and home lost. . . lawyer then advises of hopeless conflict and clients should seek other counsel.

   b. HELD: (1) Motives good. . . immaterial; (2) Disclosure of conflict. . . too late; (3) No business involving himself like this; (4) Reprimanded.

6. Goldman v. Kane, 329 N.E.2d 770 (Mass. 1975)

a. FACTS: Financial transaction between attorney and client. . . client changes life style and goes to Florida but continues to consult lawyer. . . client buys a large boat and asks lawyer to arrange financing. . . lawyer can't arrange financing so client instructs lawyer to sell his house for $85,000 which lawyer is unable to do. . . client says he has to have balance of $30,000 for new boat the next day or will lose it. . . lawyer owns 95% of stock in a corporation that would loan client the $30,000 for conveyance of his $85,000 home, all furniture in it, another boat, and deed of trust in new boat. . . client agrees and lawyer draws up the documents and flies to Florida. . . upon arrival lawyer advises client not to enter into agreement and walk away from boat deposit. . . client then signs (as part of agreement):

> "I fully understand that (lawyer) is a major stockholder of the transferee herein. As my attorney he has strongly advised me that this transfer is adverse to my financial welfare and has recommended that I not transfer. My only expectation is that I shall receive full title to the boat upon repayment of the loan."

Home subsequently sold for $86,000. . . client defaults and lawyer, without notice, took possession of boat.

b. HELD: (1) Law looks with disfavor upon attorney-client transactions; (2) By law, attorney cannot take advantage of client; (3) Attorney bargains with client in manner advantageous to attorney, court will subject it to close scrutiny; (4) Attorney's burden to show transaction was in all respects fairly and equitably conducted; (5) Must protect client and give advice as if transaction was between client and stranger; (6) Full disclosure

and advice here insufficient; (7) Fundamental unfairness and egregious over-reaching self-evident; (8) Bare minimum should not have proceeded until independent advice (with full disclosure) had been obtained.

7. Ames v. State Bar, 506 P.2d 6205 (Cal. 1973)

   a. FACTS: Clients retained lawyer to press a claim of fraud in connection with sale of land. . . lawyer then buys clients' interest for $20,000 with right of clients to repurchase within 45 days for $23,000. . . clients unable to arrange financing and lawyer winds up with property.

   b. HELD: (1) Lawyer acquired an interest adverse to clients; (2) Lawyer's loyalty was divided; (3) No fraud and lawyer sought only to accomodate client . . . still violates rule; (4) Reprimanded.

8. Matter of Kali, 569 P.2d 227 (Ariz. 1977)

   a. FACTS: Lawyer represents a pension fund that for tax reasons needed to make a loan and another client who needed money . . . client owed lawyer $25,000 for legal services. . . lawyer wanted $10,000 on account and he could obtain $40,000 loan for him from another client. . .without disclosing to pension fund that borrower was another client and that $10,000 of loan was for legal fees, attorney obtains loan at usurious rate. . . consequence of usurious rates not explained to pension funds. . . loan also secured by jewels appraised at $110,000. . . client defaults and lawyer advises pension fund to seek other counsel.

   b. HELD: (1) Loan party for fee payment impaired lawyer's independent judgment; (2) Needed full disclosure of conflict and risk of loss because of usurious rates; (3) Disclose at start needed; (4) 2 year suspension.

9. Matter of Hurd, 354 A.2d 78 (N.J. 1977)

a. FACTS: Lawyer arranged a loan of $2,000 from elderly, long-time, unsophisticated family friend to his sister. . . security for the loan was the friend's house with a right of reconveyance when loan repaid . . . agreement stated reconveyance null and void if property condemned within one year. . . time of loan publicity that land to be condemned for school purposes. . . condemned and sister gets $11,500.

b. HELD: (1) Agreement was unconscionable; (2) Obligated to advise more than simply needed an attorney; (3) Fiduciary obligation of a lawyer applies to person who, although not strictly clients, the attorney has or should have reason to believe rely on him; (4) Lawyer should have refused to go forth until friend obtained independent legal advice; (5) Violated DR9-101 (appearance of impropriety); (6) 3 month suspension.

10. In the Matter of Kuzman, 335 N.E.2d 210 (Ind. 1975)

a. FACTS: Lawyer sets up joint savings account at request of disabled elderly client. . . he never touched this account . . . also undertook to represent her totally for $1,000 cash and 20% in real estate worth between $250,000 and $1,000,000 (formed a corporation and issued himself 20% of stock).

b. HELD: (1) Incumbent upon lawyer to explain other legal means to achieve same purpose; (2) Fee arrangement based upon her age and physical condition without provision for monthly billing and accounting was clearly excessive; (3) Only thing contingent about fee was amount of services prior to death and not in the amount of the fee; (4) Reprimanded.

11. In Re Anderson, 287 N.E.2d 682 (Ill. 1972)

a. FACTS: Lawyer represented decedent. . . decendent's home in land trust (joint

tenancy) of decedent, her daughter, and lawyer. . . lawyer and daughter joint tenants in savings account. . . evidence that lawyer arranged this in lieu of will.

b. HELD: (1) Proof of relationship of attorney and client and that beneficiary in whom testatrix reposed trust and confidence, prepared or procurred preparation of will by which he profits raises presumption of undue influence; (2) Lawyer must show (a) that he made a full and frank disclosure; (b) that the consideration was adequate; (c) client had independent legal advice; (3) 5 year suspension.

F. Additional References

1. "Disciplinary Proceedings Based Upon Attorney's Direct or Indirect Purchase of Client's Property", 35 ALR 3rd 674.

2. "Conflict of Interest in Real Estate Closing Situations", 68 ALR 3rd 967.

3. "Liability of Attorney Representing Conflicting Interests", 28 ALR 3rd 389.

4. "What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action", 17 ALR 3rd 835.

5. In the Matter of Hall, 438 P.2d 874 (Wash. 1968) (use of confidence and secrets).

6. Section 496A.18, Code of Iowa 1977 (Attorney fee as a percentage of stock to be issued is illegal).

7. Wise, Legal Ethics, pg. 155 (1966).

8. Matter of Cipriano, 346 A.2d 393 (N.J. 1975) (Cannot represent adverse party in any matter arising out of original case).

9. Memphis & Shelby County Bar Assoc. v. Sanderson, 378 S.W.2d 173 (Tenn. 1963) (Cannot represent a person in one case that you are suing in another).

10. American Bar Association, Informal Opinion 1322, March 31, 1975.

11. T.P. Bd. of Lake Val. T.P., Traverse City v. Lewis, 234 N.W.2d 815 (Minn. 1975) (Prohibition applies further to any partner or associate of lawyer).

12. In Re Jones, 462 P.2d 680 (Ore. 1969) (Any attorney should know, without being told, that when a client wants to name the lawyer as a beneficiary, the lawyer withdraws from further participation).

CONCLUSION:

A. Today, lawyers must be more and more concerned with the apperance of impropriety.

B. The Code language of "differing interests" should be used instead of "conflict of interest".

C. Any "Full Disclosure" should be in writing and of sufficient intensity to notify the client, with specificity, of what factual situation that may occur which would create a "differing interest", and how such "differing interests" would "affect" the lawyer's independent judgment.

D. Best course is not to become involved in these situations today.

SETTLEMENTS AND COMMUTATIONS

There are three ways to finalize a case in the nature of settlement.

I. Special Case Settlement.

A. Section 85.35: bona fide dispute, over more than simply degree of disability.

B. Can be used in cases where there is a memorandum of agreement, but problems caused in the nature of the legislature's amendment of 85.35: the legislature retained the same requirements and only deleted the requirement for a memorandum of agreement.

II. Agreements for Settlement: Where memorandum or award is on file.

A. May be used where only dispute is over disability.

B. Leaves three-year reopening period intact.

C. It sets the disability and claimant must show a change in physical condition to support a reopening award (ignorning exotic cases of a psychiatric change of condition).

III. Commutation: Final, not partial; where a memorandum of agreement or award on file.

A. Not an instrument of settlement.

B. But may coincide with a settlement.

C. Requirements:

1. Period of disability determinable.
2. Must be in the best interest of claimant (need).

D. Need: Buying a house or business is good reason. Paying off debts is not such a good reason. Buying a car is a very poor reason.

E. Large-amount Commutations, including those in suborgation matters, have special problems.

INDUSTRIAL DISABILITY 85.34(2)

I. Permanent and total disability entitles the claimant to lifetime benefits; permanent partial disability to the body as a whole is determined on basis of percentage of 500 weeks, after payment of healing period.

II. Permanent partial disability to the body as a whole produces industrial disability which is defined as loss of earning capacity. See Olson vs. Goodyear Service Stores, 125 N.W. 2d 251(1963) for sample case.

III. There is no formula to determine industrial disability. There has been no statistical study of industrial disability decisions.

IV. Factors: See sheet on industrial disability determination.

HEALING PERIOD

I. As defined, implies a permanent injury.

A. 85.34(1) ". . . until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplised, whichever comes first."

B.

500—8.3(85) *Healing period. A healing period exists only in connection with an injury causing permanent partial disability. It is that period of time after a compensable injury until the employee has returned to work or recuperated from the injury. Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first.

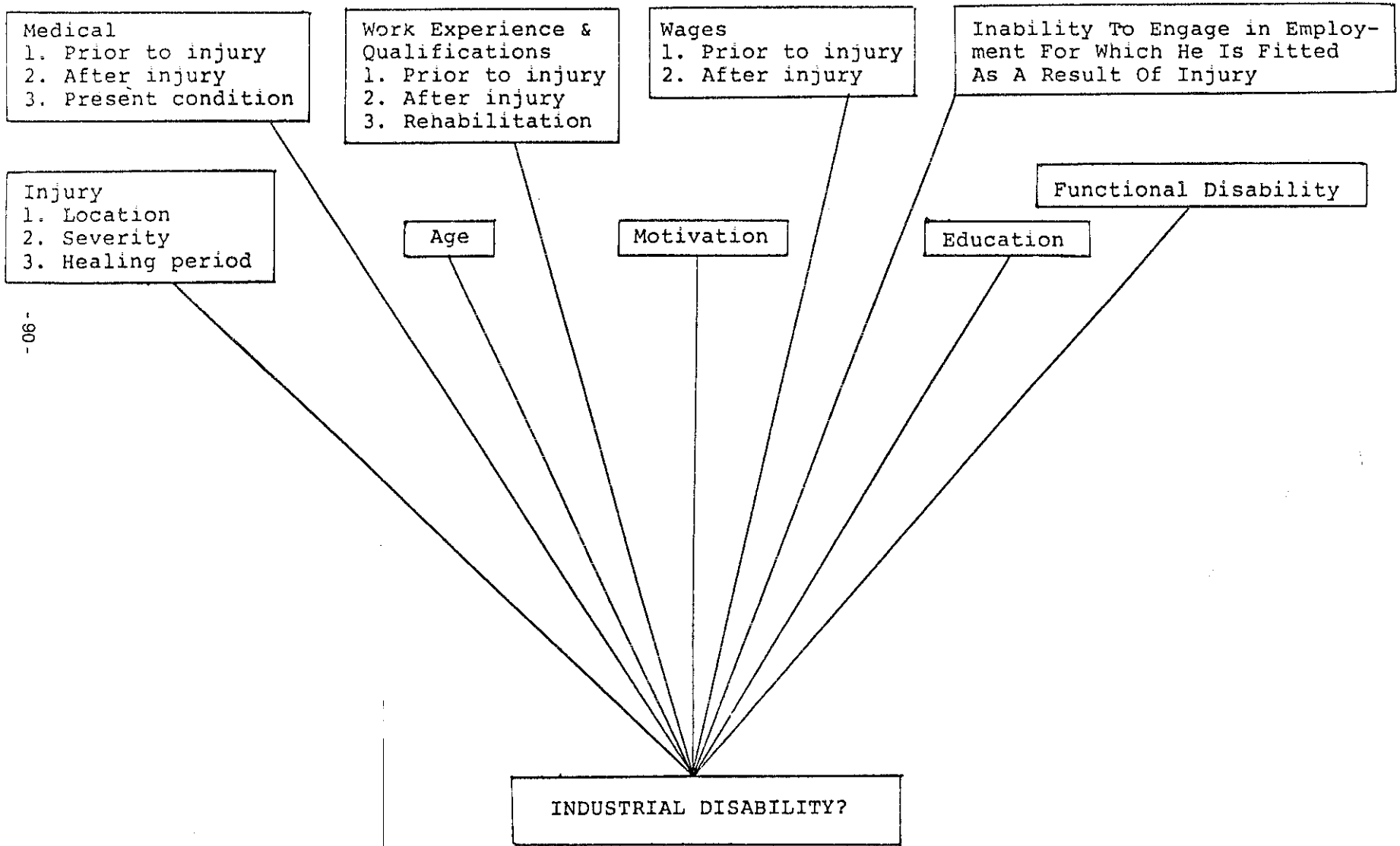
The rule is intended to implement section 85.34 of the Code.

*Effective 9/28/77.

II. The "running award" runs until the test of 85.34(1) and 500.8.3 have been met.

III. The effect of Auxier vs Woodward State Hospital is unknown at this time.

INDUSTRIAL DISABILITY DETERMINATION



USE OF REHABILITATION - IN THEORY AND IN PRACTICE

I. What is Rehabilitation?

A. A comprehensive approach to injury management, including medical care, social and vocational guidance designed to reduce financial loss by reducing human loss.

B. A formalized, institutional process vs. a preventative measure.

C. A concept and a practice which takes on new importance because of four major factors:

1. Law changes and regulatory rulings
2. Changing pattern of injury
3. Advances in medical knowledge and increased life expectancy
4. Escalating costs for disability and medical care

The point is whether you come to a decision to be actively involved in rehabilitation as a means to disability management out of a sense of moral responsibility or because the laws require you to do so, it can also make good sense financially.

II. Who needs it?

A. Anyone suffering an injury or illness which will likely result in an extended period of disability. These will certainly include:

1. brain
2. spinal cord injury
3. severe burns
4. major amputations
5. major fractures
6. severe back injuries

B. In addition to the foregoing obvious types of cases requiring a formal, institutional recovery program, the benign cases in which we expect an uneventful recovery can deteriorate unless preventative rehabilitation is part of the injury management process.

III. How to provide it?

A. The essential ingredients for a workable rehabilitation program are:

1. Early identification of the nature of the disability and qualification of attending physicians.
2. Evaluation of care to be sure the patient is treated in the right place by the right people at the right time.
3. Close follow up.

B. A successful rehabilitation program must begin with a plan and close coordination among the many specialists necessary to implement it. The plan must have a specific goal:

1. The patient should be involved - all we can do is put the program within reach and make it possible for the claimant to take it from there.
2. The goal should be reasonably attainable, and based on a full understanding of the patient's abilities, life style and expectations.
3. The goal should be clearly described and fully understood by the patient and his family.
4. A target date, or dates, should be set as recovery stages are reached.
5. The plan for reaching the goal must be carefully laid out. The patient must understand his role in the process.

IV. Both sides of the Coin

A. Accident prevention

1. The economic objective behind accident prevention is obvious.
2. Increased emphasis on human and social considerations (enlightened capitalism).
3. Other considerations of vital importance are increased worker morale, better labor relations, and community image.

B. Rehabilitation

1. What accident prevention may miss, rehabilitation may catch.
2. We have done more to promote safety than to promote rehabilitation.
3. Rehabilitation offers an opportunity to excel by establishing an intimate working relationship between the insurance industry and the medical profession based upon a community of purpose and an identity of interest to obtain optimum results for every claim dollar spent.

Some of the authors whose works have provided ideas for this presentation are:

George Sawyer, Vice President, Liberty Mutual Insurance Company.

Rolland A. Martin, M.D., Oregon Workers Compensation Board

"Insurance and Rehabilitation" by Arne Fougner.

Some of the institutions and organizations whose services are available to assist in the rehabilitation process are:

Evaluation Consultants

Rehabilitation Evaluation Consultants
2130 Fairways Lane
St. Paul, Minnesota 55113
612-631-2046

Southwestern Rehabilitation and Counseling Center
1802 East Thomas Road Suite 15
Phoenix, Arizona 85016
602-279-3400

International Rehabilitation Associates, Inc.
1617 John F. Kennedy Blvd.
Philadelphia, Pa. 19101
215-563-3346

Homemakers Upjohn
Rehabilitation Evaluation Service

Treatment Centers

Sister Kenny Institute
Chicago Avenue at 27th St.
Minneapolis, Minnesota 55407
David C. Hintzman, M.S.
Chief Vocational Evaluation

St. Luke's Methodist Hospital
1026 A. Avenue N.E.
Cedar Rapids, Iowa 52402
319-398-7331
Donald D. Weis, M.D. Medical Director

Institute of Rehabilitation Medicine
N. Y. University Medical Center
400 East 34th St.
New York, City, N. Y. 10016
212-679-3200
Howard A. Rusk, M.D., Director ext. 2475

Burlington Medical Center
602 N. Third
Burlington, Iowa 52601
319-753-3011

Idaho Elks Rehabilitation Hospital
204 Fort Place
Boise, Idaho 83702
208-343-2583
Glenn Darwall, Assistant Administrator

The Pain & Health Rehabilitation Center
Route 2, Welsh Conlee
La Crosse, Wisconsin 54601
608-786-0611

Rehabilitation Institute of Chicago
345 East Superior St.
Chicago, Illinois 60611
312-649-6000
Dr. Henry B. Betts, Medical Director

Craig Rehabilitation Hospital
1599 Ingalls St.
Denver, Colorado 80214
303-237-7753

Industrial Injury Clinic
Theda Clark Memorial Hospital
Neenah, Wisconsin 54956
414-725-4311
John W. McKay, Director

Immanuel Medical Center
Department of Physical Medicine
and Rehabilitation
6901 N. 72nd St.
Omaha, Nebraska 68122
402-572-2295
Dwight M. Frost, M.D., Director

THE IOWA COMPETITION LAW

Assistant Attorney General Gary H. Swanson
Chief Counsel, Division of Antitrust Enforcement
Iowa Department of Justice

I. STATE ENFORCEMENT AND PROCEDURES

A. Investigative Program

1. Sources of investigations

2. Preliminary investigations

3. Formal investigations

(a) The Grand Jury

(b) Civil Investigative Demands

(1) Testimonial (form attached)

(2) Document Production (form attached)

(3) Protective Orders

(c) General letters of inquiry

(d) Field investigations

B. Litigation Program

1. Criminal Prosecutions

2. Injunctive Proceedings

3. Proprietary Actions

4. Civil Penalty Suits

5. Parens Patriae Cases

6. Private Actions

7. Litigation Factors

   (a) Administrative

   (b) Economic

   (c) Legal

   (d) Election of Proceedings

8. Penalties

II. THE LAW

A. Substantive Violations

1. Price fixing

2. Agreements to limit production

3. Agreements not to advertise or price compete

4. Agreements on discounts

5. Bid rigging

6. Horizontal territorial allocation

7. Vertical territorial allocation

8. Horizontal customer allocation

9. Vertical customer allocation

10. Requirement contracts

11. Exclusive dealing arrangements

12. Attempts to monopolize

13. Monopolization

14. Tie-in arrangements

15. Resale price maintenance

16. Refusals to deal and terminations

17. Group boycotts

18. Price discrimination

B. Standards of Illegality and Examples

C. Per se rules/Rule of Reason/Relevant Market

1. Product market

2. Geographic market

D. Exemptions

E. Minimizing the risks

NOTE: The presentation by Mr. Swanson is intended for timely reference. Nothing in his oral remarks is to be construed as an official opinion of the Attorney General.

CHAPTER 1224

TRADE AND COMMERCE

H F 584

AN ACT relating to competition between business, commercial or professional entities, prohibiting unreasonable restraints of economic activities providing for enforcement and providing criminal and civil penalties

Be It Enacted by the General Assembly of the State of Iowa

SECTION 1 NEW SECTION **Short title.** This Act shall be known and may be cited as the "Iowa Competition Law".

SEC. 2 NEW SECTION **Construction.** This Act shall be construed to compliment and be harmonized with the applied laws of the United States which have the same or similar purpose as this Act. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices

SEC. 3 NEW SECTION **Definitions.** As used in this Act unless the context otherwise requires:

1. "Commodity" means tangible or intangible property, real personal or mixed.
2. "Enterprise" means a business, commercial or professional entity, including a corporation partnership limited partnership, professional corporation, proprietorship, incorporated or unincorporated association or other form of organization
3. "Government agency" means the state, its political subdivisions and any public agency supported in whole or in part by taxation.
4. "Person" means a natural person, estate, trust enterprise or government agency.
5. "Price" includes the terms and conditions of sale, rental, rate, fee or any other form of payment for a commodity or service
6. "Relevant market" means the geographical area of actual or potential competition in a line of commerce all or any part of which is within this state
7. "Service" means any activity which is performed in whole or part for financial gain.
8. "Trade or commerce" means any economic activity involving or relating to any commodity, service, or business activity

SEC. 4 NEW SECTION **Restraint prohibited.** A contract, combination or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market

SEC. 5 NEW SECTION **Monopoly prohibited.** A person shall not attempt to establish or establish maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing or maintaining prices

SEC. 6 NEW SECTION. **Exemptions.** This Act shall not be construed to prohibit:

1. The activities of any labor organization, individual members of such an organization, or group of such organizations, of any employer or group of employers, or of any groups of employees if these activities are directed solely to legitimate labor objectives which are permitted under the laws of either this state or the United States.

2. The activities of any agricultural or horticultural organization, whether incorporated or unincorporated, or of the individual members of such organizations if these activities carry out the legitimate objectives of such organizations to the extent permitted under the laws of either this state or the United States.

3. The activities of persons engaged in the production of agricultural products when these persons act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing the products of these persons to the extent permitted under the laws of either this state or the United States. These associations may have marketing and purchasing agencies in common and their members may make the necessary contracts and agreements to effect such purposes. However, such associations must be operated for the mutual benefit of the members of these associations acting as producers to qualify under this subsection.

4. The activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States.

SEC. 7 NEW SECTION. **Attorney general to enforce.** The attorney general with such assistance as may be required from time to time of the county attorneys in their respective counties shall institute all criminal and civil actions and proceedings brought under this Act in the name of the state.

SEC. 8 NEW SECTION. **Venue.** A suit or proceeding brought under this Act may be brought in the county where the cause of action arose, where any defendant resides or transacts business, or where an act in furtherance of the conduct prohibited by this Act occurred.

SEC. 9 NEW SECTION. **Investigation.**

1. If the attorney general has reasonable cause to believe that a person has engaged in or is engaging in conduct prohibited by this Act, the attorney general shall make such investigation as is deemed necessary and may, prior to the commencement of a suit against this person under this Act:

a. Issue written demand on this person, its officers, directors, partners, fiduciaries, or employees to compel their attendance before the attorney general and examine them under oath;

b. Issue written demand to produce, examine, and copy a document or tangible item in the possession of this person or its officers, directors, partners, or fiduciaries;

c. Upon an order of a district court, pursuant to a showing that such is reasonably necessary to an investigation being conducted under this section:

(1) Compel the attendance of any other person before the attorney general and examine this person under oath;

(2) Require the production, examination, and copying of a document or other tangible item in the possession of such person; and

d. Upon an order of a district court, impound a document or other tangible item produced pursuant to this section and retain possession of it until the completion of all proceedings arising out of the investigation.

2. A written demand or court order issued pursuant to this section shall contain the following information, as applicable:

a. A reference to this Act and a general description of the subject matter being investigated;

b. The date, time and place at which any person is to appear or to produce documents or other tangible items;

c. Where the production of documents or other tangible items is required, a description of such documents or items by class with sufficient clarity so that they may be reasonably identified.

3. Any procedure, testimony taken, or material produced under this section shall be sealed by the court and be kept confidential by the attorney general, until an action is filed against a person under this Act for the violation under investigation, unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories, or produced material, or unless disclosure is authorized by the court for the purposes of interstate cooperation in enforcing this Act and similar state and federal laws.

4. This Act shall not be construed to limit or abridge statutory or constitutional limitations on self-incrimination.

5. Evidence obtained from a natural person pursuant to the provisions of this section shall not be introduced in a subsequent criminal prosecution of this person. However, evidence obtained from a natural person pursuant to a grand jury proceeding may be so introduced.

SEC. 10. NEW SECTION. **Investigation enforcement.** If a person objects or otherwise fails to obey a written demand or court order issued under section nine (9) of this Act, the attorney general may file in the district court of the county in which the person resides or maintains a principal place of business within this state an application for an order to enforce the demand or order. Notice of hearing and a copy of the application shall be served upon the person, who may appear in opposition to the application. If the court finds that the demand or order is proper, that there is reasonable cause to believe there has been a violation of this Act, and that the information sought or document or object demanded is relevant to the violation, it shall order the person to comply with the demand or order, subject to such modification as the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further order in the proceedings which justice requires to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

SEC. 11. NEW SECTION. **Protective orders.** Before the attorney general files an application under section ten (10) of this Act and upon application of any person who was served a written demand or court order under section nine (9) of this Act, upon notice and hearing, and for good cause shown, the district court may make any order which justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden of expense, including the following:

1. That the examination of this person shall not be taken or that documents or other tangible items shall not be produced for inspection and copying;

2. That the examination or production of documents or other tangible items shall be had only on specified terms and conditions, including a change in the time or place;

3. That certain matters shall not be inquired into or that the scope of the examination or production shall be limited to certain matters;

4. That the examination or production and inspection shall be conducted with only those persons present as designated by the court;

5. That the transcript of the examination shall be sealed and be opened only by order of the court;

6. That a trade secret or other confidential research, development, or commercial information shall not be disclosed or shall be disclosed only in a designated way

SEC. 12. NEW SECTION. **Remedies.** The state or a person who is injured or threatened with injury by conduct prohibited under this Act may bring suit to:

1. Prevent or restrain conduct prohibited under this Act and remove the conduct's effect by injunction, divestiture, divorcement, dissolution of domestic enterprises right to do business in this state, compelling the forfeiture or restraint of the issuance of a certificate of incorporation, permit to transact business, license, or franchise, or granting other equitable relief. The state may bring suit under this section without posting bond.

2. Recover actual damages resulting from conduct prohibited under this Act.

3. Recover, at the court's discretion, exemplary damages which do not exceed twice the actual damages awarded under subsection two (2) of this section if:

a. The trier of fact determines that the prohibited conduct is willful or flagrant; and,

b. The person bringing suit is not the state.

4. Recover the necessary costs of bringing suit, including a reasonable attorney fee. However, the state may not recover any attorney fee.

SEC. 13. NEW SECTION. **Civil penalty.** In addition to suit under section twelve (12) of this Act, the state may bring suit to assess a civil penalty against an enterprise whose conduct is prohibited under this Act. The suit may be tried to the jury and the civil penalty provided for in this section shall be imposed by the court. The civil penalty assessed shall not exceed ten percent of the total value of the specific commodities by their brand, make, and size or of services either of which were the subject of the prohibited conduct sold in the relevant market in this state by the enterprise in each year in which this conduct occurred but this penalty shall not exceed one hundred fifty thousand (150,000) dollars. In computing this penalty, only the four most recent years in which the prohibited conduct occurred, as of commencement of suit under this section, shall be used in the computation.

SEC. 14. NEW SECTION. **Criminal penalties.** A person or a natural person having substantial control over an enterprise who knowingly and willfully engages in conduct prohibited by this Act shall be, upon conviction, fined not to exceed twenty-five thousand (25,000) dollars, imprisoned in the county jail for not more than six months, or both so fined and imprisoned.

SEC. 15. NEW SECTION. **Election of remedies.** The bringing of suit to assess a civil penalty against a person by filing a petition shall be an election of remedies to not bring a criminal prosecution against this person. The bringing of a criminal prosecution against a person by filing an information or returning an indictment shall be an election of remedies to not bring suit to assess a civil penalty against this person.

SEC. 16. NEW SECTION. **Limitations.**

1. Suit by the state to assess a civil penalty or to obtain a criminal conviction under this Act must be commenced within four years after the cause of action accrues or, if there is fraudulent concealment of this cause of action, within four years after the cause of action becomes known, whichever period is later.

2. Suit under section twelve (12) of this Act must be commenced within four years after the cause of action accrues or, if there is a fraudulent concealment of this cause of action, within four years after the cause of action becomes known, whichever period is later. However, if this cause is based, in whole or part, on the same set of facts as alleged in a suit brought under section thirteen (13) of this Act, this period shall be suspended until one year after the suit brought under section thirteen (13) of this Act is concluded.

SEC. 17. NEW SECTION. **Prima facie evidence.** A final decree or judgment, other than a consent decree or consent judgment entered before trial, in a suit brought by the state is prima facie evidence against the defendant in a suit

brought by any person other than the state under section twelve (12) of this Act as to all matters respecting which this decree or judgment would be an estoppel between the state and the defendant. This section shall not affect the application of collateral estoppel or issue preclusion.

SEC. 18. Chapter five hundred fifty-three (553), Code 1975, is repealed.

SEC. 19. NEW SECTION. **Effective date.** This Act shall take effect on January 1, 1977.

Approved June 28, 1976

STATE OF IOWA
DEPARTMENT OF JUSTICE
DIVISION OF ANTITRUST ENFORCEMENT

TO:

DEMAND TO APPEAR AND

BE EXAMINED UNDER

OATH AND FOR

PRODUCTION OF DOCUMENTS

OR TANGIBLE ITEMS

This demand is issued pursuant to the provisions of the Iowa Competition Law (Chapter 553, Code of Iowa), in the course of an inquiry for the purpose of ascertaining whether there is or may have been a violation of Chapter 553, Code of Iowa by conduct of the following nature:

You are a person whom the Attorney General of Iowa has reasonable cause to believe has information and is in possession, custody, or control of documents or tangible items relevant to an investigation of these matters, and you are therefore required to appear and be examined under oath and to produce for inspection and copying the documents or tangible items described in the attached Schedule at the following time and place:

DATE AND TIME OF EXAMINATION AND PRODUCTION and from day to day thereafter until completed:

PERSON TO WHOM PRODUCTION IS TO BE MADE:

PLACE OF EXAMINATION AND PRODUCTION:

You are hereby advised that objection to or reasons for not complying with this demand may be filed with the Division of Antitrust Enforcement on or before the date set forth above.

You are hereby further advised that Section 553.10, Code of Iowa, provides:

> If a person objects or otherwise fails to obey a written demand or court order issued under section nine (9) of this Act, the attorney general may file in the district court of the county in which the person resides or maintains a principal place of business within this state an application for an order to enforce the demand or order. Notice of hearing and a copy of the application shall be served upon the person, who may appear in opposition to the application. If the court finds that the demand or order is proper, that there is reasonable cause to believe there has been a violation of this Act, and that the information sought or document or object demanded is relevant to the violation, it shall order the person to comply with the demand or order, subject to such modification as the court may prescribe Upon motion by the person and for good cause shown, the court may make any further order in the proceedings which justice requires to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

Dated this _____ day of _____, 19____.

RICHARD C. TURNER
Attorney General of Iowa

_____
Assistant Attorney General
Division of Antitrust Enforcement
State Capitol
Des Moines, Iowa 50319

STATE OF IOWA
DEPARTMENT OF JUSTICE
DIVISION OF ANTITRUST ENFORCEMENT

TO:

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PLACE OF PRODUCTION:

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Dated this _____ day of _____, 19____.

RICHARD C. TURNER
Attorney General of Iowa

_____
Assistant Attorney General
Division of Antitrust Enforcement
State Capitol
Des Moines, Iowa 50319

EXHIBIT

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, _____, being duly sworn on oath do state and depose that on the _____ day of _____, 19___ I served the within Demand and attached schedule on _____ in _____ County, Iowa

_____

Division of Anti-Trust Enforcement
State Capitol
Des Moines, Iowa 50319

Subscribed and sworn to before me this _____ day of _____, 19___.

_____
Notary Public in and for the
State of Iowa

Exhibit

EXHIBIT - SAMPLE PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR _____ COUNTY

STATE OF IOWA ex. rel. RICHARD C. TURNER, Attorney General of Iowa Plaintiff vs. JOURNEYMEN BARBERS, LOCAL NO. _____ AND CERTAIN NAMED INDIVIDUALS X AND Y Defendant	:	CIVIL ACTION NO _____ PETITION

COMES NOW the Plaintiff and for cause of action states:

1. This action is brought by the State of Iowa on relation of Richard C. Turner, Attorney General of Iowa, to obtain equitable relief against the defendants and the co-conspirators described herein.

2. This action is instituted under §7of the Iowa Competition Law, Chapter 1224, Acts of the 66th G.A., 1976 (H.F. 584), in order to prevent and restrain the violation by Defendants and co-conspirators of §4 of said Law.

3. At all times pertinent hereto Defendants and co-conspirators transacted business and maintained offices or barber shops in _____ County, Iowa.

4. Defendant, Journeymen Barbers Local No. _____ is an unincorporated association of barbers with its principal place of business in Des Moines, Iowa.

5. Defendant Mr. X is a resident of _____ County, Iowa, and is President of Journeymen Barbers Local _____.

6. Defendant Mr. Y is a resident of _____ County

Iowa, and is recording secretary of Defendant Journeymen Barbers Local _____.

7. Other persons, firms and corporations not named as Defendants in this Petition have participated as co-conspirators with the named Defendants in the violations alleged herein and have performed acts and made statements in furtherance thereof.

8. In January 1977, and continuing to the date of filing of this Petition, Defendants and co-conspirators have engaged in conduct in unreasonable restraint of trade and commerce in a relevant market in violation of §4 of the Iowa Competition Law. Said violation will be continued or renewed unless the relief hereinafter prayed for is granted.

6. Said combination and conspiracy is a continuing agreement, understanding, and concert of action among Defendants and co-conspirators, the substantial terms of which were to raise, fix, maintain and stabilize the minimum prices of haircuts and other services, including but not limited to shaves, shampoos, and styling, in the Des Moines market.

7. For the purpose of forming and effecting the aforesaid combination and conspiracy, defendants and co-conspirators did those things which they combined and conspired to do.

8. The aforesaid combination and conspiracy has had, and continues to have, the following effects, among others:

(a) prices of haircuts and other services, including but not limited to shaves, shampoos and styling, have been raised, fixed, stabilized and maintained at artificial, non-competitive levels;

(b) customers of Defendants and co-conspirators have been deprived of free and open competition in the sale of haircuts and other services, including but not limited to, shaves, shampoos and styling;

(c) competition among defendants and co-conspirators in the sale of haircuts and other services, including but not limited to shaves, shampoos and styling, has been restrained.

Exhibit

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that the Defendants and co-conspirators have engaged in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce in a relevant market, in violation of §4 of the Iowa Competition Law.

2. That the Defendants and co-conspirators, their officers, directors, agents and employees, members and successors and all other persons acting or claiming to act on their behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the combination and conspiracy hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. Plaintiff further prays that the Court retain jurisdiction of this action in order to implement and carry out the terms of all orders and decrees that may be entered herein or to entertain any suitable application or motion by the Plaintiff for additional relief within the jurisdiction of the Court.

4. Plaintiff further prays for such other additional equitable relief as the Court may deem appropriate in the circumstances, and that it have judgment against defendants for the costs of this action.

RICHARD C. TURNER
Attorney General of Iowa

GARY H. SWANSON
Assistant Attorney General

State Capitol
Des Moines, Iowa 50319
515-281-5164

ATTORNEYS FOR PLAINTIFF

Exhibit

DIVISION OF ANTITRUST ENFORCEMENT
IOWA DEPARTMENT OF JUSTICE

Price fixing - An agreement between two or more competitors to control the price of a product or service sold by them.

Bid Rigging - Agreement between competitors in which the successful bidder on a contract is predetermined.

Output Limitation - Agreement between competitors to limit the quantity of a product or service marketed.

Horizontal Territorial Allocation - Marketing agreement between competitors granting exclusive rights to sell within an area to one or more competitors.

Horizontal Customer Allocation - Agreement between competitors which restricts the customers to whom a competitor may sell.

Vertical Territorial Allocation - Restriction by a supplier on the area in which a purchaser may resell.

Vertical Customer Allocation - Restriction by a supplier on the customers to whom a purchaser may resell.

Group Boycott - Concerted effort to injure the business of anyone by preventing customers or suppliers from doing business with him or her.

Tie-In Arrangement - Refusal to sell a product or service unless another product or service is purchased.

Exclusive Dealing Arrangement - Sale of a product or service on the condition that the buyer not purchase the goods or services of a competitor of the supplier.

Requirement contract - Seller requires that the buyer only buy that seller's product or service in a given line.

Price Discrimination - Person engaged in sale of a commodity, and for purpose of destroying the business of a competitor, discriminates between sections or localities by selling to persons in one locality at a lower rate than others.

Refusal to Deal - Seller refusing to deal or termination of sales to buyer when done (1) pursuant to purpose of creating monopoly, or (2) because of buyer's refusal to adhere to restrictions imposed by seller which are in themselves illegal.

Resale Price Maintenance - Agreement by distributor to maintain resale prices prescribed by seller.

(This material is intended for timely reference only and nothing contained herein is to construed as an official opinion of the Attorney General)

LEGAL MALPRACTICE

BY

JOEL D. NOVAK
DES MOINES, IOWA

I. Liability

A. To the client

1. Duty (attorney-client relationship)

Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977)--The threshold requirement for a legal malpractice action is that an attorney-client relationship exists so that a duty arises between the attorney and the client.

2. Standard of care

Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). A lawyer has a duty to his client to exercise ordinary care in handling the client's work.

Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977). The obligation of a lawyer is to use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.

3. Causation

(a) Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). A client who seeks to recover against his or her lawyer in a malpractice action based upon negligent handling of a lawsuit for money damages must not only prove negligence, but must also prove that, absent the lawyer's negligence, the underlying suit would have been successful.

(b) Many courts have held that the elements of proximate causation and/or actual damages are not established where the plaintiff fails to prove the collectibility of a potential judgment in the underlying suit. See Baker v. Beal, supra; 45 A.L.R.2d 62; 7 Am Jur 2d Attorney's at Law, §190; 7 C.J.S. Attorney and Client, §157.

4. Theories of liability

(a) Contract

(b) Negligence

(c) Fraud

(d) Statute

B. To the nonclient

1. Statutes

(a) Civil Rights Act

1. 42 U.S.C.A., §§ 1983, 1985.

(b) Securities Act

1. Security Act of 1933, §5 (15 U.S.C.A., §773)

2. Securities Act of 1933, §11 (15 U.S.C.A., §77K)

3. The Securities Act of 1933, §12 (15 U.S.C.A., §77.71[1])

4. The Securities Act of 1933, §17 (U.S.C.A., §77Q)

5. The Securities and Exchange Act of 1934, §10B and Rule 10B-5 (15 U.S.C.A., §78)

(c) State securities laws

Chapter 502 Code of Iowa (1977).

2. Malicious prosecution or Abuse of Process

(a) Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976). The elements of a malicious prosecution action are: (1) a previous prosecution; (2) instigation or procurement thereof by defendant; (3) termination of the prosecution by an acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice in bringing the prosecution on the part of the defendant; and (6) damage to the plaintiff.

(b) Sarvold v. Dodson, supra. Absence of probable cause and favorable termination of prosecution are not essential elements of an action for abuse of process.

(c) Brody v. Ruby, N.W.2d (filed June 28, 1978). Under Iowa law, there is no cause of action arising from malicious prosecution unless there has been either an arrest, seizure of property, or a special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action.

(d) Brody v. Ruby, supra. The general rule is that an attorney can be liable for consequences of professional negligence only to a client unless a third party is a direct or intended beneficiary of the lawyer's services.

(e) Brody v. Ruby, supra. The Code of Professional Responsibility for Lawyers furnishes no basis for a private cause of action to third parties for negligence.

3. Interference with a business relationship

(a) Restatement of Torts, §772 (Privilege to Advise). One is privileged purposely to cause another not to perform a contract or enter into or continue a business relation with the third person by giving honest advice unless the person giving the advice is under a special duty to the third person.

(b) McDonald v. Stewart, 182 N.W.2d 437 (Minnesota 1970). An attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship provided the attorney has not exceeded the relationship for his own personal interest or knowingly participates with his client in the perpetration of a fraudulent or unlawful act.

4. Intentional infliction of mental distress

(a) Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976). Iowa recognizes a cause of action based upon intentional infliction of mental distress. If such an action were to lie against an attorney, he would have to be guilty of "outrageous conduct", which is conduct exceeding all bounds usually tolerated by decent society.

5. Defamation

(a) Robinson v. Home, Fire & Marine Insurance Company, 49 N.W.2d 521 (Iowa 1951). An attorney at law is absolutely privileged to publish false and defamatory matter against another in communications preliminary to a proposed judicial proceeding, or the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel if it has some relation thereto.

6. Privity

(a) Brody v. Ruby, _____ N.W.2d _____ (filed June 28, 1978). Absent special circumstances it is generally held that an attorney can be liable for consequences of professional negligence only to a client and not to a third person.

(b) Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969). Accountants held liable to party whom they knew intended to rely upon accounting statement for negligent failure to determine amount of accounts in manner agreed upon.

C. Fiduciary relationship

1. Confidentiality

Meyerhofer v. Empire Fire & Marine Insurance Company, 497 F.2d 1190 (2d Cir. 1974). Malpractice liability may be predicated upon a breach of confidence.

2. Adverse interest

(a) VanVeen v. VanVeen, 213 Iowa 323, 238 N.W.2d (Iowa 1931). Generally, an attorney cannot represent conflicting interests which would interfere with his fiduciary obligations.

(b) 17 A.L.R. 3d 835. Disciplinary action against attorneys who are involved in a conflict of interest situation as a result of representing two clients at the same time.

(c) 28 A.L.R. 3d 394. Liability of attorney representing conflicting interests.

(d) 31 A.L.R. 3d 715; Rowan v. LeMars Mutual Insurance Company, 230 N.W.2d 905 (Iowa 1975). An attorney representing two clients simultaneously whose interest are adverse are subject to disqualification from appearing in the case.

(e) 52 A.L.R. 2d 1243. Effect of attorney representing interests adverse to that of former client.

II. Who is liable

A. The attorney's estate

1. 611.20 Code of Iowa (1977) Revival of actions. Under Iowa survival statute, legal malpractice action will survive the attorney's death.

B. Partners

1. 7 Am Jur 2d (Attorneys at Law). As a general rule, the partners of a law firm are liable for the tortious wrong committed within the scope of the agency by one of its members.

2. 70 A.L.R.3d 1298. Annotation reviews the partnership's liability for the tort of a partner.

C. Professional corporation

1. Chapter 496C Code of Iowa (1977). The Iowa legislative approach in treating the liability of the officers and shareholders of a corporation is one where only the corporation and the tortfeasor is liable.

D. Others for whom the attorney may be responsible

1. Associates and office staff.

2. Paralegal assistants

3. Associated counsel

4. Noble v. Sears Robuck & Co., 109 Cal. Rptr. 269 (Calif. 1973). Investigators or detectives.

5. Generally an attorney is not vicariously liable for the negligence of the court's administrative or enforcement staff.

III. Statute of Limitations

1. Barrett v. Burt, 250 F. Supp. 904 (S.D. Iowa 1966). Five year statute of limitations.

2. Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975). Two year statute of limitation.

3. Cameron v. Montgomery, 224 N.W.2d 154; Chrischiiles v. Griswold, 150 N.W.2d 94 (Iowa 1967). The discovery doctrine applies in Iowa.

IV. Defenses

A. Prematurity

1. Haggee v. Worthington, Park & Worthington, 209 Cal. App. 2d 670, 26 Cal. Rptr. 132 (Calif. 1962); Fuschetti v. Bierman, 319 A 2d 781 (N.J. 1974). Some courts facing the issue as to whether or not a client must sue on an underlying action appear to have taken the position that the client need not sue prior to bringing the action based on malpractice.

B. Contributory negligence

C. Immunity

1. Smallwood v. United States, 358 F. Supp. 398 (ed. Mo. 1973), aff'd 486 F.2d 1407 (8th Cir. 1973). Defense of immunity in civil rights action.

D. Privilege

1. The general rule on privilege is that such a privilege generally protects judges, counsel, parties, and witnesses from responsibility for libel or slander for words, otherwise defamatory, published in the course of judicial proceedings, provided that the statements are pertinent or relevant to the case.

V. Damages

A. Direct damages

1. Freeman v. Ruben, 318 So. 2d 540 (Fla. 1975). Measure of damages to a cause of action is the value of the claim lost. In other words, the damages are what the client should have recovered less what was actually recovered.

B. Exemplary damages

2. Hall v. Wright, 156 N.W.2d 661 (Iowa 1968). An attorney can be responsible for exemplary damages where the action against the attorney is based upon a willful or fraudulent misrepresentation.

1. Patterson and Wallace v. Frazer, 79 S.W. 1077 (Tex. 1904). An attorney may find himself liable for exemplary or punitive damages lost as a result of his negligence. For example, where the attorney's client through his neglect has exemplary damages imposed upon him or where, for example, in a slander suit, because of the attorney's neglect, the case is dismissed and the client would have been entitled to exemplary damages.

C. Litigation expenses

1. Spering v. Sullivan, 361 F. Supp. 282 (D. Del. 1973). Expenses incurred in an attempt to reinstate an action because of an attorney's negligence may be recoverable.

D. Consequential damages

1. Economic loss

(a) Kirtland and Packard v. Superior Court, 59 Cal. App. 3d 140, 131 Cal. Rptr. 418 (Calif. 1976). An economic loss may be increased liability insurance premiums.

2. Injury to reputation

(a) Hill v. Montgomery, 56 N.E. 320 (Ill. 1900). A client remarried after her attorney misrepresented that he had obtained a divorce for her. She was faced with the possibility for criminal indictment for bigamy.

(b) Kirtland and Packard v. Superior Court, 59 Cal. App. 3d 140, 131 Cal. Rptr. 419 (Calif. 1976). A physician could recover for injury to his reputation which resulted from the negligence of his attorney in permitting an adverse judgment in a malpractice action against the doctor.

3. Mental anguish, pain and suffering

(a) McEvoy v. Helikson, 562 P.2d 540 (Ore. 1977). Consequential damages for an emotional injury recoverable in a legal malpractice action. However, most jurisdictions do not allow such damages where the only wrong is negligent conduct.

E. Statutory damages

1. 610.15 Code of Iowa 1977 (Deceit or Collusion). An attorney who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge or a party to an action or proceeding is not only liable to be disbarred, but forfeits to the injured party treble damages in a civil action. However, it appears before treble damages can be recovered there have to be actual damages.

VI. Professional liability insurance

A. Duty to defend

1. St. Paul Fire & Marine Insurance Company v. Lenzmeier, 243 N.W.2d 153 (Minn. 1976). The duty to defend is broader than the duty to indemnify as it can include groundless claims for which no obligation to pay would arise. The insuror that does not defend a claim potentially within the scope of the policy does so at his own risk.

2. Chipokas v. The Traveler's Indemnity Company, ____N.W. 2d ____ (filed June 28, 1978 in the Iowa District Court). There is no duty to defend against a claim wholly outside the liability coverage.

B. Who is covered under the policy

1. Generally the coverage of a partnership includes all the partners.

2. Coverage for a professional corporation may only include the shareholder-employees, but you can get protection for officers, directors, and employees.

C. Notice Requirements

1. Requirement

All policies require the insured to give a prompt notice of a claim or suit.

2. Untimely notice

Oregon Automobile Insurance Co. v. Fitzwater, 531 P.2d 894 (Ore. 1975). Test on whether or not notice has been timely given is based upon what a "reasonable attorney" would have done under similar circumstances.

Henderson v. Hawkeye Security Insurance Co., 106 N.W.2d 86 (Iowa 1960). The Iowa law is well settled that where there is a breach of a condition precedent in an insurance policy prejudice to the insuror is presumed. The presumption is rebuttable, but the burden to show lack of prejudice by satisfactory evidence is on the insured.

D. Exclusions

1. Fraud

2. Nonprofessional aspects of an attorney's business

3. Fines, penalties, punitive or exemplary damages

4. Business activities of the attorney other than for his own law practice.

5. 84 A.L.R. 3d 187--Annotation related to lawyer's professional liability insurance.

VII. Prevention of malpractice actions

A. Knowledge of the law

1. Certainty of the law

(a) Meagher v. Cavli, 97 N.W2d 370 (Minn. 1959). It is well settled that an attorney is not liable for an error as to a legal principle which is debatable or uncertain.

2. Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). Mere errors in judgment by a lawyer are not grounds for negligence at least where a lawyer acts in good faith and exercises a

reasonable degree of care, skill, and digligence.

B. Follow your client's instructions

C. Compliance with time limitations

1. Docket control

D. Index systems

E. Specialization

F. Communication to the client (client relations)

ANNUAL CASE REVIEW - IOWA SUPREME COURT
OCTOBER 1977 - OCTOBER 1978

By Tim Estlund
Conway, Casey & Doll
Osage, Iowa

ACTIONS: money had and received

"'Money had and received' was developed at common law as one of the common counts in general assumpsit to cover the case in which a person receives money that in equity and good conscience belongs to another. *** (Citing authorities). Although this form of action is ordinarily one at law, it is governed by equitable principles and is favored by the courts. *** (Citing authorities).

"However, before a plaintiff may recover under this theory, he must establish by a preponderance of the evidence not only that defendant received the money but also the circumstances making it inequitable for the defendant to retain the money. *** (Citing authorities).

"***

"It is well established that an action for money had and received lies where money is given for a special purpose which is not carried out. *** (Citing authorities)."

Key Pontiac, Inc. v. Blue Grass Sav. Bank, 265 N.W. 2d 906, 908 (Iowa 1978)

AGENCY: attorney-in-fact

"It is an accepted principle of the law of agency that an attorney in fact is an agent of limited authority. *** (Citing authorities). It is also true that when a person is informed he is dealing with an attorney in fact, he is under a duty to inquire into the exact authority of that agent. ***

"However, under another principle of the law of agency with respect to insurance agents, where the limitations of the agent's power is set out in writing, there is no obligation to go beyond such writing. *** (Citing authorities). The above***implies that when a person deals with an attorney in fact who has written authority with limitations, such party is entitled to rely on the limitations expressed in the written document and is under no duty to make further inquiry as to the scope of the agent's power. ***"

State v. Sellers, 258 N.W. 2d 292, 296 (Iowa 1977)

AGENCY: insurance solicitor

"Our cases have uniformly held that a soliciting agent's knowledge and material declarations at the time an application for insurance is obtained are binding on the company and may serve as a basis for reformation.

"***

"This is true even when the agent is mistaken. The mistakes of the soliciting agent are the mistakes of the insurer. *** (Citing authorities)."
Johnson v. United Investors Life Ins. Co., 263 N.W. 2d 770, 772-773 (Iowa 1978)

AGENCY: agent's pre-relationship knowledge

"***The rule in Iowa is that knowledge acquired by an agent before the commencement of the relationship of the principal and agent is imputable to the principal if the knowledge is present in the mind of the agent while acting for the principal in a transaction to which the information is material. *** (Citing authorities). This is the rule recognized in the majority of jurisdictions. *** (Citing authorities)."
Curran, Etc. v. National-Ben Franklin, Etc., 261 N.W. 2d 822, 826 (Iowa 1978)

APPEAL: dismissal sua sponte

"If it is determined that this court does not have jurisdiction, plaintiff's appeal must be dismissed even though defendant herein has not moved to dismiss the appeal***. This was made clear in Hardin v. Illinois Central R. Co., 254 Iowa 426, 429, 118 N.W. 2d 76, 78, where the court stated:

> "'***, jurisdiction cannot be conferred even by consent, much less by silence of an appellee. It is our duty to refuse, on our own motion, to entertain an appeal not authorized by rule. ***.'"

Qualley v. Chrysler Credit Corp., 261 N.W. 2d 466, 468 (Iowa 1978)

APPEAL: finality - undisposed compulsory counterclaim

"A court can sustain a motion for summary judgment on part of the issues or on part of the pleadings, under rule 237, R.C.P. Nonetheless we repeat what we stated in both the Mid-continent (248 N.W. 2d 145) and Farm Service (169 N.W. 2d 559) cases: if a court sustains a plaintiff's motion with reference to a petition leaving a counterclaim undisposed of, the court should use an appropriate procedural device to protect the defendant against execution until disposition of the counterclaim. Such devices include entering the ruling on the motion but withholding entry of the judgment itself, or ordering that execution not issue pending disposition of the counterclaim. *** (Citing authorities). The same would be true in reverse, of course, if a defendant's motion for summary judgment on his counterclaim is sustained and the issues are reserved arising from the plaintiff's petition.

"In the present case***the judgment on the petition was interlocutory because the counterclaim was compulsory, so that the appeal*** must be dismissed."
Farmer's Coop. Elevator Co., Panora v. Knapp, 259 N.W. 2d 762, 764 (Iowa 1977)

APPEAL: partial payment of judgment prior to appeal

The voluntary payment of $100,000 of $180,000 jury verdict with reservation of the right to appeal does not amount to a waiver of the right to appeal. Court did not decide whether partial payment or reservation of appeal rights, standing alone, would avoid a waiver determination.

Starke v. Horak, 260 N.W. 2d 406, 407-408 (Iowa 1977)

APPEAL: timeliness

"***It is axiomatic that compliance with our rules relating to time for appeal are mandatory and jurisdictional. *** (Citing authorities) Where an appellant is late in filing, by as little as one day, we are without jurisdiction to consider the appeal. *** (Citing authority)."

Accordingly, where order appealed from was filed June 6, 1977, and appellant's attorney served notice on appellee and her attorney on July 1, 1977, but the notice of appeal which was mailed to clerk on the same day was not filed until July 8, 1977, the appeal was not filed timely. Rule 82(d), R.C.P. was inapplicable.

Mantz and Mantz, 266 N.W. 2d 758 (Iowa 1978)

ARBITRATION: enforceability of agreement to

"Under principles developed under the common law of this state, a participant in arbitration can withdraw from arbitration proceedings at any time, and any agreement on the part of the parties to make such an agreement be binding and exclusive means of settling disputes is not enforceable. *** (Citing authorities). However, it also appears to be true that while provisions bind the parties to the use of arbitration to settle future disputes is not enforceable by the Iowa courts, the courts do not treat them as void and will enforce them after an arbitration award has been given to one of the parties. *** (Citing authorities)."

Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W. 2d 317, 325 (Iowa 1977)

ASSUMPTION OF RISK: instructions

"Plaintiff's next claim it was error for the trial court to submit to the jury instructions on the doctrine of assumption of risk***, where other instructions embraced language covering the same allegations in terms of 'working in a place of known danger.' ***

"***

"The rationale which impels us in Rosenau to hold that the doctrine of assumption of risk should not be instructed upon as a separate defense was based on our conclusion such instruction, along with other instructions on contributory negligence, were repetitive, tending to unduly emphasize a defendant's claim of contributory negligence. *** (Citing authorities)."

Manley v. O'Brien Cty. Rural Elec. Coop., 267 N.W. 2d 39, 42-44 (Iowa 1978)

ATTACHMENT: constitutionality of chapter 639

"It must be recognized, however, chapter 639 does have some of the features of the statutes struck in Fuentes and North Georgia. ***

"***

"This statute is rationally related to a vital state interest. A state must protect the rights of creditors from debtors, who, without the statute, could easily thwart the lawful attempts of their creditors to enforce the obligations of their debtors. A state must, at the same time, protect the rights of debtors from unjustified seizure of their property.

"While we admit our statute does not perfectly protect the rights of both creditors and debtors, we find it does effect '***a constitutional accommodation of the conflicting interests of the parties.' *** (Citing authority)."

Stoller Fisheries, Inc. v. American Title Ins., 258 N.W. 2nd, 336, 346 (Iowa 1977)

CONFLICTS OF LAW: validity of arbitration clause

Court appears to approve of the most significant relationship test when attempting to determine which state's law will apply to an issue concerning the validity of an arbitration clause. However, the issue was decided on the basis of the parties' agreement to allow the arbitrator to choose the site of the arbitration proceedings. It would, however, appear that the Court has adopted the most significant relationship test in yet another area of conflicts of law.

Joseph L. Wilmotte & Co. v. Rosenman Bros. 258 N.W. 2d 317, 325-328 (Iowa 1977)

CONTRACTS: implied obligations

"Contractual obligations may arise from implication as well as from the express writing of the parties. 'A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.' *** (Citing authority). ***

"Courts are slow to find implied covenants. The obligation must arise from the language used or it must be indispensable to give effec to the intent of the parties; it must have been so clearly within their contemplation that they deemed it unnecessary to express it. It can be justified only on the ground of legal necessity and can arise only when it can be assumed it would have been made a part of the agreement if attention had been called to it. Moreover, an implied covenant cannot be found when the contract is fully integrated. *** (Citing authorities)."

Notwithstanding these limitations, the Court found a sublessor had breached an implied covenant in a contract with a sublessee to continue its business in an adjacent commercial space.

Fashion Fabrics of Iowa v. Retail Investors, 266 N.W. 2d 22 (Iowa 1978)

CONTRACTS: statute of frauds - one-year requirement

"***In considering statute of fraud defenses, we do not demand that an oral contract must actually be performed within a year. We hold, rather, such a contract must be impossible of performance within that time if it is to come within the proscription of the statute. ***"

Johnson v. Ward, 265 N.W. 2d 746, 747 (Iowa 1978)

CONTRACTS: statute of frauds - rule of evidence

"Although some authorities are critical of the doctrine, we have consistently held the statute of frauds is simply a rule of evidence. It governs, not the validity of a contract, but only the manner in which one may be proven. *** (Citing authorities)

"Accepting this as controlling, we face the question--not raised by the parties or the trial court--as to how this statute should be asserted. ***

"***

"We now hold the statute of frauds is a defense to be raised by answer or by proper objection to evidence at trial and not by motion to dismiss. The present case points up the sound reason for such a rule. Even if we were to concede that this contract is within the statute, it is by no means certain plaintiff could not prove his case by calling upon***(statutory exceptions)."

Johnson v. Ward, 265 N.W. 2d 746, 747-748 (Iowa 1978)

CONTRACTS: third-party beneficiaries

"We have said that while intended third party beneficiaries are entitled to benefits of contractual promises, incidental third party beneficiaries cannot be so entitled, and that in order to be an intended third party beneficiary the circumstances must indicate an intent of the promisee to make a gift to the third party or to confer upon it some right against the promisor not due from the promisee to the third party. *** (Citing authority)."

Klinger-Holtze v. Sulzbach Const. Co., 262 N.W. 2d 290, 294 (Iowa 1978)

CONTRACTS: tortious interference

"The basic elements going into a prima facie establishment of the tort are***as follows: '(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.'"

Stoller Fisheries, Inc. v. American Title Ins., 258 N.W. 2d 336, 340 (Iowa 1977)

CONTRIBUTION: intentional tortfeasors

The Court continues to adhere to the view that contribution or indemnity is not available to an intentional tortfeasor, but admits

the contrary view has "logic and soundness." The Court concludes the present case did not present "appropriate facual circumstances to expand the right of contribution" with respect to intentional tort-feasors.
Wright v. Haskins, 260 N.W. 2d 536, 538-539 (Iowa 1977)

CORPORATIONS: officer's liability for fraudulent corporate acts

"A corporate officer is individually liable for fraudulent corporate acts which he or she participated in or committed. *** (Citing authority). The exemption from personal liability of corporate directors and officers is subject to the qualification of good faith, and honesty of intent and purpose. Where there is ulterior motive, the immunity is withdrawn. *** (Citing authority).

"Directors or officers of a corporation may be presumed to have knowledge of the financial affairs of their corporation when making statements concerning its financial condition. It is not necessary that they know such statements to be false and fraudulent, it is their duty to know them to be true, and they are liable in damages to anyone dealing with the corporation, relying on the truth of such false or fraudulent financial reports. *** (Citing authorities)."
Briggs Transp. Co. v. Starr Sales Co., 262 N.W. 2d 805, 808-809 (Iowa 1978)

DAMAGES: interest

"The general rule is that interest runs from the time that money becomes due and payable, and in the case of unliquidated claims, including those founded on contract, this is the date they become liquidated, ordinarily the date of judgment. *** (Citing authority).

"In Iowa, however, an exception exists to the unliquidated claim rule when the damage is complete at a particular time. Then interest runs from that time although the damage has not been fixed in a specific sum. *** (Citing authority). Actions for wrongful death ordinarily come within this exception, *** (Citing authority), whereas other personal injury actions ordinarily do not do so unless the damage appears to have been complete at a particular time. *** (Citing authority)."
Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W. 2d 714, 720 (Iowa 1978)

DAMAGES: measure of

If damaged property is capable of being repaired, the measure of damages is the amount necessary to restore it to its former condition. If it cannot be repaired, the measure of damages is the value of the property before the damage dimished by its value after the damage.
White v. Citizens Nat. Bank of Boone, 262 N.W. 2d 812, 817 (Iowa 1978)

DAMAGES: pain and suffering

"We permit recovery for a decedent's pain and suffering in wrongful death actions when the item has substantial evidentiary support. *** (Citing authority). The question here is whether the item has

evidentiary support which is substantial. This item is not to be submitted, of course, if death or unconsciousness is instantaneous. *** (Citing authorities). On the other hand, if substantial evidence shows the decedent did suffer pain the item is submissible although the period of consciousness was not protracted. *** (Citing authority).

"***

"Here the physician testified that decedent was unconscious but did respond to some extent to painful stimulus, but whether this was reflex action or a conscious response the physician did not say and was not asked, and the burden of proof was, of course, on plaintiff. Upon examination of the entire record on this subject, we conclude that the evidence on consciousness and pain is not 'substantial.' We therefore hold that on this record, the trial court erred in submitting pain and suffering. *** (Citing authorities)."
Schlichte v. Franklin Troy Trucks, 265 N.W. 2d 725, 727-728 (Iowa 1978)

DISCOVERY: duty to supplement

Where plaintiff answered defendant's interrogatories by stating damage amounted to $4,900.00 and stated said amount was the best estimate "at this time," and plaintiff did not supplement answers prior to trial, plaintiff could not introduce evidence at trial of damages in excess of $4,900.00.
White v. Citizens Nat. Bank of Boone, 262 N.W. 2d 812, 815-817 (Iowa 1978)

DISSOLUTION: contempt hearing

The trial court overreached in converting a contempt citation into a modification proceeding.
Gilliam v. Gilliam, 258 N.W. 2d 155, 156 (Iowa 1977)

DISSOLUTION: court-ordered sale of homestead

Provision of dissolution decree requiring sale of parties' homestead and application of proceeds to debts of the parties, does not violate Iowa's homestead laws.
In Re Marriage of Tierney, 263 N.W. 2d 533 (Iowa 1978)

DISSOLUTION: modification order may not waive arrearages

Trial court does not possess authority to exonerate liability for any or all then past due and accrued decretal support payments. Modification of a decree for support payments operates prospectively and not retrospectively.
Gillaim v. Gilliam, 258 N.W. 2d 155, 156 (Iowa 1977)

DISSOLUTION: modification re dependency deductions

The provisions of a dissolution decree awarding dependency deductions are not a portion of the property division of the parties, but are directly related to the matter of child support allowances, and consequently, the award of the dependency deductions is subject to modification.
In Re Marriage of Habben, 260 N.W. 2d 401, 402-403 (Iowa 1977)

DISSOLUTION: stipulation "encouraged" by court

Under the particular circumstances involved, the Supreme Court concluded wife's assent to stipulation was the result of duress fostered by trial court's comments which were intended to encourage settlement, and consequently, the stipulation was voidable by the wife.
In Re Marriage of Hitchcock, 265 N.W. 2d 599, (Iowa 1978)

DRAM SHOP ACTIONS: double recovery precluded

Trial court correctly allowed a $6,000.00 pro tanto credit to defendant dram-shop operator on plaintiff's $28,000.00 verdict on the basis of plaintiff's $6,000.00 recovery from the intoxicated individual. The fact that Section 123.94 of the Dram Shop Act prohibits actions for contribution or indemnity does not intitle a plaintiff to double recovery.
Shasteen v. Sojka, 260 N.W. 2d 48, 52-53 (Iowa 1977)

ESTOPPEL: back child support

Where ex-wife failed to enforce child support provisions of divorce decree for a period of nineteen years, she was barred by the doctrine of equitable estoppel by acquiescence from enforcement thereo
Davidson v. Van Lengen, 266 N.W. 2d 436 (Iowa 1978)

ESTOPPEL: knowledge of or access to actual facts

Plaintiff was injured in defendant's establishment on October 30, 1970. In negotiating plaintiff's claim one year later, defendant referred to the injury date as November 20, 1970, and plaintiff proceede on the assumption that that was in fact the date of her injuries. Sui was filed and service was completed on November 20, 1972. Defendant's answer and motion for summary judgment raised statute of limitations as a defense. Plaintiff sought to rely on estoppel to preclude the statute of limitations defense on the ground she relied on defendant's representation with regard to the date of her injuries.

The Court held plaintiff could not carry her burden of proof in connection with the assertion of estoppel in light of the fact she, at all times, had available to her evidence which would have established the exact date of her injuries (cancelled checks and medical records).
Dierking v. Bellas Hess Superstore, 258 N.W. 2d 312 (Iowa 1977)

ESTOPPEL: pleading requirement

The general rule is that in order to rely upon it, one must plead the defense of estoppel. However, an exception exists for the situation where the party seeking to rely on estoppel did not have an opportunity to raise it in their pleadings, as where a trial court denies plaintiff's application to reply to defendant's answer.
Dierking v. Bellas Hess Superstore, 258 N.W. 2d 312, 315 (Iowa 1977)

EVIDENCE: expert opinion of possibility and probability

Opinion testimony concerning causation which is couched in terms

like "possible" and "probable" is admissible, although such an opinion, standing alone, may not be enough to make out a case of proximate cause for the jury.
Duke v. Clark, 267 N.W. 2d 63,66 (Iowa 1978)

EVIDENCE: non-expert opinion testimony
"It is true, of course, nonexpert witnesses who possess special knowledge may testify as to their opinions of causes of events within their special knowledge. It is also true such opinions must be based on observations of these witnesses. ***
"***
"'Such nonexpert opinions are generally permitted where these conditions are met (1) the witness has made observations of specific events or conditions; (2) he has sufficient intelligence to draw proper inferences from such observations; and (3) such opinions from special knowledge will assist the jury more than if the witness were limited to the specific detail.'"
Meeker v. City of Clinton, 259 N.W. 2d 822, 830-831 (Iowa 1977)

EVIDENCE: opinion v. shorthand rendering of facts
"***'***The kind of testimony to which defendant objects here has been described as "shorthand" rendering of facts. It is, in fact, not really an opinion, but at most a conclusion drawn from facts of common observation.' ***
"***
"'Certain observations of witnesses which are really based upon inference may nevertheless be expressed in evidence by reason of necessity (expediency and convenience). Thus, a witness, having made observations but unable to orally produce the details sufficiently to give a jury a precise understanding of what was observed, may give his conclusion to express his impression of such composite facts. This has best been described as permissible shorthand rendering of the facts. The expressed inference is proper if it necessarily implies the existence of the observed but unstated facts, and if within the range of common knowledge. It includes testimony to ordinary cause and effect.'"
Meeker v. City of Clinton, 259 N.W. 2d 822, 831 (Iowa 1977)

EVIDENCE: similar events or occurrences
"Evidence of similar occurrences is not relevant to the issue of causation of the occurrence in question in the absence of proof of substantial similarity of all conditions that might enter into or affect causation. *** (Citing authority)."
Meeker v. City of Clinton, 259 N.W. 2d 822, 832 (Iowa 1977)

HUSBAND AND WIFE: alienation of affections - criminal conversation
In an appeal challenging the viability of civil actions based upon alienation of affections and/or criminal conversation, the Court held "the action for alienation of affections remains consistent with public policy in this jurisdiction and shall be retained." On the other hand, the Court abolished "the tort of criminal conversation in Iowa for conduct occurring after January 1, 1978."
Bearbower v. Merry, 266 N.W. 2d 128 (Iowa 1978)

INSURANCE: "other insurance" provisions

"Only the Oldsmobile policy covered Barton and Laura, but that policy and the Ford policy covered Paul. The uninsured motorist clauses of the policies each contained 'other insurance' paragraphs, ***.

"In essence, Grinnell Mutual contends that by virtue of the other-insurance paragraphs in Paul's own policy, Paul must first look to the Oldsmobile uninsured motorist insurance. Hence, Paul, Barton and Laura's estate must divide the limit of $20,000.00 of that insurance among them, and Paul can then look to the Ford uninsured motorist insurance to make up the balance of his $10,000.00 maximum. The net result would be to reduce the recovery of Barton and Laura below $10,000.00 each***.

"***

"***The purpose of***(Section 516A.2) is not to permit an insurer to reduce claims below minimum required limits, but to hold claims within minimum required limits.***"

Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W. 2d 714, 718-719 (Iowa 1978)

INSURANCE: reformation

"Plaintiff sought reformation based on mutual mistake. It was her burden to prove by a preponderance of clear, satisfactory and convincing evidence that through mistake the policy failed to express the mutual intent of the parties. *** (Citing authority). In reformation cases involving insurance policies, less proof is required than in contract cases generally. *** (Citing authority)."

Johnson v. United Investors Life Ins. Co., 263 N.W. 2d 770, 774 (Iowa 1978)

INSURANCE: uninsured motorist coverage

Where an insured commences an action against his or her insurer seeking damages under an uninsured motorist clause, the action is based upon contract and not tort, and therefore, the statute of limitations is ten rather than two years.

Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W. 2d 714, 716-717 (Iowa 1978)

JURISDICTION: long-arm statute

The Court concluded the long-arm statute was available to acquire jurisdiction over defendants, non-resident directors of an Iowa corporation, who had committed a tort which, although initiated outside of Iowa, produced injury to residents of Iowa. In addition, the Court concluded piercing the "corporate cloak" to attain personal jurisdiction over defendant non-resident directors did not offend due process concepts.

DeCook v. Environmental Sec. Corp., Inc., 258 N.W. 2d 721, 726 (Iowa 1977)

LEGAL MALPRACTICE: requirement of attorney-client relationship

"***A lawyer has a duty to his client to exercise ordinary care in handling the client's work. ***

"However, for this duty to arise it is necessary that an attorney-client relationship exists. This is the threshold requirement for a legal malpractice action. ***

"An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from conduct of the parties. *** (Citing authority). The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competency, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. *** (Citing authority). In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them, and the attorney, aware of such reliance, does nothing to negate it. *** (Citing authorities).

"In a legal malpractice action it is not sufficient merely to prove an attorney-client relationship existed with respect to some matters. It is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based. *** (Citing authorities)."

Kurtenbach v. TeKippe, 260 N.W. 2d 53, 56 (Iowa 1977)

MUNICIPALITIES: duty re maintenance of alleys

Where plaintiff was injured in a fall in defendant-city's alley, defendant could not successfully assert its duty to properly maintain the area was diminished in light of the fact plaintiff was a pedestrian in a predominantly vehicular area.

Greninger v. City of Des Moines, 264 N.W. 2d 615 (Iowa 1978)

MUNICIPALITIES: punitive damages

Recognizing that "***the weight of authority is against allowing (punitive) damages absent a statute expressly allowing them" in an action against a municipality, the Court nevertheless, holds "that under proper circumstances punitive damages are recoverable in tort claim actions against governmental subdivisions."

Young v. City of Des Moines, 262 N.W. 2d 612, 620-622 (Iowa 1978)

MUNICIPALITIES: tort claims act

Estate representatives, wives and children of firemen killed on the job were not entitled to bring a tort action against the city where they had received statutory death benefits under chapter 411. With reference to the nature of chapter 411, its history and relationship with similar statutes, and the reasoning of analogous federal decisions, the Court concluded the legislature intended that chapter 411 constitute an exclusive remedy for covered persons against the municipality, and consequently, plaintiffs were barred by operation

of that statute within the meaning of section 613A.4(4) from maintaining their action.
Goebel v. City of Cedar Rapids, 267 N.W. 2d 388 (Iowa 1978)

PARTIES: misnomer in original notice

"Under rule 49, R.C.P., the caption of an original notice must name the parties and be 'directed to the defendant.' Where a misnomer is substantial we have held the name variance is fatal and voids the notice. *** (Citing authority). Where the real party has been served, some variance in the name is not fatal. *** (Citing authority). ***

"Since the Iowa rules relating to process were amended in 1975, we no longer require the same strict compliance formerly demanded with regard to the components of an original notice. *** (Citing authority). It is clear we are now committed to liberal construction of our rules of procedure to insure resolution of disputes on their merits. *** (Citing authority)."
Burg v. Bryant, 264 N.W. 2d 750, 751 (Iowa 1978)

PLEADINGS: amendment-additional defendant

"The record before us reveals plaintiffs simply made a mistake in identity of the railroad they intended to sue. It was nonexistent and of course valid service could not be made on it. Jurisdiction of defendant,***, was first obtained after the amendment making it a defendant. The statute of limitations had run.

"***

"This is not a case of correction of a misnomer but rather the substitution of a new party after the statute of limitations had run. The ruling of the trial court (sustaining defendant's motion to dismiss) was correct."
Smith v. Baule, 260 N.W. 2d 850, 854 (Iowa 1977)

PLEADINGS: amended by pretrial order

Plaintiff's allegation of general negligence in his petition was effectively amended and restricted by an order following pretrial conference reflecting plaintiff's allegations of specific negligence at the conference. When the evidence adduced at trial did not support the allegation of specific negligence, defendant was entitled to a directed verdict notwithstanding the fact that a jury question might have been produced on the general negligence allegation.
Gray v. Schlegel, 265 N.W. 2d 156, 158-159 (Iowa 1978)

PLEADINGS: joinder of claims by cross-claimant

Unlike rule 18(a), F.R.C.P., the Iowa rules do not permit a cross-claimant unrestricted joinder of claims.
Frank v. Art's-Way Mfg. Co., 262 N.W. 2d 584, 586 (Iowa 1978)

TAXATION: comparable sales evidence re assessed valuation

Again, the Court has disallowed an assessor's valuation for property tax purposes on the ground the assessor erroneously limited his search for sales of comparable properties to the taxing district.

The holding in Bartlett & Company Grain v. Board of Review, 253 N.W. 2d 86 (Iowa 1977), stating that distance alone did not render sales incomparable, was reaffirmed and sales throughout the Midwest were considered.
Farmer's Grain Dealers Ass'n v. Sather, 267 N.W. 2d 58 (Iowa 1978)

TORT CLAIMS ACT: notice of claim

Aggrieved citizen's letter to city council person relating detailed account of alleged police misconduct constituted substantial compliance with notice provisions of chapter 613A.
Cook v. City of Council Bluffs, 264 N.W. 2d 784 (Iowa 1978)

TORT CLAIMS ACT: prison assault

"Although we have not considered a claim under Chapter 25A based on a fellow prisoner's assault during confinement in a state institution, we have held the Iowa Tort Claims Act permits an action by a prisoner injured by the state's negligence. *** (Citing authority). The same rule applies when the state negligently permits one in its custody to be injured by the violent assault of another prisoner. Of course, the state is not an insurer of the prisoner's safety, but it must exercise reasonable care to protect him from harm. *** (Citing authorities).

"These authorities without exception limit the right of recovery to circumstances showing negligence based on a failure to protect after some danger was, or should have been, apparent. ***"
Barnard v. State, 265 N.W. 2d 620, 621 (Iowa 1978)

TORTS: interference with prospective bequest

"The tendency of courts and other jurisdictions, when faced with this same issue, seem to be to permit actions of this character to be maintained. *** (Citing authorities).

"***

"We have recognized the existence of actions in tort for wrongful interference with business advantage. *** (Citing authorities). We can see no compelling reason for us to decline to extend this concept to a non-commercial context. *** We are pursuaded that an independent cause of action for the wrongful interference with a bequest does exist, recognizing as we do the difficulties attendant to recovery in such an action. ***"
Frohwein v. Haesemeyer, 264 N.W. 2d 792, 795 (Iowa 1978)

TRIAL: dismissal under rule 215.1

Where plaintiff's action should have been dismissed under rule 215.1, but the clerk and Court failed to do so, and notwithstanding the fact that the issue was not raised by defendant, the Supreme Court on appeal from verdict for plaintiff reversed and remanded for dismissal.
Werkmeister v. Kroneberger, 262 N.W. 2d 295 (Iowa 1978)

TRIAL: separation of plaintiffs

Trial court's sua sponte separation order in controversy involving

twenty plaintiffs and two defendants was not an abuse of discretion. Rule 186, R.C.P., is substantially the same as rule 42(b), F.R.C.P., and, under the latter, it is clear a sua sponte separation order by the trial court is permissible.
Meeker v. City of Clinton, 259 N.W. 2d 822, 827 (Iowa 1977)

VERDICT: avoidance by juror's affidavit

Affidavits of jurors showing matters occurring during trial or in the jury room may be received for the purpose of avoiding a verdict if the matter does not essentially inhere in the verdict itself. Examples of matters not inhering in the verdict and thus includable in an affidavit as supportive of verdict avoidance are as follows: (1) improper approach to a juror by a party, his agent or attorney; (2) conversations between witnesses or others as to the facts or merits of the case, out of court and in the presence of jurors; (3) improper verdict determination, i.e., average,by lot, etc. Matters which inhere in a verdict, and consequently, may not be utilized are: (1) juror's misunderstanding of instructions, testimony or pleading; (2) juror's allegation of undue influence by fellow jurors; and (3) juror's allegation that his calculations or judgment were mistaken.
Anderson v. Goodyear Tire & Rubber Co., 259 N.W. 2d 814, 819-820 (Iowa 1977)

VERDICT: jurors - five-sixths

Allowance of five-sixths jury verdict after six hours of deliberation by rule 203(a), R.C.P., does not mean jury can deliberate for six hours and six minutes, including one hour for meal, and return five-sixths verdict. Six hours of deliberation means six hours of deliberation deducting all recesses.
Parker v. Tuttle, 260 N.W. 2d 843, 846-849 (Iowa 1977)
See also Paulsen v. Des Moines U. Ry. Co., 262 N.W. 2d 592, 597 (Iowa 1978)

WITNESSES: newsperson's privilege re confidential sources

Although a fundamental newsperson privilege exists, such a privilege is not absolute nor unlimited. A compelling state interest will subordinate a newsperson's privilege to withhold confidential information. A party seeking to invade the privilege must establish that (1) the information is necessary or critical to the involved cause of action or asserted defense; (2) other available reasonable means to obtain the information sought have been exhausted; and (3) it does not appear from the record that the action or defense is patently frivolous.
Winegard v. Oxberger, 258 N.W. 2d 847, 850, 852-853 (Iowa 1977)

WORKER'S COMPENSATION: pretermination of benefits notice

"We hold, on the basis of fundamental fairness, due process demands that, prior to termination of worker's compensation benefits, ***, he or she is entitled to a notice which, as a minimum, requires the following:

"'(1) the contemplated termination,

"'(2) that the termination of benefits was to occur at a

specified time not less than thirty days after notice,

"'(3) the reason or reasons for the termination,

"'(4) that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,

"'(5) that the recipient have the right to petition for a review-reopening under section 86.34."

Auxier v. Woodward State Hosp.-Sch., 266 N.W. 2d 139, 141-143 (Iowa 1978)

WORKER'S COMPENSATION: coffee break exception to going and coming rule

Under circumstances presented, the Court refused to decide whether it would recognize an exception to the going and coming rule of non-compensability in the co-called off-premises coffee break and lunch break situations where the employee demonstrates the break was actually on company time.

Halstead v. Johnson's Texaco, 264 N.W. 2d 757, 760 (Iowa 1978)

WORKER'S COMPENSATION: second injury fund

Where claimant had lost part of right hand in previous accident, loss of portion of right arm in later accident did not entitle claimant to benefits of second injury fund. The Court concluded "*** the language of the statute '***the loss of or loss of use of another such member or organ ***' ***" does not mean separate parts of the same arm or leg.

Anderson v. Second Injury Fund, 262 N.W. 2d 789 (Iowa 1978)

POST TRIAL JURY VISITS

TOPICAL OUTLINE

I Background reasons for jury visits

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B. Edification of bench and bar

II Jurors concepts and attitudes toward Court procedures, including such problems as delays, in camera sessions, and admonitions

III Jurors basic understanding and use of instructions in general

IV Jurors problems with certain specific instructions, both in criminal and civil cases

V Jurors general understanding of and reaction to voir dire, handling of witnesses, and arguments

VI Trends and problems with jurors increasingly active interests in trials -- that is, with reference to note taking, requesting the reading of back-up testimony, questions raised by jurors, requested additional instructions, and some of the reasons therefor

VII Impact of a leader-type foreman

VIII Variant administrative and mental processes used by jurors in arriving at verdicts

IX Jurors concepts and speculations re insurance involvement

X Jurors general serious approach to their duties and their overall concept of our judicial system and the role of the lawyer and the Court

(Note: The above does not purport to be based upon a scientific jury survey system, but is information garnered from jurors over a period of approximately five years involving juries in both criminal and civil cases.)

RECENT TORT CASES
8TH CIRCUIT AND IOWA COURT OF APPEALS

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Clarke v. Burkle, 570 F.2d 824 (C.A. Iowa 1978)

Two actions arising out of the 1968 automobile accident as a result of which passenger sustained injuries which resulted in his total and permanent disability were brought against the automobile driver and the manufacturer. The first suit was filed in 1970 and named the driver, George Burkle, as sole defendant. The second suit was commenced in 1973 and named Volkswagen of America as a defendant; Burkle was not made a defendant in that suit.

The first case, Burkle, was disposed of by a stipulated judgment entered some months after the suit was filed. The judgment was in the principal amount of $50,000.00. The second case, Volkswagen, was disposed of by summary judgment in favor of the defendant.

In the Volkswagen case, counsel for Volkswagen amended their Answer setting up the defense that the entry and satisfaction of the judgment in favor of the plaintiff in the Burkle case barred the plaintiff from maintaining his subsequent action against Volkswagen. Subsequently, counsel for Volkswagen filed another motion for summary judgment based upon the disposition of the Burkle case.

The District Court determined that Volkswagen was entitled to summary judgment under Iowa law, but the court withheld its ruling to allow the plaintiff time to move to amend the stipulated judgment in the Burkle case to reflect the alleged intention to preserve the plaintiff's cause of action against Volkswagen.

Thus, in accordance with the suggestion of the District Court, the plaintiff moved in the old Burkle case for an amendment of the judgment specifically to preserve whatever claim the plaintiff had against Volkswagen of America. The plaintiff's motion was based upon Federal Rule of Civil Procedure 60(b)(1) and (4).

The District judge dealt with the motion in a memorandum order, determined that the motion was without merit, and denied it. Thus, it follows automatically that the summary judgment for the defendant in the Volkswagen case was granted.

On appeal, the Eighth Circuit Court of Appeals

stated that the opinion of the District judge in dealing with Volkswagen's motion for summary judgment based on the satisfaction of judgment in the Burkle case was a correct statement of the law. Judge Hanson had declared the Iowa law to be that where a plaintiff sues one of several joint tortfeasors and obtains a judgment against that tortfeasor, and where the judgment is paid off and is satisfied in clear and unambiguous terms, the satisfaction bars a plaintiff later proceeding against another tortfeasor or other tortfeasors, in that it makes no difference whether the judgment which was satisfied was entered after an adversary trial before judge or jury or whether the judgment was entered by consent or stipulation. The District Court refused to apply Community School District of Postville v. Gordon N. Peterson, 176 NW 2d 169 (Iowa 1970), which case holds that the affect of the liability of joint tortfeasors of a prejudgment release executed in favor of one of the tortfeasors depends upon the intent of the parties. Thus, Volkswagen was entitled to summary judgment unless plaintiff could obtain some relief with respect to the old Burkle judgment and its satisfaction by counsel for plaintiff.

However, the Court of Appeals held that the District Court erred in failing to hold an evidentiary hearing when it considered plaintiff's Rule 60 (b) motion to amend the Burkle judgment.

Kack v. United States, 570 F.2d 754 (C.A. Minnesota 1978)

A student pilot brought this action under the Federal Tort Claims Act, seeking damages against the United States for claimed negligent conduct of traffic controllers at the Rochester, Minnesota, airport which allegedly caused the student pilot to lose control and crash when he encountered wake turbulence created by a heavy aircraft which preceded his landing. Specifically, Kack alleged that the controllers, employees of the Federal Aviation Authority, (1) failed to provide him with adequate and timely notice of the existence of wake turbulence which caused his aircraft to crash as he was attempting to land it; (2) failed to provide enough space between his aircraft and the aircraft which preceded him in landing and caused the wake turbulence; and, (3) failed to warn him of his precariously low altitude in relation to the wake turbulence hazard created by the other plane.

The District Court denied recovery, and Kack appealed.

Held: Affirmed.

1. The pilot of the airplane bears principal responsibility to see and avoid the hazard of wake turbulence. It is well settled that under VFR (Visual Flight Rule) conditions the primary responsibility for safe operation of the aircraft rests with the pilot, regardless of traffic clearance.

2. Traffic controllers do have some duty of due care toward the pilots and aircrafts they direct and situations may arise where the duty is violated such as where a plane crashes due to wake turbulence, because the controllers negligently order the plane to fly close to a much heavier plane creating the turbulence. This, however, was not the situation in this case. Plaintiff was advised by the control tower that he was to follow a "heavy 707 aircraft" and to use "caution due to wake turbulence."

Lunsford v. United States, 570 F.2d 221 (C.A. South Dakota 1977)

This action was brought as a class action against the United States under the Federal Tort Claims Act. The named plaintiffs either themselves lost property or are heirs at law, next of kin or court-appointed representatives of persons who died or lost property in the flood which occurred in Rapid City, South Dakota, on June 9, 1972. They sought to bring this action on behalf of all persons who lost their lives and property as a result of the flood which caused substantial property damage and resulted in 283 deaths.

The plaintiffs alleged that the flood was directly and proximately caused by excessive rains produced by cloud seeding at a time when threatening weather conditions were present. The experimental cloud seeding program was conducted by the South Dakota School of Mines and Technology under contract with the Bureau of Reclamation, Department of Interior.

On June 7, 1974, the named plaintiffs filed administrative claims with the Bureau of Reclamation. In addition,

to the individual claims, each claim stated that it was further filed as a class claim and action on behalf of all persons who sustained damage proximately caused by the flood. The claims were denied by the Department of Interior on December 4, 1974.

The named plaintiffs then filed their class action in the United States District Court. Neither the administrative claims nor the complaints stated the total amount of damages incurred by the entire class.

The United States moved to dismiss the class action for lack of subject matter jurisdiction under the Federal Tort Claims Act. The District Court dismissed the action as a class action. The Court then granted the plaintiffs permission to file an interlocutory appeal.

Held: Affirmed. The class action suit was properly dismissed.

Maintenance as a Class Action

1. The Federal Tort Claims Act, 28 USC Section 2675(a), requires that a claim be properly presented to the appropriate federal agency and denied before an action can be brought in Federal District Court. The administrative exhaustion requirement of 28 USC Section 2575(a) is jurisdictional, and thus, it cannot be waived.

2. The clear purpose behind the administrative exhaustion requirement of the Federal Tort Claims Act is to encourage prelitigation settlement and the various governmental agencies are given broad authority to settle the claims.

3. A class action can be maintained under the Federal Tort Claims Act if each of the claimants have individually satisfied all of the jurisdictional requirements. Alternatively, a class action can also be maintained if a class claim has been filed which names the individual claimants, asserts and establishes the authority of the named claimant (or claimants) to present claims on behalf of the unnamed class members, states the total amount

of the claim for the entire class and otherwise satisfies the jurisdictional requirements. Neither alternative was satisfied here. The administrative claims filed here did not adequately present the claims of the unnamed class members. Not all of the claimants were identifiable; none of the named plaintiffs asserted authority to present claims on behalf of the unnamed class members; and no sum certain was stated with respect to the class claims so that the government could evaluate the claim for possible settlement.

United States v. Fleming, 566 F.2d 623 (C.A. Missouri 1977)

The plaintiff was injured on April 29, 1970, while operating a flat work ironer in the laundry where she had been employed for about two weeks. At the time of the plaintiff's injury, the ironer had no protective finger guard of any kind. She brought this product's liability action against the manufacturer of the ironer, alleging that the defendant was liable for her injuries under theories of strict liability and negligence. The jury returned a verdict for the defendant. The plaintiff appealed.

Plaintiff contended on appeal that the trial court erred in allowing the defendant to refer to, and read certain Missouri statutes. Plaintiff contended that the defendant injected a false issue in the proceeding by referring to her employers alleging criminal conduct in removing the finger guard when there was no evidence of the employer's arrest or conviction.

The evidence indicated that the ironer, as designed and sold in 1930, was equipped with a finger guard connected to a clutch mechanism so that when the finger guard was pushed, the clutch was disengaged and the ironer would stop. The finger guard had been removed and the clutch rendered inoperable apparently by the plaintiff's employer.

Missouri statutes make it a misdemeanor for an employer to fail to safely and securely guard machinery which is placed so as to be dangerous to employees.

Defendant's counsel made reference to these statutes in his opening statement, read the statutes into evidence and referred to them again during a final argument. Plaintiff objected to the opening remarks, because the statutes were not listed as exhibits and to the reading of the statutes, because they were prejudicial and irrelevant, since there was no conviction of "this defendant." The trial court overruled those objections.

Held: Affirmed.

1. The general rule is that the introduction into evidence of domestic statutes (or law) is wholely improper.

2. The proper procedure in this case would have been for the trial court to judicially notice the statutes, instruct the jury as to their applicability, and prohibit the reading of the statutes or reference to their criminal aspects.

3. However, failure to follow the above procedure is not grounds for granting a new trial or disturbing a verdict unless the result is "a plain miscarriage of justice" or "inconsistent with substantial justice." See Federal Rule of Civil Procedure 61. The references to the alleged criminal conduct of plaintiff's employer should not have been allowed; however, the defect in the proceeding did not affect the substantial rights of the parties and must be disregarded.

Tureen v. Equifax, Inc., 571 F.2d 411 (C.A. Mo. 1978)

Tureen brought this action for damages resulting from an alleged invasion of his privacy by Equifax, Inc. The U. S. District Court for the Eastern District of Missouri entered judgment on a jury verdict in favor of the plaintiff in the amount of $5,000.00. On appeal, defendant contended that the trial court erred in denying defendant's motion for a directed verdict at the close of the evidence.

Held: Reversed and remanded. The District Court

erred in denying the defendant's motion for directed verdict at the close of the evidence.

1. The basis of the right of privacy is the right to be let alone.

2. In establishing conditions of liability for the invasion of the right of privacy, it is necessary to harmonize individual rights with community and social interests. There must be a balancing of public and private interests.

3. Restatement (2nd) of Torts, Sections 652A through 652E (1977): The right of privacy is invaded by (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of the other's name or likeness, (3) unreasonable publicity given to the other's private life, (4) publicity that unreasonably places the other in a false light before the public.

4. Where in order to make an informed judgment it is necessary for the decision-maker to have information which normally would be considered private, and information is legitimately related to legitimate purposes of the decision-maker, the public interest provides the defendant with a shield, similar in principle to a qualified privilege in libel, for invasion of privacy purposes. Thus, the court concluded that defendant did not invade plaintiff's privacy merely by collecting and retaining his past insurance history, because there was a legitimate purpose for the collection and even disclosure, in certain circumstances, of an individual's past insurance history.

5. The fact of proper collection and retention, however, does not mean that its disclosure by the reporting company was proper. Indiscriminate publication of private information unrelated to any legitimate public purpose could, and should, give rise to an action for invasion of privacy.

6. The Restatement (2d) of Torts, Sec.

652D (1977), articulates the tort of public disclosure of private facts by stating that "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

"Publicity" as it is used in this section differs from "publication" as that term is used in connection with liability for defamation. "Publication", in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity", on the other hand, means that the matter is made public by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

7. Since the evidence in this case reveals only a disclosure by defendant to its client, All-American Insurance Company, without further dissemination of the information about plaintiff, the court concluded that the District Court erred in denying the defendant's motion for directed verdict at the close of the evidence.

United States v. LePatourel, 571 F.2d 405 (C.A. Neb. 1978)

Injured automobile accident occupants brought an action in State Court against a Federal district judge whom they claimed was negligent in the operation of his vehicle while on official business for the United States. As directed under the Federal Tort Claims Act, the United States substituted itself as party defendant and removed the cases to federal court. Plaintiffs filed motions for remand and

for reconsideration of the District Court's Order of Substitution, asserting that Judge Denney was not an "employee of the government" for purposes of the Act. The United States opposed plaintiffs' motions and sought summary judgment based upon plaintiffs' failure to file administrative claims within 2 years as required by 28 USC 2401(b), 2675.

The District Court consolidated the cases and denied the United States' motion for summary judgment, holding that the federal judiciary is not within the purview of the Federal Torts Claims Act, and, therefore, (1) plaintiffs' actions were not barred for failure to file administrative claims under the Act, and, (2) removal to Federal Court under the Act was improper.

Held: Reversed and remanded to the District Court with directions to enter judgment for defendant.

1. The Federal Tort Claims Act, 28 USC Sections 1346B, 267180 applies to a federal judge performing an official but nonjudicial function.

2. Since at the time of the accident Judge Denney was operating his automobile on official business, and was receiving both mileage and per diem allowances from the United States government, and was acting within the scope of his governmental employment at the time of the accident alleged in the present case, plaintiffs' exclusive remedy was to file a claim with the administrative office of the United States Courts. See 28 USC Sections 2679(b), 2672. Plaintiffs failed to pursue that remedy within the 2-year Statute of Limitations and their action is, therefore, time-barred. 28 USC, Sections 2401(b), 2675(a).

Parker v. Seaboard Coastline R.R., 573 F.2d 1004 (C.A. Ark. 1978)

Plaintiffs brought two separate actions for wrongful death against A.C.F. Industries, Inc., the manufacturer of a hopper car, and Seaboard Coastline Railroad, the supplier of the hopper car, on theories of negligence and strict liability after plaintiffs'

decedents suffocated while unloading the hopper car of fertilizer. The cases were consolidated for trial by jury. At the close of plaintiffs' evidence, the trial court granted defendants' motion for directed verdicts and dismissed plaintiffs' complaints with prejudice. On appeal, plaintiffs contended that the Court erred in directing a verdict and should have submitted to the jury their cause against A.C.F. on the theory that the hopper car was negligently designed, and against Seaboard on the grounds that the car was defective so as to be unreasonably dangerous. The thrust of defendants' response was that aside from insufficient proof on negligence and defective conditions, plaintiffs failed to present proof sufficient to create a jury issue on proximate cause.

Held: The trial court erred in directing the verdict for the defendant. Reversed and remanded for new trial.

1. Evidence that hatchways on the top of the car were sometimes opened by workers who unloaded the car so they could see how close the compartment was to being empty, that it was sometimes necessary to open two hatchways, because the angle of light was such that it was too dark to see inside the compartment and on the morning of the accident, the foreman had opened one of the hatches for the purpose of confirming the type of fertilizer being shipped, demonstrated that it was reasonably forseeable that loading and unloading personnel would have occasion to climb on and enter into the hoppers.

2. Evidence that the top of the hopper car had too many hatches with large open areas into which one could accidentally fall, that there should be a grill or grating over each hatchway entrance, that there were no warnings on the hopper or the hatches to indicate the absence of an interior ladder where none existed, or warnings as to hazards, including commodity cave-in, suffocation, and entrapment, and that there should have been two ladders in each hopper to provide

adequate egress from the hopper in case of accidental fall into the car or the need to escape was sufficient to permit a finding that the manufacturer of the hopper was negligent in designing it.

3. The issue of proximate cause is generally for the jury. It may, of course, be shown by circumstantial evidence as well as by direct proof. Without an eyewitness, the jury may draw any conclusion from circumstancial evidence which is within reasonable probability. (Iowa test the same, Ford Motor Company v. Mondragon, 271 F.2d 342, 345 (8th Cir. 1959). It is not necessary in establishing a necessary fact by circumstantial evidence that a party upon whom the burden of proof rests shall present evidence to dispel all contradictory inferences. It is necessary, however, that such party produce evidence of facts and circumstances which may be accepted by the trier of the fact as establishing with reasonable certainty the truth of the inference contended for.

Voegeli v. Lewis, 568 F.2d 89 (C.A. So. Dakota 1977)

Medical malpractice suit resulted in a jury verdict in favor of the defendant doctor and the defendant hospital in which the treatment occurred.

On Saturday, May 27, 1972, plaintiff Voegeli fell off a motorcycle and injured his right leg. Plaintiff was taken to the hospital by friends and approximately one-half hour after arriving was seen by defendant Dr. Lewis in the x-ray room. Defendant Lewis read the plaintiff's x-rays and ordered him admitted to the hospital. According to defendant Lewis' report, plaintiff had suffered a fracture of the medial condyle of the right tibia and hemarthrosis of the right knee.

Defendant Dr. Lewis was called back to the hospital at 6:45 p.m., that same evening. He was informed that plaintiff's leg appeared slightly mottled and that the patient complained that his toes felt cold and he was unable to move them. At 7:05 p.m.,

defendant Lewis examined the plaintiff again.

On Monday morning, May 29, 1972, defendant Dr. Lewis put plaintiff in a full cast leaving the toes exposed. Because of complaints that he was in constant pain, the cast was removed on Thursday morning, June 1, 1972, and the plaintiff was informed that Dr. Lewis and another doctor would perform exploratory surgery. After surgery, plaintiff was told that due to impaired circulation it would be necessary to amputate part of his leg. On Saturday, June 3, 1972, plaintiff's leg was amputated at the knee joint.

Plaintiff and his wife subsequently instituted this action against Dr. Lewis and Methodist Hospital, alleging that the negligent failure of the defendants to follow good medical practice proximately caused the amputation of plaintiff's leg. The case was tried to a jury which returned verdicts in favor of both defendants. Following entry of judgment on these adverse verdicts, and the denial of their motion for a judgment notwithstanding the verdict and for a new trial on the issue of damages, or in the alternative for a new trial, the plaintiffs brought this appeal.

Held: Judgment affirmed as to Methodist Hospital, but reversed and remanded for new trial as to defendant Lewis.

Motion for Judgment N.O.V.

1. In passing upon a Motion for Judgment N.O.V., the trial court and the appellate court are: (1) to consider the evidence in the light most favorable to the party prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved in favor of the prevailing party; (3) to assume as proved all facts which the prevailing party's evidence tends to prove; (4) to give the prevailing parties the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and, (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusion to be drawn from it.

2. The court found conclusive proof of the defendant doctor's negligence. However, despite this negligence, the court held that the jury could have found that such negligence did not proximately cause the loss of plaintiff's leg. Since the evidence on the issue of proximate cause was not conclusive, the court affirmed the denial of plaintiff's Motion for Judgment N.O.V.

Motion for New Trial

1. In reviewing the District Court's Order denying a new trial, the appeallate court ordinarily defers to the discretion of the District Court and reverses only upon a strong showing that such a discretion has been abused.

2. A District Court has very wide discretion in handling pre-trial discovery and the appellate court is most unlikely to fault its judgment, unless, in the totality of circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

3. A party who has responded to every discovery request has a continuing duty to make seasonable supplemental responses with respect to the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is to testify, and the substance of his testimony. There is a similar duty to amend a prior response seasonably if the party obtains information upon the basis of which he knew that the response was incorrect when made.

4. The Defendant's failure to supplement responses to plaintiffs' interrogatories unfairly prejudiced the plaintiffs in the presentation of their case and the plaintiffs were, thus, entitled to a new trial of their claims against Defendant Dr. Lewis. (In this case, the Defendant Lewis produced two expert witnesses who testified at trial. The first doctor testified on behalf of Defendant Lewis even though defendant had indicated in his answers to interrogatories

that this doctor had "rendered no professional opinion on any of the issues in the case and that it was uncertain if he would be called as a witness." This particular doctor had also assured the plaintiffs in writing that he had not been engaged as an expert and he did not expect to be called as a witness.

The second doctor who testified had changed his opinion since his deposition. Plaintiffs had no knowledge of this change in opinion until the trial when the doctor testified. His testimony was completely different as to subject matter and substance. For example, at deposition he had stated that Defendant Dr. Lewis could not have found a pulse as he claimed; that it was impossible. At trial, the doctor testified that the defendant doctor could have found a pulse in plaintiff's leg from a "collateral source."

Pritchett v. Kimberling Cove, Inc., 568 F.2d 570 (C.A. Missouri, 1977)

This action was commenced by Mr. and Mrs. Joseph Pritchett, the parents of Margaret Pritchett, the seriously injured minor operator of a boat owned by her parents, for medical expenses incurred for Margaret Pritchett, loss of services, and damages to the boat. The defendants were the minor driver of the other boat, Scott Clifton, Recreation Unlimited, Inc., Kimberling Cove, Inc., and Charles J. Dando, President of both corporations. Kimberling was a defendant on the theory that it negligently entrusted the boat to Scott Clifton. Recreation was a defendant on the theory that it operated as a joint enterprise with Kimberling.

The District Court found that Kimberling negligently entrusted the boat to Scott Clifton and judgment was entered against Kimberling. Regarding Recreation, the District Court concluded that there was no joint enterprise between it and Kimberling and, therefore, held that there was no joint liability with Kimberling. Appeal followed.

Negligent Entrustment Issue

1. Restatement (2d) of Torts, Sec. 390

(1965) provides: CHATTEL FOR USE BY PERSON KNOWN TO BE INCOMPETENT "one who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely, because of his use, inexperience or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and to others whom the supplier should expect to share in or be engaged by its use, is subject to liability for physical harm resulting to them.

2. Four elements of proof are necessary to establish negligent entrustment: (1) entrustment of a chattel (directly or through a third party) to another; (2) likelihood that the person to whom the chattel is entrusted will, due to his youth, inexperience, or otherwise, use the chattel in a manner involving an unreasonable risk of harm to himself and others; (3) knowledge of the entrustor (actual or imputed) of such likelihood; and (4) proximate cause of the harm to the plaintiff by the conduct of the entrustee.

3. One who supplies a chattel for the use of another who knows its exact character and condition is not entitled to assume that the other will use it safely if the supplier knows or has reason to know that such other is likely to use it dangerously, as where (1) the other belongs to a class which is notoriously incompetent to use the chattel safely, or (2) lacks the training and experience necessary for such use, or (3) the supplier knows that the other has on other occasions so acted that the supplier should realize that the chattel is likely to be dangerously used, or (4) that the other, though otherwise capable of using the chattel safely, has a propensity or fixed purpose to misuse it."

Held: The District Court correctly concluded that Kimberling was liable for harm suffered by the plaintiffs under the theory of negligent entrustment.

Joint Enterprise Issue

1. According to Restatement (2d) of Torts, Sec. 491 (1965), the term "joint enterprise" includes a partnership, but it is broader and extends to a cooperative undertaking to carry out a small number of activities or objectives, or even a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise. Each is considered the agent or servant of the others, so that the act of any member within the scope of the enterprise is charged vicariously against the rest. Thus, when the negligence of a member of a joint enterprise (acting within the scope of the enterprise), causes harm to a third person, such negligence is imputed to all other members, who become mutually liable.

Held: The District Court erred in failing to conclude that the relationship between Recreation and Kimberling involving the rental motor boats constituted a joint enterprise.

United Barge v. Notre Dame Fleeting & Towing, 568 F.2d 599 (C.A. Mo. 1978)

Action was brought to recover damages resulting from the sinking of a barge which, after being discovered aground on ice, broke in half during wheelwashing efforts to free it. The U. S. District Court for the Eastern District of Missouri entered judgment in favor of plaintiff and defendants appealed. The court of appeals held that: (1) the District Court's finding that the fleet operator should have become aware of the ice buildup under the barge's hull in time to have taken preventive action was not clearly erroneous, and (2) although the time pressure may have rendered the entire process more difficult and concommitently more hazardous, substantial evidence supported the District Court finding that the defendants fell short of the ordinary care reasonably required under the circumstances. Judgement affirmed.

1. An inference of negligence arises when a seaworthy vessel is delivered to a bailee in good condition but is returned damaged.

2. Once the bailment relationship is established and the bailor proves the vessel was "seaworthy" when delivered, the bailee will be found liable for the damage to the vessel unless he comes forward with evidence that the damage resulted from causes or circumstances other than from his own negligence. The burden of producing evidence is then cast upon the bailee, because he is generally in a better position than the bailor to know the cause of the loss and to show it was not involving the bailee's liability.

Buckeye Cellulose Corporation v. Braggs Electric Construction Company, 569 F.2d 1036 (C.A. Ark. 1978)

This is an appeal from the District Court's order denying the plaintiff's uncontested motion under Federal Rule of Civil Procedure 60(b)(6) to vacate and re-enter a judgment so as to permit an appeal on the merits.

In this diversity action, plaintiff sought a declaratory judgment that defendant was obligated to indemnify Buckeye for money paid in settlement of personal injury claims asserted against it by Braggs' employees. Both sides filed motions for summary judgment which were argued and taken under submission by the District Court on January 12, 1976. Between February 1 and March 15, 1976, plaintiff's counsel inquired three times at the office of the Clerk of Court regarding the status of the case. Each time counsel was told that no judgment or order had been entered and further that the parties would be notified promptly when a decision was received from the district judge. On April 1, 1976, the District Court's judgment and opinion were received and filed in the Clerk's office. Neither the counsel nor the parties, however, were notified of this action.

On March 28, 1977, counsel for both parties learned for the first time of the judgment entry on April 1, 1976. The Clerk's office acknowledged that through its neglect, the judgment had not been

forwarded to counsel. On April 13, 1977, plaintiff filed a motion to obtain an extension of time to permit an appeal. On April 22, 1977, the District Court filed its Order denying the motion, because it was without jurisdiction to extend the time for appeal. On May 13, 1977, plaintiff filed a Motion for Reconsideration based upon Federal Rule of Civil Procedure 60(b)(6). On June 6, 1977, the District Court denied the motion for the same reason the Court felt it was without jurisdiction to grant the relief sought.

Held: Reversed and remanded with directions to the District Court that its Order of April 1, 1976, be vacated and re-entered.

1. The District Court believed it was without jurisdiction to extend the time for appeal in this case, because of FRCP 77(d). That Rule provides in part:

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. . . . Lack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

2. On its face, Rule 77(d) appears to bar the relief sought by plaintiff. However, Rule 77(d), must be read together with FRCP 60(b)(6) which provides that, upon motion and under such terms as are just, the District Court may relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment." The Supreme Court has noted Rule 60(b)(6) vests power in courts adequate to enable

them to vacate judgments whenever such action is appropriate to accomplish justice. The judgment should be vacated and re-entered.

Lisa-Jet, Inc. v. Duncan Aviation, Inc., 569 F.2d 1044 (C.A. Neb. 1978)

Owner of a jet which was destroyed in a crash brought this action against the defendant corporation which provided flight instruction to prospective employee of the owner. The U. S. District Court for the District of Nebraska entered a directed verdict in favor of the defendant corporation which had provided the flight instruction, and the owner appealed.

The court of appeals held that: (1) the defendant corporation which provided the flight instruction could not be held liable on the theory that its instructor was responsible for any negligence in the operation of the aircraft, where it could not be determined whether the instructor or prospective employee of the owner was piloting the jet at the time of the crash and where both individuals were capable of operating the jet at the time of the accident (2) the defendant corporation which provided flight instruction could not be held liable on the theory that the accident was caused by independent acts of negligence on the part of its instructor, where an inference of negligence on the part of the instructor could only be made through conjecture and speculation.

1. Lisa-Jet contended that even in the absence of proof of specific acts of negligence on the part of the defendants flight instructor, negligence concepts imposed liability on the defendant, his employer, by virtue of the instructor relationship which existed at the time of the flight in question. In effect, the plaintiff asserted that the instructor was the pilot-in-command of the aircraft at the time of the accident and is vicariously liable for any negligence which was a proximate cause of the accident regardless of proof as to which person was piloting the plane at the time of the crash. Plaintiff cited Lang v. Nelson-Ryan

Flight Service, Inc., 259 Minn. 460, 108 NW 2d 428 (1961), as a case holding that the instructor, as the pilot-in-command, is responsible for any negligence in the operation of an aircraft, regardless of whether or not it could be established that he was in actual operation of the controls at the time.

2. However, the pilot-in-command theory was rejected here where both instructor and student were capable of operating the aircraft at the time of the accident. Mitchell v. Eyre, 190 Neb. 182, 206 NW 2d 839 (1973). To recover the plaintiff must prove who was piloting the plane at the time of the crash. Otherwise, any conclusions as to negligence would be based upon surmise and conjecture. An issue depending entirely upon speculation, surmise or conjecture is never sufficient to sustain a judgment. The mere fact that the accident happened does not give rise to an inference of negligence on the part of anyone.

Weber v. Towner County, 565 F.2d 1001 (C.A. North Dakota 1977)

Persons who were injured when their converted school bus-camper ran into a washout on a township road, brought this action against the township and the county. The county's motion for a summary judgment was granted by the District Court and plaintiffs appealed.

The plaintiffs asserted that Towner County was negligent in failing to repair the road or provide adequate warning of its defective condition. They claimed that the county's duty to exercise reasonable care arose out of (1) a contract to repair the road made by a county commissioner and a township supervisor; (2) Towner County's action in undertaking to place a warning sign and repair the road. The plaintiffs contended that there existed a lawful and enforceable oral contract between the county and township to repair the road, though it may have been procedurally defective, because of its

lack of formal approval by the Towner County Board of Commissioners. Plaintiffs further maintained that even had there been no formal contract, the county road crew, in fact, commenced the repair work and ultimately completed it with the county receiving payment for it, and having undertaken performance of the project, the county thereby assumed a duty to exercise reasonable care in the service it provided.

Held: Reversed. The District Court erred in granting the county's motion for summary judgment. Factual issues present in this case should have been tried to the court or submitted to the jury.

1. In the present case there was an ongoing arrangement under which Towner County road crews provided road services to the township. The county sought and received payment for the services. The arrangement was not an isolated occurrence, but followed the standard procedure established by the parties during a long-term course of dealing which by its very nature must have been familiar to the County Board of Commissioners. Under these circumstances, the county could have been found liable under any of the following theories:

   A. Implied Contract. A contract may be implied giving rise to liability on the part of a governmental unit even where there are procedural defects in the formation of the contract, such as a failure to fully comply with the procedures statutorily prescribed for the governmental unit to enter that contract.

   B. Agency by Ratification. A valid ratification requires that the principal have power to confer authority for the act being ratified. Here, the County Board of Commissioners clearly had statutory authority to appoint one particular commissioner to deal with this problem. Failure by the Board to formally pass upon each and every road service job

provided by the county and paid for by the township throughout the years need not negate the presumption of ratification of the well-established business practice which arises from the Board's failure to repudiate the arrangements or to terminate such road repair services to the township.

C. Acquiescence. The unauthorized act of an agent purportedly done for the benefit of a principal can be subsequently ratified by the purported principal, either expressly or by implication through conduct of the principal which is inconsistent with an intention to repudiate the agent's actions. The long silence of the County Board of Commissioners without repudiating the arrangement with the township showed that the Board acquiesced in the course and manner of this business.

D. Implied Agency. An agency may be shown by circumstances such as the relation of the parties to each other and their conduct with reference to the subject matter of the particular contract, as well as a previous course of dealing with the subject matter. The course of conduct here was sufficient to raise the issue of implied agency.

E. Agency by Estoppel. A principal cannot disaffirm the authority of its agent to make a contract, and at the same time retain the benefit of his unauthorized act.

F. Quasi-contract. Regardless of whether an agency, either express or implied, existed under these circumstances, a contract obligation on the part of the county to repair the washout and to do so with due care may be found to have arisen as a matter or quasi-contract,

whereby a contract may be imposed by law in order to bring about justice and fundamental fairness.

G. Estoppel-contract. By virtue of the fact that the County Board of Commissioners was aware of the course of business conducted by one of its commissioners and the township and did nothing to prevent the county from retaining payment and even receiving federal funding for the repair of the washout, principles of equity may dictate that a binding contract be found between the county and township and that the Board be estopped from denying liability for the events which transpired during the transaction.

2. The plaintiffs' contention that Towner County was negligent in failing to repair the washout or to provide adequate warning of the defective condition in the road also presented issues for trial. It is a basic tenant of tort law that an acter who may or may not have a duty to act, must, if he acts at all, exercise reasonable care to make acts safe for others. Restatement (2d) of Torts, Section 324A.

Nielson v. Armstrong Rubber Co., 570 F.2d 272 (C.A. North Dakota 1978)

Action was brought against Armstrong to recover for injuries sustained when a tire exploded while being mounted by the plaintiff. The District Court entered judgment on a verdict for the plaintiff, and the manufacturer appealed.

On appeal, Armstrong contended that (1) it was prejudiced by an amendment to the plaintiff's complaint, made at the close of the evidence, which added strict products liability to a negligence claim already alleged; and, (2) that the District Court erroneously permitted the testimony of plaintiff's expert, Dr. Kurt.

Held: Affirmed.

1. No prejudice to Armstrong resulted from the fact that the District Court permitted plaintiff to amend the complaint at the close of the evidence to add products liability to the already-alleged negligence claim. While strict products liability had been discussed at pre-trial and plaintiff specifically stated he was relying only on ordinary negligence, the plaintiff submitted a pre-trial memorandum citing the law of strict products liability. At trial, the plaintiff's attorney asked his expert whether, in the expert's opinion, the tire was a dangerous instrument and whether there was a warning on it. The defendant specifically offered evidence in defense of this theory and had actual notice that plaintiff was partially relying on strict products liability. In such circumstances, the defendant was not prejudiced by the amendment.

2. District courts have wide discretion in determining whether to exclude expert testimony. The extent of a witness's knowledge of matters about which he offers to testify go to the weight rather than the admissibility of the testimony. The District Court properly admitted the testimony of Dr. Kurt as to the vulcanizing process at defendant's plant causing the defect in the tire. This was proper even though Dr. Kurt admittedly had never seen a vulcanizer.

Holmquist v. Volkswagen of America, Inc., 261 NW 2d 516 (Iowa Ct. Apps. 1977)

This products liability action was brought against a manufacturer and dealer of an automobile which overturned and caused injuries to the plaintiff, who was a passenger in the car. Liability was based upon a defective steering mechanism. Defendant appealed a judgment rendered for plaintiff in the amount of $498,000.00.

The product in question was a 1970 Prosche 914 automobile. Plaintiff was riding as a passenger in the Porsche automobile when it left the road

and overturned on an "S" curve. At the time of the accident, the car had been driven 229 miles. Plaintiff was, at the time of the accident, a paraplegic, the result of being shot in the back 7 years earlier. He was paralyzed below the 10th thoracic vertebra, at which level the spinal chord was severed by the gunshot. He was able to get about by use of a wheel chair and a specially-equipped car. The injuries received in the automobile accident consisted of multiple fractures of the pelvis and lower right leg. Subsequently, it was discovered that he had a severed urethra; however, there was dispute whether it occurred in the accident or before. Due to the fractures and complications ensuing from the paralysis, plaintiff's right leg was amputated between the knee and hip. Plaintiff also developed decubitis ulcers which required skin-grafting.

Held: Affirmed. Review denied by the Supreme Court December 16, 1977.

1. In this action against the manufacturer and retailer of an automobile which overturned causing injuries to the occupants, the jury was entitled to consider the changes made by the defendant in tightening the retention bolts on the Porsche automobile after the accident. This action denied the plaintiff the opportunity to examine the car regarding this specific defect in the steering mechanism. "Spoliation of evidence raises a presumption against the spoliator."

2. A letter to customers composed by Volkswagen for use by dealers which indicated that the retaining bolt for the steering gear and lock rings should be reviewed, since under continued driving such bolts might loosen resulting in serious impairment of steering control, was entitled to full probative value by the jury. Defendant contended that this evidence had no probative value, because it did not prove a specific defect in the car in question. However, the letter did show the result of loosened bolts, i.e., a serious impairment of steering control. As such, it is entitled to full probative value by the jury.

3. Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature to aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. However, sufficient data must appear upon which an expert judgment can be made, and if absent, the opinion is incompetent. The receipt of opinion testimony rests largely in the discretion of the trial court, and its ruling will not be disturbed absent manifest abuse of that discretion.

4. In tort cases for personal injuries, impairment of future earning capacity is a distinct item of damage. Such impairment is measured by the present value of the loss of impairment of general earning capacity, rather than the loss of wages or earnings in a specific occupation. In determining the amount of loss, consideration may be given to evidence of wages and earnings of the plaintiff prior to the injury.

5. Impairment of physical capacity creates an inference of lessened earning ability in the future. Medical testimony is admissible in support of this element of damage, but not always essential. The basic element to be determined in the matter of claimed impairment of future earning capacity is a reduction in value of the power to earn, not the difference in earnings received before and after the injuries.

6. An award of $498,000.00 to a 27-year-old paraplegic who had been paralyzed below the 10th thoracic vertebra was not excessive where, as a result of the automobile accident, he sustained multiple fractures of his right leg and pelvis and ultimately underwent amputation of his right leg; that a severed urethra was discovered; where he was confined in bed flat on his back for 6 weeks due to pelvic fracture;

where he developed various ulcers which required treatment; that he was unable to walk with crutches or braces due to paralysis and amputation between the hip and the knee; where medical and hospital expenses at the time of the trial amounted to $11,298.07; and where the plaintiff sustained a loss of earnings in the amount of $32,890.00 and loss of future earnings in the amount of $227,240.00.

Northrup v. Archbishop Bergan Mercy Hospital, 575 F.2d 605 (C.A. Neb. 1978)

This diversity action was instituted against the hospital to recover damages on the theory that the hospital, through its negligence, permitted the plaintiff's father, while a confused and disoriented patient, to leap to his death from his 5th story hospital window. The District Court denied the hospital's motions for directed verdict, judgment notwithstanding the verdict and a new trial and entered judgment in accordance with a jury verdict awarding the plaintiff $30,000.00.

In this appeal, the hospital contended that the District Court should have granted its motions for a directed verdict, judgment notwithstanding the verdict, or alternatively, a new trial, because the plaintiff failed to produce sufficient expert testimony establishing her claim for relief.

Held: Affirmed.

1. Expert testimony is not legally necessary when the conclusion to be drawn from the facts does not require specific, technical or scientific knowledge and the circumstances surrounding the injury are with the common experience, knowledge, and observation of laymen. Here the plaintiff alleged that the hospital was negligent in (1) failure to install guards or locks on its windows; (2) failure to adequately restrain and secure the decedent; (3) failure to supervise the decedent properly while he was a patient; and (4) failure to keep the treating physician sufficiently informed

of the decedent's mental condition. These allegations are within the comprehension of laymen and required only common knowledge and experience.

Luster v. Retail Credit Company, 575 F.2d 609 (C.A. Arkansas 1978)

This libel action was brought against the defendant Mercantile Agency arising out of false statements contained in a Fire and Mercantile Report compiled for a customer.

Plaintiff was engaged in the ownership and operation of certain specialty restaurants. On February 26, 1975, one of plaintiff's restaurants was severely damaged by fire. This restaurant was insured by St. Paul Insurance Company through plaintiff's producing agent, Gatz Insurance Agency. After the fire, St. Paul requested that the producing agent find other coverage. The Gatz Agency was unsuccessful in placing coverage with other standard-grade companies. Finally, Bowes & Company in Dallas, Texas, agreed to accept coverage of the restaurant. Thereafter, Bowes & Company requested a Fire and Mercantile Report from defendant Retail Credit Company concerning plaintiff and his business.

Defendant compiled a Fire and Mercantile Report on plaintiff and his business. The report indicated that plaintiff had suffered a fire loss at his restaurant in Jonesboro. It was not expected to be reopened. Arson was suspected. The author had been unable to locate plaintiff, his business had been on the decline and he was delinquent on an indebtedness to the bank. The report was false in many material respects. The report was compiled on the basis of conversations with three individuals: an employee at the bank, a postal employee, and a former customer.

Upon receipt of this report, Bowes & Company cancelled plaintiff's insurance. Trial was commenced on December 6, 1976. A jury returned a verdict for plaintiff, awarding him $50,000.00 in compensatory damages and $100,000.00 in punitive damages.

Held: Affirmed in part, reversed in part.

1. Trial court did not err in holding that the defendant could be liable for all republications of the report which were reasonably forseeable. The courts are divided as to whether one accused of libel is liable for republication if it is shown that the republication was forseeable as a natural and probable consequence of the original publication. According to the law of Arkansas, a defendant can be liable for unauthorized republications if such republications were reasonably foreseable.

2. In a defamation case, mental anguish and embarassment are proper elements of damages. Whether such mental anguish was a natural and probable consequence of the actions of the defendant is a question for the jury.

3. The trial court did not err in submitting the question of whether the report was libelous per se to the jury. Under Arkansas law, a defamation is libelous per se if it charges the commission of a crime. The report in this case did not expressly state that the plaintiff was guilty of arson. However, the report did state that the author of the report had been unable to locate the plaintiff; that unusual circumstances surrounded the fire; investigation was continuing and a search was out for one particular party, but no arrests could be confirmed at the present time; and that the plaintiff's business had been on the decline for some time and he was behind in his loan payments to the bank. In construing whether words are actionable per se, the entire publication must be construed and the words taken as they are commonly understood. Reasonable minds could interpret the report as charging the plaintiff with the crime of arson and, thus, the trial court did not err in submitting this issue to the jury.

4. The defense of conditional privilege was available to the defendant in this case, because the report was made by a mercantile agency to a customer having an interest in the matter. In order

to render a verdict for the plaintiff, the jury had to find that the report was made with malice. The conditional privilege did not protect the defendant, because there was evidence from which the jury could find that the report was made with malice, i.e., reckless disregard of the consequences.

5. Defendant is correct in his contention that the jury's verdict in the amount of $50,000.00 in compensatory damages and $100,000.00 in punitive damages is excessive. Although the award of $50,000.00 compensatory damages is not excessive, the additional award of punitive damages was improper. In Arkansas, a jury may not give punitive damages unless it is shown that the defendant acted with actual ill will or express malice. The Arkansas rule is that "where the words spoken are actionable per se, prima facie the law implies malice, and the jury can award compensatory damages only; but cannot award exemplary or punitive damages without proof of express malice."

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