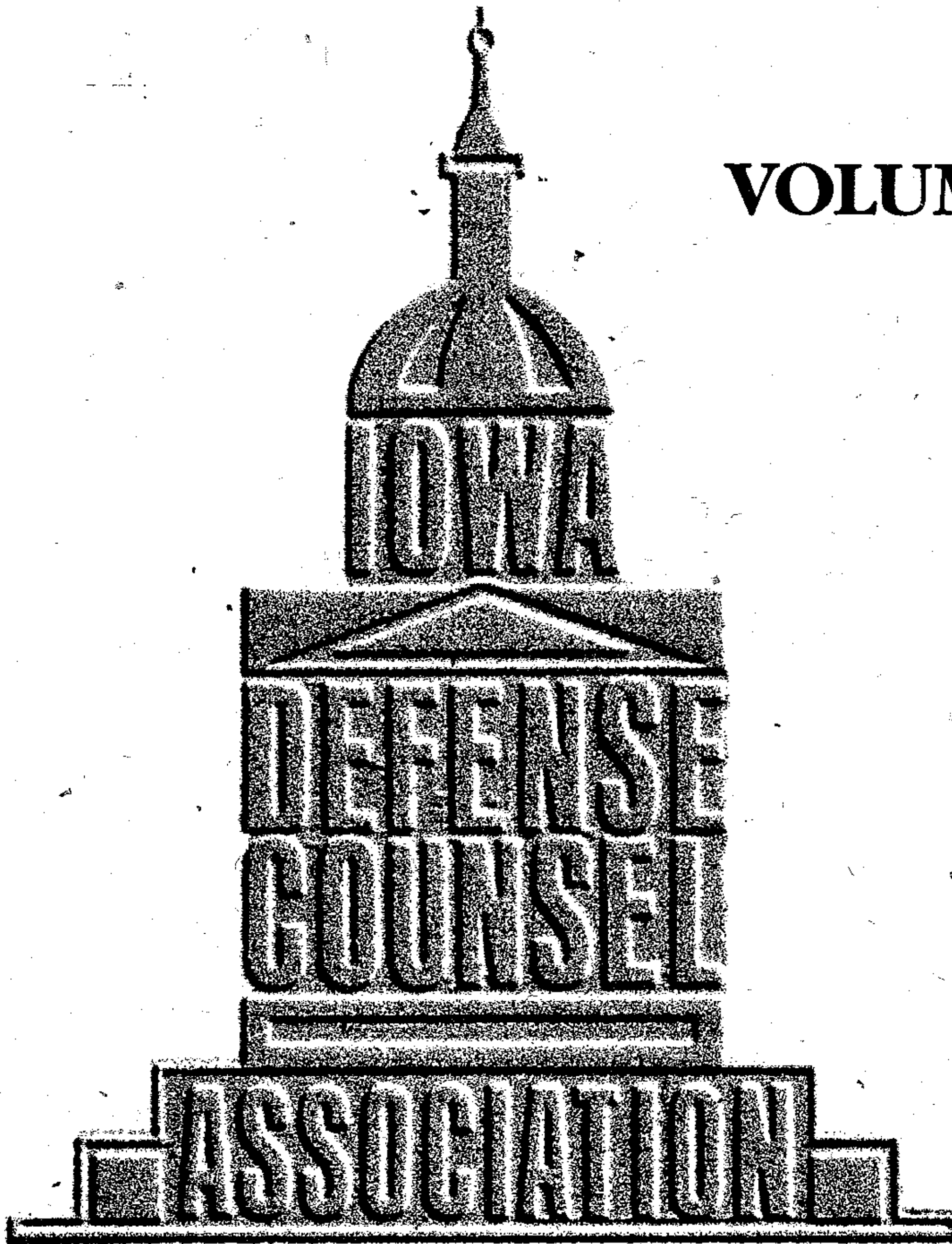
VOLUME 1



1995
ANNUAL MEETING

SEPTEMBER 20, 21, & 22
EMBASSY SUITES HOTEL ON THE RIVER
101 EAST LOCUST STREET
DES MOINES, IOWA 50309

1995 IOWA DEFENSE COUNCIL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 20

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Introduction and Report of Association

1:15 - 2:00 p.m. Daubert & Expert Rules
John C. Gray - Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, IA

2:00 - 2:45 p.m. Annual Appellate Update, Pt. 1
Steven L. Serck - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

2:45 - 3:15 p.m. Defamation and its Defenses in Iowa
Glenn L. Smith - Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, IA

3:15 - 3:30 p.m. BREAK

3:30 - 4:00 p.m. A Report on the First Joint Trial Academy-Training Young Lawyers
Robert D. Houghton - Shuttleworth & Ingersoll, Cedar Rapids, IA

Deborah J. Hughes - Irvine & Robbins, Cedar Rapids, IA

4:00 - 4:30 p.m. Tortious Interference: Elements and Defenses
Richard K. Whitty - O'Connor & Thomas, P.C., Dubuque, IA

4:30 - 5:00 p.m. Civil RICO
Brad J. Brady - Crawford, Sullivan, Read, Roemerman & Brady, Cedar Rapids, IA

5:15 - 8:00 p.m. COCKTAILS - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 21

8:30 - 9:00 a.m. Legislative Developments
Robert M. Kreamer - Whitfield & Eddy, Des Moines, IA

9:00 - 12:15 a.m. Employment Law
Jaki K. Samuelson - Whitfield & Eddy, Des Moines, IA

Mark L. Zaiger - Shuttleworth & Ingersoll, Cedar Rapids, IA

Constance A. Schriver - Lane & Waterman, Davenport, IA

10:15 - 10:30 a.m. BREAK

12:15 - 12:45 p.m. LUNCH

12:45 p.m. Supreme Court Report
Hon. Linda K. Newman - Iowa Supreme Court, Davenport IA

1:15 - 3:15 p.m. Women as Defense Council

1:15 p.m. Introduction:
Jaki K. Samuelson - Whitfield & Eddy, Des Moines, IA

1:25 p.m. Understanding Gender Bias I:
H. Richard Smith - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

1:50 p.m. Understanding Gender Bias II:
Janet Griffin - Blue Cross/Blue Shield of Iowa, Des Moines, IA

2:15 p.m. How Are We Doing In Iowa:
Judge James R. Havercamp - Chief Judge Seventh Judicial District, Davenport, IA

2:45 p.m. Looking to the Future:
Megan Antenucci - Whitfield & Eddy, Des Moines, IA

3:15 - 3:30 p.m. BREAK

3:30 - 4:15 p.m. Annual Appellate Update, Part II
Leonard T. Strand - Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA

4:15 - 5:00 p.m. Negotiation and Evaluation-Structured Settlements
Jerry Lothrop - Capitol Planning, Inc., St. Louis Park, MN

5:00 - 5:15 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:30 - 9:00 p.m. Reception and Banquet
GLEN OAKS COUNTRY CLUB
6:00 - 7:30 Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 22

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:15 a.m. Annual Appellate Update, Part III
Rex B. Staub - Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, IA

9:15 - 9:45 a.m. Ethics and Billing
Joseph C. Holland, Iowa City, IA

9:45 - 10:15 a.m. Client Relations, Imminent Pressure Points
Wendy N. Munyon - Grinnell Mutual Reinsurance Co., Grinnell, IA

Sharon Soorholtz Greer - Cartwright, Druker & Ryden, Marshalltown, IA

10:15 - 10:30 p.m. BREAK

10:30 - 11:00 p.m. Statistical Proof
Prof. David Baldus - University of Iowa, Iowa City, IA

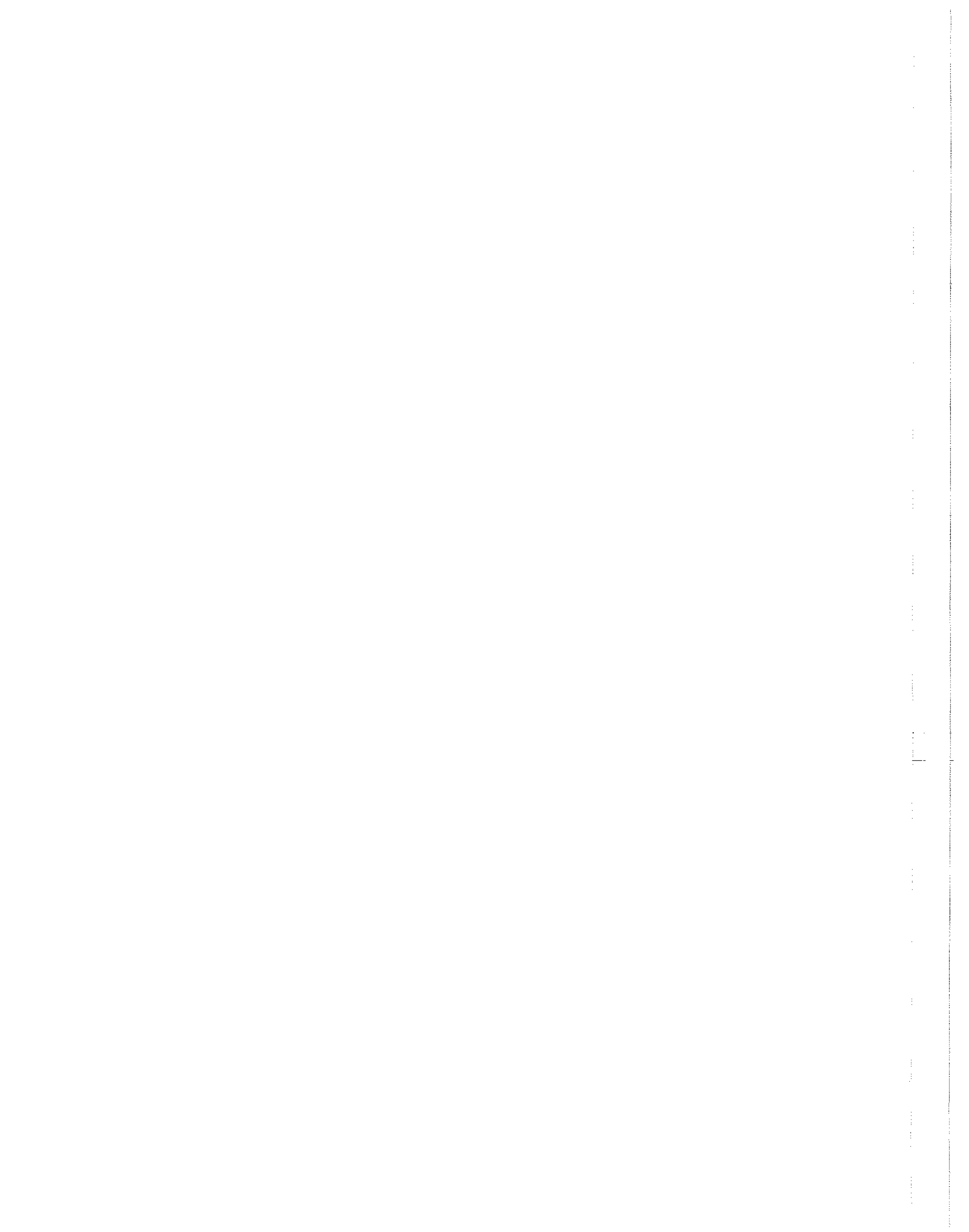
11:00 - 11:45 p.m. Deposition Dilemmas and Ethics of Effective Objecting
George S. Eichhorn - Eichhorn, Elverson & Vasey, Des Moines, IA

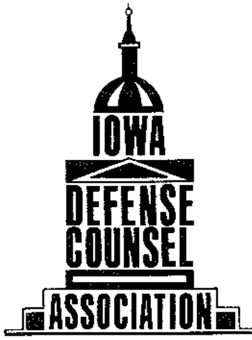
11:45 - 12:15 p.m. Attorney Advertising
Dorothy L. Kelley - Davison, Burnette & Kelley, Des Moines, IA

12:15 - 12:45 p.m. LUNCH

12:45 p.m. Federal Court Report
Hon. Michael Melloy - U.S. District Judge, N. Dist., Cedar Rapids, IA

1:15 - 2:00 p.m. Government Studies and Reports-When Are They Hearsay and When Are They Not
James W. Carney - Carney, Williams, Blackburn, Grask & Appleby, Des Moines, IA





OFFICERS AND DIRECTORS
1994 - 1995

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Gregory M. Lederer
1200 Merchants National Bank Bldg
Cedar Rapids, IA , 52401

PRESIDENT-ELECT

Charles E Miller
600 Davenport Bank Bldg
Davenport, IA , 52801

SECRETARY

Robert A Engberg
321 N. 3rd St.
Burlington, IA., 52601

TREASURER

DeWayne Stroud
5400 University Ave.
West Des Moines, IA., 50266

BOARD OF DIRECTORS
(DATE IS TERM EXPIRATION DATE)

DISTRICT I

Marion L. Beatty - 1996
301 W. Broadway
Decorah, IA , 52101

DISTRICT II

Stephen G. Kersten - 1997
P.O. Box 957
Fort Dodge, IA., 50501

DISTRICT III

Emmanuel S Bikakis - 1996
Suite 340, Insurance Exchange Bldg.
Sioux City, IA , 51101

DISTRICT IV

Gregory G Barnsten - 1997
P.O Box 249
Council Bluffs, IA., 51502

DISTRICT V

Robert L Fanter - 1996
1300 First Interstate Bank Bldg
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DISTRICT VI

Robert D. Houghton - 1997
P.O. Box 2107
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DISTRICT VII

Carol A. H Freeman - 1996
600 Davenport Bank Bldg.
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DISTRICT VIII

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P.O. Box 790
Grinnell, IA., 50112

AT LARGE

Jaki K. Samuelson - 1996
1300 First Interstate Bank Bldg.
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Michael W. Ellwanger - 1995
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David L. Brown - 1996
803 Fleming Bldg.
Des Moines, IA., 50309

James A. Pugh - 1996
5400 University Ave.
West Des Moines, IA., 50266

PAST PRESIDENTS

* Edward F. Seitzinger 1964 - 1965
* Frank W. Davis 1965 - 1966
  Donald J. Goode 1966 - 1967
  Harry Druker 1967 - 1968
* Phillip H. Cless 1968 - 1969
  Phillip J. Willson 1969 - 1970
  Dudley Weible 1970 - 1971
  Kenneth L. Keith 1971 - 1972
  Robert G. Allbee 1972 - 1973
  Craig H. Mosier 1973 - 1974

* Ralph W. Gearhart 1974 - 1975
  Robert V.P. Waterman, Sr. 1975 - 1976
* Stewart H. M. Lund 1976 - 1977
* Edward J. Kelly 1977 - 1978
  Don N. Kersten 1978 - 1979
  Marvin F. Heidman 1979 - 1980
  Herbert S. Selby 1980 - 1981
  L.R. Voigts 1981 - 1982
  Alanson K. Elgar 1982 - 1983
* Albert D. Vasey (Honarary) 1983

Harold R. Grigg 1983 - 1984
Raymond R. Stefani 1984 - 1985
Claire F. Carlson 1985 - 1986
David L. Phipps 1986 - 1987
Thomas D. Hanson 1987 - 1988
Patrick M. Roby 1988 - 1989
Craig D. Warner 1989 - 1990
Alan E. Fredregill 1990 - 1991
David L. Hammer 1991 - 1992
John B. Grier 1992 - 1993
Richard J. Sapp 1993 - 1994

IOWA DEFENSE COUNCIL FOUNDERS AND OFFICERS

* Edward F. Seitzinger
President

* D.J. Fairgrave
Vice-President

* Frank W. Davis
Secretary

Mike McCrary
Treasurer

William J. Hancock

* Edward J. Kelly

Paul D. Wilson

ANNUAL MEETING CHAIRPERSONS

General Program - DeWayne Stroud
Ginger Plummer

Program Chair - Charles E. Miller

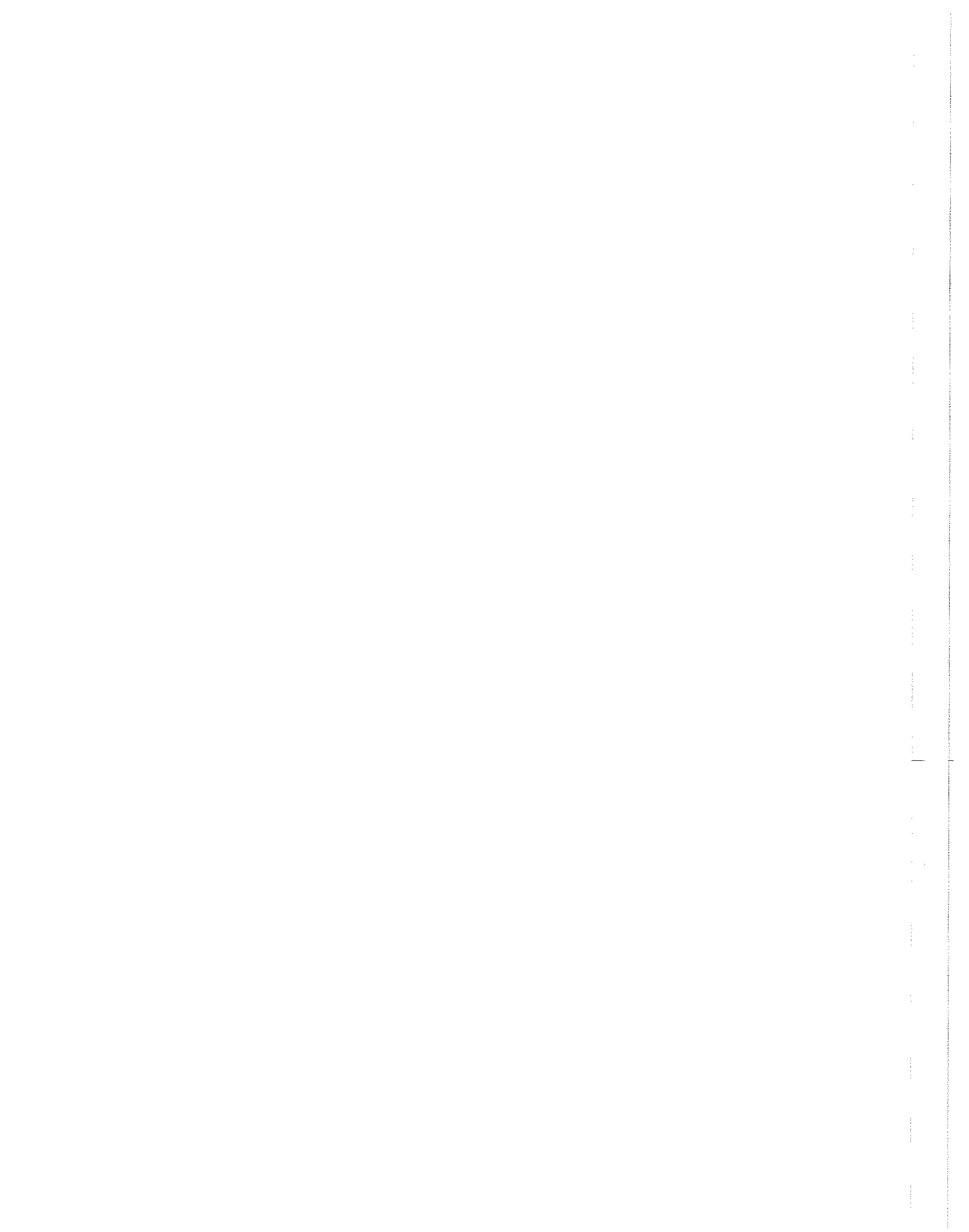
* Deceased

1995 ANNUAL MEETING
TABLE OF CONTENTS

	SECTION	PAGES
Annual Appellate Decisions Review Steven L. Serck, Leonard T. Strand, and Rex B. Staub	A	1 - 186
Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.* John C Gray	B	1 - 36
"Defamation and its Defenses in Iowa" Glenn L Smith	C	1 - 11
Joint Trial Advocacy College Schedule Deborah J. Hughes	D	1 - 2
Tortious Interference: Elements and Defenses Richard K Whitty	E	1 - 11
Civil Rico Overview & Developments Brad J. Brady	F	1 - 40
1995 Legislative Report Robert M. Kreamer	G	1 - 29
Employment Termination: Traditional and Evolving Sources of Employer Liability Mark L. Zaiger	H	1 - 28
Settlement of Potential and Pending Employment Claims Mark L Zaiger	H	29 - 40
Sexual Harassment Jaki K Samuelson	H	41 - 65
Violence in the Workplace Constance A Schriver	H	67 - 76
The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation Constance A. Schriver	H	77 - 89
Women as Defense Counsel Fact & Fiction Relating to Gender Bias in the Profession **Introduction** Jaki K Samuelson	I	1 - 3
The Trial Lawyer's Perspective H Richard Smith	I	5 - 8
The Client's Perspective Janet Griffin	I	9
How We Are Doing In Iowa Judge James R Havercamp	I	11 - 32
Gender Bias in the Legal Profession Megan M. Antenucci	I	33 - 65
Settlement Annuities - An Update on New Products, Ideas and Techniques Jerry C. Lothrop	J	1 - 51
Ethics and Alternative Billing Joseph C Holland	K	1 - 71
Client Relations: Imminent Pressure Points and the Resulting Ethical Problems Sharon Soorholtz Greer & Wendy N Munyon	L	1 - 6
Statistical Proof of Discrimination: An Overview David C Baldus	M	1 - 6
Deposition Dilemmas and the Ethics of Effective Objections George S. Eichhorn, Esq	N	1 - 68
Attorney Advertising Dorothy L. Kelley	O	1 - 24
Evidence Problems with Governmental Studies, Investigations and Reports James W. Carney	P	1 - 16
Charting the Future of Iowa's Courts	Q	1 - 4
Annual Meetings Index 1965 thru 1994	INDEX	1 - 24

A B C D E F G H I J K L M N O P Q

INDEX



A

ANNUAL APPELLATE DECISIONS REVIEW

September 1994 - August 1995
519 N.W.2d through 535 N.W.2d

By

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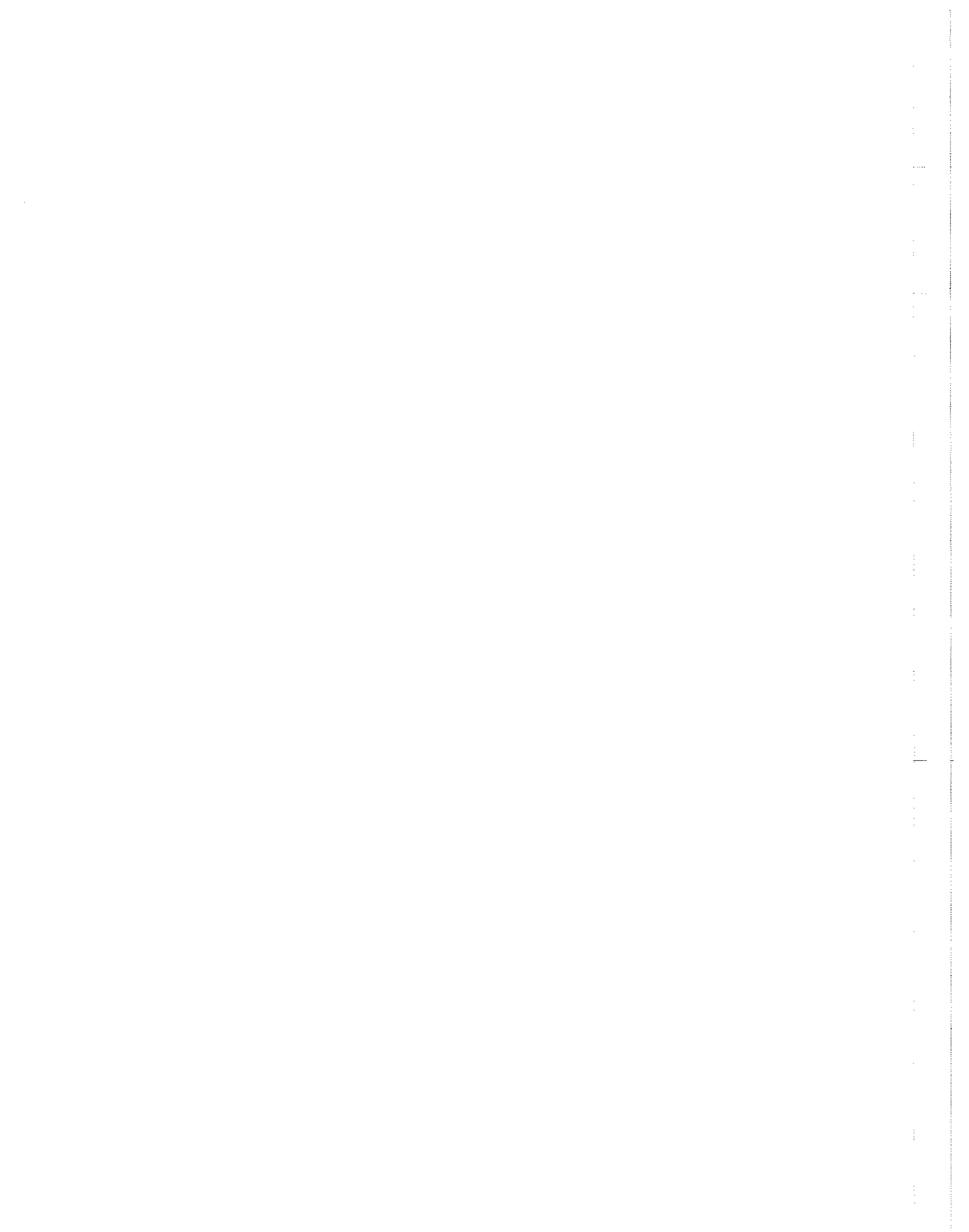
TABLE OF CONTENTS

	Page
Appellate Procedure (RBS)	1
Attorneys (SLS)	10
Civil Procedure (RBS)	20
Commercial Law (SLS)	30
Comparative Fault (LTS)	36
Constitutional Law (SLS)	39
Contracts (SLS)	42
Courts (RBS)	57
Damages (SLS)	60
Evidence (RBS)	70
Government (SLS)	78
Indemnity (LTS)	88
Insurance (LTS)	89
Judgment (RBS)	102
Jurisdiction (RBS)	107
Limitations of Action (RBS)	111
Negligence (RBS)	116
Torts (LTS)	126
Trial (RBS)	163
Workers' Compensation (SLS) (RBS)	169



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APPELLATE PROCEDURE

Rex Staub

Kirkpatrick Estate v. Hennings, 524 N.W.2d 440 (Iowa Ct. App. 1994)

Amount in Controversy

Vendor brought action against purchaser, seeking $1,731.06 in interest for period that purchaser was in possession under real estate contracts during which time vendor was unable to make marketable title. Purchaser filed counterclaim, seeking damages in amount of $4,332 on ground that he was forced to pay penalties when he withdrew money from his bank accounts. The District Court granted summary judgment for vendor, purchaser appealed.

HELD: Subject to the exceptions specified in Rule of Appellate Procedure 3, the Supreme Court and Court of Appeals lacks jurisdiction to entertain an appeal of a case involving an amount in controversy below the jurisdictional amount stated in Rule 3 (currently $5,000.00). In determining amount in controversy, the claim and counterclaim cannot be aggregated if neither alone is sufficient to confer jurisdiction under Rule 3. In this case, the trial court could not have entered judgment against either party for $5,000. Appeal dismissed.

In re Marriage of Okonkwo, 525 N.W.2d 870 (Iowa Ct. App. 1994)

Brief

HELD: An appellee's failure to file a brief does not entitle the appellant to reversal as a matter of right but does provide a basis for sanctions. Additionally, consideration of the issues in appeal will be limited to those raised in the appellant's brief.

Northern Natural Gas Co. v. Knop, 524 N.W.2d 668 (Iowa Ct. App. 1994)

Preservation of Appeal - By Agreement

Northern Natural Gas petitioned for Injunctive Relief against the Knops and Pueggels as owners of property on which Northern Natural Gas held a pipeline easement. Northern Natural Gas sought to enjoin the Knops and the Pueggels from interfering with its construction of additional new pipelines pursuant to the easement. The trial court ruled in favor of the Knops and Pueggels denying Northern's Petition, and Northern appealed. Subsequent to the appeal, however, Northern obtained new easements from the Knops and Pueggels permitting construction of the proposed pipelines.

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Northern did not drop the appeal contending the easements were obtained only out of necessity and that the terms of the new easement expressly reserved their right to pursue this appeal.

HELD: Voluntary compliance with the judgment ordinarily requires dismissal of an appeal on that judgment. However, Northern's purchase of a new easement subsequent to the filing of appeal with reference to the preservation of its appellate right on the original easement precludes waiver of appellate rights. The terms of the original easement remained in dispute and are subject to appeal.

Soo Line Railroad Co. v. Iowa Dept. of Transp., 521 N.W.2d 685 (Iowa 1994)

Preservation of Error - Brief

HELD: A party's random mention of an issue in its appellate brief, without elaboration or supportive authority is insufficient to preserve the issue for consideration by the appellate courts.

Burton E. Tracy and Co., P.C. v. Frink , 520 N.W.2d 316 (Iowa Ct. App. 1994)

Preservation of Error - Covenant Not to Compete

Frink was one of three stockholders in the Burton Tracy Accounting Firm. All stockholders were subject to a covenant not to compete clause in their contracts. Frink subsequently left Burton Tracy and opened his own accounting firm in the same town taking a number of Burton Tracy clients with him. Burton Tracy sued Frink for violation of the covenant not to compete.

At trial, Frink challenged the application of the covenant to the clients he had taken from Burton Tracy as opposed to the legality of the covenant itself. In fact, the trial court stated in its conclusions "the defendant [Frink] does not object to the validity of the covenant not to compete." The District Court ordered the covenant be enforced and awarded Burton Tracy damages. On appeal Frink attacks the legality of the covenant itself.

HELD: "It is a basic rule of appellate procedure that questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal." Because the trial was solely on the application of the covenant to certain clients and Frink did not plead or otherwise argue that the covenant was invalid, the legality of the covenant itself cannot be considered on appeal.

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Podraza v. City of Carter Lake, 524 N.W.2d 198 (Iowa 1994)

Preservation of Error - Motion for Directed Verdict

Podraza owned a home in Carter Lake with a chain link privacy fence surrounding the perimeter of the home. After receiving authorization from the Carter Lake Board of Adjustment to replace the chain link fence with a wood fence, she was served with a letter from the Mayor of Carter Lake ordering her to stop construction because the Board had erred in its authorization. Ultimately, Podraza brought a civil rights action against the City and Mayor. At the close of evidence, the trial court denied the City and Mayor's motion for directed verdict. The jury returned a verdict in favor of Podraza on all grounds of recovery.

HELD: Review of a trial court's denial of a motion for directed verdict is for correction of errors of law and is limited to the grounds raised in the motion. Although the City raised six arguments in its appeal, only two of the arguments were presented to the trial court in support of its motion for directed verdict. The City's contention that, by making a generalized objection to the sufficiency of the evidence supporting Podraza's claims, it preserved appeal on all six arguments is without support. Appellate courts will only consider grounds not precisely raised in a motion for directed verdict "where the record indicates the trial court, counsel, and both parties had no doubt what the grounds for the motion were and these grounds were obvious and discussed below." The four arguments were not preserved for appeal.

State v. Caslavka, 531 N.W.2d 102 (Iowa 1995)

Preservation of Error - Motion for Directed Verdict

Caslavka operated a feed store. It was his business practice to accept prepayments from farmers for products that would be delivered later in the farming season. Approximately $380,500 received from the farmers as prepayment was deposited in the store's savings account. However, when the feed store defaulted on a business loan and the lending bank sought to exercise its right of set-off against all funds in the feed store savings account, the bank found only $128,000 in the account. The State proceeded to charge Caslavka with misappropriation in the first degree, alleging that he had removed substantial funds from the store account and had applied them to personal uses such as vacations, trading losses, and gambling debts. The misappropriation charge required the State to prove that Caslavka held the prepayments as a trustee.

At close of State's evidence, Caslavka moved for a directed verdict of acquittal, asserting that the evidence did not establish that a trust relationship with respect to the prepaid funds. The district court denied the motion for directed verdict.

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At the close of all evidence, Caslavka then submitted a proposed jury instruction concerning his duty as a trustee. On appeal, the State contended that Caslavka waived any error in the Motion for Directed Verdict in light of the fact he conceded the existence of a trust relationship in his proposed jury instructions.

HELD: Once a motion for directed verdict has been overruled by the trial court, any error in that ruling is not waived simply because the moving party offers jury instructions that are inconsistent with the position taken in the motion for directed verdict.

Lawrence v. Grinde, 534 N.W.2d 414 (Iowa 1995).

Preservation of Error - Motion for Directed Verdict

HELD: In order for a party to preserve error when challenging the grant of a motion for directed verdict, the party need only challenge the motion and inform the trial court of the grounds for the challenge. The plaintiff is not required to file a motion for new trial following the grant of directed verdict to preserve error.

Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402 (Iowa Ct. App. 1994)

Preservation of Error - Judgment

Nepstad Custom Homes brought a mechanic's lien foreclosure action against the Krulls and their mortgagee for amounts due on construction of the Krull's home. The Krulls counterclaimed for breach of contract. The dispute centered on whether the contract was a "fixed-price" contract or whether it was a "cost-plus contract" (i.e. a contract for the cost of materials and labor plus a given percentage). At the time of entering into the contract, Curtis Krull represented Nepstad Homes in a separate mechanics' lien foreclosure and Gregory Nepstad, individually, in a dissolution action. The court held for the Krulls ordering Nepstad to pay for cost-overruns and for defects in the home. Nepstad appealed contending the court erred in considering extrinsic evidence of the unambiguous building contract and that a confidential and fiduciary relationship existed between Nepstad and Krull for purposes of construing the contract.

HELD: Nepstad failed to preserve error when it failed to raise the issue before the trial court that the contract should be resolved in its favor because of the fiduciary relationship between Krull and Nepstad. A Rule 179(b) motion to enlarge or amend is necessary for preservation of error when a trial court fails to resolve a disputed matter. Judgment affirmed.

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State v. Gilliland, _____ N.W.2d _____ (Iowa, July 19, 1995)

Preservation of Error - Jury Instructions

Gilliland appealed his conviction for assault with a dangerous weapon contending the court improperly instructed the jury that, when used in an assault, a semi-trailer is a dangerous weapon as a matter of law.

HELD: Because Gilliland acquiesced in the challenged jury instruction at trial, he failed to preserve error on this issue.

Strong v. Rothamel, 523 N.W.2d 597 (Iowa Ct. App. 1994)

Preservation of Error - Offer of Proof

Strong sued Rothamel for injuries sustained in a motor vehicle accident. Strong's attorney entered into an agreement with Rothamel's attorney to settle the case for $10,000. Strong refused to complete the settlement papers, contending that she had not authorized settlement. As a result, Rothamel filed a motion to enforce the settlement agreement. At an unreported hearing ("Hearing #1"), the District Court ordered the settlement agreement be enforced.

Strong appealed and filed a designation of the parts of the record to be included in the Appendix. The designation included a letter from the attorney representing her in the settlement and her own affidavit regarding her recollections of the settlement discussions. Rothamel objected, contending the letter and affidavit were not part of Hearing #1's record. A second hearing to establish the record was then held. At the second hearing, Strong was not allowed to testify regarding her recollection as to what transpired at Hearing #1 and she made no offer of proof on the issue.

HELD: Although Strong should have been allowed to testify at the second hearing to establish the record for appeal, no error was preserved because she did not make an offer of proof.

Vande Kop v. McGill, 528 N.W.2d 609 (Iowa 1995)

Preservation of Error - Summary Judgment

Former client brought legal malpractice action against the estate of an attorney who had prepared an antenuptial agreement which did not contain provisions governing the disposition of property in the event of divorce. The District Court sustained the estate's motion for summary judgment accepting the argument that,

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as a matter of law, the attorney did not commit malpractice because the provisions requested by the plaintiff were, at the time the agreement was drafted, void as contrary to public policy. The Court of Appeals affirmed, and the Supreme Court granted application for further review.

HELD: Allegation that attorney had failed to fully advise plaintiff was not preserved for review where: plaintiff did not raise the issue in his resistance to the motion for summary judgment or in his affidavit in support of resistance; District Court did not rule on the issue; and plaintiff failed to file motion requesting a ruling on the issue. Decision Affirmed.

In re Estate of Day, 521 N.W.2d 475 (Iowa Ct. App. 1994)

Preservation of Error - Unrecorded Hearing

John Day left instructions in his will that his estate property could be sold by public auction or private sale at the discretion of the executor. The designated executor was unable to serve so successor executors were appointed. The successor executors filed a petition for approval of sale of the estate property to a Day family member. At the hearing on the petition, no formal evidence was introduced and no record was made although one of the executors admitted to the court that she had received an offer on the property that was higher than the family members offer. The court ordered the estate property be sold at public auction. Family member appealed, contending, among other claims, that the court had no authority to consider the executor's statement when no record was made.

HELD: The successor executors and prospective purchaser/family member did not request that the hearing be recorded nor did they object to the fact that it was unrecorded. If a party finds a record insufficient, Rules of Civil Procedure 179(b), 241, and 252, and Rule of Appellate Procedure 10(c), provide avenues to recreate the record prior to appeal. Appellants failure to avail themselves of the Rules waives their claim of error on this issue.

Polk County v. Davis, 525 N.W.2d 434 (Iowa Ct. App. 1994)

Pro Se Appellant

Polk County petitioned for order for removal in a forcible entry and detainer action following tax sale of real property owned by Davis. Although Davis filed an answer, he failed to appear for the December 23, 1992 hearing and judgment was rendered against him. The record shows that Davis did not receive the writ of removal until January 6, 1993, and within ten days

filed a motion for extension of time to file a motion for new trial, and motion for new trial. Although the trial court granted his motion for extension, after consideration of his motion for new trial, it was denied. Davis appealed, raising new issues in his appellate brief.

HELD: The fact that Davis is a lay person handling his own appeal does not provide a basis for departing from appellate procedures. The Court of Appeals reversed the trial court's grant of an extension of time and affirmed the trial court's denial of Davis' request for new trial.

Fox v. Interstate Power Co., 521 N.W.2d 762 (Iowa Ct. App. 1994)

Standard of Review - Apportionment of Fault

Fox operated a dairy farm and began to experience problems with his dairy herd allegedly due to stray voltage from several Interstate high-power lines strung across his property. Fox filed suit against Interstate for negligence, strict liability, and breach of implied warranty of fitness. The jury returned a special verdict assessing 80% of the fault to Fox, 20% to Interstate. On appeal, Fox contends there was no substantial evidence in the record to support the jury's verdict, and, in particular, there was insufficient evidence to support the allocation of fault.

HELD: Appellate review of apportionment of fault is governed by the substantial evidence rule. In this case there was substantial evidence to support the jury's allocation of fault because: the herd suffered from mastitis caused by bacteria that could easily have been spread from cow to cow; Fox did not keep records of which cows suffered from mastitis; and Fox could have done more to keep the herd's environment clean to restrict the spread of the disease. The decreased production of the herd's milk could have been related to environment, milking procedures, nutrition, and genetics, as well as extraneous voltage.

Committee on Prof. Ethics & Conduct v. Peterson, 524 N.W.2d 176 (Iowa 1994)

Standard of Review - Attorney Discipline Actions

HELD: In attorney disciplinary proceedings, the Committee has the burden of proof by a "convincing preponderance of the evidence" that the Respondent has violated the Code as charged. When an attorney fails to appeal the grievance commission's recommendation, appellate review is de novo of the record made before the grievance commission.

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Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995)

Standard of Review - Dismissal

Clyde Schmitz and Connie Karhoff, beneficiaries to the estate of Julia Schmitz, filed a legal malpractice action against the attorney for the estate. Following a bench trial, the District Court dismissed the Petition concluding that Schmitz/Karhoff had failed to prove by a preponderance of the evidence that the attorney had breached his duty of care.

HELD: When the trial court, following a bench trial, denies recovery because a party has failed to sustain its burden of proof on an issue, that decision will not be interfered with unless the appellate court determines that the party carried its burden as a matter of law. This requires a showing that the evidence presented is so overwhelming that only one reasonable inference on each critical fact issue can be drawn.

Wende v. Orv Rocker Ford Lincoln Mercury, 530 N.W.2d 92 (Iowa Ct. App. 1995)

Standard of Review - Summary Enforcement of Settlement

Preservation of Error - Motion to Enforce Settlement

Wende instituted a personal injury suit against Orv Rocker Ford/Lincoln/Mercury, Ford Motor Co., and Jack Jeffrey for injuries she received while a passenger in a ford van rented from Orv Rocker and driven by Jeffrey. Wende orally agreed to settle with each party for $15,000. Before written documents were executed, however, Wende tried to withdraw from the settlement agreement. All of the Defendants filed motions to enforce the settlements and Wende finally acknowledged settlement with Ford Motor Co. After an unrecorded hearing on Orv Rocker's and Jeffrey's motion to enforce, the District Court ordered the settlement agreements be enforced. The issue had been submitted to the court without objection and no party objected to the unrecorded nature of the hearing.

HELD: On appeal from "summary enforcement" by trial court of settlement agreement where facts are not in dispute, standard of review is same as for summary judgments. However, if material facts surrounding settlement agreement are disputed and matter is submitted to court, the trial court's decision has same effect as jury verdict which is reviewed for claims of error.

HELD: A settlement agreement need not be reduced to writing to be enforceable unless required by statute or court rule. Section 554.1206(1) of Iowa's Uniform Commercial Code - which requires a writing - is inapplicable here because the Section

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applies only to certain contracts for the sale of personal property.

HELD: A party who did not object to the submission of the motion to enforce settlement agreement to court as finder of fact failed to preserve any claim of error involving the procedure followed by trial court for consideration of the motion.

Howard v. Schildberg Constr. Co., Inc., 528 N.W.2d 550 (Iowa 1995)

Standard of Review - Summary Judgment and Judgment in Equity

Howard owned land that was encumbered by a mining lease conveyed to Schildberg. He brought a declaratory judgment action, seeking to have the lease declared invalid and unenforceable. Alternatively, Howard asked the court interpret the lease as not encumbering that portion of his property north of the Nodaway River. Both parties filed motions for summary judgment. On the motions, the district court ruled in favor of Schildberg finding the lease valid and enforceable. Although the court found a factual dispute existed with respect to whether the lease encumbered the property north of the river, the issue was decided adversely to Howard at trial. On appeal Howard contends the Supreme Courts review is de novo because the case was tried in equity.

HELD: Even in equity cases, the Supreme Court does not conduct de novo review of rulings on summary judgment. Summary judgment rulings are reviewed on error.

HELD: Although the trial court ruled on objections at trial, (which are ordinarily a benchmark of a case tried at law as opposed to equity), and the Supreme Court does not approve of the practice of making evidentiary rulings in equity cases, the fact the trial court did so does not automatically transform an equity case to one at law. On de novo review of the trial judgment, this case is affirmed.

Iowa Dept. of Transp. v. District Court for Bremer County, 534 N.W.2d 457 (Iowa 1995)

Standard of Review - Writ of Cert

HELD: The Supreme Court will sustain a writ of certiorari only where the district court is found to have acted beyond its authority or jurisdiction.

ATTORNEYS
Steve Serck*

Board of Professional Ethics and Conduct v. Sather, No. 194/95-555 (Iowa 1995).

Discipline

Sather, inside counsel for a major U.S. corporation, hired a local attorney to handle the estate of his deceased father. After a conflict of interest developed with the estate attorney, Sather agreed to become the designated attorney for the estate.

After years of inactivity and notices regarding delinquency from the clerk of court, the grievance commission recommended Sather be reprimanded.

HELD: Although (1) this was a family probate matter, (2) Sather oversaw the matter without compensation, and (3) no apparent prejudice occurred, an attorney still holds the responsibility to comply with statutory and court-ordered deadlines for taking necessary actions in estate matters. Attorney reprimanded.

Committee v. Harris, 524 N.W.2d 179 (Iowa 1994).

Discipline

Harris represented husband in a dissolution of marriage proceeding. He failed to reserve a claim to an interest in the family business. The court denied a later action to establish his client's right to a pension fund because it had not been reserved. He then paid the client from his own funds, representing it as an award from the court.

Harris took funds without authorization from his client's trust account to pay attorney's fees. Client objected and Harris paid him back using funds in the firm's trust account belonging to other clients. Additionally, he failed to cooperate with the committee investigation.

He also required client to surrender a watch to pay fees but failed to account to client for the proceeds.

Grievance Committee recommended one-month suspension.

HELD: License suspended for three years.

*I wish to thank associate Garth Adams and summer associates Denise Hill, Cynthia Christy and Chris Adam for their assistance in putting together this outline.

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Committee v. Humphreys, 524 N.W.2d 396 (Iowa 1994).

Discipline

Attorney was convicted on five counts of federal income tax violations (four felonies and one Class A misdemeanor). On several occasions he commingled client's funds in his own bank account. He also advanced $1,000 to a client and misrepresented that it came from a local bank. Lastly, he drafted organizational documents for a corporation and received stock in the corporation in lieu of attorney fees. He also made several loans to the corporation while acting as attorney for the corporation. Grievance commission recommended five year suspension.

HELD: Respondent's license to practice law is revoked.

Committee v. Peterson, 524 N.W.2d 176 (Iowa 1994).

Discipline

Peterson mishandled clients' affairs on several occasions. Peterson allowed statute of limitations to run on claims. Peterson received illegal fees for handling estates and failed to close the estates timely. Peterson also handled a medical malpractice case which was dismissed and falsely advised the clients that the case was set for trial. In an uncontested marriage dissolution, Peterson kept the balance of retained funds. Peterson's failure to file bankruptcy petitions which he told his clients had been filed resulted in a foreclosure action against the client's business. Finally, he misrepresented himself as a "licensed broker" and misappropriated a client's money for his personal use.

Peterson failed to respond to complaint and failed to appear at Grievance Commission's hearing.

HELD: We revoke Peterson's license to practice law.

In re Marriage of Burkle, 525 N.W.2d 439 (Iowa Ct. App. 1994).

Discipline

Immediately prior to child custody hearing, wife filed domestic abuse petition against husband. Petition was later dismissed for insufficient evidence. Wife testified later that she filed the domestic abuse petition at the advice of her former lawyer, in an effort to gain an advantage in the custody dispute.

HELD: Use of a domestic abuse proceeding solely to gain an advantage in a dissolution custody dispute may constitute

tortious conduct and violate Iowa R. Civ. P. 80(a). The involvement of a lawyer in such activity may violate the rules of professional responsibility.

Committee v. Ottesen, 525 N.W.2d 864 (Iowa 1994).

Discipline

During a three-month period, without knowledge or authorization of his clients, Ottesen withdrew and converted funds from his trust account. He also failed to maintain adequate trust account records, or to perform regular and adequate reconciliations of the trust fund accounts. Ottesen also failed to respond to the Committee's investigation. The Grievance Commission recommended a three-year suspension.

HELD: License revoked. "The public, as well as our profession in its service to it, needs to know that disbarment is almost certain to follow a lawyer's conversion of a client's funds."

Committee v. Horn, 526 N.W.2d 301 (Iowa 1995).

Discipline

Horn advised a client it was necessary to open a probate estate for her deceased husband when in fact it was not necessary.

Horn did not answer the complaint, respond to a request for admissions, or appear at the grievance commissioner's hearing.

HELD: In view of violations of the Iowa Code of Professional Responsibility, repeated failure to respond to inquiries, and previous disciplinary record Horn's license was suspended for twelve months.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Sikma, 533 N.W.2d 532 (Iowa 1995).

Discipline

Attorney was involved in a business relationship with a client. Client now claims knowledge of the client's assets while serving as his legal counsel benefitted him by encouraging the client's investment in an organization of which attorney is CEO. The attorney denied wrongdoing but admitted to having an attorney-client relationship with the client, benefitting from the client's investment and failing to make full disclosure to the client prior to the client's investment.

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HELD: When an attorney enters into a business relationship with a client where there are differing interests between attorney and client, the attorney has the burden of establishing that the transactions were fair and equitable, the attorney faithfully discharged all his or her duties to the client and the client was advised to seek independent advice or receives the advice the attorney would have given the client had the transaction been between the client and a stranger.

Because the attorney knew the client's liquid assets, gained this knowledge while serving as legal counsel and failed to make proper disclosure he violated the disciplinary rule prohibiting an attorney from misusing confidential information.

Because attorney did not deliberately solicit client's investment, and in light of clean past record, we suspend his license for three months.

Committee v. Zimmerman, 522 N.W.2d 619 (Iowa 1994).

Discipline

Attorney representing a mother and her boyfriend in a China proceeding filed an application to modify custody. He requested the court to order the child to be examined by a named clinical psychologist. The court entered an order denying the request, but the attorney subsequently visited with the child's guardian and obtained her permission for the child to visit with the psychologist. The Committee filed a complaint alleging he violated the Code by arranging the evaluation in spite of the order, and neglecting to seek clarification of the order. The attorney argued that the order was subject to two interpretations and that he could have acted on the basis of a reasonable interpretation which was not prohibited.

HELD: An attorney cannot violate, or advise a client to violate a court order merely because one of two interpretations would allow the challenged conduct. Faced with an ambiguous order an attorney should seek clarification from the court. Attorney admonished.

Committee v. Matias, 521 N.W.2d 704 (Iowa 1994).

Discipline

Matias agreed to accept referrals in the living trust area from Fidelity of Iowa. He then introduced a speaker who specializes in living wills at a seminar and provided some of his business cards to the audience along with materials provided by the speaker. He did not disclose he lacked certification in any

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specialty of law and no disclaimer was present in the materials distributed. He failed to respond to several notices.

HELD: Attorney's unethical solicitation of business and failure to respond to the Committee's inquiries warranted suspension for two months.

Committee v. James, 523 N.W.2d 753 (Iowa 1994).

Discipline

Grievance committee recommended suspension of an attorney's license because he allowed the initial report of a guardianship to become delinquent and failed to correct this when notified of it and also neglected his duties to file a timely inheritance tax return and inventory. Further, he had earlier been reprimanded for similar conduct and did not correct his office procedures. In both instances he failed to respond to committee inquiries and would not cooperate in the disciplinary investigation.

HELD: The attorney's misconduct involving neglect of guardianship and probate matters and failure to cooperate in a disciplinary investigation warranted a suspension for a minimum of three months.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Clauss, 530 N.W.2d 453 (Iowa 1995).

Discipline

Attorney Clauss forged and notarized signatures on returns of service, failed to report settlement agreements to the court and his clients, withdrew claimed fees from client's fund in an attorney's trust account, and had been sanctioned previously.

HELD: For an attorney to notarize any signature not made in his presence is, in itself, a serious violation of the canons of ethics. However, to notarize a signature that he himself forges is far worse.

Past unethical conduct and disciplinary measures taken as a result of that conduct are viewed by the court as aggravating circumstances. Clauss' license is suspended for three years.

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Committee v. Humphrey, 529 N.W.2d 255 (Iowa 1995).

Discipline

The Committee investigated Humphrey for alleged neglect of three probate matters and a post-conviction relief (PCR) matter. Humphrey allegedly failed to respond to several orders from the state and federal courts on the PCR matter as well as numerous inquiries from the Committee on all four matters.

The Committee ultimately charged Humphrey with several violations of the Iowa Code of Professional Responsibility for Lawyers and recommended a suspension of his license for 30 days.

HELD: Although this might be a good case to consider probation with mentoring supervision as an alternative to suspension, we are reluctant to order probation due to lack of an effective way to supervise lawyers.

Humphrey is suspended for 60 days.

Feaker v. Bulicek, No. 5-166/94-0983 (Iowa Ct. App. 1995).

Fees

Feaker obtained judgment against Bulicek and perfected a levy on a previous judgment in favor of Balicek on May 10, 1993. On July 9, 1993 Bulicek's attorney filed notice of attorney's lien. The district court held that the attorney's lien was not superior to the right of a creditor seeking to collect a judgment. Bulicek appealed.

HELD: An attorney's lien does not relate back to the date the attorney commenced services. Here, Feaker's levy preceded the perfection of the attorney's lien and was superior. Affirmed.

Federal Land Bank of Omaha v. Woods, 520 N.W.2d 305 (Iowa 1994).

Fees

Following court of appeals entry of a judgment against defendant borrowers, the district court awarded the bank additional attorney's fees. The borrowers claimed the sum was excessive and wanted to relitigate the issue of attorney's fees. Their theory was that awards must be capped by a statutory fee schedule enforced at the time they executed the original promissory note.

HELD: Award of attorney's fees at a rate of $75 or $85 per hour was not excessive where attorney's efforts were reasonably required by pending litigation. The statutory fee

schedule had been repealed and was not applicable to the case at bar.

Tom Riley Law Firm, P.C. v. Tang, 521 N.W.2d 758 (Iowa App. 1994).

Fees

This case involved a fee dispute between an attorney and client regarding a contingent fee agreement in a personal injury suit. The case was settled prior to appeal for $215,000. This amount included pre-judgment interest in the amount of $23,626.32. Client disputed whether law firm was entitled to 1/3 of the pre-judgment interest as part of its contingent fee.

HELD: Attorney fee disputes are generally resolved on principals of contract law. To construe written contracts the intent of parties should be determined by language in the contract, unless they are ambiguous. Where the fee agreement provided that the firm would receive 1/3 of "gross recovery," which was defined as entire amount of money collected, it was not ambiguous and the law firm was entitled to 1/3 of pre-judgment interest.

Hoffmann v. Internal Medicine, P.C. of Ottumwa, 533 N.W.2d 834 (Iowa Ct. App. 1995).

Disqualification

Hoffmann, a physician and shareholder in Internal Medicine, P.C., filed suit against the corporation to determine the repurchase price of the stock issued to him previously.

Hoffmann was represented by an attorney from the law firm of Johnson, Hester and Walter. Internal Medicine was represented by an attorney, the partner of which is a former member of the Johnson firm. Such partner formerly represented Internal Medicine as a partner in the Johnson firm, and retained the corporation as a client after joining his new firm. The Johnson firm has had no attorney-client relationship with Internal Medicine since 1989.

Internal Medicine filed a motion to disqualify the Johnson firm from representing Hoffmann, claiming that the former association with the firm created a conflict of interest. The district court found a substantial relationship between the Johnson firm's prior representation of Internal Medicine and the firm's present representation of Hoffmann, concluding that an appearance of impropriety required the firm's disqualification.

HELD: The trial court did not abuse its discretion in disqualifying the Johnson law firm because of the distinct possibility that the corporation disclosed confidences during the

prior representation which could surface and help establish or interpret the terms of the agreement with Hoffmann.

Whether an attorney or a law firm should be disqualified in a particular case depends on the outcome of the "substantial relationship" test, which requires disqualification when the subject matter of the new litigation or representation is substantially related to the subject matter of the prior representation.

Federal Land Bank of Omaha v. Tiffany, 529 N.W.2d 294 (Iowa 1995).

Disqualification

John Tiffany organized two Iowa corporations whose names were identical to well-known lenders in the Farm Credit System. The lenders sued, arguing that his purpose was to harass them.

During the proceedings, Tiffany filed a motion to disqualify plaintiffs' attorney, Rodney Kubat, contending that he had a conflict of interest because he had represented two creditors in Tiffany's prior bankruptcy.

The district court denied Tiffany's motion to disqualify Kubat and his firm, concluding that Kubat's representation of the creditors in Tiffany's prior bankruptcy had ended before any conflict could be created in this case.

HELD: The district court did not abuse its discretion in refusing to disqualify Kubat and his firm.

Lawrence v. Grinde, No. 46/93-1663 (Iowa 1995).

Malpractice

Grinde and his law firm helped Lawrence pursue a chapter seven bankruptcy after his fitness club failed. Lawrence was later indicted for bankruptcy fraud for failing to disclose a transfer of funds in his bankruptcy petition. The federal court found Lawrence not guilty of all charges. Two regional newspapers published articles discussing the indictment and acquittal.

Lawrence brought a legal malpractice action against Grinde and his firm for negligently handling his bankruptcy case. The district court granted defendants' motion for a directed verdict on the issue of damage to Lawrence's reputation. The jury found the defendants negligent and awarded $700,000 for severe emotional distress and $52,000 for economic loss. The district court reduced the emotional distress award to $5,000 and ordered remittitur of the economic loss exceeding $14,233.49.

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HELD: We affirm the entry of directed verdict on the damage to reputation claim. Damages to reputation are not allowed in an action premised on a defendant's merely negligent act. We reverse the trial court's refusal to grant defendant's motion for directed verdict on the emotional distress claim. Recovery of emotional distress damages is allowed only in situations which involve both a close nexus to the action at issue and extreme emotional circumstances. Here, the claimed emotional distress is too far removed from the defendant's negligent conduct to cause the imposition of a duty and does not naturally arise from the acts complained of.

Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995).

Malpractice

Crotty took over an estate for an attorney who had died. When Crotty filed the federal estate tax return and the state inheritance tax return, he used the descriptions of the real estate that the previous attorney had set forth in the probate inventory. It was later determined that these descriptions were incorrect and described significantly more land than the decedent actually owned upon her death. As a result, the tax returns reflected higher taxes for the land than they should have.

In addition, Crotty incorrectly computed the taxes due. The decedent owned much of the land subject to a life estate, and Crotty neglected to include a life estate reduction factor to reflect the actual value of the decedent's real estate and thereby reduce the taxes due on the estate.

After the probate action was finalized, a district court clerk informed Crotty that the legal descriptions of the land were incorrect. Crotty then attempted to correct the descriptions, but actually furthered the inaccuracy of the descriptions. After making the "corrections", Crotty did not attempt to correct the tax returns he had previously filed to reflect the decreased value of the decedent's real estate. Crotty also failed to return any of the excess attorney fees he had been paid based on the higher value of the decedent's real estate.

The beneficiaries then sued Crotty, alleging breach of duty and negligence. After a trial to the district court, it found no malpractice had occurred and dismissed the petition.

HELD: Generally, the issue of breach of duty is a question of fact for the jury. However, if the facts are so compelling that no reasonable jury could differ as to whether there was a breach of duty, then the issue can be decided by the court. This is such a "rare" case, and we determine that Crotty was negligent as a matter of law.

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Reversed and remanded to district court for assessment of damages.

Venard v. Winter, 524 N.W.2d 163 (Iowa 1994).

Malpractice

Attorney represented client in an action to foreclose mechanic's lien regarding improvements to the client's property. Client sued the attorney for legal malpractice on theories of breach of oral contract, constructive fraud and negligent misrepresentation. Client alleged he had money to redeem property but was told by attorney to wait just before the expiration of the redemption to do so, but attorney failed to take necessary steps to complete the redemption before the period expired. District court held that five year statute of limitations governing unwritten contracts, rather than two year statute governing injuries to person, applied.

HELD: Cause of action arose from unwritten contract between client and attorney. Therefore, action governed by five-year statute of limitations governing unwritten contracts and actions for injuries to property and not two-year statute.

Vande Kop v. McGill, 528 N.W.2d 609 (Iowa 1995).

Malpractice

Attorney Hindt drafted an antenuptial agreement which contained provisions for the disposal of each party's property in the event of that party's death. The document did not address what would occur in the event of a divorce between the parties.

After 15 years of marriage, the wife sued for divorce. The husband, dissatisfied with the property division and believing that the antenuptial agreement should have protected him, sued for malpractice. He alleged negligence in failing to inform him that the antenuptial agreement would not protect his property interests in the event of his divorce.

The district court granted summary judgment in favor of Hindt on the ground that Hindt did not commit legal malpractice because the provisions the husband claims he requested to be included in the agreement were, at the time, void as contrary to public policy.

HELD: In order to establish a prima facie claim of legal malpractice, the plaintiff must produce substantial evidence that shows: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney, either by an act or failure to

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act, violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual injury, loss or damage.

Iowa case law as of 1975, when the antenuptial agreement was drafted, indicated that such agreements were contrary to public policy and therefore void. Thus, there was no breach of duty and summary judgment in Hindt's favor is affirmed.

Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995).

Privilege

This case arises out of a workers' compensation claim for penalty benefits in which the claimant, Pickering, sought to examine the claim file of the workers' compensation insurance carrier. The defendant carrier claims that these documents are protected by the attorney-client privilege. Pickering argues that Liberty Mutual waived the privilege by designating its previous attorney as an expert witness.

HELD: While an express waiver did not occur because no privileged communications were disclosed, the carrier's designation of its former attorney as an expert witness constituted an implied waiver. Therefore, Rule 125(a) requires disclosure of all facts known to the expert which relate to his opinions and allows discovery of any documents containing such facts.

However, the withdrawal of such an expert witness designation prior to the disclosure of confidential communications would constitute a withdrawal of the implied waiver. Such a withdrawal would re-establish the attorney-client privilege.

CIVIL PROCEDURE

Rex Staub

In re Marriage of McGonigle, 533 N.W.2d 524 (Iowa 1995)

Appointment of Counsel - Rule 13

In a marriage dissolution proceeding, penitentiary inmate Mark McGonigle petitioned for a guardian ad litem in accordance with Iowa Rule of Civil Procedure 13. The District Court granted McGonigle's motion provided he pay the fees for the requested services. Unwilling or unable to pay, McGonigle filed a motion to represent himself and to be transported to attend the dissolution proceeding. He attended trial and testified.

After an order dissolving the marriage was entered, McGonigle appealed seeking a reversal of the decree, and that a

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guardian ad litem be appointed to represent him, if and when the case is remanded.

HELD: Rule 13 is intended to provide a vicarious presence for a party unable to attend trial or present a defense. Where a defendant prisoner, otherwise competent, appears and participates in a civil trial the intent of Rule 13 is satisfied.

Estate of Dyer v. Krug, 533 N.W.2d 221 (Iowa 1995)

Capacity

A beneficiary of the closed estate of Iona Dyer, filed a medical malpractice suit seeking damages for the wrongful death of Dyer. Although the beneficiary had never served as the appointed legal representative of the Estate, she filed the suit on behalf of the estate as Dyer's daughter and the purported administrator of the estate.

Because the suit was brought solely on behalf of the estate, the district court dismissed the petition on the Defendants' motion finding: (1) The beneficiary had no standing as Dyer's daughter to bring a wrongful death claim; and (2) because beneficiary was not the legal representative of the Estate, she lacked capacity to bring suit on behalf of the estate. The Supreme Court affirmed the motion to dismiss.

HELD: The right to recover wrongful death damages vests exclusively in the estate representative. Although the estate representative may assign a wrongful death claim or an assignment of the claim may occur by operation of law under the principles of subrogation, there is no evidence that this occurred.

HELD: The beneficiary's argument that the closing of the Estate operated as a transfer or assignment of all interests of the Estate to her as a beneficiary is without support. Even if the court accepted that argument, the beneficiary did not amend the petition to add herself as an individual party in her capacity as a beneficiary.

Central National Insurance Co. v. Insurance Co. of North America, 522 N.W.2d 39 (Iowa 1994)

Default - Motion to Set Aside for Excusable Neglect

Central National Insurance (CNI) brought an action against Insurance Company of North America (INA's) and a second insurer to recover on policies they issued to parties against whom CNI had obtained a default judgment. CNI then obtained a default judgment against INA, and INA moved to set it aside. The district

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court considered granted the motion to set aside the default. CNI appealed.

HELD: INA's failure to answer was due to excusable neglect. The court found INA received the suit papers including a copy of the petition in the underlying case at its home office instead of its local office. The INA claims representative in the home office did not intentionally or willfully fail to arrange for timely answer. INA intended to defend and had it not been for the claims representative's mistake, a timely answer would have been filed. Once INA became aware of the default it promptly moved to set it aside and asserted the existence of a meritorious defenses. Consistent with Rule of Civil Procedure 236, all of these reasons taken together constituted good cause for setting aside the default.

Millington v. Kuba, 532 N.W.2d 787 (Iowa 1995)

Default - Motion to Set Aside for Excusable Neglect

Mary Rose and Thomas Millington Jr., obtained a default judgment against Kuba Funeral Home and its two directors, Edward and John Kuba, on claims of negligence and intentional infliction of emotional distress arising from the wrongful cremation of their father. The Kubas filed a motion to set aside the default judgment based upon mistake, inadvertence and excusable neglect under Iowa Rule of Civil Procedure 236. The Kubas contended they did not believe they were the real parties in interest and each believed the other was securing counsel. They also claimed they were not willfully defying the rules of procedure. The district court granted the motion, finding the Kubas had met their burden of establishing good cause based on excusable neglect.

HELD: Evidence of the Kubas promptness in moving to set aside default; that each was of the opinion that the other was securing counsel; and that they were not the real parties in interest was sufficient good cause for setting aside the default.

Stephenson v. Furnas Electric Co., 522 N.W.2d 828 (Iowa 1994)

Designation of Expert Witness

Stephenson applied for workers' compensation benefits for repetitive motion disorders developed on the job. The case was scheduled for a December 5, 1991 hearing before the Industrial Commissioner. On November 5, 1991, Stephenson filed notice of her anticipated expert thereby complying with the 30-day requirement under Iowa Rule of Civil Procedure 125(c) which provides that anticipated expert witnesses must be disclosed "as soon as practicable, but in no event less that 30 days prior to the

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beginning of trial except on leave of court." The Deputy Commissioner struck Stephenson's expert designation based on the fact that Stephenson had not complied with the "as soon as practicable" requirement of Rule 125(c), because she had decided in early October to call the expert.

HELD: "30 days" and "as soon as practicable" under Rule 125(c) are cumulative so that violation of either amounts to noncompliance with the rule. Exclusion of Stephenson's expert witness is the most severe sanction under the rule and is justified only when prejudice would result. Although the Deputy Industrial Commissioner could have exercised discretion by imposing a lesser sanction, there was no abuse in striking the expert. To hold otherwise would deprive the Deputy of his discretion to enforce the "as soon as practicable" clause. (Note: this case does not suggest that disclosure 30 days prior to trial could never be "as soon as practicable.")

Holsapple v. McGrath, 521 N.W.2d 711 (Iowa 1994)

Dismissal - Failure to State Claim

Don and Beulah DeVoss retained the services of attorney McGrath to convey their farm as a gift to Bobby and Barbara Holsapple. Bealuh signed the quit claim deed because Don had died before it was drafted. Bealuh then died before it was determined the deed was defective for failure to include the necessary notary form. As a result, the Holsapples brought a legal malpractice claim against McGrath. McGrath filed a motion to dismiss for failure to state a claim contending he did not owe a duty to the Holsapples and an attorney-client relationship existed only with the DeVosses. The district court granted the motion.

HELD: In order for the Holsapples as third-party plaintiffs to recover damages for an attorney's negligence in executing a quit claim deed, they must be able to establish that they were specifically identified by the donor as an object of the grantor's intent and that an expectancy was lost or diminished as a result of professional negligence. Because the Holsapples alleged both elements in their petition, they stated a claim for relief. The court erred in dismissing the suit.

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)

Pleadings - Amending to Add New Parties

Harold Ezzone and his wife, Patricia LaRosa, owned and operated Precision Torque Converters of Florida (PTCF), an automotive parts manufacturing business. In 1985, Willis and Dennis Hansen and the State Bank of Lawler provided a $300,000 loan

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to Ezzone and his wife to start an Iowa branch of this operation - Precision Tongue Converters of Iowa (PTCI). Willis and Dennis Hansen eventually purchased PTCI for $250,000. Although the plaintiffs were not present at the closing, Ronald Riccardi, (Ezzone's employee), authorized transfer of the property and received the purchase price. Riccardi, however, never transferred the money to Ezzone. Ezzone initially brought suit in his own name against Riccardi seeking an accounting. Later, Ezzone sought to amend the petition to add his wife LaRosa as a new plaintiff. The district court denied the amendment and LaRosa was forced to file her own action and intervene in this case. Among the many issues raised on appeal, Ezzone claims the court erred in refusing his request to amend.

HELD: Rule of Civil Procedure 89 which authorizes amendments to add parties is not limited to the adding of new defendants. New plaintiffs may also be added under the rule so long as the defendants have received sufficient notice of the action during the statute of limitations.

<u>Kachevas, Inc. v. State</u>, 524 N.W.2d 450 (Iowa Ct. App. 1994)

<u>Sanctions - Dismissal (Discovery)</u>

HELD: In order to impose the discovery sanction of dismissal, the district court must find the party's refusal to comply was a result of willfulness, fault, or bad faith. This case warranted dismissal in light of the following facts: the plaintiffs had failed to answer the initial set of interrogatories which resulted in the filing of a motion to compel almost 4½ months later; the plaintiffs again failed to provide answer after a motion to compel was granted; it took the filing of an application for sanctions to persuade plaintiffs to file answers, which even then were unverified; and the plaintiff's failed to abide by the court's order requiring a verified answer within ten days.

<u>2049 Group Ltd. v. Galt Sand Corp.</u>, 526 N.W.2d 876 (Iowa Ct. App. 1994)

<u>Sanctions - Dismissal (Discovery)</u>

Galt Sand contracted with the plaintiff, 2049 Group, a California corporation, to perform garment finishing. Galt Sand refused to pay the plaintiff's final invoices claiming the goods received from the plaintiff were impaired. The plaintiff filed suit against Galt Sand seeking recovery under contract and tort theories. Galt Sand counterclaimed for breach of warranty and tort. Thereafter, Galt Sand served interrogatories, request for production, and notices of two depositions on the plaintiff. Galt Sand ultimately filed a motion to compel which resulted in a court

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order directing the plaintiff to respond on or before July 15, 1993. After receiving no response, Galt Sand filed motion for sanctions for failure to comply with the court's discovery order on September 7, 1993. On October 1, 1993, the court granted plaintiff's counsel motion to withdraw, holding in abeyance a ruling on the motion for sanctions under the proviso that if plaintiff did not obtain new counsel within 14 days the motion for sanctions would be granted. New counsel was obtained on October 13, 1993 and a new discovery deadline was set. In the subsequent hearing on the motion for sanctions, the court found the plaintiff had no substantial justification for failing to comply with the court-ordered discovery. The court dismissed the case with prejudice. Plaintiff appealed.

HELD: In order to justify dismissal as a sanction for failure to comply with a discovery order, the court must find the noncompliance was due to willfulness, fault, or bad faith. Although the trial court's decision to impose discovery sanctions is discretionary, the court abused its discretion in this case as their was no evidence of bad faith on plaintiff's part, particularly given the dispute between plaintiff and it's attorneys, the delay caused by substitution of counsel, and the array of lesser sanctions available to the court.

Turnbull v. Horan, 522 N.W.2d 860 (Iowa Ct. App. 1994)

Sanctions - Dismissal (Service Delay)

On June 8, 1990, Turnbull was injured when she was sprayed by an unknown substance. On June 8, 1992, her attorney filed a petition naming New Cooperative as the defendant in the 1990 accident. The Petition was delivered to the clerk of court without the original notice and directions for service. Ultimately, New Cooperative was not served with the petition and original notice until October 12, 1992 - 126 days after the petition was filed. New Cooperative moved to dismiss arguing the 126-day delay was presumptively abusive. The district court agreed and dismissed the petition without prejudice.

HELD: Although the rules governing service of the petition, original notice and directions for service after filing do not specify when service must be made on the defendant, the petition may be dismissed if there is an abusive delay in completing service. In determining whether there is an abusive delay, the court considers the length of the delay and whether the delay was intentional. In this case, the 126-day delay in serving New Cooperative was presumptively abusive. Turnbull claimed the delay was justified because her attorney needed more time to investigate the claim and ensure service on the proper defendant. She also claimed the delay was necessary to avoid violating Rule 80

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and exposure to its sanctions. The Supreme Court found the reasons cited by Turnbull were not sufficient justification for the delay.

Cox v. Rolling Acres Golf Course Corp., 532 N.W.2d 761 (Iowa 1995)

Summary Judgment - Dram Shop/Complicity

Cox, a passenger in a vehicle driven by Charles Atwood, was injured when Atwood lost control of the vehicle and it rolled in a ditch. Cox brought a dram shop action against Rolling Acres and two other bars that had provided alcohol to Atwood, claiming the Defendants knew or should have known that Atwood was intoxicated. The defendants moved for summary judgment based upon Cox's complicity in contributing to Atwood's intoxication. The district court granted the motion for summary judgment based upon complicity and assumption of the risk.

HELD: The facts of the case demonstrate as a matter of law that Cox was more than Atwood's passenger and in fact contributed materially to Atwood's intoxication. Accordingly, it is one of those "exceptional cases" in which the existence of complicity may be determined as a matter of law without submission of the question to a jury. Defendant's motion for a summary judgment is affirmed.

Vaughn v. City of Cedar Rapids, 527 N.W.2d 411 (Iowa Ct. App. 1994)

Summary Judgment - Breach of Employment Contract

Vaughn was employed as the executive director of the Cedar Rapids Civil Rights Commission until released in 1991. Vaughn filed suit against Cedar Rapids (City) claiming breach of employment contract and intentional failure to pay back wages. The city moved for summary judgment asserting Vaughn was an employee at will and had received all the wages owed to him. The district court granted the motion for summary judgment.

HELD: The City has the burden of showing the nonexistence of a material fact on its motion for summary judgment. A genuine fact issue is generated only if reasonable minds can differ on how the issue should be resolved. However, if the conflict in the record consists only of the legal consequences flowing from the undisputed facts, then summary judgment is proper. In this case, Vaughn did not set forth specific facts showing that he was anything other than an employee at will. Judgment affirmed.

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Fisher Controls International, Inc. v. Marrone, 524 N.W.2d 148 (Iowa 1994)

Summary Judgment - Employment Severance Payments

Marrone's employment with Fisher Controls was terminated as part of an overall staff reduction. Marrone entered into a severance agreement that required him to return the gross amount of the "severance pay" upon initiating any legal action relating to his employment with Fisher. Marrone subsequently filed a civil rights complaint with the Iowa Civil Rights Commission, alleging age discrimination against Fisher. As a result, Fisher demanded that Marrone repay his severance pay, and Marrone refused. In Fisher's action to recover the lump-sum severance payment, it specifically alleged that the subject of Marrone's civil rights complaint was age discrimination in the termination of his employment. The district court granted summary judgement in favor of Fisher for the amount of Marrone's lump-sum severance pay plus interest. Marrone appealed.

HELD: Marrone's filing of a complaint with the Civil Rights Commission was the equivalent of "initiating any legal action" against his employer, and thus pursuant to the severance agreement, gave the employer the right to recoup the lump-sum severance pay. The phrase "any legal action" encompasses formal proceedings in any forum in which a party is entitled to seek the relief being asked under authority of the state.

Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995)

Summary Judgment - Intentional Torts

Marks, a member of Trinity Reformed Church, was excommunicated in a disciplinary action taken by the Church. Thereafter, he sued interim pastor Hartgerink and other church officials for defamation and intentional infliction of emotional distress. The district court granted the defendants' motion for summary judgment and dismissed the case.

HELD: There is no absolute rule against granting summary judgment in intentional tort cases despite the subjective nature of motive and intent.

Grefe & Sidney v. Watters, 525 N.W.2d 821 (Iowa 1994)

Summary Judgment - Legal Malpractice Claim

Grefe & Sidney sued Watters for fees and expenses. Watters counterclaimed alleging malpractice. The district court granted Grefe & Sidney summary judgment on its claim for fees and

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expenses. The jury returned a verdict for Grefe & Sidney on Watters' counterclaim. Watters appealed. The ultimate question is whether a judgment in favor of the law firm on the malpractice counterclaim renders harmless a prior but allegedly erroneous grant of summary judgment in favor of the law firm on its petition for fees.

HELD: Watters' resistance to the motion for summary motion was based on her allegation that, by committing malpractice, the legal services provided by the firm were of no value. Even if this created a genuine issue of material fact precluding summary judgment, such error was rendered harmless or moot by the subsequent judgment on the counterclaim which found the firm free from all negligence.

Randol v. Roe Enterprises, Inc., 524 N.W.2d 414 (Iowa 1994)

Summary Judgment - Proximate Cause

Randol brought suit against a Roe Enterprises gas station for injuries she suffered in a slip and fall on the gas station pavement. Randol contended that a drop off between the paved and graveled portions of the gas station parking lot caused the fall. Roe Enterprises moved for summary judgment arguing there was no direct or circumstantial evidence that Randol's fall was proximately caused by the drop off. The district court granted summary judgment, and the Court of Appeals affirmed. Randol filed an application for further review with the Supreme Court.

HELD: The evidence concerning the mechanics of Randol's fall (head over heels) was consistent with the conclusion that she fell as a result of stepping off a paved surface onto a lower, gravel surface. Randol's deposition testimony generated a genuine issue of material fact on proximate cause. "Proximate cause is ordinarily a question for the jury", and "it is only in rare cases that a party establishes proximate cause as a matter of law." Summary judgment vacated and case remanded.

Perkins v. Wal-Mart Stores, No. 753, 525 N.W.2d 817 (Iowa 1994)

Summary Judgment - Proximate Cause

Perkins brought a slip and fall action against Wal-Mart. At her deposition, Perkins stated that, although she did not observe anything on the floor that might have caused her to fall, when she rose she had dust on her clothes and sand on the palms of her hands. Wal-Mart moved for summary judgment contending there was no factual dispute that Perkins was unable to identify a cause for the fall. The district court granted summary judgment and the Court of Appeals affirmed.

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HELD: Perkins, as the non-moving party, is entitled to every legitimate inference reasonably deduced from the record. Based upon her deposition testimony, a reasonable mind could conclude that the dust, sand and other debris on the floor caused the fall, thereby raising a genuine issue of material fact as to the cause of the fall. Summary judgment vacated and case remanded.

Stoner v. Kilen, 528 N.W.2d 648 (Iowa Ct. App. 1995)

Vacation of Judgment

Motion to Amend to Conform to Proof

Stoner transferred funds in excess of $300,000 into Kilen's name to allegedly avoid creditors. Later, Stoner filed a petition in equity against Kilen to recover the funds. Pursuant to a meeting with Stoner's counsel, Kilen returned approximately two-thirds of the money. At trial, Kilen did not appear nor was she represented by counsel. The district court found Kilen to be in default and ruled in favor of Stoner for the sum of $107,982. Kilen did not file a motion to set aside the default judgment. After collection proceedings were initiated, Kilen then retained new counsel and filed a petition to vacate the default judgment on the sole basis of fraud in the proceeding. Kilen contended Stoner's counsel represented that in exchange for the two-thirds, suit would be dismissed and that is why she took no further part in the proceedings.

The District Court denied Kilen's motion to vacate the default judgment. Kilen's post-hearing motion to amend to conform to the proof was also denied because it constituted an attempt to interject an issue - procedural irregularity - that should have been raised earlier. Kilen appealed.

HELD: (Motion to Amend) A motion for leave to amend to conform to the proof based upon procedural irregularities was properly denied where it was made at the close of the evidence on a motion to vacate based on fraud. Kilen had not argued prior to the amendment that the judgment be vacated for procedural irregularities. The proposed amendment would have introduced a completely new issue into the proceeding.

HELD: (Motion to Vacate) Because the time had passed for Kilen to file a motion to set aside the default judgment (Rule 236), she was forced to resort to a petition to vacate judgment (Rule 252). That being the case, Kilen was required to make a showing why her grounds for relief could not have been discovered within the Rule 236 time frame. Her failure to make this precludes relief under Rule 252.

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In Re Marriage of Rathe, 521 N.W.2d 748 (Iowa 1994)

Venue

Delores and Danny Rathe obtained a dissolution decree in Black Hawk County District Court in 1979. In 1992, Delores filed an application in Woodbury County seeking a finding that Danny was in contempt for nonpayment of child support. Woodbury District Court dismissed the application finding it lacked subject matter jurisdiction to conduct a contempt proceeding on a decree that had been entered in another county.

HELD: A District Court sitting in one county has subject matter jurisdiction over a proceeding to enforce a support order in another county under Iowa's Unified Trial Court System. The remedy for bringing an action in an improper county is not dismissal but change to a proper county under Rule of Civil Procedure 175.

COMMERCIAL LAW

Steve Serck

Tannahil v. Aunspach, No. 5-295/94-1676 (Iowa Ct. App. 1995).

Corporate Veil

Tannahill is the sole proprietor of Rent-A-Dent, a used car sales and rental business. Aunspach was the president and shareholder of American Delivery Services Corporation.

Tannahill leased vehicles to American Delivery Services, the lessee, although the rental agreement was not signed. Tannahill later sued American and Aunspach for breach of oral rental agreement. The trial court found Aunspach personally liable because he had not established the corporate charter he claimed to operate under.

HELD: Failure to follow corporate formalities in the ordinary course of business does not necessarily justify piercing the corporate veil. There is no dispute regarding American's corporate existence and no indication Aunspach represented the leases were a personal undertaking. Reversed.

Chapman's Golf Center v. Chapman, 524 N.W.2d 422 (Iowa 1994).

Usury

In 1976, defendants purchased a golf center on installment contract from plaintiffs. The interest rate was set at 7 3/8% the first year with subsequent rates calculated on the basis of one percent greater than the average prime rate. The agreement

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was modified subsequently several times, thus creating a new contract each time. In 1980, the prime rate reached 15%.

In April 1991 the plaintiffs notified the defendants they had defaulted and brought a foreclosure action. The defendants claimed the contract became usurious and thus unenforceable when the interest rate exceeded the statutory limit of 9%. Judgment for plaintiffs.

HELD: Affirmed. A new contract arose after the original was modified and statutes in effect at the time of modification governed. In 1980 the contract was so modified and at that time the "business purpose" exception to the usury statute made a rate above 9% legal.

Hilpipre Auction Company v. Republic Acceptance Corp., 526 N.W.2d 311 (Iowa 1995).

Tax Lien

Republic caused certain machinery and equipment to be sold at auction pursuant to its rights as a secured creditor in that collateral. Republic was aware the machinery and equipment were subject to Muscatine County's real property tax lien and did not inform the purchasers. The sale proceeds were $340,000 while tax liens of $700,000 existed.

Auction company filed a bill of interpleader and the district court granted the county first lien on proceeds of sale.

HELD: Affirmed. The county's real property tax lien transferred to proceeds of sale realized by secured creditor who auctioned machinery and equipment encumbered far beyond its value.

Farmers Cooperative Co. v. DeCoster, 528 N.W.2d 536 (Iowa 1995).

Mechanic's Lien

Farmers Coop supplied gasoline, diesel fuel and petroleum to an excavator who used some of these products while working for DeCoster on DeCoster's property. The excavator failed to pay a sum owed to Farmers Coop, and Farmers Coop filed a mechanic's lien and foreclosure action against the DeCoster property.

DeCoster filed a motion for summary judgment claiming the fuel products supplied by Farmers Coop did not fall within the meaning of "material" for which a mechanic's lien could be filed under Iowa Code section 572.1(2) (1993). The district court denied summary judgment, concluding that the products were included in the term "material".

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HELD: Section 572.1(2) provides an expanded definition of "material", but does not specifically include fuel products. However, a companion statute, Iowa Code section 573.1(2), has an expanded definition of "material" which includes gasoline, kerosene, lubricating oils and greases, provisions and fuel. It is significant that the legislature listed fuel as additional to the ordinary meaning of material, indicating that its intent was not to include fuel in the ordinary meaning of material.

Gasoline, diesel fuel and petroleum are not included within the ordinary meaning of "material" under section 572.1(2) and therefore these items are not lienable.

Reversed.

Winkel v. Erpelding, 526 N.W.2d 316 (Iowa 1995).

Bills and Notes

Alphons and Vera Erpelding executed two promissory notes payable to A.N. Erpelding.

A.N. died and his executor sued to recover the debt. Alphons and Vera testified A.N. came to their house in April, 1986, signed both notes, subscribed the notation "paid in full" on both, and left the notes with Alphons and Vera. The district court granted summary judgment to Alphons and Vera. Court of Appeals reversed. Alphons appealed.

HELD: Debtor's possession of the instrument creates a rebuttable presumption of discharge. Surrender of the instrument contemplates an intentional act free of mistake and fraud. The logical explanation is A.N. intended to cancel and surrender the notes.

Decision of Court of Appeals vacated; District Court judgment affirmed.

In re Receivership of Mt. Pleasant Bank and Trust Co., 526 N.W.2d 549 (Iowa 1995).

Receivers

Adam Judgement Holders (AJH) were judgment creditors of the Mt. Pleasant Bank and Trust Company (MPB). MPB was closed by the Iowa Banking Commission and the FDIC was appointed receiver of MPB. The remaining assets were sold by the FDIC to the FDIC in its corporate capacity.

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The FDIC filed a petition for termination of the receivership after the FDIC had liquidated MPB. The net liquidation recovery was made available to unsecured creditors on a pro rata basis. AJH filed objections to the termination including the FDIC's accounting, FDIC's payment to itself, and paying participant banks more than their ratable share. The court ordered the final report entered. AJH appealed.

HELD: The interest on FDIC-corporate's investment to carry out the receivership is part of a contract of sale approved by the court and payment of interest is justifiable as a matter of contract law. Additionally, payment of liquidation expenses held priority.

Participant banks were parties to contracts with MPB and not mere creditors of the receivership estate. Direct recovery by a participant bank against the receiver in preference to the general pro rata distribution of assets is authorized in equity when the property is not that of the bank but that of the participant bank.

Affirmed.

C-Thru Container Corp. v. Midland Mfg. Co., 533 N.W.2d 542 (Iowa 1995)

Parol. Evidence/Trade Usage

Defendant contracted to produce bottles for plaintiff. Plaintiff later sued for breach of contract, claiming defendant had been unable to produce commercially acceptable bottles. Plaintiff instead purchased its bottles from another supplier at a lower price. Plaintiff claims that phone conversations between the parties indicated defendant would be unable to produce commercially acceptable bottles.

Defendant filed a motion for summary judgment contending that the contract did not require it to demonstrate an ability to manufacture commercially acceptable bottles as a condition precedent to the obligation to place an order. It asserted that the contract required that it manufacture commercially acceptable bottles in response to an order and because plaintiff never placed an order there was no breach.

The trial court granted the defendant's motion for summary judgment concluding that no sample container requirement was in the written contract. The court also held the parol evidence rule precluded consideration of evidence that the industry practice was to provide sample bottles before receiving an order. The court of appeals reversed the district court's ruling

concluding that evidence regarding the trade practice should have been considered.

HELD: The completely integrated contract could be explained or supplemented by parol evidence of trade usage even though it added a new term to the contract because the parol evidence showed trade usage which did not contradict any contract terms. Therefore, evidence it is a trade practice to provide sample bottles before ordering was admissible and a material issue of fact as to what performance is required of a seller as a prerequisite to a buyer's obligation to place an order for bottles. This precluded summary judgment for the defendant.

McIntire v. Muller, 522 N.W.2d 329 (Iowa App. 1994).

Open Account/Contract for Lump Sum

Builders sued farmer for the balance of an alleged open account seeking compensation for construction of a barn. Farmer claimed he had been quoted lump sums price, which was greatly exceeded by builders. The jury returned a verdict in favor of the builder. The farmer appeals claiming that the verdict is not supported by substantial evidence.

HELD: Affirmed. From the evidence presented the jury reasonably could have found there was an open account contract, and the charge was fair and reasonable. A materials list was never established and the farmer made changes as construction progressed.

Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57 (Iowa 1994).

Preferential Transfer

Seller of hog feeds sued bank alleging breach of agreement to assure payment of customers' feed account, tortious interference with contract between feed seller and customers, improper transfer of assets from customers to bank, and superior claim to proceeds of joint payee checks in the sale of customers' hogs held by the bank.

The bank president had made an oral statement that when the customers sold hogs for which the bank held a security interest the feed bill to the store would get paid. This statement was made to the store's finance company credit manager and the store had only a second-hand account of the conversation. The credit manager involved testified he did not interpret this statement as a guaranty of the customers' feed account. Later the customers' assets, including hogs, were transferred to the bank as satisfaction for all sums owed to it. The customers discharged their obligations to the feed store through federal bankruptcy

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proceedings and the bank refused to pay for the feed stores' unpaid balance.

HELD: There was no express or implied contract guaranteeing payment of the customers' account at the feed store created by the bank president's oral statement. The bank was not equitably estopped from denying it had agreed to assure full payment to the feed store where there was no evidence that the statement relied on was false, misleading or made with the intent that it be relied on. The transfer of hogs and other assets to the bank from the customers to satisfy money owed to the bank was not void as improper assignment for the benefit of creditors. Relinquishment of the indebtedness as fair consideration for a transfer which was preferential to the bank as a creditor. The indebtedness relinquished by the bank exceeded the market value of the assets transferred indicating the transfer was not void as fraudulent.

Midland Savings Bank FSB v. Stewart Group, LC, 533 N.W.2d 191 (Iowa 1995)

Lien Priority

Bank brought a mortgage foreclosure action against mortgagor subject to several mechanics' liens to determine what priority the bank's mortgages would have over other claims. The district court granted the bank's motion for summary judgment and found its mortgage liens to be superior to the mechanics' liens. The court was asked to determine if the bank's purchase-related advances should be entitled to construction mortgage lien priority or purchase money mortgage priority and whether the bank's construction advances are entitled to priority.

HELD: The bank's purchase money mortgage lien had priority over mechanics' lien for construction materials supplied after the mortgage was recorded to the extent it protected the unpaid balance of the purchase price. Further, the bank as a construction lender was entitled to a construction mortgage lien priority over subsequent mechanics' lien claimant, even though loan funds were paid to the owner rather than directly to providers or suppliers of work or improvements.

Wilde v. Buresh, 533 N.W.2d 565 (Iowa 1995).

Foreclosure

Sheriff's deed holder's notice stating that agricultural property was about to be sold and providing mortgagors the first right of refusal was sent by certified mail, return receipt requested, rather than by restricted certified mail. The notice

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was delivered to the former mortgagors' residence but allegedly was signed by a stranger and never received by them. Therefore, they did not reply within the statutory time and the land was sold. Iowa Code section 654.16A(5) does not expressly require the notice be sent by restricted certified mail, only that it be sent by registered, or certified mail, return receipt requested.

HELD: The Code authorizes certification by mere certified mail and the deed holder complied with that requirement. Therefore, the notice was properly sent in accordance with the statute.

COMPARATIVE FAULT
Len Strand

Baumler v. Hemesath, ___ N.W.2d ___ (Iowa, July 19, 1995)

Applicability of Chapter 668

Baumler was employed as a farmhand by Hemesath. He was injured when he slipped into a tire tractor rut while helping remove manure from a holding pit. He sued, alleging that Hemesath failed to maintain a safe work area and failed to warn him of dangers in the work area. Because Baumler was Hemesath's employee, there was an issue at trial of whether Iowa Rule of Civil Procedure 97 or Iowa Code chapter 668 applied to the case. Hemesath argued in favor of Chapter 668 because, pursuant to Section 668.14(1), he wanted to offer evidence of the fact that Baumler's insurance carrier had paid a portion of his medical expenses. The trial court held that Rule 97, not Chapter 668, applied and thus refused to allow Hemesath to offer evidence of the insurance benefits.

HELD: Affirmed. Rule 97, which has been in effect in one form or another for 80 years, provides that in an action by an employee against his or her employer, the defendant may plead and prove contributory fault in mitigation of damages. While Hemesath argues that the enactment of Chapter 668 effectively preempts Rule 97, no such intent appears in the language of Chapter 668. Thus, in negligence actions by employees against their employers, Rule 97 rather than Chapter 668 applies.

Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531 (Iowa 1995)

Applicability of Chapter 668

Texaco hired Seneca to install monitoring wells on the site of a Texaco service station. Seneca subcontracted with J & R to do the drilling. Seneca was responsible for locating the exact places for J & R to drill. A Seneca employee marked the drilling

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locations on Friday. A concrete subcontractor then poured cement at the drilling sites on Monday. J & R drilled the wells one month later. Seneca did not recheck the site after it initially marked the well locations. When J & R drilled, it punctured an underground storage tank. The service station owner did not know of the puncture and re-filled the tank several times over the next three weeks. About 2300 gallons of petroleum leaked from the puncture. The owner sued Texaco, Seneca and J & R for recovery of clean-up costs the owner incurred. The Iowa Comprehensive Petroleum Underground Tank Fund Board intervened to recover additional costs from the defendants pursuant to Iowa Code Chapter 455G. The trial court held that any recovery by the Board must be reduced by any fault assigned to the station owner.

HELD: Reversed on the issue of comparative fault. Chapter 455G gives the Board a direct cause of action against responsible parties. The Board does not merely become subrogated to the rights of any property owner that received financial assistance from the Board. In claims brought under Chapter 455G, the property owner does not fall within any category of persons to whom fault may be assigned. The owner is not a "claimant," under any Chapter 455G claims, nor is the owner a "defendant," a "person who has been released" or a "third-party defendant." In fact, Chapter 455G specifically prohibits the defendants from bringing claims against the owner. Thus, there is no basis for using Chapter 668 to reduce the Board's recovery by the owner's share of fault.

Long v. Jensen, 522 N.W.2d 621 (Iowa 1994)

Applicability of Chapter 668

Plaintiff was injured when she fell down the steps outside of her daughter's townhouse. She sued the landlord for both breach of contract and negligence. The jury found defendant liable on both theories but assessed 35% fault to plaintiff. The trial court reduced the verdict by 35% in accordance with the jury's allocation of fault. The plaintiff, on appeal, alleged that comparative fault principles should not apply because her claim was one for breach of contract.

HELD: Affirmed. The breach of contract involved a lease provision that obligated the defendant to maintain the premises. This contractual obligation merely helped establish the duty element of the negligence claim. The claim essentially was a negligence claim. As such, the trial court properly applied Chapter 668 to the claim.

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Venard v. Winter, 524 N.W.2d 163 (Iowa 1994)

Experts

Plaintiff in professional malpractice case who fails to designate expert witness within time provided by Iowa Code § 668.11 may escape the consequences of this failure by dismissing case without prejudice and re-filing a new action.

Olson v. Prosoco, Inc., 522 N.W.2d 282 (Iowa 1994)

Failure to Avoid Injury

Unreasonable failure to avoid injury instruction is properly given only when there is evidence that the injured party could have done something after a tort occurred to avoid further injury. A tort occurs when injury is first suffered. Thus, acts that the injured party could have taken prior to suffering the initial injury do not support a failure-to-avoid-injury defense.

McDonnell v. Chally, 529 N.W.2d 611 (Iowa Ct. App. 1995)

Mitigation

Plaintiff was a passenger in a vehicle that was involved in a two car collision. She suffered neck and back injuries. The jury assessed 30% fault to each of the two drivers and 40% fault to the plaintiff. The plaintiff's fault was based on a theory that the plaintiff failed to mitigate her damages by failing to attempt to lose weight and by failing to perform physical therapy suggested by her doctor. The trial court gave an instruction based on this theory. The plaintiff appealed, alleging that a mitigation instruction was inappropriate under these circumstances.

HELD: Affirmed. The unreasonable failure to lose weight pursuant to medical advice can be assessed as fault if weight loss would mitigate damages. After the accident, plaintiff's neurologist suggested that she lose weight and participate in physical therapy. Instead, she gained over 20 pounds during a six month period before her next appointment. The doctor advised her that weight loss would ease her back pain. He also noted that her attendance at physical therapy sessions was erratic. The trial court did not err in giving a mitigation instruction in light of this evidence.

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Biddle v. Sartori Memorial Hosp., 518 N.W.2d 795 (Iowa 1994)

Release

The plaintiff's release of the defendant-physician extinguished any vicarious liability claim against the defendant-hospital. The primary tortfeasor and any party who could be vicariously liable must be treated as a single party under chapter 668. Thus, any release of the primary tortfeasor extinguishes all vicarious liability claims against others. The release of the physician rendered the hospital responsible only for its own conduct, conduct that the jury found not to constitute negligence.

Mosell v. Estate of Marks, 526 N.W.2d 179 (Iowa Ct. App. 1994)

Sudden Emergency

Mosell was a passenger in Marks' car when a deer ran in front of the vehicle. Marks swerved to avoid the deer and slid into the path of a truck. Marks was killed and Mosell was injured in the accident. Mosell sued Marks' estate. The trial court refused to give a sudden emergency doctrine instruction, believing that the concept was subsumed into the general principles of comparative fault. The jury awarded damages to Mosell.

HELD: Reversed and remanded. Marks was confronted with "an unforeseen, exigent combination of circumstances not of his own making." These circumstances required Marks to make an immediate decision. The sudden emergency doctrine remains a viable concept to aid the jury in understanding comparative fault principles under such emergency circumstances.

CONSTITUTIONAL LAW

Steve Serck

Kelly v. State, 525 N.W.2d 409 (Iowa 1994).

Equal Protection

Public employees represented by a union were granted wage increases of ten percent over three years due to contractual obligation. Nonunion state employees, including plaintiffs, were granted a 7.5% increase over the same period.

The trial court ruled the unequal pay increase violated equal protection provisions of the U.S. and Iowa Constitutions.

HELD: Because there is no fundamental constitutional right to public employment and there is no suspect classification

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involved in union membership or nonmembership, a rational basis test is applied.

Equal protection requires people similarly situated to be treated similarly. The two groups here are not similarly situated - one is unionized, the other is not. The unionized group was subject to a court order compelling a set pay increase, the other group was not. The State could have rationally determined not to extend equal pay increases to nonunion employees for economic reasons.

Reversed and remanded.

Krull v. Thermogas Co. of Northwood, Iowa, Division of Mapco Gas Products, Inc., 522 N.W.2d 607 (Iowa 1994).

Equal Protection

Homeowners brought negligence action against liquid propane gas company arising from gas explosion and resulting fire allegedly caused by furnace gas control valve. They alleged the company was negligent by failing to properly identify the valve in a recall program initiated by the valve manufacturer. The defendant manufacturer brought a constitutional equal protection challenge to Iowa Code §614.1(11) Iowa's statute of repose regarding defective improvements to real property. The claim asserted the statute is discriminatory because the legislature excludes owners, occupants and operators of an improvement to real property from Section 614.1(11) coverage while covering architects and builders.

HELD: The statute of repose does not violate state or federal equal protection clauses. A rational basis for the classification exists because owners have continuing control of the premises and would be responsible for their repair and maintenance while architects and builders have no control over the premises once they are turned over to the owner.

McMahon v. Iowa Dept. of Transportation, Motor Vehicle Div., 522 N.W.2d 51 (Iowa 1994).

Equal Protection

An automobile owner petitioned for review of a DOT decision revoking his personalized license plates for displaying a message which had sexual connotations. The plates read "3MTA3" which read "EATME" in a rearview mirror.

The district court held that the DOT's procedure for determining revocation of personalized license plates is arbitrary

and capricious because it may fail to revoke an offensive plate that has a legitimate alternate meaning.

HELD: Reversed. The DOT procedure for determining whether a personalized license plate's message should be allowed promoted a legitimate governmental interest where the office reviewed and could disallow personalized license plate applications when made, and allowed borderline cases after further review subject to public comment.

Gard v. Little Sioux Intercounty Drainage District of Monona and Harrison County, 521 N.W.2d 696 (Iowa 1994).

Equal Protection

Estates of drowned boaters brought a negligence action against an intercounty drainage district for the injury and death of the decedents. The plaintiffs relied on Iowa Chapter 670 whereby all municipalities in Iowa are subject to liability for torts. The district court granted a motion to dismiss in favor of the drainage district because a drainage district is not a municipality subject to suit in tort and therefore had immunity.

HELD: A drainage district is not a municipality subject to suit and tort. The legislature's failure to include drainage district within this definition does not violate equal protection rights of those injured by drainage districts because of the limited nature of the district's purposes and powers.

Howard v. Schildberg Construction Co., 528 N.W.2d 550 (Iowa 1995).

Lease of Agricultural Land

In 1960, the Howards entered into a mining lease with the Missouri Valley Limestone Company. The agreement described the leased land to include the family farm both north and south of the East Nodaway River. However, an addendum to the lease required that the lessee obtain the written permission of the lessor to mine on the property north of the river. While the initial term of the lease was 20 years, the lease also had a renewal provision which stated that the lessee could renew the lease for additional terms of 10 years so long as the limestone and gravel deposit was not exhausted.

In 1963, Missouri Valley sold its interest in the lease to the Schildberg Construction Company. At the end of the original 20 year lease, Schildberg renewed the lease for an additional 10 years. After the expiration of the renewal term, Schildberg sought another 10 year extension of the lease. Howard objected to this second renewal and sought to have the lease either declared invalid

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and unenforceable or to be interpreted as not including the part of the property north of the river.

The district court held that (1) the lease was valid and enforceable; (2) it did not fall within the agricultural land alienation provision of the Iowa Constitution; (3) the lease allowed multiple renewals; and (4) that the lease clearly and unambiguously included the property north of the river.

HELD: Affirmed. The Iowa constitutional agricultural land alienation restriction does not apply to agricultural land leased for purely non-agricultural purposes. Because the lease between Howard and Schildberg is clearly limited to mining on land, the lease does not fall within the constitutional restriction.

Also in dispute in this case was whether the lease applied only to the land south of the river or whether it also included land north of the river. The contract as written was unambiguous. The lease clearly includes the property both north and south of the river.

The final dispute between the parties concerns whether the lease provided for only one renewal or provided for perpetual renewals. In general this court has held that a covenant to renew is satisfied by one renewal. Perpetual leases are not favored. However, where the intent of the parties is clearly to create a perpetual lease, it will be enforced. Courts have not applied the one renewal rule when the lease clearly provides for multiple renewals or when the lease contains a condition, the occurrence of which terminates the right to further renewals.

Here, the lease was not perpetual because it provided that it was effective only "so long as the limestone or gravel deposit is not exhausted". Therefore, when the mineral deposit is exhausted, the lease automatically expires.

CONTRACTS

Steve Serck

Howard v. Schildberg Construction Co., 528 N.W.2d 550 (Iowa 1995).

Lease of Agricultural Land

In 1960, the Howards entered into a mining lease with the Missouri Valley Limestone Company. The agreement described the leased land to include the family farm both north and south of the East Nodaway River. However, an addendum to the lease required that the lessee obtain the written permission of the lessor to mine on the property north of the river. While the initial term of the lease was 20 years, the lease also had a renewal provision which stated that the lessee could renew the lease for additional terms

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of 10 years so long as the limestone and gravel deposit was not exhausted.

In 1963, Missouri Valley sold its interest in the lease to the Schildberg Construction Company. At the end of the original 20 year lease, Schildberg renewed the lease for an additional 10 years. After the expiration of the renewal term, Schildberg sought another 10 year extension of the lease. Howard objected to this second renewal and sought to have the lease either declared invalid and unenforceable or to be interpreted as not including the part of the property north of the river.

The district court held that (1) the lease was valid and enforceable; (2) it did not fall within the agricultural land alienation provision of the Iowa Constitution; (3) the lease allowed multiple renewals; and (4) that the lease clearly and unambiguously included the property north of the river.

HELD: Affirmed. The Iowa constitutional agricultural land alienation restriction does not apply to agricultural land leased for purely non-agricultural purposes. Because the lease between Howard and Schildberg is clearly limited to mining on land, the lease does not fall within the constitutional restriction.

Also in dispute in this case was whether the lease applied only to the land south of the river or whether it also included land north of the river. The contract as written was unambiguous. The lease clearly includes the property both north and south of the river.

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Here, the lease was not perpetual because it provided that it was effective only "so long as the limestone or gravel deposit is not exhausted". Therefore, when the mineral deposit is exhausted, the lease automatically expires.

Chapman's Golf Center v. Chapman, 524 N.W.2d 422 (Iowa 1994).

Usury

In 1976, defendants purchased a golf center on installment contract from plaintiffs. The interest rate was set at 7 3/8% the first year with subsequent rates calculated on the basis of one percent greater than the average prime rate. The agreement was modified subsequently several times, thus creating a new contract each time. In 1980, the prime rate reached 15%.

In April 1991 the plaintiffs notified the defendants they had defaulted and brought a foreclosure action. The defendants claimed the contract became usurious and thus unenforceable when the interest rate exceeded the statutory limit of 9%. Judgment for plaintiffs.

HELD: Affirmed. A new contract arose after the original was modified and statutes in effect at the time of modification governed. In 1980 the contract was so modified and at that time the "business purpose" exception to the usury statute made a rate above 9% legal.

Keppy v. Lilienthal, 524 N.W.2d 436 (Iowa Ct. App. 1994).

Breach/Oral Contract

Lilienthals entered into an oral agreement with Keppy to lease sows and boars to Keppy to revitalize their pig herd. Proceeds from sale of the offspring were to be paid 45 percent to Lilienthals, 36 percent to Keppy and 19 percent to pay feed costs.

Keppy was to provide animal husbandry, properly breed, feed, and care for the pigs until sale, provide a location and utilities and pay all veterinary costs.

The Lilienthals switched feed. The new feed began to cause mortality problems so Keppy switched feed suppliers. Keppy claimed she switched feed because Lilienthals had failed to provide the 'best feed' pursuant to the agreement. The Lilienthals then informed Keppy the agreement was terminated and that Keppy owed them for selling hogs in violation of their agreement.

Keppy filed an injunction requesting the Lilienthals be enjoined from removing hogs from the farm. The Lilienthals filed a counterclaim requesting a writ of replevin of all the property on the farm related to the feeder operation.

The District Court found an oral agreement, that Keppy had authority to change feed, and that Keppy did not breach the

contract by selling hogs and changing feed. Further, the court held the Lilienthals breached first by changing source of feed.

HELD: Affirmed. The oral contract was not terminable at will. When no duration is specified by the parties, we look to the nature of the contract to determine a reasonable duration. Here, it can be implied that the contract was to be in force until the herd was revitalized. Keppy did not breach contract by switching feed suppliers because Lilienthal breached the agreement to supply "best feed" thus forcing Keppy to switch suppliers.

Keppy did not breach by selling hogs and withholding proceeds because lessors knew of sale before or failed to object afterwards.

Hosteng Concrete & Gravel, Inc. v. Tular, 524 N.W.2d 445 (Iowa Ct. App. 1994).

Reformation

The Tulars obtained a loan from First Federal Savings & Loan Association to purchase a home. The deeds contained the correct legal description of the real estate while the mortgage did not contain a ten-foot strip of land by mistake. Hosteng did improvements to the property and filed a mechanic's lien for work and materials supplied.

First Federal foreclosed on its mortgage - the petition contained the incorrect legal description. Hosteng bought the property at the sheriff's sale. The mortgage and mechanic's lien were satisfied. The Tulars failed to redeem the property within the requisite six month period.

Hosteng was informed the legal description on the sheriff's deed was incorrect. Tullars refused to execute a quit claim deed so Hosteng brought action to quiet title. District Court concluded 10 foot strip was excluded from First Federal mortgage by mutual mistake and quieted title in Hosteng.

HELD: We affirm the decision to reform the mortgage and to quiet title in the ten foot strip.

Reformation may be had not only by the original parties to an instrument but also by a real party in interest claiming priority with a party to the instrument, such as a purchaser at an execution, judicial or foreclosure sale. In reforming the instrument, the court does not change the agreement between the parties but rather changes the instrument to conform to the parties' real agreement.

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Northern Natural Gas Co. v. Knop, 524 N.W.2d 668 (Iowa Ct. App. 1994).

Interpretation

Northern Natural Gas owns gas pipeline easements crossing property owned by the Knops and Puegels. The easements were obtained in the 1930s from the owners' predecessors. Pipelines were laid across the properties in 1931 and additional lines added in 1957 and 1963.

Northern petitioned for injunctive relief seeking to enjoin the property owners from interfering with pipeline construction pursuant to the easements. The district court determined the 1930 easements did not grant the right to construct additional pipelines following construction in 1931.

HELD: In construction of written contracts, intent of the parties' controls determined by provisions of contract. If ambiguity existed by the terms of the easement agreement, the manner in which the parties had construed them was presumptive evidence of intention. The fact that additional lines had been installed after construction of original pipeline was presumptive evidence of parties' intention to include future construction within terms of easements. Both Knops and Puegels should have been enjoined from interfering with Northern's rights under the easements.

Reversed and remanded.

Farmers & Merchants Savings Bank v. Vandenberg Chevrolet-Buick, Ltd., 523 N.W.2d 211 (Iowa 1994).

Interpretation

A car dealership sold the bank a customer's deferred payment note and security agreement. The dealership later learned the loan applicant had signed for the named co-signer. The bank's deficiency judgment against the co-signatoree was set aside because she had never signed the note. Bank then sued the dealership alleging breach of warranty in its written agreement that all deferred payment obligations assigned to it by the bank would not be "subject to any disputes, set offs, or counterclaims."

HELD: The contract language warranting against "dispute" over genuineness of assigned deferred payment obligations constituted assurance the genuineness of assigned documents would not be challenged. Therefore, challenge to the enforcement of this note based upon genuineness of signature triggered the assignor's warranty.

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Morgan v. American Family Mutual Insurance Co., 534 N.W.2d 92 (Iowa 1995).

Interpretation

Insureds brought action against insurer for breach of contract and bad faith denial of claim for uninsured motorist benefits. Jury found insurer failed to pay in bad faith and awarded compensatory and punitive damages.

HELD: Reversed. Plaintiffs cannot recover because their suit is barred by a contractual limitations period in the policy. A written agreement speaks for itself; ignorance of the contents of the agreement does not negate or void the contents, absent fraud or mistake.

If a party is able to and has the opportunity to read a contract, the party is charged with notice of the terms and conditions of the contract.

Schlitz v. Teledirect International, Inc., 524 N.W.2d 671 (Iowa Ct. App. 1994).

Waiver

The Schlitzs leased office space to TDI for one year. TDI had two options to renew, one for two years and another for three years. Both required notice to Schlitzs 90 days prior to lease expiration. Lease also contained holdover clause with higher rental rate.

TDI did not exercise option to renew lease but continued to occupy and pay regular rent, not the holdover rent. Schlitzs later executed an "Assignment of Real Estate Lease and Agreement" assigning TDI's leasehold interest for the remainder of the term mentioned in the lease, and all renewals and extensions of said term. The assignment provided the Schlitzs were providing their covenant and agreement that TDI was not in default on performance of its lease.

TDI later informed Schlitzs it was vacating. Schlitzs filed suit to recover holdover rent at the higher rate for 29 months after the original lease had expired.

Trial court found the requirement of written notice to exercise the option to renew was waived and that the lease was treated as renewed. Additionally, the Schlitzs were estopped from denying renewal or extension of the lease and were denied holdover rent.

HELD: Affirmed. Lease requirement of written exercise of option to renew or extend lease may be waived. When a person knows or ought to know of entitlement to enforce right and neglects to do so it implies intention to waive or abandon that right.

Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994).

Parol Evidence

Scott Richardson purchased two acres and his father David Richardson and stepmother Sheila Richardson purchased the remaining one acre of a three acre tract. Evidence at trial indicated discussions were held as to the need for an easement to ensure David and Sheila would have access and could install utilities to their property. The conveyance contained language providing David and Sheila with a "right for ingress and egress" over the land purchased by Scott.

Scott sold his land to Ricky Cline. David and Sheila then had underground water, telephone and electricity lines installed subject to the easement. Cline filed suit alleging the utility lines constituted a trespass.

Trial court found it was the intent of the parties to have an open easement available for installation of utilities.

HELD: Testimony regarding the parties' intentions with respect to the easement was not parol evidence intended to vary, add to or subtract from the written agreement. The court was required to interpret what an "easement with right for ingress and egress" was and testimony was relevant to determining the meaning.

We affirm the trial court's interpretation of the easement. The Richardson's installation of utilities did not burden the servient estate to a greater extent than was contemplated at the time of the creation of the easement and Cline is not entitled to any injunctive or monetary relief.

Iowa Realty of Pella v. Boomsma's, Inc., 533 N.W.2d 549 (Iowa 1995).

Listing Agreement/Consideration

Real estate broker sent a letter to seller asking him to protect the real estate agency's interest in customers whom the broker had previously shown the property. As part of the agreement later signed by the seller, if one of the listed parties purchased the property within 6 months the real estate broker would be entitled to the normal 6 percent commission rate. The seller eventually completed the sale of the property, through his own

efforts, to one of the entities listed in the broker's letter. The broker now demands a commission on the sale, claiming the letter was a written, enforceable contract.

The trial court recognized that the written agreement omitted elements required to be included in the listing agreement but deemed the letter was an enforceable agreement to pay a 6 percent commission.

HELD: Reversed. Broker's letter agreement, which identified listing agreement already in existence was designed to protect the broker's right to commission beyond the period of initial listing. But because it did not contemplate any additional services to be performed by the broker it was not enforceable, absent a provision establishing a definite protection period in the original listing contract. When a contract contemplates subsequent execution of subsidiary agreements, promises in that agreement do not require additional consideration; however, if a subsidiary agreement is not contemplated in the original contract and the original agreement is completed to performance, the subsidiary agreement requires additional independent consideration. This was not offered in this case. Therefore, the agreement to pay a commission to the broker was unenforceable.

C-Thru Container Corp. v. Midland Mfg. Co., 533 N.W.2d 542 (Iowa 1995)

Parol. Evidence/Trade Usuage

Defendant contracted to produce bottles for plaintiff. Plaintiff later sued for breach of contract, claiming defendant had been unable to produce commerically acceptable bottles. Plaintiff instead purchased its bottles from another supplier at a lower price. Plaintiff claims that phone conversations between the parties indicated defendant would be unable to produce commercially acceptable bottles.

Defendant filed a motion for summary judgment contending that the contract did not require it to demonstrate an ability to manufacture commercially acceptable bottles as a condition precedent to the obligation to place an order. It asserted that the contract required that it manufacture commercially acceptable bottles in response to an order and because plaintiff never placed an order there was no breach.

The trial court granted the defendant's motion for summary judgment concluding that no sample container requirement was in the written contract. The court also held the parol evidence rule precluded consideration of evidence that the industry practice was to provide sample bottles before receiving an order. The court of appeals reversed the district court's ruling

concluding that evidence regarding the trade practice should have been considered.

HELD: The completely integrated contract could be explained or supplemented by parol evidence of trade usage even though it added a new term to the contract because the parol evidence showed trade usage which did not contradict any contract terms. Therefore, evidence it is a trade practice to provide sample bottles before ordering was admissible and a material issue of fact as to what performance is required of a seller as a prerequisite to a buyer's obligation to place an order for bottles. This precluded summary judgment for the defendant.

State Ex Rel Bernau v. Keller-Apex Loan, 522 N.W.2d 111 (Iowa App. 1994).

Listing Agreement

The state superintendent of banking became receiver for an insolvent industrial loan company. Several real estate listing contracts were entered into between the superintendent as receiver and a realtor. At the time the properties were sold the uniform listing contracts had expired or were unenforceable because they contained no expiration date. The realty company claims contracts were orally extended by employees of the state superintendent and is suing for commissions pursuant to the listings.

HELD: The Iowa Administrative Code requires all listing agreements to be in writing, including the commission to be paid, signatures of all parties and a definite expiration date. This is analogous to the statute of frauds. In this case the listing agreement did not support the broker's claims for commission because it did not cover the period in which properties were sold and lacked required elements of expiration date or signature of receiver.

Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294 (Iowa 1994).

Implied Contract

Roberts, a passenger excursion boat operator, leased waterfront property from the City of Bettendorf and the adjacent riverbed from the DNR. When Steamboat was selected by the City to operate a riverboat gambling excursion Roberts' lease with the City was not renewed but the DNR lease was extended for four more years. Steamboat started operations and occupied the city docking area which had been designed and built by Roberts. Roberts was not paid compensation.

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Roberts brought suit against the City and Steamboat under several theories, including breach of an implied contract. The trial court granted summary judgment in favor of the defendants concluding that there was insufficient evidence to support theories of the implied contract claim because of the lack of evidence that Roberts was unjustly enriched.

HELD: Affirmed. The state-authorized DNR lease was not exclusive because Roberts did not have access to the riverfront. Roberts' right to use the riverbed was conditioned upon access to the City's leased property which access was previously taken away.

The doctrine of unjust enrichment exists to prevent the taking of property or benefits of another. If Steamboat had wrongfully occupied the riverbed the law would have implied a promise to pay Roberts benefits received from Steamboat's operations. However, because Roberts' right to use the DNR portion of the riverbed was conditioned upon access to the City's property, it was contrary to equity to imply a promise to pay restitution.

<u>Burton E. Tracy & Co., P.C. v. Frink</u>, 520 N.W.2d 316 (Iowa App. 1994).

<u>Covenant Not to Compete</u>

Accounting corporation brought a violation of covenant not to compete action against a withdrawing shareholder. The covenant required client accounts retained by a withdrawing stockholder to be purchased. When Frink withdrew, a number of school districts went with him. He argued school districts are not clients because Iowa law requires an annual audit procedure.

The district court held that school districts were clients and upheld the covenant.

HELD: Affirmed. We refuse to consider the legality of the covenant because it was not properly pled at the trial court level.

<u>McIntire v. Muller</u>, 522 N.W.2d 329 (Iowa App. 1994).

<u>Open Account/Contract for Lump Sum</u>

Builders sued farmer for the balance of an alleged open account seeking compensation for construction of a barn. Farmer claimed he had been quoted lump sums price, which was greatly exceeded by builders. The jury returned a verdict in favor of the builder. The farmer appeals claiming that the verdict is not supported by substantial evidence.

HELD: Affirmed. From the evidence presented the jury reasonably could have found there was an open account contract, and the charge was fair and reasonable. A materials list was never established and the farmer made changes as construction progressed.

Kuehl v. Freeman Bros. Agency, Inc., 521 N.W.2d 714 (Iowa 1994).

Foreseeability/Mitigation/Personal Liability

Seller corporation sold its insurance agency to buyer under a purchase agreement which required seller to be responsible for pre-sale errors and omissions. Previous to the sale an application for auto insurance was mishandled by seller by not listing the insured's son as owner or driver. When the insured's son took the car to college he killed a passenger while intoxicated.

A civil action commenced and upon notice Seller refused to defend the case and allowed its errors and omission insurance to lapse. Due to financial troubles Buyer was forced to settle the civil claims for $150,000. Buyer did not give Seller notice of the settlement agreement and stopped making payments on the agency purchase agreement. Seller then brought a breach of contract suit. Buyer counterclaimed on the basis of fraud, negligence, misrepresentation, contribution indemnity, and breach of contract. Judgment was entered in favor of Buyer on its counterclaim.

HELD: Affirmed. Seller breached the contract by refusing to be responsible for payment of the civil claims arising out of its earlier mishandling of the insurance application. Seller further breached the contract by failing to maintain professional liability insurance to cover such errors and omissions.

Damages based on breach of contract must have been foreseeable or contemplated by parties when they entered into the agreement. Damages are foreseen if a reasonable person would expect them to flow from the breach of contract. The person asserting a breach of contract has a duty to exercise all reasonable diligence to mitigate damages caused by the other party's breach. Seller could have foreseen the damages and Buyer did not violate its duty to mitigate damages from seller's mishandling of application by settling a potential multi-million dollar claim for $150,000.

President and sole owner of seller was personally liable for breach of contract because he signed the contract in both his capacity as representative of the corporation and individually.

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Howard v. Schildberg Construction Co., 528 N.W.2d 550 (Iowa 1995).

Lease of Agricultural Land

In 1960, the Howards entered into a mining lease with the Missouri Valley Limestone Company. The agreement described the leased land to include the family farm both north and south of the East Nodaway River. However, an addendum to the lease required that the lessee obtain the written permission of the lessor to mine on the property north of the river. While the initial term of the lease was 20 years, the lease also had a renewal provision which stated that the lessee could renew the lease for additional terms of 10 years so long as the limestone and gravel deposit was not exhausted.

In 1963, Missouri Valley sold its interest in the lease to the Schildberg Construction Company. At the end of the original 20 year lease, Schildberg renewed the lease for an additional 10 years. After the expiration of the renewal term, Schildberg sought another 10 year extension of the lease. Howard objected to this second renewal and sought to have the lease either declared invalid and unenforceable or to be interpreted as not including the part of the property north of the river.

The district court held that (1) the lease was valid and enforceable; (2) it did not fall within the agricultural land alienation provision of the Iowa Constitution; (3) the lease allowed multiple renewals; and (4) that the lease clearly and unambiguously included the property north of the river.

HELD: Affirmed. The Iowa court agreed with those courts and held that the Iowa constitutional agricultural land alienation restriction does not apply to agricultural land leased for purely non-agricultural purposes. Because the lease between Howard and Schildberg is clearly limited to mining on land, the lease does not fall within the constitutional restriction.

Also in dispute in this case was whether the lease applied only to the land south of the river or whether it also included land north of the river. This contract as written was unambiguous. The lease clearly includes the property both north and south of the river.

The final dispute between the parties concerns whether the lease provided for only one renewal or provided for perpetual renewals. In general this court has held that a covenant to renew is satisfied by one renewal. Perpetual leases are not favored. However, where the intent of the parties is clearly to create a perpetual least, it will be enforced. Courts have not applied the one renewal rule when the lease contains a condition, the occurrence of which terminates the right to further renewals.

Here, the lease was not perpetual because it provided that it was effective only "so long as the limestone or gravel deposit is not exhausted". Therefore, when the mineral deposit is exhausted, the lease automatically expires.

Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402 (Iowa Ct. App. 1994).

Construction/Substantial Performance

Curtis and Chris Krull entered into a contract with Nepstad for construction of a home for $190,000. After Nepstad built the foundation and began building the frame of the home, the Krulls insisted the foundation be lowered, necessitating removal of the foundation and frame that had just been built. Nepstad then rebuilt the foundation as the Krulls requested.

The parties then entered into a new contract to apportion the costs of rebuilding the foundation. They set a new price of $195,045.50. Construction costs exceeded the second contract price, and a dispute ensued over who should pay for the excess costs. The Krulls refused to make the final payments and Nepstad refused to complete the home until payment was made. The Krulls then finished building the home themselves.

Nepstad filed a mechanic's lien and foreclosure action against the Krulls, claiming that the contract was a cost-plus contract. Krulls counter-claimed for breach of contract due to defects in construction. The trial court determined the contract was a fixed-price contract and dismissed Nepstad's foreclosure petition. The court held for the Krulls on their breach of contract claim and ordered Nepstad to pay the cost overruns during construction ($12,645.59) as well as the costs of repairing defects in the home ($6,535).

HELD: Affirmed. When interpreting a written contract, the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says. Ambiguity exists when, after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists concerning which of two reasonable constructions is proper. Here, the contract was ambiguous as written, so the district court properly allowed extrinsic evidence.

When a contractor substantially complies with a contract, it is entitled to recover the contract price with deductions for defects and incompletions. The contractor has the burden of proving substantial compliance, which allows only omissions or deviations that are unintentional, are not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to the other portions of the building, and may be

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compensated for through deductions in the contract price. Once the contractor meets the burden of showing substantial performance, the homeowner has the burden of proving any defects or incompletions to be deducted. Nepstad failed to prove substantial performance.

Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103 (Iowa 1995).

Privity

Tomka, who owned a custom cattle feeding operation, contracted with Brummer to feed Brummer's cattle until they reached market weight.

Brummer requested the cattle be implanted with two synthetic growth hormones manufactured by Hoechst to enhance their weight gain. Tomka arranged for the implants, and the veterinarian that was hired billed Brummer for the cost of the hormones and the implanting charge. After the implantations, the cattle became restless and did not gain weight as they should have. As a result, the cattle were sold later than expected and Tomka lost money on the contract.

Tomka filed suit against Hoechst under both tort and contract theories of recovery.

HELD: Recovery of economic losses under contract theory should not be determined by whether or not the plaintiff sustained damage to his or her person or property. The deciding factor is the relationship of the loss to what the product was supposed to accomplish. Accordingly, contract law protects a consumer's expectation that a product purchased will be fit for its intended use, whereas tort actions protect against safety hazards and the risk of injury to persons and property.

Tomka's damage clearly falls within contract-warranty theories. Tomka is alleging that the defendant's hormones failed to promote growth and weight gain in his cattle as they should have.

Tomka seeks consequential economic loss damages which include loss of profits, loss of goodwill, and loss of business reputation.

For recovery of consequential economic losses under an express warranty theory, the plaintiff must be in privity with the defendant.

Even if Tomka is considered the buyer of the hormones, recovery of damages will not be permitted because the hormones were purchased from the veterinarian and not from Hoechst, and Tomka was therefore not in privity with Hoechst.

Because he is a non-privity buyer and the damages he seeks are consequential economic loss damages, Tomka may not recover under an express warranty theory.

Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc., 526 N.W.2d 305 (Iowa 1995).

Privity

Plaintiff BGF purchased an allegedly defective Northstar freeze dryer from a distributor.

The district court submitted a claim of breach of express warranty under the U.C.C. Jury awarded BGG $70,000 in consequential economic loss damages against Northstar.

HELD: BGG was not in privity with Northstar and was not entitled to recover consequential damages against the manufacturer for breach of express warranty.

Non-privity buyers who rely on express warranties are limited to direct economic loss damages. Such damages typically are the difference between the actual value of the goods and the value as warranted. The jury did not award BGG such damages, instead it awarded consequential economic loss damages for which it was not entitled.

Reverse and remand to enter judgment in favor of Northstar.

Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995).

Assignment

LeMars Mutual Insurance Company issued Alfred Coyle an insurance policy. William Lawlor, as agent for LeMars, told Coyle that the LeMars policy insured Coyle for liability for negligent welding and related work activities. In January 1990, Coyle performed negligent welding on Red Giant's oil tanks, causing damage to Red Giant in excess of $58,351. Coyle notified LeMars of the damage and LeMars denied coverage and refused to defend Coyle in Red Giant's suit against Coyle. Red Giant obtained a judgment against Coyle for $58,351.52 plus interest and costs. Red Giant and Coyle reached a settlement in which Coyle assigned to Red Giant all of his rights against LeMars and Lawlor for failure to provide coverage. In consideration for the assignment, Red Giant agreed to not execute the judgment against Coyle.

Red Giant then sued Lawlor and LeMars as the assignee of Coyle as to all causes of action Coyle had against LeMars and

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Lawlor. The district court entered summary judgment in favor of LeMars and Lawlor. It reasoned that because of the covenant not to execute there could be no liability because Coyle was no longer "legally obligated to pay" Red Giant - a precondition to coverage under the policy.

HELD: Reversed. The agreement between Coyle and Red Giant was a contract and not a release, so Coyle's liability remained, and he was still "legally obligated" to Red Giant. Therefore, if the insurance policy covered such damages, LeMars is obligated to pay. Additionally, the outstanding liability against Coyle means that the action against Lawlor based on Lawlor's failure to procure the correct coverage is still viable, even if there is not coverage under the insurance policy. This interpretation of the "legally obligated to pay" language in the policy is consistent with the rules of construction for insurance policies, which provide that ambiguous language should be construed in favor of the insured. We find that the term "legally obligated" is ambiguous.

COURTS

Rex Staub

Federal Land Bank of Omaha v. Tiffany, 529 N.W.2d 294 (Iowa 1995)

Judges - Assignment of Single Judge to Complex Litigation

Tiffany organized two Iowa corporations whose names were identical to well-known lenders in the farm credit system. The Federal Land Bank of Omaha, the Production Credit Association of the Midlands, and other members of the farm credit system filed an action to enjoin Tiffany from using the names. The District entered summary judgment against Tiffany. On appeal Tiffany argued the court erred in refusing his request to assign the case to a single judge in accordance with Rule of Civil Procedure 136(b).
* Note: Case of first impression on Rule 136(b).

HELD: The court did not abuse its discretion in finding the litigation not so complex as to require assignment to a single judge. Rule 136(b) provides that a case designated as "complex litigation" **may** be assigned to a single judge to deal with all proceedings in the case; its application is highly discretionary.

McLaughlin v. State, 533 N.W.2d 546 (Iowa 1995)

Judges - Comment on Specific Evidence

McLaughlin was tried and convicted of several counts of sexual abuse. On appeal, he claimed, (among other issues), that his lawyer was ineffective in failing to object to a supplemental

instruction given by the district court. The claim was based upon a jury note passed to the judge which asked him to clarify matters involving evidence about which the jury was apparently confused. The court responded with a supplemental instruction which identified and restated the State's evidence on the matter. The court of appeals reversed the conviction and the State applied for further review.

HELD: Identification and restatement of evidence that was a part of the State's case created a presumption of prejudice. Further, the supplemental instruction amounted to comment on specific evidence. Conviction reversed, remanded for new trial.

State v. Dixon, 534 N.W.2d 435 (Iowa 1995)

Judges - Declaration of Mistrial

While operating his vehicle, Dixon struck and killed a young child. At trial on charges of involuntary manslaughter and failure to give aid and information, Dixon's counsel was cross-examining the State's witness when the judge interjected his own remarks regarding the accuracy of a diagram depicting the accident scene. Defense counsel objected on the basis the judge was acting as a witness and he requested that a record be made outside the presence of the jury. In response, the judge called a mistrial. Dixon's counsel did not object to the declaration for mistrial. After the trial, the judge issued a written statement indicating he had interpreted counsel's objection to his comments as a motion for mistrial. Dixon responded with a motion to dismiss contending the declaration of mistrial constituted an abusive discretion and that retrial would improperly subject Dixon to double jeopardy. The hearing on the motion to dismiss was held before a different judge who dismissed the charges with prejudice.

HELD: The trial judge has considerable discretion in declaring mistrial after procedural error has occurred at trial. The appellate courts will not reverse the trial court's decision absent a finding of abuse of discretion. If the trial judge determines that manifest necessity or the ends of public justice require a mistrial, it may properly declare mistrial without the defendant's consent and even over the defendant's objection.

HELD: The trial judge in a criminal trial is more than a mere moderator and may ask questions of witnesses in an attempt to clarify testimony and illicit facts necessary for clear presentation of issues. The court, however, must preserve the attitude of impartiality and guard against giving the jury the impression that the court believes the defendant is guilty. In this case, the trial judge acted irrationally and irresponsibly in declaring mistrial sua sponte rather than weighing the prejudicial potential of comments and considering alternative actions.

In Interest of C. W., 522 N.W.2d 113, (Iowa Ct. App. 1994)

Judges - Recusal

The state brought an action to terminate parental rights. During a recess in the trial, the juvenile judge mentioned that she recalled being involved in a criminal drug case wherein drugs had been found in a home that had been leased by the parent. The parent's counsel immediately asked the judge to recuse herself in order to avoid the appearance of impropriety. The guardian ad litem for the child informed the court that the parent had no involvement in the drug activity referenced above as she was at a community corrections center at the time. The judge denied the request and rendered judgment in favor of the state.

HELD: The appearance of impropriety standing alone is not sufficient to merit a judge's recusal. Actual prejudice must be shown before recusal is necessary and the parent failed to provide evidence of actual prejudice at trial or on appeal.

S. S. v. Iowa District Court for Black Hawk County, 528 N.W.2d 130 (Iowa 1995)

Judges - Subject Matter Jurisdiction

The State filed a motion for waiver of juvenile court jurisdiction so that the minor could be tried as an adult on the charge of robbery in the first degree. A Black Hawk County juvenile judge held a hearing on the motion and entered an order waiving the minor to adult criminal court. The minor appealed. The appeal was heard by a Black Hawk County district associate judge who affirmed the juvenile judge's order. The minor filed an application for interlocutory appeal, contending the district associate judge had no subject matter jurisdiction to hear the minor's appeal from the associate juvenile judge.

HELD: District associate judges do not have subject matter jurisdiction to hear appeals from juvenile court orders. The appellate decision entered by the district associate judge on the issue of waiver, is void. Case remanded for hearing by a district judge on the waiver issue.

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DAMAGES

Steve Serck

Lawrence v. Grinde, No. 46/93-1663 (Iowa 1995).

Malpractice

Grinde and his law firm helped Lawrence pursue a chapter seven bankruptcy after his fitness club failed. Lawrence was later indicted for bankruptcy fraud for failing to disclose a transfer of funds in his bankruptcy petition. The federal court found Lawrence not guilty of all charges. Two regional newspapers published articles discussing the indictment and acquittal.

Lawrence brought a legal malpractice action against Grinde and his firm for negligently handling his bankruptcy case. The district court granted defendants' motion for a directed verdict on the issue of damage to Lawrence's reputation. The jury found the defendants negligent and awarded $700,000 for severe emotional distress and $52,000 for economic loss. The district court reduced the emotional distress award to $5,000 and ordered remittitur of the economic loss exceeding $14,233.49.

HELD: We affirm the entry of directed verdict on the damage to reputation claim. Damages to reputation are not allowed in an action premised on a defendant's merely negligent act. We reverse the trial court's refusal to grant defendant's motion for directed verdict on the emotional distress claim. Recovery of emotional distress damages is allowed only in situations which involve both a close nexus to the action at issue and extreme emotional circumstances. Here, the claimed emotional distress is too far removed from the defendant's negligent conduct to cause the imposition of a duty and does not naturally arise from the acts complained of.

Baumler v. Hemesath, No. 73/93-1560 (Iowa 1995).

Interest

Baumler brought action against his employers, the Hemesaths, alleging that while working on their farm he sustained injuries. The jury awarded Baumler damages of $163,290, including past medical expenses of $7790 and future medical expenses of $5000. Both parties appealed.

HELD: The case was tried pursuant to Iowa Rule of Civil Procedure 97, not Iowa Code chapter 668--the court properly held the interest provisions of Chapter 668 did not apply to Baumler's past damages. Additionally, interest should accrue from the date of the amended petition, not the original petition.

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The section 535.5 interest rate applies to future damages rather than the rate under Chapter 668.

Jamieson v. Harrison, 532 N.W.2d 779 (Iowa 1995).

Comparative Fault

Jamieson was injured in a fight in Harrison's bar. Jamieson sued under the dram shop act and premises liability theory. The dram shop claim was settled.

The premises liability claim was tried to a jury which found both parties 50 percent at fault. The court reduced Jamieson's damages by the amount of his fault. The court refused to allow a credit of the settlement proceeds against the judgment. Harrison appealed.

HELD: Because the dram shop claim is not subject to the comparative fault statute, proceeds from a settlement of that claim could not be used as a basis for proportionate credit against the recovery on the premises liability claim.

The pro tanto credit rule applies to cases not within the scope of the comparative fault statute. However, Harrison is not entitled to credit because the damages recoverable on the premises liability claim were reduced by comparative fault and the total of the settlement and comparative fault judgment did not exceed Jamieson's total damages. I.e., the jury found $20,000 in total damages, but judgment (after subtraction for comparative fault) was $10,000. The previous settlement was for $9,000. Thus, because the judgment plus the settlement do not exceed $20,000 Harrison gets no pro tanto credit.

McGough v. Gabus, 526 N.W.2d 328 (Iowa 1995).

Punitive Damages

A former employee of Charles Gabus, Gene Gabus and Charles Gabus Ford, Inc. ("Gabus") who had embezzled from Gabus reimbursed the loss by conveying to Gabus a corporation called "Duggie Enterprises", a vending machine business. Gabus sold the business to Leo McGough.

McGough discovered the business took more time than represented, machines were broken, he did not get contracts to install machines at Gabus Ford as promised, gross sales were about one-half of what Gabus said and that Gabus had substantially overstated the appraisal.

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The jury awarded damages for benefit of the bargain, operating losses and lost profits. Additionally, it assessed punitive damages against Charles and Gene Gabus. The trial court withdrew the punitive damage awards because it found Gabus' fraud was "simple and not aggravated."

HELD: Gabus could be guilty of willful and wanton conduct by misleading McGough about the business's potential and misstating the appraisal value and staffing requirements. The district court erred in setting aside the punitive damages.

Affirmed in part, reversed in part and remanded.

Podraza v. City of Carter Lake, 524 N.W.2d 198 (Iowa 1994).

Punitive Damages

Landowner obtained a permit to replace a fence on her property boundary which was located on a city right-of-way. After building the fence the city informed her it had erred in granting the permit and eventually removed the fence for her.

The landowner brought a civil rights action against the city and mayor. The jury returned a verdict for the landowner for compensatory and punitive damages.

HELD: Affirmed. Current Iowa law holds that an award of punitive damages does not depend on an award of compensatory damages, but rather depends on a showing of actual damages.

Giese Construction Co. v. Randa, 524 N.W.2d 427 (Iowa Ct. App. 1994).

Quantum Meruit

Plaintiff Giese Construction Co. contracted with City of Clear Lake to repave and lower a street which rendered driveways along the street "not usable". Defendant had a summer home there and his neighbor told Giese Construction Co., without his consent, to replace both of their driveways. Defendant later refused to pay, claiming contractor had no approval and did a poor job.

Giese Construction Co. filed a petition to foreclose on its mechanic's lien or in the alternative for relief under implied contract and quantum meruit. Randa counterclaimed for removal of driveway and restoration of property to prior condition. District court ruled in favor of the defendant on both claims.

HELD: Affirmed in part. The express contract required to foreclose on mechanic's lien did not exist between homeowner and

contractor. Neither neighbor nor anyone else had authority to act as homeowner's agent.

Contractor could not recover on implied contract or quantum meruit theory for services performed; contractor pleaded existence of express contract which generally precludes recovery under implied contract and homeowner was not aware of improvement until long after its completion.

Reversed in part. Construction company is not required to place homeowner in better position than he was following completion of city's paving project. Homeowner is in better position now and Giese does not have to pay to restore Randa's driveway to previous condition.

Brant v. Bockholt, 532 N.W.2d 801 (Iowa 1995).

Present Value

Plaintiff was a passenger in an automobile that was involved in an accident. District court overruled plaintiff's objections to instructions which required jury to reduce awards for future pain and suffering to present value.

HELD: Future pecuniary damages such as earnings or medical expenses should be reduced to present value. However, future noneconomic damages such as pain and suffering and emotional distress need not be reduced to present value.

Reversed and remanded for retrial on issue of damages.

Ballard v. Amana Society, Inc., 526 N.W.2d 558 (Iowa 1995).

Lost Profits

Amana delivered corn, later discovered to contain toxins, to the Ballards' farm to be fed to a swine herd. The toxins caused the death of several hogs and reduced or eliminated several sow's reproductive abilities. The Ballards sued seeking the fair market value of the swine that died and any lost profits associated with re-establishing the herd.

The jury awarded $87,000 including $75,000 for lost profits. Court of Appeals affirmed damages associated with replacement cost but reversed the award for lost profits.

HELD: Court of Appeals decision vacated, District Court judgment affirmed. We believe the Ballards may recover lost profits associated with the re-establishment of their hob

operation, based on an interruption in their farrow-to-finish operation's ability to produce litters.

Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc., 526 N.W.2d 305 (Iowa 1995).

Privity

Plaintiff BGF purchased an allegedly defective Northstar freeze dryer from a distributor.

The district court submitted a claim of breach of express warranty under the U.C.C. Jury awarded BGG $70,000 in consequential economic loss damages against Northstar.

HELD: BGG was not in privity with Northstar and was not entitled to recover consequential damages against the manufacturer for breach of express warranty.

Non-privity buyers who rely on express warranties are limited to direct economic loss damages. Such damages typically are the difference between the actual value of the goods and the value as warranted. The jury did not award BGG such damages, instead it awarded consequential economic loss damages for which it was not entitled.

Reverse and remand to enter judgment in favor of Northstar.

Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103 (Iowa 1995).

Privity

Tomka, who owned a custom cattle feeding operation, contracted with Brummer to feed Brummer's cattle until they reached market weight.

Brummer requested the cattle be implanted with two synthetic growth hormones manufactured by Hoechst to enhance their weight gain. Tomka arranged for the implants, and the veterinarian that was hired billed Brummer for the cost of the hormones and the implanting charge. After the implantations, the cattle became restless and did not gain weight as they should have. As a result, the cattle were sold later than expected and Tomka lost money on the contract.

Tomka filed suit against Hoechst under both tort and contract theories of recovery.

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HELD: Recovery of economic losses under contract theory should not be determined by whether or not the plaintiff sustained damage to his or her person or property. The deciding factor is the relationship of the loss to what the product was supposed to accomplish. Accordingly, contract law protects a consumer's expectation that a product purchased will be fit for its intended use, whereas tort actions protect against safety hazards and the risk of injury to persons and property.

Tomka's damage clearly falls within contract-warranty theories. Tomka is alleging that the defendant's hormones failed to promote growth and weight gain in his cattle as they should have.

Tomka seeks consequential economic loss damages which include loss of profits, loss of goodwill, and loss of business reputation.

For recovery of consequential economic losses under an express warranty theory, the plaintiff must be in privity with the defendant.

Even if Tomka is considered the buyer of the hormones, recovery of damages will not be permitted because the hormones were purchased from the veterinarian and not from Hoechst, and Tomka was therefore not in privity with Hoechst.

Because he is a non-privity buyer and the damages he seeks are consequential economic loss damages, Tomka may not recover under an express warranty theory.

Holdsworth v. Nissly, 520 N.W.2d 332 (Iowa App. 1994).

Inconsistent Verdict

Holdsworth was a career agent with Farm Bureau who was terminated by his supervisors after he had complained to company officials about his supervisors' treatment of him. Holdsworth sued his supervisor Nissly for tortious interference with contract and unjust enrichment and also sued Farm Bureau for tortious interference with prospective business advantage with insurance clients. The jury found for Holdsworth and awarded $16,000 on his claims against Nissly and nearly $2.3 million on his claims against Farm Bureau. When the district court granted a new trial against Nissly on damages, the defendants appealed.

HELD: A new trial is required because of the inconsistency in the awards of damages between Nissly and Farm Bureau. Where verdicts are clearly inconsistent there is no adequate means to determine which damage verdict is inconsistent with the jury's intent.

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Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994).

Avoidable Consequences

Jury returned a verdict in a products liability action finding the manufacturer of hydrochloric acid based mortar cleaner 100 percent at fault for eye injury which occurred when bung closure failed. On appeal the manufacturer claimed the lower court incorrectly failed to submit a jury instruction setting forth the doctrine of avoidable consequences which provides a party cannot recover damages that result from consequences which could have been avoided.

HELD: The doctrine operates only after a legal wrong occurs, but while some damage may still be averted. The doctrine does not apply in this suit because no negligence occurred before the injury and the worker could do nothing to mitigate damages after the injury was sustained. Affirmed.

Kuehl v. Freeman Bros. Agency, Inc., 521 N.W.2d 714 (Iowa 1994).

Foreseeability/Mitigation/Personal Liability

Seller corporation sold its insurance agency to buyer under a purchase agreement which required seller to be responsible for pre-sale errors and omissions. Previous to the sale an application for auto insurance was mishandled by seller by not listing the insured's son as owner or driver. When the insured's son took the car to college he killed a passenger while intoxicated.

A civil action commenced and upon notice Seller refused to defend the case and allowed its errors and omission insurance to lapse. Due to financial troubles Buyer was forced to settle the civil claims for $150,000. Buyer did not give Seller notice of the settlement agreement and stopped making payments on the agency purchase agreement. Seller then brought a breach of contract suit. Buyer counterclaimed on the basis of fraud, negligence, misrepresentation, contribution indemnity, and breach of contract. Judgment was entered in favor of Buyer on its counterclaim.

HELD: Affirmed. Seller breached the contract by refusing to be responsible for payment of the civil claims arising out of its earlier mishandling of the insurance application. Seller further breached the contract by failing to maintain professional liability insurance to cover such errors and omissions.

Damages based on breach of contract must have been foreseeable or contemplated by parties when they entered into the agreement. Damages are foreseen if a reasonable person would

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expect them to flow from the breach of contract. The person asserting a breach of contract has a duty to exercise all reasonable diligence to mitigate damages caused by the other party's breach. Seller could have foreseen the damages and Buyer did not violate its duty to mitigate damages from seller's mishandling of application by settling a potential multi-million dollar claim for $150,000.

President and sole owner of seller was personally liable for breach of contract because he signed the contract in both his capacity as representative of the corporation and individually.

Matthess v. State Farm Mutual Auto. Ins. Co., 521 N.W.2d 699 (Iowa 1994).

Inadequacy

Passenger injured in an automobile accident brought action against insurance companies to obtain underinsured motorist benefits. Jury returned $50,085 verdict for passenger. Passenger's motion for new trial was denied. Court of appeals reversed and remanded for a new trial on damages.

HELD: Inadequate damages award merits a new trial just as excessive damages would. Whether damages are adequate should be determined on a case-by-case basis so that the test is whether the verdict fairly and reasonably compensates the injury the party sustained. Each itemization of damages in award is a special jury finding which must be supported by evidence and if the finding is not supported by evidence a new trial will be required.

Here, the awards were sufficient and the jury was in the best position to judge credibility of witnesses in light of conflicting evidence of extent and severity of injuries. There was no abuse of discretion by the district court. A reviewing court should not set aside damages award simply because it might have reached a different conclusion.

Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516 (Iowa 1995).

Collateral Source

Jackson was injured in a car collision with Christenson. Jackson settled with Christenson for the liability limits of Christenson's insurance ($100,000), then sued Farm Bureau under his own under-insured motorist policy. The policy provided that all amounts awarded under it were to be offset by disability payments. The jury awarded Jackson $329,223.50. The district court reduced the verdict by $22,080 for the amount of disability benefits paid to Jackson. Jackson argued on appeal that the judgment should not

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have been reduced by the amount he received in disability benefits because evidence of those payments is barred under the collateral source rule.

HELD: Iowa Code section 516A.2(1) (1991) allows limitations on the amount recovered under under-insured motorist coverage in order to avoid duplication of insurance benefits and other benefits received by injured parties. The exclusion of disability benefits is valid and does not offend the collateral source rule.

Condon v. Employers Mutual Casualty. Co., 529 N.W.2d 630 (Iowa Ct. App. 1995).

Collateral Source

Widow Condon, as administrator of her husband's estate, filed a wrongful death action against the uninsured motorist who caused the accident in which her husband was killed. Employer's Mutual, the insurer that provided uninsured motorist coverage, intervened. Condon filed a motion in limine to exclude evidence of workers' compensation benefits paid or payable to her as her husband's widow. The trial court granted the motion and excluded the evidence. Employer's appealed.

HELD: Although in this case the widow and the administrator are the same person, they are two separate and distinct entities. Therefore, under Iowa Rule of Evidence 402, evidence of workers' compensation benefits to the widow was properly excluded as irrelevant. What a widow receives in the form of collateral benefits is not relevant to a claim made by the estate.

McDonnell v. Chally, 529 N.W.2d 611 (Iowa App. Ct. 1994).

Mitigation

McDonnell, brought a personal injury action against the driver of the rear-ending vehicle. The jury concluded McDonnell was 40 percent at fault due to her failure to mitigate her damages by failing to attempt to lose weight and/or by failing to perform physical therapy as ordered by her doctor.

HELD: If weight loss will mitigate damages, the failure to attempt to lose weight as advised by the treating physician can be assessed as fault. However, before an instruction on mitigation of damages by weight loss may be given by the court, the defendant has the burden of showing substantial evidence that weight loss would have mitigated the plaintiff's damages. The defendant must also show substantial evidence that requiring plaintiff to lose

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weight was reasonable under the circumstances. This was true here. Affirmed.

Papenheim v. Lovell, 530 N.W.2d 668 (Iowa 1995).

Automobile

Papenheim's vehicle was damaged in an accident with Lovell. Papenheim brought an action requesting damages for the difference between the market value of his vehicle before and after the accident. Court awarded Papenheim $4,666.63 for repairs. The evidence showed that the vehicle was worth $22,000 prior to the accident and only $17,000-$18,000 after repairs which themselves would cost $4,000.

HELD: The proper measure of damages is the difference between the vehicle's reasonable market value before and after the injury, plus the reasonable value of the use of the vehicle for the time reasonably required to repair or replace it. This is the standard to be applied when the vehicle cannot by repair be placed in as good condition as it was before the injury. The trial court erred in using the measure of damages to be applied when the vehicle can be repaired so that, when repaired, it is in as good condition as it was before the injury.

Where repairs cannot restore an automobile to its prior condition, allowing diminution in market value is consistent with the general rule that the measure of damages is the amount that will compensate for all detriment naturally and proximately caused.

Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402 (Iowa Ct. App. 1994).

Construction/Substantial Performance

Curtis and Chris Krull entered into a contract with Nepstad for construction of a home for $190,000. After Nepstad built the foundation and began building the frame of the home, the Krulls insisted the foundation be lowered, necessitating removal of the foundation and frame that had just been built. Nepstad then rebuilt the foundation as the Krulls requested.

The parties then entered into a new contract to apportion the costs of rebuilding the foundation. They set a new price of $195,045.50. Construction costs exceeded the second contract price, and a dispute ensued over who should pay for the excess costs. The Krulls refused to make the final payments and Nepstad refused to complete the home until payment was made. The Krulls then finished building the home themselves.

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Nepstad filed a mechanic's lien and foreclosure action against the Krulls, claiming that the contract was a cost-plus contract. Krulls counter-claimed for breach of contract due to defects in construction. The trial court determined the contract was a fixed-price contract and dismissed Nepstad's foreclosure petition. The court held for the Krulls on their breach of contract claim and ordered Nepstad to pay the cost overruns during construction ($12,645.59) as well as the costs of repairing defects in the home ($6,535).

HELD: Affirmed. When interpreting a written contract, the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says. Ambiguity exists when, after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists concerning which of two reasonable constructions is proper. Here, the contract was ambiguous as written, so the district court properly allowed extrinsic evidence.

When a contractor substantially complies with a contract, it is entitled to recover the contract price with deductions for defects and incompletions. The contractor has the burden of proving substantial compliance, which allows only omissions or deviations that are unintentional, are not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to the other portions of the building, and may be compensated for through deductions in the contract price. Once the contractor meets the burden of showing substantial performance, the homeowner has the burden of proving any defects or incompletions to be deducted. Nepstad failed to prove substantial performance.

EVIDENCE

Rex Staub

In re Receivership of Mt. Pleasant Bank & Trust Co., 526 N.W.2d 549 (Iowa 1995)

Business Records Exception

Judgment creditors of the Mt. Pleasant Bank and Trust Company (Bank) objected to the final report of the Federal Deposit Insurance Corporation (FDIC) in its capacity as receiver of the Bank. The district court overruled the objections and approved the final report.

HELD: An exhibit identified as the receiver's trial account balances and monthly detail concerning Bank was hearsay but fell within the business records exception to the hearsay rule, (Iowa Rule of Evidence 803(6)). FDIC established that the balances were trustworthy by demonstrating that they were the product of FDIC's regulatory accounting policies and manuals.

In re H.E.W., Inc., 530 N.W.2d 460 (Iowa Ct. App. 1995)

Circumstantial Evidence

H.E.W., as operator of an asbestos disposal business, was served with Notice of Forfeiture of its tractor and leased semitrailer after a state inspection of the items resulted in various hazardous waste charges. The State's case was based on circumstantial evidence.

HELD: Circumstantial evidence is as probative as direct evidence in proving a matter initially. However, circumstantial evidence does not have such probative force if the inference drawn from it is "based on surmise, speculation or conjecture." The trial court erred in finding the circumstantial evidence presented by the State had such probative force.

Jackson v. Farm Bureau Mutual Insurance Co., 528 N.W.2d 516 (Iowa 1995)

Collateral Source Rule

Jackson brought suit against his underinsured motorist (UM) carrier after settling with the tortfeaser for the tortfeaser's policy limits. Jackson filed a motion in limine to exclude evidence of the disability benefits he received under a separate disability policy. The Court denied the motion but instructed the jury not to consider the amount of settlement or disability Jackson received in determining the total amount of damages.

The jury returned a verdict for Jackson and the court set-off the settlement and disability against the award. Jackson argues: evidence of the disability benefits is barred by the collateral source rule; and that his UM offset clause should be read to apply only to the receipt of disability benefits under "disability laws (such as social security disability)."

HELD: Offset clauses in UM policies are valid. Evidence of payments which may be set-off under terms of the policy is not barred under the collateral source rule if the result is to prevent duplication of coverage.

Sanford v. Meadow Gold Dairies, Inc., 534 N.W.2d 410 (Iowa 1995)

Collateral Source - Workers Compensation Benefits

Sanford, a Meadow Gold employee, was injured while operating a machine that fills ice cream containers. He began to receive workers compensation benefits as a result of the injury and

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filed suit against the machine manufacturer. After the suit was settled, Sanford's employment with Meadow Gold was terminated. He then filed suit against Meadow Gold for wrongful/retaliatory discharge and fraudulent misrepresentation.

Prior to trial, Sanford filed a motion in limine to exclude evidence concerning his receipt of workers compensation benefits and his recovery against the machine manufacturer arguing Meadow Gold was not entitled to a set-off under Iowa Code Section 668.14. The trial court conditionally sustained Sanford's motion in limine subject to review if Sanford presented inconsistent statements regarding the excluded evidence. At trial, Sanford introduced evidence of Meadow Gold's actions in dealing with his workers compensation claim. In response, Meadow Gold introduced evidence concerning the compensation benefits he received. Sanford appealed and Meadow Gold cross appealed contending Sanford's retaliatory discharge claim should not have been submitted because it was preempted by the Labor Management Relations Act.

HELD: Although workers compensation benefits are not to be considered in determining damages in a retaliatory discharge suit, the trial court did not abuse its discretion in admitting evidence concerning the resolution of Sanford's workers compensation claim. Sanford's testimony opened the proverbial door.

Ward v. Loomis Brothers, Inc., 532 N.W.2d 807 (Iowa Ct. App. 1995)

Drug Use - Personal Injury Claim

Terry Ward, a painter employed by subcontractor/Five Seasons Paint and Drywall, was killed when he fell from a scissors lift owned by electrical subcontractor/Paulson Electric Company. Loomis Brothers was the general contractor on the job. Ward's estate brought suit against Loomis Brothers for negligence in fixing the floor on which the lift rested, and against Paulson as owner of the lift. Loomis cross-claimed against Paulson alleging contractual duty to indemnify. Paulson counterclaimed against Ward's estate, alleging conversion.

The trial court dismissed all claims except Ward's claim against Loomis Brothers. At trial, Loomis Brothers presented evidence of Ward's use of marijuana, and the jury was instructed that this evidence could be used as a specification of fault.

HELD: Evidence of an injured party's illegal drug use is admissible where "there is a showing the use of an illegal drug has relation to the incident in question and/or where it is relevant to the damage issue." In this case, the court was justified in instructing that Ward's marijuana use was a possible cause of his

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death where: (1) Ward was a long time marijuana user; (2) he had been known to smoke marijuana while working; (3) his post-mortem urine drug screen tested positive for marijuana; (4) Ward did not show concern for his own safety; and (5) experts testified that one under the influence of marijuana might show such lack of concern.

In re L.G., 532 N.W.2d 478 (Iowa Ct. App. 1995)

Expert Testimony

The State brought a CINA action on behalf of minor child, L.G. During the proceeding, five physicians and a medical social worker testified as to their "strong belief" that the burns sustained by L.G. could not have been accidental. Relying primarily upon the credibility of L.G.'s single parent, the juvenile court concluded the burns were not intentionally inflicted. The court, however, adjudicated L.G. a CINA because of the parent's failure to exercise a reasonable degree of care in supervising L.G. The State appealed, contending the evidence supported a finding that L.G.'s injuries were not accidental.

HELD: Appellate review of CINA proceedings is de novo.

HELD: Although the court is not bound to accept expert testimony, even if uncontradicted by other expert testimony, de novo review of the record shows the expert testimony was extremely persuasive in light of the parents inconsistent testimony of events. There was clear and convincing evidence that the parent had physically abused L.G.

Condon v. Employers Mutual Casualty Co., 529 N.W.2d 630 (Iowa Ct. App. 1995)

Insurance - Offset

Harry Condon sustained injuries in an accident caused by an uninsured motorist. He received workers compensation benefits as but eventually died from injuries sustained in the accident. Dorothy Condon, as Harry's widow, continued to received workers compensation benefits after his death.

In her capacity as the Administrator of Harry's Estate, Dorothy filed a wrongful death action against the motorist, and Employers Mutual (EMC) intervened. EMC provided uninsured motorist coverage for Harry's employer. At trial, the court did not allow EMC to introduce evidence concerning Dorothy's receipt of workers compensation benefits.

HELD: EMC was properly excluded from introducing evidence of Dorothy's receipt, or right to receive workers

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compensation benefits. This evidence was not relevant to a wrongful death claim brought solely by Harry's estate. The widow rather than the estate was the recipient of the workers compensation benefits. Even though Harry's widow and Administrator were one in the same, "they are two distinct entities."

State v. Pansegrau, 524 N.W.2d 207 (Iowa Ct. App. 1994)

Opinion Testimony - Expert - Criminal

Pansegrau was charged with third-degree sex abuse. At trial he admitted that intercourse occurred but that it was at the suggestion and instigation of the victim. In rebuttal, the State introduced the testimony of an expert concerning rape trauma syndrome.

HELD: The trial court is afforded considerable discretion in determining whether to allow rebuttal testimony.

HELD: Although experts are generally allowed to express opinions on matters that explain relevant mental and physical symptoms in persons who are abused, they are not allowed to give an opinion on the credibility or truthfulness of a witness.

Sonnek v. Warren, 522 N.W.2d 45 (Iowa 1994)

Opinion Testimony - Lay Witness

Joanie Sonnek suffered a closed-head injury when her car collided with a vehicle driven by Warren. Sonnek's husband and child filed suit against Warren for lost spousal and parental consortium. For purposes of the lawsuit, they admitted that Sonnek bore the majority of fault in the accident but claimed that Warren did not maintain proper lookout. At trial, the Sonneks' requested an instruction that Warren was required to "avoid a collision with a vehicle traveling or positioned on the wrong side of the road" as part of her duty of proper lookout. The court refused the instruction and judgment was rendered for Warren. Sonneks appealed the judgment claiming the trial court erred in: (1) refusing to submit their instruction on proper lookout; (2) failing to submit a last clear chance instruction to the jury; and (3) excluding lay opinion testimony of a police officer regarding the speed at which a prudent driver should have been traveling at the time and place of the accident.

HELD: Because the police officer's lay opinion testimony was based on observations of circumstances dissimilar to those existing at the time and place of the accident, it was not an abuse of discretion to exclude his testimony.

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Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994)

Parol Evidence

Scott Richardson wished to purchase a three acre tract of land from Gerald Pasch. He was unable to obtain financing for the entire tract so his parents, David and Sheila Richardson, agreed to purchase a one-acre piece of the lot. David and Sheila planned to build a home on their portion of the lot and discussed with Pasch the need to provide an easement along the west edge of the real estate to ensure they would have access and could install utilities to their property. The conveyance from Pasch contained language granting David and Sheila a "right for ingress and egress" over the land purchased by Scott. In 1988 Scott sold his portion of the lot to Cline. In the fall of 1990, David and Sheila had underground water, telephone, and electricity lines installed under the land subject to the easement. Cline filed suit alleging the installation of the utility lines was a use of the servient estate for unauthorized purposes, seeking injunctive relief, or alternatively, damages for the alleged increase in value to the Richardson's property. The District Court ruled in favor of the Richardsons and assessed costs against Cline.

HELD: The district court did not err in utilizing parol evidence in reaching its judgment. Although parol evidence may not be offered for the purpose of varying, adding to, or subtracting from a written agreement, this case involved testimony that aided the court in determining the meaning of the "right for ingress and egress" language in the easement.

C-Thru Container Corp. v. Midland Manufacturing Co., 533 N.W.2d 542 (Iowa 1995).

Parol Evidence

Midland Manufacturing entered into a contract with C-Thru whereby Midland agreed to purchase bottlemaking equipment from C-Thru to be used in manufacturing bottles for C-Thru. The cost of the bottlemaking equipment was to be credited against C-Thru's bottle purchases. The contract also provided that, should Midland fail to manufacture commercially acceptable bottles, Midland was required to pay the entire purchase price for the equipment plus interest within thirty days.

C-Thru decided to purchase bottles from another supplier at a lower price, and notified Midland that full purchase price on the bottlemaking equipment was due. After Midland refused to pay, C-Thru filed a breach of contract action. Midland responded with a motion for summary judgment contending that no breach of contract had occurred, as C-Thru had never ordered any bottles. In resisting Midland's motion, C-Thru argued that a material issue of

fact existed on whether Midland was unable to manufacture the bottles, thereby excusing C-Thru's failure to place an order. As proof, C-Thru relied on deposition testimony that the practice in the bottlemaking industry was for the bottlemaker to provide sample bottles as verification that it could make commercially acceptable bottles before a new purchaser placed any orders. The trial court granted Midland's Motion for Summary Judgment, finding the contract contained no sample container requirement, and that the parole evidence rule precluded consideration of any trade usage evidence.

HELD: The Court of Appeals reversed the trial court's ruling, finding that evidence of the trade usage should have been considered. Even though the agreement between Midland and C-through is unambiguous and trade usage evidence adds a new term to the contract, this evidence may be used to supplement a fully integrated agreement under Iowa's Uniform Commercial Code. Considering the evidence in the light most favorable to the non-movant, (C-Thru), summary judgment should not have been granted.

Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402 (Iowa Ct. App. 1994)

Parol Evidence

Nepstad Custom Homes brought a mechanic's lien foreclosure action against the Krulls and their mortgagee for amounts due on construction of the Krull's home. The Krulls counterclaimed for breach of contract. The dispute centered on whether the contract was fixed-price or whether it was a cost-plus contract (a contract for the cost of materials and labor plus a given percentage). At the time of entering into the contract, Curtis Krull represented Nepstad Homes in a separate mechanic's lien foreclosure and Gregory Nepstad, individually, in a dissolution action. The court held for the Krulls ordering Nepstad to pay for cost-overruns and for defects in the home. Nepstad appealed contending the court erred in considering extrinsic evidence of the unambiguous building contract and that a confidential and fiduciary relationship existed between Nepstad and Krull for purposes of construing the contract.

HELD: Extrinsic evidence construing the contract was admissible because the billing arrangement in the contract was ambiguous.

State v. Caldwell, 529 N.W.2d 282 (Iowa 1995)

Reputation for Truthfulness

During his criminal trial, Caldwell sought to impeach the arresting officer by introducing testimony regarding his reputation

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Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994)

Parol Evidence

Scott Richardson wished to purchase a three acre tract of land from Gerald Pasch. He was unable to obtain financing for the entire tract so his parents, David and Sheila Richardson, agreed to purchase a one-acre piece of the lot. David and Sheila planned to build a home on their portion of the lot and discussed with Pasch the need to provide an easement along the west edge of the real estate to ensure they would have access and could install utilities to their property. The conveyance from Pasch contained language granting David and Sheila a "right for ingress and egress" over the land purchased by Scott. In 1988 Scott sold his portion of the lot to Cline. In the fall of 1990, David and Sheila had underground water, telephone, and electricity lines installed under the land subject to the easement. Cline filed suit alleging the installation of the utility lines was a use of the servient estate for unauthorized purposes, seeking injunctive relief, or alternatively, damages for the alleged increase in value to the Richardson's property. The District Court ruled in favor of the Richardsons and assessed costs against Cline.

HELD: The district court did not err in utilizing parol evidence in reaching its judgment. Although parol evidence may not be offered for the purpose of varying, adding to, or subtracting from a written agreement, this case involved testimony that aided the court in determining the meaning of the "right for ingress and egress" language in the easement.

C-Thru Container Corp. v. Midland Manufacturing Co., 533 N.W.2d 542 (Iowa 1995).

Parol Evidence

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fact existed on whether Midland was unable to manufacture the bottles, thereby excusing C-Thru's failure to place an order. As proof, C-Thru relied on deposition testimony that the practice in the bottlemaking industry was for the bottlemaker to provide sample bottles as verification that it could make commercially acceptable bottles before a new purchaser placed any orders. The trial court granted Midland's Motion for Summary Judgment, finding the contract contained no sample container requirement, and that the parole evidence rule precluded consideration of any trade usage evidence.

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HELD: Extrinsic evidence construing the contract was admissible because the billing arrangement in the contract was ambiguous.

State v. Caldwell, 529 N.W.2d 282 (Iowa 1995)

Reputation for Truthfulness

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for untruthfulness. After the State objected, Caldwell made an offer of proof through voir dire of a witness outside the presence of the jury. The trial court sustained the objection, finding that the reputation testimony would not be based upon a "general cross section of the community".

HELD: The admissibility of reputation evidence falls within a trial court's sound discretion and will be reversed only upon a finding of abuse of discretion and prejudice. In this case, the exclusion of testimony from witnesses whose testimony is based upon statements made solely by their friends was properly excluded. However, the Court should have allowed testimony from witnesses whose testimony is based upon comments made by a representative number of people who worked with the Officer. Failure to permit such testimony constituted prejudicial err.

State v. Rojas, 524 N.W.2d 659 (Iowa 1994)

Residual Hearsay

During prosecution of Rojas for sex abuse, the State introduced a social worker's videotaped interview of the child victim after the child had recanted her testimony on the stand. Rojas appealed contending the videotape should have been excluded because the residual exception to the hearsay rule did not apply. The Court of Appeals affirmed the conviction. The Supreme Court accepted application for further review.

HELD: Although Iowa Code Section 910A.14(3) makes a special provision for the admission of recorded statements of children describing sexual abuse, the evidence must still be considered under Rule of Evidence 803(24) - the residual exception to the hearsay rule. Requirements for admissibility under the residual hearsay exception are trustworthiness, materiality, necessity, service of the interests of justice and notice. In this case, residual hearsay exception was supported and the videotape properly admitted.

Eldridge v. Casey's General Stores, Inc., 533 N.W.2d 569 (Iowa Ct. App. 1995)

Subsequent Remedial Measures

Eldridge brought suit for a slip and fall at a Casey's. She attributed the fall to a crack in the Casey's pavement. Shortly after the fall, a Casey's employee sprayed the crack orange. Eldridge intended to introduce photos of the crack taken by her husband two days after the fall. The orange spray paint was clearly visible in the photos. Casey's objected under Rule of Evidence 407 - subsequent measures are not admissible to prove

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negligence or culpable conduct in connection with the event. The judge ultimately allowed the photographs into evidence, instructing Eldridge that she was not to use the photos to draw attention to Casey's use of spray paint to warn future customers of the cracked pavement.

HELD: The trial court is granted a broad range of discretion in terms of the admissibility of evidence. In this case, the trial judge reached a reasonable compromise of Casey's concerns and Eldridge's right to admit pictures of the location where she fell.

HELD: Casey's also argued on appeal that the judge should have issued a limiting instruction on the photos to the jury. Because Casey's failed cite any reference to the record showing that a limiting instruction was requested, or indicating it made any other objections to the instructions as given, error was not preserved.

GOVERNMENT

Steve Serck

Hunt v. State, No. 5-105/94-0929 (Iowa Ct. App. 1995)

Immunity

On September 25, 1991 the DOT decided to install four-way stop traffic control signals at an intersection effective November 20, 1991. Previously, traffic in two directions was not required to stop.

On October 24, 1991, Diane Hunt pulled into the intersection and was struck, suffering fatal injuries. The administrator of her estate brought suit against the state for failing to timely install the traffic signals. The district court granted the State's motion to dismiss.

HELD: Affirmed. Section 668.10(1) gives the State immunity from liability for decisions about whether and where to place traffic signs. The State's decision concerning when to install a sign falls within this grant of immunity.

Kachevas, Inc. v. State, 524 N.W.2d 450 (Iowa Ct. App. 1994).

Immunity

Kachevas, Inc. owned a restaurant on leased property which the state indicated it would condemn for a highway project. The state subsequently decided the property was not needed.

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Kachevas, Inc. commenced an action against the state seeking damages for the state's decision not to condemn their leasehold interest in the property. The claims were based on inverse condemnation, negligence, interference with prospective contractual advantage and under 42 U.S.C. §1983 for violating their civil rights.

The state argued immunization by the discretionary function exception set forth in the Iowa Tort Claims Act and was successful on a motion to dismiss all claims except the inverse condemnation claim.

HELD: Affirmed. The decision of when and where to construct a highway is a decision made at the planning level, and as such should be considered discretionary. Similarly, the decision not to build a highway should be considered a discretionary decision.

Gard v. Little Sioux Intercounty Drainage District of Monona and Harrison County, 521 N.W.2d 696 (Iowa 1994).

Immunity

Estates of drowned boaters brought a negligence action against an intercounty drainage district for the injury and death of the decedents. The plaintiffs relied on Iowa Chapter 670 whereby all municipalities in Iowa are subject to liability for torts. The district court granted a motion to dismiss in favor of the drainage district because a drainage district is not a municipality subject to suit in tort and therefore had immunity.

HELD: A drainage district is not a municipality subject to suit and tort. The legislature's failure to include drainage district within this definition does not violate equal protection rights of those injured by drainage districts because of the limited nature of the district's purposes and powers.

Collister v. City of Council Bluffs, No. 159/94-538 (Iowa 1995).

Immunity

The City of Council Bluffs owned a street sweeper that was disabled on the side of the road and struck by the Collister vehicle. The Collisters and their insurer brought suit for damages. The jury found the city and the driver of the street sweeper at fault.

HELD: The operator of a vehicle owned by a municipality has the same responsibility to observe the rules of the road as does any other driver. The city has no immunity under Section

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668.10(1) for its negligent failure to warn of its parked street sweeper.

Affirmed.

Hameed v. Brown, 530 N.W.2d 703 (Iowa 1995).

Immunity

A Fort Dodge police officer attempted to execute an arrest warrant against William Roby. Roby escaped from the officer and later assaulted and seriously injured Hameed. Hameed then sued the city of Fort Dodge, the arresting officer, and the police chief, claiming that the city was liable for her injuries on a negligence theory. The city moved for summary judgment, contending that it owed Hameed no duty and that Iowa Code section 613A.4(10) (1989) immunized it from liability. The trial court granted the city's motion for summary judgment.

HELD: We affirm the summary judgment ruling on the basis that section 613A.4(10) immunizes the city from liability.

Iowa Code section 613A.4(10) immunizes a municipality from liability for "[a]ny claim based upon an act or omission of an officer or employee of the municipality. . . if the damage was caused by a third party. . .not under the supervision or control of the municipality."

The undisputed facts show that Roby stabbed Hameed several hours after he escaped from the police officer. Therefore, Roby was not under the supervision or control of the city when he assaulted Hameed, and the city is necessarily immune from liability.

Hansen v. State, 528 N.W.2d 547 (Iowa 1995).

Immunity

Laura Hansen was injured as a result of an automobile accident on an icy highway. The highway was considered a municipal extension of a primary road and was under concurrent state and city jurisdiction. The state's policy for removal of existing ice and snow was to treat or remove it within four hours after the department received actual notice of the condition. Under this policy, the state still had 15 minutes during which to treat the roadway at the time Hansen's accident occurred. Iowa Code section 668.10(2) provides for state immunity if the state establishes that it has complied with its policy for snow and ice removal or treatment. The state and city moved for summary judgment based on this statute and it was granted by the trial court.

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HELD: Affirmed. If the government policy for snow and ice removal and treatment are followed, the governmental entity will be exempt from tort liability. In this instance, the state did comply with its policy and is therefore immune as a matter of law.

The Hansens argued that the City of Arnold's Park, which had concurrent jurisdiction over the highway, did not have a policy in place for the removal of ice and snow. Therefore, it cannot claim immunity under the statute. However, the town's action in entering into an agreement with the state for the state to provide maintenance of the highway amounted to a policy for the removal of ice and snow. Therefore, the city can also claim immunity under the statute.

deKoning v. Mellem, No. 94-412 (Iowa 1995).

Election Contest

In an effort to contest a successful school bond election, some eligible electors brought a mandamus action. District court sustained the auditor's summary judgment motion because the electors had not timely filed a bond as required by Iowa Code sections 62.5 and 62.6, and therefore had not properly initiated a contest court proceeding.

HELD: The procedures for contesting elections of county officers in Iowa Code chapter 62 are made applicable to public measure contests by Iowa Code section 57.6. Because no bond was filed within 20 days after the election results were declared, the contestants failed to comply with the statutory procedures and therefore no contest court was properly initiated.

Affirmed.

Washington County Hospital v. Louisa County, 526 N.W.2d 302 (Iowa 1995).

Indigent Care

Washington County Hospital sued Louisa County to recover the cost of medical care provided to an indigent resident of Louisa County. The district court concluded Louisa County was liable for care pursuant to Iowa Code §347.16(3).

HELD: Affirmed. County hospital is not required to give notice to the indigent resident's county as a prerequisite to recovery and the hospital is not required to mitigate its costs by transferring the patient to the university hospital for care at state expense.

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Net Midwest, Inc. v. State Hygienic Laboratory, 526 N.W.2d 313 (Iowa 1995).

Non-Competition Act

Net Midwest, Inc. (Net) provides analytical testing services to individuals, private businesses and governmental agencies. State Hygienic Laboratory (SHL) operates as a part of the University of Iowa offering analytical services to government and private entities in the areas of human disease, environmental quality and public health.

The overlap in the types of testing performed by SHL and Net has resulted in competition between the two labs. Net filed suit claiming sale of services by SHL violated the Iowa noncompetition act, Iowa Code §23A.2. The district court held the services fall within Iowa Code §23A.2(10(k)(9), an exception for on-campus activities of an institution under the control of state board of regents relating to professional services sold.

HELD: Affirmed. Services provided by state hygienic laboratory were "professional services" where employees hold college degrees and the purpose is to promote public good by providing testing services which enhance environmental protection and public health. The SHL fell within University of Iowa's "extension mission" within meaning of exemption provisions.

Thorson Estate Trust v. City of West Des Moines, 531 N.W.2d 647 (Iowa Ct. App. 1995).

Assessment

The city acquired the right-of-way of a private road and completed a paving project for construction of a street. The city then instituted a special assessment on owners of property abutting the street. The landowners sought review and the district court reduced the assessments and the city appealed.

HELD: Street paving projects confer general and specific benefits. Abutting property owners aren't required to pay for general benefits to the community at large. Factors which delineate between general and special benefits are: present and future use of abutting property, increase in market value of abutting property, size and shape of abutting property, proximity to improvement, amount of property fronting improvement, needs of property owners served by improvement, and primary purpose behind construction.

Self-assessment by city and extra-thickness of road reflect general benefits to the city. The road provides some

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general benefit to the public and future alternative access is planned.

Affirmed in part, reversed in part, and modified.

Kelly v. State, 525 N.W.2d 409 (Iowa 1994).

Public Employees

Public employees represented by a union were granted wage increases of ten percent over three years due to contractual obligation. Nonunion state employees, including plaintiffs, were granted a 7.5% increase over the same period.

The trial court ruled the unequal pay increase violated equal protection provisions of the U.S. and Iowa Constitutions.

HELD: Because there is no fundamental constitutional right to public employment and there is no suspect classification involved in union membership or nonmembership, a rational basis test is applied.

Equal protection requires people similarly situated to be treated similarly. The two groups here are not similarly situated - one is unionized, the other is not. The unionized group was subject to a court order compelling a set pay increase, the other group was not. The State could have rationally determined not to extend equal pay increases to nonunion employees for economic reasons.

Reversed and remanded.

Polk County Bd. of Supervisors v. Polk Commonwealth Charter Commission, 522 N.W.2d 783 (Iowa 1994).

Charter Commission

County board of supervisors and auditor brought a declaratory judgment action seeking ruling that commonwealth charter was legally defective and ineligible to be placed on the election ballot because (1) it violated the constitutional goal of one person, one vote; (2) the commission proposing the charter exceeded the narrow powers provided by the legislature under Dillon's rule; (3) the proposed charter did not satisfy requirements of the statute providing for such a charter; and (4) the public hearing requirements were not met.

HELD: If the entity holds governmental power the one person, one vote rule applies unless members of the body are appointed rather than elected, or if the body exercises only

narrow, limited governmental powers, and its activities disproportionately affect specific groups of individuals. The "mayors' commission" does not violate this rule because the duties of the commission included calling upon agencies to provide statistics, evaluating municipal services, estimating present cost of service area, studying and evaluating equipment and employees used by each member, reviewing service, and recommending commission action,--none of which conferred authority to exercise governmental powers.

County home rule, not Dillon's rule would apply to the commission because it is a creature of state legislation and therefore statutes delineating its functions are to be construed liberally in order to promote the objectives of the legislature supporting their enactment. All relevant provisions are to be considered together to ensure promotion of statutory goals.

The proposed charter also satisfies statutory requirements because the section providing limitations on alternative forms of county government grants broad authority for governments to differ from the express prescriptions in other statute sections regulated by board of supervisors and other optional forms.

We affirm the district court's order on the issuance of the writ of mandamus to compel the board of supervisors to submit the proposed charter to the county auditor for placement on the election ballot and dismissing the petition of the board of supervisors.

Ernst v. Johnson County, 522 N.W.2d 599 (Iowa 1994).

Non-Conforming Use

A leased quarry had been purchased by its owners in 1969 when county ordinances zoning the site A-1 agricultural allowed for mining and mineral extraction. In 1980 the zoning ordinances were amended to require a conditional use permit for mining unless the owner could establish the land had been used for mining as an "existing use" prior to enactment of the ordinance. The quarry saw limited use throughout the years since the amendment but the new owners wanted to increase the mineral extraction. The county held a factfinding hearing and decided the quarry had not maintained its status because it lacked commercial activity and instructed the owners to cease operations and apply for a use permit.

HELD: The quarry owners, as the party asserting non-conforming use, had the burden of establishing lawful and continued use by a preponderance of the evidence. To determine the sufficiency of evidence the court looks to realties of the business in question, nature of its operations, and customary or common

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industrial use. The fact the quarry was engaging in little commercial activity due to low demand does not indicate it was not "in use" because the operators maintained all required permits, licenses, and leases.

Periods of discontinuance which are caused by circumstances beyond the control of the property owner are not voluntary and will not cause loss of non-conforming use. Therefore, the plaintiffs may operate the quarry without applying for a conditional use permit.

Mahaska State Bank v. Kelly, 520 N.W.2d 329 (Iowa App. 1994).

Cities

The bank acquired ownership of a sewer service line and lift station through foreclosure of private property. The sewer equipment was used by area residents. The bank wanted to transfer responsibility for the line to the city, claiming it had been "dedicated to the city at common law."

HELD: There is no authority to extend the common law dedication of streets and highways to sewer lines and lift stations. Even assuming there could be a common law dedication in this area, there was no resolution by the city accepting this responsibility. Further, at no time had the city accepted the control and maintenance of the sewer lines or lift stations. There also was no easement to the city to cross the land where the line and station were located.

City of Clinton v. Sheridan, 530 N.W.2d 690 (Iowa 1995).

Cities

The electors of Clinton, Iowa adopted a home rule charter in 1987 that included initiative and referendum provisions for adoption, amendment, or repeal of ordinances by voters at an election. Iowa Attorney General Opinions have held that initiative and referendum elections are not authorized by Iowa law. Based on these opinions, the Clinton County auditor refused to place a referendum issue on the ballot at the 1993 city election. The city then commenced a declaratory judgment action requesting the court to declare the initiative and referendum provisions constitutional. The trial court ruled that the initiative and referendum provisions were inconsistent with state law and dismissed the petition.

HELD: Reversed. Under the provisions of the 25th Amendment to the Iowa Constitution (the home rule amendment), if a state statute and a municipal ordinance cannot be reconciled, the state statute prevails. Because the home rule amendment permits

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cities to determine their local government systems, cities are no longer dependent upon the legislature to grant them power, and any limitation on the city's power must be expressly imposed by state law. Therefore, there is no conflict between the initiative and referendum provisions of the city of Clinton's home rule charter and Iowa statutes.

Cox Cable of Cedar Rapids v. Bd. of Review, 521 N.W.2d 743 (Iowa 1994).

Cities

City assessor included the value of active subscriber house drops in the property tax assessment against Cox Cable Company. The cable company argued the housedrops should be assessed against the subscriber/real estate owner instead of the cable company which only installs them.

HELD: Tax assessment appeals are equity proceedings and should be reviewed de novo. Housedrops are taxable as "real property" as they qualify as improvements "attached" to the land. Further, these taxes are properly assessed to the cable company rather than the owners of the real estate because the company retained ownership, paid for installment and replacement costs of the drops and received ongoing economic benefits.

Dickinson County v. City Development Committee, 521 N.W.2d 466 (Iowa 1994).

Cities

City development committee approved a proposal to involuntarily annex unincorporated farm land. The county and owner of the development appealed the decision alleging the city did not meet the burden of proving it can provide substantial municipal services and benefits not previously enjoyed as required by Iowa Code section 368.17(4).

HELD: The city has the burden to establish its capabilities to provide "not previously enjoyed" services as of the date the annexation proceedings were instituted. However, if the city proposes to extend services which are already provided but substantially more in degree than what the territory is now enjoying, the city meets the "not previously enjoyed" requirement. Here the current provision of services is as good if not better than it would be if annexed by the city. Therefore, the city did not meet its evidentiary burden and the city development committee's decision must be reversed.

Citizens of Rising Sun v. Rising Sun City Development Committee, 528 N.W.2d 597 (Iowa 1995).

Cities

In 1992, pursuant to Iowa Code chapter 368, Citizens of Rising Sun submitted a petition to the City Development Board to incorporate Rising Sun into a city. The Rising Sun City Development Committee was formed pursuant to Iowa Code section 368.14 in order to consider Rising Sun's proposal. The Committee held a public hearing on Rising Sun's petition for incorporation. Rising Sun intended to provide certain services itself. The remaining customary municipal services were to be provided through contracts with other governmental agencies, franchise agreements, individual contracts or by residents themselves.

The Committee subsequently concluded that the proposed city could not provide customary municipal services within a reasonable time. The Committee reasoned that indefinitely contracting for all services does not constitute the provision of municipal services. The Committee, therefore, denied approval of Rising Sun's petition.

HELD: Affirmed. Iowa Code section 368.22 limits judicial review of incorporation cases to the question of whether there is substantial evidence for the Committee's decision. The incorporation statute requires a petitioner to demonstrate a sound economical reason for incorporation of a territory and a reasonable plan for the city itself to furnish substantial municipal services within a reasonable time.

Rising Sun planned to furnish very few services directly to the territory. Instead, all services would remain essentially as they existed prior to the incorporation. Rising Sun also failed to include a contingency plan for staffing or funding municipal services in the event that contracts could not be maintained, or a comprehensive plan for the eventual independent provision of substantial municipal services.

Hawk Eye v. Jackson, 521 N.W.2d 750 (Iowa 1994).

Police Reports

A county attorney refused to allow a newspaper to inspect an Iowa Division of Criminal Investigation file concerning allegations of use of excessive force by police. The newspaper sought a writ of mandamus compelling the attorney to make the report available. The attorney rested his case for non-disclosure on Iowa Code §22.7 and §622.11 protecting a peace officer's investigative reports.

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HELD: This statutory privilege is qualified and requires a public official to show (1) a public officer is being examined, (2) the communication was made in official confidence, and (3) the public interest would suffer by disclosure. We use a de novo standard of review. Under the unique facts of this case any public harm created by disclosure of the investigatory report would be outweighed by the public harm from its non-disclosure. The public interest would not suffer by disclosure because only two witnesses expressed concern about giving statements and their reluctance stemmed from an upcoming civil litigation and not fear of retaliation, no confidential informants were used, the newspaper's inquiry was after the official investigation had ended, there is no hearsay, rumor or libelous comment in the report, and it contained no subjective theories, conclusions or recommendations.

INDEMNITY

Len Strand

Ward v. Loomis Bros., Inc., 532 N.W.2d 807 (Iowa Ct. App. 1995)

Contractual Indemnity

Ward, an employee of a painting subcontractor, fell from a scissors lift and was killed at a construction site. His estate sued Loomis, the general contractor, and Paulsen, an electrical subcontractor that owned the lift. Loomis asserted a contractual indemnity claim against Paulsen, but the trial court granted summary judgment for Paulsen on this indemnity claim prior to trial. The jury ultimately assessed 60% fault to Loomis and 40% fault to Ward. On appeal, Loomis claimed that it was entitled to indemnification from Paulsen pursuant to the contract.

HELD: Affirmed. The indemnification agreement stated that Paulsen, as subcontractor, would indemnify Loomis, as general contractor, against all claims "caused by, arising from, incident to, connected with or growing out of the work to be performed under this contract regardless of whether such claim is alleged to be caused, in whole or in part, by negligence or otherwise on the part of [Paulsen] . . . ." Paulsen owned the scissors lift but had not consented to its use by the painting contractor. Loomis contended that the indemnity clause nonetheless was triggered because the accident involved Paulsen's lift. Noting that the right to indemnity is "equitable in nature," however, the court held that the trial court correctly refused to order indemnification under these circumstances.

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Employers Mut. Casualty Co. v. Chicago and North Western Transp. Co.,
521 N.W.2d 692 (Iowa 1994)

Indemnification From Own Negligence

CNW negligently caused damage to property owned by Employers' insured. Employers paid for the damage and then sued CNW as subrogee. CNW claimed that it was insulated from liability by an indemnification provision in a contract between CNW and the insured. The clause stated that the insured indemnified CNW against all claims for damage or loss, even if CNW caused or contributed to the damage. The trial court refused to enforce the indemnification clause and entered judgment for Employers.

HELD: Reversed. Agreements relieving an indemnitee from its own negligence are viewed with disfavor, but are enforceable if clear and unambiguous. Because the contract at issue here meets this standard, the trial court erred.

INSURANCE
Len Strand

Morgan v. American Family Mut. Ins. Co., 534 N.W.2d 92 (Iowa 1995)

Bad Faith

Penny Kapinski was driving a car owned by her parents when it was broadsided by an uninsured driver who ran a red light. Penny hit her head on the dashboard but did not appear to have serious injuries immediately after the accident and declined to see a doctor. Over the next several months, however, Penny developed fainting spells and other symptoms that, according to her doctors, stemmed from the accident. She and her parents demanded that their insurer, American Family, pay the $100,000 uninsured motorist coverage limits because of Penny's injuries.

American Family investigated the claim and, ultimately, denied the claim. As part of its investigation prior to the denial of coverage, American Family submitted some, but not all, of Penny's medical records to a neurologist. This neurologist opined that Penny's symptoms were not caused by the accident. Penny and her parents sued American Family for breach of contract and bad faith. At trial, the jury found that American Family had wrongfully and in bad faith denied Penny's claim. The jury further found that Penny's total damages from the accident exceeded $300,000 and assessed punitive damages of $1 million. The trial court entered judgment against American Family for the policy limits of $100,000 plus the $1 million in punitive damages for bad faith.

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HELD: Reversed. To prevail on a claim of first-party bad faith, the plaintiffs were required to show that American Family's denial of Penny's claim lacked a reasonable basis. No bad faith liability exists if a claim is fairly debatable. If an objectively reasonable basis for denying a claim exists, then the bad faith claim fails as a matter of law. Here, at the time it denied Penny's claim, American Family had doubts due to the fact that Penny apparently suffered no immediate symptoms from the collision. She was not unconscious and denied being "dazed." Her first fainting spell was three weeks after the accident. The first time that she sought extensive medical assistance was 15 months after the accident. American Family submitted most of Penny's records to an expert, who concluded that the accident was not the cause of Penny's problems. An insurance company is not required to disregard the opinion of its own expert in favor of the opinions of an expert hired by the insured. Further, even if American Family's investigation was not perfect (because, among other things, it did not submit all of Penny's records to its own expert), such an imperfect investigation does not constitute bad faith if an objectively reasonable basis for denial exists. Here, as a matter of law, American Family had an objectively reasonable basis for the denial of Penny's claim.

Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203 (Iowa 1995)

Bad Faith (reverse)

Marian Johnson was injured by downed electrical lines on the farm she owned with her husband Verdell. They sued the utility that owned the lines. The utility cross-claimed against Verdell, alleging that his negligence was a cause of Marian's injuries. The Johnsons asked their liability insurer, Farm Bureau, to defend the cross-claim. Farm Bureau refused, relying on a policy exclusion for injuries suffered by an insured. The policy stated that no coverage exists for "bodily injury to you or any insured...." The policy defined "insured" as the named insureds plus, if a named insured is a person, "the spouse of any such person if living in his or her household." Verdell Johnson was the named insured. Nonetheless, the Johnsons sued Farm Bureau for breach of the policy and first-party bad faith. Farm Bureau counterclaimed for "reverse bad faith," alleging that the Johnsons' claim was frivolous. The trial court granted summary judgment for Farm Bureau on the Johnsons' coverage and bad faith claims and, later, granted a directed verdict for the Johnsons on Farm Bureau's "reverse bad faith" claim.

HELD: Affirmed. While the implied covenant of good faith and fair dealing in insurance contracts is mutual, there is no need to adopt Farm Bureau's suggested new tort of "reverse bad faith." Insurers already may seek sanctions under Iowa Rule of Civil Procedure 80(a) if insureds assert frivolous bad faith claims

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in an attempt to gain strategic advantage. Thus, the district court properly dismissed Farm Bureau's "reverse bad faith" claim.

Central Nat'l Ins. Co. v. Insurance Co. of North America, 522 N.W.2d 39 (Iowa 1994)

Coverage

CNI had an agency agreement with Church Insurance Consultants, Inc. Church was insured under an insurance policy issued by INA. CNI ultimately sued Church for losses caused to CNI by (1) Church's failure to remit premiums paid to Church by CNI policyholders and (2) Church's writing of CNI policies in violation of CNI's underwriting guidelines. CNI obtained a judgment against Church and sought to collect the judgment from Church's insurers, including INA.

Church's INA policy included coverage for any loss that "the Insured (Church) shall sustain .... resulting directly from one or more fraudulent acts committed by an Employee acting alone or in collusion with others." CNI alleged that this coverage insured Church for liability that Church might face to others, such as CNI, arising from dishonesty by Church's employees. The trial court disagreed, finding that the policy covered only loss incurred by Church due to dishonest employees, not liability to third parties that Church might face as a result of such dishonesty.

HELD: Affirmed. Church's INA policy covered only losses incurred by Church, not Church's liability to third parties. Thus, the trial court correctly held that CNI was not entitled to recover under the INA policy.

FDIC v. American Casualty Co., 528 N.W.2d 605 (Iowa 1995)

Coverage

Bank's officers were covered by a claims-made policy, issued by American, from February 1982 through February 1985. The Bank purchased, at a substantially-reduced premium, a twelve month discovery period extension just before the policy expired in 1985. This extension allowed claims made during the twelve month extension period to be treated as though they were made during the policy period.

During this twelve month discovery period, the insurer received notice of potential claims against three officers. However, no actual claims were asserted until 1989. The FDIC ultimately obtained judgments against the three bank officers and sued in federal court to recover under the insurance policy. The

federal court certified the coverage question to the Iowa Supreme Court.

HELD: No coverage exists. The policy was a claims-made policy. Because no claims were made during the coverage period, or the twelve month extension period, there is no coverage unless some other provision of the policy provided coverage. The FDIC argued that the notice of claims provision of the policy established coverage. This provision stated that if the insurer received notice of potential claims "during the policy period," then those claims would be covered even if not asserted until after the policy expired. The insurer argued, however, that this clause did not apply because the notice of potential claims did not occur "during the policy period," but instead during the twelve month discovery period subsequent to the policy period. Relying on several federal cases construing the same policy language, the Supreme Court held (1) that the policy was not ambiguous and (2) that the notice of claims provision provided coverage only if the insurer was notified of potential claims during the actual policy period, not the subsequent, twelve month discovery period.

Tacker v. American Family Mut. Ins. Co., 530 N.W.2d 674 (Iowa 1995)

Coverage

Duffy owned a home in Fort Dodge. In 1978, he rewired the family room in the home. Later, he sold the home to the Tackers. In 1990, Philip Tacker was electrocuted while using a wet vac in the family room. His widow sued Duffy, claiming that the accident was caused by Duffy's negligence in rewiring the family room. At the time of the accident, Duffy was insured by an American Family homeowner's policy on his current residence. The policy included liability coverage but contained an exclusion of damages arising out "the ownership or rental to any insured of any premises other than an insured premise." It also contained a coverage period from July 1989 until July 1990. American Family argued that this policy did not cover Duffy's potential liability to Tacker because (1) the alleged negligence did not occur during the coverage period and (2) the injuries were sustained at a location other than an "insured premises." The district court rejected these arguments and, instead, granted Tacker's cross-motion for summary judgment on the coverage issue.

HELD: Affirmed. The policy was an occurrence-based policy. The time of an "occurrence" is when injury occurs, not when the allegedly negligent act or omission occurs. In addition, Tacker is not making a premises liability claim that relates simply to the condition of property formerly owned by Duffy. Instead, she is making a claim of direct, personal negligence by Duffy that happened to involve repairs to a residence. This claim has nothing

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to do with the fact that Duffy once owned the residence. The exclusion that American Family relies upon does not apply.

Kibbee v. State Farm Fire & Casualty Co., 525 N.W.2d 866 (Iowa 1994)

Coverage

Kibbee obtained a judgment against the Crams for intentional infliction of emotional distress. State Farm insured the Crams but denied coverage. As part of a settlement between Kibbee and the Crams, the Crams assigned to Kibbee their rights against State Farm. Kibbee then sued State Farm for coverage. The policy covered liability for "personal injury" and defined "personal injury" to include "false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution and humiliation." The policy also, however, excluded liability for intentional acts. Kibbee claimed that the phrase "malicious prosecution and humiliation" meant "malicious prosecution and malicious humiliation." He thus argued that the policy was contradictory and ambiguous because it (1) covered "malicious .... humiliation" but (2) contained an intentional acts exclusion. State Farm argued that the word "malicious" modified "prosecution" but did not modify "humiliation." The district court ruled for State Farm, holding that the policy was not ambiguous and that the exclusion applied.

HELD: Affirmed. Kibbee's argument relies on his claim that the lack of a comma between the phrase "malicious prosecution" and the phrase "and humiliation" proves that the term "malicious" was intended to modify "humiliation." Punctuation, however, is the most fallible basis for contract interpretation. There is no such tort as "malicious humiliation." If the policy was intended to cover intentional infliction of emotional distress, it easily could have used those well-known words. Kibbee's interpretation of the "personal injury" definition is not reasonable and, therefore, no ambiguity exists. There is no conflict between the intentional act exclusion and the policy's coverage provisions.

Yegge v. Integrity Mut. Ins. Co., 534 N.W.2d 100 (Iowa 1995)

Coverage

The Yegges hired New Way Construction to build a residence for them. New Way was insured by a general business liability policy issued by Integrity. The Yegges claimed that New Wave breached its contract with the Yegges and committed breaches of warranty, negligence and fraud. Integrity refused to defend or indemnify New Way, asserting that the Yegges' claims were not covered. The Yegges obtained a substantial judgment against New

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Way and bought suit against Integrity demanding payment of the judgment.

The policy provided coverage for "bodily injury" and "property damage" caused by an "occurrence." The trial court found that no coverage existed because none of the Yegges' claims against New Way involved personal injury or property damage. Further, the court held that New Way's conduct did not constitute an "occurrence" as the term "occurrence" is defined in the policy.

HELD: Affirmed. The Yegges' judgment against New Way did not include any award based on personal injury. Further, the policy defined "property damage" to mean "physical injury to tangible property" and "loss of use of tangible property." The Yegges' claims against New Way did not involve such "property damage." They instead involved a claim that New Way poorly performed its contract. Any damages were intangible economic losses, not "property damage" losses. Finally, no "occurrence" occurred because there was no "accident."

Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995)

Coverage

Coyle allegedly performed negligent welding work on Red Giant's oil tanks, causing $58,000 in damages. LeMars Mutual insured Coyle, while Lawlor was Coyle's insurance agent. Lawlor allegedly had assured Coyle, prior to this incident, that his LeMars Mutual policy would provide coverage for negligent welding activities. However, when Red Giant made claim against Coyle, LeMars Mutual denied coverage and refused to provide a defense.

Red Giant and Coyle eventually settled, with Coyle confessing to judgment in the amount of Red Giant's damages, Red Giant agreeing not to execute on the judgment and Coyle assigning to Red Giant all claims he had against Lawlor and LeMars Mutual. Red Giant, as Coyle's assignee, then filed suit against Lawlor and LeMars Mutual, respectively, for failure to procure requested coverage and bad faith denial of coverage. The defendants moved for, and were granted, summary judgment on grounds that the settlement between Red Giant and Coyle extinguished any possible liability on the part of the defendants.

The commercial general liability policy issued by LeMars Mutual to Coyle stated that the insurer would pay any sums that the insured "becomes legally obligated to pay as damages. . . ." The defendants argued that the settlement agreement, which included a promise by Red Giant that it would not enforce the judgment, demonstrated that Coyle was not "legally obligated to pay" anything to Red Giant. The issue, then, was whether an insurer may be

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liable to the injured party when the insured is protected by an agreement not to execute.

The trial court granted the defendants' summary judgment motion, finding that there could be no liability because Coyle had no legal obligation to pay damages to Red Giant.

HELD: Reversed and remanded. There are two opposing lines of authority on this issue. One line holds that an agreement not to execute is not a release and that, therefore, the underlying debt remains. The other line holds that the insured, once obtaining an agreement not to execute, has suffered no damages because he or she has never had to pay any claim. The Iowa Supreme Court adopted the first line of authority, holding that the settlement between Red Giant and Coyle did not remove the claim from the scope of the CGL's coverage definition. Red Giant did not release Coyle from liability, it simply agreed not to execute. Thus, an obligation to pay still existed.

Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc., 522 N.W.2d 837 (Iowa 1994)

Coverage

Hopkins discovered in 1992 that it had been the victim of employee theft from 1987 through 1991 in the total amount of $44,000. It paid an investigator over $5000 to document this theft. Hopkins was insured by Cincinnati for employee dishonesty. One policy covered the period 1986 to 1989, and another covered the period 1989 to 1992. The parties disputed the meaning of two clauses in both polices dealing with Cincinnati's limit of liability and with the effect of later-discovered claims that would have been covered under prior policies. Hopkins alleged that it was entitled it to recover $15,000 in coverage under the old policy and $15,000 in coverage under the new policy. Cincinnati argued that there was no coverage under the old policy and that Hopkins was entitled only to the $15,000 under the new policy. The trial court found both contested provisions to be ambiguous, construed them in favor of the insured, and ruled in Hopkins' favor.

HELD: Affirmed. While the mere fact that case authority exists to support two alternative interpretations does not, alone, establish ambiguity, the trial court correctly held that the two contested provisions in this case were ambiguous. Because ambiguous provisions must be construed against the insurer, the trial court's judgment was correct.

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CUNA Mutual Ins. Society v. Matzke, 532 N.W.2d 759 (Iowa 1995)

Coverage

Larry Matzke was covered by a CUNA insurance policy that paid outstanding loans in the event that an insured became "totally and permanently disabled." The policy defined this term as an illness or injury that prevents the insured from being able to "work at his own job or at any other paying job for which he is suited by education, training or experience for the rest of his life." Matzke was a firefighter and suffered a "rotary cuff" injury while on the job. He left the fire department and began receiving disability pension payments. He then demanded that CUNA pay off his outstanding loans in accordance with his policy. CUNA refused, claiming that Matzke's injury was not a total and permanent disability within the meaning of the policy. The district court granted CUNA's motion for summary judgment.

HELD: Affirmed. There is a difference between occupational disability policies and general disability policies. An occupational disability policy provides benefits if the claimant is unable to perform his or her regular job. A general disability policy provides benefits only if the claimant is unable to perform any job for which he or she is otherwise qualified. CUNA's policy definition falls within the scope of a general disability policy. Because it was undisputed that Matzke presently is employed by a building contractor, he does not fall within the policy definition of "totally and permanently disabled." This is true even though his present occupation pays significantly less than did his former one.

Morgan v. American Family Mut. Ins. Co., 534 N.W.2d 92 (Iowa 1995)

Limitation of Actions Clauses

In 1985, Penny Kapinski was driving a car owned by her parents when it was broadsided by an uninsured driver who ran a red light. She and her parents demanded that their insurer, American Family, pay the $100,000 uninsured motorist coverage limits because of Penny's injuries. American Family rejected the claim and, at trial, relied on a contractual limitation of actions clause contained in the policy. This clause stated that American Family could not be sued on an uninsured motorist coverage claim that "is barred by the tort statute of limitations." Here, while the accident occurred in 1985, the plaintiffs' suit was not filed until 1989, well-beyond Iowa's two-year statute of limitation for personal injury claims.

The plaintiffs sought to avoid the limitation of actions clause by arguing that they had never received notice of the fact that this clause was added to the policy, by American Family, in

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1984. The jury found that while American Family had, in fact, provided a copy of the revised policy to the plaintiffs prior to the accident, the plaintiffs had not received proper notice of the clause because a cover letter describing the new policy form did not mention the clause. The jury also found that Penny's damages exceeded the $100,000 policy limits. Thus, the trial court entered judgment for the plaintiffs, on the breach of contract claim, for the policy limits.

HELD: Reversed. Because the jury found that the plaintiffs had received a copy of the new policy form prior to the accident, the plaintiffs are bound by the terms and conditions contained therein. Ignorance of the contents of a writing does not provide a basis for avoiding those contents. Because they received the policy, the plaintiffs are charged with knowledge of its terms and cannot avoid the effect of those terms. Plaintiffs' claim was barred by the limitations clause.

<u>Fireman's Fund Ins. Co. v. ACC Chemical Co.</u>, ___ N.W.2d ___ (Iowa, July 19, 1995)

<u>Notice</u>

Chemplex manufactured polyethylene products at a plant in Clinton. In 1984, after the EPA had investigated toxic contamination at the plant, Chemplex negotiated a consent decree to clean up the site. Chemplex and the City of Clinton spent millions of dollars doing so. Chemplex looked to its various comprehensive general liability insurers, and excess insurers, to reimburse it for these efforts. The insurers, relying on various exclusions, policy definitions and notice requirements, denied coverage. At trial, the jury found coverage and assessed substantial damages against the insurers. The jury expressly found that sufficient notice had been given in accordance with policy requirements.

HELD: Reversed. Compliance with a notice requirement in a policy is a condition precedent to recovery. Chemplex, in 1984, copied an "R.B. Jones," supposedly an agent for the insurers, in on letter that mentioned the possibility of a claim. No direct notice to the insurance companies was given until five years later. Chemplex contends that the insurers had constructive notice of the claims prior to this direct notice because they made periodic insurance inspections of the site. However, even if such inspections could have revealed actual pollution, they could not have revealed the fact that the EPA had investigated the site or that Chemplex had, in a consent decree, committed itself to millions of dollars in clean up costs. As for actual notice, the copying of "R.B. Jones" in on a letter mentioning the potential claim was not, as a matter of law, sufficient notice to the insurers of the claim. The identity of "R.B. Jones," and its alleged relationship to the insurers, is somewhat of a mystery.

Even if "R.B. Jones" was an agent of the insurers, however, the mere mailing of a copy of the letter to "R.B. Jones" was not in substantial compliance with the policy's notice requirements.

Failure to substantially comply with a notice requirement results in a loss of coverage unless compliance is excused or waived or unless no prejudice occurred to the insurers as a result of the noncompliance. No valid excuse for the five year delay in complying with the notice requirement was offered by Chemplex. Further, as a matter of law, this delay prejudiced the insurers. The insured has the duty to prove a lack of prejudice when substantial compliance does not occur. Here, the five year delay cost the insurers the opportunity to investigate. The site changed during these years and at least one key witness died. The insurers were deprived of any opportunity to take part in settlement negotiations with the EPA or to otherwise resolve the situation. They were given notice only after Chemplex already had spent millions of dollars. Because prejudice existed as a matter of law, Chemplex's failure to comply with notice requirements prevents Chemplex from recovering on any of the policies.

Met-Coil Systems Corp. v. Columbia Casualty Co., 524 N.W.2d 650 (Iowa 1994)

Notice

A subsidiary of Met-Coil ("MC") was sued for patent infringement by CTI in 1986. MC was insured from 1981 through 1988 by various insurers via primary and excess policies that MC purchased through an insurance broker. MC advised the broker of the CTI suit in 1986. When CTI filed a second suit in 1988, MC asked the broker to review both suits and determine whether insurance coverage existed. The two cases were consolidated and tried in 1991. CTI obtained an $18 million verdict against MC. MC spent over $4 million on legal fees during its unsuccessful defense of CTI's claims.

Only one of MC's insurers ever received written notice of the CTI lawsuits prior to the return of the verdict. This insurer received the notice just four days before trial began. Most of the other insurers did not receive written notice until after the verdict, and one did not receive such notice until it was served with MC's coverage lawsuit. MC and CTI ultimately settled CTI's judgment, after which MC sued its insurers for coverage. The district court granted the insurers' summary judgment motion on grounds that MC did not comply with notice-of-claim provisions in the policies. On appeal, MC argued (1) that it substantially complied with the notice requirements by informing its broker of the claims, (2) that it had a valid excuse for any late notice, (3) that the insurers had waived any notice requirements and (4) that any non-compliance was not prejudicial to the insurers.

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HELD: Affirmed. When a notice provision is written into a policy as a condition precedent of coverage, the insured must show substantial compliance in order to obtain coverage. Absent substantial compliance, the insured must show either (1) valid excuse, (2) waiver or (3) lack of prejudice. Prejudice is presumed when the insured fails to comply with notice requirements. MC did not show substantial compliance, nor did it prove any of the exceptions to the substantial compliance requirement. The notice provisions of the various policies required that the insured directly notify the insurer of any suits and forward to the insurer every demand, notice, summons or process received. Even if the insurance broker was an authorized agent of the insurers, MC did not substantially comply because it did not directly inform the insurers of suit and did not forward legal process to the insurers.

MC's claimed excuse likewise fails. MC claimed (1) that it thought its broker was taking care of notice requirement and (2) that it did not know that CTI's claims were covered. The express language of the notice requirements, which required MC to forward process directly to the insurers, destroys any excuse based on MC's reliance on the broker. As for MC's belief that the claims were not covered, such a belief may be an excuse only if MC exercised due diligence to discover the existence of coverage. MC made only minimal efforts to determine whether coverage existed.

MC's claim that the insurers waived notice also fails. MC claimed that the policies were ambiguous as to whether notice to the broker also constituted notice to the agent. The "notice of suit" provision, however, was not ambiguous. It clearly required MC to notify the insurer directly and to forward process to the insurer. Finally, the evidence overwhelmingly demonstrates that the insurers were prejudiced by MC's failure to give notice, as they were denied any right to participate in, settle or control litigation that cost MC millions in attorney fees and resulted in a massive judgment against MC.

Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203 (Iowa 1995)

Reasonable Expectations

Marian Johnson was injured by downed electrical lines on the farm she owned with her husband Verdell. They sued the utility that owned the lines. The utility cross-claimed against Verdell, alleging that his negligence was a cause of Marian's injuries. The Johnsons asked their liability insurer, Farm Bureau, to defend the cross-claim. Farm Bureau refused, relying on a policy exclusion for injuries suffered by an insured. The policy stated that no coverage exists for "bodily injury to you or any insured. . . ." The policy defined "insured" as the named insureds plus, if a named insured is a person, "the spouse of any such person if living in his or her household." Verdell Johnson was the named insured.

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Because Marian was his spouse, and lived with him in the same household, Farm Bureau argued (and the trial court agreed) that the policy did not cover the utility's cross-claim against Verdell. Verdell unsuccessfully relied on a reasonable expectations argument for coverage.

HELD: Affirmed. The reasonable expectations doctrine applies only if (1) the policy is ambiguous or unclear or (2) there are circumstances attributable to the insurer which would foster coverage expectations. Neither of these prerequisites were present. The policy's exclusion of coverage for bodily injury to an insured is not ambiguous. Likewise, Verdell received copies of his policy, including the exclusion language, at least twice after the exclusion was first added to the policy. No evidence supports his claim that any conduct of the insurer fostered coverage expectations. Because the doctrine of reasonable expectations cannot apply here, Farm Bureau's denial of coverage was not in violation of the policy.

Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516 (Iowa 1995)

Underinsured Motorist Coverage

In action to recover underinsured motorist benefits, district court reduced verdict by amount of disability benefits that the insured had received under a separate disability policy. The underinsured coverage provisions stated that benefits would be reduced by amounts paid to the insured by "workmen's compensation, disability benefits or other laws." The insured argued that evidence of the disability payment violated the collateral source rule. He further argued that since he was paid under a disability policy, not a disability law, the policy clause allowing a deduction for disability benefits did not apply.

HELD: Affirmed. Iowa law expressly permits insurers to include terms that reduce UIM benefits to avoid duplication in benefits. Iowa Code § 516A.2(1). Thus, there is no collateral source rule issue. Because the issue of contract interpretation was not raised below, it will not be considered on appeal.

Ramsbacher v. State Farm Mut. Automobile Ins. Co., 531 N.W.2d 475 (Iowa Ct. App. 1995)

Underinsured Motorist Coverage

Plaintiff was a motorcycle passenger injured in a car-motorcycle accident. She reached settlements with the insurance carriers of the two drivers that totaled $580,000. She then sued her own insurer, State Farm, for underinsured motorist benefits. The jury found that her total damages were $541,000. Nonetheless,

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the district court entered judgment against State Farm for $300,000.

HELD: Reversed. The jury found total damages to be $541,000. Because the plaintiff already had received $580,000 from the tortfeasors, State Farm had no liability on its underinsured motorist policy.

Mewes v. State Farm Auto Ins. Co., 530 N.W.2d 718 (Iowa 1995)

Underinsured Motorist Coverage

Mewes was a passenger in a car owned by Kraft that was rear-ended by an underinsured driver. Mewes suffered serious injures. She settled with the underinsured driver for her policy limits of $20,000. Kraft had a policy issued by IMT which covered passengers, such as Mewes, and provided underinsured coverage up to $50,000. IMT paid Mewes the full $50,000 in coverage. Mewes also was covered by three policies issued by State Farm. Two of these policies had underinsured limits of $20,000 while the third had underinsured limits of $50,000. State Farm refused to pay under any of these policies, alleging that such a payment would be contrary to the antistacking, "other insurance" clause in its policies because IMT already had paid its $50,000 underinsured limit. Mewes sued State Farm for coverage and bad faith. The trial court granted summary judgment for State Farm.

HELD: Affirmed. Iowa Code § 516A.2 permits antistacking clauses. Contrary to Mewes' contention, this section does not apply only to policies written by the same company. IMT was liable for primary coverage because it insured the vehicle involved in the accident. Under the language of the State Farm policy, and in accordance with § 516A.2, the State Farm coverage was only excess coverage and applied only to the extent that the limits of a State Farm policy exceed IMT's limits. Because no State Farm policy had underinsured limits in excess of the IMT limit, State Farm is not liable to Mewes under any policy.

Condon v. Employers Mutual Cas. Co., 529 N.W.2d 630 (Iowa Ct. App. 1995)

Uninsured Motorist Coverage

Harry Condon was injured by an uninsured motorist while he was at work. He received workers' compensation benefits for several weeks but ultimately died from his injuries. Upon his death, his widow continued to receive workers' compensation benefits. Harry's estate then sued the uninsured motorist. Employers Mutual intervened as uninsured motorist carrier for Harry's employer. The jury found damages of $625,700, including

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$163,000 for spousal support. The policy limit was $500,000. The trial court reduced the judgment against Employers Mutual by $67,219, the amount of workers' compensation benefits paid to Harry prior to his death, but did not reduce the judgment by the amount of workers' compensation benefits paid, and payable, to Harry's widow after his death.

HELD: Affirmed. Under Iowa law, workers' compensation benefits payable to the surviving spouse are not duplicative of UM insurance paid to the administrator of the estate. Although, in this case, the widow and the administrator of the estate are the same person, they are considered two distinct legal entities. Thus, Employers Mutual was not entitled to a reduction for the amount of workers' compensation benefits payable to the widow and was not entitled to offer evidence at trial of the amount of these benefits.

JUDGMENT

Rex Staub

State v. State Police Officers Council, 525 N.W.2d 834 (Iowa 1994)

Attorneys Fees - Declaratory Judgment

When the State reduced the number of supervisory employees in the Department of Public Safety it resulted in three supervisory employees displacing three members of the bargaining unit. The State then denied a grievance filed by the State Police Officers (SPOC) on behalf of the displaced members. SPOC demanded the grievance be submitted to arbitration. The State filed a petition for declaratory judgment claiming the grievance was not arbitrable. SPOC counterclaimed, seeking an order to compel arbitration and requesting attorneys fees for bad faith refusal to arbitrate. The district court ordered arbitration but refused attorneys fees.

HELD: Arbitrability is for the courts to decide and, in this case, the district court properly ordered arbitration. However, the court should be cautious not to consider the merits of the underlying claim when analyzing its arbitrability.

HELD: An award of attorneys fees in labor arbitration disputes is available only "when the losing party has acted in bad faith vexatiously, wantonly, or for oppressive reasons". The facts of this case do not show that the State acted in bad faith. Denial of attorneys fees is denied.

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Grant v. Laurie, 533 N.W.2d 563 (Iowa 1995)

Attorneys Fees - Rule 13

Michael Grant was struck and killed by a vehicle driven by Laurie. Laurie was later convicted of involuntary manslaughter as a result of the accident and sentenced to prison. Michael Grant's parents, Thomas and Kim Grant, brought a wrongful death suit against Laurie while he was in prison. Attorney Charles Levad had been appointed to represent Laurie in the criminal proceedings and, notwithstanding his attempts to withdraw, continued to represent Laurie in the wrongful death suit. On the issue of Levad's attorneys fees in the suit, the District Court taxed Levad's fees as guardian ad litem to the Grants.

HELD: The trial court did not err in taxing Levad's fees to the Grants. The fees incurred by Levad as guardian ad litem for an incarcerated civil defendant could be taxed as costs to the prevailing plaintiffs in a wrongful death action under Rule of Civil Procedure 13 and Iowa Code Section 625.5. The costs accrued as a result of the Grant's filing of suit and could not be collected from Laurie.

HELD: However, the Supreme Court reduced Levad's award of $2,391.66 to $1,849.88. $1,849.88 was the fee fixed by the District Court for representing Laurie. The amount above and beyond that figure constituted Levad's own challenge of the fee allowance, and fell outside of the underlying claim between the Grants and Laurie.

Cline v. Richardson, 526 N.W.2d 166 (Iowa Ct. App. 1994)

Court Costs - Depositions

HELD: Deposition costs are recoverable as court costs only to the extent they were incurred for depositions introduced, (in whole or in part), into evidence at trial. Because the trial transcript only referred to Cline's deposition once and it was neither offered nor admitted into evidence, it was an abuse of discretion to tax the costs of the deposition to Cline.

State v. Hess, 533 N.W.2d 525 (Iowa 1995)

Nunc Pro Tunc

The State filed a trial information charging Hess with: Count I - assault with intent to inflict serious bodily injury; Count II - assault causing injury; and a charge of failure to appear entered in another case. In a written plea agreement, Hess agreed to plead guilty to Count II and the failure to appear, and

the State agreed to dismiss Count I. After the sentencing hearing, the Court issued an incorrect written order entering judgment on Count I and dismissing Count II. Hess filed an appeal arguing the error in the written entry rendered his entire sentence illegal.

HELD: The record unambiguously demonstrated that any inconsistency between the oral sentence and written judgment entry was merely clerical in nature. The case was remanded back to the court to correct the error by issuance of a nunc pro tunc order.

<u>Garden Gate, Inc. v. Northstar Mfg.</u>, 526 N.W.2d 305 (Iowa 1995)

<u>Nunc Pro Tunc</u>

Beyond the Garden Gate, Inc. (BGG) bought a used Northstar floral freeze dryer from Richard Delong. Problems developed with the machine on several occasions and BGG contracted with Lehmen Commercial Services to repair the dryer. After repeated attempts at repair failed, BGG sold the Northstar machine and purchased a new freeze dryer from a different manufacturer. When BGG failed to pay Lehman for the repairs, Lehman filed suit against BGG. BGG counterclaimed against Lehman and filed a third-party petition against Northstar and the manufacturer, Copeland, alleging breach of implied and express warranties and fraud. Copeland cross-claimed against Northstar for indemnity.

The jury awarded BGG $40,000 on its breach of express warranty claims against Northstar. The court also entered judgment in favor of Copeland and against Northstar for attorneys fees and expenses under the indemnity contract. When Copeland tried to execute on the judgment, it discovered that the court had rendered judgment against Northstar Companies instead of "Northstar Freeze-Dry Manufacturing, Inc.", its true name. After Northstar appealed, Copeland and BGG filed separate applications for a nunc pro tunc order to amend the judgment to reflect Northstar's correct corporate name. The district court entered a nunc pro tunc order on the error.

HELD: The nunc pro tunc order amending the indemnity judgment for Copeland to reflect Northstar's true corporate name was affirmed. The mistake was simply a clerical error and did not affect the parties. Additionally, the district court retained jurisdiction to enter the order as it was based on a collateral issue which did not affect the subject matter of Northstar's appeal.

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Estate ex rel. Casas v. Fellmer, 521 N.W.2d 738 (Iowa 1994)

Preclusion - Issue

In 1975, Casas filed a paternity action against Fellmer alleging he was the father of her child, Lisa. Although Fellmer denied paternity, the parties reached a compromise. In 1977, the District Court approved the compromise finding that Fellmer was not the father of Lisa. Casas dismissed her complaint against Fellmer with prejudice.

In 1992, the State sought to establish Fellmer's paternity of Lisa in order to compel payment of child support. Fellmer filed a motion to dismiss, contending the 1977 action precluded consideration of the issue. The State argued that issue preclusion did not apply because: the 1977 ruling was simply an approval of a compromise, as opposed to a litigation, of the paternity issue; Fellmer's payment under the compromise constituted an admission of paternity and was inconsistent with the 1977 finding of no paternity; and different parties were involved in the current case.

Fellmer's motion was denied and the State presented a blood test showing the probability of Fellmer's paternity of Lisa to be 99.47%. The court found Fellmer to be Lisa's father and ordered accrued and current child support be paid.

HELD: Issue preclusion requires a determination that: (1) The issue is identical to the one previously decided; (2) The issue must have been raised and litigated in the previous action; (3) The issue must have been material and relevant to the disposition of the previous action; and (4) The previous determination made on the issue must have been necessary and essential to the resulting judgment. In this case, issue preclusion applied. The 1977 action precluded relitigation of the current paternity action.

HELD: Element 2 - The existence of a full-blown trial is not a prerequisite to the finding that the issue was "raised and litigated" in a previous action. It is enough to show the issue was conclusively determined in a previous action and judgment was entered. The court's 1977 approval of the compromise constituted litigation of the paternity issue.

HELD: Regarding the State's claim that different parties are involved, the State's only interest in the case occurs directly through Lisa - whose interest occurs directly through Casas. The real parties in interest were parties to the 1977 action.

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Burns v. Board of Nursing of Iowa, 528 N.W.2d 602 (Iowa 1995)

Preclusion - Issue

The Board of Nursing disciplined Burns for habitual intoxication in violation of Iowa Code § 147.55(4) and placed her on probation for three years. Burns challenged the Board's decision claiming it constituted a deprivation of her constitutional rights. On review, the district court reversed the Board's decision and remanded the case for reinstatement of Burns' license. The Board appealed the district court decision to the Supreme Court in "Burns I", 495 N.W.2d 698. In "Burns I", The Supreme Court reversed the district court and remanded the case back.

Before the decision in "Burns I" was issued by the Supreme Court, Burns filed a separate petition for declaratory judgment claiming the statute upon which the discipline was based was vague on its face, or, as applied, amounted to an unconstitutional delegation of power to the Board. This claim was ultimately heard in "Burns II", 520 N.W.2d 631, in which the court rejected Burns' constitutional argument.

After "Burns I" and "Burns III" were decided by the Supreme Court, the remand of "Burns I" was considered by the District Court. Burns once again raised her constitutional claims in the remand. The District Court found that the constitutional claims were precluded by the Supreme Court's decision in "Burns II". This case is "Burns III", Burn's final appeal of the remanded district court decision on "Burns I".

HELD: Burns' constitutional challenge was considered and lost in Burns II. Because Burns II constituted the final decision on the constitutional issues, issue preclusion prevents her from relitigating those issues in this appeal.

West v. Wessels, 534 N.W.2d 396 (Iowa 1995)

Preclusion - Claim and Issue

West filed for judicial review of his termination as the superintendent of the Buffalo Center-Rake-Lakota Community School District. The district court and Court of Appeals upheld the termination. West subsequently brought a multi-theory tort and breach of contract action against the school district, members of the board of education for the school district, a principal and football coach employed by the school district, and the attorney who represented the school district in the judicial review proceedings.

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Wessels and the other defendants filed motions for summary judgment contending that West's claims had been litigated in the judicial review proceeding and, therefore, were barred under the theories of claim and issue preclusion. The district court granted summary judgment. The Supreme Court affirmed in part, reversed in part, and remanded.

HELD: Claim preclusion prevents the relitigation of claims raised in a previous proceeding. Issue preclusion prevents the parties from relitigating issues previously resolved if they were necessary in deciding the prior litigation. In this case, claim preclusion bars relitigation of the claims which are dependent upon termination of the contract or measured by the loss of the contract as these claims have been the subject of the prior judicial review proceeding. However, the rest of West's claims, (i.e., tortious interference with West's prospective contractual relationship with another school district) are not barred by claim or issue preclusion. Summary judgment on these claims should not have been granted.

<u>Jamieson v. Harrison</u>, 532 N.W.2d 779 (Iowa 1995)

<u>Pro Tanto Credit</u>

Jamieson sued tavern owner Harrison on separate alternative counts of dram shop and premises liability for the same injuries he sustained in a bar fight. Before trial, the parties settled the dram shop claim for $9,000. At trial on the premises liability claim, the jury found both parties 50% at fault, assessing damages of $20,000. Jamieson received $10,000 and Harrison's request for pro tanto credit on the dram shop settlement of $9,000 was refused.

HELD: Although the pro tanto credit rule applies, because Jamieson's total recovery of $19,000 did not exceed his damages of $20,000, he did not receive a double recovery.

JURISDICTION

Rex Staub

<u>FDIC v. American Casualty Co. of Reading</u>, 528 N.W.2d 605 (Iowa 1995)

<u>Certified Questions</u>

The FDIC obtained judgment against three of the directors and officers of the Mineola State Bank in Mills County, Iowa. Thereafter, the FDIC brought suit in federal court to recover under the directors and officers liability policy issued to Mineola by American Casualty Company. The Iowa Supreme Court accepted a

certified question from the federal district court on coverage. FDIC objected, arguing the Iowa Supreme Court lacked jurisdiction, or at least lacked the power to answer, because any answer would be based upon federal precedent.

HELD: The Iowa Supreme Court has jurisdiction to entertain the certified question from the federal district court, even if the district court will be bound by federal precedent.

In re Marriage of Wallick, 524 N.W.2d 153 (Iowa 1994)

Minimum Contacts

Jonathan and Judith Wallick obtained a marital dissolution decree in Connecticut. Shortly thereafter, Jonathan moved to Iowa and Judith moved to Vermont with their three children. Judith contacted the Vermont Office of Child Support regarding Jonathan's child support arrearage. After Vermont initiated an action to enforce the Connecticut child support judgment in Iowa, Iowa entered an ex parte income withholding order against Jonathan. Jonathan then filed in Iowa a Petition for Modification of the Connecticut Dissolution Decree, serving Judith in Vermont with notice of the action. Judith filed a Motion to Dismiss the Iowa action for lack of personal jurisdiction. Jonathan argued there was jurisdiction because Judith had "purposefully availed" herself of Iowa's administrative and legal system by instituting proceedings to withhold his wages in Iowa.

HELD: The Iowa Courts may exercise jurisdiction over a non-resident only if that non-resident has "certain minimum contacts" with Iowa. In the context of this case, Judith has never lived in nor visited Iowa and was forced to enforce child support in Iowa solely because Jonathan chose to move to Iowa. This alone is not enough to satisfy the minimum contacts test.

Robert's River Rides v. Steamboat Development Corp., 520 N.W.2d 294 (Iowa 1994)

Navigable Waters

HELD: Generally Iowa exercises concurrent jurisdiction and authority with the federal government over navigable waters such as the Mississippi. Iowa's jurisdiction extends from the "high water mark to the center of the stream".

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Roach v. Crouch, 524 N.W.2d 400 (Iowa 1994)

Patent Claims

After forming Iowa Engineered Processes Corporation (IEPC) with two colleagues, Roach patented a machine that utilized a cascade process for cleaning and deburring metal parts. The patent was assigned to IEPC. After Roach left IEPC, in 1986, IEPC sought a patent for improvements to the machine. The patent application for the improvements designated Roach and IEPC employee Crouch as co-inventors. Claiming sole inventorship, Roach protested Crouch as a co-inventor and refused to sign the patent application or assign his patent rights to IEPC. Ultimately the Patent Commissioner issued the patent in both Roach and Crouch's names.

Roach filed for declaratory judgment in federal district contending he was the sole inventor and owner of the improvement. Crouch and IEPC moved to dismiss contending Roach's claims rested on ownership rights that were matters of state law. The federal court dismissed the action finding that Roach had failed to establish a factual basis for federal jurisdiction. Roach then filed in state district court. This time Crouch and IEPC moved for partial summary judgment contending that Roach's inventorship claims - as opposed to ownership claims - were within the exclusive jurisdiction of federal court. The state district court granted Crouch's motion and held the sole ownership issue over for trial. Roach filed interlocutory appeal.

HELD: Roach's cause of action based upon sole inventorship raised a substantial federal question, thus rendering federal jurisdiction exclusive.

Clubine v. American Cyanamid, 534 N.W.2d 385 (Iowa 1995)

Preemption

Clubine and other farmers applied herbicides manufactured by American Cyanamid (American) to their fields. Contending the herbicides damaged his crops, Clubine filed a products liability suit against American for defective manufacture of an unreasonably dangerous product, breach of implied and express warranty, and negligent testing of the herbicide. American moved for dismissal contending the claims were preempted by federal legislation that regulates the manufacture and labeling of the herbicide - the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The court found that all of the claims but negligent testing were preempted. Clubine appealed.

HELD: Preemption may be found where Congress' intent to preempt the field is either expressly stated or implicit in

congressional policy. FIFRA expresses such an intent. With the exception of the negligent testing claim, all of Clubine's claims are "label-based" and depend upon requirements in addition to or different from those imposed under the FIFRA labeling requirements. As a result these claims are properly preempted by federal legislation.

Sanford v. Meadow Gold Dairies, Inc., 534 N.W.2d 410 (Iowa 1995)

Preemption

Sanford, a Meadow Gold employee, was injured while operating a machine that fills ice cream containers. He began to receive workers compensation benefits as a result of the injury and filed suit against the machine manufacturer. After the suit was settled, Sanford's employment with Meadow Gold was terminated. He then filed suit against Meadow Gold for wrongful/retaliatory discharge and fraudulent misrepresentation.

Prior to trial, Sanford filed a motion in limine to exclude evidence concerning his receipt of workers compensation benefits and his recovery against the machine manufacturer arguing Meadow Gold was not entitled to a set-off under Iowa Code Section 668.14. The trial court conditionally sustained Sanford's motion in limine subject to review if Sanford presented inconsistent statements regarding the excluded evidence. At trial, Sanford introduced evidence of Meadow Gold's actions in dealing with his workers compensation claim. In response, Meadow Gold introduced evidence concerning the compensation benefits he received. Sanford appealed and Meadow Gold cross appealed contending Sanford's retaliatory discharge claim should not have been submitted because it was preempted by the Labor Management Relations Act.

HELD: Retaliatory discharge suits are not preempted under the Labor Management Relations Act when the action does not require an interpretation of the collective bargaining agreement. In this case, there was no argument concerning the terms or effect of the union contract. All issues were limited to matters of routine state law. Consequently, the trial courts refusal to dismiss the claim on the basis of preemption was proper.

Pierce v. Conference of Seventh Day Adventists, 534 N.W.2d 425 (Iowa 1995)

Preemption - Free Exercise Clause

Pierce was employed as a ministerial intern to the Conference of Seventh Day Adventists (Church). After his employment was terminated he sued the Church on several theories

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including breach of unilateral contract of employment. The Church moved for summary judgment arguing the Free Exercise Clause of the First Amendment precluded the court from reviewing any issues related to the Church's policies, procedures or actions in terminating Pierce. The court granted summary judgment.

HELD: Under the First Amendment secular tribunals may not interfere with a church's relationship with its ministers. Pierce's claims arising from his employment with the Church are included within this restriction. Summary Judgment affirmed.

In re Receivership of Mt. Pleasant Bank & Trust Co., 526 N.W.2d 549 (Iowa 1995)

Subject Matter

Judgment creditors of the Mt. Pleasant Bank and Trust Company (Bank) objected to the final report of the Federal Deposit Insurance Corporation (FDIC) in its capacity as receiver of the Bank. The district court overruled the objections and approved the final report.

HELD: Congress provided state and federal courts with concurrent jurisdiction over certain FDIC matters. In this case, the state district court had subject matter jurisdiction to enter an order approving the settlement of the Bank's claims against its former directors and officers.

LIMITATIONS OF ACTION

Rex Staub

State v. Schultzen, 522 N.W.2d 833 Iowa (1994)

Amendments to Statute of Limitations - Criminal

From July 1986 to July 1988, Schultzen committed sexual abuse on his young cousin. During that time period, Schultzen was 16 to 18 years of age and the victim was four to six years of age. At the time of the abuse, the offense carried a four-year statute of limitations. However, on July 1, 1990, the statute of limitations for sexual abuse was amended to extend indictment to six months after the child victim attained 18 years of age. Schultzen was indicted in February 1992. He claimed the four-year statute applies and bars prosecution for any offenses committed before February 1988.

HELD: As a general rule, if the case is barred by a statute of limitation it cannot be resurrected by an amendment extending the statute of limitations. In this case, however, ex post facto did not apply because the prosecution of Schultzen was

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not barred when the Amendment to the four-year statute became effective. Accordingly, the State's prosecution was not time barred.

Venard v. Winter, 524 N.W.2d 163 (Iowa 1994)

Legal Malpractice - Section 614.1

Civil Procedure - Voluntary Dismissal (Rule 215)

In June 1992, Venard brought a legal malpractice action against his former attorney based on the attorney's alleged failure to take necessary steps to complete the redemption of certain property. In the course of discovery, Venard failed to designate his experts within the deadline set forth in Iowa Code Section 668.11. The attorney filed a motion for summary judgment based on Venard's failure to comply with Section 668.11 arguing Venard could not make a prima facie of malpractice without such experts. Before the court ruled on the motion, Venard voluntarily dismissed his suit without prejudice under Rule of Civil Procedure 215. Five days later he filed a similar petition with additional claims. The attorney filed a motion to dismiss the second suit arguing the suit was barred under the two-year statute of limitations (Iowa Code Section 614.1(2)) and that, because Venard had dismissed his first suit for failure to comply with expert deadlines, this suit should be dismissed as well. Although the court rejected the statute of limitations argument, it accepted the attorneys second argument and dismissed the suit. Venard appealed.

HELD: Venard's action against the attorney arose from an oral agreement for services and was governed by the five-year statute of limitations governing unwritten contracts and actions for injuries to property, Iowa Code Section 614.1(4)

HELD: Venard had an absolute right under Rule 215 to dismiss without prejudice his first legal malpractice action for any reason. Even accepting the attorney's argument that Venard did so only to escape the consequences of his failure to designate experts in time, motive plays no part in a voluntary dismissal under Rule 215. Iowa Code Section 668.11, (which governs liability cases and sets forth the time period within which a plaintiff must designate experts), does not require a dismissal for a party's failure to designate experts and is not in conflict with Rule 215. Although the court applied the proper statute of limitations, it improperly granted dismissal on the Rule 215 argument.

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Langner v. Simpson, 533 N.W.2d 511 (Iowa 1995)

Medical Malpractice, Section 614.1(9)

On September 26, 1991, Langner brought a medical malpractice suit against psychiatrist Simpson, Spencer Municipal Hospital, mental health counselor Neboda, and Northwest Iowa Mental Health Center for treatment she received during the 1980's. All of the defendants raised the two-year statute of limitations, (Iowa Code Section 614.1(9)), as an affirmative defense. Simpson and Spencer Municipal Hospital also filed motions for summary judgment on all claims against them on the same theory.

In her resistance, Langner argues the statute was tolled for three reasons: (1) She was a "mentally ill person" who was unable to file suit within the two-year statute, thereby subjecting her to Iowa Code Section 614.8 which extends the statute to one-year from termination of the mental disability; (2) The continuing treatment doctrine and the continuum of negligent treatment doctrine tolled the statute; and (3) The defendants conspired to fraudulently conceal her injuries from her. The district court granted the motion for summary judgment. The Supreme Court affirmed.

HELD: The medical malpractice statute of limitations begins to run when the party knew, or through the use of reasonable diligence, should have known of the injury for which damages are sought. The motion for summary judgment was supported by Langner's deposition testimony that shows she became aware of her injuries in April 1988 - three years before suit was filed. Accordingly, Section 614.1(9) applies and bars Langner's action.

HELD: The continuing treatment doctrine and the continuum of negligent treatment doctrine on the part Simpson and the hospital were not applicable under the facts of this case. Langner left the care of Simpson and the hospital in April 1988. She then sought treatment from Neboda who practiced in a separate independent facility. Because there was no nexus between the care provided by Simpson and the hospital and the care provided by Neboda, the continuous treatment theory failed. The continuum of negligent treatment argument also failed because Langner's claim against Simpson and the hospital were based upon one brief isolated period.

HELD: No evidence was presented to support Langner's claim that Simpson and the hospital attempted to hide material facts on the claim from her.

HELD: Although Section 614.8 extends the statute of limitations for "mentally ill persons," the mental disability must be such that the plaintiff is not capable of understanding his or her rights. Evidence on this issue was limited to the fact that

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Langner had been diagnosed as depressed. Proof of depression - without more - is not proof of disability due to mental illness.

Claus v. Whyle, 526 N.W.2d 519 (Iowa 1994)

Sex Abuse

Beverly Jo Claus was born in 1974 to Richard and Beverly Whyle. In November 1987, Beverly Jo was hospitalized after taking an overdose of Tylenol. During her hospital stay, she informed an intake nurse that her father had placed his hand upon her breast during a family vacation in 1983. On September 20, 1989, Beverly Jo married Aaron Claus. At the time Aaron was 17 and Beverly Jo was 15.

Commencing in late 1990 through 1993, Beverly Jo began to have flashbacks of a specific incident of sexual abuse by her father on November 7, 1987, and general recollections of sex abuse that occurred from 1979 through 1989. In November 1991, Beverly Jo brought suit against her mother and father for sexual abuse. Her husband also made a claim for loss of consortium.

The father argued that Iowa Code Section 614.1(2) (two-year statute of limitations) and Section 614.8 (one-year extension of the two-year statute after termination of minority) applied barring her suit. Concerning the November 7, 1987, incident of sex abuse, the trial court rejected the father's argument finding instead that Iowa Code Section 614.8A applied. That section provides that actions for sex abuse that occur when the injured party is a child but not discovered until after the injured party is of majority, shall be brought within four years from the date of discovery. Concerning the claim that the father touched Beverly Jo's breast in 1983, the court applied Sections 614.1(2) and 614.8 and dismissed the claim. Beverly Jo obtained a verdict on the November 7, 1987 incident.

HELD: Substantial evidence supported the trial court's finding that the father had sexually abused Beverly Jo on November 7, 1987. Beverly Jo was a 13-year-old minor at the time who did not recall the event until late 1990 or early 1991, after she reached the age of majority. Section 614.8A properly applied and allowed her to bring this claim within four years of discovery.

HELD: Beverly Jo's claim that her father touched her breast in 1983 also occurred when she was a minor, but she was aware of the incident in 1987. Accordingly, Section 614.1(2) and 614.8 applied and she was required to bring the claim within one year of September 20, 1989 - her marriage date and the date she reached majority. She failed to do so.

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HELD: Concerning the husband's claim for loss of consortium, the two incidents of sex abuse occurred before they were married. As the discovery rule is inapplicable to a loss of consortium claim, the husband had no claim.

Krull v. Thermogas Company of Northwood, Iowa, 522 N.W.2d 607 (Iowa 1994)

Statute of Repose

James and Deanna Krulls' home and possessions were destroyed when their LP gas furnace exploded in November 1990. The furnace had been purchased in 1969 and was equipped with a Honeywell V8139 control valve. In 1980, Honeywell voluntarily recalled the V8139 control valve and requested that its retailers check for the recalled valve during service calls. In the fall of 1989, a Mapco Gas Products service person visited the Krull's home, inspected their furnace, but failed to identify the valve as a V8139 subject to recall.

Also, the day before the November 1990 explosion, the same service person installed a gas line to the Krulls' chicken coop. The service person turned off the gas before installing the line, but did not go into the Krulls' home and turn off the furnace. When the service person was done with the line, he intended to go into the home and relight the pilot on the furnace but was told by James Krull that he would do it himself. James failed to do so and in the early morning hours of the next day the home exploded.

The Krulls brought suit against Thermogas, (a division of Mapco), for negligence in failing to properly identify the valve. Thermogas filed a third-party action against Honeywell seeking contribution and indemnity. Honeywell moved for summary judgment contending that because the furnace was purchased in 1969, all claims against it expired in 1984 under the 15-year statute of repose, Iowa Code Section 614.1(11).

Mapco appealed claiming the statute of repose did not apply because Section 614.1(11) applied only to "improvements to real property" and the valve was not an improvement. Alternatively, Mapco contends: (1) Even if the valve was an improvement, the Legislature did not intend to extend Section 614.1(11) to manufacturers of the improvement; (2) Even if the negligent design and manufacture claim was time barred under Section 614.1(11), the negligent recall claim was not; and (3) Section 614.1(11) denies Mapco the opportunity to seek indemnity from a party protected by statute and violates the Equal Protection Clause.

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HELD: As part of the furnace, the control valve was a betterment of the Krull's home and thus was an improvement to real property. Therefore, Section 614.1(11) applies and bars Mapco's claim because it was brought more than 15 years after 1969, the date of the sale of the furnace which is considered to be the alleged act or omission.

HELD: Section 614.1(11) does not exempt manufacturers. Section 614.1(11) specifically states that it does not apply to owners, occupants, or operators of the improvement. Manufacturers of improvements are not included in the express exception.

HELD: Mapco's negligent recall claim arises from the negligent manufacture claim and, therefore, falls within the scope of Section 614.1(11).

HELD: Contrary to Honeywell's argument Mapco has standing to raise a claim under the Equal Protection Clause. However, Section 614.1(11) does not violate equal protection. Judgment affirmed.

NEGLIGENCE

Rex Staub

Baumler v. Hemesath, _____ N.W.2d _____ (Iowa, July 19, 1995)

Failure to Warn

Judgment - Interest

Baumler brought suit against the Hemesaths for negligent failure to maintain a safe working area and negligent failure to warn. The jury returned a verdict for Baumler and the Hemesaths appeal on the following grounds: the instrumentality of the injury, (i.e. a rut), was an open and obvious danger, therefore a failure to warn instruction should not have been submitted to the jury; the District Court erred in precluding evidence of insurance-paid medical bills; and the district court applied the wrong interest rate to Baumler's past damages.

HELD: The evidence supported a finding that the Hemesaths could have anticipated the safety risk of the instrumentality yet gave no warning nor minimized the hazard. The failure to warn claim was properly submitted to the jury.

HELD: Although the court properly rejected the interest calculation under Chapter 668 to Baumler's past damages, it improperly applied Chapter 668 to Baumler's future damages. The court should have assessed 10% interest on the judgment pursuant to Iowa Code Section 535.3 (interest on judgments and decrees).

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HELD: Interest on the claim related to the slip in the rut should accrue from date of Baumler's amended petition as opposed to his original petition.

Hoffnagle v. McDonald's Corp., 522 N.W.2d 808 (Iowa 1994)

Franchisee/Franchisee

Hoffnagle was employed by Rapid-Mac (a McDonald's franchisee) at a Rapid-Mac McDonald's restaurant. While working, Hoffnagle was assaulted by two customers in the parking lot of the restaurant. She received workers' compensation benefits as a result of the assault and filed suit against the McDonald's Corp. as the franchisor and owner of the property where the restaurant was located. McDonald's filed a motion for summary judgment, asserting that, as a matter of law, it had no duty to provide Hoffnagle with a safe place to work or to provide security for her because those duties were the responsibility of her employer, Rapid-Mac. District court granted summary judgment.

HELD: The best method for determining the existence of a franchisor's duty of security is by analogy to the employer - independent contractor law as found in Restatement (Second) of Torts Section 414. Under this analysis, the duty of care owed to Hoffnagle by the franchisor turns on the extent of the franchisor's retained control over the property and daily operation of the McDonald's restaurant.

HELD: Whether the franchisor's retained control was sufficient to impose a duty is an issue that can be determined as a matter of law.

HELD: McDonald's retained authority under its franchisee agreement with Rapid-Mac did not vest it with sufficient control of the property to render McDonald's a "possessor" of land for purposes of applying Restatement (Second) of Torts Section 344 - which provides that possessor of land has duty to discover and protect against physical harm from intentional acts of third persons occurring on premises.

Collister v. City of Council Bluffs, 534 N.W.2d 453 (Iowa 1995)

Municipality

Preservation of Error - Jury Instructions

A Council Bluffs street sweeper was struck and left disabled in the westbound lane of Highway 6. The sweeper driver, Michael Johnson, left the sweeper and allegedly failed to turn on the sweeper's emergency flashers. Ten minutes later, a car driven

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by Richard Collister struck the rear of the abandoned street sweeper injuring Collister and his passenger, Elizabeth Martin. Collister's auto insurance carrier brought a subrogation suit against Council Bluffs and Johnson. The jury returned a verdict finding the defendants 70% at fault. The City appealed alleging the trial court erred in instructing the jury the City could be found negligent for "failing to take any action to warn approaching traffic" and for "failing to take appropriate action to provide roadway lighting which is up to current design standards".

HELD: Jury instructions are reviewed to determine whether they are supported by substantial evidence.

HELD: Iowa Code Section 668.10(1) provides that a municipality shall not be assigned a percentage of fault for "the failure to place, erect, or install a stop sign, traffic control device, or other regulatory signs as defined in the uniform manual for traffic control devices adopted pursuant to Section 321.252". However, this statute does not immunize the City from liability in this case because Collister's claim is based upon the City's failure to activate the emergency parking lights on the street sweeper. Because these lights do not fall within the definition of a "traffic control device", the claim of failure to take action to warn approaching traffic was properly submitted.

HELD: The instruction concerning the City's duty to take appropriate action to provide roadway lighting should not have been submitted because the court focused on "current" design standards as opposed to design standards in effect at the time the lighting was erected. However, because the City did not object to the instruction on this basis and the given instruction was actually more favorable to the City, no prejudice resulted.

Griglione v. Martin, 525 N.W.2d 810 (Iowa 1994)

Municipality - Negligence per se

Susan Griglione brought a civil rights action under 42 U.S.C. Section 1983 against the City of Mt. Pleasant and Steve Martin, the police officer who shot and killed her husband, Rodney Griglione. Her petition also contained claims against Martin for negligence and assault and battery. The same claims were pressed against the City under a theory of vicarious liability. The district court sustained the City's motion for summary judgment on the civil rights claim pressed against the City, and the City and Martin obtained jury verdicts on the remaining claims. On appeal, Griglione contends the district court erred in failing to instruct the jury that an officer's violation of a police department standard operating procedure (SOP) is negligence per se. She also contended the summary judgment on her civil rights claim against

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the City should not have been granted. The Court of Appeals affirmed the judgment. The Supreme Court granted further review.

HELD: In order for the violation of rules of conduct, (e.g. police department. SOP), to constitute negligence per se, those rules must establish specific standards that are to be followed without exception in all instances. Additionally, rules that invoke negligence per se must be preordained by a state legislative body or an administrative agency regulating on a statewide basis. The Police Department SOP in this case is not specific enough nor was it preordained.

HELD: Although summary judgment should not have been granted because a dispute of material fact existed on the civil rights claim against the City, judgment should not be reversed. The civil rights claim against Martin did go to trial and the jury ruled in his favor. Absent a finding that Martin violated Rodney Griglione's civil rights, plaintiff's civil rights claim against the City cannot succeed.

Morris v. Leaf, 534 N.W.2d 388 (Iowa 1995)

Police Pursuit

During a high-speed chase, the fleeing suspect struck Morris' vehicle injuring Morris and his two passengers. Morris filed suit against the City of Des Moines and the Des Moines Police Officer involved in the chase. The City and Officer filed motions for summary judgment on the ground the Officer had no duty to protect Morris from the negligent act of the fleeing motorist and that, as a matter of law, the Officer's acts were not the proximate cause of the collision. The district court granted summary judgment, Morris appeals. (Note: this is a case of first impression on this issue).

HELD: Civil liability cannot be imposed upon the City or Officer absent a showing that the Officer acted with "reckless disregard for the safety of others". This requires proof that the officer committed an intentional act of an unreasonable character in disregard of a risk known to or so obvious that the officer had to aware of it and so great as to make it highly probable that harm would follow. The undisputed facts of this case show: the chase took place during the day when traffic was light; the officer followed the fleeing suspect only fast enough to keep the suspect's vehicle in sight; and the fleeing suspect had already began speeding when the officer decided to pursue him. In light of these facts, the pursuing officer did not act in reckless disregard for the safety of others. Summary judgment affirmed.

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Meyers v. Delaney, 529 N.W.2d 288 (Iowa 1995)

Premises Liability

Meyers was injured when a limb on one of Delaney's trees fell on his foot. Meyers sued Delaney for negligent failure to maintain the tree, failure to warn of the trees dangerous condition and failure to protect Meyers from a danger that Delaney knew or should have known about. After a bench trial, the court ruled in favor of Delaney. Meyers appealed contending the court applied the wrong legal standard and disregarded the evidence in reaching the verdict.

HELD: A landowner has a duty to use reasonable care to prevent unreasonable risk of harm to persons on adjoining premises from diseased or otherwise unsafe trees. However, the tree owner is liable only if the owner has actual or constructive notice of the tree's defective condition. Judgment affirmed.

Coleman v. Monson, 522 N.W.2d 91 (Iowa Ct. App. 1994)

Premises Liability - Business Invitee

Jury Instruction - Distraction Doctrine

While working at a Western Auto store, Coleman was injured in a slip and fall on the store's wet floor. The floor was being cleaned by employees of Larry Monson, d/b/a Jewell Janitorial Service at the time. Coleman sued Monson for negligence and the jury returned a verdict finding Monson 60% at fault. On appeal, Monson argued the district court erred by: (1) instructing that Monson owed plaintiff the standard of care owed an invitee; (2) instructing the jury as to the distraction doctrine; and (3) denying his motion for directed verdict.

HELD: A servant, whether an industrial employee or domestic servant, is a business "invitee" for purposes of determining the duty of the floor cleaning service. Therefore, the duty of the cleaning service to the store employee is the same as that owed by an occupier or possessor of land.

HELD: The distraction Doctrine instruction should not have been submitted to jury. Plaintiff claimed the cleaning service had a duty to warn Coleman about water on the floor because the cleaner expected or had reason to expect that Coleman's attention would be distracted the wet "shiny" floor. The claim fails in light of the plaintiff's testimony at trial that she was looking down and proceeding with caution when she fell.

Chumbley v. Dreis and Krump Manufacturing Company, 521 N.W.2d 192 (Iowa Ct. App. 1993)

Products Liability - Sole Proximate Cause

On his first day on the job at Fairplay Scoreboards, Chumbley severed his fingers while operating a machine press manufactured by Dreis and Krump (D & K). Chumbley brought a products liability suit against D & K for negligent design of the press' safety brake. At jury trial, D & K argued Fairplay's negligence was the sole proximate cause of Chumbley's injuries, or, in the alternative, the injuries were caused by Chumbley's own negligence in operating the press.

The Court instructed the jury that if it found Fairplay's conduct was the sole proximate cause of Chumbley's injuries, then it must find that D & K's fault, if any, was not a proximate cause of the injuries. Although the jury returned a verdict finding D & K at fault, the jury found D & K's fault was not a proximate cause of Chumbley's injuries. Chumbley appealed contending the court erred in instructing the jury that his employers negligence (Fairplay) could be the sole proximate cause of an injury in a products liability suit brought by an injured employee against a manufacturer.

HELD: D & K succeeded in carrying its burden on the sole proximate cause defense. As a result, D & K is insulated from liability even if the third party allegedly at fault - Fairplay - is immune from suit under workers' compensation laws.

Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294 (Iowa 1994)

Products Liability - State of the Art

Hughes lost his left arm when he became entangled in a corn head mounted on the front of his Massey-Ferguson combine. Hughes sued Massey-Ferguson on theories of negligence and strict liability. The jury returned a verdict for Hughes. On Massey-Ferguson's appeal, the Court of Appeals reversed and ordered a new trial on the negligence claim only.

In the second trial, the district court submitted an instruction for Massey-Ferguson on it's "state of the art" defense. The jury returned a verdict for Massey-Ferguson, and Hansen appealed contending the defense did not apply given simplicity of the safety devices involved.

HELD: If the record contains evidence to support a theory of defense, the court's decision to instruct the jury on that defense should not be disturbed on appeal. In this case, the trial court properly submitted the "state of the art" instruction

to the jury despite Hughes' contention that the apparent simplicity of the safety devices on the combine precluded the defense. Attachment of these "simple" devices safely to a large and powerful combine called for engineering expertise.

Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994)

Products Liability - State of the Art

While moving a drum filled with hydrochloric acid based mortar cleaner, the bung closure to the drum popped causing the acid to spray in his eyes Olson's eyes. Prosoco manufactured the acid cleaner but did not manufacture the drum or bung closure. Olson sued Prosoco under theories of strict liability and negligence. Prosoco requested a "state of the art" jury instruction on the strict liability and negligence theories. The jury awarded Olson $735,000 finding Prosoco 100% at fault under both theories.

On appeal, Prosoco claimed the district court erred in the following respects: (1) by submitting the case to the jury on both strict liability and negligence theories; (2) by submitting instructions on both theories that were duplicative and confusing and, hence, prejudicial; (3) by submitting a failure to warn instruction; (4) by failing to submit Prosoco's unreasonable failure to avoid injury instruction; and (5) by failing to instruct on Prosoco's "state of the art" defense with respect to the negligence claim. Prosoco also contends the jury verdict was inconsistent in light of the fact that the drum manufacturer and bung closure manufacturer were found 0% at fault. Lastly, Prosoco contends the jury committed misconduct by performing, during deliberations, an experiment on two water filled model drums produced at trial.

HELD: Although the trial court erred in submitting the case to the jury on both strict liability and negligence, and instructions regarding Prosoco's failure to warn under both theories were duplicative, this error did not have a prejudicial effect on the verdict.

HELD: A "state of the art" instruction is not required in a negligent failure to warn case.

HELD: The trial court properly submitted the failure to warn instruction because the evidence was sufficient to show the risk of injury was not known and obvious to the Plaintiff.

HELD: The jury verdicts were not inconsistent. There was no evidence to indicate the bung closure and drum were unreasonably dangerous in and of themselves. There was sufficient evidence for the jury to conclude that a dangerous product was

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created when the bung closure and drum were used to contain the Defendant's acid-based product.

HELD: The experiments performed by the jury were cumulative of evidence already presented by expert witnesses at trial. Further, affidavits asserting juror misconduct are not admissible to impeach the verdict.

Ballard v. Amana Society, Inc., 526 N.W.2d 558 (Iowa 1995)

Strict Liability

Jury Instructions - Lost Profits

The Ballards filed suit against Amana seeking direct and economic damages associated with injuries to their swine herd caused by the ingestion of toxic corn purchased from Amana. The jury returned a verdict finding Amana eighty percent at fault and awarded damages of $87,000. The award included damages for lost profits calculated on a four-year period of swine herd repopulation. Amana appealed. The Court of Appeals affirmed in part and reversed in part, finding that, although the Ballards were entitled to lost-profit damages, the evidence presented on the lost profits claim was overly speculative. The Court of Appeals also found the district court erred in submitting both strict liability and breach-of-warranty theories to the jury. The Ballards filed application for further review with the Supreme Court.

HELD: The Plaintiffs may recover lost profits associated with the reestablishment of their hog operation. The expert testimony presented on this component of damages was sufficient and provided a reasonable basis upon which the jury could calculate lost profits.

HELD: The foreseeable acquisition of diseased hogs by the Plaintiffs is not an intervening cause sufficient to relieve Defendant of it's liability for the full four-years of business interruption the Plaintiffs will suffer.

HELD: The trial court did not err in submitting both strict liability and breach-of-warranty theories to the jury. The existence of toxins in the feed corn was a genuine hazard peripheral to it's sale and a serious product defect that led to the death of the swine herd.

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Hagen v. Texaco Refining & Marketing, 526 N.W.2d 531 (Iowa 1995)

Strict Liability - Fuel Leak (Chapter 455G)

Dean and Nancy Hagen purchased a retail service station from Texaco under an agreement that required Texaco to install monitoring wells at the station. Texaco contracted with Seneca Corporation who then subcontracted with J & R Drilling Services (J & R) to drill the wells. Although Seneca marked the location for drilling, the markers were moved before the drilling occurred. As a result the drilling performed by J & R pierced an underground storage tank. The Hagens did not discover the hole in the tank for three weeks, during which time 2,300 gallons of fuel leaked through the hole. The Hagens subsequently received assistance for the cleanup from the Iowa Comprehensive Petroleum Underground Tank Fund Board (Board).

The Hagens filed suit against Texaco, Seneca and J & R for negligence. The Board intervened and filed a motion for partial summary judgment contending all of the defendants were strictly liable. The district court denied the motion, and the Board appealed.

HELD: The drilling of monitoring wells around underground storage tanks was not an abnormally dangerous activity which would subject Texaco and Seneca to the vicarious liability rule expressed in Restatement (Second) of Torts Section 427 - which provides that one who employs an independent contractor to do work that is abnormally dangerous is liable to the same extent as the contractor for harm to others. The drilling was not an unusual or inappropriate activity around the storage tank and the wells could have been installed with reasonable care. The trial court properly denied the board's motion for summary judgment on this issue.

HELD: However, under the Petroleum Underground Storage Tank Fund (Iowa Code Section 455G.13(7)) strict liability applies even in the absence of negligence or intent to harm. With this in mind, the court erred in failing to grant the Board's motion for summary judgment with respect to Seneca's and J & R's strict liability. J & R's conduct in drilling the well was a cause in fact of the spill. Seneca's action or inaction in placing the markers for the drilling was a proximate cause of the spill. Thus, both Seneca and J & R are strictly liable under Section 455G.13(7).

Stevens v. Des Moines School Dist., 528 N.W.2d 117 (Iowa 1995)

Superseding Cause

While attending a Des Moines Middle School, Danny Stevens suffered a beating at the hands of another student. Danny and his parents sued the Des Moines Public School District alleging the

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school district failed to reasonably warn potential victims of the student's violent nature, failed to control the student, and failed to properly supervise the students. The district court instructed the jury that if it found that Stevens' injuries resulted from an unforeseen and sudden act of another pupil, the sudden act constituted a superseding cause of the injury and the negligence of the school district, if any, could not be the proximate cause of the injury. The jury found the school district negligent, but that it's negligence was not a proximate cause of the injuries. Plaintiff appealed.

HELD: The superseding cause instruction should not have been given under the facts of this case. If a breach of the school district's duty to control students occurs and an assault is committed on a student as a result of that breach, the school district should not be excused from the effects of it's own negligence.

Hernandez v. Midwest Gas Company, 523 N.W.2d 300 (Iowa Ct. App. 1994)

Vicarious Liability - Independent Contractor

Injured employee of an independent contractor sued a gas company and co-employees for injuries he suffered while cutting and capping a natural gas line for the gas company. The district court granted summary judgment for the gas company and co-employees, and the injured employee appealed.

HELD: The gas company did not owe a duty to the employee of the independent contractor because the work performed by the employee did not subject him to "peculiar risk of harm".

HELD: The gas company did not retain sufficient control over the operative details of the cutting and capping to subject it to liability to employee of independent contractor.

HELD: The injured employee could not avoid the exclusive remedy provision of workers' compensation statute, in light of the fact that he was experienced in cutting and capping gas lines and had done so under similar circumstances without incident, and his co-employees had done the same.

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Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203 (Iowa 1995)

Abuse of Process

Marian Johnson was injured by downed electrical lines on the farm she owned with her husband Verdell. They sued the utility that owned the lines. The utility cross-claimed against Verdell, alleging that his negligence was a cause of Marian's injuries. The Johnsons asked their liability insurer, Farm Bureau, to defend the cross-claim. Farm Bureau refused, relying on a policy exclusion for injuries suffered by an insured. Despite the exclusion, the Johnsons sued Farm Bureau for breach and for bad faith. Farm Bureau counterclaimed for abuse of process, alleging that the bad faith claim was filed primarily for an improper purpose. The district court granted summary judgment for Farm Bureau on the Johnsons' claims but also granted a directed verdict against Farm Bureau on its counterclaims.

HELD: Affirmed. Farm Bureau was required to prove that the Johnsons used legal process primarily for an improper purpose. This is difficult to establish. Proof of an improper motive or malicious intent in the filing of a claim does not establish this element. Even if the bad faith claim was filed for purposes of gaining settlement leverage, this is not an improper purpose. Settlement is a proper goal of legal process, even if the suit is frivolous.

Griglione v. Martin, 525 N.W.2d 810 (Iowa 1994)

Civil Rights

Rodney Griglione's wife alerted the police that he was agitated and heading toward the residence of his former girlfriend. A police officer went to the girlfriend's mobile home to investigate. He saw Rodney climb over a fence with a knife. Rodney then charged the police officer with the knife, at which time the officer shot and killed Rodney. Rodney's estate sued the officer and the city for negligence, assault and battery and violation of civil rights. The district court granted summary judgment for the city on the civil rights claim, finding that the plaintiff failed to raise an issue of fact on her claim that the city inadequately trained the officer. The jury returned a defense verdict on all remaining claims.

HELD: Affirmed. While the grant of summary judgment for the city on the civil rights claim against it was in error, due to the existence of factual issues, the city's potential liability for any civil rights violation by the officer was vicarious in nature.

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Because the jury found that the officer did not violate Griglione's civil rights, there was no basis for imposing vicarious liability on the city. Thus, the improper grant of summary judgment for the city was harmless.

Claus v. Whyle, 526 N.W.2d 519 (Iowa 1995)

Consortium

Husband has no claim for loss of consortium based on fact that wife allegedly was sexually abused as a child, even if wife did not discover alleged sexual abuse until after marriage.

Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294 (Iowa 1994)

Conspiracy

Civil conspiracy itself is not actionable. It is the acts causing injury undertaken in furtherance of the conspiracy that give rise to a civil cause of action.

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)

Conversion

Ezzone and his wife, LaRosa, owned a Florida company that made remanufactured auto parts. They hired Riccardi, who ultimately assumed financial control of the business but never became an owner, director or officer. In 1985, Ezzone and Riccardi began discussions with officials in New Hampton to possibly relocate the company. They eventually obtained a substantial loan commitment from the State Bank of Lawler ("Bank") and its owner, Willis Hansen, to start the Iowa operation. A new Iowa corporation was formed and all assets from the Florida company were transferred to the new corporation. Shares of the new corporation were divided between Ezzone and LaRosa.

Subsequently, Willis Hansen and Dennis Hansen purchased the company for $250,000. Neither Ezzone nor LaRosa were present at the closing, but the purchasers apparently thought that Riccardi had authority to complete the transaction. Riccardi accepted the purchase price and disappeared. Ezzone and LaRosa then sued the Bank, the Hansens and Riccardi. Riccardi was not located and did not provide a defense at trial. The jury awarded substantial actual and punitive damages to Ezzone and LaRosa on various theories, including conversion, interference with contract and breach of confidential relationship.

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HELD: Affirmed with a reduction of punitive damages. Conversion is the act of wrongful control of or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property. Here, not only did the defendants deal with Riccardi despite the lack of documentation that he was authorized to sell the corporation's assets, but they also paid the purchase price directly to Riccardi (by wire transfer and by creation of a certificate of deposit in his name) rather than to the company. Given this fact, and other evidence supporting a finding that the defendants were working in concert with Riccardi, substantial evidence supported the jury's verdict for plaintiffs on the conversion claim, as well as on other theories.

Fischer v. UNIPAC Service Corp., 519 N.W.2d 793 (Iowa 1994)

Defamation

Fischer took out student loans during medical school. UNIPAC serviced the loans. He obtained a one year deferment upon graduation to participate in an internship program. He then asked for another deferment to complete the program. This request was denied. Fischer and his attorney continuously requested reconsideration. In the meantime, Fischer defaulted on his loan payments, which were now due because the deferment had been denied. UNIPAC declared him to be in default and made a default report to a credit agency. Fischer filed a six count complaint, including claims based on state and federal debt collection acts and two intentional tort claims: interference with prospective business relationships and defamation. He appealed from a district court order granting summary judgment for the defendants on all counts.

HELD: Affirmed. With regard to the defamation claim, a qualified privilege protects one who makes a statement in good faith on any subject to which that person has a right or duty. In another portion of the opinion the Court found that Fischer had no entitlement to a second year of deferment. Thus, he was properly declared to be in default. The reporting of a bad debt is permissible under state and federal law. Further, a lender is required, by federal law, to report unpaid debts to credit agencies when the debt is federally insured. There is no evidence that the defendants acted in bad faith. As a matter of law, the defendants' conduct was privileged.

Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995)

Defamation

Ex-communicated member of church sued church officials for defamation and for intentional infliction of emotional

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distress. The church had found that he had engaged in a pattern of offensive and hostile conduct during a long-standing dispute that had been proceeding within the church membership. The alleged defamatory statements included letters from church officials to the plaintiff informing him of various disciplinary actions, a letter from one church member to the church outlining allegations against the plaintiff and asking that action be taken, and various communications from the church to the members informing them of the discipline that had been taken against the plaintiff. The trial court granted summary judgment for the defendants on all counts.

HELD: Affirmed. As a general rule, civil courts will not interfere with ecclesiastical matters. Thus, the court cannot interfere with the actual decision to expel the plaintiff from the church. As for the defamation claim, several legal principles defeat the various claims of defamatory statements. Letters mailed from the church to the plaintiff, and to no one else, cannot be actionable because they were not published. Communications made regarding the punishment inflicted on the plaintiff are not actionable because they were true. The statements made in the church member's letter to the church, outlining various allegations against the plaintiff, were protected by qualified privilege. A statement made in good faith, on a subject matter in which the maker has an interest, or in reference to which that person has a right or duty, is protected by qualified privilege if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion. Whether a qualified privilege applies is a matter for the court to decide. Statements made in the course of church discipline actions are entitled to this protection. Because no evidence of actual malice exists, summary judgment was appropriate with regard to the letter at issue.

<u>Robert's River Rides, Inc. v. Steamboat Development Corp.</u>, 520 N.W.2d 294 (Iowa 1994)

<u>Defamation</u>

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's,

however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. The city attorney indicated that Robert's had made misrepresentations on its lease renewal application. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its defamation claim, Robert's alleged that the city attorney made defamatory statements to the effect that Robert's had made misrepresentations on a lease renewal application. "A qualified or conditional privilege encompasses communications made in good faith on any subject matter in which the person communicating has an interest, or in reference to which that person has a right or duty, if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion." The qualified privilege is lost where actual malice is demonstrated. Here, the claimed defamatory statements were made to State officials for their consideration in performing their statutory duties. The statements thus were privileged unless made with actual malice. As a matter of law, Robert's failed to demonstrate actual malice.

Cox v. Rolling Acres Golf Course Corp., 532 N.W.2d 761 (Iowa 1995)

Dramshop

Cox and Atwood spent the day playing golf and drinking beer. After three rounds of golf, they moved on to bar-hopping. Later, Atwood lost control of the truck that both were riding in and rolled it into a ditch. Cox suffered serious injuries. He sued the golf course and the various bars that Atwood and Cox had visited on a dramshop theory. All defendants moved for summary judgment based on theories of complicity and assumption of the risk. The district court granted the defendants' motions by finding complicity as a matter of law.

HELD: Affirmed. Complicity is an absolute bar to recovery under Iowa's dramshop law. Complicity exists where the plaintiff has "encouraged or voluntarily participated to a material and substantial extent in the drinking of beer or intoxicating liquor" by the party who injured the plaintiff. Complicity must be more than passive. It is not enough to show that the plaintiff was a mere drinking companion of the intoxicated person. Unlike assumption of the risk, complicity turns on involvement, not knowledge of intoxication. Here, the undisputed evidence shows

that Cox and Atwood took turns buying beer for over eight hours and consumed twenty to thirty beers. They quit drinking only when they ran out of money, and they left to get more money to continue drinking. While complicity can be decided as a matter of law only in exceptional cases, this is one of those cases. Cox clearly participated to a material and substantial extent in Atwood's intoxication.

Fiala v. Rains, 519 N.W.2d 386 (Iowa 1994)

Duty

Lori Rains was involved in a stormy, sometimes violent relationship with Matthew Moeller. She also became acquainted with Andy Fiala. One night Rains broke off a date with Moeller and went with friends to a local bar, where she ran into Fiala. Rains and Fiala ultimately ended up at Rains home. Moeller, upset about being stood up, was lurking outside Rains home when the two arrived. He broke in the front door and, ultimately, beat and kicked Fiala into unconsciousness. Fiala sued Moeller and Rains, settling with Moeller before trial. The district court then granted Rains motion for directed verdict at the close of Fiala's evidence, finding that Rains owed no legal duties to Fiala.

HELD: Affirmed. Fiala asserted duties based on Rains alleged knowledge of a dangerous situation and on a premises liability theory. Fiala claims that Rains had a duty to warn him of the fact that she had broken off a date with Moeller because, given Moeller's history of violence, it was foreseeable that Moeller would respond as he did. There was no evidence, however, from which a jury could find that Rains could have foreseen that Fiala was in danger. Moeller had made no threats to Rains concerning Fiala. Further, no "special relationship" existed upon which to base liability for mere nonfeasance by Rains.

As for premises liability, Fiala relies on Restatement (Second) of Torts § 344, a section concerning possessors of land who hold that land open to the public for business purposes. This section does not apply to social hosts. The duty of social hosts, found at § 318, is much narrower. Fiala does not contend that § 318 applies under these facts. The district court correctly granted a directed verdict on Fiala's premises liability claim.

Schaeffer v. Cerro Gordo County Abstract Co., 525 N.W.2d 844 (Iowa 1994)

Duty

Plaintiffs obtained a written right of first refusal from the owner of real estate and recorded the document. The owner died

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and his estate sold the property at auction. The abstract company prepared an abstract which did not list the right of first refusal. Upon learning of the sale, the plaintiffs sued the abstract company on various theories, including negligence. The trial court granted summary judgment for the defendant on all claims.

HELD: Affirmed. Abstractors owe duties to those who reasonably rely on the accuracy of the abstract, such one who purchases property or extends credit based on ownership of the property. Plaintiffs do not fall into this class, as they did not rely on the abstract. Their interests were protected by the recording statutes, not by the abstracting process. Thus, plaintiffs have no negligence claim against the abstractor.

Burton v. Metropolitan Transit Authority, 530 N.W.2d 696 (Iowa 1995)

Duty

Plaintiff, a nine-year-old boy, was injured while attempting to cross the street after getting off a city bus. He sued the transit authority for negligence, alleging that it owed him various duties, including a duty to warn him of the dangers of crossing the street on which the stop was located. The trial court granted a defense motion for summary judgment, finding that the defendant had not breached any duty actually owed to the plaintiff.

HELD: Affirmed. Carriers have a duty to discharge passengers in a safe place. Here, the plaintiff did depart the bus safely and was seen walking prior to crossing the street. This fact demonstrates that the defendant did not breach its duty. Carriers do not owe extended duties once the passenger has safely departed the vehicle. While school bus drivers may owe additional duties to warn students of dangers, the plaintiff was not riding a school bus. The duties owed by school bus drivers and common carriers are not the same.

NOTE: This was an en banc decision with two dissenting votes.

Morris v. Leaf, ___ N.W.2d ___ (Iowa, July 19, 1995)

Duty

Plaintiffs were occupying a vehicle that was struck by a driver attempting to elude a police officer. They sued the city and police officer. The trial court granted summary judgment for the defendants on grounds that the city and police officer owed no duty to plaintiffs.

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HELD: Affirmed. No duty exists for one person to control the conduct of a third party unless (1) a special relation exists between the actor and the third party that gives the actor a duty to control the third party or (2) a special relation exists between the actor and another that gives the actor a duty to protect the other. Plaintiffs claim that the existence of a high speed chase created a special relation that obligated the officer to protect them. However, Iowa Code § 321.231 expressly permits operators of emergency vehicles to exceed the speed limit so long as they do not act recklessly. Thus, no liability can exist unless the plaintiffs' proved that the officer acted with reckless disregard for the safety of others. Here, the undisputed evidence showed that traffic was light and that the chase happened in the daytime with clear weather and dry roads. Nothing about the officer's conduct suggests that the officer acted recklessly.

Meyers v. Delaney, 529 N.W.2d 288 (Iowa 1995)

Duty

One who maintains trees owes a duty to avoid injuring persons on adjoining property by permitting a tree to become so defective and decayed that it will fall on them. However, liability is premised on actual or constructive knowledge of a defect or safety hazard. Where the limb that fell and caused damage was apparently healthy and showed no visible defects when viewed from the ground, the evidence supports a finding that the owners had no actual or constructive knowledge of its defective condition.

Hoffnagle v. McDonald's Corp., 522 N.W.2d 808 (Iowa 1994)

Duty

Employee of McDonald's franchisee was assaulted at the franchisee's restaurant. She recovered workers compensation benefits from the franchisee and then sued the franchisor on a theory that the franchisor's control of the restaurant's operation and its ownership of the restaurant's real property imposed duties on the franchisor. The franchisor owned the real property and leased it to the franchisee. The franchisor also, via the franchise agreement, regulated certain aspects of the franchisee's business. The trial court, however, granted summary judgment for the franchisor on grounds that no duty existed.

HELD: Affirmed. The Supreme Court relied on an analogy to employer-independent contractor law (Restatement (Second) of Torts § 414) to determine that the franchisor did not exercise sufficient control over the franchisee's operations to create duties owing to the franchisee's employee. Only if the franchisor

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retained day-to-day control over the operations would Iowa law impose duties on the franchisor. The mere right to inspect and control the quality of the operation is not sufficient control. Likewise, the franchisor, while owner of the real estate, did not exercise sufficient control over the property to be deemed the "possessor" for purposes of premises liability law (Restatement (Second) of Torts § 344).

NOTE: The Supreme Court held that the issue of whether sufficient control exists to create a duty is an issue for the court, not for the jury, because "control" is simply a component of the "duty" issue.

Claus v. Whyle, 526 N.W.2d 519 (Iowa 1995)

Duty

Daughter who was sexually abused by father while a minor asserted negligence claim against mother based on mother's alleged duty to protect her from such abuse. Trial court found no liability for mother because no evidence suggested that mother knew of abuse.

HELD: Affirmed. In absence of evidence indicating that mother knew abuse was occurring, mother cannot be liable for breach of any duty to protect daughter.

Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103 (Iowa 1995)

Economic Injury

Tomka operated a custom cattle feeding operation. He agreed to feed cattle owned by Brummer and to be paid on the basis of weight gain. He used a hormone manufactured by the defendant to stimulate growth. He claimed that the hormone did not work as promised, causing the cattle to gain less weight and Tomka to lose money on the deal. He sued in both tort and contract. The trial court granted a directed verdict on all claims.

HELD: Affirmed. As for the tort claims, Iowa law does not permit recovery in tort for pure economic loss if the plaintiff's person or property has not been injured. Tort law does not encompass the purely economic injury that the plaintiff allegedly suffered.

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Falczynski v. Amoco Oil Co., 533 N.W.2d 226 (Iowa 1995)

Employment

Plaintiff, a Polish immigrant, was an hourly employee of Amoco who originally was hired to work as a accounting clerk. When her supervisors determined that she was not getting her work done fast enough, they had her transferred to another department while allowing her to stay at the same pay level. She claims that her new supervisor in this department was tough, demanding and often demeaning to minorities. Plaintiff also began having health problems that her physician was unable to relieve. She missed work frequently due to illness and medical appointments. After several oral and written warnings about her absences, Amoco decided to terminate plaintiff's employment. She then sued for national origin discrimination (under state and federal law) and disability discrimination (under state law). After a bench trial, the district court entered judgment for Amoco on both claims.

HELD: Affirmed in part, reversed in part. The Court affirmed dismissal of the national origin claim, agreeing with the district court that the plaintiff failed to prove two elements of this claim. These elements were (1) a showing that she was qualified to retain the job and (2) a showing that it was more likely than not that her discharge was based on her national origin. Her excessive absenteeism supported the district court's finding that she no longer could perform the essential functions of her job. Further, Amoco went beyond its own policies for absenteeism and gave the plaintiff both oral counseling and written warnings prior to her ultimate discharge. No evidence suggested that Amoco applied its policies to plaintiff more harshly than it did to other employees.

The Court reversed the judgment for Amoco on the disability claim, however, and remanded for reconsideration based on the existing record. The Court held that the district court did not properly analyze this claim because it did not decide whether plaintiff was disabled. Instead, the district court simply held that the plaintiff was discharged for absenteeism. A proper analysis of this claim, however, requires a threshold inquiry as to whether the plaintiff was disabled within the meaning of Iowa law. Because no such inquiry was made, a remand is necessary.

Boelman v. Manson State Bank, 522 N.W.2d 73 (Iowa 1994)

Employment

Plaintiff was a vice-president of defendant bank when he was diagnosed with multiple sclerosis. After the diagnosis, plaintiff began seeing a psychologist who concluded that he suffered from adjustment disorder and a depressed mood. The

evidence showed that plaintiff began to have difficulty working with his co-employees, who began complaining about his conduct and attitude. The bank attempted to resolve the situation by relieving the plaintiff of certain supervisory duties, but his problems with co-workers continued. In addition, bank customers began to refuse to deal with plaintiff, instead asking to speak with the bank's other loan officer. The bank finally discharged the plaintiff's employment in October 1990. He alleged that the defendants unlawfully discharged him because of his disease in violation of the Iowa Civil Rights Act and the federal Rehabilitation Act of 1973. After a trial to the court, the district court entered judgment for the bank.

HELD: Affirmed. The evidence supported trial court's finding that the MS caused plaintiff to be mentally and emotionally unqualified to handle his job responsibilities. The trial court also correctly found that no accommodation was available or conceivable under the circumstances. Finally, the record supports that trial court's finding that the plaintiff was discharged for a legitimate, non-discriminatory reason (poor performance) rather than because of his disability.

Lange v. Lange, 520 N.W.2d 113 (Iowa 1994)

Fiduciary Duty

Brothers Jean and Elmer owned all of the stock of a holding company that was the majority owner of a local bank. Elmer had a 52% to 48% edge in ownership because Jean assigned some debt to the company at the time it was formed. The brothers acted as equal partners, however, during the course of their ownership and expressed intent, on several occasions, to equalize the ownership disparity. Several attempts to do so were postponed due to the corporation's financial difficulties. In 1986 or 1987, Elmer agreed to sell Jean 600 shares of Elmer's stock to bring about equalization. However, this transfer never formally occurred.

Upon Elmer's death, Jean attempted to go through with the contemplated purchase of 600 shares. Elmer's family, however, decided that they would prefer to retain majority control. Jean, who had managed the corporation over the years, feared that the corporation would suffer if Elmer's family took over management responsibilities. Thus, as the sole surviving board member, Jean appointed his own son to fill Elmer's vacant seat as director and passed a resolution by which the corporation redeemed many shares of Elmer's family's stock. He also caused the corporation to issue additional shares to himself. He then purchased 400 shares of the bank's stock from a minority shareholder of the bank.

Elmer's family sued, claiming that Jean violated fiduciary obligations by issuing shares to himself and causing the

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corporation to redeem Elmer's family's shares. The family also claimed that Jean usurped a corporate opportunity by purchasing the 400 shares of bank stock for his own account. The district court set aside the corporation's issuance of shares to Jean and the redemption of shares from Elmer's family, but found that Jean breached no duty by purchasing shares in the bank for his own account. The district court also held that a 1983 agreement between Jean and Elmer allowed Jean to purchase 600 shares from Elmer's family. Both parties appealed.

HELD: Affirmed in part and reversed in part. The redemption was properly set aside because the bylaws allowed only total, not partial, redemption upon the death of one of the brothers. Jean did not usurp any corporate opportunity by purchasing 400 shares of the bank's stock from a minority shareholder because the corporation already had firm majority ownership of the bank and the corporation had no financial ability to purchase those shares itself. Finally, the issuance of corporate stock to Jean was improper because it furthered no legitimate business purpose and instead served only to enrich Jean and provide him with majority control of the corporation.

McGough v. Gabus, 526 N.W.2d 328 (Iowa 1995)

Fraud

Gabus sold a vending machine business to McGough for $190,000. Gabus had obtained the business from a former employee, who conveyed it to Gabus in partial repayment of funds that the employee had embezzled from Gabus. Gabus told McGough that an appraiser had determined the business to be worth $304,000. In fact, the appraisal was substantially lower. Gross sales also were only about one-third of what Gabus had reported them to be. McGough sued for fraud and was awarded substantial actual and punitive damages. On appeal, Gabus claimed a lack of sufficient evidence as to scienter, intent to deceive and reliance.

HELD: Affirmed as to fraud liability. Gabus professed innocence as to the mistaken information that he passed on to McGough. He claimed that he "misread" the appraisal and that the gross sales information came from the ex-employee. Clear and convincing evidence of scienter existed, however, because a false statement, even if made "innocently," can establish scienter if made recklessly. Gabus should have know better than to simply pass on information received from the ex-employee, as the ex-employee already had proved his dishonesty by embezzling from Gabus. As for reliance, the fact that the buyer had opportunity to investigate the business himself does not automatically make reliance unjustified. There is no objective standard of reasonable care for plaintiffs in fraud cases. Instead, the issue is whether the

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plaintiff, in light of his or her own intelligence and information, justifiably relied on the misstatements.

Hernandez v. Midwest Gas Co., 523 N.W.2d 300 (Iowa Ct. App. 1994)

Gross Negligence

Hernandez was an employee of an independent contractor hired by Midwest to work on a gas pipeline. He suffered brain damage from an injury that occurred during the project. He sued Midwest and three co-employees. The district court granted summary judgment for the defendants.

HELD: Affirmed. Co-employee gross negligence exists only if there is a showing of (1) knowledge of the peril, (2) knowledge that injury was a probable result of the peril, and (3) a conscious failure to avoid the peril. The evidence in the record demonstrates that the co-employees had performed similar work for years without incident. No evidence suggested that they had any reason to believe that injury was probable.

Gerace v. 3-D Mfg. Co., 522 N.W.2d 312 (Iowa Ct. App. 1994)

Gross Negligence

Employee injured by belt mover sued manufacturer of mover and two co-employees. Jury found that manufacturer was not at fault but determined that the co-employees had engaged in gross negligence and, thus, were liable to plaintiff. Trial court granted co-employees' JNOV motion.

HELD: Affirmed. Co-employee gross negligence exists only if there is a showing of (1) knowledge of the peril, (2) knowledge that injury was a probable result of the peril, and (3) a conscious failure to avoid the peril. Here, the belt mover had been used frequently in the past without incident and there was no evidence that the co-employees had knowledge that injury was a probable result of using the mover. The issue of gross negligence should not have been submitted to the jury.

Collister v. Council Bluffs, ___ N.W.2d ___ (Iowa, July 19, 1995)

Governmental Immunity

A city employee was driving a street sweeper, at night, when it was struck and disabled by a hit-and-run driver. The employee parked the street sweeper on the highway just over the crest of a hill. Ten minutes later, the plaintiffs' vehicle struck the street sweeper from behind. The plaintiffs sued the city,

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alleging that the city had breached a duty to warn approaching traffic of the parked street sweeper and a duty to properly light the highway. The trial court instructed on both duties and a jury awarded damages to the plaintiffs. On appeal, the city alleged that it was immune, under section 668.10(1), for failure to warn approaching traffic and immune, under section 670.4, for failure to properly light the roadway.

HELD: Affirmed. When operating motor vehicles, a city has the same duty as other drivers to follow the rules of the road. Iowa Code chapter 321 imposes duties on drivers to utilize warning lights when they park on public roads. Section 668.10(1) immunizes the city from failing to place a "stop sign, traffic control device, or other regulatory sign." It does not immunize the city from following the rules of the road. Here, the city's liability was based on the duty that every driver has to warn oncoming traffic of a disabled vehicle, not on any duty to erect traffic control devices.

As for the roadway lighting issue, section 670.4 immunizes the city from liability for roadway lighting only if the road was constructed in accordance with generally recognized standards in existence at the time of construction. While the trial court's instruction on this issue was incorrect, the error was not prejudicial because it actually favored the city.

<u>Hameed v. Brown</u>, 530 N.W.2d 703 (Iowa 1995)

<u>Governmental Immunity</u>

Fort Dodge police attempted to arrest William Roby for violating a no contact order. He escaped from the officer and later assaulted Hameed, for whose protection the no contact order had been issued. She sued the city and the officers on a negligence theory and also sued, on a premises liability theory, the alleged partners who owned the business where the assault occurred. The district court granted summary judgment for the city and police officers on grounds that no duty existed.

HELD: Affirmed on another ground. Iowa Code § 613A.4(10) immunizes a municipality from liability for damage done by a third party not under the supervision or control of the municipality. Roby was not under the supervision or control of the city or the police department when he assaulted Hameed. Thus, the city and police department are immune from liability.

NOTE: The plaintiff did obtain a substantial verdict against an owner of the business in which the attack occurred. This verdict was not appealed.

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Hansen v. State, 528 N.W.2d 547 (Iowa 1995)

Governmental Immunity

Under Iowa Code § 668.10, a state or city cannot be liable for failure to remove ice and snow from roadways if it establishes that it has complied with its policy or level of service concerning snow and ice removal. Summary judgment for state and city defendants affirmed.

Muzingo v. St. Luke's Hospital, 518 N.W.2d 776 (Iowa 1994)

Immunity

Dr. Whitters, a Cedar Rapids psychiatrist, was appointed by the court in 1990 to examine Glenn Muzingo for purposes of evaluation for an involuntary commitment to St. Luke's Hospital. Muzingo was released one day later on the advice of Whitters and the Hospital's chief medical officer.

Four months later Muzingo placed a bomb inside the car of his wife, Terri. The bomb exploded, causing serious injuries to Terri. She filed suit against Whitters and the Hospital, claiming that they were negligent in the treatment and discharge of her husband and that they failed to protect the Muzingo family despite knowing that Glenn had contemplated murder. The defendants filed motions to dismiss, claiming that a court-appointed psychiatrist is entitled to absolute quasi-judicial immunity. The district court agreed, granting the motions.

HELD: Affirmed. Iowa already has expanded the doctrine of quasi-judicial immunity to other nonjudicial officers whose actions are integral to the judicial process. The focus is on the nature of the functions performed. Other jurisdictions have held that a court-appointed psychiatrist performs quasi-judicial functions as an "arm of the judge." Iowa follows this reasoning. When psychiatrists and other mental health providers are appointed by the court and render an advisory opinion regarding an individual's mental condition, they are acting as an arm of the court and are protected from suit by absolute quasi-judicial immunity. Absent such protection, the threat of liability could undermine objectivity and independence and the professionals' willingness to accept court appointments.

Federal Land Bank of Omaha v. Tiffany, 529 N.W.2d 294 (Iowa 1995)

Immunity

Federal farm credit banks are immune from state antitrust liability under the Iowa Competition Law.

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Gard v. Little Sioux Intercounty Drainage District, 521 N.W.2d 696 (Iowa 1994)

Immunity

Drainage districts formed pursuant to Iowa Code chapter 468 are not "municipalities" for purposes of chapter 613A and are thus not subject to actions for money damages.

Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531 (Iowa 1995)

Independent Contractors

One who hires an independent contractor to do work involving an abnormally dangerous activity is liable to the same extent as the contractor for physical harm to others. The drilling of monitoring wells around underground storage tanks is not unusual and can be done safely if reasonable care is exercised. Thus, the drilling of such wells is not an "abnormally dangerous activity" that subjects the employer of the independent contractor to liability for harm caused by the activity.

Hernandez v. Midwest Gas Co., 523 N.W.2d 300 (Iowa Ct. App. 1994)

Independent Contractors

Hernandez was an employee of an independent contractor hired by Midwest to work on a gas pipeline. He suffered brain damage from an injury that occurred during the project. He sued Midwest and three co-employees. The district court granted summary judgment for the defendants.

HELD: Affirmed. The employer of an independent contractor is not liable for damages to an employee of the independent contractor caused by the independent contractor's own negligence. If, however, the employer retains a degree of control over the contractor's work, the employer may be liable if the injury was caused by the employer's failure to exercise reasonable care with regard to the retained control (Restatement (Second) of Torts § 414). While Midwest employees inspected the job site on a regular basis and instructed the contractor's employees to wear hard hats and safety glasses, Midwest did not retain control over the specifics of the contractor's work. Since Midwest did not control the manner in which the work was done, it did not retain sufficient control to be liable for injury to the contractor's employees.

Also, the employer of an independent contractor may be liable to the contractor's employees if the work is of such a

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nature that it presents a peculiar risk or inherent danger even if done properly (Restatement (Second) of Torts §§ 416, 427). The trial court correctly held, however, that injury suffered by the plaintiff was caused by the contractor's failure to follow routine and common safety precautions, not by any dangers inherent in the work.

Millington v. Kuba, 532 N.W.2d 787 (Iowa 1995)

Intentional Infliction of Emotional Distress

Plaintiffs claimed that the defendant funeral home wrongfully cremated the remains of their father at their sister's request but in contravention of their own instructions. They sued to recover their emotional distress. The trial court granted summary judgment for the defendants on the claim of intentional infliction of emotional distress because the plaintiffs, as a matter of law, had failed to prove either (1) outrageous conduct or (2) severe emotional distress.

HELD: Affirmed. The evidence in the record concerning the extent of the plaintiffs' emotional distress did not rise to the level of severity necessary to support this cause of action. Neither sought medical treatment for any symptoms. Their complaints were of headaches, insomnia, loss of appetite and fits of rage. These symptoms fall short, as a matter of law, of the level of severity required by Iowa law.

Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995)

Intentional Infliction of Emotional Distress

Excommunicated church member sued various church officials for defamation and intentional infliction of emotional distress. Supreme Court affirms summary judgment for defendants on both claims. On intentional infliction claim, Court holds as a matter of law that the alleged outrageous acts either (1) are irrelevant because the were committed by non-defendants or (2) do not rise to the high level of outrageous conduct.

Schaeffer v. Cerro Gordo County Abstract Co., 525 N.W.2d 844 (Iowa 1994)

Interference

Plaintiffs obtained a written right of first refusal from the owner of real estate and recorded the document. The owner died and his estate sold the property at auction. The abstract company prepared an abstract which did not list the right of first refusal.

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Upon learning of the sale, the plaintiffs sued the abstract company on various theories, including intentional interference with existing and prospective contract. The trial court granted summary judgment for the defendant on all claims.

HELD: Affirmed. The elements of intentional interference with existing contract and intentional interference with prospective contract include requirements that the defendant have both knowledge of the existing or prospective contract and an intent to interfere. Neither knowledge nor intent existed in this case, as no evidence suggested that the abstract company knew of the right of first refusal.

<u>Hill v. Winnebago Indus., Inc.</u>, 522 N.W.2d 326 (Iowa Ct. App. 1994)

<u>Interference</u>

Hill was executive assistant to the CEO of Winnebago. Beginning in 1990, the CEO began writing memos blaming the company's problems on the management practices of its founder and chairman. When the chairman learned of these memos, he terminated the CEO. Because the CEO was gone, the company also terminated Hill. Hill sued Winnebago and the chairman on various theories. At trial, the case was submitted as a breach of oral contract case against Winnebago and an interference with contract case against the chairman. The jury rejected the contract claim but found for Hill on the interference with contract claim.

HELD: Reversed. Interference must be both intentional and improper to be actionable. While the chairman may have intentionally interfered with Hill's employment contract, the interference was not, as a matter of law, improper. First, Hill's termination was a logical result of the fact that the CEO for whom he served had been discharged. Second, officers, directors and shareholders of a corporation are privileged to interfere with the corporation's contracts if they have no improper motive and if they are acting in the best interests of the corporation. No evidence suggested that the chairman exceeded the scope of this privilege.

<u>Fischer v. UNIPAC Service Corp.</u>, 519 N.W.2d 793 (Iowa 1994)

<u>Interference</u>

Fischer took out student loans during medical school. UNIPAC serviced the loans. He obtained a one year deferment upon graduation to participate in an internship program. He then asked for another deferment to complete the program. This request was denied. Fischer and his attorney continuously requested reconsideration. In the meantime, Fischer defaulted on his loan payments, which were now due because the deferment had been denied.

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UNIPAC declared him to be in default and made a default report to a credit agency. Fischer filed a six count complaint, including claims based on state and federal debt collection acts and two intentional tort claims: interference with prospective business relationships and defamation. He appealed from a district court order granting summary judgment for the defendants on all counts.

HELD: Affirmed. With regard to the interference claim, Fischer must establish "improper" interference in order to prevail. In another portion of the opinion the Court found that Fischer had no entitlement to a second year of deferment. Thus, he was properly declared to be in default. It is not "improper" for a party to do what that party has a right or obligation to do. The reporting of a bad debt is permissible under state and federal law. Further, a lender is required, by federal law, to report unpaid debts to credit agencies when the debt is federally insured. As a matter of law, the defendants' conduct was not improper.

Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57 (Iowa 1994)

Interference

Farmers who were bank customers purchased feed on credit from plaintiff elevator. The elevator's feed supplier became concerned with the amount of credit purchases that the farmers were making and discussed the issue with the bank. The bank allegedly told the supplier that the farmers were about to sell hogs and that the bank would insist that they pay the feed bill when the hogs were sold. However, when the farmers deposited the hog sale proceeds in the bank, the bank exercised a set-off to satisfy a portion of the farmers' debt to bank. The bank later accepted a substantial amount of the farmers' assets as satisfaction for the farmers' remaining debts. The farmers later declared bankruptcy and obtained a discharge of substantial debts owed to the elevator. The elevator sued the bank on various theories, including tortious interference with contract. All theories were disposed of at trial by summary judgment or directed verdict.

HELD: Affirmed. The tortious interference claim required proof of improper interference. "Improper," the Court stated, means that the actor's "predominant purpose was to injure or destroy the plaintiff's business." The evidence demonstrates that the bank was acting to protect its own interests and was not acting with intent to destroy or injure the feed store. Thus, the trial court correctly granted summary judgment on the tortious interference with contract claim.

NOTE: The Supreme Court, seemingly by mistake, applied the "purpose to injure or destroy" element from the tort of intentional interference with prospective contract to the tort of interference with existing contract. Prior Iowa case law indicated

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that a showing of a purpose to injure or destroy was necessary only to prove a claim of interference with prospective contract. Nesler v. Fisher & Co., 452 N.W.2d 191, 198-99 (Iowa 1990). Here, however, the Court (while citing to a page of Nesler that discussed the elements of a claim for interference with prospective contract) applied the "purpose to injure or destroy" element to an interference with existing contract claim.

Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294 (Iowa 1994)

Interference

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's, however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its interference claim, Robert's alleged that the City and Steamboat interfered with Robert's performance of its lease with the State. Interference is actionable only if it is improper. Iowa courts apply a seven factor test to determine if interference is improper. As a matter of law, Robert's failed to raise a fact issue as to improper conduct.

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Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995)

Malpractice (Legal)

Upon Julia Schmitz's death, attorney Robert Hudson was designated to serve as attorney for the estate. When Hudson's health began to fail, he asked attorney J. Desmond Crotty to take the file over for him. Crotty agreed to do so. Crotty, when filing state inheritance and federal estate tax returns, relied on the legal descriptions of certain real estate that Hudson had initially used in the probate inventory. These descriptions turned out to be inaccurate, actually describing more Carroll County land than Julia actually owned at the time of her death. This caused the estate to pay taxes on more real estate than the decedent actually owned. Also, Crotty valued the real estate as if Julia owned it all in fee simple despite the fact that she had only a life interest in much of it. The erroneous valuation of estate assets also caused the court to approve a higher attorney fee for Crotty than he otherwise would have received.

After the estate was closed, Crotty was informed of the inaccurate legal descriptions and attempted to cure them with a nunc pro tunc order. This order did not solve the problem. Further, even after learning of the mistake Crotty did not attempt to correct the inheritance and estate tax returns. Several years passed before the plaintiffs, the beneficiaries of the estate, discovered the errors. By then the deadline for filing amended returns had passed. Plaintiffs sued Crotty for legal malpractice. After trial to the court, the court found that Crotty had not breached his duty of care.

HELD: Reversed and remanded. Whether an attorney has breached his or her duty of care usually is a fact issue. Here, however, the facts demonstrate as a matter of law that Crotty failed to exercise reasonable care in the handling of the estate. He should have recognized the errors in the legal description, should have noted that the decedent only had a life estate, and, upon learning of the errors after the estate closed, should have taken steps to correct the problem. This is a rare case in which the only inference that may be drawn from the facts is that the attorney failed to exercise reasonable care.

Vande Kop v. McGill, 528 N.W.2d 609 (Iowa 1995)

Malpractice (Legal)

Vande Kop, just prior to his second marriage, retained attorney Hindt in 1975 to draft an antenuptial agreement. The agreement, as drafted, discussed disposition of the parties' property in the event of death but did not address what would occur if the marriage was dissolved. Vande Kop and his soon-to-be-wife

executed the agreement. Fifteen years later, Vande Kop's wife sued for dissolution of the marriage. She was awarded alimony and a substantial property settlement. Vande Kop then sued attorney Hindt's estate, alleging that Hindt was negligent in not drafting the antenuptial agreement to provide "divorce insurance."

The district court granted a defense motion for summary judgment, finding that at the time the agreement was drafted, the provisions Vande Kop claims should have been inserted were deemed void as against public policy. Thus, the court held, Hindt was not negligent for failing to include such provisions in the agreement.

HELD: Affirmed. The district court correctly determined that, in 1975, Iowa law was such that provisions in an antenuptial agreement bearing on alimony and property division were void. While the law changed after 1975 to permit such provisions, attorneys are not required to be clairvoyant and predict future changes in the law.

<u>Holsapple v. McGrath</u>, 521 N.W.2d 711 (Iowa 1994)

<u>Malpractice (Legal)</u>

Plaintiffs claim that Mr. and Mrs. DeVoss intended to deed certain farmland to them. McGrath, the attorney for Mr. and Mrs. DeVoss, allegedly drafted a quitclaim deed that was defective. Both Mr. and Mrs. DeVoss died before ever executing a valid deed. Plaintiffs also claim that Mrs. DeVoss desired to devise the farmland to plaintiffs in her will. Plaintiffs sued McGrath for alleged negligence in (1) drafting an invalid quitclaim deed and (2) failing to draft a will for Mrs. DeVoss that devised the farmland to the plaintiffs. The trial court granted McGrath's motion to dismiss, holding that McGrath owed no duty to the plaintiffs because they were not his clients.

HELD: Reversed and remanded. The Supreme Court has previously held that a non-client may sue an attorney for negligence if the non-client was the direct, intended and specifically-identifiable beneficiary of a decedent's <u>testamentary</u> instruments. This case involved a suit by the alleged beneficiaries of an <u>inter vivos</u> instrument, the quitclaim deed. Facing such a claim for the first time, the Supreme Court held that a non-client may sue an attorney for negligent preparation of inter vivos instruments if (1) the plaintiff was specifically identified, by the donor, as an object of the donor's intent and (2) the expectancy was lost or diminished as a result of professional negligence.

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Biddle v. Sartori Memorial Hosp., 518 N.W.2d 795 (Iowa 1994)

Malpractice (Medical)

Plaintiff in wrongful death case sued the hospital, the emergency room physician and others. He reached a settlement with the physician and went to trial against the hospital. The trial court held that the hospital could be liable only for its own alleged negligence, not the alleged negligence of the released physician. The jury then returned a verdict for the hospital on the issue of the hospital's negligence.

HELD: Affirmed. The plaintiff's release of the physician extinguished any claim against the hospital based on vicarious liability. The primary tortfeasor and any party who could be vicariously liable must be treated as a single party under Chapter 668. Thus, any release of the primary tortfeasor extinguishes all vicarious liability claims against others. The release of the physician rendered the hospital responsible only for its own conduct, conduct that the jury found not to constitute negligence.

Manno v. McIntosh, 519 N.W.2d 815 (Iowa Ct. App. 1994)

Malpractice (Medical)

Decedent's estate sued physicians for medical malpractice in the form of failure to diagnose and abandonment of treatment. During trial the district court directed a verdict for the defendants on the abandonment claim and also excluded certain deposition testimony as inadmissible hearsay. Jury found decedent 78% at fault but district court ordered new trial, deciding that its directed verdict on abandonment was incorrect and that its evidentiary rulings likewise were in error. The defendants appealed from the new trial order.

HELD: Reversed and remanded with directions to dismiss. The district court's initial evidentiary rulings were not erroneous. As for abandonment, this claim requires a showing that the physician left the patient in a critical stage of a disease without reason or sufficient notice to enable him to procure another physician. This claim was asserted against both Dr. McIntosh and Dr. Dusdieker. Dr. McIntosh testified that he accepted the patient with the understanding that Dr. Dusdieker would take over treatment when he returned to town. When Dr. Dusdieker returned, Dr. McIntosh discussed the patient's case with him and he agreed to take over the patient's care. The decedent's daughter testified that she understood that Dr. Dusdieker took over the decedent's care. There is thus no basis for an abandonment claim against Dr. McIntosh.

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The abandonment claim against Dr. Dusdieker is based on the fact that he attended an out-of-town conference for several days after taking over the decedent's care. Dr. Dusdieker arranged for an associate, Dr. Voights, to care for the decedent during this period. There is no evidence to suggest that Dr. Voights was not a competent substitute. In addition, other physicians also examined and cared for the decedent during Dr. Dusdieker's absence. The plaintiff failed to raise a fact issue as to any abandonment by Dr. Dusdieker.

NOTE: The court of appeals also rejected plaintiff's claim that the district court erred in failing to instruct on an agency theory. The court held that one doctor who simply recommends another doctor, or procures a substitute doctor during the doctor's absence, is not liable for the other doctor's negligence unless the recommendation itself was negligent.

<u>Griglione v. Martin</u>, 525 N.W.2d 810 (Iowa 1994)

<u>Negligence Per Se</u>

Rodney Griglione's wife alerted the police that he was agitated and heading toward the residence of his former girlfriend. A police officer went to the girlfriend's mobile home to investigate. He saw Rodney climb over a fence with a knife. Rodney then charged the police officer with the knife, at which time the officer shot and killed Rodney. Rodney's estate sued the officer and the city for negligence, assault and battery and violation of civil rights. The evidence at trial showed that the officer violated various police department procedures, including (1) failing to request a backup to handle a disturbance call, (2) failing to identify himself as a police officer before firing his weapon and (3) failing to attempt alternative methods to avoid using deadly force. The district court instructed the jury that the violation of standard operating procedures is evidence of negligence. The plaintiff, however, argued that the officer's violation of the procedures was negligence per se. The jury returned a defense verdict.

HELD: Affirmed. The violation of specific rules of conduct is negligence per se only when those rules establish standards that are to be followed unwaveringly in all situations. The police department manual, however, states in two locations that the standard operating procedures are mere guidelines to assist officers in dealing with unfamiliar or threatening situations. The manual specifically states that the procedures cannot substitute for sound judgment or common sense. Thus, the procedures do not create such strict standards of conduct as to render any deviation negligence per se. Further, it would be poor policy to allow such local, non-uniform standards constitute negligence per se.

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Negligence per se should arise only from violation of those standards of care that apply statewide.

Lawrence v. Grinde, ___ N.W.2d ___ (Iowa, July 19, 1995)

Negligent Infliction of Emotional Distress

Lawrence sued his former bankruptcy lawyer, claiming that the lawyer's alleged negligence caused Lawrence to be indicted for bankruptcy fraud. He sought damages for emotional distress based on this alleged negligence. The jury awarded substantial emotional distress damages, but the trial court reduced the award to $5000. On appeal, the defendant argued that no emotional distress recovery was permitted for mere negligence.

HELD: Reversed. Emotional distress recovery in a negligence action is allowed only if (1) the plaintiff suffered physical injury, (2) the plaintiff was a bystander who witnessed the serious injury or death of a close relative or (3) the plaintiff and defendant were parties to a contract concerning a highly emotional matter of life and death. None of these circumstances are present here. Emotional distress damages are not allowed in a simple claim of negligence against an attorney.

Millington v. Kuba, 532 N.W.2d 787 (Iowa 1995)

Negligent Infliction of Emotional Distress

Plaintiffs claimed that the defendant funeral home wrongfully cremated the remains of their father at their sister's request but in contravention of their own instructions. They sued to recover their emotional distress. The trial court granted summary judgment for the defendants on the claim of negligent infliction of emotional distress because there was no physical injury to the plaintiffs.

HELD: Affirmed. Generally, negligent infliction of emotional distress is actionable only when (1) the plaintiff suffered physical injury, (2) the plaintiff was a bystander who witnessed the serious injury or death of a close relative or (3) the plaintiff and defendant were parties to a contract concerning a highly emotional matter of life and death, such a contract for a physician's services in delivering a child. This case does not fall into any of these exceptions. The plaintiffs did not have a contract with the funeral home and did not personally witness the alleged negligence. They were too far removed from the negligent conduct to permit recovery on a theory of negligent infliction of emotional distress.

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Greatbatch v. Metropolitan Federal Bank, 534 N.W.2d 115 (Iowa Ct. App. 1995)

Negligent Misrepresentation

Plaintiffs applied for a mortgage loan from defendant bank. The loan application stated that the bank made no warranties regarding the property. The bank also provided a disclosure statement indicating that closing could not occur until an acceptable water test or septic certification had been received from the seller. Several weeks after plaintiffs applied for the loan, the bank informed them that the loan was ready to close. A bank official allegedly told plaintiffs that all inspections and certifications had been completed. At closing, the plaintiffs signed a document in which they acknowledged responsibility for the inspection of the property and agreed to hold the bank blameless for the condition of the property.

Actually, no inspection of the well ever had been conducted. After developing a problem with the septic system and learning that the septic system had never been inspected, the plaintiffs filed suit against the bank on a negligent misrepresentation theory. The trial court granted summary judgment for the bank on grounds that the bank could not be liable for negligent misrepresentation because the bank, in its dealings with plaintiffs, was not in the business of supplying information and thus owed no duty to plaintiffs.

HELD: Affirmed. No duty to exercise reasonable care in the supplying of information exists unless the defendant was in the business of supplying such information for the guidance of others. In prior Iowa cases, product manufacturers and sellers of a business have been found not to be in the business of supplying information while accountants and investments brokers have been so found. The banking industry falls into the middle of this spectrum. Whether a bank, in a particular circumstance, is deemed to have been in the business of supplying information must turn on the nature of the transaction at issue. Here, the product supplied by the bank was a loan, not information. Thus, the district court correctly held that the bank cannot be liable on a theory of negligent misrepresentation.

Clubine v. American Cyanamid Co., ___ N.W.2d ___ (Iowa, July 19, 1995)

Preemption

Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), state law claims against the makers of herbicides that the products were unreasonably dangerous and that the products breached implied and express warranties were preempted.

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Olson v. Prosoco, Inc., 522 N.W.2d 282 (Iowa 1994)

Preemption

Olson was working as a bricklayer foreman when he noticed a 15 gallon drum of mortar cleaner sitting on the ground. To prevent the drum from freezing to the ground, he picked it up to move it onto a nearly pallet. When he dropped it onto the pallet, the bung closure popped out of the drum, splashing the cleaner into his eye. The cleaner contains hydrochloric acid. Olson eventually lost his eye due to the incident.

Olson sued the manufacturer of the cleaner, Prosoco, for strict liability and negligence due to the allegedly defective packaging. The jury found Prosoco 100% at fault and awarded substantial damages.

HELD: Affirmed in an en banc decision. One of Prosoco's defenses was based on a theory that the federal Hazardous Materials Transportation Act preempted Olson's state law tort claims. In rejecting this defense, the Court noted that the intent of HTMA was to regulate the shipment or transport of hazardous materials. Following precedent from other jurisdictions, the Court held that HTMA did not regulate the activities that Olson was engaged in when he was injured.

Baumler v. Hemesath, ___ N.W.2d ___ (Iowa, July 19, 1995)

Premises Liability

Baumler was employed as a farmhand by Hemesath. He was injured when he slipped into a tire tractor rut while helping remove manure from a holding pit. He sued, alleging that Hemesath failed to maintain a safe work area and failed to warn him of dangers in the work area. A money judgment was entered on a verdict for Baumler. On appeal, Hemesath alleged that the danger was open and obvious and did not create such a risk of harm as to require a warning.

HELD: Affirmed. Baumler's status as an employee on the farm made him a business invitee. Hemesath had a duty to keep the premises in a reasonable condition, to take reasonable steps to ascertain the condition of the premises and to warn of risks. A landowner is not liable for injuries caused by an open and obvious danger unless he or she can and should anticipate that the dangerous condition will cause harm despite being open and obvious. Here, there was testimony that Hemesath's son advised Hemesath of the tractor ruts prior to the accident and that, in prior years, Hemesath had filled such ruts with gravel to prevent injury. Another son of Hemesath slipped in the ruts prior to Baumler's accident. This evidence supports a finding that Hemesath should

have known that the ruts would cause injury despite their open and obvious condition and that Hemesath should have made the ruts safe or warned Baumler of the danger.

Long v. Jensen, 522 N.W.2d 621 (Iowa 1994)

Premises Liability

Plaintiff was injured when she fell down the steps outside of her daughter's townhouse. She sued the landlord on a premises liability theory. At the time of the accident, the daughter and her husband were in the process of purchasing the townhouse from the landlord. A prior written lease had expired, but the daughter continued to pay the monthly rental amount set forth in the lease. Under the written lease, the landlord had assumed responsibility for maintenance of the premises. The defendant, however, claimed that he was a contract vendor at the time of the accident, not a landlord. He pointed to the fact that the lease had expired and the parties had agreed to the terms of sale. The trial court disagreed and submitted the plaintiff's claims to the jury, which returned a verdict for the plaintiff.

HELD: Affirmed. The evidence supported a finding that the sale had not yet been completed and that the defendant was still a landlord, and not a contract vendor, as of the date of the accident. As such, and because the lease required the defendant to maintain the property, the trial court properly submitted the plaintiff's claims to the jury.

Coleman v. Monson, 522 N.W.2d 91 (Iowa Ct. App. 1994)

Premises Liability

Store employee slipped on wet floor while a cleaning company was cleaning the store. She sued cleaning company for negligence. Trial court instructed that the cleaning company owed the employee the duty of care owed to an invitee. Jury assessed 60% of fault to cleaning company.

HELD: Revered and remanded for new trial. One who carries out an activity on land on behalf of the possessor of the land is subject to the same duties of care as the possessor. Plaintiff, as an employee of the store, was a business invitee. The trial court correctly held that the cleaning company owed plaintiff the duty of care owed to an invitee. However, the trial court improperly instructed the jury on plaintiff's distraction theory. In an attempt to overcome the fact that the water on the floors was open and obvious, the plaintiff claimed that the fact that the floors in the store were naturally shiny was a "distraction" that prevented her from noticing the obvious

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condition. The trial court erred in giving the plaintiff's "distraction" instruction because the plaintiff admittedly knew that some aisles of the store were wet and admittedly was looking down and proceeding with caution when she fell. There was no evidence that plaintiff was distracted and, therefore, the trial court erred in submitting this theory to the jury.

Hoffnagle v. McDonald's Corp., 522 N.W.2d 808 (Iowa 1994)

Premises Liability

Employee of McDonald's franchisee was assaulted at the franchisee's restaurant. She recovered workers compensation benefits from the franchisee and then sued the franchisor on a theory that the franchisor's control of the restaurant's operation and its ownership of the restaurant's real property imposed duties on the franchisor. The franchisor owned the real property and leased it to the franchisee. The franchisor also, via the franchise agreement, regulated certain aspects of the franchisee's business. The trial court, however, granted summary judgment for the franchisor on grounds that no duty existed.

HELD: Affirmed. The Supreme Court relied on an analogy to employer-independent contractor law (Restatement (Second) of Torts § 414) to determine that the franchisor did not exercise sufficient control over the franchisee's operations to create duties owing to the franchisee's employee. Only if the franchisor retained day-to-day control over the operations would Iowa law impose duties on the franchisor. The mere right to inspect and control the quality of the operation is not sufficient control. Likewise, the franchisor, while owner of the real estate, did not exercise sufficient control over the property to be deemed the "possessor" for purposes of premises liability law (Restatement (Second) of Torts § 344).

NOTE: The Supreme Court held that the issue of whether sufficient control exists to create a duty is an issue for the court, not for the jury, because "control" is simply a component of the "duty" issue.

Olson v. Prosoco, Inc., 522 N.W.2d 282 (Iowa 1994)

Products Liability

Olson was working as a bricklayer foreman when he noticed a 15 gallon drum of mortar cleaner sitting on the ground. To prevent the drum from freezing to the ground, he picked it up to move it onto a nearly pallet. When he dropped it onto the pallet, the bung closure popped out of the drum, splashing the cleaner into

his eye. The cleaner contains hydrochloric acid. Olson eventually lost his eye due to the incident.

Olson sued the manufacturer of the cleaner, Prosoco, for strict liability and negligence due to the allegedly defective packaging. The jury found Prosoco 100% at fault and awarded substantial damages. On appeal, Prosoco argued that the trial court should not have submitted the case on both negligence and strict liability.

HELD: Affirmed in an en banc decision. The Supreme Court did, however, hold that failure to warn should be submitted as a negligence theory, not a strict liability theory. The Court noted that there is no practical difference between strict liability failure to warn and negligent failure to warn. It concluded that failure-to-warn claims should be submitted as negligence, with the defendant being held to the standard of care of an expert in the field.

> "The relevant inquiry therefore is whether the reasonable manufacturer knew or should of known of the danger, in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or consumers."

The Court also held that the state of the art defense does not apply to failure-to-warn claims. Instead, evidence of the state of the art simply goes to the issue of whether the plaintiff met his or her burden of proving negligence. In addition, the Court reaffirmed the principle that manufacturers have no duty to warn of risks that are known and obvious to the plaintiff. Finally, the Court affirmed the trial court's refusal to instruct on a failure to avoid injury theory, holding that the acts allegedly supporting such a theory must have arisen after injury occurs, not prior to the injury.

Smith v. Air Feeds, Inc., 519 N.W.2d 827 (Iowa Ct. App. 1994)

Products Liability

Smith works for Putco. He was injured at work while operating a Komatsu punch press. The press was connected to a feeder manufactured by Air Feeds. Putco purchased the feeder after it purchased the press. Air Feeds supplied a circuit design to help Putco connect the feeder to the press. When this did not work adequately, Air Feeds recommended that Putco consult with Mullins, an engineer at D.J. Engineering. Mullins designed circuitry that allowed the feeder controls to override the controls on the press. Air Feeds advised Putco that this design was unsafe and recommended

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that Putco install point guarding to protect the user. Putco did not do so.

While Smith had his hand in the press, he reached to flip a switch on the feeder. He hit the wrong switch. Because of the circuitry design, this switch activated the press and severed his hand. Smith and his family sued several parties, including Air Feeds, on various products liability theories. The district court granted Air Feeds' motion for summary judgment. The court found that Mullins was not acting as an agent of Air Feeds when he modified the circuitry, that Air Feeds was not strictly liable because the defect arose from a post-sale modification, and that Air Feed was not negligent. Smith appealed.

HELD: Reversed and remanded. Smith's claims against Air Feeds do not arise only from the post-sale modifications, but rather from Air Feed's placement of switches on its feeder. Air Feed's placed nearly identical switches next to each other on the feeder. Air Feeds manufactured the feeder to be integrated with nonspecific existing presses. Thus, the end user must connect the feeder to a press. It is possible for the installer to connect the feeder in such a manner that the feeder's controls will operate the press. Under these circumstances, it is for the jury to decide if Air Feeds should have foreseen such a use and designed its controls accordingly. The modification does not automatically shield Air Feeds from liability.

As for agency, there is an issue of fact as to whether Mullins was acting as Air Feeds' agent. Putco believed that Mullins was Air Feeds' engineer. Mullins believed that Air Feeds was his customer. Mullins became involved at Air Feeds' request. The jury must decide if Air Feeds is liable for Mullins' conduct on an agency theory.

Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531 (Iowa 1995)

Proximate Cause

Texaco hired Seneca to install monitoring wells on the site of a Texaco service station. Seneca subcontracted with J & R to do the drilling. Seneca was responsible for locating the exact places for J & R to drill. A Seneca employee marked the drilling locations on Friday. A concrete subcontractor then poured cement at the drilling sites on Monday. J & R drilled the wells one month later. Seneca did not recheck the site after it initially marked the well locations. When J & R drilled, it punctured an underground storage tank. The service station owner did not know of the puncture and re-filled the tank several times over the next three weeks. About 2300 gallons of petroleum leaked from the puncture. The owner sued Texaco, Seneca and J & R for recovery of

clean-up costs the owner incurred. The Iowa Comprehensive Petroleum Underground Tank Fund Board intervened to recover additional costs from the defendants. The trial court denied the Board's summary judgment motion, which contended that all three defendants were liable as a matter of law.

HELD: Affirmed in part and reversed in part. The district court properly refused to grant summary judgment against Texaco. However, Seneca and J & R are liable as a matter of law. Under chapter 455G, any party whose conduct was a proximate cause of a release is liable regardless of negligence or intent to harm. Seneca's obligation was to inform J & R of the correct location for drilling. Its failure to do so proximately caused the release. The owners' repeated filling of the tank after the puncture was not an intervening and superseding cause because (1) it is foreseeable that a party would put petroleum products in an underground petroleum storage tank, (2) the failure of a third person to prevent harm threatened by the initial tortfeasor's conduct is not an intervening and superseding cause and (3) the harm threatened by the owners' conduct was the same harm risked by Seneca's conduct.

Sumpter v. City of Moulton, 519 N.W.2d 427 (Iowa Ct. App. 1994)

Proximate Cause

Sumpter, a 67 year old, received a notice from the city requiring him to mow weeds on his property. He became angry and informed the city that he would not mow until the city fulfilled its obligation to clean ditches that surround the property. Later, however, he set out to clean the ditches himself. He suffered a heart attack. He sued the city, claiming that its failure to clean the ditches was the proximate cause of his heart attack. The district court gave an intervening cause instruction which allowed the jury to find that Sumpter's own over-exertion was an intervening cause that discharged the city from liability for its negligence. The jury found that the city was negligent but that this negligence was not the proximate cause of Sumpter's injuries. Sumpter appealed.

HELD: Reversed and remanded. The district court should not have given an intervening cause instruction. Generally, the doctrine of intervening cause refers to the conduct of a third party or outside force, not the conduct of the plaintiff. Further, an intervening cause does not break the chain of proximate causation if it is a foreseeable consequence of the defendant's negligence. While it is possible that a plaintiff's own conduct could be such an unforeseeable result of the defendant's negligence that it may constitute an intervening cause, this doctrine should be applied with caution because it completely releases the defendant from liability. When the plaintiff's own conduct is at issue, that conduct normally should be addressed by a comparison of

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fault rather than under principles of intervening causation. In this case, the plaintiff's effort to clean the ditches was a foreseeable consequence of the city's negligence. The district court erred in giving an intervening cause instruction. Plaintiff is entitled to a new trial.

Stevens v. Des Moines Ind. Comm. School District, 528 N.W.2d 117 (Iowa 1995)

Proximate Cause

Stevens, a student at a Des Moines middle school, was assaulted by Harris, another student. Stevens sued the school district for failure to warn potential victims of Harris' violent nature, failure to control Harris and failure to properly supervise students. The jury found that the school was negligent but that this negligence was not a proximate cause of the injury. The trial court gave a superseding cause instruction which stated that if the injury was caused by an "unforeseen and sudden, impulsive or spontaneous act of another pupil, such act is the superseding cause of injury and the conduct cannot be considered to be a proximate cause of the injury." On appeal, the plaintiff argued that doctrine of superseding cause did not apply because the risk that a pupil might act in a sudden or impulsive manner is the very risk that the school allegedly failed to exercise reasonable care in abating.

HELD: Reversed and remanded. The gist of the plaintiff's claim is that the school has a duty to supervise and control students and warn of danger. It would be ironic if the impulsive, violent conduct of a student could be deemed a superseding cause that relieves the school from liability for failing to discharge this duty. The very risk that constituted negligence was the probability that such actions might occur.

Chumbley v. Dreis and Krump Mfg. Co., 521 N.W.2d 192 (Iowa Ct. App. 1993)

Sole Proximate Cause

Employee injured while operating press brake brought products liability action against manufacturer. Manufacturer claimed that the employer's failure to properly instruct employee on use of press brake and employer's failure to use press brake safety devices were the sole proximate cause of injury. Trial court gave sole proximate cause instruction. Jury found manufacturer to be at fault but also found that this fault was not a proximate cause of the injury. On appeal, employee alleged that it is error to instruct that an employer's negligence can be the

sole proximate cause of injury in a third-party case brought by employee.

HELD: Affirmed. Sole proximate cause is a valid defense, for which the defendant bears the burden of proof. The fact that the employer is immune from liability does not make the sole proximate cause defense unavailable to manufacturer. Providing a sole proximate cause instruction is part of trial court's obligation to instruct jury on party's theory of case.

Olson v. Prosoco, Inc., 522 N.W.2d 282 (Iowa 1994)

State of the Art

Olson was working as a bricklayer foreman when he noticed a 15 gallon drum of mortar cleaner sitting on the ground. To prevent the drum from freezing to the ground, he picked it up to move it onto a nearly pallet. When he dropped it onto the pallet, the bung closure popped out of the drum, splashing the cleaner into his eye. The cleaner contains hydrochloric acid. Olson eventually lost his eye due to the incident.

Olson sued the manufacturer of the cleaner, Prosoco, for strict liability and negligence due to the allegedly defective packaging. The jury found Prosoco 100% at fault and awarded substantial damages.

HELD: Affirmed in an en banc decision. While holding that failure to warn claims should be submitted under negligence principles, and not as strict liability claims, the Supreme Court held that there is no state of the art defense to failure to warn claims. Instead, state of the art evidence goes to the issue of whether the plaintiff proved negligence.

Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294 (Iowa 1994)

State of the Art

Hughes was using a Massey-Ferguson combine when the cornhead became clogged. Hughes was aware of the manufacturer's warnings that the machine should be shut off before unclogging the cornhead. However, he thought he saw smoke coming through the engine compartment and elected to quickly climb out of the cab to determine the source of the smoke. Instead of climbing down the steps and walking behind the combine, he stepped over stair-rail and tried to cross over the front of the machine. He lost his step and fell into the auger.

After the first trial, in which Hughes prevailed, the court of appeals determined that the strict liability claim should

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not have been submitted and remanded for a new trial on negligence. The second jury found that the combine and cornhead conformed to the state of the art in all respects except warnings. However, the jury also found that any inadequacy of the warnings did not cause Hughes' injuries. On appeal, Hughes alleged that the trial court should not have given a state of the art instruction.

HELD: Affirmed. Massey-Ferguson produced evidence that the various components of the combine and cornhead conformed to the state of the art--not just to industry standards. Thus, the trial court correctly submitted the state of the art defense to the jury.

SPECIAL CONCURRENCE: Justice Ternus, in a special concurrence joined by two of the four other justices, discussed the state of the art defense in detail. Specifically, she addressed the fact that the state of the art defense, as applied, often is difficult to distinguish from the elements of the plaintiff's case. She suggested that the defense be interpreted to mean "the level of scientific and technical knowledge existing at the time the product was manufactured." If the alternative design proposed by plaintiff was not technologically possible at the time of manufacture, then the defense would succeed. If the alternative design was technologically possible, then the state of the art defense would fail but the plaintiff would still have to prove that the advantages of this alternative design outweighed the disadvantages.

Ballard v. Amana Society, Inc., 526 N.W.2d 558 (Iowa 1995)

Strict Liability

The Ballards claim that their swine herd suffered damage due to toxins contained in feed corn that they purchased from the defendant. The trial court submitted the case under strict liability and warranty theories. The jury awarded damages to the Ballards. The court of appeals reversed, holding that it was error to submit the case under both theories. The Supreme Court granted further review.

HELD: Court of appeals decision vacated, district court judgment affirmed. The existence of toxins in the feed corn was a genuine hazard peripheral to the sale of goods and also was a serious product defect, causing the death of swine and a business interruption. The district court was correct in concluding that the Ballards could assert claims both in tort and contract.

Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294 (Iowa 1994)

Trespass

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's, however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its trespass claim, Robert's alleged that Steamboat, with the City's assistance, trespassed on Robert's exclusive right to use the State's riverbed and profited by the use of various improvements to the adjacent riverfront. This claim requires an analysis of the true nature of Robert's riverbed rights. Under Iowa law, the State's "lease" of a portion of its riverbed to a private concern is more akin to a license. The public trust doctrine allows the State to permit use of a riverbed for specified purposes, subject to the right of navigation vested in the federal government. Robert's right to use the riverbed was in connection with its access to the City's riverfront. When Robert's right to use the riverfront expired, so too did the purpose of Robert's riverbed lease. Robert's lease, in effect, was a license that was conditioned upon Robert's continued access to the riverfront.

Further, Robert's must show that it was in actual or constructive possession of the property at the time of the alleged trespass in order to maintain a cause of action for trespass. Robert's removed its boat from the riverbed once its lease of the riverfront expired. While Robert's continued to pay rent to the State under its riverbed lease, the payment of rent alone is insufficient to establish actual possession. As for constructive

possession, Robert's cannot establish this form of possession because it was a mere licensee. The district court correctly granted summary judgment on Robert's trespass claim.

Dean v. Air Exec, Inc., ___ N.W.2d ___ (Iowa, July 19, 1995)

Vicarious Liability

Rump and Dean, at their employer's request, leased an aircraft from Air Exec for a business trip. Rump piloted the craft. The plane crashed, killing both Rump and Dean. Dean's estate sued Air Exec under Iowa's aircraft owner liability statute, Iowa Code § 328.41. Air Exec claimed that it could not be vicariously liable to Dean, for Rump's alleged negligence, because, absent gross negligence, Rump himself could not have been liable to Dean, his co-employee. Air Exec thus sought summary judgment. The trial court denied the motion.

HELD: Affirmed. Workers compensation laws do not immunize third parties from liability. The aircraft owner liability statute is an independent cause of action that arises when the operator of the aircraft was negligent. The fact that workers compensation laws, for policy reason, prevent actions for negligence against co-employees does not mean that others cannot be statutorily liable for that negligence. The district court correctly denied the summary judgment motion.

Biddle v. Sartori Memorial Hosp., 518 N.W.2d 795 (Iowa 1994)

Vicarious Liability

Plaintiff in wrongful death case sued the hospital, the emergency room physician and others. He reached a settlement with the physician and went to trial against the hospital. The trial court held that the hospital could be liable only for its own alleged negligence, not the alleged negligence of the released physician. The jury then returned a verdict for the hospital on the issue of the hospital's negligence.

HELD: Affirmed. The plaintiff's release of the physician extinguished any claim against the hospital based on vicarious liability. The primary tortfeasor and any party who could be vicariously liable must be treated as a single party under Chapter 668. Thus, any release of the primary tortfeasor extinguishes all vicarious liability claims against others. The release of the physician rendered the hospital responsible only for its own conduct, conduct that the jury found not to constitute negligence.

TRIAL

Rex Staub

Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103 (1995)

Amendment of Pleadings - Conforming to Evidence

Tomka operated a custom cattle feeding operation. He brought a products liability action against Hoechst Roussell Agri-Vet Co., for damages he sustained after implanting a Hoechst synthetic growth hormone in cattle he was custom feeding for Brummer. Hoechst moved for directed verdict contending that as Tomka did not own the cattle that were implanted, he had not suffered damage to his own property. After Hoechst moved for directed verdict, Tomka sought leave to amend his petition to add two new theories of recovery premised on Hoechst's alleged violation of federal regulation. The district court denied the motion to amend and granted directed verdict. Tomka appealed. The Court of Appeals affirmed, and further review was granted.

HELD: Although leave to amend should be freely given, an amendment to conform to the proof should not be allowed if it will substantially change the claim. The amendment sought by Tomka would have substantially changed his claims against Hoechst midway through trial.

HELD: A trial court's refusal to allow an amendment of the petition will be reviewed for abuse of discretion. The trial court did not abuse its discretion in this case. Judgment affirmed.

Hill v. Winnebago Industries, Inc., 522 N.W.2d 326 (Iowa Ct. App. 1994).

Directed Verdict - Standard at Trial

Hill was employed as the executive assistant to Richard Connor, Winnebago's Chief Executive Officer/President. Connor was placed on a leave of absence and ultimately terminated. Shortly thereafter Hill was terminated because, without Connor, his job was eliminated.

Hill brought an employment action against Winnebago and it's Chairman, John Hansen. The claims against Winnebago included: breach of express employment agreement; breach of unilateral employment agreement (employee handbook); and breach of implied employment agreement. The claim against Hanson was for intentional interference with contractual relationship. At trial, the court granted Winnebago's motion for directed verdict on the claim of breach of unilateral contract but submitted the remaining claims to the jury. The jury returned a verdict for Hill solely against

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Hanson. Hanson appealed the court's denial of his motion for directed verdict.

HELD: To overrule a motion for directed verdict, the trial court must find "substantial evidence" in support of each element of the claim; if reasonable minds could differ, the issue should go to the jury. In the context of the facts of this case, the claim against Hanson should have been dismissed on directed verdict. Hanson, as Winnebago's Chairman, enjoyed a qualified privilege to interfere with the employment relationship between the corporation and its employees. Judgment reversed, case dismissed.

McIntire v. Muller, 522 N.W.2d 329 (Iowa Ct. App. 1994)

Jury Instructions

McIntire sued Muller on an open account, seeking compensation for the construction of Muller's barn. Muller counterclaimed for breach of construction contract. The jury returned a verdict in favor of McIntire. On appeal, Muller argued the verdict was not supported by substantial evidence and that the jury instructions did not sufficiently explain the separate claims and defenses in the case.

HELD: The trial court has a duty to ensure that the jury understands the law it must apply. In evaluating whether this was done, the appellate court must read all of the instructions "together rather than piecemeal or in artificial isolation". If the instructions do not, as a whole, sufficiently convey the applicable law, judgment must be reversed and new trial held.

HELD: A party is not entitled to a particular instruction if the issue is adequately covered in other instructions.

Brant v. Bockholt, 532 N.W.2d 801 (Iowa 1995)

Jury Instructions - Damages

Brant was a passenger in a vehicle that collided with a vehicle owned by Brenda Neil and operated by Bockholt. Brant brought suit against Neil and Bockholt for injuries sustained in the collision. At trial, Brant objected to the court's jury instructions to the extent they required the jury to reduce the recovery for future pain and suffering to present value. The jury awarded Brant damages for treatment, scarring, past and future pain and suffering, and future medical expenses.

HELD: The Supreme Court elects to follow the rule that prevails in most jurisdictions - awards for future non-economic

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damages such as pain and suffering and emotional distress need not be reduced to present value. The trial court's instruction on this issue constituted reversible error.

HELD: Errors against a party are cured by a verdict in that party's favor unless error was prejudicial with respect to amount of recovery.

Sonnek v. Warren, 522 N.W.2d 45 (Iowa 1994)

Jury Instructions - Last Clear Chance & Proper Lookout

Joanie Sonneck suffered a closed-head injury when her car collided with a vehicle driven by Warren. Sonneck's husband and child filed suit against Warren for lost spousal and parental consortium. For purposes of the lawsuit, they admitted that Sonneck bore the majority of fault in the accident but claimed that Warren did not maintain proper lookout. At trial, the Sonnecks' requested an instruction that Warren was required to "avoid a collision with a vehicle traveling or positioned on the wrong side of the road" as part of her duty of proper lookout. The court refused the instruction and judgment was rendered for Warren. Sonneks appealed the judgment claiming the trial court erred in: (1) refusing to submit their instruction on proper lookout; (2) failing to submit a last clear chance instruction to the jury; and (3) excluding lay opinion testimony of a police officer regarding the speed at which a prudent driver should have been traveling at the time and place of the accident.

HELD: Sonneks' instruction sought to add an action-oriented duty to the uniform instruction on "proper lookout". Although Sonneck's instruction may be appropriate in certain cases, it was not compatible with the uniform proper lookout instruction under the facts of this case and properly rejected.

HELD: The "last clear chance" doctrine does not apply to a consortium damage claim. Therefore, the court properly rejected Sonnecks' last clear chance instruction.

Mosell v. Estate of Marks, 526 N.W.2d 179 (Iowa Ct. App. 1994)

Jury Instructions - Sudden Emergency Doctrine

Leonard Marks entered Army Post Road at Southeast 36th Street, Des Moines and proceeded east. Marks did not pass a deer-crossing sign that was posted on Army Post west of Southeast 36th Street . After Marks turned onto Army Post, a deer ran in front of his car. Marks, attempting to avoid the deer, applied the brakes, steered left across the center line and collided with a westbound vehicle driven by Mosell. Marks and his brother Donald, a

passenger in the vehicle, were killed in the collision; Mosell was injured.

Mosell and her husband filed suit against Marks' estate. The trial court refused to instruct the jury on the sudden emergency doctrine, concluding the doctrine was "subsumed" in comparative fault. The jury awarded Mosell and her husband $108,399.61. The estate appealed.

HELD: The trial court erred in failing to instruct the jury on the sudden emergency doctrine. Marks was confronted with an unforeseeable, exigent combination of circumstances not of his own making that called for an immediate decision to brake and swerve in an attempt to miss the deer. Failure to submit such an instruction supported by substantial evidence constituted reversible error.

Weems v. Hy-Vee Food Stores, Inc., 526 N.W.2d 571 (Iowa Ct. App. 1994)

Jury Instructions - Superseding Cause

Weems began to experience pain in her lower back after a slip and fall on a wet floor at a Drug Town Store owned by Hy-Vee. Approximately eighteen months later, Weems visited an orthopedic surgeon for pain and received an epidural block. Weems then developed spinal meningitis from an infection caused by the epidural block. Weems suit against Hy-Vee for injuries from the fall included a claim for damages associated with the epidural block and spinal meningitis. The district court refused to submit Hy-Vee's requested instruction that the epidural block was a superseding cause of the spinal meningitis. The jury found Hy-Vee 60% at fault. The court also denied Hy Vee's motion for new trial for failure to instruct on superseding cause.

HELD: Hy-Vee was not entitled to a jury instruction on whether harmful side effects of medical treatment rendered eighteen months after Weem's fall constituted an intervening superseding cause of subsequent damages. An intervening act is reasonably foreseeable, and will not break the causal connection between the original negligence and later injury, "if the subsequent force or conduct is within the scope of the original risk." Medical treatment of Weems' injury is considered a normal consequence of the tortfeasers conduct and within the scope of the original risk. The facts did not show that Weem's medical treatment was a superseding cause in light of the fact that an epidural spinal injection is a common treatment for lower back pain and spinal meningitis is a known, if remote, risk of that treatment.

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Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994)

Jury Instructions - State of the Art

Jury Misconduct

(See discussion of facts in case under "NEGLIGENCE")

HELD: A "state of the art" instruction is not required in a negligent failure to warn case.

HELD: The experiments performed by the jury during deliberation were cumulative of evidence already presented by expert witnesses at trial and should not upset the verdict. Further, affidavits asserting juror misconduct are not admissible to impeach the verdict.

State v. Tinius, 527 N.W.2d 414 (Iowa Ct. App. 1994)

Jury Misconduct

Tinius was tried for vehicular homicide and OWI. After submission of the case, one of the jurors brought a dictionary to the deliberations and read the definition of "reasonable" to the other jurors. After Tinius was convicted, he moved for a new trial based, in part, upon juror misconduct. The district court found the conduct harmless and denied Tinius' motion.

HELD: Use of a dictionary or other similar non-legal materials by a jury during deliberation constitutes jury misconduct. Outside information that is introduced into the deliberation process falls outside the tolerable bounds of jury deliberation. However, the misconduct must be examined in light of all the evidence, including the demeanor of witnesses and issues presented at trial. In the facts of this case, misconduct by the juror was unlikely to have influenced the verdict, because the definition of reasonable in the dictionary does not conflict with the legal concept of reasonable doubt as explained in the jury instructions. Judgment affirmed.

Holdsworth v. Nissly, 520 N.W.2d 332 (Iowa Ct. App. 1994)

Directed Verdict - Preservation of Error

New Trial - Inconsistent Verdict

Holdsworth was employed as an insurance agent with Farm Bureau. After termination, he sued his supervisor, Nissly, for tortious interference with contract and unjust enrichment. He also sued Farm Bureau for tortious interference with prospective

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business advantage with his insurance clients. At the close of Holdsworth's evidence, both defendants filed a motion for directed verdict. The district court reserved ruling on the motion and the case was submitted to the jury. The jury returned a verdict in favor of Holdsworth and against Nissly for past lost income and punitive damages and against Farm Bureau for past lost income, future loss of income and punitive damages. All parties filed a motion for new trial and the defendants moved for JNOV.

In ruling on all the post-trial motions, including the reserved motion for directed verdict, the court determined that Holdsworth had failed to present sufficient evidence on his claims against Farm Bureau and granted Farm Bureau's motions for directed verdict and JNOV. Although Holdsworth sought a new trial against Nissly on the issue of damages, the court ordered a new trial on Nissly's liability and damages. On appeal, Holdsworth contended Farm Bureau failed to preserve error on the issue of sufficiency of the evidence because it only raised a general objection to the jury instructions and that new trial against Nissly should be limited to damages.

HELD: Where the district court overrules a motion for directed verdict, a party does not waive error by agreeing to jury instructions which correctly state the law. Simply because Farm Bureau agreed to the instructions does not mean that they believe that there was a case for the jury. Error was sufficiently preserved in post-trial motions.

HELD: Generally, new trials will be granted as to the whole case and on all issues and seldom on issues of damages only. An exception to this rule occurs when the liability of the defendant is definitely established. In this case, the jury's findings against both defendants were inconsistent. New trial on all issues against Nissly is proper.

<u>Matthess v. State Farm Mut. Automobile Ins. Co.</u>, 521 N.W.2d 699 (Iowa 1994)

<u>New Trial - Inconsistent Verdict</u>

Matthess, a car salesman, brought suit against State Farm, his underinsured motorist carrier, for injuries he sustained while test driving a vehicle with a customer. The jury awarded Matthess $50,085.00 in damages. Matthess moved for a new trial alleging the verdict was inadequate as a matter of law and not supported by substantial evidence. The Court of Appeals reversed and remanded the case for a new trial on the damage issue only. State Farm sought further review.

HELD: Although an award of inadequate damages merits new trial as much as excessive damage awards, the test is whether the

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verdict fairly and reasonably compensates the party for the injury sustained. The segmented awards of $2,500 for past loss of body function, $1,000 for future loss of body function, $2,500 for past pain and suffering, and $1,000 for future suffering were not inadequate for an injured passenger who sustained scalp lacerations, fractures of several ribs, pulmonary contusion, and a fractured clavicle in light of testimony from the doctors who treated Matthess following the accident. The jury was in the best position to judge the credibility of the witnesses and make judgments as to the economic elements of damages. Substantial Evidence supports the jury's award.

State v. Rupe, 534 N.W.2d 442 (Iowa 1995)

Witnesses

Rupe was tried and convicted of two counts of sexual abuse. During the trial, the court allowed one of the child witnesses to the abuse to testify via closed-circuit television. Rupe appealed his conviction claiming, (among other things), that by allowing the child witness to testify outside of his presence, the court violated his Sixth Amendment right to confront witnesses.

HELD: The court properly found the child witness would be unable to communicate truthfully in Rupe's presence as it would be an anxiety-producing setting. Rupe's constitutional rights were not violated by the closed-circuit testimony.

State v. Damme, 522 N.W.2d 321 (Iowa Ct. App. 1994)

Witnesses - Cross Examination

HELD: Cross-examination is not confined to the identical details testified to on direct examination, but extends to its entire subject matter and to all matters that may modify, supplement, contradict, rebut, or make clear the facts testified to on direct examination. This applies even if only a portion of that event or transaction was testified to on direct.

WORKERS' COMPENSATION

Steve Serck

Thomas v. Hansen, 524 N.W.2d 145 (Iowa 1994).

Hansen & Sons Welding (Hansen) obtained an extensive construction contract with IBP. Hansen engaged Leo Morgan to do electrical work on the project. Morgan carried no workers' compensation insurance, although it was required by IBP for contractors. Morgan arranged to bill IBP through Hansen, who in

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turn paid Morgan. Morgan's employee, Thomas, was injured on the job. Thomas later recovered in a separate suit brought against IBP.

Thomas filed for and received workers' compensation benefits from Hansen and its workers' compensation insurer. The District Court affirmed award of benefits and determined the award was not subject to indemnity rights.

HELD: Arrangement between claimant's employer and company was a joint venture such that the company was responsible for claimant's workers' compensation benefits. But the company and its workers' compensation insurer were entitled to be indemnified for their payments to claimant from claimant's tort recovery from third party.

Affirmed in part; reversed in part and remanded.

Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543 (Iowa 1995).

Bergeson suffered an industrial disability caused by the combination of two injuries which triggered the liability of the Second Injury Fund. The deputy commissioner found that the employer's insurance carrier had overpaid Bergeson by 12.8 weeks of compensation and ordered the Fund to reimburse the carrier for the amount it overpaid. The payment ordered was to come out of the Fund's liability to Bergeson and therefore did not add any to the Fund's total liability nor did it give any windfall benefits to Bergeson. Fund appealed.

HELD: Affirmed. Commissioner has authority to order the Fund to reimburse another party in an arbitration proceeding when an employer or insurer paid employee benefits determined to be the responsibility of the Fund.

WORKERS' COMPENSATION

Rex Staub

Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995)

Alternate Medical Care

Long sustained injury to his upper extremities during the course of his employment at Roberts Dairy. The dairy and its insurer admitted liability and assumed responsibility for Long's medical care. An orthopedic surgeon concluded that Long suffered a permanent partial impairment of his upper extremities. Long's pain persisted and the physician suggested additional evaluation at either Mayo Clinic or the University of Iowa Hospitals. The insurer approved Long's referral to an orthopedic surgeon at the

Mayo Clinic. Before the Mayo examination, however, the Mayo surgeon insisted on new diagnostic testing at a cost in excess of $5,000. The insurer refused and arranged for Long to see an orthopedic surgeon at the University of Iowa Hospitals. Long preferred the Mayo surgeon so he filed an application for alternate medical care under Section 85.27. The Industrial Commissioner denied Long's application, concluding that he had failed to show that the medical treatment authorized at the University of Iowa was not reasonably suited for Long's injuries. The District Court reversed on judicial review. The dairy and its insurer appealed.

HELD: By challenging the employer's choice of treatment and seeking alternate care, Long assumed the burden of proving the authorized care was unreasonable. The authorized care in this case was not unreasonable considering the treating orthopedic surgeon had identified both the University Hospital and the Mayo Clinic as suitable to meet claimant's needs.

<u>2800 Corp. v. Fernandez</u>, 528 N.W.2d 124 (Iowa 1995)

<u>Arising Out of and In the Course of - Intoxication</u>

Fernandez worked as an exotic dancer for 2800 Corporation at the "Bottoms Up Lounge" (Lounge) in Council Bluffs. While riding in a car driven by another intoxicated dancer, Fernandez was injured when the car smashed into a retaining wall a few miles from the Lounge less than one hour after Fernandez left work. Fernandez subsequently filed for workers compensation benefits. At arbitration, the Deputy Commissioner awarded Fernandez benefits for 10% functional impairment to each foot plus 150 weeks for severe facial disfigurement. On the employer's appeal the Commissioner adopted the deputy's decision, adding additional findings and analysis. On judicial review the District Court affirmed the commissioner's decision but remanded for the sole purpose of determining the weekly benefit rate based upon the number of dependent exemptions reflected in the record. The employer appealed. The primary issue on appeal was whether the injury suffered by Fernandez arose out of and in the course of her employment.

HELD: For an injury to arise out of and in course of employment for purposes of a workers' compensation claim, the injury must be a rational consequence of the hazard connected with the employment.

HELD: Substantial evidence supported the Commissioner's finding that Fernandez's intoxication was a substantial cause of her injuries and that her intoxication arose out of and in the course of her employment. The evidence showed that the Lounge owner condoned (if not encouraged) the dancers' drinking, that Fernandez was noticeably drunk when she left work on the day of the

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accident, that her intoxication resulted from drinking at work as opposed to drug and alcohol use before work, and that Fernandez rode with an intoxicated driver as a result of her own work-related intoxication.

HELD: The general "going and coming rule" under which an employee's injuries "occurring off the employer's premises while the employee is on the way to or from work are not compensable" is now subject to the newly created "zone of danger" exception. This exception applies when an employee's injuries are caused by intoxication arising out of and in the course of employment. However, the exception does not extend to circumstances where there is no nexus between the dangers of intoxication and the injury.

Thilges v. Snap-On Tools Corp., 531 N.W.2d 644 (Iowa 1995)

Benefits - Interest

Issue: What is the proper computation of interest on weekly workers compensation benefits not paid when due?

HELD: The district court properly ordered that weekly benefit payments should be considered paid when placed in the United States mail addressed to the claimant. Interest accrued on each workers' compensation payment from the date it was due, as finally determined by Industrial Commissioner or reviewing court, not from the date of administrative decision.

Manpower Temporary Servs. v. Sioson, 529 N.W.2d 259 (Iowa 1995)

"Care" - Section 85.27

Sioson worked for Manpower as a temporary office worker. Manpower assigned her to work at the University of Iowa where she was shot while working by a university student. She survived the attack but was rendered a quadriplegic. There was no dispute that Sioson's injuries and resulting conditions were work related. The Industrial Commissioner found that the workers' compensation insurer was required to provide a van for Sioson because of her work related quadriplegia. On judicial review, the District Court affirmed the Industrial Commissioner but modified the order to require Sioson to pay the cost of the van's maintenance, repair, fuel, title, license and insurance. Manpower and its insurer appealed and argued the request for the van was not for "care" as defined under Iowa Code Section 85.27.

HELD: The term "care" under Section 85.27 includes such things as crutches, artificial members, and appliances because these things, just as services by health care professionals, prevent or alleviate physical or mental defects or illnesses.

Unusually strong medical evidence of necessity, as well as claimant's family status and past lifestyle constituted substantial evidence in support of the Commissioner's finding that the van constituted an "appliance" for purposes Section 85.27.

HELD: The cost of van's repair, fuel, title, license, and insurance, are not reasonable medical expenses. Sioson should bear those expenses.

Estate of Dean v. Air Exec Inc., 534 N.W.2d 103 (Iowa 1995)

Co-employee Immunity

George Rump and Julia Dean were directed by their common employer to travel by air from Ft. Madison to Ottumwa. Rump leased an aircraft from Air Exec and piloted it himself. On approach to the Ottumwa airport, the plane crashed, killing both Rump and Dean.

Larry Dean, as Administrator of Julia's estate, brought an action against Air Exec based upon Rump's negligence. The claim was predicated on the aircraft owner's liability statute, Iowa Code Section 328.41, which fixes civil responsibility on the owner of the aircraft for the negligent conduct of those persons to whom the owner entrusts the plane. Air Exec moved for summary judgment on the theory that, absent gross negligence, Rump's co-employee immunity under Iowa Code Section 85.20, inured to Air Execs benefit as a party vicariously liable for a co-employee's negligence. The District Court denied the Motion for Summary Judgment.

HELD: Co-employee immunity under the workers' compensation exclusive remedy provision (Section 85.20) does not inure to the benefit of a third party vicariously liable for the co-employee's negligence.

Gerace v. 3-D Manufacturing Co., Inc., 522 N.W.2d 312 (Iowa Ct. App. 1994)

Co-employee Immunity

Evidence - Industry Standards

Gerace, an employee of Apache Hose and Belting Co., brought an action against 3-D (the manufacturer of a belt mover), Apache's president, and the company's fabrication manager for an injury he suffered when he slipped and fell in front of a belt mover. Gerace sought damages from 3-D under theories of strict liability, express warranty, and negligence, and against the president and fabrication manager on a theory of gross negligence. Following a jury verdict for 3-D and against the president and fabrication manager, the president and fabrication manager moved

for JNOV and a new trial. The District Court granted the motion for JNOV, and Gerace appealed.

HELD: Apache's president and fabrication manager did not have knowledge that injury was a probable, rather than merely a possible result of the purchase and use of the belt mover. Therefore, the gross negligence exception to co-employee immunity did not apply so as to render the president and fabrication manager liable. Transporting belts from storage to the plant had been done repeatedly with the belt mover without incident, and there was no evidence that defendants knew of any danger along the route of the belt mover.

HELD: Testimony concerning American National Standards Institute (ANSI) standards was inadmissible as beyond the scope of discovery when neither the employee's responses to interrogatories concerning standards he claimed were violated nor employee's expert witnesses in deposition gave the defendants notice of employee's intent to introduce ANSI or other industry standards. Employee also violated his duty to supplement responses.

HELD: Expert testimony concerning alleged violations of OSHA standards was inadmissible for lack of foundation where employee did not specify content of OSHA regulations cited and failed to show how regulations were violated or how violations related to accident.

Collins v. Department of Human Servs., 529 N.W.2d 627 (Iowa Ct. App. 1995)

Industrial Disability

While working in a clerical position with the Iowa Department of Human Services (DHS), Collins developed carpal tunnel syndrome in her left hand. She underwent surgery and developed reflex sympathetic dystrophy in her hands, a condition with symptoms of pain, swelling and tenderness caused by a dysfunction of the sympathetic nervous system. She returned to work and developed carpal tunnel in her right hand. Later, Collins was treated for depression which she claimed was related to her hand injuries. Although the Deputy Commissioner determined both hand injuries were compensable as scheduled members, Collins was not awarded benefits for the psychological aspect of her injury. The Industrial Commissioner affirmed the decision. On judicial review, the District Court found that Collins should be compensated for industrial disability as opposed to loss of a scheduled member and remanded the case to the Commissioner. DHS appealed.

HELD: A psychological condition caused or aggravated by a scheduled injury is compensable as an unscheduled injury. Because Collins suffered an injury to a scheduled member (her

hands) and to an unscheduled part of her body (the nervous system) she is entitled to compensation for an industrial disability.

Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995)

Interlocutory Appeal of Discovery Order

Attorney-Client Privilege

Pickering was injured in the course of his employment with Squealer Feeds. After his application for workers' compensation benefits was denied by Squealer's insurance carrier, Liberty Mutual, Pickering filed an action with the Industrial Commissioner for compensation benefits **and** penalty benefits. The Industrial Commissioner considered the compensation benefits issue separately from the penalty benefits issue and awarded Pickering compensation benefits.

Before the hearing on the penalty benefits, Liberty Mutual's attorney withdrew and was designated as an expert for Liberty Mutual. Liberty Mutual also refused Pickering's request for production of the portion of the claim file post-dating its denial of compensation. Liberty Mutual contended that portion of the file was irrelevant and protected as work product and attorney-client privileged.

The Deputy Commissioner granted Pickering's motion to compel, ordering Liberty Mutual to produce the entire file. In response, Liberty Mutual filed an application for interlocutory appeal to the Industrial Commissioner and requested a stay of the Deputy's order. The Industrial Commissioner dismissed the application finding it to be an impermissible interlocutory appeal. The District Court affirmed the Industrial Commissioner's ruling, and Liberty Mutual appealed.

HELD: Although the Supreme Court is hesitant to allow judicial review of discovery disputes in administrative proceeds, under Iowa Code Section 86.26, Liberty Mutual was entitled to interlocutory appeal of the Deputy's discovery order so long as: (1) Liberty had exhausted its administrative remedies; and (2) the Commissioner's final decision on penalty benefits would not provide an adequate remedy. The Supreme Court held that Liberty Mutual had exhausted its administrative remedies by appealing to the Industrial Commissioner, and further held that a later ruling that the documents were not discoverable would not be an adequate remedy.

HELD: The Deputy Commissioner abused his discretion in ordering the production of Liberty Mutual's entire file. Any documents prepared after the claim for penalty benefits was filed were irrelevant and not discoverable, unless such discovery was

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permitted under Iowa Rule of Civil Procedure 125(a) which permits the discovery of an expert's opinions and facts known to an expert.

HELD: Liberty Mutual waived attorney-client privilege with respect to the attorney it designated as an expert witness. Accordingly, documents containing the mental impressions or opinions of the attorney concerning the reasonableness of Liberty Mutual's actions or containing facts known to the attorney were discoverable.

Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995)

Loss of Earning Capacity

Lost Wages - Medical Appointments

Wage Rate - Calculation

Thilges filed five petitions alleging she had suffered five separate industrial injuries while working for Snap-On Tools. The Deputy Commissioner determined that Thilges's injuries constituted one cumulative compensable injury and that Snap-On was subject to a 50% penalty for failing to pay permanent partial disability benefits for scheduled member injuries after receiving impairment ratings from the treating physicians. The Commissioner adopted the proposed decision of the Deputy, but granted additional healing-period benefits. The district court upheld the Commissioner's award of benefits, interest, and penalties in all respects except the computation of the appropriate wage rate.

HELD: The Commissioner correctly viewed loss of earning capacity in terms of the claimant's present ability to earn wages in the competitive job market without regard to the accommodation furnished her, as opposed to her remaining work future in its entirety.

HELD: Iowa Code Section 85.39 does not entitle an employee to wages lost in attending medical appointments which were not arranged for or approved by employer. Further, work time lost in attending these medical appointments is not compensable as part of the healing period benefits.

HELD: Only forty-hour work weeks were to be considered in determining appropriate wage rate for claimant's cumulative injury despite claimant's failure to work a full forty-hour week during seven of the previous thirteen weeks because clients missed time was the result of unanticipated occurrences.

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Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995)

Mental Injury

Sanctions - Discovery

Dunlavey filed a petition alleging that he had sustained a psychological injury as a result of job-related stress. Economy denied coverage for lack of a physical injury. The Industrial Commissioner's award of workers' compensation benefits was affirmed by the District Court on judicial review. Economy and employer appealed.

HELD: Purely mental injuries fall within the definition of "personal injuries" as found in Iowa's workers' compensation statute, Iowa Code Section 85.3(1). To recover for a purely nontraumatic mental injury, the employee must satisfy two requirements. First, the employee must establish factual or medical causation (i.e., that the mental injury was caused by mental stimuli in the work environment). Second, the employee must meet the legal causation standard (i.e., that the mental injury was caused by workplace stress greater than the day-to-day stresses experienced by other workers employed in the same or similar jobs).

HELD: Deputy Commissioner's exclusion of deposition testimony and exhibits of employer's only expert witness at the arbitration hearing was an appropriate sanction for employer's failure to supplement responses regarding identity of experts at least 30 days before hearing.

Johnson v. International Paper Co., 530 N.W.2d 475 (Iowa Ct. App. 1995)

Notice of Injury - Section 85.23

Johnson was employed at International Paper Co. in Clinton. On March 20, 1990, Johnson left work early due to pain in his legs. He did not gave written notice of his injury to International until August 14. On November 15, 1990, Johnson filed for workers' compensation benefits. The Commissioner affirmed the Deputy Commissioner's denial of benefits because of Johnson's failure to furnish the statutorily required notice of a work-related injury to International within ninety days of the injury. The District Court affirmed.

HELD: Although the ninety day notice provision of Iowa Code Section 85.23 is satisfied if the employer has actual knowledge of the occurrence, actual knowledge requires more than the fact that the employer was aware of an employee's illness. A statement to an employer that an employee is ill, without more, does not satisfy the actual knowledge requirement.

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Henry v. Iowa - Illinois Gas & Elec. Co., 522 N.W.2d 301 (Iowa 1994)

Nursing Services

HELD: Nonmedical homemaking services performed by members of a claimant's family are not compensable as "nursing services" under Section 85.27.

McCormick v. North Star Foods, Inc., 533 N.W.2d 196 (Iowa 1995)

Sanctions

Remand for Enlargement of Commissioner's Findings

Danae McCormick injured her foot in the course of her employment with North Star Foods. North Star offered her light duty work, but she refused. McCormick also refused to attend an independent medical examination (IME).

The Deputy Industrial Commissioner found McCormick had unreasonably refused light duty work and should be denied temporary partial disability and healing period benefits for the period of refusal as provided for in Iowa Code Section 85.33(3). For refusing to submit to the IME, the Deputy ruled McCormick should be denied permanent partial disability benefits as provided in Section 85.39.

The Industrial Commissioner affirmed the denial of temporary partial disability and healing period benefits, but found that the permanent partial disability benefits should only have been suspended as opposed to being forfeited. McCormick filed a motion for enlargement of the Commissioner's findings, under Iowa Rule of Civil Procedure 179(b), with respect to the time periods involved. However, before the Commissioner ruled on the motion, McCormick filed a Petition for Judicial Review. The District Court found that upon filing of the Petition, the Commissioner lost jurisdiction to rule on the 179(b) motion.

HELD: Suspension rather than forfeiture of McCormick's permanent partial disability benefits was appropriate.

HELD: The evidence supported a finding that the light duty work proposed by North Star was suitable. Therefore, denial of temporary partial disability and healing period benefits during the period of her refusal to accept the light duty work was a proper sanction.

HELD: The case was remanded back to the District Court to determine the dates necessary to compute benefits and interest to which McCormick was entitled. If the parties agreed, the

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District Court could simply incorporate the facts as found by the Industrial Commissioner in ruling upon the 179(b) motion. If the parties were unable to stipulate, the District Court should remand the case back to the Commissioner to make the necessary findings as to time period.

Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994)

Sanctions - Discovery

Miller filed three separate workers' compensation claims against her employer, Lauridsen Foods, and its insurance carriers. In response to the employer's witness interrogatory on the first claim, Miller did not identify Julie, Jerry, and Milan Harris as potential lay witnesses. In 1989, the Deputy Commissioner consolidated the three claims for hearing. In 1990, Miller dismissed the first claim. Under a consolidation theory of merger, the Deputy then granted Lauridsen's motion to exclude Miller's three lay witnesses as a sanction for her failure to disclose them in the dismissed claim. The Industrial Commissioner, district court and Court of Appeals all affirmed the Deputy's sanction order. The Supreme Court granted Miller's application for further review.

HELD: Where the Deputy Commissioner consolidated the three claims into one, and the claimant dismissed one of the three claims, the Deputy Commissioner abused his discretion in excluding the lay witnesses as a sanction for the claimant's failure to designate them in the dismissed case. Miller had the right to dismiss the first claim and avoid sanctions that might otherwise have been imposed.

HELD: The deputy commissioner's decision to exclude the lay witnesses was not harmless error. Lay testimony could buttress the medical testimony and would be relevant and material in determining the cause and extent of Miller's injuries and condition. The case was remanded to the Deputy Commissioner for consideration of the lay witnesses' testimony.

ANNAT Associates v. Celandine, 525 N.W.2d 827 (Iowa 1994)

Substantial Evidence

Dr. Celandine suffered a herniated disc while employed as an otolaryngologist with ANNAT Associates. Although the injury left Celandine with chronic pain in his legs that initially required him to curtail his surgery practice, he continued to specialize in the treatment of allergies. Celandine obtained workers' compensation benefits on a finding of 20% industrial

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disability. Later, Celandine ended his limited surgical practice due to his disability which further reduced his salary.

Celandine subsequently petitioned for a review-reopening hearing alleging he was entitled to additional industrial disability benefits due to the reduction in his earning capacity. Celandine did not introduce any expert medical testimony regarding a change of condition but claimed he abandoned his surgical practice because he felt he could not competently perform surgery due to the pain from his injury. The Industrial Commissioner affirmed the Deputy Commissioner's decision that Celandine suffered an additional 40% industrial disability due to additional loss of earning capacity. ANNAT Associates and their insurance carrier, Aetna, sought judicial review asserting that the award of additional benefits was not supported by substantial evidence. The District Court affirmed, the Industrial Commissioner and Aetna appealed.

HELD: Additional expert medical testimony was not required to corroborate Celandine's opinion that he could no longer safely perform surgery. Substantial evidence in the record supported the agency's conclusion that Celandine quit performing surgery based on his desire to protect his patient's safety and not merely to retire and enjoy disability benefits; thus Celandine was entitled to additional benefits.

Presthus v. Barco, Inc., 531 N.W.2d 476 (Iowa Ct. App. 1995)

Substantial Evidence

Presthus suffered repetitive motion injuries to his arms while working at Barco. His treating physician did not believe the injury extended to his shoulders, and determined Presthus had suffered 5% permanent impairment to his right upper extremity and 3% permanent impairment to his left upper extremity. Before the Industrial Commissioner, Presthus argued that the injury extended to his shoulders. The Commissioner accepted the treating physician's impairment ratings and converted them into a 5% body as a whole impairment. The Commissioner also affirmed the decision to suspend permanent partial disability payments to Presthus during the period he was receiving temporary partial disability benefits for the same injury.

HELD: Where there is conflict in the evidence presented before the Commissioner, the Court of Appeals is not free to interfere with the Commissioner's findings. The fact that other evidence may support a higher impairment rating does not mean that the Commissioner's conclusion is not supported by "substantial evidence," which is defined as evidence that a reasonable person would accept as adequate to reach a conclusion.

HELD: Presthus was not entitled to both temporary and permanent partial benefits because he could not be temporarily and permanently disabled for the same injury at the same time.

Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267 (Iowa 1995)

Substantial Evidence

HELD: While the Commissioner's decision must be explained to the extent that an appellate court can follow the analytical process, the law does not require the Commissioner to discuss every fact in the record and explain why it was accepted or rejected.

HELD: The claimant's request for quasi-de novo review of the Industrial Commissioner's findings was rejected because the Court has long reviewed the Industrial Commissioner's decisions under a substantial evidence analysis. Here, the Commissioner properly considered the medical evidence as well as key witness testimony and engaged in a weighing of the evidence in the record; substantial evidence supported the Commissioner's decision.

Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995)

Substantial Evidence - Conflicting Testimony

Penalty Benefits - Delay in Payments

Kiesecker suffered work-related cumulative trauma to both knees resulting in bilateral chondromalacia. A physician examined Kiesecker and determined that he had suffered 8% permanent partial disability. The Commissioner agreed with the physician's disability rating and awarded benefits. The Commissioner also found the employer and its insurer had acted unreasonably in failing to pay the benefits for ninety days after the receipt of the last letter of clarification from the treating physician and awarded Kiesecker $500 in penalty benefits under Section 86.13. Kiesecker filed a petition for judicial review. The District Court affirmed in part, reversed in part and remanded the case. Kiesecker appealed to the Court of Appeals which affirmed the District Court. The Supreme Court granted further review.

HELD: Industrial Commissioner's determination of 8% disability was supported by substantial evidence. The Commissioner was not required to accept the testimony of Kiesecker's lay witnesses who stated that he constantly rubbed his knees, could not sleep on a sofa, could not carry heavy objects without stopping and resting, and could not go fishing, in light of contrary evidence showing that, at the time of hearing, Kiesecker was employed as a brick tender requiring him to carry bricks and cement blocks on

scaffolding. It was not inconsistent for Commissioner to find claimant's lay witnesses credible but to give their testimony less weight than that of the treating physician.

HELD: For purposes of imposing a penalty, the delay in payment of worker's compensation benefits did not become immediately unreasonable at the time the medical report was obtained by the employer. Even after receipt of the medical report, issues regarding percentage of disability were still fairly debatable. The Commissioner erred in awarding the penalty.

Riley v. Oscar Mayer Foods, Inc., 532 N.W.2d 489 (Iowa Ct. App. 1995)

Substantial Evidence

Preexisting Condition

Larry Riley died of an apparent heart attack shortly after he left his job early, complaining of illness. Riley's widow filed for workers' compensation death benefits claiming that Riley's employment had aggravated or accelerated his underlying or preexisting heart condition which contributed to or hastened his death. The Industrial Commissioner found no causal connection between Riley's work activities and his death and his widow sought review by the District Court.

The District Court reversed of the Industrial Commissioner, finding that, shortly before his death, Riley had performed heavy work as part of his job. By "superimposing" the heavy work performed by Riley on his preexisting condition, the court found the work caused Riley's heart attack and death.

Oscar Mayer appealed, claiming that substantial evidence supported the findings of the Industrial Commissioner, and that the District Court erred by substituting its findings for those of the Commissioner.

HELD: Workers' compensation cases are reviewed at law, and the courts are bound by the Industrial Commissioner's finding of fact if they are supported by substantial evidence in the record as a whole. Legal error is present under the substantial evidence analysis when an agency reaches a conclusion based on uncontroverted evidence which is contrary to the conclusion "reasonable minds would reach."

HELD: Because Larry had a pre existing heart condition, workers' compensation benefits were dependent upon a showing of legal and medical causation. Legal causation is satisfied under one of the following three circumstances: (1) when heavy exertion ordinarily required by work is superimposed on a defective heart

which aggravates or accelerates the pre existing condition; (2) proof of an instance of unusually strenuous exertion is imposed upon a pre existing disease condition; (3) the damage results from continued exertions required by employment after the onset of the heart attack. Under the facts of this case, there was substantial evidence to support the Commissioner's finding that there was insufficient proof of legal and medical causation.

Gilleland v. Armstrong Rubber Company, 524 N.W.2d 404 (Iowa 1994)

Testimony - Weight Given to Treating & Examining Physician

Gilleland appealed from a district court order affirming the Industrial Commissioner's denial of his claim for additional workers' compensation benefits, contending the Commissioner erred in giving inordinate weight to the opinion of his treating physician and in failing to reopen the record for additional evidence.

HELD: The Industrial Commissioner did not improperly give the treating physician opinion more weight than the opinion of a physician who saw the claimant once for an independent examination. The span of time between the injury and when the claimant was seen by the independent examining physician, as well as the fact that the physician was unable to base his decision on objective factors, were valid considerations in determining the weight to be given to the treating physician's testimony.

HELD: The Industrial Commissioner acted within its discretion in not allowing new evidence to be introduced through an appellate brief.

Stroup v. Reno, 530 N.W.2d 441 (Iowa 1995)

Uninsured Employer - Section 87.21

Stroup was injured in the course of his employment as a farm worker with the Renos who, in violation of Section 87.21, had no workers' compensation coverage. Under Section 87.21, Stroup had the option of: (1) bringing an administrative action against the Renos for limited workers' compensation benefits; or (2) filing a tort suit for unlimited damages. Stroup chose to file a tort action against the Renos. After losing the suit, Stroup then filed a workers compensation petition. The Industrial Commissioner held that Section 87.21 precluded Stroup from seeking benefits after he pursued damages in tort. The District Court affirmed and Stroup appealed.

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HELD: Under the clear language of Section 87.21, once an employee has chosen to pursue one of the two expressed methods of recovery, the employee is foreclosed from subsequently pursuing the alternate method.

HELD: If an uninsured employer is sued under in tort the second option in Section 87.21, that employer is denied the protections of the workers' compensation statute. Instead, the uninsured employer is forced to defend a tort action while at a substantial disadvantage concerning the statutory presumptions of negligence and proximate cause as well as being unable to assert defenses. This is the penalty to which the employer is exposed for failing to carry insurance.

DISSENT - (Justice Ternus, joined by Justices Harris, Lavorato, and Newman): Considering the legislative intent to penalize the uninsured employer, if an employee is unsuccessful in a tort action brought under Section 87.21, the employee should not be barred from filing a subsequent claim for workers' compensation benefits.

Anderson v. W. Hodgeman & Sons, Inc., 524 N.W.2d 418 (Iowa 1994)

Venue - Judicial Review

In the course of her employment with Hodgeman, Anderson was injured in an automobile accident in Lyon County. Hodgeman's workers' compensation carrier provided treatment for her injuries but did not pay any weekly benefits. More than two years after the accident, she filed a petition with the Industrial Commissioner. On Hodgeman's motion for summary judgment based upon the applicable two year statute of limitations (Iowa Code Section 85.26(1)), the Industrial Commissioner dismissed Anderson's petition.

Anderson filed a petition for judicial review in Lyon County. Hodgeman filed a motion for change of venue claiming that Polk County was the proper venue because Anderson was a not an Iowan. At hearing on the motion, Hodgeman orally moved to dismiss the petition contending that not only was the petition in the wrong county, but that the Lyon District Court did not have the authority to transfer the case to the proper county. The Lyon District Court judge transferred the case to Polk County and Hodgeman filed an interlocutory appeal of the court's refusal to dismiss.

HELD: Under the statutory framework of Iowa Code Sections 86.17, 86.26, and 17A.19(2), Polk County District Court was the only court permitted by statute to hear Anderson's petition for judicial review. Because the filing of a petition for judicial review in the proper county is a jurisdictional requirement, Section 17A.19(2) does not give another District Court the power to transfer Anderson's case to the proper county.

HELD: Although Iowa Rule of Civil Procedure 175(a) provides for a change of venue in actions filed in the wrong county, it does not apply to administrative appeals.

Hanigan v. Hedstrom Concrete Prod. Inc., 524 N.W.2d 158 (Iowa 1994)

Wage Basis - Computation

Hanigan was injured while driving a truck for Hedstrom Concrete. Before the Industrial Commissioner, Hanigan argued that Iowa Code Section 85.36(7) governed the computation of the wage basis for his weekly benefit rate because he had only worked for Hedstrom for two weeks before the accident. Section 85.36(7) provides that in cases where an employee has been on the job for fewer than 13 weeks, the rate is computed based on what the employee would have earned had he been employed the full 13 weeks. The Industrial Commissioner decided to compute Hanigan's rate under Iowa Code Section 85.36(6) because Hanigan was paid by the mile or "output." Under Section 85.36(6), the rate computation is based on an average of the employee's earnings over the course of 13 weeks. The Commissioner computed Hanigan's rate by averaging his wages for the two weeks he had actually worked. The District Court affirmed the Commissioner's computation and Hanigan appealed.

HELD: Absent any similar employees who could provide a reasonable basis for computing what the employee would have earned over the course of thirteen weeks of employment, the wage basis for purposes of benefits should not be computed under Section 85.36(7) and Section 85.36(6) was properly applied.

Aluminum Co. of Am. v. Quinones, 522 N.W.2d 63 (Iowa 1994)

Waiver of Benefits - Section 85.55

In 1967, Quinones underwent surgery to repair a herniated disc. Upon returning to work at Alcoa, Quinones signed an agreement waiving compensation for any injury sustained while employed at Alcoa that might occur directly or indirectly because of the physical defect. The waiver described the defect as "residual weakness as a result of surgery for a herniated nucleus pulposis." In 1977 all work restrictions from the injury were lifted. In 1989, Quinones retired from Alcoa as a result of numerous injuries to the same disc space as had been operated on in 1967. Quinones brought an arbitration proceeding for these injuries and Alcoa asserted the waiver as a defense. Although he received an award of benefits from the Industrial Commissioner, the District Court reversed the award based upon the waiver.

HELD: The waiver provision of Section 85.55 was enacted to encourage employers to hire disabled workers and relieves the

employer of liability for aggravation of a pre-existing condition when that condition was embraced within the waiver.

HELD: The waiver was not rendered void as a result of Alcoa's removal of Quinones' work restrictions in 1977. Intent to revoke a waiver must be shown by clear evidence.

**I wish to thank Scott Goings for assisting me in putting together a portion of this outline.

1995 IOWA DEFENSE COUNCIL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 20

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Introduction and Report of Association

1:15 - 2:00 p.m. Daubert & Expert Rules
John C. Gray - Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, IA

2:00 - 2:45 p.m Annual Appellate Update, Pt. 1
Steven L. Serck - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

2:45 - 3:15 p.m. Defamation and its Defenses in Iowa
Glenn L. Smith - Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, IA

3:15 - 3:30 p.m BREAK

3:30 - 4:00 p.m. A Report on the First Joint Trial Academy-Training Young Lawyers
Robert D. Houghton - Shuttleworth & Ingersoll, Cedar Rapids, IA

Deborah J. Hughes - Irvine & Robbins, Cedar Rapids, IA

4:00 - 4:30 p.m. Tortious Interference: Elements and Defenses
Richard K. Whitty - O'Connor & Thomas, P.C., Dubuque, IA

4:30 - 5:00 p.m. Civil RICO
Brad J. Brady - Crawford, Sullivan, Read, Roemerman & Brady, Cedar Rapids, IA

5:15 - 8:00 p.m. COCKTAILS - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 21

8:30 - 9:00 a.m. Legislative Developments
Robert M. Kreamer - Whitfield & Eddy, Des Moines, IA

9:00 - 12:15 a.m. Employment Law
Jaki K. Samuelson - Whitfield & Eddy, Des Moines, IA

Mark L. Zaiger - Shuttleworth & Ingersoll, Cedar Rapids, IA

Constance A. Schriver - Lane & Waterman, Davenport, IA

10:15 - 10:30 a.m. BREAK

12:15 - 12:45 p.m. LUNCH

12:45 p.m. Supreme Court Report
Hon. Linda K. Newman - Iowa Supreme Court, Davenport IA

1:15 - 3:15 p.m. Women as Defense Council

1:15 p.m. Introduction:
Jaki K. Samuelson - Whitfield & Eddy, Des Moines, IA

1:25 p.m. Understanding Gender Bias I:
H. Richard Smith - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

1:50 p.m. Understanding Gender Bias II:
Janet Griffin - Blue Cross/Blue Shield of Iowa, Des Moines, IA

2:15 p.m. How Are We Doing In Iowa:
Judge James R. Havercamp - Chief Judge Seventh Judicial District, Davenport, IA

2:45 p.m. Looking to the Future:
Megan Antenucci - Whitfield & Eddy, Des Moines, IA

3:15 - 3:30 p.m. BREAK

3:30 - 4:15 p.m. Annual Appellate Update, Part II
Leonard T. Strand - Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA

4:15 - 5:00 p.m. Negotiation and Evaluation-Structured Settlements
Jerry Lothrop - Capitol Planning, Inc., St. Louis Park, MN

5:00 - 5:15 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:30 - 9:00 p.m. Reception and Banquet
GLEN OAKS COUNTRY CLUB
6:00 - 7:30 Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 22

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:15 a.m. Annual Appellate Update, Part III
Rex B. Staub - Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, IA

9:15 - 9:45 a.m. Ethics and Billing
Joseph C. Holland, Iowa City, IA

9:45 - 10:15 a.m. Client Relations, Imminent Pressure Points
Wendy N. Munyon - Grinnell Mutual Reinsurance Co., Grinnell, IA

Sharon Soorholtz Greer - Cartwright, Druker & Ryden, Marshalltown, IA

10:15 - 10:30 p.m. BREAK

10:30 - 11:00 p.m. Statistical Proof
Prof. David Baldus - University of Iowa, Iowa City, IA

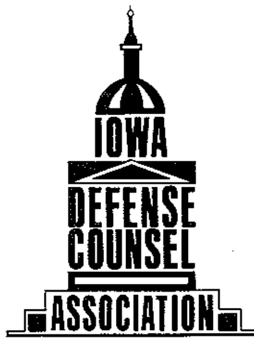
11:00 - 11:45 p.m. Deposition Dilemmas and Ethics of Effective Objecting
George S. Eichhorn - Eichhorn, Elverson & Vasey, Des Moines, IA

11:45 - 12:15 p.m. Attorney Advertising
Dorothy L. Kelley - Davison, Burnette & Kelley, Des Moines, IA

12:15 - 12:45 p.m. LUNCH

12:45 p.m. Federal Court Report
Hon. Michael Melloy - U.S. District Judge, N. Dist., Cedar Rapids, IA

1:15 - 2:00 p.m. Government Studies and Reports-When Are They Hearsay and When Are They Not
James W. Carney - Carney, Williams, Blackburn, Grask & Appleby, Des Moines, IA



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West Des Moines, IA., 50266

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General Program - DeWayne Stroud
Ginger Plummer

Program Chair - Charles E. Miller

* Deceased

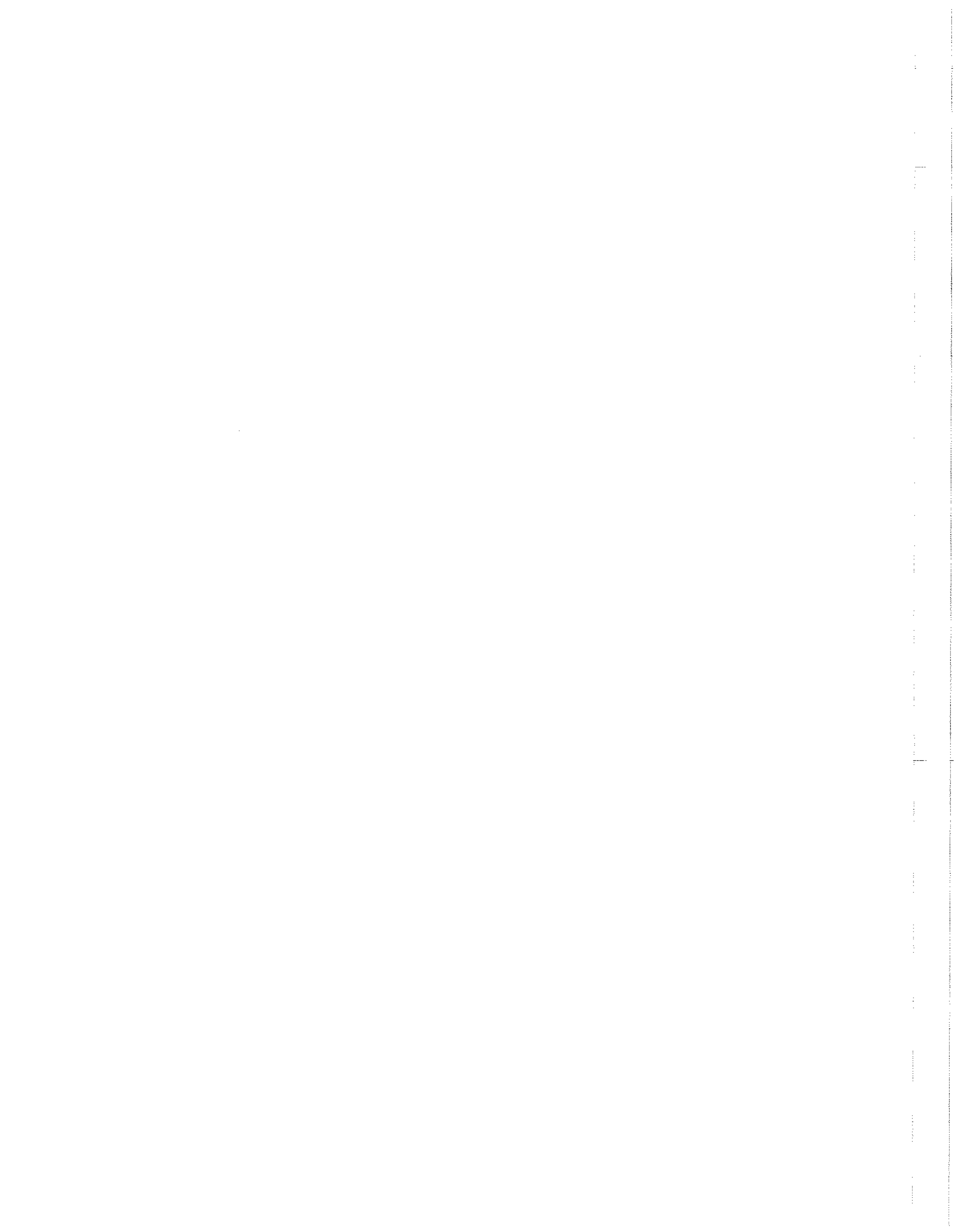
1995 ANNUAL MEETING
TABLE OF CONTENTS

	SECTION	PAGES
Annual Appellate Decisions Review Steven L. Serck, Leonard T. Strand, and Rex B. Staub	A	1 - 186
Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.* John C Gray	B	1 - 36
"Defamation and its Defenses in Iowa" Glenn L. Smith	C	1 - 11
Joint Trial Advocacy College Schedule Deborah J Hughes	D	1 - 2
Tortious Interference: Elements and Defenses Richard K. Whitty	E	1 - 11
Civil Rico Overview & Developments Brad J Brady	F	1 - 40
1995 Legislative Report Robert M Kreamer	G	1 - 29
Employment Termination: Traditional and Evolving Sources of Employer Liability Mark L. Zaiger	H	1 - 28
Settlement of Potential and Pending Employment Claims Mark L. Zaiger	H	29 - 40
Sexual Harassment Jaki K. Samuelson	H	41 - 65
Violence in the Workplace Constance A. Schriver	H	67 - 76
The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation Constance A. Schriver	H	77 - 89
Women as Defense Counsel Fact & Fiction Relating to Gender Bias in the Profession **Introduction** Jaki K. Samuelson	I	1 - 3
The Trial Lawyer's Perspective H Richard Smith	I	5 - 8
The Client's Perspective Janet Griffin	I	9
How We Are Doing In Iowa Judge James R. Havercamp	I	11 - 32
Gender Bias in the Legal Profession Megan M. Antenucci	I	33 - 65
Settlement Annuities - An Update on New Products, Ideas and Techniques Jerry C. Lothrop	J	1 - 51
Ethics and Alternative Billing Joseph C Holland	K	1 - 71
Client Relations: Imminent Pressure Points and the Resulting Ethical Problems Sharon Soorholtz Greer & Wendy N. Munyon	L	1 - 6
Statistical Proof of Discrimination: An Overview David C. Baldus	M	1 - 6
Deposition Dilemmas and the Ethics of Effective Objections George S. Eichhorn, Esq	N	1 - 68
Attorney Advertising Dorothy L Kelley	O	1 - 24
Evidence Problems with Governmental Studies, Investigations and Reports James W. Carney	P	1 - 16
Charting the Future of Iowa's Courts	Q	1 - 4
Annual Meetings Index 1965 thru 1994	INDEX	1 - 24

B

EXPERT TESTIMONY IN IOWA STATE COURT AFTER DAUBERT v MERRELL DOW PHARMACEUTICALS, INC.

John C. Gray
Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz
Sioux City, Iowa



EXPERT TESTIMONY IN IOWA STATE COURTS AFTER *DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*

B

I. INTRODUCTION

Folk wisdom has it that anyone who is at least fifty miles from home can hold himself out as an "expert" in polite conversation. What concerns good lawyers is that a person who possesses only that geographical qualification believes he should be able to testify as an expert on a wide range of topics before a jury. What further concerns good lawyers is that a jury may, simply because this person is classified as an "expert," give far greater credence to the "expert's" testimony than is deserved.

The most significant recent United States Supreme Court decision on the trial court's role in determining the admissibility of so-called expert testimony is Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). In Daubert, the United States Supreme Court rejected the rule that expert opinion based upon a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community and held that the Federal Rules of Evidence provide the standard for admitting expert scientific testimony in a federal trial.

The Daubert court further held that the trial court must make a preliminary assessment of whether the proffered testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts of the issue. The court then set out the several considerations which would bear upon the inquiry.

There have been only a few decisions of the Iowa Supreme Court or Iowa Court of Appeals since Daubert; these post-Daubert decisions do not generally appear to suggest sweeping

changes and counsel faced with this issue are advised to refer to decisions of the Iowa Supreme Court since the adoption of Iowa Rule of Evidence 702.

II. EVALUATION OF EXPERT TESTIMONY PRIOR TO *DAUBERT*

It is not hard to determine how the Iowa Supreme Court evaluated expert testimony prior to 1970. Judge Mark McCormick, in his excellent and often-cited law review article, "Opinion Evidence in Iowa" 19 Drake Law Review 256 (1970), sets out clearly the development of that law.

After articulating the rationale for admitting expert testimony; that in the discretion of the trial court, the expert opinion will probably help the trier of fact find the facts properly, Judge McCormick set forth the three conditions which must be satisfied in every instance to establish the admissibility of expert opinion evidence:

1. It must be reasonably probable that the expert's opinion will help the jury in searching for the truth.

2. An expert must be qualified through skill, knowledge or experience to form the opinion.

3. An expert may not express opinions without a sufficient foundation in the record.

This third requirement is itself threefold: (1) the expert must be shown qualified to form and express the opinion; (2) the opinion must be shown to have a substantial and competent basis in fact to assure that it is not mere speculation nor conjecture; and (3) the trier of fact must know what the opinion is based on to have a means of evaluating it.

Two cases illustrate how the court's application of the first criterion changed in the next decade:

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State v. Conner, 241 N.W.2d 447, 458 (Iowa 1976)

The Iowa Supreme Court rejected polygraph evidence as it had not gained general acceptance. The rule requiring general scientific acceptance as a foundation for scientific evidence grew out of the case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

State v. Hall, 297 N.W.2d 80 (Iowa 1980)

While accepting the rationale of Frye v. United States, insofar as it bears upon the reliability of the proffered evidence, the Iowa Supreme Court rejected the "general scientific acceptance" standard as a prerequisite to admission of evidence if the reliability of the evidence is otherwise established. The court recognized the impossibility of establishing rules to bind the court in every case, but it did state that the complexity of the subject matter and the likely affect of the proffered evidence on the fact finding process are significant considerations. The more complex the subject matter and the more likely it is that the expert's testimony will be dispositive of the trial outcome, the stronger must be the showing of scientific acceptance and evidentiary reliability.

Here, the court found that the foundation evidence of reliability and the inherent understandability of the evidence itself provided a sufficient basis for its admission. The evidence in question was blood stain analysis.

III. IOWA RULE OF EVIDENCE 702 - TESTIMONY BY EXPERTS

Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or the 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.

The Committee believed that rule 702 was consistent with prevailing Iowa case law and that, consistent with State v. Hall, 297 N.W.2d 80 (Iowa 1980), the scientific or specialized body of knowledge or discipline need not be one that is generally recognized in the scientific community, provided it meets the threshold tests set forth in Hall. (The court does not state what those threshold tests are.) One must assume that the threshold tests are (1) whether the scientific or technical knowledge will assist the trier of fact to understand the evidence or determine the issue (understandability), and (2) whether the proffered witness is so qualified (reliability).

After the court determines whether the threshold tests of State v. Hall are met, the court then determines whether the qualifications of the specific witness are such that the witness should be allowed to testify.

It was recognized there will be concerns that persons with marginal credentials will be given "expert" status and thereby automatically gain unwarranted recognition of their ideas. The court believed that through proper use of rule 104 inquiries and rule 403 that more safeguards exist under rule 702 than under the current common law. Committee Comment-1983 (I.R.E. 702).

IV. DECISIONS OF THE IOWA SUPREME COURT AFTER THE ADOPTION OF RULE 702

Iowa Power & Light v. Stortenbecker,
334 N.W.2d 326 (Iowa App. 1983)

"In order for the expert's opinion to be competent, sufficient data must be present upon which an expert judgment can be made; these facts must be sufficient for the witness to reach a conclusion which is more than mere conjecture or speculation." The trial court abused its

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discretion in admitting the testimony of an expert witness concerning the alleged potential human health hazards from electrical fields caused by transmission lines. This testimony is excluded because of its highly-speculative and conjectural nature and because of its lack of probative value.

<u>DeBurkarte v. Louvar</u>,
393 N.W.2d 131 (Iowa 1986)

In a medical malpractice action against a family physician for failure to timely diagnosis breast lumps as cancerous, the court allowed the expert testimony of a Philadelphia osteopath on the standard of care and chance for survival even though the expert had no familiarity with the practice of medicine in Iowa.

<u>Tappe v. Iowa Methodist Medical Center</u>,
477 N.W.2d 396, 402 (Iowa 1991)

The Iowa Supreme Court ruled that a profusionist is not qualified to offer expert opinion on the cause of a stroke during cardiac bypass surgery. It is not enough that a witness be generally qualified in a field of expertise; the witness must also be qualified to answer the particular question propounded. Posing the question in terms of "profusion" does not remedy the profusionist's lack of training outside the profusion field.

<u>Wheeler v. Dental East, P.C.</u>,
494 N.W.2d 248 (Iowa App. 1992)

A dentist specializing in the field of prosthodontics, who himself performs tooth extractions, is qualified to express an opinion on the appropriate standard of care for the extraction of teeth.

<u>Hunter v. Board of Trustees of Broad Lawns Medical Center</u>,
481 N.W.2d 510 (Iowa 1992)

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A management expert allowed to testify that plaintiff's employment termination was not due to a "staff reduction." The Supreme Court ruled that (1) the jury understanding of organization is assisted by such testimony, (2) expertise in management allows the expert to speak to the issue of corporate structure in general, and (3) that the professor's research included only a portion of the written analysis is a subject for cross examination, not exclusion.

Wick v. Henderson,
485 N.W.2d 645 (Iowa 1992)

The Iowa Supreme Court overruled the district court's striking of plaintiff's expert's testimony on issue of standard of care. That issue was the standard of care of an anesthesiologist and the Supreme Court allowed the plaintiff's expert, a qualified neurologist who had not had any substantial experience, education or training for the past 30 years in either surgery or anesthesiology or the relationship between the two, sufficient to qualify him to render the opinions. Unless the neurologist was allowed to testify as to the duty of a nurse anesthetist and anesthesiologist to monitor the position of a patient's arm while the patient is under anesthesia.

There are three conditions which must be satisfied in every instance to establish the admissibility of expert opinion evidence: (1) the subject matter must be proper for expert testimony; (2) the witness must be qualified to form the opinion; and (3) there must be a sufficient foundation in the record to support it. These are, of course, the same three principal discretionary determinations cited by Judge McCormick. 19 Drake Law Review 271.

V. ***DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*, 113 S.Ct. 2786 (1993)**

In Daubert, the United States Supreme Court made it clear that the Federal Rules of

Evidence, not the "general acceptance" test of Frye, was the test to the be applied in determining the admissibility of expert scientific testimony in a federal trial. The court determined that the Federal Rules, especially rule 702, placed appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring the expert's testimony both rests on a reliable foundation and is relevant. The trial judge, pursuant to rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.

A. Background.

The plaintiffs filed suit against Merrell Dow Pharmaceuticals alleging that severe birth defects in their sons were caused by the company's anti-nausea drug, Bendectin, which each mother had taken during pregnancy.

The district court granted summary judgment to the defendant based upon an affidavit by its expert concluding, upon review of the extensive published scientific literature on the subject, that maternal use of Bendectin was not shown to be a risk factor for human birth defects. The plaintiffs had responded with the affidavits of eight equally well-credentialed experts who, upon review of animal studies, chemical structure analyses and the unpublished "reanalysis" of previously published human statistical studies found Bendectin to be a risk factor. The court rejected the evidence of the plaintiffs' experts and granted the summary judgment motion. The Ninth Circuit affirmed the rejecting of plaintiffs' evidence under the "general acceptance" standard of Frye.

B. Supreme Court Opinion.

Following a discussion of the Frye test and the development and interpretation of the

Federal Rules of Evidence, the court held that the Federal Rules of Evidence have superseded the "general acceptance" test of Frye. The displacement of the Frye test does not mean there are no limits on admissibility of purportedly scientific evidence. The court carefully pointed out that Rules of Evidence 702, 104 and 403 certainly place limits on the admissibility of purportedly scientific evidence.

If the purported testimony is scientific testimony or evidence, it must be not only relevant but also reliable. "Scientific knowledge" is that which is "derived by the scientific method" and "supported by appropriate validation." In other words, proposed testimony must be supported by appropriate validation, i.e., "good grounds" based on what is known.

An additional requirement of rule 702, that the evidence or testimony "assists the trier of fact to understand the evidence or to determine a fact in issue," is a relevance inquiry. This consideration has often been called "fit."

The Supreme Court stated also that the trial judge must be a "gatekeeper" and must, pursuant to rule 104(a), determine whether the expert is proposing to testify as to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. The court did not set forth an inclusive list of the factors which the trial court should consider, but it did provide some general observations. These are: (1) whether the theory or technique is scientific knowledge which can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication (scientific scrutiny); (3) the known or potential rate of error; and (4) general acceptance within the scientific community.

The court cautioned that the inquiry should be solely on principles and methodology, not on the conclusions that they generate. Furthermore, the court is to keep in mind the limitations

of Federal Rules 703, 706 and 403.

Rule 403 is the second major hurdle that the proffered testimony must surmount. That rule reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Daubert underscored the importance of a thorough rule 403 balancing to the admissibility of expert testimony by quoting the following passage from Jack Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not be Amended, 138 F.R.D. 631, 632 (1991):

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under rule 403 of the present rules exercises more control over experts than over lay witnesses.

The court finally discussed the competing concerns of the business community that abandoning the "general acceptance test" would result in a "free-for-all" and, on the other hand, the fear that the trial judge will, by excluding "invalid evidence," sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. The court recognized either concern could occur on occasion, but that the balance struck by Rules of Evidence is designed not for an "exhaustive search for cosmic understanding but for a particularized resolution of legal disputes."

VI. POST-*DAUBERT* DECISIONS OF THE IOWA SUPREME COURT

Kirk v. Union Pacific Railroad,
514 N.W.2d 734 (Iowa App. 1994)

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Plaintiff-employee was injured when a railroad car rolled over his leg. The railroad sought to show through expert testimony that, if the plaintiff had indeed fallen from the top car, the wheel of the gondola car that ran over plaintiff's leg could not have continued to roll nearly far enough to account for the damage actually done to the leg. The railroad cars involved in the expert's test were similar to but not the same cars. The expert did not take into account the potential differences such as brake type, brake shoe condition, draft gear condition, striker plate absorption upon impact, wheel bearing condition, coupler shock absorber condition, or brake actuating equipment in general. No accounting was made for the difference between the distribution of loads within the cars involved in the accident and those involved in the tests. There were other significant variables which were not taken into account.

The court rejected the defense argument that the criticisms to the methodology should go to the weight, rather than the admissibility, of the evidence. However, the court found that the aggregate effect of the numerous differences "reveals the foundational failure of the evidence to assist the trier of fact in accurately determining facts in issue."

The court did not cite Daubert. Had the court applied the Daubert analysis, it would probably have found that the evidence did not assist the trier of fact to understand or determine a fact in issue.

Hutchison v. American Family Mutual Insurance Company,
514 N.W.2d 882 (Iowa 1994)

In Hutchison, the Iowa Supreme Court affirmed the trial court's ruling allowing a defense clinical neuropsychologist to testify, based upon his opinion of the medical records and information generated by all of her experts, that the plaintiff's injuries were preexisting and there was no causation from the accident.

In this case, the plaintiff had claimed damages for mental and emotional problems as a result of a closed-head injury she claims she suffered during a car accident. Her experts testified that she had mental problems related to the accident. A clinical psychologist and neuropsychologist called by American Family testified that the injuries were preexisting and that there was no brain injury caused by the motor vehicle accident.

On appeal, plaintiff contended that the neuropsychologist was incompetent to testify about her head injury and that he should not be allowed to express opinions regarding the medical causation of head injuries.

The Iowa Supreme Court relied upon Iowa Rule of Evidence 702. It stated that rule 702 codified Iowa's existing "liberal rule on the admission of opinion testimony." It believed that the United States Supreme Court reaffirmed this approach in Daubert v. Merrell Dow Pharmaceuticals, Inc.. After considering other restrictions on experts imposed in other jurisdictions, the Iowa Supreme Court refused to impose barriers to expert testimony other than the basic requirements of rule 702 and those described by the Supreme Court in Daubert.

The Iowa Supreme Court held that the trial judge has the duty to assess "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." Expressing confidence in the ability of the Iowa judges to undertake this review, the court did not provide any guidelines.

In Re Estate of Ohrt,
516 N.W.2d 896 (Iowa 1994)

In a case involving interpretation of wills and family settlement, attorney Orville Bloethe testified without objection concerning legal matters that went to and controlled the ultimate issues

in the case. Acknowledging that Mr. Bloethe holds impeccable professional credentials and is widely recognized in the fields of probate and tax law, the court stated that his testimony should not have been received. Experts, no matter how well qualified, generally should not be permitted to give opinions on question of domestic law.

Bray v. Hill,
517 N.W.2d 223 (Iowa App. 1994)

The plaintiff's daughter, a nurse, was asked to give an expert opinion in a medical malpractice claim regarding her observations as to the practice of surgeons and physicians with reference to pre-operative conferences. Defendant objected.

The district court sustained defendant's objection to the testimony. The court affirmed the district court's action, relying upon Iowa Code § 147.139.

Bryan, et al v. Mobay Animal Health Corp., et al,
No. 93-1456 (Iowa App. 1-23-95)

Plaintiffs sued defendants who were manufacturers of an allegedly defective cattle vaccine known on BRSV Vac-4N Horizon IV claiming that the vaccines either caused or failed to protect their cattle from bovine viral diarrhea and other related diseases. The plaintiffs' only expert, Dr. Rickard, practiced general veterinary medicine and only treated cattle for two of the plaintiffs. The district court found that plaintiffs' expert's testimony was inadmissible because he lacked the necessary technical qualifications. His opinion would be too speculative to allow the issue of causation to be put before the jury.

On appeal, the court of appeals reversed the decision of the district court. It found that Dr. Rickard to be a licensed and practicing doctor of veterinary medicine whose practice centered on the care and treatment of bovines, both feedlot and cow-calf. He had used the

BRSV vaccine over the course of several years and had found a recurring pattern of bovine viral diarrhea in those animals vaccinated with the product.

The court held that the expert's "knowledge from experience is every bit as good as that acquired academically" and was not troubled by the expert's lack of technical background regarding the products in question and absence of laboratory tests to isolate a defect.

However, as Judge Habhab artfully pointed out in the dissent, the expert was unable to identify any defect in the BRSV vaccine other than a "possible" cause of the disease. The expert had never performed any testing or analyses of the vaccines. He did not know anything about the actual components of the vaccines or how they were processed. He was unable to answer what the killing agent is or the killing process was as it relates to the vaccines. He was unable to say there was anything wrong with the vaccines. The dissent did appear to apply the standard of rule 702.

VII. APPLICATION OF *DAUBERT* IN OTHER JURISDICTIONS

The courts of the Seventh Circuit, for example, have applied Daubert fairly strictly. Since Daubert, the Seventh Circuit Court of Appeals has approved the trial courts' use of its analysis (or the equivalent) to exclude (1) "curbside" medical opinion and other unproved hypotheses (Porter v. Whitehall Labs, Inc., 9 F.3d 607, 614 (7th Cir. 1993)); (2) a diagnosis based on observation where experts in the field would have conducted a medical workup, or a review of the existing literature, in a more extensive examination of the patient's occupational medical histories (O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1106-07 (7th Cir. 1994)); and (3) the opinions of two physicians who tendered proof that was largely anecdotal (Bradley v. Brown, 42 F.3d 434, 438 (7th Cir. 1994)).

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Ayers v. Robinson,
1995 W.L. 314 606 (MPD Il. May 23, 1995)

Federal Judge Shadur applied a rigorous Daubert analysis to the "willingness to 'pay'" approach to valuing human life for hedonic damages.

In terms of "scientific knowledge" the hedonic damages proof tendered by the "expert"in the field was rejected (and ridiculed).

VIII. CONCLUSION

The Iowa Supreme Court appears to believe that Daubert does not cause any change in the analysis it has applied since State v. Hall. Indeed, in many cases, it appears that the Iowa appellate courts have not required the district courts to apply a "gatekeeper" function and, in fact, have found an abuse of discretion when the court has done so. Perhaps the more rigorous applications of Daubert in other jurisdictions will influence Iowa appellate courts and a rule 104 preliminary hearing on the admissibility of purported scientific expert testimony will become more useful.

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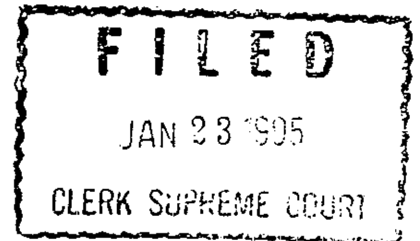
IN THE COURT OF APPEALS OF IOWA

No. 4-421 / 93-1456



CAROL BRYAN, WILLIAM COLLINS, and JOHN GAFFNEY,

Plaintiffs-Appellants,

vs.

MOBAY ANIMAL HEALTH CORP., DIAMOND SCIENTIFIC CO., and PIONEER INTERNATIONAL, INC., MICROBIAL GENETICS DIVISION,

Defendants-Appellees.

Appeal from the Iowa District Court for Iowa County, Kristin L. Hibbs, Judge.

Plaintiffs appeal a ruling of the district court granting summary judgment in favor of the defendants. **REVERSED AND REMANDED.**

Wythe Willey, Cedar Rapids, for appellants.

Stephen D. Hardy and Andrew D. Hall of Grefe & Sidney, Des Moines, for appellees.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, S.J.

Plaintiffs Carol Bryan, William Collins, and John Gaffney appeal a ruling of the district court granting summary judgment to the defendants, Mobay Animal Health Corp., Diamond Scientific Co., Pioneer International, Inc. and Microbial Genetics Division. We reverse and remand for trial.

Plaintiffs filed suit against the defendants, manufacturers of allegedly defective cattle vaccines known as BRSV Vac-4 and Horizon IV. Plaintiffs claim the vaccines either caused or failed to protect their cattle from bovine viral diarrhea and related diseases.

Defendants filed a motion for summary judgment. They claimed the plaintiffs' evidence did not include the opinion of a sufficiently competent expert to establish the vaccines were defective or that any defect was the cause of the cattle's illness. Defendants claimed the plaintiffs' only expert, Dr. Loren Rickard, lacked any specialization or expertise in the field of pathology. They argued Rickard only practiced general veterinary medicine and only treated cattle for Bryan and Collins.

The district court granted defendants' motion for summary judgment. It determined expert testimony was necessary to aid the jury in the technical aspects of the allegedly defective vaccines. It found Dr. Rickard's testimony inadmissible because he lacked the necessary technical qualifications. It determined his opinion would

be too speculative to allow the issue of causation to be put before the jury. The plaintiffs appeal.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Milne, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423; Gott, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The language of our rule and case law are substantially similar or identical to that of rule 56 of

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the Federal Rules of Civil Procedure, see, e.g., Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule, Sherwood, 179 N.W.2d at 339.

Iowa Rule of Evidence 702 provides:

> 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.

We have a liberal tradition in the admission of opinion evidence under this rule. Hutchinson v. American Family Mut. Ins. Co., 514 N.W.2d 882, 886 (Iowa 1994).

An expert's learning and experience may provide the necessary elements of qualification to testify in a particular field. Id. (citations omitted). The expert need not be a specialist in a particular field of medicine to give an expert opinion. Id. (citing DeBurkarte v. Louvar, 393 N.W.2d 131, 138 (Iowa 1986)).

Dr. Rickard is a licensed and practicing doctor of veterinary medicine. The majority of his practice is centered on the care and treatment of bovines, both feedlot and cow-calf. He has used the BRSV Vac-4 vaccine over the course of several years and has found a recurring pattern of bovine viral diarrhea in those animals vaccinated with the product.

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The district court found Rickard did not have any particular technical background regarding the products in question and did not run laboratory tests to isolate a defect, thus his testimony was insufficient as to causation. We disagree. Rickard need not be a pathologist to give an opinion on defect and causation since "knowledge from experience is every bit as good as that acquired academically." DeBurkarte, 393 N.W.2d at 138 (quoting Mark McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 263 (1970)). In addition, any lack of absolute certainty goes to the weight of his testimony, not to its admissibility. See State v. Buller, 517 N.W.2d 711, 713 (Iowa 1994).

Issues of proximate cause are only rarely decided as a matter of law. Bloomquist v. Wapello County, 500 N.W.2d 1, 5 (Iowa 1993). Viewing the evidence in the light most favorable to the plaintiffs, we determine there are genuine issues of material fact as to whether defendants' allegedly defective products proximately caused increased sickness and death among plaintiffs' cattle. We therefore reverse the judgment of the district court and remand for trial on these issues.

REVERSED AND REMANDED.

Sackett, P.J., concurs; Habhab, J., dissents.

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HABHAB, J. (Dissenting)

I respectfully dissent. I would affirm the trial court for the reasons hereinafter set forth.

In dissenting, it appears the majority agrees with the trial court that this is the type of case where expert testimony is necessary to establish that the vaccines were defective and that the defects were the cause of the cattle's illness. It also appears the plaintiffs relied on the testimony of Dr. Lauren Rickard, a general practitioner of veterinary medicine, as their expert in this field.

Be that as it may, the circumstance that concerns me the most is the majority, by its ruling, has now qualified Dr. Rickard as an expert. It is here that I disagree with the majority, for in reaching its decision the proper standard was not employed.

Before any consideration can be given as to whether genuine issues of material fact exist, we must first determine whether the trial court acted properly in excluding Dr. Rickard's testimony. On appeal, our task is only to determine whether the trial court abused its discretion in excluding his testimony.

In assessing the propriety of the trial court's exclusion of Dr. Rickard's opinion testimony, we are guided by the rule that the admission of expert testimony rests within the sound discretion of the district court. Gale v. Clark, 410 N.W.2d 662, 673 (Iowa 1987). Reversal on this

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ground, as the majority is now doing, is not justified absent manifest abuse of that discretion. Id.

It is undisputed that Dr. Rickard's credentials are impressive. However, it is not enough that Dr. Rickard be generally qualified in the field of veterinary medicine, he must also be qualified to answer the particular questions propounded to him.

Thus, assuming without deciding, that a general practicing veterinarian has the qualifications to give testimony in the field of pathology, Dr. Rickard was unable to identify any defect in the property in question other than "possibility" or "possible" cause of the disease.

As I review the record, all three plaintiffs rely on Dr. Rickard's testimony to establish defect and proof of causation. But when reviewing his testimony, he fails to identify either defect or causation beyond a speculative "possibility."

It is readily understandable why Dr. Rickard's testimony was so guarded. He admitted that he had never performed any testing or analysis of either of the Horizon IV or the BRSB vac IV vaccines. He did not know anything about the actual components of the vaccines or how they were processed. He was unable to answer what the killing agent is or the killing process was as it relates to the vaccines. When he was asked whether there was anything specifically wrong with the vaccines, he testified: "No. I can't prove that there was anything wrong with that

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product. There's a possibility, is there something wild in the product (sic), because in the industry this is something--something like this has happened before. . . . It can happen. I don't know that that's the problem here. There's a possibility that maybe its not effective. Maybe it won't protect cattle against BVD when they're challenged. I can't prove that."

An expert can generally testify to the probability or possibility of a particular outcome but that conclusion must be more than conjecture. Haumersen v. Ford Motor Co., 257 N.W.2d at 11.

The following findings by the trial court are important here:

> Dr. Rickard testifies merely that wild strains of virus have been known to exist in the course of the history of vaccinations and that he suspects the vaccine was defective. But, he offers no facts to show the existence of a wild strain in this vaccine. The testimony leaves the identification of the defect and the facts of causation entirely to be inferred. There is no hard evidence to show the probability or possibility of causation, only an unsubstantiated supposition.

The trial court had before it all the facts and circumstances it needed to reach its decision. In a well-reasoned and structured opinion, it held that Dr. Rickard's conclusions amounted to no more than speculation, that his testimony does not elucidate for the jury the technical information that it needs to correctly decide this case. Under the circumstances here, I am unable to find that there is a manifest abuse of discretion. I would affirm.

'Hedonic

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Lillian AYERS, Individually and as Special Administrator of the Estate of Lenardo Ayers, Deceased, Plaintiff, v. Hugh ROBINSON, City of Chicago Police Department and Matt Rodriguez, Defendants.

No. 92 C 7815.

United States District Court,
N.D. Illinois.

May 23, 1995.

MEMORANDUM OPINION AND ORDER

SHADUR

*1 At about 9 p.m. September 14, 1992 City of Chicago ("City") Police Officer Hugh Robinson ("Robinson") shot and killed Lenardo Ayers ("Lenardo") in the vicinity of 68th and Loomis Streets in Chicago. Lenardo's mother Lillian Ayers ("Lillian"), both individually and as special administrator of his estate, brings this action against Robinson, Chicago Police Chief Matt Rodriguez and City itself to recover money damages under 42 U.S.C. Â 1983 and various Illinois state laws.

At trial Lillian would hope to introduce into evidence expert testimony by Professor Stan Smith ("Smith") on the issue of hedonic damages. In Smith's book coauthored with Michael Brookshire (Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys (1990 with 1992/93 cum. supp.) ("Hedonic Damages")) the hedonic value of life is defined as "the value of the pleasure, the satisfaction, or the 'utility' that human beings derive from life, separate and apart from the labor or earnings value of life" (id. 164). Hedonic Damages describes the concept as encompassing everything from the fleeting joy derived "from staring adoringly into an infant's smiling face" to the more deep-seated satisfactions involved in "endur[ing] life's hardships" (id. 164). Smith claims to be able to put a dollar figure on those intangibles and, if allowed to do so, would testify that Lenardo's hedonic damages are approximately $2 million.

Defendants have moved to exclude that testimony under the principles set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786(193), and their motion is now fully briefed and ready for decision. For the reasons stated in this memorandum opinion and order, defendants' motion is granted.

Anticipated Testimony

Lillian has not tendered any specific proffer as to the nature of Smith's anticipated testimony. But the principles and methodology upon which Smith relies--the so called "willingness-to-pay" approach to valuing human life (P. Mem. 7-15)--are reported in a number of articles in addition to Hedonic Damages 161-75: see, e.g., Lauraine Chestnut & Daniel Violette, The Relevance of Willingness-To-Pay Estimates of the Value of a Statistical Life in Determining Wrongful Death Awards, J. Forensic Econ. 3(3) 75 (1990); Andrew McClurg, It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame L.Rev. 57 (1990); Ted Miller, Willingness to Pay Comes of Age: Will the System Survive?, 83 Nw. U.L.Rev. 876 (1989)), and a number of articles authored or co-authored by Smith (Smith, Should Judges Allow Testimony About Hedonic Damages?, Chi. Daily L. Bull., July 15, 1991, at 2; Gary Magnarini & Smith, Hedonic Damages, Wis. Law., Feb. 1991, at 17-19 and 56-58; and Smith, Hedonic Damages in Wrongful Death Cases, A.B.A. J., Sept. 1, 1988, at 70-73). See also the reported cases in which Smith has previously sought to testify (e.g., Mercado v. Ahmed, 974 F.2d 863, 868-71 (7th Cir.1992) and Estate of Sinthasomphone v. City of Milwaukee, No. 91 C 1121, 1995 U.S. Dist. LEXIS 2652 (E.D. Wis. Mar. 2)). All of those materials supply ample basis for evaluation, for Daubert, 113 S.Ct. at 2797 has instructed:

> *2 The focus [of the admissibility determination], of course, must be solely on principles and methodology, not on the conclusions that they generate.

For current purposes the most useful explication of willingness-to-pay methodology is set forth in the sample testimony in Chapter 11 (pages 225-29) of Hedonic Damages and in the related section at pages 81-85 of its 1992/93 supplement. Those samples provide both a concise summary of the conceptual

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underpinnings of the economic model and an overview of the most recent empirical data. Hence that testimony will be used as a starting point, drawing upon the larger body of literature and Smith's own scholarship when necessary. Although Smith's coauthorship of Hedonic Damages leads this opinion to refer to that title throughout (rather than speaking of Smith alone), it is reasonable to treat the book's sample testimony as reflective of what Smith would offer if he were allowed to take the stand.

In the book's initial text the sample testimony deals with the damages to be awarded a 35-year-old white male named Jack Doe in a wrongful death action. Here is the testimony on hedonic damages, which follows testimony as to the economist's credentials and a calculation of economic loss ($605,795):

DIRECT EXAMINATION

Q: [Plaintiff's attorney] Do the losses that you have estimated thus far, wages, fringe benefits, and household services, all net of personal consumption, account for all the losses sustained by the decedent?

A: [Economist] No they do not.

Q: What additional losses are there?

A: Mr. Doe also suffered the loss of the pleasure of life, itself: the value that he would have expected to obtain from living beyond the value he may have attached to his net financial loss. This is a value which is recoverable in this jurisdiction according to my understanding.

Q: Is there a name that economists sometimes use to refer to this value?

A: Sometimes this loss is referred to as a loss of hedonic value.

Q: What does the word hedonic mean?

A: It comes from a Greek root word meaning value or satisfaction or pleasure. Economists use the word to refer to the non-earnings-based value of life, the value we get from living as opposed to working. People get value or satisfaction or pleasure from living, even though not all moments are pleasurable. But by and large, unless we are suicidal, we regard life as satisfying.

Q: Is this non-earnings-based value, or hedonic value, a significant figure?

A: Yes it is. In this instance it is $1,709,842 when applied to Mr. Doe. Studies have shown that where estimates of lost earnings are available as well as estimates for the non-earnings value of life, the hedonic value ranges up to several times earnings.

Q: Are you saying that economists have made measurements of the value of life beyond lost earning capacity?

A: Yes they have. There is an extensive body of literature published in scholarly journals estimating this value in several different ways.

*3 Q: What are those ways?

A: First, economists have examined the value of life expressed by consumers in their expenditures on safety. If you buy an air bag for your car, you are spending money to reduce the probability of injury and death. You are placing an implicit value on your life in so doing. Secondly, economists have studied what certain risky occupations receive as extra compensation for the risk they present. When someone receives an extra $1.00 an hour as a security guard in a high-risk neighborhood, this represents a premium for the extra hazard to life. Finally, government agencies analyze the impact of lifesaving regulations and the costs associated with such regulations. All in all, there are dozens of estimates in the literature regarding the value of life published over the last several decades.

Q: What do those estimates show?

A: The estimates show, typically, that we value life in the several million dollar range.

Q: Can you describe to us an example of how these studies are conducted?

A: Yes. Assume that a person purchases a safety device for $700 and that device reduces the probability of his death from 7 in 10,000 to 5 in 10,000. By reducing his chance of dying by 2/10,000ths, or one chance in 5,000 at a cost of $700, economists would say that he valued his life at $3,500,000. In effect, if 5,000 people spent $700 each on air bags, one life would be saved at a total cost of $3,500,000. These figures are not the actual figures from air bag studies, but just sample figures to show how the analysis is done, in simple terms.

Q: Is this estimate for the total value of life?

A: Yes, these estimates include several components of value that must be subtracted out in order to arrive at the net satisfaction value. Specifically, we must subtract the net lost earnings value, the loss of household services, and the value of financial security for the statistically unknown, or anonymous, person being considered

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in these economic studies of the overall value of a human life.

Q: Could you explain this in more detail?

A: Yes. The value of life estimates are, in many instances, for the lives of anonymous persons. From that total value, we must account for what the unknown, statistically average person earns, contributes in household services, and attributes as a value of financial security. These figures add up to an estimated $800,000. Netting this amount from a reasonably conservative estimate of the value of life leaves approximately $2,700,000 which I treat as an undiscounted value for the anonymous, statistically average person.

Q: What adjustments do you then make to the undiscounted $2,700,000 figure?

A: I estimate the value of life per year of life expectancy by dividing by the remaining life expectancy of an average person, which is approximately 45 years according to the life tables. This leaves a $60,000 per-year value in 1989 dollars. Although most economists estimate that the remaining life expectancy of the lives of the people covered in the studies ranges from about 35 to 40 years, I used a more conservative figure of 45 years, which lowers the per-year estimate, because it is the value for an average person in the U.S. census.

*4 Q: What other adjustments do you make?

A: I then take into account the age, race, and sex of the decedent by calculating the losses through the life expectancy of Mr. Doe, using the same growth and discount factors we discussed earlier.

Q: So you figured out the hedonic value of life based on the value that is attributed to statistically average people and then adjusted it to the specific characteristics of the decedent, namely, age, race and sex?

A: Yes sir.

Q: What further adjustments did you make?

A: Economists do not know as yet how to adjust further, to take into account that the decedent was married, for example, or that he had two children. These factors and all the other factors regarding the quality of life of the decedent can only be taken into account by the jury, in my opinion.

Q: So your figures can be adjusted upward or downward depending on other factors that a trier of fact may wish to take into account?

A: Yes sir.

Q: No further questions, your honor.

CROSS-EXAMINATION

Q: [Defense attorney] Turning now to the intangible losses that you tried to estimate, what is the word you used for them?

A: [Economist] I called it a hedonic loss, the loss of the satisfaction of living.

Q: Are you saying that because Jack Doe lost out on the hedonistic opportunities he had, he should also be compensated, without taking into account any of the misfortunes he might have sustained in his life such as sickness of a loved one?

A: The term is hedonic, not hedonistic. The two are different. I have estimated the value that he placed on the satisfaction of living, which includes his fair share of life's misfortunes.

Q: What is the purpose of the studies that economists have made that you refer to? Were they done to value life in court?

A: No, not particularly, but they can be used to do so. Government studies regarding average wages in various professions are not done to value lost earnings in court, but they are routinely used to do so.

Q: Are you saying that because I will pay $700 for an air bag to reduce the probability of dying by 1 chance in 5,000 that I will sell my life for $3,500,000?

A: No, if I asked you how much you valued your life, the answer would probably be an infinite amount. But by looking at the fact that if 5 million people were to buy air bags, they would be spending $3,500,000,000 and in that group, approximately 1,000 lives would be saved. Whose life is not known with any certainty at all, but collectively as a group, 5 lives were saved at a cost of $3,500,000 each. This is the basis on which economists say that members of the group place a $3,500,000 value on life.

Q: Don't you save more than a life when you buy an air bag? Don't you prevent injury, and don't you perhaps save property also in many of these devices such as smoke detectors?

A: Yes sir, that is true, and to the best of the ability of the analysis, the value of injury and property saving is taken into account.

*5 Q: Do you expect us to believe that the average person, in buying safety devices, knows the risks that he is averting?

A: Studies have shown that for common risks, average individual perceptions are quite realistic; for uncommon risks, however, such as for nuclear

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plant accidents, risks are misperceived.

Q: Is your benchmark figure the result of averaging?

A: No, it is not a formal weighted average of the results. But I believe it is a reasonable estimate of the value that we may, on average, place on life

Q: So it is speculative whether Mr. Doe valued his life at this figure, isn't it?

A: No, it is not speculative. Speculative damages usually refers to the cause of the damages. Here we know that there was a loss from the death, we are not speculating. And in estimating the loss, we are not speculating any more than if we were estimating the earnings losses of a deceased 18 year old, who had just graduated from high school with no earnings history. In that instance as in this, we would be going to tables that show average earnings for males of certain ages.

Q: Dr. Economist, do you know whether Jack Doe enjoyed life as much as an average person does?

A: I don't know whether he did or not. I have estimated the value that I believe he placed on his life based on the information that I can take into account. I can't help the jury to determine whether, due to other factors, Mr Doe valued his life less or more than my estimate.

Q: What if I told you Mr. Doe never bought an air bag?

A: That doesn't necessarily mean that he had a casual disregard for the value of life; he may have been very careful crossing the street and shown in other ways how he valued his life. Not all of his behavior must be consistent; I would agree though, that if he frequently took risks for no particular reason, that might be relevant.

Q: Why isn't the hedonic value of life in the government accounting system like wages are?

A: The government does not account for household services in Gross National Product, either, as we discussed before. That exclusion does not mean that the value of such services, or that the value of living, is zero

Q: What is the multiple between the lowest and the highest figure in the studies you examined?

A: The multiple is something like 5 for the more accepted studies.

Q: Five times from low to high! I find that a rather broad range, Professor Economist. No further questions, your honor.

REDIRECT EXAMINATION

Q: [Plaintiff's attorney] Is it speculative to state that we place a value on our lives?

A: [Economist] No. We, governments, industry, and individuals are constantly in the process of weighing risks and expenditures, implicitly valuing life in the process.

Q: When a policeman negotiates for extra pay due to the extra risk of death on his job, does he ask for, on average, as much as you or I?

A: No, studies of risk premiums paid to certain occupations probably underestimate the value of life, since those jobs attract people who show more than average willingness to place their lives at risk. This concept was first put forth by Adam Smith, who was perhaps the first economist, in the late 1700s.

*6 Q: How do you explain the broad range of results?

A: Well, if you do studies of how much money high school graduates earn, you will find that some of them wind up barely making a living, and some of them as entrepreneurs, wind up making millions of dollars. I don't find it unusual that in the studies of how various groups value life there is a significant variation. We don't all value life the same, I expect.

Q: Are you saying that the hedonic value of Mr. Doe was $1,709,842?

A: No. Only God knows the true value of Mr Doe. I have made an estimate based on what economists can take into account. The trier of fact can adjust my estimate based on additional factors.

Q: So the fact that Mr Doe enjoyed a caring wife and two lovely children is not specifically taken into account in your analysis, is it?

A: No, it is not

Q: No further questions. Thank you for your testimony.

Next the testimony in the Hedonic Damages supplement deals with a hypothetical permanent injury case. What is reproduced here is the portion relating to the hedonic damage calculation generally. It incorporates into the analysis a recent survey (Ted Miller, The Plausible Range for the Value of Life--Red Herrings Among the Mackerel ("Plausible Ranfe "), J Forensic Econ. 3(3) 17 (1990)) that is intended to cure the theory of one of its major headaches: the wide range of values represented in the empirical data (see, e.g., William Landes & Richard Posner, The Economic Structure of Tort Law 187-89 (1987) ("statistical estimates of the

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compensating differentials that people demand to assume a risk of death or serious injury vary so greatly that it is not yet clear that the method is yet usable"):

DIRECT EXAMINATION

Q: Now, Dr. Economist, have you estimated damages other than those resulting from the function of Mr. Terry as what I would call an economic machine, simply producing money to live on?

A: Yes, sir I have estimated an entirely different category of damages.

Q: This is both in the workplace and the home?

A: This is his loss of enjoyment of life separate from loss of earning capacity.

Q: In general how is this done?

A: In general, let me talk you through three sources of those data By the 1980s, particularly, we had a wealth of wage differential studies that showed us what workers were willing to give up in wages to work in safer jobs: jobs that would reduce their probability of death on the job. Assume we use the example of top floor window washers on the 50th floor versus first floor window washers. Assume also that we found out from research that each first floor washer was willing to accept $300 less in annual wages on average, and that first floor window washers had a one in ten thousand less probability of death on the job, because if they fall off they don't fall anywhere Then, we know what ten thousand of those first floor workers will give up in wages. They are willing to give up $300 each, or $3 million in total, so that one of them will not lose his life They value life, those ten thousand workers collectively, at 13 million, or $300 each times 10,000 workers.

*7 Well, I have studied those wage differential studies to come up with a total value of life, including all the components, of about $2.5 million. There are also a number of consumer studies in which we find out what consumers are willing to spend for safety devices, such as a car air bag system or smoke alarm systems in homes From those studies, assume we know, for example, that consumers are willing to spend $500 for an air bag system in a car. If, because of air bags, one in ten thousand of those people will not die in a wreck who otherwise would have died, then ten thousand people spending $500 each have valued the life of an unknown American at $5 million. They don't know which one is going to be saved, but collectively they valued it at $5 million. We have a range of those studies.

Finally, in the 1980s we found out what Federal Government agencies were using as standards for the value of life when they set safety regulations, and those values average above $2.5 million. So, I've got three categories of sources that lead me to the conclusion that a conservative estimate of the total life value of a statistically average American--based on what Americans actually do, the wage decisions they make, the consumer decisions they make, and what government agencies use as value of life standards--that a conservative standard of total life value is just over $2.5 million in today's dollars.

From that I have to subtract the economic machine part of that $2.5 million; not for Thomas Terry, but for an unknown average American, and I weight that by the percentage of working Americans who are women versus men. I calculate and deduct from the $2.5 million "whole life" value, the economic machine components for average wage and fringe benefit earnings and the average value of household services When I do all that and apply it to the life expectancy of Mr. Terry, we get a lost enjoyment of life value based on what Americans do We don't ask them, "What would you do to avoid being killed?" We look at what they actually do, what they're actually willing to give up to preserve an unknown American life They don't know if it's theirs, but we know the risk and probabilities of death--in those riskier jobs or without the safety devices

Based on all that--I know that's an overview--I calculate loss of enjoyment of life at a little over $50,000 a year based upon the willingness-to-pay literature in economics. That's the loss as if it were all lost, as if Mr. Terry died. That's what Dr. Psychologist gives me. The percentages that, in his opinion, are the percentages of that $50,000 that this man has lost because of what happened to him. Otherwise the numbers would be much higher

Q: This value of human life concept, this is a new concept that you've just developed?

A: It's as old as the first economics book l Adam Smith in 1776 wrote a book called Inquiry Into the Nature and Causes of Wealth of Nations, which is the first "modern" economics book. He

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talked about what are called compensating wage differentials, and when I teach labor economics classes, we talk about the same thing. They are now sometimes called hedonic wage differentials, but what Adam Smith says is that workers must be paid more to induce them to work in riskier jobs. He didn't have skyscrapers at the time, but if you're going to make them wash windows on the 50th floor, you must pay them a higher wage rate and that differential may exist forever because there's a whole bunch of people who aren't going to work on the 50th floor. Again, Adam Smith may have been thinking of coal miners, but it was the same principle. So, the concept is as old as the first economics book. It was not until the 1980s, however, that we had enough studies, modern studies, of wage and consumer behavior to enable people like me to put that in terms we can use in courtrooms.

***8** Q: Have any articles or publications or pamphlets been written specifically dealing with this concept?

A: Yes.

Q: And can you give us a few of those?

A: One book that deals with that specifically is called Economic/Hedonic Damages, The Practice Book for Plaintiff and Defense Attorneys. That's the book I suppose you're holding. In the Journal of Forensic Economics, there is an article entitled, "Hedonic Damages and Personal Injury: A Conceptual Approach." It's the approach we're following in this case. There have been a number of other papers and articles given at professional meetings on these very concepts and it's what many forensic economists are spending research time on now, as a matter of fact.

Q: So, is your conclusion as to the overall value of life of this unknown American we talked about, this $2.5 million?

A: That's the total life value I used.

Q: Can you discuss in a little more detail the types of studies about differing wage rates versus different risks of life, how they generate values of life from the actual decisions of workers in the work place?

A: Yes, sir, and I can really repeat what I just said, quickly. We have studies, particularly in the 1980s, and most were actually performed for purposes other than courtroom testimony, that match wage differentials for jobs of varying risks with the statistics that, by the 1980s, we had on deaths on the job, by industry and by occupation. Those studies and databases, by the 1980s, allowed us to see that, for example, those first floor window washers would earn $300 less a year. I'm using that number as an example, but this is how the studies were performed. Risk statistics would show those top floor people had a one in ten thousand greater probability of death. So if ten thousand first floor people will spend $300 each--by spend I mean give up in wages, to be safer--if ten thousand of them spend $300, they're valuing an American life at $3 million. Now I'm using $2.5 million. But I'm looking at those studies from the 1980s that actually average above $5 million.

Q: Are there other consumer studies that relate to this particular problem we're presenting to the jury?

A: Consumer-based studies would first examine the cost of a safety device. Assume it was $200 for a smoke detector system in a home, and we, again by the 1980s, had the probabilities on accidental deaths with or without smoke alarms. Well, if ten thousand consumers spent $200 each for the system, they're spending $2 million in total to save one in ten thousand persons. They don't know which one of them would have died, but they're collectively valuing life at $2 million. So, these studies were the second foundation for my opinion.

Q: I think you mentioned earlier some federal studies in this area. What studies of the federal regulatory agencies or bodies, if any, did you rely upon in reaching your conclusion about the $2.5 million figure?

A: I'm going to read you the most current information on what federal regulatory agencies use as their value of life standards when they set safety standards. The value of life standard used by the Nuclear Regulatory Commission is the highest, and that is $5 million--remember I used $2.5 million. The Occupational Safety and Health Administration standard is exactly $2 million. The Consumer Product Safety Administration for unknown adults uses a standard of $1.7 million; for an unknown child, $1.95 million. The Federal Highway Administration standard is one-and-a-half million. It wasn't until the late 1980s that these values came out in published articles. If one averages all of those regulatory standards, the average is 2.7 million. Let me try to explain what that means. If the Occupational Safety and Health Administration standard is $2 million, which it is,

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that means that if they could order a company to install a safety device or make its 10,000 workers use a safety device (a guard on a machine or a respirator system or maybe specially designed goggles), they would do so if that piece of safety equipment costs $200 a worker and reduces the risk of death by one in ten thousand. If that device had cost $201 for each of 10,000 workers, OSHA wouldn't have made them do it. They would not force a $2.1 million expenditure; that exceeds their $2 million standard.

***9** Q: In any field of endeavor people criticize the work of other people and I'm sure in your profession as an expert you have been criticized; you have maybe criticized other people. What criticism of this loss of enjoyment of life approach have you considered in evaluating your approach to what this value is?

A: To my knowledge I have read all of the articles and all of the books published to date that have anything to do with this area and again, by the way, the original applications for these studies were in regulatory economics, not the courtroom connection. Many criticisms involve technical details; for example, in looking at different risks of death, how good are the data? What are the best sources? The best single review of these studies was done by economist Dr. Ted Miller, who works for the Urban Institute in Washington. He attempted to adjust the studies that had been published--these wage studies and consumer studies--based on some of the criticisms. His conclusion from all of the studies was an average whole life value of $2.2 million in 1988 dollars, which is just over $2.5 million in 1991 after adjustment for inflation. Indeed, a major criticism of some other economists working in this area comes from me. Whole life values are not hedonic loss values. The "economic machine" component of life value must be subtracted.

Although Lillian's counsel has not supplied this Court with Smith's hedonic damages calculation in this case, given the above methodology it would appear that the figure would fall in the $2 million range. But the precise number is less important to the analysis here than what the input provided by counsel reveals as to the legitimacy of the approach in Daubert terms.

Daubert Principles

Daubert has injected the trial judge into the expert testimony arena in a more active sense than before by abandoning the strict "general acceptance" standard of Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923) in favor of a more flexible approach based on the Federal Rules of Evidence ("Rules"), especially Rules 702 and 403. Though the Rules interrelate under the Daubert analysis, each will first be looked at separately.

Rule 702 provides:

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.

Daubert, 113 S.Ct. at 2795-96 describes the "scientific knowledge" requirement as designed to compensate for the wide latitude that experts might otherwise have in rendering opinions, by providing some assurance that those opinions have a reliable basis and are grounded in the methods and procedures of science, as opposed to subjective belief or unsupported speculation. As for the helpfulness requirement ("assist the trier of fact"), it calls for what is in essence a specialized relevance inquiry that requires scientific testimony to "fit" the case at hand (id. at 2795, borrowing from Judge Edward Becker's opinion in United States v. Downing, 753 F.2d 1224, 1242 (3d Cir.1985)). In making the twofold determination of scientific knowledge and fit the district court should consider such matters as (1) whether the theory or technique can be and has been tested, (2) whether it has been subjected to peer review and publication, (3) its known or potential rates of error and (4) its general acceptance--a non-exhaustive list of "general observations" meant to guide, not bind, the analysis (113 S.Ct. at 2796-98).

***10** Since Daubert our own Court of Appeals has approved trial courts' use of its analysis (or the equivalent) to exclude (1) a "curb side" medical opinion and other unproved hypotheses (Porter v. Whitehall Labs., Inc., 9 F.3d 607, 614 (7th Cir.1993)), (2) a diagnosis based on observation where experts in the field would have conducted a medical workup, a review of the existing literature and a more extensive examination of the patient's occupational and medical histories (O'Conner v.

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Commonwealth Edison Co , 13 F 2d 1090, 1106-07 (7th Cir 1994) [FN1]) and (3) the opinions of two physicians whose tendered proof was largely anecdotal (Bradley v Brown, 42 F 3d 434, 438 (7th Cir 1994)) More generally, Wilson v City of Chicago, 6 F 3d 1233, 1238-39 (7th Cir 1993) (citation to Daubert omitted) has exhorted district courts to apply Daubert in these unwavering terms:

> The elimination of formal barriers to expert testimony has merely shifted to the trial judge the responsibility for keeping "junk science" out of the courtroom It is a responsibility to be taken seriously. If the judge is not persuaded that a so-called expert has genuine knowledge that can be genuinely helpful to the jury, he should not let him testify

And most recently, see Gruca v Alpha Therapeutic Corp , N 94-1893, 1995 U S App LEXIS 6105, at *11-*15 (7th Cir Mar 25), criticizing a district court for abdicating its "gatekeeping" responsibilities

Rule 403 is the second major hurdle that the proffered testimony must surmount (Daubert, 113 S Ct at 2798; Buscaglia v United States, 25 F 3d 530, 533 (7th Cir 1994); United States v Brown, 7 F 3d 648, 654 (7th Cir 1993)) That Rule reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Daubert, 113 S Ct at 2798 underscored the importance of a thorough Rule 403 balancing to the admissibility of expert testimony by quoting the following passage from Jack Weinstein, Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended, 138 F R D 631, 632 (1991):

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.

No post-Daubert Seventh Circuit decision addresses the admissibility of expert hedonic damages testimony In the past our Court of Appeals has sent mixed signals on the subject generally and on Smith in particular (contrast Sherrod v Berry, 827 F 2d 195, 206 (7th Cir 1987) ("[t]he testimony of expert economist Stanley Smith was invaluable to the jury in enabling it to perform its function of determining the most accurate and probable estimate of the damages recoverable for the hedonic value of [plaintiff's] life'), vacated and remanded on other grounds, 856 F 2d 802 (7th Cir 1988) (en banc) [FN2] with Mercado, 974 F 2d at 868-71 (7th Cir 1992) (expressing "serious doubts" about Smith's underlying methodology and noting the lack of consensus among experts in the field)) This opinion of course takes those decisions thoroughly into account to the extent that they are consistent with Daubert

Daubert Analysis

*11 Because Smith's methodology is itself divided into several parts, it is most convenient to scrutinize it in the same terms for Daubert purposes. This opinion therefore addresses seriatim each of what, although he does not label his approach in these terms, are essentially the five principal parts of Smith's calculation--(1) benchmark (2) adjustments, (3) pedigree, (4) empirical data and (4) underlying assumptions--in accordance with the Daubert factors

1 Benchmarks

Hedonic Damages begins its text calculation with a benchmark figure that purportedly represents the value of a statistical human life as determined through willingness-to-pay methodology In the Jack Doe hypothetical that figure is $3 5 million, which is said to be based on a group of 21 studies conducted between 1974 and 1988 (Ann Fischer, Lauraine Chestnut & Daniel Violette, The Value of Reducing Risks of Death: A Note on New Evidence ("Fischer et al."), 8 J Pol'y Analysis & Mgmt 88, 90 (1989), reprinted in part in Hedonic Damages 169). Graph A following this opinion plots the results of those studies, illustrating data that ranges at a relatively even spread (mean = 3 1, median = 2 8, standard deviation = 2.7) from a low of $450 thousand to a high of $8 5 million After criticizing the methodology behind a number of studies with very low estimates (smokers = $520 thousand, police officers = $870 thousand), Fischer et al 96 concludes that "[t]he most defensible empirical results indicate a range for the value-per-statistical-life estimates of $1 6 million to $8 5 million (in 1986 dollars)" In turn Hedonic Damages derives

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its benchmark by characterizing the "preponderance of the results" as "rang[ing] from the high several hundred thousands well into the several millions" (at 168) and by labeling $3.5 million as that range's "central tendency" (id. 170).

Hedonic Damages ' supplement begins with a lower benchmark of $2.5 million, finding its main source in Plausible Range. Smith describes that article as the best single review of the empirical data, and Lillian's counsel have attached a copy to their memorandum on the current motion. Plausible Range takes 67 willingness-to-pay studies conducted between 1969 and 1990, makes a number of so-called "adjustments" and concludes that the value of a statistical life is between $1.5 and $3.5 million--with $2.2 million representing a statistically sound mean and median (Smith's $2.5 million simply adjusts that figure for inflation through 1991). Graphs B and C respectively depict the sets before and after "adjustments."

Plausible Range 's treatment of a subset of 37 wage-risk studies (depicted in Graph D) illustrates its "adjustment" methodology. Six major adjustments are made to the raw data set. First, 12 of the 16 results over $3.5 million are divided by 3, which squeezes them together and brings all 12 within the $1-to-$3 million range (Graph E). Plausible Rance does that because those studies use data compiled by the Bureau of Labor Statistics ("BLS"), which are said to be "biased" by a factor of 3. [FN3] Second, Plausible Range removes a portion of the underlying data from 2 of the remaining 4 studies over $3.5 million and recalculates the results, which squeezes those 2 points together and moves them within the target range (Graph F). Third, Plausible Range multiplies 3 of the very low results by 2.2 (Graph G), assertedly because those studies used data compiled by the Society of Actuaries ("SOA"). Fourth, Plausible Range trashes 7 studies altogether, all but 1 of those discarded figures falling either below $1.5 million or above $3.5 million (Graph H). Fifth, Plausible Range leaves unscathed 13 studies clustered around $1, $2 and $2 million (Graph I). That five-step process leaves 30 data points, most of which have been altered by a factor of 2 or 3. Finally, Plausible Range adjusts for what it calls "risk underestimation." One of the persistent criticisms of the willingness-to-pay model is that people are poor perceivers of risk. That is when faced with a safety threat most persons will either under- or over-estimate the actual risk. That critique goes to the heart of the theory and threatens to undermine almost all of the empirical research (McClurg, 66 Notre Dame L.Rev. at 103-04; Joanne Linnerooth, The Value of Human Life: A Review of the Models, 17 Econ. Inquiry 52, 53 (1979)). Plausible Range estimates that in the employment context people tend to underestimate risk by about 20% and, to compensate for that, multiplies the remaining 30 values by 1.234 (Graph J). That calculation appears to be based on a single 1978 survey of 74 University of Oregon students. This Court confesses to difficulty in following the even more convoluted adjustments made to the balance of the Miller's 67 studies. But the effect is to bring their extraordinarily disparate results within the $1.5-to-$3.5 million range.

***12** Daubert, 113 S.Ct. at 2795 requires that expert testimony be based upon the methods and procedures of science. For the moment this Court will set aside its doubts as to the potential validity of a willingness-to-pay approach to the value of life to begin with, but will instead assume that the doctrine can under appropriate constraints qualify as a "science." But to locate its $3.5 million benchmark within the broad range of values contained in the willingness-to-pay literature, Hedonic Damages employs a simple eyeballing technique. Eyeballing may have the advantage of ease, but it surely lacks scientific reliability in the sense of producing consistent results (id. at 2795 n. 9). Anyone can look at the same range and come up with a different figure. It also contributes to gameplaying. Note, for example, how quick "Dr. Economist" in the sample testimony (presumably Smith himself) is to exploit the method's malleability by suggesting that he could have picked a higher number (like $5 million) and that by opting for the lower figure he is somehow rendering a "conservative" opinion. Maybe so, but a conservative opinion in that sense does not equate to a scientific one. Someone who states on the basis of a dull pain in his right knee that he thinks it is going to rain less than 1 inch expresses a conservative, but surely an unscientific, opinion.

Plausible Range spends a good deal more effort in deriving its $2.2 million mean. From the end result alone (Graph C) there is room for the conclusion that the willingness-to-pay model values life at

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approximately $2.2 million (though even the manipulated ultimate spread, almost equally spaced between a figure close to $1 million and one over $3.5 million, is troublesome as the predicate for picking a number in midrange--or indeed any number--as the value). But the real problem is in the classically Procrustean way that author Miller gets to that stage: Any objective reader can recognize the methodology as one that has made whatever adjustments were necessary to bring the raw data within a target range. Adding, subtracting, multiplying and dividing with a predetermined result in mind cannot fairly be labeled science. To put it bluntly, Plausible Range strikes this Court as a prime candidate for an Oscar in the most-misleading-title category.

Nor is that the only difficulty with the suggested results. To reexamine what has just been assumed arguendo, the entire process of selecting and adjusting willingness-to-pay data has proved unreliable because of the widely divergent views among economists concerning what does and does not constitute not a sound study. Thus the author of Plausible Result, writing a year earlier (Miller, 83 Nw. U.L.Rev. at 882 nn. 29 & 30), reported a 1985 survey of 17 willingness-to-pay studies by another economist that had concluded that the best three of those priced the value of life at approximately $8 million, almost four times the Plausible Result figure. Those "best three" studies are among the ones whose results Plausible Result divides by 3. It is also beyond cavil that the dozen-or-so economists who used BLS and SOA data in their own wage-risk studies disagree sharply with Plausible Result as to the quality of those statistics. In sum, neither the $3.5 nor the $2.5 million benchmark rests upon any scientific method or procedure, so that testimony regarding either one is inadmissible under the scientific knowledge prong of Rule 702. [FN4]

2. Adjustments

***13** By definition the willingness-to-pay model estimates the value of a statistical life--a nameless, faceless member of society. This Court's trial jury will have a very different task: It must value the life of a specific individual (Lenardo), the quality of whose life may have been substantially richer or poorer than the statistical mean. Applying Hedonic Damages ' definition of the hedonic value of life to persons in radically different situations illustrates the point. Compare under that definition (1) a person who is sick with one who is healthy or (2) someone very old with someone very young. Or compare (3) a person with a loving family with one who has none, or (4) someone with many friends versus someone who has none. Try it with an arguably tougher class of criteria--say (5) wealth, (6) race, (7) intelligence, (8) education, (9) sex, (10) character, (11) reputation--and the complexities become plain. That process reveals a lack of fit (Daubert, 113 S.Ct. at 2796) because the willingness-to-pay data upon which Hedonic Damages relies goes to one thing (value of a statistical life) while the jury is called upon to determine a potentially very different figure (value of Lenardo's life).

Hedonic Damages purports to address that problem by adjusting the benchmark to account for certain specific characteristics of the plaintiff. Here is the calculation in the Jack Doe hypothetical (Hedonic Damages 170-72):

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	$3,500,000	benchmark
less	800,000	lost earnings, fringe benefits and household services
	----------	
equals	$2,700,000	hedonic value for average person
divided by	45	life expectancy of average person
	----------	
equals	$60,000	per year hedonic value for average person

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Hedonic Damages then assumes a life expectancy of 75 years and calculates the present value of Jack Doe's hedonic life with a 1.29% rate of growth and a discount factor of 3.13%.

Thus Hedonic Damages claims that the final figure ($1,709,842) accounts for Jack Doe's age, race and sex. That too is misleading, and in combination with the relatively low probative value of the testimony also calls for its exclusion under Rule 403 As described, the adjustment calculus makes an allowance for age and perhaps for income as well (its use of a 1.29% rate of growth is tied to Jack Doe's projected earnings and an assumption that the rich have a greater capacity to enjoy life). D. Mem. 7 n 3 suggests that Smith has backed off of the latter position, stating there that "[i]n a deposition given in another case on November 17, 1994 [citation omitted] Smith reiterated the position the position [sic] that rich and poor have the same value of life." If so (and Lillian has offered nothing to the contrary), it is clear only that the adjustments address the decedent's age As for the sex of the decedent, it would appear to be taken into account only in the indirect sense that the factor is reflected in the actuarial tables--and that would appear to be true a fortiori of the factor of race.

***14** Whether sex or race (or both) matter to life fulfillment is an interesting question, but one into which Hedonic Damages does not delve Its authors' representation that it has done so is grossly misleading. Most fundamentally, Hedonic Damages has gone only a small part of the way toward addressing the fit problem. Age is 1 of 11 factors identified at the beginning of this section as potentially separating Lenardo's hedonic value of life from the statistical mean, but the list could well have been several times as long. In sum, the low probative value of such testimony (ill-fitting data) is substantially outweighed by the danger of unfair prejudice (a false appearance of tailoring to the individual case)

3. Pedigree

Another troubling aspect of Smith's testimony is his use of Adam Smith's 1776 work An Inquiry into the Nature and Causes of the Wealth of Nations (Edwin Cannan ed., University of Chicago Press 1976) to lend pedigree to his theory. Adam Smith is of course the undisputed godfather of modern economics and The Wealth of Nations his crowning achievement. Unfortunately for Stan Smith, the surname Smith seems to be about the only thing they have in common

Very little in the classic Wealth of Nations supports the Hedonic Damages method of valuing life, and much counsels against it. Adam Smith was a skeptic when it came to the ability of people to perceive risk (example: lotteries, id. 120-21), and he also observed that in certain contexts the "fear of misfortune" is overbalanced by "the hope of good luck" and the fancied "occasions of acquiring honour and distinction," particularly on the part of the young who thus do not make rational economic judgments about wages and risk (examples: soldiers and sailors, id. 122-23). Both of those observations remain perceptive today: As to the former, its continued accuracy is evident in the exceedingly poor odds and enormous popularity of state lotteries, while as to the latter, one need only view many of our armed forces' television commercials that portray the physical challenges of serving and are also designed to appeal to a young person's sense of adventure

Adam Smith did comment that certain laborers (example: coal miners, id 112) demand higher pay as a result of employment risks and incorporated that into a general theory of wages. But the leap from that observation to a theory for valuing life was not taken for almost 200 years: It is recognized that the genesis of the willingness-to-pay method of valuing human life is T.C. Schelling's The Life You Save May Be Your Own (reprinted in the Brookings Institution's study Problems in Public Expenditure Analysis (Samuel Chase, Jr. ed., 1966)) In that piece Schelling set out the model's basic framework, and nothing has really changed in that respect since Schelling's purpose was to suggest a method for conducting cost-benefit analyses in the context of proposed safety regulations. It was another 20 years before the further leap into the courtroom was first taken, and this time the economist was Stan Smith (Sherrod, 827 F.2d at 205-06)

***15** As a method for measuring statistical life in a regulatory context, then, the theory's genealogy traces back only to Schelling, while as a method of calculating damages in court Stan Smith is (or hopes to be) the father of what is really an infant industry By seeking to portray as a genealogical credential

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the exceedingly tenuous connection between his willingness-to-pay methodology and Adam Smith's Wealth of Nations, Stan Smith coats his novel use of a quite recent economic theory with a vintage veneer that it does not deserve Because the sample testimony involving Adam Smith's classic work thus provides little support for Stan Smith's theory and much unfair prejudice when used to influence a lay jury, it too is inadmissible under Rule 403

4. Empirical Data

After Schelling had suggested a new way to measure the value life, a number of economists set out to determine what results would flow from the application of that theory to the real world Over a 20-year period they found that the willingness-to-pay model values life somewhere between $500 thousand and $9 million (see Graphs A and B).

Even if this Court were to find that the methodology underlying those studies constituted "science" as that term is properly understood, it would still have to exclude them under the helpfulness standard of Rule 702. It would really be no use to a jury to hear that others had placed the statistical value of life at greater than $500 thousand and less than $9 million (especially when told of how those numbers had been arrived at--see Mercado, 974 F.2d at 870-71) And it is frankly bogus to massage those numbers, as both Hedonic Damages and Plausible Result have done, to create a deceptive appearance of precision rather than the true picture of an enormous spread in "value" That is both fatal in Rule 702 terms and a basis for exclusion under Rule 403's balancing test.

5 Underlying Assumptions

As to the basic assumption underlying the economic model--that the amount of individuals' willingness-to-pay for small reductions in the likelihood of death reflects how society values life--this Court shares many of the concerns expressed by our Court of Appeals in Mercado, 974 F.2d at 868-71 and mirrored in much of the academic literature (see, e.g., McClurg, 66 Notre Dame L. Rev. at 103-06; Linnerooth, 17 Econ Inquiry at 53-54; and sources cited in each). Those criticisms focus on (1) the assumption that people have freedom of choice in deciding to confront risk, (2) the assumption that people perceive risk accurately, (3) the nonmonetary factors that drive many consumer purchases (e.g., advertising) and employment decisions (e.g., civic pride), and (4) the political aspects of government regulation (e.g., budgets, lobbyists). This Court agrees that those considerations go a long way toward undermining the basic premise behind the willingness-to-pay model.

On the other hand, a great deal has been written on the subject over a number of years, some of it in respected academic journals P. Mem. 9-12 n. 3 lists 58 articles, papers and other works. That listing too is deceptive, for a good deal of it is fluff, but a half-dozen-or-so of the listed articles have been published in discriminating periodicals (see bibliography in Vasile Tega, Management and Economics Journals (1977)) For current purposes it is unnecessary to decide whether there has been enough testing or peer review of the underlying theory to constitute scientific knowledge. Stripped of its empirical moorings, Schelling's basic insight into risk and the value of life cannot possibly assist the jury in calculating damages, so it is plainly inadmissible under the helpfulness prong of Rule 702--regardless of its fate under Rule 702's scientific knowledge requirement

***16** One other consideration, already touched upon, plays out for the most part under Rule 403 and helps to explain why willingness-to-pay methodology may be an appropriate guide for regulators but not for courts and juries traversing the difficult terrain of valuing life Those two activities have very different foci: Regulators deal in averages, while courts deal with specific cases. Thus a statistical mean may have validity in the former context, while at the same time it simply creates the already-mentioned deceptive appearance of precision in the latter.

* * *

In sum, viewed in term of 'scientific knowledge" the hedonic damages proof tendered by Lillian has thus failed to survive Daubert analysis. So Lillian's motion has failed on the battleground selected by the parties.

Other Specialized Knowledge?

As already indicated, both sides' submissions have taken the position that Smith's testimony is

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"scientific" in nature and is therefore properly analyzed under Daubert But at least in the present state of the art (?), a substantial argument might be made for disqualifying that testimony from the "scientific" label in the first instance That however would not necessarily end the analysis, for Rule 702 also speaks of "other specialized knowledge" (it may be noted that "specialized knowledge" is the label attached by Mercado, 974 F 2d at 871 in upholding a trial judge's decision to bar Smith's testimony).

By its express terms Daubert speaks only of "scientific" testimony and not of "other specialized knowledge" (113 S.Ct. at 2795 n 8). It is an interesting question, not yet resolved by the lower federal courts post-Daubert, whether Daubert analysis extends to the other Rule 702 branches ("technical knowledge" is of course the third category referred to there) and, if so, with what possible adaptations But that question need not be addressed here, not just because the parties have limited their quarrel to "scientific knowledge" but also because the factors discussed in this opinion demonstrate the inadmissibility of the Smith testimony from any perspective

Conclusion

All five principal parts of Smith's proposed testimony on the issue of hedonic damages are inadmissible under Rule 702 or Rule 403 or both. Defendants' motion to exclude the testimony is granted in its entirety.

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

FN1. This Court, sitting by designation, was a member of the O'Conner panel.

FN2. As a technical matter, a vacated opinion becomes no opinion at all In this instance, however, the status of the quoted language is less clear, because the penultimate paragraph in the majority opinion on en banc rehearing reads (id at 807-08): Because we reverse and remand for a new trial, we need not discuss the district court's other evidentiary rulings or jury instructions. We leave these questions for the district court on remand to decide in light of this court's prior discussions of those matters, specifically those found in our earlier vacated opinion.

FN3 It is worth noting that Hedonic Damages 211 (the original text) considered BLS data to be the leading source in the field

FN4. It may be worth mentioning–and rejecting–Smith's use of regulatory statistics to bolster his argument that willingness-to-pay data congeals around $2.5 million. Government regulations are really a different kettle of fish for two reasons. First, it is not at all clear that agencies use willingness-to-pay or any other purportedly scientific approach to estimate life values Beyond the more general observations that can be made about bureaucratic and political processes and the way in which decisions are reached at those levels (Mercado, 974 F 2d at 871) the willingness-to-pay literature itself illustrates the way in which government agencies abandon science to secure politically acceptable compromises (Miller 88 Nw U L Rev at 886-87 (footnotes omitted)): The Occupational Safety and Health Administration's (OSHA's) use of risk reduction values in regulatory analysis led the agency into a major conflict with the Office of Management and Budget (OMB) in 1985. OSHA initially attempted to use a value of $3,000,000 per anonymous life saved The OMB decided that this value was too high and suggested that OSHA use a value of $1,000 000. Eventually OMB and OSHA reached a compromise of $2,000,000 per life saved Second, in the regulatory context the range of estimates is enormous and Smith (like the author of Plausible Result) is simply cherry-picking (McClurg, It's a Wonderful Life, 66 Notre Dame L Rev at 106 & n 214) (citations omitted): Although they do not always reveal their methodologies, federal agencies have set life values as low as $70,000 and as high as $132 million per life 214 214. The $70,000 figure was set in 1980 in connection with a Consumer Product Safety Commission regulation governing space heaters The $132 millon value came from a 1979 regulation by the Food and Drug Administration banning DES in cattle feed.

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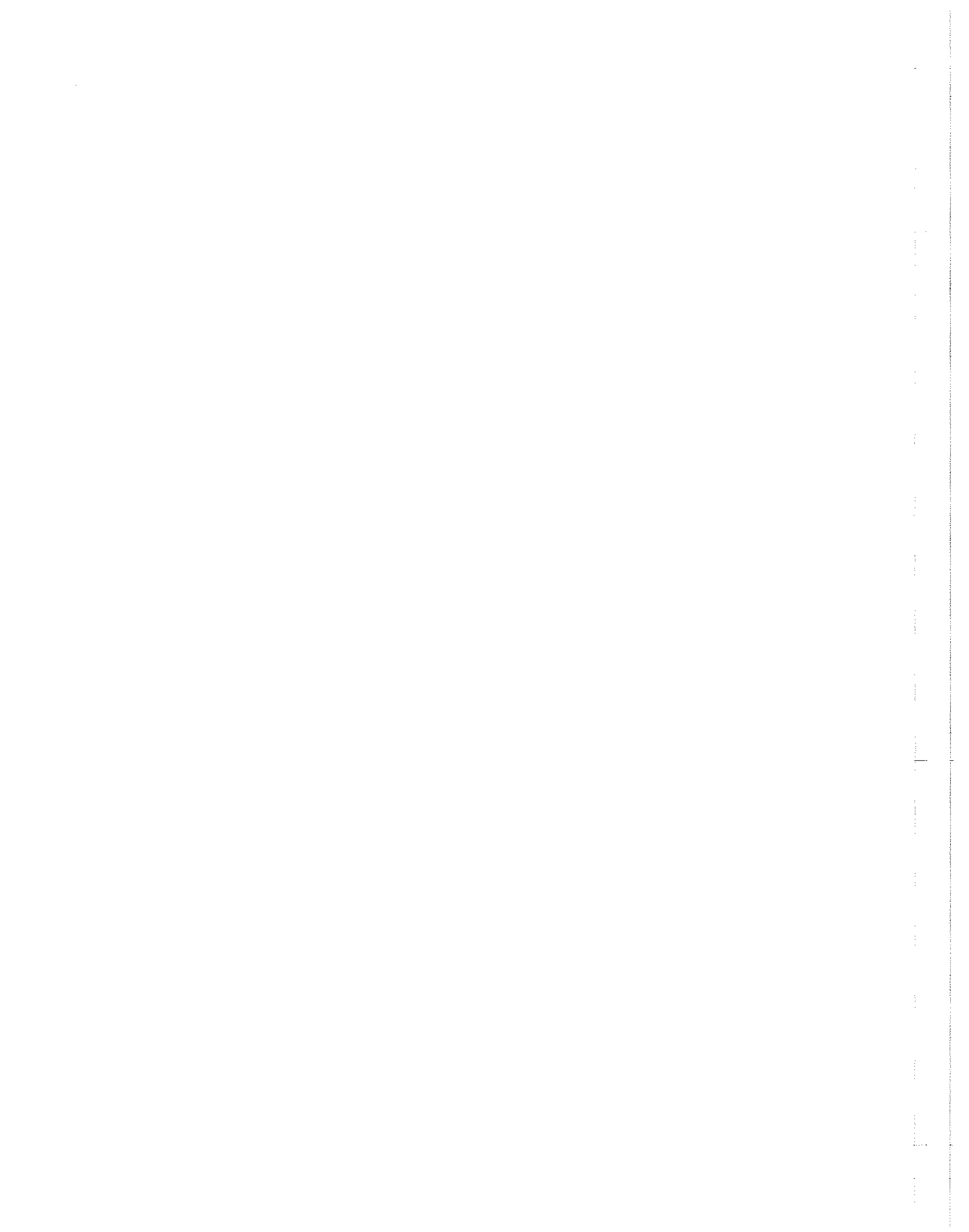
"DEFAMATION AND ITS DEFENSES IN IOWA"

Glenn L. Smith
Finley, Alt, Smith, Scharnberg, May & Craig, P.C.
Des Moines, Iowa



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"DEFAMATION AND ITS DEFENSES IN IOWA"

GLENN L. SMITH
Finley, Alt, Smith, Scharnberg, May & Craig, P.C.
Des Moines, Iowa

I. DEFINING DEFAMATION--the Plaintiff's Concern

A. DEFAMATION

1. Defamation is the invasion of a person's interest in their reputation and good name. Lara v. Thomas, 512 N.W.2d 777, 785 (Iowa 1994); Hughes v. Samuels Bros., 159 N.W. 589 (Iowa 1916).

2. It is the point of view of the third party that is important--only those statements that are perceived as defamatory by some third party are even potentially actionable, Overstreet v. New Nonpareil Co., 167 N.W. 669 (Iowa 1918); in other words, actionable defamation requires "publication." Marks v. Estate of Hartgerink, 528 N.W.2d 539, 545 (Iowa 1995). An allegedly slanderous statement has to be heard and understood by someone other than the plaintiff, Royston v. Vander Linden, 197 N.W. 435 (Iowa 1924), and an allegedly libelous statement has to be read and understood by someone other than the plaintiff, Mielenz v. Quasdorf, 28 N.W. 41 (Iowa 1886) in order to be actionable.

3. In order to be defamatory, a statement has to be false. At common law the defendant had the burden of proving the truth of an allegedly defamatory statement. However, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 89 L.Ed.2d 783, 106 S.Ct. 1558 (1986), the United States Supreme Court has declared the plaintiff must prove the falsity of the statement at least when the speech at issue is speech of public concern. See also Bagley v. Iowa Beef Processors, Inc., 797 F.2d 632, 648 (8th Cir. 1986) where the 8th Circuit stated "in Hepps, the Supreme Court made clear not only the proof of falsity was an additional component that must be borne by all First Amendment defamation plaintiffs, but that fault and falsity are two separate and distinct elements of recovery."

4. "Whether a publication is understood as defamatory must be determined by giving to the subject-matter thereof, as a whole, that meaning which naturally

belongs to the language used." Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 14 (Iowa 1990).

5. The question of "whether the words are capable of a defamatory meaning" is for the court to answer, whereas the question of "whether they were so understood" is for the jury. Vinson v. Linn-Marr Community School District, 360 N.W.2d 108, 116 (Iowa 1984).

B. LIBEL AND SLANDER

1. The law of defamation consists of the twin torts of libel and slander, Lara, 512 N.W.2d at 785:

   (a) slander--"the speaking of base and defamatory words tending to prejudice another in his [or her] reputation, office, trade, business or means of livelihood." Blacks Law Dictionary, 5th ed.

   (b) libel--"the malicious publication, expressed either in printing or writing, or by signs and pictures, tending to injure the reputation of another person or to expose the person to public hatred, contempt, or ridicule or to injure the person in the maintenance of the person's business." Vinson, 360 N.W.2d at 116; Kelly v. Iowa State Educ. Ass'n., 372 N.W.2d 288, 295 (Iowa 1985).

2. Although they are not recognized in every state, Iowa case law recognizes two divisions within both libel and slander:

   (a) slander per se--statements that are so naturally and immediately injurious that no proof of falsity, special harm, or malice is required. Lara v. Thomas, 512 N.W.2d at 785 (Iowa 1994).

      (1) --the following are categories of statements that have been deemed to be slanderous per se:

         (i) statements charging an indictable crime--the crime must subject the offender to jail sentence or involve moral turpitude. Rees v. O'Malley, 461 N.W.2d 833, 835 (Iowa 1990).

(ii) statements charging affliction with venereal disease. Dahl v. Hansen, 132 N.W. 965 (Iowa 1911).

(iii) statements tending to injure one in their profession, business, or vocation. Lara, 512 N.W.2d at 785; Amick v. Montross, 220 N.W. 51 (Iowa 1928).

(iv) statements that constitute "an attack on the integrity and moral character" of a person. Lara, 512 N.W.2d at 785.

(v) statements charging unchastity. Ballinger v. Democrat Co., 212 N.W. 557 (Iowa 1927).

(b) slander--those statements not falling in the category of slander per se--in the absence of the presumptions raised by a finding of slander per se, a plaintiff must prove falsity, actual harm to plaintiff's reputation and malice.

(c) libel per se--"words....of such a nature, whether true or not, that the court can presume as a matter of law that publication will have a libelous effect." Spencer v. Spencer, 479 N.W. 293, 296 (Iowa 1991) citing W. Prosser, Law of Torts, 746-47 (4th ed. 1971).

(1) The following are additional categories of statements that have been deemed to be libelous per se:

(i) "to make published statements accusing a person of being a liar, a cheater, or [a] thief." Spencer, 479 N.W.2d at 296.

(ii) "an attack on the integrity and moral character of a party." Vinson, 360 N.W.2d at 116.

(d) libel per quod--those statements requiring reference to facts and circumstances beyond the words actually used to establish their defamatory character--in the absence of the presumptions raised by a finding of libel per

se, a claimant must prove falsity, damages, and malice. Vinson, 360 N.W.2d at 115, Sheibley v. Ashton, 130 Iowa 195, 106 N.W. 618 (1966).

C. MALICE

1. There are two kinds of malice in the area of defamation, Vinson, 360 N.W.2d at 115:

   (a) legal malice--found when the words themselves are of such a damaging nature that malice is implied as a matter of law.

   (b) actual malice--found when there is proof of the speaker's bad motives or ill-will in publishing (either spoken or written) the statement--the actual motive/state of mind of the speaker/writer is dispositive. See McCarney v. Des Moines Register and Tribune, 239 N.W.2d 152, 156 (Iowa 1976) ("Actual antagonism or contempt has been held insufficient to show [actual] malice. So has intent to inflict harm. There must be an intent to inflict harm through falsehood"); see also St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2 262, 267-68 (1968).

      (1) The United States Supreme Court held that "public officials and public figures may not recover. . . unless they prove. . . actual malice - that is with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. at 279-80; see also Bagley v. IBP, Inc., 747 F.2d at 643.

II. DEFENDING DEFAMATION--the Defendant's Concern

A. TRUTH

1. "Substantial truth" is an absolute defense in a defamation action. Hovey v. Iowa State Daily Publication Bd., 372 N.W2d 253, 256 (Iowa 1985).

2. The defendant need not establish the literal truth of every detail so long as the "gist" or "sting" of the defamation charge is substantially true--one determines the "gist" or "sting" by "look[ing] at the highlight of the [publication], the pertinent

angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." Behr v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987).

3. The test for summary judgment on a defense of substantial truth is "whether the plaintiff would have been exposed to any more public disgrace had the publication been free of error." Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989).

B. OPINION

1. Iowa case law treats opinion as absolutely protected. Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989) citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805 (1974).

2. In Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir. 1986) the 8th Circuit adopted several factors to be used in determining whether a statement is fact or opinion: (1) the precision and specificity of the statement; (2) the literary context in which the statement was made, including tone and use of cautionary language; and (3) the public context in which the statement was made, including whether the statement concerned public or private figure(s).

3. In Milkovich v. Lorain Journal Co., 497 U.S. 1, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990) the Court determined that the protection needed for statements of opinion was provided by existing constitutional doctrine.

C. PRIVILEGE

1. "A statement is said to be privileged when one is justified in communicating defamatory information which would ordinarily be actionable without incurring liability." Marks v. Estate of Hartgerink, 528 N.W.2d 539, 545 (Iowa 1995).

2. There are two types of privilege, Vojak v. Jensen, 161 N.W.2d 100, 105 (Iowa 1968); Mills v. Denny, 63 N.W.2d 222, 224 (Iowa 1954):

   (a) absolute privilege--if found, offers a complete defense to liability regardless of

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the existence of actual malice. An absolute privilege applies to statements made in certain situations:

(1) judicial proceedings--"an absolute privilege [exists] for defamation which takes place in a judicial proceeding" so long as the statement is "made by one who has an interest in the subject matter to [someone]else who also has an interest in it or stands in such a relation that it is proper or reasonable....to give the information and so long as "the statement [has] some relation to the issues in the judicial proceeding." Spencer, 479 N.W.2d at 295; See Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988) (holding a workers' compensation hearing to be a "judicial proceeding" for the purposes of applying this absolute privilege).

(2) state and federal legislative proceedings -- an absolute privilege extends to statements made within the course of legislative proceedings at the state and federal level. Mills, 63 N.W. 2d at 225.

(3) high level executive communications-- "within the executive branch of government, an absolute defense against liability for libel attaches to all statements made by certain officials in the context of their participation in government--the complete defense extends only to the highest state officials." Jones, 440 N.W.2d at 892.

(b) qualified/conditional privilege--if found, offers a defense that can be overcome by a showing of actual malice. A qualified privilege exists when:

(1) "a qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which that person has a right or duty, if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion....the essentials of such a privilege are: (1)

good faith; (2) an interest to be upheld; (3) that the statement is limited in its scope to that [interest]; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only." Knudsen v. Chicago & N. Western Transp., 464 N.W.2d 439, 442 (Iowa 1990); Rees, 461 N.W.2d at 837; Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 104 (Iowa 1985); Brown v. First Nat'l Bank, 193 N.W.2d 547, 552 (Iowa 1972).

(2) Qualified privilege status has been extended to statements made in certain situations:

(i) lower level executive communications --"a qualified privilege may attach to certain statements made by a lower-ranking government official which are necessary to the performance of official duties." Jones, 440 N.W.2d at 893.

(ii) legislative proceedings below state level--see Mills, 63 N.W.2d at 226 (statements made in a city council meeting are entitled to a qualified, as opposed to absolute, privilege).

(iii) right to reply--"if a person is attacked in a newspaper, he may write to the paper to rebut the charges, and may at the same time retort upon his assailant, where such retort is a necessary part of his defense or fairly arises out of the charges he has made....a man who commences a newspaper war cannot subsequently come to the court as plaintiff to complain that he has had the worst of the fray." Haas v. Evening Democrat Company, 107 N.W.2d 444, 453 (Iowa 1961).

(iv) Job Service proceedings--"A report or statement, whether written or verbal, made by a person to a representative of the division or to another person administering this law is a privileged communication. A person is not liable for slander

or libel on account of the report or statement unless the report or statement is made with actual malice." Iowa Code §96.11(7)(b)(2); Palmer v. Women's Christian Ass'n of Council Bluffs, Iowa, 485 N.W.2d 93, 97 (Iowa App. 1992).

(v) statements made in the context of a church disciplinary proceeding. Marks, 528 N.W.2d at 546.

(3) Abuse of a qualified or conditional privilege:

A qualified privilege can be lost if it is abused or exceeded. See Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306, 309 (Iowa App. 1989) (a qualified privilege is lost if it is abused); Brown v. First Nat'l Bank of Mason City, 193 N.W.2d 547, 552 (Iowa 1972) ("the qualified privilege, by its very nature, does not allow widespread or unrestricted communication"); Robinson v. Home Fire & Marine Ins. Co., 59 N.W.2d 776, 782 (Iowa 1953) ("a qualified privilege may be abused by excessive publication of the defamatory matter, as by knowingly publishing it to a person to whom its publication is not otherwise privileged").

D. CONSTITUTIONAL DEFENSES

1. Petitioning the government: "petitioning, like other guarantees of the first amendment, is an assurance of a particular freedom of expression." Bagley v. IBP, Inc., 797 F.2d at 640 citing McDonald v. Smith, ___ U.S. ___, 105 S.Ct. 2787, 2789, 86 L.Ed.2d 384 (1985).

2. Activities which qualify as first amendment petitioning (those that are "genuinely intended to influence the legislative process" without at the same time "abus[ing] or corupt[ing]" it) are afforded defamation protection subject to and consistent with the rules laid down in Sullivan, Gertz, and Hepps (see infra). Bagley v. IBP, Inc.

3. Fair Report/Comment--Under common law there was a "fair comment" or "fair report" privilege; this privilege is now embodied in several constitutional

First Amendment U.S. Supreme Court decisions, see Jones, 440 N.W.2d at 897.

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4. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) afforded first amendment protection to defamation concerning the official conduct of a "public official." Even if defamatory statements concerning a public official are false, the public official, in order to recover, is required to show that those statements were made with "actual malice." See Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 890 (Iowa 1989) ("actual malice means that the statement was made with knowledge that it is false or with reckless disregard for its truth or falsity").

   (a) Who is a "public official"?

      (1) Rosenblatt v. Baer, 383 U.S. at 85, 86 S.Ct. at 676, 15 L.Ed.2d at 605 "the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

      (2) Hutchinson v. Proximire, 443 U.S. 111, 119 n. 8, 99 S.Ct. 2675, 2680 n. 8, L.Ed.2d 411, 421 n. 8 (1979) "public official....cannot be thought to include all public employees...."

      (3) Jones, 440 N.W.2d at 895, quoted Rosenblatt and Proximire in support of its decision that a low-ranking fire fighter is not a public official".

      (4) In McCarney v. Des Moines Register and Tribune, 239 N.W.2d 152 (Iowa 1976), the court held that a captain of a police force was a public official.

   (b) Who is a "public figure"?

      (1) Those persons who have in some degree voluntarily thrust themselves to the forefront of a particular public controversy and who are better able to minimize the adverse impact of the

defamation through their access to the mass media.

(2) There are three types of public figures, Id. citing Gertz, 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808:

(i) all purpose public figures--persons who have "achieved such pervasive fame or notoriety" or who "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes;"

(ii) limited purpose public figures--those "individuals who thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved" See Haas, 107 N.W.2d at 448 and

(iii) involuntary public figures--when an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed an involuntary public figure. See 50 Am Jur 2d §72 at 387; see also Jones, 440 N.W.2d at 895 ("instances of truly involuntary public figures must be exceedingly rare") quoting Gertz.

(c) In cases controlled by the standard established in Sullivan and Gertz, a publisher of allegedly defamatory speech or written material will not be held liable if they were merely negligent in publishing the speech or material. See Jones, 440 N.W.2d at 890.

5. PRIVATE PLAINTIFFS

(a) In Gertz, the Supreme Court left states free to "define for themselves the appropriate standards of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual" so long as that level was not set at strict liability. Id.

(b) Since Gertz, the Iowa Supreme Court has had several occasion to define the limits of liability in defamation actions brought be private individuals:

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(1) Vinson v. Linn-Marr Community School District, 360 N.W.2d 108 (Iowa 1985) held that in an action between a private individual and a non-media defendant, the Sullivan and Gertz requirement of "actual malice" is not needed to protect the First Amendment interests of the speaker.

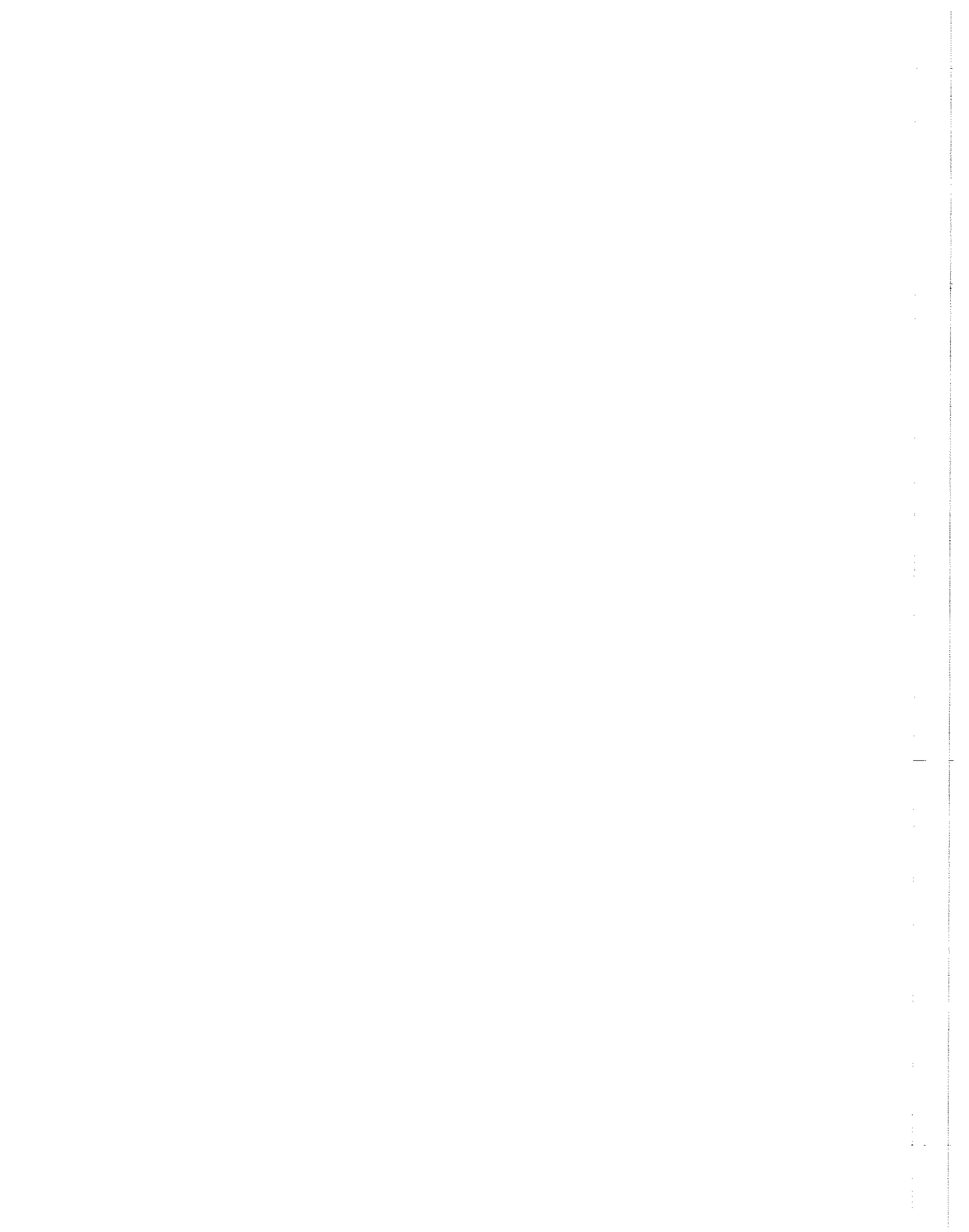
(2) Jones v. Palmer Communications, Inc., 440 N.W.2d 884(Iowa 1989) held that in an action between a private individual and a media defendant a negligence standard applies. Actual malice must be proven in order to be awarded punitive damages. Id. at 899.

(c) In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 768, 106 S.Ct. 1558, 89 L.Ed.2d at 787 (1986), the United States Supreme Court held that "fault" and "falsity" are different considerations and that in order to prevail on a defamation claim, a private plaintiff must not only show fault, but they also bear the burden of proving falsity. See also In re IBP Confidential Bus. Documents Litigation, 797 F.2d at 647 (identifying "elements of recovery constitutionally necessary" to support a private plaintiff's libel judgment).

D

JOINT TRIAL ADVOCACY COLLEGE SCHEDULE

Deborah J. Hughes
Irvine & Robbins
Cedar Rapids, Iowa



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JOINT TRIAL ADVOCACY COLLEGE
SCHEDULE

THURSDAY, JUNE 8, 1995

8:30 - 9:00 Continental Breakfast at the Law School and Registration

9:00 - 9:15 Overview

9:15 - 9:45 Jury Selection:

15 minutes from the plaintiff's perspective - Dwight James

15 minutes from the defendant's perspective - Connie Alt

9:45 - 12:00 VOIR DIRE

Time	Section	
9:45	A1	Performance/Critique
10:15	A2	Performance/Critique
10:45		Break
11:00	A3	Performance/Critique
11:30	A4	Performance/Critique

12:00 - 1:00 Lunch at the Law School

1:00 - 1:30 Opening Statements:

15 minutes from the Plaintiff's perspective - Ed Gallagher, Jr.

15 minutes from the Defendant's perspective - Carol Freeman

1:30 - 4:00 OPENING STATEMENTS

1:30	B1	Performance/Critique
2:05	B2	Performance/Critique
2:40	B3	Performance/Critique
3:15		Break
3:25	B4	Performance/Critique

Small Group Leaders make assignments for Direct and Cross Examinations.

4:00 to 5:00 Evidentiary Issues and Preserving the Record - Iris Muchmore, Phil Willson and Jean Pendleton.

6:00 p.m. Cocktail Party at Jim Hayes' home
1142 East Court Street
Iowa City, Iowa 52240

FRIDAY, JUNE 9, 1995

8:30 - 9:00 Continental Breakfast

9:00 - 9:30 Ethics and Professionalism - Scott Peters

9:30 - 9:50 Direct Examination - Dorothy O'Brien

9:50 - 10:10 Cross Examination - Dave Phipps

10:10 - 12:00 DIRECT AND CROSS EXAMINATION

10:10	B1	Performance/Critique (A1 is the Witness)
10:35	B2	Performance/Critique (A2 is the Witness)
11:00		Break
11:10	B3	Performance/Critique (A3 is the Witness)
11:35	B4	Performance/Critique (A4 is the Witness)

12:00 - 1:15	Lunch at the Law School
1:15 - 1:45	Final Argument:

15 minutes from the Plaintiff's perspective - Bruce Braley

15 minutes from the Defendant's perspective - Pat Roby

1:45 - 4:00 CLOSING ARGUMENT

1:45	A1	Performance/Critique
2:15	A2	Performance/Critique
2:45		Break
3:00	A3	Performance/Critique
3:30	A4	Performance/Critique

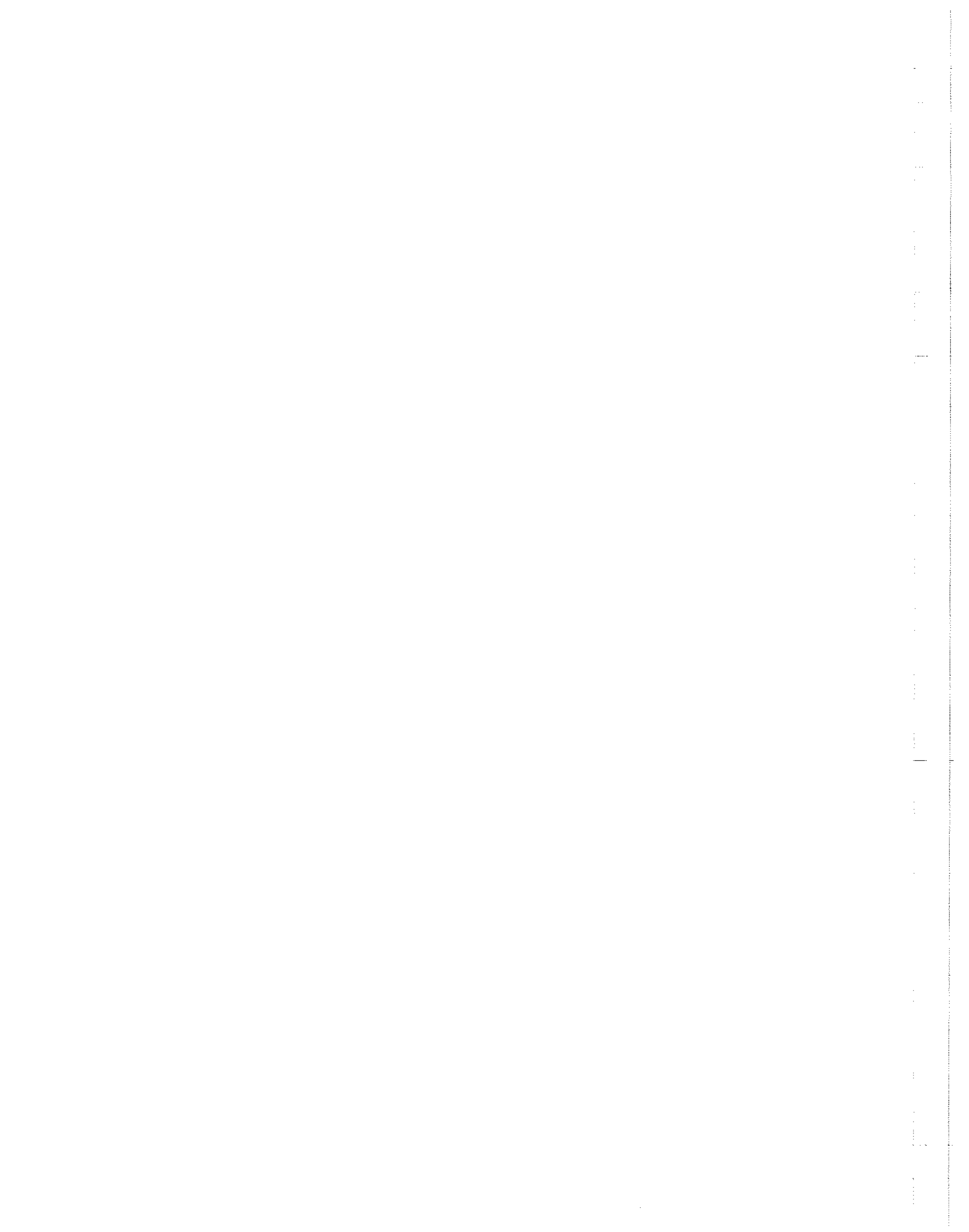
4:00 - 5:00 Students work on preparation for mock trials in small sections. Instructors make assignments for Saturday's session.

SATURDAY, JUNE 10, 1995

9:00 - 12:00 Mock Trials in small sections and critiques

9:00	Voir Dire	Plaintiff
9:15	Voir Dire	Defendant
9:30	Opening	Plaintiff
9:45	Opening	Defendant
10:00	Direct Examination	Plaintiff
10:15	Cross Examination	Defendant
10:30	Direct Examination	Defendant
10:45	Cross Examination	Plaintiff
11:00	Closing	Plaintiff
11:15	Closing	Defendant

11:30 - 11:45 DELIBERATIONS



E

TORTIOUS INTERFERENCE: ELEMENTS AND DEFENSES

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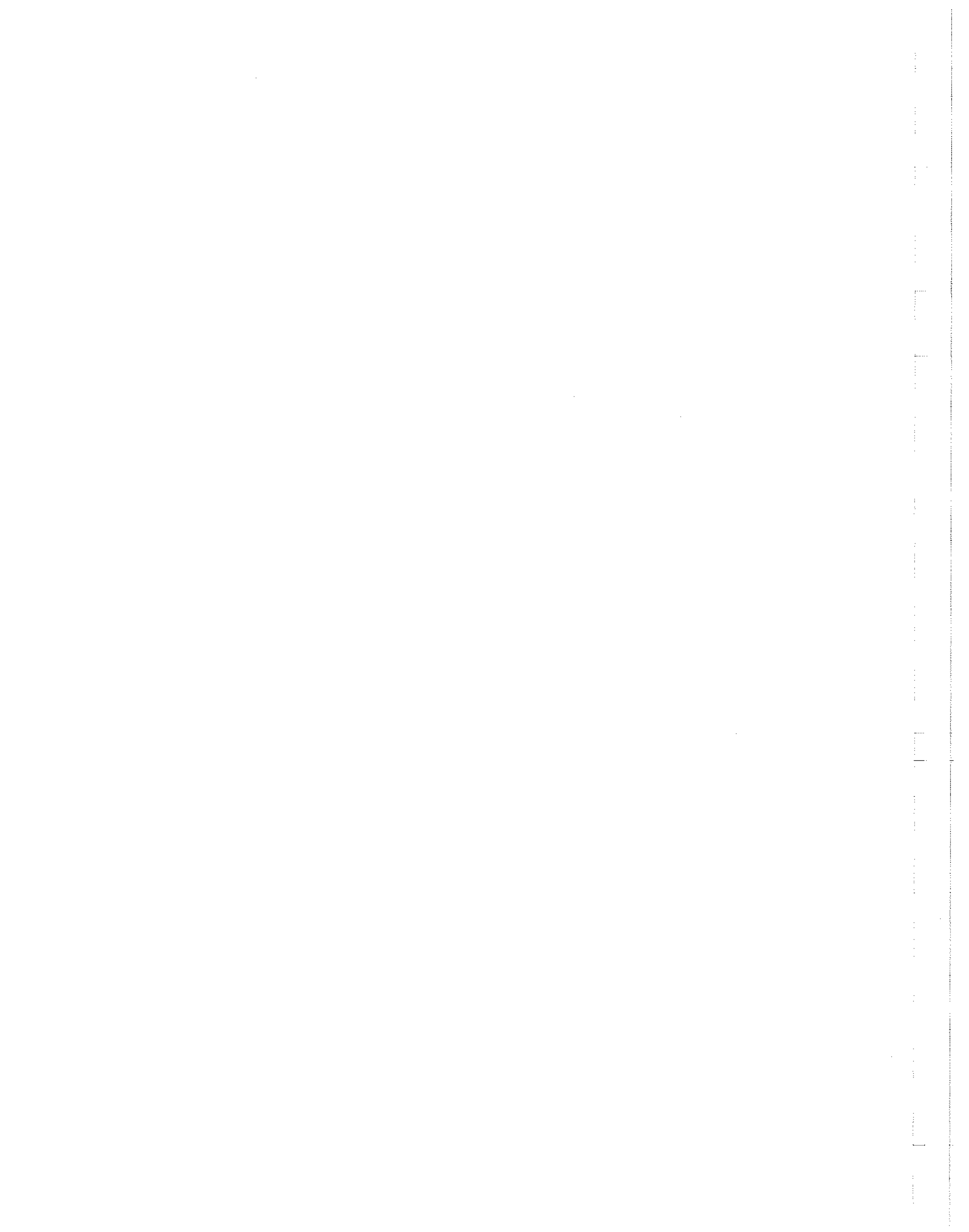

TORTIOUS INTERFERENCE: ELEMENTS AND DEFENSES

> *"...if the comers to my market are disturbed or beaten, by which I lose my toll, I shall have a good action of trespass on the case."*
> 11 Hen. IV 47

E

I. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

A. An existing valid contractual relationship or expectancy

Kabe's Restaurant, Ltd. v. Kintner, (unpublished Court of Appeals Decision filed January 23, 1995)
Tort of intentional interference with a contractual relationship applies to at-will employment contracts. Accord: Toney v. Casey's General Stores, Inc., 372 N.W.2d 220 (Iowa 1985) (but at-will employee must produce "substantial evidence of a predominant motive to terminate the employment for improper reasons.")

Hunter v. Bd. of Trustees, 481 N.W.2d 510 (Iowa 1992)
While one cannot tortiously interfere with a contract to which one is a party, employee is not generally considered a party to employer's employment contract with another employee and thus may be liable for interference notwithstanding qualified privilege to which officers and directors are entitled.

Grahek v. Voluntary Hosp. Co-op., 473 N.W.2d 31 (Iowa 1991)
Intentional interference with contractual relations found only where the tortfeasor is a third-party to the contract. Court remanded to determine whether alleged tortfeasor was a party to the employment contract which was terminated.

Irons v. Community State Bank, 461 N.W.2d 849 (Iowa 1990)
One cannot tortiously interfere with a contract to which she is a party.

Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)
Claim of intentional interference by a foreclosing senior mortgagee with a contractual relationship between a farm tenant and the United States Department of Agriculture. The court found that there was a business relationship between the farm tenant and the Department of Agriculture.

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)
Investigating lawsuits against plaintiff real estate developer and complaints to city building inspector regarding his construction site, while lawful activity standing alone, were improper because motivated by desire to harass.

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Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)
A party to a contract cannot tortiously interfere with that contract.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 1986)
Bank may be held liable for intentional interference with existing contracts based on its alleged interference with tenant's agricultural lease even though the interference occurred after the tenant breached the contract by nonpayment of rent. The contract was not terminated until after the bank's alleged interference.

Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985)
Intentional interference not found because the tortfeasor's alleged conduct did not cause the contract between two other parties to be breached. The bank reassigned the plaintiff from the Amana office to the Cedar Rapids office of the bank. Plaintiff had no contractual right to be assigned to the Amana office and therefore neither the defendants nor the bank intentionally interfered with the plaintiff's employment contract.

Edward Vantine Studios v. Fraternal Composites, 373 N.W.2d 512 (Iowa App. 1985)
Contracts between a photographer and several fraternities and sororities were valid contracts despite the competitor photographer's claim that the contracts were invalid due to a clause stating that plaintiff could not honor the contracts unless received by his office within fourteen days.

Bump v. Stewart, Wimer & Bump, 336 N.W.2d 731 (Iowa 1983)
Ousted member of law firm unsuccessfully brought claim of tortious interference with his contract since there was not a valid contract and there was no evidence presented of damages to the plaintiff.

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982)
Intentional interference with contractual relationship found where defendant corporation refused to allow the plaintiff corporation to use the steam line on its premises to pump molasses onto barges. The plaintiff had a lease right to use the steam line and the court awarded plaintiff actual and punitive damages for defendant's refusal to allow the plaintiff to use the steam lines.

Restatement (Second) of Torts Section 766, Comment f (1979)
A void contract cannot be the basis for this claim but a voidable contract may. Until the contract is voided, it remains valid and may not be interfered with in an improper manner.

B. Knowledge of the relationship on the part of the interferer

Restatement (Second) of Torts Section 766, Comment i (1979)
The actor must have knowledge of the contract with which she is interfering and of the fact that she is interfering with the performance of the contract. However, it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty and it is no defense that she is mistaken as to their legal significance or misbelieves that the agreement is not legally binding or has a different legal effect from what it is judicially held to have.

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C. Intentional interference

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)
If otherwise legal actions are found to have been taken with intent to harass, this could amount to intentional and improper interference. "Intent" means that the actor desires to cause the consequences of his act or that he believes that the consequences are substantially certain to result from it. "Intent" and "motive" should not be confused. Motive or purpose determines whether the interference was improper.

Farmers Coop Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975)
Intent to perform the acts that cause the interference is required but proof of intent to injure or destroy a relationship is not.

Restatement (Second) of Torts Section 766C (1979)
No liability exists for negligent interference with contractual relations.

D. Improper interference

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)
Improper interference found where bank interfered with corporation's former shareholder's contractual rights by releasing all corporate funds within its possession to corporate employee. Evidence was presented that the bank operated in concert with employee to remove the shareholders from the operation of the corporation.

Fischer v. Unipac Service Corp., 519 N.W.2d 793 (Iowa 1994)
Defendant's interference is not "improper," and will not give rise to tort claim, where defendant has right or duty to act.

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Jackson v. State Bank of Wapello, 488 N.W.2d 151 (Iowa 1992)
Since bank had legal right to refuse to advance additional funds because it deemed itself insecure, as a matter of law, bank's acts were not improper.

Hunter v. Bd. of Trustees, 481 N.W.2d 510 (Iowa 1992)
Must show actions were improper but need not show actions were malicious.

Kansas City Life Ins. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)
Senior mortgagee's certification to USDA of itself as operator of plaintiff's farm property thereby precluding plaintiff from participating in federal crop support program created jury issue on "improper" interference.

Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990)
If otherwise legal actions are found to have been taken with intent to harass, this could amount to intentional and improper interference.

Kendall\Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988)
No improper interference with plaintiff's right of first refusal to publish where authors approached defendant and defendant's contract did not preclude plaintiff's right of first refusal.

Peterson v. First National Bank, 392 N.W.2d 158 (Iowa App. 1986)
Court found that there was sufficient evidence that the jury reasonably could have determined the bank did not employ proper means when it terminated the tenant's agricultural lease.

Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986)
Threat of economic reprisal is recognized as a basis for recovery; case remanded to determine whether surgeon's threat to end his professional association with clinic or threats of substantial economic reprisal unless plaintiff was terminated constituted interference with plaintiff's employment contract.

Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985)
Since the plaintiff had no right under the employment contract to be assigned to branch office, interference resulting in plaintiff's reassignment to main office did not constitute interference with contractual relations and directed verdict for defendants was appropriate.

Polito v. Perkins Restaurants, Inc., 617 F. Supp. 380 (D.C. Iowa 1985)
Defendant's offer of new job, inducing plaintiff to voluntarily quit old job, was not improper even though defendant terminated plaintiff less than one year later.

Edward Vantine Studios v. Fraternal Composites, 373 N.W.2d 512 (Iowa App. 1985)
Intentional and improper interference with contractual relations found where competitor advised various fraternities and sororities that if they executed a new

contract with the competitor that he would indemnify the fraternities and sororities for any legal costs or fees incurred by their breach of existing contract with photographer. Several of the fraternities would not have breached their contract with the photographer without the competitor's promise to indemnify.

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982)

Defendants conspired with one another in sending a letter to the lessee that he could no longer use a steam line, which was guaranteed to the lessee.

Team Cent., Inc. v. Teamco, Inc, 271 N.W.2d 914 (Iowa 1979)

Substantial evidence of improper conduct existed to support jury verdict, including evidence of defendant's deceptive representations concerning the proposed purchase of plaintiff's business long after there was no possibility that the deal would be consummated and evidence that defendant intervened to prevent a sale of the business to another.

Restatement (Second) of Torts Section 767 (1979)

In determining whether interference is improper, consideration is given to the nature of the actor's conduct; the actor's motive; the interests of the other with which the actor's conduct interferes; the interests sought to be advanced by the actor; the social interests in protecting the freedom of action of the actor and contractual interests of the other; the proximity or remoteness of the actor's conduct to the interference; and the relations between the parties. Language quoted in Hunter v. Bd. of Trustees, 481 N.W.2d 510 (Iowa 1992).

E. Resultant damage to the party whose relationship or expectancy has been disrupted

Irons v. Community State Bank, 461 N.W.2d 849 (Iowa 1990)

Plaintiffs failed to show requisite loss since their relationship with FmHA had not been breached or terminated.

Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986)

Resultant damage is not limited to actual breach or loss of contract; it can include an increase in the burden of performance. Accord: Toney v. Casey's General Stores, Inc. 372 N.W.2d 220 (Iowa 1985); Nesler v. Fisher & Co., 452 N.W.2d 191 (Iowa 1990).

Edward Vantine Studios v. Fraternal Composites, 373 N.W.2d 512 (Iowa App. 1985)

Punitive damages may be awarded in cases of intentional interference with a business or contractual relationship only if the interference is with legal malice.

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982)

Although the plaintiff failed to provide evidence to support the determination of compensatory damages, the plaintiff was still entitled to punitive damages since actual damages were shown and substantial evidence was found to show the tort was committed with legal malice.

Pringle Tax Service v. Knoblauch, 282 N.W.2d 151 (Iowa 1979)

Exemplary damages awarded where court found the defendant maliciously interfered with plaintiff's business relationships by breaching a covenant not to compete.

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II. INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS/ BUSINESS EXPECTANCIES

A. A prospective contractual or business relationship existed

Restatement (Second) of Torts Section 766B (1979)

Any prospective contractual relation of pecuniary value is protected against interference even if the prospective relation is not expected to be reduced to a formal, binding contract. It may include prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation.

B. Knowledge of the prospective relationship on the part of the interferer

C. Intentional interference

Restatement (Second) of Torts Section 766C (1979)

No liability exists for negligent interference with prospective relationships

D. Improper interference

Fischer v. Unipac Service Corp, 519 N.W.2d 793 (Iowa 1994)

Plaintiff must show "purpose" on part of defendant to financially injure or destroy plaintiff.

First Medical, Inc. v. Embassy Manor Care Center, Inc., 483 N.W.2d 14 (Iowa App. 1992)

Terminating relationship with plaintiff pharmacist in favor of another pharmacist does not establish improper motive.

Hoeffer v. Wis. Educ. Ass'n Ins. Trust, 470 N.W.2d 336 (Iowa 1991)

Plaintiffs are held to a "strict standard of substantial proof 'that the defendant acted with a predominantly improper purpose;'" this rule of strict proof operates "'to avoid opening the door to virtually limitless suits of a highly speculative and remote nature'" in a competitive business setting.

Kansas City Life Ins. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)

The court found that there was sufficient evidence that Kansas City Life acted with the purpose of injuring or destroying Hullinger's prospective contractual relations with the Department of Agriculture.

Preferred Marketing v. Hawkeye Nat. Life, 452 N.W.2d 389 (Iowa 1990)

Terminated insurance agent failed to present evidence that insurer improperly interfered with agent's expectancy of future commissions since insurer was contractually entitled to terminate agency relationship at will and there was no evidence that predominant motive for termination was to damage agent's business rather than to rid itself of an uncooperative marketing director.

Page County Appliance Center v. Honeywell, 347 N.W.2d 171 (Iowa 1984)

In appliance store owner's suit against travel agency, computer lessor and computer manufacturer alleging radiation from computer installed in travel agency had interfered with reception of display televisions at appliance store, evidence merely established a total disregard for the success of the appliance store and not a purpose to financially injure or destroy.

Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984)

Where a defendant acts for two or more purposes, his improper purpose must predominate.

Clarke v. Figge, 181 N.W.2d 211 (Iowa 1970)

Intentional interference with prospective economic advantage found in a case where the defendant, president of bank, intentionally attempted to injure plaintiff and corporation in which plaintiff held stock. Accord: Farmers Coop Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975).

Restatement (Second) of Torts Section 766C (1979)

No liability exists for negligent interference with prospective economic relations.

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E. The actor's interference caused the relationship to fail to materialize

Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984)
Chain of causation between officers' allegedly false statements and plaintiff's loss of business expectancies was broken where plaintiff had a full and fair opportunity to be heard on liquor licensing issue during adversary proceedings before public body charged with making licensing decision.

F. The existence and amount of resulting damages

Hoefer v. Wis. Educ. Ass'n. Ins. Trust, 470 N.W.2d 336 (Iowa 1991)
Agent representing unsuccessful bidder on school district's insurance contract did not show damages from fact that contract was awarded to an insurer which was later determined to lack authority to bid since agent's insurer finished seventh in the bidding.

Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731 (Iowa 1983)
Ousted member of law firm presented no evidence of damage in light of the fact that his income more than doubled in the calendar year following his separation from the firm.

III. AFFIRMATIVE DEFENSES

A. Justification

Peterson v. First National Bank, 392 N.W.2d 158 (Iowa App. 1986)
Bank failed to establish the affirmative defense of justification since a jury could have found that the bank did not employ proper means.

C.F.Sales v. Amfert, Inc., 344 N.W.2d 543 (Iowa 1983)
Manufacturer was not justified inducing retailer to stop delivery of fertilizer to a purchaser since fertilizer had already been sold pursuant to a valid contract and thus manufacturer no longer had a "legally protected interest" in the fertilizer.

Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731, 737 (Iowa 1983)
Terminating plaintiff's alleged employment contract was justified due to concern for preservation of established law practice and there was no evidence wrongful means were employed in separating ousted attorney from the firm.

Locksley v. Anesthesiologists of Cedar Rapids, P.C., 333 N.W.2d 451, 455 (Iowa 1983)

Numerous incidents of incompetent care by neurosurgeon justified refusal to supply neurosurgeon with anesthesia service.

Iowa Defense Counsel Association Report on Civil Jury Instructions, Chapter 1200

Proposes jury instructions on affirmative defenses of "right to compete," "financial interest," "truthful information," and "honest advice."

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B. Privilege

Kabe's Restaurant, Ltd. v. Kintner, (unpublished Court of Appeals Decision filed January 23, 1995)

Major shareholder, officer and director of corporation had a fiduciary duty to the corporation and his actions (calling a special board meeting at which the plaintiff's job was examined and employment was terminated) were protected by qualified privilege as long as he did not use improper means and acted in good faith to protect the interests of the corporation. Granting defendant's motion for judgment notwithstanding the verdict sustained on appeal.

Hsu v. Vet-A-Mix, Inc., 479 N.W.2d 336 (Iowa App. 1991)

Officers and directors of corporation have a qualified privilege to interfere with corporate business relations so long as they are acting in good faith and do not employ improper means. Accord: Bossuyt v. Osage Farmers Nat. Bank, 360 N.W.2d 769 (Iowa 1985).

IV. INSURANCE COVERAGE

Employers Reinsurance v. Mutual Medical, 504 N.W.2d 885 (Iowa 1993)

Insurance coverage extending to "negligent acts, errors or omissions" does not extend coverage to tortious interference claims since such depend upon deliberate, not merely negligent, acts.

V. STATUTE OF LIMITATIONS

A. The five year statute of Section 614.1(4) applies

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 403 (Iowa 1982).

B. Statute runs from the date plaintiff suffers damage

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

Plaintiff's claim for loss of opportunity to negotiate reduction in outstanding judgment did not accrue until plaintiff paid full amount of judgment and not when defendant took assignment of judgment.

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982)

Defendant's failure to plead the five year statute of limitations absolved the court from determining when the tort was complete. Defendant did not offer an excuse for their failure to plead the statute of limitations.

VI. JURY INSTRUCTIONS

A. Iowa Civil Jury Instructions, Chapter 1200.

B. Iowa Defense Counsel Association Report on Civil Jury Instructions, Chapter 1200.

Acknowledgement

I would like to acknowledge the intentional and proper efforts of Mark A. Pihart, a third-year student at the University of Iowa College of Law, toward the research and preparation of this outline.

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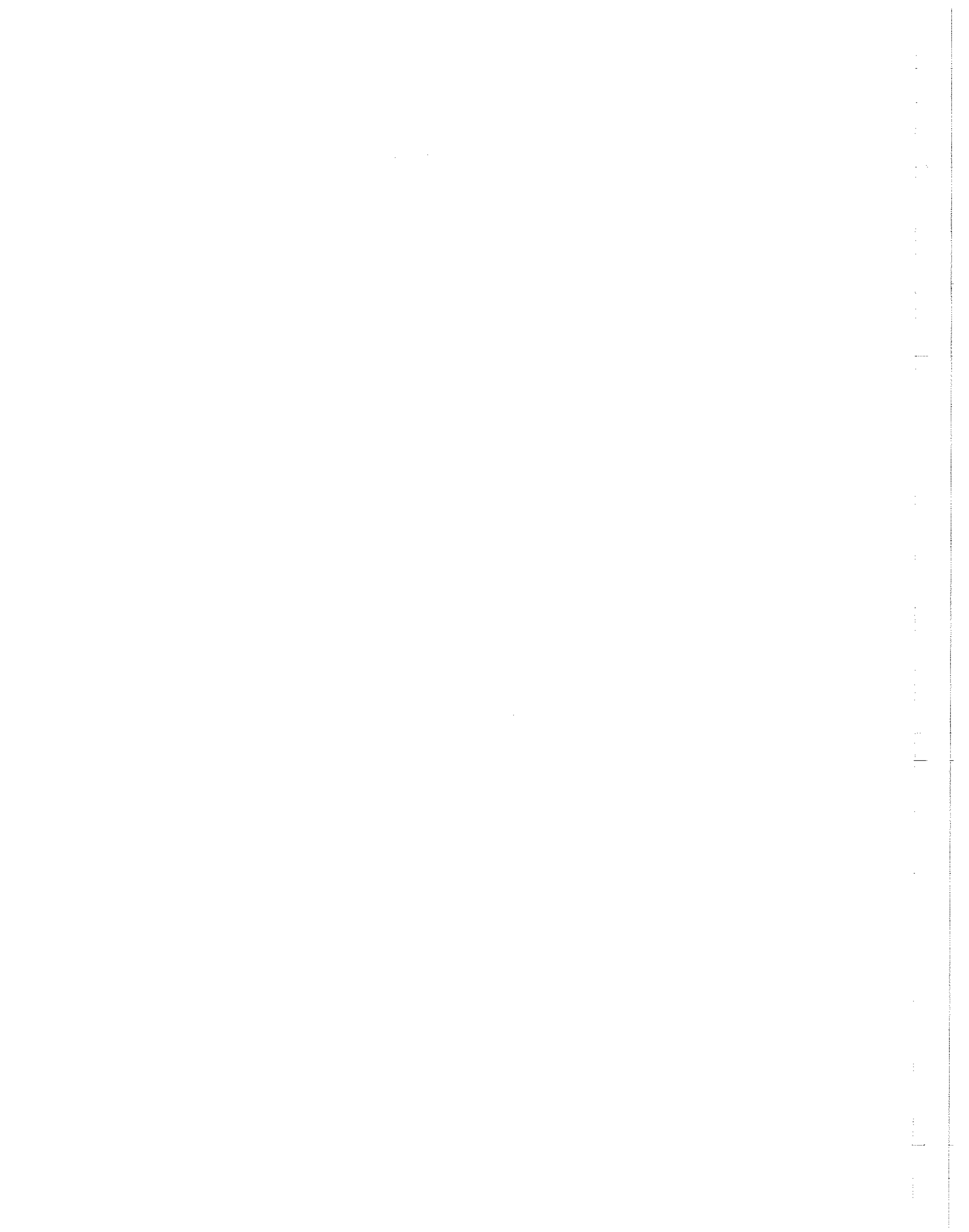

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CIVIL RICO OVERVIEW & DEVELOPMENTS

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TABLE OF CONTENTS

I. LEGISLATIVE HISTORY AND JUDICIAL ATTITUDES 1

II. STATUTORY LANGUAGE AND CONSTRUCTION 3

III. INJURY TO BUSINESS OR PROPERTY 4

IV. SECTION 1964-CAUSATION /STANDING REQUIREMENTS-"BY REASON OF" 5

V. SECTION 1962 - THE FOUR GROUNDS FOR RICO LIABILITY 8

- A. SECTION 1962(A) LIABILITY 8
- B. SECTION 1962(B) LIABILITY 9
- C. SECTION 1962(C) LIABILITY 9
- D. SECTION 1962(D) LIABILITY 11

VI. RACKETEERING ACTIVITY/PREDICATE ACTS 13

VII. ENTERPRISE 15

VIII. PATTERN 18

IX. MISCELLANEOUS PRETRIAL ISSUES 22

- A. JURISDICTION 22
- B. SECTION 1965 - SPECIAL VENUE AND PROCESS PROVISIONS 23
- C. STATUTE OF LIMITATIONS 23
- D. PLEADING ISSUES 23

X. MISCELLANEOUS TRIAL ISSUES 25

- A. BURDEN OF PROOF 25
- B. DAMAGES/ATTORNEYS FEES 25

APPENDIX I - 18 U.S.C. §§ 1961-1965

APPENDIX II - RICO STANDING ORDER

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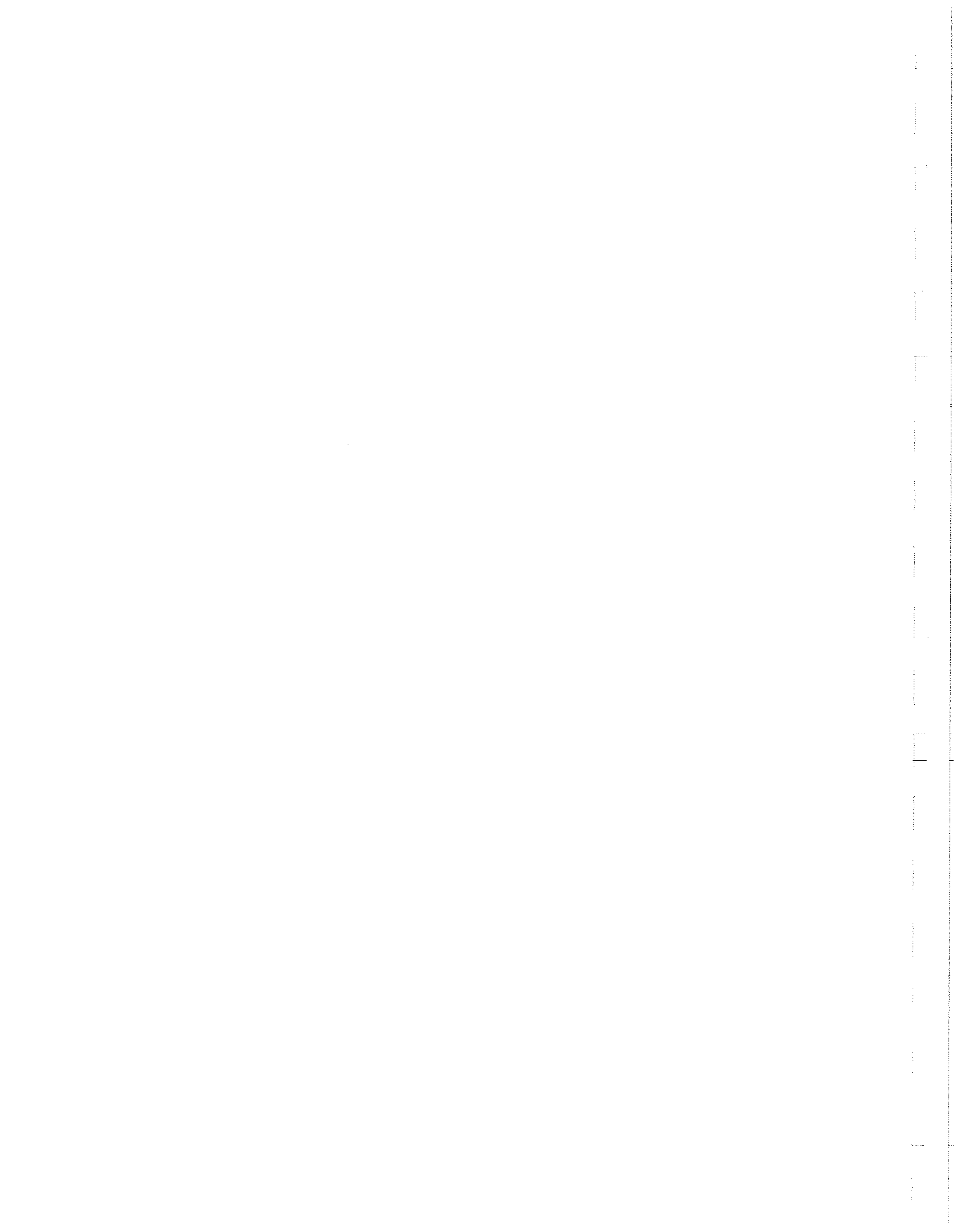

CIVIL RICO - OVERVIEW AND DEVELOPMENTS

I. LEGISLATIVE HISTORY AND JUDICIAL ATTITUDES

The "Racketeer Influenced Corrupt Organization ("RICO") Act" is set out in 18 USC § § 1961-1968. The statute was enacted in 1970 as one title of a 13-title bill known as the Organized Crime Control Act. As its title suggests, RICO and the accompanying legislation comprising the Organized Crime Control Act primarily were enacted as part of the "law and order" program of the Nixon administration and Congress. The Act was the "culmination of a long period of public concern about the threat posed by organized crime". David B. Smith & Terrance G. Reed, Civil RICO 1-1(Perm. Ed. rev. Vol. 1995). The OCCA's stated purpose was to "seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime". Organized Crime Control Act of 1970, PUB. L. No. 91-452, Statement of FIndings and Purpose, 84 Stat. 922-23 (1970).

The Senate report indicated that RICO's primary purpose was to "eliminate . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce". The origin of the statute is a 1967 report of The President's Commission On Law Enforcement And Administration Of Justice. The report identified four methods through which organized crime commonly acquired control of businesses: (1) investment of profits from illegal activities, (2) acquiring interests in business in satisfaction of gambling debts, (3) charging and collecting loans with usurious interest rates, and (4) exercising various forms of extortion. The primary purpose of the first drafts of RICO legislation was to address the first of these concerns: investment of illegal profits in legitimate business activities. Smith & Reed Civil RICO, 1-2.

As the Supreme Court recognized in 1985, RICO has evolved "into something quite different from the original conception of its enactors". Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985). *See* Bennett v. Berg, 685 F 2d 1053, 1063 (8th Cir. 1982) (determining that RICO suits are not limited to circumstances in which ties to organized crime are alleged), *rev'd in part on other*

grounds, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S Ct. 527, 78 L. Ed. 2d 710 (1983).

For the first 10-12 years of its existence, the Civil RICO statute was seldom used. There were only two reported decisions under the statutes between 1970 and 1978, and only 13 reported decisions through 1981. Since that date, however, there has been an explosion of decisions within a period of only a few years. As of the time of the Supreme Court's decision in Sedima, there were 270 reported decisions involving RICO Of those, 77% alleged securities or other fraud as the predicate act. Only 9% involved criminal conduct ordinarily associated with organized crime. Douglas E. Abrams, The Law of Civil RICO 5 (1991). Since 1975 Civil RICO filings have averaged over 1,000 a year. Smith & Reed, Civil RICO 8 (Cum. Supp. March 1995).

Civil RICO has engendered substantial controversy since the flood of RICO decisions commencing in the early 1980's For example, in his dissent in Sedima, Justice Powell complained that RICO was "used more often against respected businesses with no ties to organized crime, than against the mobsters who were clearly intended targets of the statute". Sedima, 473 U.S. at 526. However, it is largely because of the U.S. Supreme Court's interpretation of Sedima and other decisions that civil RICO has expanded in significance.

Judicial response to the statute varies dramatically. However, a general review of the District Court decisions, as well as some statistical studies, evidences continued judicial hostility to Civil RICO claims. *See, e.g.*, Goldsmith, Civil RICO Reform: The Basis for Compromise, 71 Minn. L. Rev 827, 837-40 (1987) In the Northern District of Iowa, although a number of RICO claims have been plead, only one has ever been tried, and it was subsequently dismissed by the 8th Circuit on appeal. Ironically, some have suggested that judicial overreaction to the problem of organized crime, and resulting broad interpretations of the scope of RICO in criminal cases, especially in the 1970's and early 1980's, is in part responsible for the expansion of RICO in civil litigation. As the First Circuit stated, "the courts' natural antipathy to organized crime has clouded their perception of RICO, its purpose, and its legislative history." United States v. Turkette, 632 F.2d 896, 905 (1st. Cir. 1980).

Judicial antipathy to the complexities of civil RICO has generated language in opinions that can most charitably be described as extreme. For example, in Lange v. Hocker, 940 F.2d 359 (8th Cir. 1991), Justice Bowman, writing for the Eighth Circuit, in affirming the District Court's dismissal of a RICO complaint for failure to satisfy the "pattern" requirement, noted that "the efflorescence of RICO's judicial interpretation has not been an uncomplicated progression; indeed, the flowering of the statute's legacy is akin to jungle underbrush run amok. With machete in hand, we attempt to clear a path to reach the case now before us. Having hacked our way through the tangle, we affirm the order of the District Court granting the defendants' motion to dismiss the complaint". In Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990) where the Court held that an enterprise could not consist of government offices alleged to be part of an "association-in-fact" absent a command structure separate and distinct from those offices, the Court characterized a complaint filed by the plaintiff chiropractors as "the apogee of pleadings by means of obfuscation" and as unintelligible "balderdash". Id. at 1441.

Commentators claim to recognize distinct judicial attitudes that vary among the District Courts and Circuit Courts concerning RICO. In addition, the Eighth Circuit, as well as all other Circuits, now has a substantial body of case law interpreting RICO. For these reasons, most of the case discussion and citations in this outline are to U.S. Supreme Court or Eighth Circuit decisions. Since many of the details of statutory interpretation are still in development, many principles set out below may not be fully applicable in other Circuits.

II. STATUTORY LANGUAGE AND CONSTRUCTION

The relevant provisions of Civil RICO are set out in 18 U.S.C. § § 1961-1965. The complete text of these sections is attached as Appendix I. It is important to remember that RICO is both a criminal and a civil statute.

Section 1961 (Definitions) and Section 1962 (Prohibited Activities) apply to both criminal and civil cases. As a result, decisions involving criminal charges are frequently cited in civil

appellate decisions. Section 1963 provides criminal penalties. Section 1964 creates the civil cause of action. Section 1965 addresses venue service of proceses in civil cases.

In general, to state a Civil RICO claim, the plaintiff must allege (1) *injury to its business or property* because the defendant (2) while involved in one or more identified relationships with an *enterprise* (3) engaged in a *pattern of racketeering activity (or collected an unlawful debt.)*. Each of these concepts is discussed below.

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RICO is primarily a federal criminal statute with civil remedy provisions available to both the government and private individuals. RICO is the only substantive federal criminal statute with a liberal construction clause. The uncodified clause specifically provides that "the provisions of this Title (Title IX) shall be liberally construed to effectuate its remedial purposes". PUB. L. No. 91-452, Section 904(a), 84 STAT. 947 (1970). This rule has been frequently cited by the Courts, especially in criminal cases, in resolving issues of statutory construction. See, e.g., United States v Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1981) Some courts have noted a conflict between this approach and the more typical method of strict statutory construction in criminal or quasi-criminal statutes. See, e.g., United States v Mandel, 415 F Supp. 997, 1022 (D. Md. 1976).

III. INJURY TO BUSINESS OR PROPERTY

Section 1964(C) provides that any person *injured in his business or property by reason of a violation of Section 1962* may bring a RICO action. Section 1961(3) specifically defines a "person" to include any individual or entity capable of holding a legal or beneficial interest in the property. Therefore, a broad category of potential plaintiffs may bring a RICO action.

It is clear that claims for personal injury are not actionable under RICO. See, e.g., Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987). Courts have permitted recovery for both tangible and intangible property loss, and under a variety of circumstances, including payment of unlawfully inflated prices, employment discharge, loss of employment opportunity, business interruptions, unpaid taxes, loss of business reputation, interest expenses, injury to credit rating, and a variety of

other losses. *See generally* Abrams at 124-25. The Eighth Circuit has allowed as RICO damages loss of business reputation, lost fees for services rendered and the cost of representation during an administrative investigation. Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 411 (8th Cir. 1984).

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IV. SECTION 1964-CAUSATION /STANDING REQUIREMENTS-"BY REASON OF"

As noted above, Section 1964(C) authorizes a RICO claim by someone who has suffered damages "by reason of" a Section 1962 violation. In Sedima, the Court specifically required that "any recoverable damages occurring by reason of a violation of Section 1962 will flow from the commission of the predicate acts". Until recently, the Circuits have been split concerning whether the "by reason of" language requires more than ordinary proof that the violation of the predicate act proximately caused the injury. The question often was phrased in terms of whether RICO was limited in its recovery to "direct victims" of the Civil RICO violation, or whether it was necessary to sustain a "RICO". *See, e.g.,* Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir.), *cert denied*, 459 U.S. 880 (1982). Many decisions resulted in denial of RICO claims based upon these special standing/ proximate cause formulations

In Holmes v. Securities Investor Protector Corp., 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), the Supreme Curt eliminated the uncertainty and conflicts among the circuits concerning these issues. In Holmes, the Securities Investor Protector Corporation (SIPC), a legislatively created organization that reimbursed the customers of securities brokers who liquidated, brought suit to collect funds it paid out to the customers of several brokers. The SIPC claimed that Holmes and the other defendants had conspired in a fraudulent stock manipulation scheme that resulted in the brokers' liquidation. The customers whom the SIPC reimbursed did not purchase securities directly from the defendants, but instead suffered other investment losses when the brokers failed. The SIPC, seeking recovery for the customers' losses under a subrogation theory

and under an independent statutory provision allowing such suits, claiming that the defendants' acts violated Section 1964(C).

The Supreme Court determined that Section 4 of the Clayton Act, on which Section 1964(C) was modeled, required a showing "not only that the defendant's violation was a 'but for' cause of his injury, but was a proximate cause as well". Holmes, 112 S. Ct. at 1317. The Court concluded that "the reasoning applies just as readily to Section 1964(C) . . . it used the same words, and we can only assume it (Congress) intended them to have the same meaning that courts had already given them" Id. at 1317-18. The Court held that the SIPC, who claimed subrogation to the rights of the brokers' non-purchasing customers, did not have damages that were proximately caused by the claimed securities fraud.

The Holmes Court expressly declined to resolve a conflict among the Circuits concerning whether a RICO plaintiff asserting securities fraud as a predicate act must be have purchased or sold a security, as is required for plaintiffs suing directly for securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. s 78j(b), and Rule 10b-5, 17 C.F.R. s 240.10b-5. Holmes, 112 S. Ct at 1323. *Accord* Brannan v. Eisenstein, 804 F.2d 1041, 1046 (8th Cir. 1986). Since the Holmes decision, it seems fairly clear that RICO's proximate cause standard, in cases involving securites fraud as well as other cases, is simply the ordinary causation standard applicable to other claimed legal damages.

The Eighth Circuit decisions concerning this issue have predictably applied the principles of Holmes. In Bietor Co. v. Blomquist, 987 F.2d 1319 (8th Cir. 1993), the 8th Circuit rejected an invitation to narrowly apply the proximate cause standard in civil RICO cases. There, a developer brought a RICO action against a former mayor, city council members, and competing developers, alleging a pattern of bribery in connection with the denial of the plaintiff's rezoning request and the granting of a competing developer's request. The District Court had held that the plaintiff's damages were not proximately caused by the predicate acts of bribery, since the city council that denied his rezoning request would have done so even if the bribery had not occurred, and since the developer failed to resubmit his request to a newly elected council that was comprised

primarily of persons whom he claimed had been bribed. After examining the Supreme Court's development of the standing/proximate cause requirements in Sedima and Holmes, the Court held that a fact finder could reasonably find that the influence of the bribed officials over the entire proceedings, as well as their negative votes, proximately caused damages to the developer, and that any further zoning application would have been futile. The Court observed that adopting a narrower view of proximate cause "not only would undermine RICO as a means of rooting out public corruption, but we would provide a formula to those who seek to achieve private gain through corruption of our democratic processes". 987 F.2d at 1320.

In Appletree Square I v. W. R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) a building owner claimed that the defendant, a manufacturer of fireproofing materials, was liable under RICO for not disclosing to "the marketplace" the hazards associated with asbestos. The building owner claimed that, if the manufacturer had generally disclosed those hazards, the purchase price of the property would have been reduced. The Court rejected the claim, noting that:

> "Courts have generally limited the use of the fraud-on-the-market theory to securities fraud cases. The real estate market, unlike the stock market, is not a well-developed market in which the price of a building reflects all publicly available information. Thus, Appletree cannot employ the fraud-on-the-market theory to establish detrimental reliance. Because Appletree has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it...lacks standing to bring its civil RICO claims."

Id. at 1287.

In Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir. 1993), the Eighth Circuit, following the rule adopted in the majority of the Circuits, held that an employee who claimed that he was discharged for criticizing and refusing to participate in the employer's racketeering activities, but was not himself a victim of any RICO predicate act, lacked standing to bring a RICO claim under Section 1964(C). The reasoning of the Court, quite simply, was that Section 1964 requires that the plaintiff prove that he or she was injured "by reason of" a "predicate act", and that the employee was injured instead by the wrongful discharge.

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V. SECTION 1962 - THE FOUR GROUNDS FOR RICO LIABILITY

Section 1962 sets out a separate ground for both civil and criminal RICO liability in each of its four subdivisions. Any RICO claim must satisfy the requirements of one or more of these subparagraphs. Each is discussed briefly below. Section 1962(C) is by far the most significant of these grounds for liability. The first three subsections create substantive offenses, both for purposes of criminal violations and civil liability. The fourth, Section 1962(D), makes it a violation to conspire to violate any of the first three subdivisions. The statutory definition of "racketeering", as well as the concepts of "enterprise" and "pattern", which are pivotal in many RICO decisions, are discussed in further detail in following sections.

A. Section 1962(A) Liability:

Section 1962(A) provides that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

Section 1962(A) represents the earliest formulation of the anti-racketeering legislation that eventually became RICO. Section 1962(A) has limited utility in Civil RICO actions, primarily because of the extremely limited number of potential plaintiffs. Numerous decisions hold that this Section provides relief only for those injured by reason of the investment or use of the racketeering income, and not for those generally injured by racketeering activity. Few potential plaintiffs satisfy this requirement.

The Circuit courts are split concerning whether Section 1962(A) requires pleading and proof of an "investment injury". *See, e.g.*, Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) (required); Busby

v. Crown Supply, Inc., 896 F.2d 833 (4th Cir 1990) (not required). The Eighth Circuit has not yet addressed the issue.

B. Section 1962(B) Liability:

> Section 1962(B) provides that:
> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1962(B) is, according to one commentator, "The least used of the four subsections" of RICO. Smith and Reed, Civil RICO at 5-14.1 The statute itself contains a unique "nexus" requirement - that the racketeering activity be causally connected to the acquisition or maintenance in or control of the enterprise. *See* Von Bulow by Auesperg v. Von Bulow, 634 F. Supp. 1284, 1307 (S.D.N.Y 1986) (mere investment of racketeering income in an enterprise under Section 1962(A) does not state a claim under Section 1962(B). In Capalbo v. Paine Weber, 694 F. Supp. 1315, 1320-21 (N.D. Ill. 1988). This nexus requirement is different from the nexus requirement under Section 1962(C) as discussed below. A number of courts also have held that Section 1962(B) has a similar "standing" requirement to Section 1962(A). *See, e.g.*, Airlines Reporting Corp. v. Barry, 666 F. Supp. 1311,1314-15 (D. Minn), *aff'd on other grounds*, 825 F.2d 1220 (8th Cir. 1987); Midwest Grinding Co. v. Spitz, 716 F.Supp. 1087, 1091 (N.D. Ill. 1989); Helman v. Murry's Steaks, Inc., 742 F. Supp. 860, 882-83 (D. Del. 1990) (allegation that plaintiff's injury flows from the predicate acts themselves does not state claim that injury flows from defendant's acquisition or maintenance of control of enterprise).

C. Section 1962(C) Liability:

Section 1962(c) provides that :

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt

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This section is by far the most commonly used subdivision of Section 1962 in Civil RICO claims. To recover under this section, a plaintiff must prove four elements:

1. the existence of an enterprise affecting interstate commerce;

2. that the defendant was employed by or associated with the enterprise;

3. that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and

4. that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts.

Benson v. Richardson, 1990 WL 290144, Civil No. C 86-2009 (N.D. Iowa, Judge Hansen, 1990)

As the Eighth Circuit explained in slightly different terms in Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 993 (8th Cir. 1989), "A plaintiff in establishing a RICO case under Section 1962(C) must demonstrate (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. " *Citing* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

In Reves v. Ernst & Young, __ U.S. __, 113 S. Ct. 1163, 112 L. Ed. 2d 525 (1993), the Supreme Court held that under Section 1962(C) a defendant must have some role in the direction of an enterprise's affairs in order to "participate, indirectly or directly" in the conduct of such affairs". In Bennett v Berg, 710 F.2d 1361 (8th Cir. 1983), the Eighth Circuit had determined that "mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself." In Reves, the Supreme Court expressly approved of the Eighth Circuit's requirement that the defendant be engaged in the

"operation or management" of the enterprise. However, the Court made it clear that the "operation" of an enterprise can occur by lower level as well as upper level employees or agents, as well as third parties, who exert control over the enterprise by bribery or other means of influence. 113 S.Ct. ____. *See also* Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993) (applying Reves and affirming directed verdict in favor of defendant law firm).

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Unlike Sections 1962(A) and (B), Section 1962(C) consistently has been interpreted as requiring that the person named as the defendant cannot also be the entity identified as the enterprise. *See, e.g.*, Bennett v. Berg, 685 F.2d at 1061-62. A party has been determined to be "associated with" a RICO enterprise under a variety of contexts. Auditors, independent accountants, lenders, contractors, and customers have been held to be "associated with the enterprise" for purposes of Section 1962(C). United States v. Mokel, 957 F.2d 1410, 1417-18 (7th Cir.), *cert. denied* 113 S. Ct. 284 (1992); United States v. Zauber 857 F.2d 137, 150 (3d Cir. 1988) (pension fund trustees and mortgage company that sold investments to trustees were "associated"); United States v. Bright, 630 F.2d 804, 830 (5th Cir. 1980) (bondsman who bribed sheriff to accept bail bonds only from his company was associated with the enterprise - the sheriff's office).

Under Section 1962(C) Courts have held that only a minimal effect on interstate commerce is required. *See, e.g.*, United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991) (scales seized from drug trafficker were manufactured in another state and cocaine flown in from Columbia impacted interstate commerce). The Section 1962(C) requirement that a defendant "conduct or participate . . . in the conduct of (an) enterprise's affairs through a pattern of racketeering activity" requires that the RICO plaintiffs show a "meaningful connection between the affairs of the enterprise and the pattern of activity".

D. Section 1962(D) Liability:

Section 1962(D) provides that:

> It shall be unlawful for any person to conspire to violate
> any of the provisions of subsection (a), (b), or (c) of this section.

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In Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir. 1993), the Eighth Circuit considered the disagreement among the Circuits concerning whether a plaintiff in a 1962(D) must allege that the act causing harm be an act specifically delineated as a RICO predicate act, or whether it is sufficient that the act causing the injury be any overt act in furtherance of the conspiracy. There the plaintiff, a discharged employee of an alleged RICO defendant, claimed that such overt acts - involving the attempt to conceal the RICO violations - led to his discharge. The Eighth Circuit, relying on Holmes, held that "standing to bring a civil suit pursuant to 18 U.S.C. § 1964(c) and based on an underlying conspiracy violation of 18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO". Id. at 387 The Court expressed concern that, if it adopted the contrary position, "a civil litigant, eager to collect treble damages under federal law (or to use the threat of those enhanced damages as bargaining leverage), rather than bringing a wrongful discharge claim in state court could circumvent the predicate act requirement applicable to suits based on s 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts."

In Krause v Perryman, 827 F.2d 346 (8th Cir. 1986), the Court affirmed a summary judgment dismissing a RICO claim against a former corporate officer who sold his interest in the corporation before fraudulent stock sale to plaintiffs that gave rise to the RICO claim. The plaintiffs claimed that the defendant was part of a "conspiracy" to defraud them in connection with their stock purchase. The former officer received proceeds from the sale to the plaintiffs and continued to receive proceeds from stock sale after alleged fraud and knew of the pending stock sale to the plaintiffs. The Court held that the former officer "had withdrawn from the alleged conspiracy ..many months before plaintiffs had their initial contact with (the defendants who sold the stock to them)". Id. at 351 Therefore, the former officer had no RICO liability under a conspiracy theory

VI. RACKETEERING ACTIVITY/PREDICATE ACTS

Section 1961(1) defines "racketeering activity" as 1) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; or 2) a violation of any of the federal criminal statutes specified in Section 1961(B). In RICO cases, these alleged violations are termed "predicate acts". The most common predicate acts are violations of 18 USC § 1341 (relating to mail fraud) and "fraud in the sale of securities" - generally under Section 10(b) and Rule 10(b)5 of the Securities and Exchange Act of 1934 Mail fraud provides an especially appealing basis for the assertion of a RICO claim, since its proof requirements are more easily met than the requirements for common law fraud. Section 18 USC Section 1341 provides that "whoever, having devised . . any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . ." Unlike common law fraud, it is not necessary that the mailing itself contain a misrepresentation. United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976) To establish mail fraud, the plaintiff must show the existence of a plan or scheme to defraud, that it was foreseeable that the defendant's scheme would cause the mails to be used, and that the use of the mails was for the purpose of carrying out the fraudulent scheme. United States v. Leyden, 842 F.2d 1026, 1028 (8th Cir. 1988).

Securities fraud, described broadly in Section 1961 as "fraud in the sale of securities", is another commonly pled predicate act in Civil RICO cases. Section 10(b) of the Securities Act, 15 U.S.C. § 78j(b), makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or any facility of any national securities exchange to:

> Use or employ, in connection with the purchase or sale of any security registered on a national exchange or any security not so registered, any

> manipulative or deceptive device or contrivance in contravention of (Securities and Exchange Commission rules)

Rule 10b-5, 17 C.F.R. s 240.10b-5, makes it unlawful :

> (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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The Supreme Court's decision in Holmes v Securities Investor Protector Corp., 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), discussed above, has provided some limitation on the class of plaintiffs who may maintain a RICO claim for securities fraud.

While mail fraud and securities fraud provide the most common predicate acts, other violations are becoming increasingly frequent. For example, Section 1961(1)(b) includes "wire fraud" which is defined to include fraud by either television or radio transmission. *See* 18 USC § 1343. Also, Section 1961(1)(b) includes extortion under 18 USC § 1951 as a predicate act. Section 1951(b)(2) defines extortion broadly as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right". A wide variety of threats of economic harm to a business or individual have been held to state a predicate act for a RICO violation. *See, e.g.*, Jordan v. Berman, 578 F. Supp. 269 (E.D. Pa. 1991) (commercial tenants stated RICO claim based on extortion when landlord over billed them and attempted to coerce payment and favorable lease terms by withholding utility and other services); Shields Enters., Inc. v First Chicago Corp., 975 F.2d 1290 (7th Cir. 1992) (threats by bank, as majority shareholder, when minority shareholders interfered with bank's threats could constitute extortion as RICO predicate act); Jund v. Town of Hempstead, 941 F.2d 1271, 1283-84 (2d Cir. 1991) (unincorporated association may incur liability under RICO for "coercively" soliciting political contributions from town employees). *But see* Flowers v. Continental Grain Co., 775 F.2d 1051, 1053 (8th Cir. 1985) (claim by former plant manager that plant owners inflated price of

goods they sold to plant and required book adjustments in order to prevent him from earning a bonus did not state RICO claim based on extortion arising from fear of economic harm; "to interpret the word 'fear' in the federal criminal statute prohibiting extortion to cover this kind of conduct would encompass almost any tort causing economic injury affecting interstate commerce. We decline to read the statute that broadly"); I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265, 267-68 (8th Cir. 1984) (threats to sue, even if groundless and in bad faith, may be tortious under state law but do not come within the federal extortion statute).

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VII. ENTERPRISE

The concept of the enterprise is central to RICO. The RICO statutes do not identify the characteristics of an "enterprise". Section 1961(4) only provides that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." As a result, the definition of an "enterprise" is almost entirely a creation of case law.

In United States v. Turkette, 452 U.S. 576, 583 (1981), the Supreme Court stated that an enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." It has always been clear that an enterprise need not be an organized crime syndicate nor need its members be members of an organized crime family. Sedima specifically acknowledged that Section 1962 applies to "any person - not just mobsters". Sedima, 473 U.S. at 495.

In Turkette, the Supreme Court resolved what was until that time the most often litigated question concerning the scope of the RICO statute - whether the term "enterprise" included illegitimate as well as lawful enterprises. The Court held that under each subparagraph of Section 1962, an enterprise includes both legitimate and illegitimate business - in other words, it includes those entities and associations created expressly to conduct criminal activity. One commentator has written that the Turkette holding, and the Court's expansive treatment concept of the RICO

enterprise in the opinion, "transformed RICO into a completely different kind of statute than Congress had intended", since the overwhelming Congressional purpose was to control the infiltration of crime into legitmate businesses. Smith & Reed, Civil RICO 3-30 ¶ 3.03.

Courts also have expansively interpreted the RICO "enterprise" as applying to a wide variety of governmental agencies and entities, including the office of a county judge; United States v. Dean, 667 F.2d 729, 730 (8th Cir.), *cert. denied*, 456 U.S. 1006 (1982); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981) and offices of governors, and state legisaltors, court clerks' offices, police and sheriffs' departments, a county prosecutor's office, tax bureaus and a prison warden's office. See U.S. Department of Justice, Criminal Division, Racketeer Corrupt Organizations (RICO): A Manual for Federal Prosecutors 27-29 (1985). Until recently, there was a split of authority concerning whether a RICO claim existed when the defendant, enterprise and pattern of racketeering had no profit making purpose. In National Organization For Women v Scheidler, No. 92-780, 1994 WL 13716, the Supreme Court determined that neither the enterprise nor the predicate acts of racketeering must be motivated by profit or other economic purpose in order to assert a claim under Section 1962(C). Scheidler overruled the decision of the Eighth Circuit in United States v. Flynn, 852 F.2d 1045. There, a criminal defendant was charged under RICO for seeking to obtain control of labor unions and to retaliate against rivals. The Circuit held that, "for purposes of RICO, an enterprise must be directed toward an economic goal". Id. at 1052.

In Scheidler, the Supreme Court also explained that the "enterprise" as described in Section 1962(A) and (B) is different from the enterprise described in Section 1962(C):

> The term "enterprise" in subsections (a) and (b) plays a different role in the structure of those subsections than it does in subsection (c). The "enterprise" referred to in subsections (a) and (b) is ..... something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a "profit-seeking" entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a "profit-seeking" entity; it

> simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity.
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> By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity..... since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity. Nothing in subsections (a) and (b) directs us to a contrary conclusion.

1994 WL 13716, at *4-5.

Judicial development of the concept of an "association-in-fact" enterprise has also expanded the reach of RICO liability. Such associations may consist of any combination of individuals and legal entities. An association-in-fact enterprise must have three characteristics: 1) there must be a common or shared purpose that animates those associated; 2) there must be an ongoing organization functioning as a continuing unit, and 3) there must be an ascertainable structure distinct from the pattern of racketeering activity The second and third requirements frequently involve proof of the same facts - the continuity of the organization is typically a result of a separate structure that directs its affairs. *See* United States v Nabors, 45 F.3d 238, 241 (8th Cir. 1995).

In United States v. Kragness, 830 F.2d 842 (8th Cir. 1987), the Eighth Circuit more carefully defined the continuity requirement:

> The continuity-of-personnel element involves a closely related inquiry, in which "[t]he determinative factor is whether the associational ties of those charged with a RICO violation amount to an organizational pattern or system of authority." (citations)... The continuity of these elements need not be absolute; the group's system of authority may be modified, old members may leave, and new members may join. (citations)..... That some changes in structure and personnel occur does not mean that there is no mechanism for continuing direction of group affairs; both the structure and the personnel of an enterprise may undergo alteration without loss of the enterprise's identity as an enterprise."

Id. at 856.

The Eighth Circuit has specifically recognized that a corporation may be an association-in-fact under RICO: "This court has never determined whether corporations can form an association-in-fact under RICO We now join other circuits in holding that corporations may be considered associations in fact for purposes of RICO." Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989).

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In Atlas, the plaintiffs, residential subcontractors, claimed that the defendants, the seller of land, the lender, and the general contractor - carried out a scheme in which the general contractor falsely promised payment for subcontractors' work on residential housing projects, the lender then foreclosed a prior lien on the property, and the misled subcontractors were unable to collect from the general contractor or obtain relief against the property. Id. at 986.

Virtually all Circuit Courts who have addressed the issue have held that, under Section 1962(C), the "person" who engages in the pattern of racketeering activity must be an entity distinct from the enterprise. *See, e.g.*, Bennett v. Berg, 685 F.2d 1053,1061-1062 (8th Cir, 1982), *modified en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied,* 464 U.S. 1008 (1983)

VIII. PATTERN

In H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 2897-99, 106 L. Ed. 2d 195 (1989), the Court held that, in order to prove a pattern of racketeering activity, "a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Id. 109 S. Ct. at 2900. The Court rejected the argument "that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes The Court stated that "conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. The Supreme Court declined to formulate a more specific test for the "continuity" required to show a pattern. Id. 109 S. Ct. at 2901. The Eighth Circuit has further explained the continuity requirement:

> "Continuity" is both a closed - and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept..... A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

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Atlas, 886 F.2d at 993.

The specific requirements of "continuity" element of the pattern in RICO cases has not been clearly defined. Before H.J., Inc., the Eighth Circuit and other Circuits held that a single scheme, even when carried out through a series of predicate acts over a period of time, was insufficient to establish a "pattern" of racketeering activity. *See, e.g.,* Allright Missouri, Inc. v. Billeter, et al. 829 F.2d 631 (8th Cir. 1987); Superior Oil Co. v. Fullmer, 785 F.2d 252, 257 (8th Cir. 1986). These decisions appear to have been effectively overruled by H.J., Inc. See Atlas Pile Driving Co. v DiCon Fin. Co., 886 F.2d 986, 990 (8th Cir. 1989) (claims by residential subcontractors that general contractor falsely promised payment for work on two subdivisions and conspired with related lender to foreclose on prior lien, eliminating subcontractors' liens, sufficiently stated a pattern of racketeering activity, where scheme covered three year period; "the Supreme Court has recently spoken on this issue, rejecting this court's interpretation of the pattern requirement.")

Even after H.J., Inc., it is clear that a single scheme to defraud one victim in connection with a single set of loan agreements generally is insufficient to constitute a pattern. In Terry A. Lambert Plumbing v. Western Sec. Bank, 934 F 2d 976, 981 (8th Cir. 1981); a plumbing contractor claimed that a loan officer assisted in obtaining an SBA loan and established a line of credit for the contractor, knowing that a second mortgage on the property, if not subordinated to the SBA mortgage, would place the loan and credit line in default. When another mortgagee refused to subordinate, the lender then declared defaults, refused to distribute proceeds from the line of

credit and liquidated the repossessed collateral. The Eighth Circuit, in affirming the lower court's summary judgment against the contractor, rejected the contractor's claim that the loan officer's conduct constituted a "pattern" of racketeering activity, noting that a single transaction which involves only one victim and takes place over a short period of time does not constitute the pattern of racketeering required for long-term criminal activity under a RICO claim . . . We agree with the statement by the Fourth Circuit that "(i)f the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim". Id. at 981.

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In Lange v. Hocker, 940 F 2d 359 (8th Cir. 1991), the Court affirmed the District Court's dismissal of a RICO claim by the shareholders of a closed corporation against former officers and directors on grounds that the pattern requirement was not satisfied. The plaintiffs claimed that the defendants had acquired a controlling interest in the corporation by an illegal stock transaction. The transaction was consummated over a period of approximately one month. The Court noted that:

> Continuity can be shown in one of two ways – closed-ended continuity or open-ended continuity. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." Id. at 242, 109 S. Ct. at 2902. Where continuity cannot be established in such a manner, a RICO violation may be shown when a "threat of continuity is demonstrated."

Id. The Court then held that "acts committed in such a short period of time do not constitute a pattern of racketeering activity." Id. at 361. The Court rejected the plaintiff's attempts to artificially extend the time period within which the pattern occurred:

> Further attempts to extend the time frame of defendants' alleged racketeering activity are equally specious. Resignation from a corporate office or directorship is not a predicate act; neither is refusal to surrender disputed stock ownership. Plaintiffs contend that after this lawsuit initially was filed, defendants, through acts of mail and wire fraud, drove (the corporation's clients away and caused key employees to resign. These allegations of fraud, however, are too vague to be the basis for a RICO claim."

Id. at 361-362.

In Primary Care Investors Seven, Inc. v. PHP Healthcare Corp., 986 F.2d 1208 (8th Cir. 1993), investors in a joint venture claimed that the defendants, a parent and subsidiary corporation, had engaged in securities fraud by misleading them into selling their interests to defendants at a discount and failing to inform them of a planned conversion of the public offering of the stock. The Court held that since the final predicate act occurred only eleven months after the initial predicate act, it failed to span the required "substantial period" for establishing a pattern of RICO activity. Id. at 1215. The Court also held that "the ministerial act of tendering payment for securities that plaintiffs had already sold cannot be a predicate act." Id. In considering whether the period was sufficiently substantial, the Court stated:

> No Eighth Circuit case has set a minimum period of time over which the predicate acts must extend in order to be "substantial." Other Circuits have consistently held that the requirement of continuity over a closed period is not met when the predicate acts extend less than a year. *See, e.g.*, Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 922 (7th Cir. 1992) (seven to eight months insufficient); Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee, 953 F.2d 587, 593 (11th Cir.) (six months to a year insufficient), *rehearing denied*, 961 F.2d 224 (11th Cir. 1992); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 609-11 (3rd Cir. 1991) ("twelve months is not a substantial period of time"), *cert denied*, — U.S. —, 112 S.Ct. 2300, 119 L.Ed.2d 224 (1992); American Eagle Credit Corp. v. Gaskins, 920 F.2d 352, 354-55 (6th Cir. 1990) (six months insufficient). Many cases in which courts have found a "substantial period of time" have involved schemes extending for a number of years. *See, e.g.*, Dana Corp. v. Blue Cross & Blue Shield Mut. of Ohio, 900 F.2d 882, 887 (6th Cir. 1990) (17 years); Fleet Credit Corp. v. Sion, 893 F.2d 441, 447 (1st Cir. 1990) (four and a half years); Walk v. Baltimore and Ohio R.R., 890 F.2d 688, 690 (4th Cir. 1989) (ten years). In this case, the activity lasted between ten and eleven months and, in light of the growing body of case law that we have just reviewed, we deem this period insubstantial.

Id. at 1215

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The Primary Care, Lambert and Lange decisions make it clear that the Eighth Circuit still intends to carefully apply the pattern requirement in civil RICO cases, even after the U.S. Supreme Court's decision in H.J., Inc.. Other Circuits have adopted a similar approach. See, e.g., Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir. 1994) (scheme of 17 months, consisting of fraud and extortion on a single construction contract is insufficient to constitute a "pattern"); Wade v. Hopper, 993 F.2d 1246, 1251 (7th Cir. 1993) (bankruptcy fraud scheme of less than one year causing one injury to a single victim is insufficient to constitute pattern).

Where the number of injuries or the number of victims increase, courts obviously are more likely to determine that a pattern exists for RICO purposes. See, e.g., Terrell v. Childers, 836 F. Supp 468 (N.D. Ill. 1993) (single fraudulent scheme by financial advisors in advising husband and wife, causing multiple injuries over a number of years, sufficient to allege a pattern, two additional actions filed against defendants by other couples alleging similar schemes); Fujisawa Pharmaceutical Co. v. Kapor, 814 F. Supp. 720, 733-34 (N.D. Ill. 1993) (pattern sufficiently pled based on single scheme to injure one victim on multiple occasions).

IX. MISCELLANEOUS PRETRIAL ISSUES

A. JURISDICTION

Under Section 1964(C), "Any person injured in his business or property by reason of a violation of Section 1962 . . . may sue therefore in any appropriate United States District Court". This statute confers federal question subject matter jurisdiction over Civil RICO claims. In addition, the Supreme Court has specifically held that State Courts have concurrent subject matter jurisdiction over Civil RICO claims. Tafflin v. Levitt, 110 S. Ct. 792 (1990). In Tafflin, The Court specifically held that the above quoted language of Section 1964(C) did not evince a legislative intent to confer exclusive jurisdiction for civil RICO claims in the federal courts.

B. SECTION 1965 - SPECIAL VENUE AND PROCESS PROVISIONS

Section 1965 sets out expansive provisions for venue and service of process in RICO cases. Section 1965(A) specifically authorizes venue wherever the defendant "resides, is found, has an agent or transacts his affairs" This venue section is non-exclusive, and the other provisions set forth in the general venue statute, 28 U.S.C §1391, may also apply

Under Section 1965(B), if one defendant is properly served, the Court may exercise nationwide personal jurisdiction over, and nationwide service of process upon, other persons when the "interests of justice" require it. Section 1965(D) also authorizes nationwide service of process, with subpoenas to be issued from the forum court.

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C. STATUTE OF LIMITATIONS

While RICO does not specifically provide a statute of limitations for a civil cause of action, the Supreme Court has held that the four year statute applicable to Clayton Act civil provisions applies to RICO proceedings. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987). This rule applies even if a lawsuit based solely upon the predicate act would be time barred. United States v. Malatesta, 583 F.2d 748, 758 (5th Cir. 1978). The lower courts have adopted a number of approaches concerning when a cause of action for civil RICO accrues. See *generally* Abrams, The Law of Civil RICO at 61-64. In this Circuit, a civil RICO claim accrues when the plaintiff discovered or had reason to discover the property interest injury that is the basis of the claim. Alexander v. Perkin Elmer Corp., 729 F.2d 576, 578 (8th Cir. 1984). The Courts have adopted several different rules where plaintiffs allege continuous conduct by the defendant, or a series of predicate acts. It is likely that the equitable tolling doctrine will apply to extend the statute of limitations in cases of fraudulent concealment. See Holmberg v. Armbrecht, 327 U.S. 392, 397.

D. PLEADING ISSUES

One of the most common pleading deficiencies in RICO claims is failure to specifically plead the circumstances of fraudulent acts that typically serve as predicate acts. Federal Rule of

CIvil Procedure 9(b) requires "in all averments of fraud" the circumstatnces of fraud " shall be stated with particularity." This rule applies to predicate acts alleging fraud. Midwest Grinding Co. v. Spitz, 769 F. Supp 1457 (7th Cir 1992)

A number of federal district courts now issue standing orders in Civil RICO cases requesting that plaintiff's counsel detail the allegations of their RICO claim. Although typically issued early, they occasionally are issued later as a means of resolving disputes over the pleadings. The Fifth Circuit has upheld the use of standing orders under the general rules of pleadings set forth in Federal Rule 8A and the rules of pleadings applicable to fraud claims set out in Rule 9(b) of the Federal Rules of Civil Procedure. Elliott v. Foufas, 867 F.2d 877, 879 (5th Cir. 1989). A sample of a standing order is attached as Appendix II.

This order, issued by the Federal District Court for the Northern District of Ohio, has been adopted virtually verbatim by federal judges in California, Pennsylvania, Michigan, and the District of Columbia. See Lyman Steel Co. v. Schearson Lehman Bros., Inc., Civ No. C-86-353, Order (N.D. Ohio) (Krenzler, J.); In re: Micropo Sec. Litig., No C-85-7428, Order of October 1, 1987, (N.D Calif.); Irey, Jr. v. Hanna, Civ No. 87-1641, Order of August 17, 1987 (W.D. Penn.); Mulligan v. Prudential Base Securities, Inc., No. 86-70856, Order of November 5, 1986; see also Police Retirement System of St. Louis v. Midwest Investment Advisory Services, 706 F. Supp. 708 (E.D. Mo. 1989); Kurz v. Mairone, 1989 WL 8870 (E.D. Pa. 1989); Norris v. Wirtz, 703 F. Supp. 1322 (N.D. Ill. 1989) In Ruiz v. Algeria, the First Circuit affirmed the dismissal of a District Court case dismissing plaintiff's RICO claim with prejudice as a result of plaintiff's failure to timely file a RICO case statement. *See also* Chamarac Properties, Inc. v. Pike, No 86-Civ. 7919 (KMW) 192 WL 332234 (S.D N Y.), Nov 2, 1992. Under local practice, the Northen District has used RICO standing order froms in granting motions for a more definite statement of the claim under Federal Rule of Civil Procdure 12(e), at least in cases where the complexity of the pleadings makes careful analysis of the RICO claim difficult, or when the absence of detail in the RICO pleadings suggests that there may be no claim.

X. MISCELLANEOUS TRIAL ISSUES

A. BURDEN OF PROOF

The RICO statute does not specify the burden of proof necessary to sustain a Civil RICO claim Before Sedima, several courts suggested that RICO's "quasi-criminal" character and treble damage recovery justified a higher standard than a preponderance. In Sedima, the Supreme Court, while declining to expressly determine the standard of proof, suggested that the "usual preponderance standard" would apply to the claim:

> We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under Section 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. (Citations) There is no indication that Congress sought to depart from this general principle here.

473 U.S. 491. Since that time, most Courts have approved application of the preponderance standard to all elements of a RICO claim. See, e.g., Cullen v. Margiotta, 811 F.2d 698, 731 (2nd Cir., 1987), Ford Motor Co. v. B&H Supply, Inc., 646 F. Supp. 975, 1001 (D. Minn. 1986). There is still some support among commentators and courts for a higher standard, such as clear and convincing evidence, at least in determining whether the predicate acts have been committed. See, e.g., Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 532 (9th Cir. 1987), (Boochever, J., dissenting); Mats, Determining The Standard Of Proof In Lawsuits Brought Under Rico, National Law Journal (October 10, 1983).

B. DAMAGES/ATTORNEYS FEES

When a RICO violation is proven, treble damages are required. The Court has no discretion not to order treble damages Abell v. Potomac Insurance Co., 858 F.2d 1104, 1129 (5th Cir. 1988), *cert denied*, 109 S. Ct. 3242 (1989) Most decisions reaching the question hold that punitive damages may not be awarded on a civil RICO claim The reasoning is that treble damages themselves are punitive, and that the Clayton Act's anti-trust laws which served as RICO's model,

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do not allow recovery of both treble and punitive damages. *See, e.g.*, Southwest Marine, Inc. v. Triple A Machine Shop, Inc., 720 F. Supp 805, 810 (N.D. Cal. 1989). Although it is not yet a settled issue, it is unlikely that RICO permits injunctive relief. *See, e.g*, Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988).

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Most Courts hold that a person has no right to contribution or indemnity for civil RICO liability. Most Courts rely upon the absence of an express creation of such a right in the civil RICO statute *See, e g.*, In re: Olympia Brewing Co. Sec. Litig., 674 F. Supp 597, 616-17 (N.D. Ill 1987).

The recovery of attorney fees for the prevailing party also is mandatory under Section 1964(C). If an action involves both RICO and nonRICO claims, the fee may be awarded only with respect to the RICO claims. *See, e.g.*, FMC Corp. v. Varonos, 892 F.2d 1308, 1317 (7th Cir. 1990). No statutory standards exist for determining the "reasonableness" of the fee.

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative [relating] to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or posses-

sion of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat 941; Nov 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov 6, 1978, P. L. 95-598,

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

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§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both[.], and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection *(l)* that he is a bona fide purchaser for value of such property

who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period A hearing requested concerning an order entered under this paragraph shall be held at the earliest posssible time, and prior to the expiration of the temporary order

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence [28 USCS Appx].

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon

such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 USC. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter [18 USCS §§ 1961 et seq.], or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter [18 USCS §§ 1961 et seq.];

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially

feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter [18 USCS §§ 1961 et seq.];

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter [18 USCS §§ 1961 et seq.]

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General

(i) Except as provided in subsection *(l)*, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the

property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure [USCS Rules of Criminal Procedure, Rule 15].

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(l) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5)

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943; Oct. 12, 1984, P. L. 98-473, Title II, Ch III, Part A, § 302, Ch XXIII, § 2301(a)-(c), 98 Stat. 2040, 2192; Oct 27, 1986, P. L. 99-570, Title I, Subtitle D, § 1153(a), 100 Stat 3207-13; Nov. 10, 1986, P. L. 99-646, § 23, 100 Stat. 3597; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, §§ 7034, 7058(d), 102 Stat. 4398, 4403.)

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§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat 943; Nov 8, 1984, P. L. 98-620, Title IV, Subtitle A, § 402(24)(A), 98 Stat 3359.)

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter [18 USCS §§ 1961 et seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter [18 USCS §§ 1961 et seq.] in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause

(d) All other process in any action or proceeding under this chapter [18 USCS §§ 1961 et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Oct 15, 1970, P L 91-452, Title IX, § 901(a), 84 Stat 944)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

A-1 STEEL COMPANY, et al Plaintiffs -vs- BROKERAGE HOUSE, INC., et al Defendants	JUDGE JOHN DOE CASE NO. C 45-783 RICO CASE STANDING ORDER 18 U.S.C. §§ 1961–1968

The above-captioned case contains a civil RICO claim, which has been filed in this Court pursuant to 18 U.S.C. §§ 1961-1968. This Standing Order has been designed to establish a uniform and efficient procedure for processing this case.

The plaintiff shall file, within twenty (20) days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated in particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the Court in processing your RICO claim.

IT IS SO ORDERED.

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UNITED STATES DISTRICT JUDGE

1995 LEGISLATIVE REPORT

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Robert M. Kreamer
Whitfield & Eddy
Des Moines, Iowa

1995 LEGISLATIVE REPORT
By
ROBERT M. KREAMER

1995 Legislative session, like the past two sessions, continues to experience partisan and philosophical gridlock on issues of interest and importance to the Iowa Defense Counsel Association. The Iowa Senate remains under Democrat control by the same 27-23 margin of the past two years. Republicans strengthened their control of the Iowa House of Representatives from 51-49 to a current margin of 64-36. Like the 1992 general election, there were a large number (26%) of freshman legislators elected in 1994 to the Iowa House of Representatives and Iowa Senate. Many of these new members were elected to the Iowa House and were both conservative and energetic in the pursuit of their legislative agenda.

Many of these newly elected members to the Iowa House possessed conservative philosophies and high energy levels and were to tackle some legislative issues heretofore considered too politically sensitive. While some of these issues of interest to the Defense Bar received attention and approval by the Iowa House of Representatives they ran into considerable resistance in the Iowa Senate and consequently gridlock was the result.

Legislation introduced in the 1995 legislative session of interest to the Defense Bar included the following bills:

House File 130 - This legislation would allow the defendant, in any action where the plaintiff is a governmental entity, the right to inform the jury of its prerogative to judge the applicable law of the case as well as the facts and to return a verdict which does not apply the law as instructed by the judge. This legislation, opposed by all segments of the organized Bar, was approved by the House Judiciary Committee, but

died on the House Calendar.

Senate File 257 - This so-called "Sunshine in Litigation Act" creating a presumption that all court records in civil actions are open to the public unless access is restricted by law was approved by the Senate Judiciary Committee. After this same subject matter was offered as an amendment to the Products Liability legislation (House File 362) and defeated by a vote of 60-33 in the Iowa House, this legislation was removed from the Senate Calendar and re-referred to the Senate Judiciary Committee.

House File 345 - This legislation would eliminate the statutory 10% interest provision found in Iowa Code Section 535.3 and provide that this interest should be at a rate found in Iowa Code Section 668.13. This legislation passed the Iowa House of Representatives by a vote of 92-4, and is now in the Senate Judiciary Committee.

House File 362 - This legislation provides that the statute of limitations for a products liability action is ten years from the date the product is first purchased. It is also provided that where misuse, failure to maintain, or unauthorized alteration of a product is the primary cause of injury, the manufacturer, assembler, designer, wholesaler, retailer or distributor from whom recovery of damages is sought shall not have any percentage of fault allocated against them under Iowa's comparative fault law. This legislation passed the Iowa House of Representatives by a vote of 63-33 and is now in the Senate Judiciary Committee.

House File 394 - This legislation provides that an action for medical malpractice allegedly committed on a minor under age six must be commenced prior to the minor's eighth birthday. This legislation passed the Iowa House of Representatives by a vote of

71-24 and is now in the Senate Judiciary Committee.

Senate File 431 - This legislation allows the professional license of a person to be revoked if they are one month delinquent in their child support obligation. This legislation passed the Iowa Senate and Iowa House of Representatives unanimously and has been signed into law by Governor Terry E. Branstad.

House File 300 (Companion Bill SSB 266) - This legislation would eliminate joint and several liability in comparative fault actions. These bills remain in the House Judiciary Committee and Senate Judiciary Committee, respectively.

House File 250 (Companion bill SSB 263) - This legislation provides that the percentage of fault assigned to the person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium and overrules Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). These bills remain in the House Judiciary Committee and the Senate Judiciary Committee respectively.

All of the above legislation, except Senate File 431 which has already received legislative and gubernatorial approval, remain alive and eligible for consideration in 1996.

While 1995 was a busy and often frustrating year, I am pleased to report that no legislation of an adverse nature to the Iowa Defense Counsel Association won legislative approval. Additionally, I am pleased that I continue to be looked to for leadership by legislators, lobbyists and other interest groups sharing our legislative perspective on the above legislation.

I want to thank all of the members of the Iowa Defense Counsel Association for

the opportunity to have represented them this past year. Additionally, I would like to extend a special thank you to the Legislative Committee and its Chairperson, Mark Tripp, for all of the support and assistance given to me at every request. I look forward to working with you in the days ahead. Thank You!

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I:\134\134.7\DEFENSE\NEWSLTR

FEB 6 1995
JUDICIARY

HOUSE FILE 130

BY SCHULTE, BODDICKER, TYRRELL, DISNEY, CORNELIUS, WELTER, KREMER, CORMACK, HURLEY, VANDE HOEF, COON, COHOON, HALVORSON, LARSON, EDDIE, HAMMITT, GREINER, BRANSTAD, SALTON, BRAUNS, KLEMME, BAKER, and FALLON

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(COMPANION TO LSB 1642SS BY BARTZ)

Passed House, Date ____________ Passed Senate, Date ____________
Vote: Ayes ______ Nays _______ Vote: Ayes ______ Nays ________
Approved ______________________________

A BILL FOR

1 An Act relating to jury instructions.
2 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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HF 130

TLSB 1642HH 76
mk/sc/14

S.F. ________ H.F. 130

1 Section 1. <u>NEW SECTION</u>. 624.13A JURY INSTRUCTION --
2 RIGHT TO JUDGE LAW.
3 1. A defendant's right to trial by jury, in all instances
4 where the state or a political subdivision of the state is the
5 plaintiff, includes the right to inform the jury of the jury's
6 prerogative to judge the law as well as all the evidence, and
7 to render a verdict dictated by conscientious consideration.
8 This right shall not be limited by the rules of civil or
9 criminal procedure, juror's oath, court order, or procedure or
10 practice of the court, including the use of any method of jury
11 selection which could preclude or limit the impanelment of
12 jurors willing to exercise this power.
13 2. Once the jury has been informed in accordance with
14 subsection 1, a party to the action shall not be prohibited
15 from presenting arguments to the jury which may pertain to
16 issues of law and conscience, including the following:
17 a. The merit, intent, constitutionality, or applicability
18 of the law to the defendant's case.
19 b. The motive, moral perspective, or circumstances of the
20 defendant.
21 c. The degree and direction of guilt or actual harm done.
22 d. The sanctions which may be applied to the losing party.
23 3. Failure to allow the defendant to so inform the jury
24 shall be grounds for a mistrial and another trial by jury.
25 EXPLANATION
26 This bill provides that in any jury trial where the state
27 or one of its political subdivisions is the plaintiff, the
28 defendant has the right to inform the jury of its prerogative
29 to judge the applicable law of the case as well as the facts
30 and to return a verdict which does not apply the law as
31 instructed by the judge. This right to inform the jury shall
32 not be limited by the rules of criminal or civil procedure,
33 court procedure or practice, or methods of jury selection
34 which might preclude or limit the selection of jurors who are
35 willing to judge the law as it applies to the case. The bill

1 also provides that any party to the trial shall not be
2 prohibited from presenting arguments to the jury pertaining to
3 issues of law and conscience. Finally, the bill provides that
4 failure to allow the defendant to inform the jury of its right
5 to judge the law as it applies to the case is grounds for a
6 mistrial and a new jury trial.
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LSB 1642HH 76
mk/sc/14

FILED MAR 7 1995

SENATE FILE 257
BY COMMITTEE ON JUDICIARY

(SUCCESSOR to SSB 189)

Passed Senate, Date ____________ Passed House, Date ____________
Vote: Ayes _______ Nays _______ Vote: Ayes _______ Nays _______
Approved ______________________________

A BILL FOR

1 An Act relating to public access to court records and providing
2 for the Act's applicability.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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S.F. 257

TLSB 2226SV 76
mk/jw/5

S.F. 257 H.F. ________

1 Section 1. NEW SECTION. 624B.1 TITLE -- DEFINITION.
2 1. This chapter shall be known as the "Sunshine in Liti-
3 gation Act."
4 2. For the purposes of this chapter, unless the context
5 otherwise requires, "court records" means any of the
6 following:
7 a. All documents of any nature filed in connection with
8 any matter before any civil court, except any of the
9 following:
10 (1) Documents filed with a court in camera, only for the
11 purpose of obtaining a ruling on the discoverability of such
12 documents.
13 (2) Documents in court files to which access is otherwise
14 restricted by law.
15 b. Settlement agreements, not filed of record, that seek
16 to restrict disclosure of information concerning matters that
17 have a probable adverse effect upon the general public health
18 or safety, the administration of public office, or the
19 operation of government.
20 c. Discovery, not filed of record, concerning matters that
21 have a probable adverse effect upon the general health or
22 safety, the administration of public office, or the operation
23 of government, except discovery not filed of record in cases
24 originally initiated to preserve bona fide trade secrets or
25 other intangible property rights.
26 Sec. 2. NEW SECTION. 624B.2 SEALING RECORDS.
27 A court order or opinion issued in the adjudication of a
28 case shall not be sealed. Other court records are presumed to
29 be open to the general public but may be sealed only upon a
30 showing pursuant to the procedures of this chapter and all of
31 the following:
32 1. A specific, serious, and substantial interest which
33 clearly outweighs the presumption of openness and any probable
34 adverse effect that sealing will have upon the general public
35 health or safety.

1 2. No less restrictive means than sealing the records will
2 adequately and effectively protect the specific interest as-
3 serted.
4 Sec. 3. NEW SECTION. 624B.3 COERCION.
5 A person shall not offer an inducement to a party to a
6 civil action designed to influence that party in regard to the
7 sealing of any court record. Violation of this section is
8 punishable as a contempt of court.
9 Sec. 4. NEW SECTION. 624B.4 NOTICE.
10 Court records may be sealed only upon a party's written
11 motion, which shall be open to public inspection. The movant
12 shall post a public notice in the manner that notices for
13 meetings of county governmental bodies are required to be
14 posted. The notice shall contain the content of the motion,
15 identify the case in which the motion has been filed, and
16 state that a hearing will be held in open court on the motion
17 and that any person may intervene and be heard concerning the
18 motion. The notice shall also contain the date and time of
19 the hearing and a brief but specific description of the nature
20 of the case, the court records sought to be sealed, and the
21 identity of the movant. A verified copy of the notice shall
22 be filed by the movant with the clerk of the supreme court.
23 Sec. 5. NEW SECTION. 624B.5 HEARING.
24 A hearing shall be held in open court on a motion to seal
25 court records as soon as practicable but not less than
26 fourteen days after notice is posted pursuant to section
27 624B.4 Nonparties may intervene as a matter of right for the
28 limited purpose of participating in the proceedings which will
29 determine whether court records are sealed. The court may
30 inspect records in camera.
31 Sec. 6. NEW SECTION. 624B.6 TEMPORARY SEALING ORDER.
32 A temporary sealing order may issue upon motion and notice
33 to any parties who have answered in the case, upon a showing
34 of compelling need from specific facts shown by affidavit or
35 by verified petition that immediate and irreparable injury

1 will result to a specific interest of the movant before notice
2 can be posted and a hearing held. A temporary sealing order
3 shall set forth the time for the hearing required by section
4 624B.5 and shall direct the movant to give the notice required
5 by section 624B.4. The court may modify or withdraw any
6 temporary order upon motion by any party or intervenor,
7 following notice to all parties and a hearing conducted as
8 soon as practicable. Issuance of a temporary order shall not
9 reduce the burden of proof of the party seeking to seal court
10 records.
11 Sec. 7. NEW SECTION. 624B.7 ORDER ON MOTION TO SEAL
12 COURT RECORDS.
13 A motion relating to sealing or opening court records shall
14 be decided by written order, open to public inspection, which
15 shall state the style and number of the case, the specific
16 reasons for finding and concluding whether the showing re-
17 quired by section 624B.2 has been made, the specific court
18 records or portions of court records which are to be sealed,
19 and the period of time the records are to be sealed. The
20 order shall not be included in any judgment or other order but
21 shall be a separate document in the case. However, failure to
22 comply with this requirement shall not affect the
23 appealability of the order.
24 Sec. 8. NEW SECTION. 624B.8 CONTINUING JURISDICTION.
25 Any person may intervene as a matter of right at any time
26 before or after judgment to seal or open court records. A
27 court that issues an order sealing court records retains
28 continuing jurisdiction to enforce, alter, or vacate that
29 order. An order sealing or opening court records shall be
30 reconsidered on motion of any party or intervenor, who had
31 actual notice of the hearing preceding issuance of the order,
32 without first showing changed circumstances materially af-
33 fecting the order. The circumstances need not be related to
34 the case in which the order was issued. However, the burden
35 of making the showing required by section 624B.2 shall be on

1 the party seeking to seal records.
2 Sec. 9. NEW SECTION. 624B.9 APPEAL.
3 An order or a portion of an order, relating to sealing or
4 opening court records, shall be deemed to be severed from the
5 case and a final judgment which may be appealed by any party
6 or intervenor who participated in the hearing preceding is-
7 suance of such order. The appellate court may abate the
8 appeal and order the trial court to direct that further public
9 notice be given, to hold further hearings, or to make addi-
10 tional findings.
11 Sec. 10. NEW SECTION. 624B.10 APPLICABILITY DATE.
12 Access to documents in court files not defined as court
13 records by this chapter remains governed by existing law.
14 This chapter does not apply to any court records sealed in an
15 action in which a final judgment has been entered before July
16 1, 1996. This chapter applies to cases pending on July 1,
17 1996, only with regard to court records filed or exchanged on
18 or after July 1, 1996, and any motion filed on or after July
19 1, 1996, to alter or vacate an order restricting access to
20 court records issued before July 1, 1996.
21 EXPLANATION
22 This bill provides a presumption that all court records in
23 civil actions are open to the public unless access is re-
24 stricted by operation of other law. The bill also provides a
25 mechanism for hearings on motions to seal court records and
26 for appeal of orders relating to the sealing of court records.
27 The bill applies to cases pending on and after July 1, 1996.
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LSB 2226SV 76
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MAR 1 0 1995

Place On Calendar

HOUSE FILE 345

BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO HSB 239)

Passed House, Date ____________ Passed Senate, Date ____________

Vote: Ayes _______ Nays _______ Vote: Ayes _______ Nays _______

Approved ______________________________

A BILL FOR

1 An Act relating to the rate of interest charged on judgments and
2 decrees.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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HF 345

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1 Section 1. Section 535.3, Code 1995, is amended to read as
2 follows:
3 535.3 INTEREST ON JUDGMENTS AND DECREES.
4 Interest shall be allowed on all money due on judgments and
5 decrees of courts ~~at-the-rate-of-ten-percent-per-year,-unless~~
6 ~~a~~ as follows:
7 1. At a rate equal to the coupon issue yield equivalent,
8 as determined by the United States secretary of the treasury,
9 of the average accepted auction price for the last auction of
10 fifty-two-week United States treasury bills settled
11 immediately prior to the date of the judgment.
12 2. A different rate which is fixed by the contract on
13 which the judgment or decree is rendered, in which case the
14 judgment or decree shall draw interest at the rate expressed
15 in the contract, not exceeding the maximum applicable rate
16 permitted by the provisions of section 535.2, which rate must
17 be expressed in the judgment or decree.
18 3. The state court administrator shall distribute notice
19 monthly of the rate set under subsection 1 and any changes to
20 that rate to all district courts.
21 4. The interest shall accrue from the date of the
22 commencement of the action.
23 ~~This-section-does-not-apply-to-the-award-of-interest-for~~
24 ~~judgments-and-decrees-subject-to-section-668.13.~~
25 EXPLANATION
26 This bill provides that the rate of interest on judgments
27 and decrees set in section 535.3 is to be equal to the coupon
28 issue rate of 52-week United States treasury bills unless a
29 different rate is set in the judgment or decree. The bill
30 also eliminates language in that section made redundant by the
31 bill providing that the section does not apply to comparative
32 fault actions.
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LSB 2123HV 76
mk/jw/5

HOUSE FILE 362
BY COMMITTEE ON ECONOMIC
DEVELOPMENT

(SUCCESSOR TO HSB 132)

(As Amended and Passed by the House March 22, 1995)

Passed ~~House~~, Date 3-22-95 Passed Senate, Date ______
Vote: Ayes 63 Nays 33 Vote: Ayes ______ Nays ______
Approved ______________________

A BILL FOR

1 An Act relating to the statute of limitations for products
2 liability actions and providing immunity from products
3 liability under certain circumstances and providing for the
4 Act's applicability.
5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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8 House Amendments ______
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HF 362
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1 modification, or change in the product which was made by a
2 person other than, and without the direction or consent of,
3 the manufacturer, assembler, designer, supplier of
4 specifications, seller, or distributor from whom recovery of
5 damages is being sought.
6 This section does not apply to a manufacturer, assembler,
7 designer, supplier of specifications, seller, or distributor
8 of a product who is subject to a federal consent decree,
9 order, or agreement recalling the product or prohibiting the
10 sale or further manufacture of the product.
11 Sec. 3. APPLICABILITY. This Act applies only to causes of
12 action accruing on or after July 1, 1995.
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HF 362
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SENATE FILE 431

AN ACT

RELATING TO CHILD SUPPORT COLLECTION, INCLUDING ALTERNATIVE MEASURES FOR PAYMENT OF COSTS FOR NONPUBLIC ASSISTANCE SERVICES, THE ESTABLISHMENT OF THE AMOUNT OF CHILD SUPPORT REQUIRED BY CERTAIN PARENTS WHO ARE NINETEEN YEARS OF AGE OR YOUNGER, PAYMENT OF A CHILD SUPPORT OBLIGATION UNDER A MODIFIED ORDER, PROVISIONS RELATING TO THE SUSPENSION, REVOCATION, NONISSUANCE, AND NONRENEWAL OF CERTAIN LICENSES FOR FAILURE TO PAY SUPPORT, AND IMPLEMENTATION PROVISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 252J.1 DEFINITIONS.

As used in this chapter, unless the context otherwise requires:

1. "Certificate of noncompliance" means a document provided by the child support recovery unit certifying that the named obligor is not in compliance with a support order or with a written agreement for payment of support entered into by the unit and the obligor.

2. "License" means a license, certification, registration, permit, approval, renewal, or other similar authorization issued to an obligor by a licensing authority which evidences the admission to, or granting of authority to engage in, a

profession, occupation, business, or industry, or to operate or register a motor vehicle. "License" does not mean or include licenses for hunting, fishing, boating, or other recreational activity.

3. "Licensee" means an obligor to whom a license has been issued, or who is seeking the issuance of a license.

4. "Licensing authority" means a county treasurer, the supreme court, or an instrumentality, agency, board, commission, department, officer, organization, or any other entity of the state, which has authority within this state to suspend or revoke a license or to deny the renewal or issuance of a license authorizing an obligor to register or operate a motor vehicle or to engage in a business, occupation, profession, or industry.

5. "Obligor" means a natural person as defined in section 252G.1 who has been ordered by a court or administrative authority to pay support.

6. "Support" means support or support payments as defined in section 252D.1, whether established through court or administrative order.

7. "Support order" means an order for support issued pursuant to chapter 232, 234, 252A, 252C, 252D, 252E, 252F, 252H, 598, 600B, or any other applicable chapter, or under a comparable statute of a foreign jurisdiction as registered with the clerk of the district court or certified to the child support recovery unit.

8. "Unit" means the child support recovery unit created in section 252B.2.

9. "Withdrawal of a certificate of noncompliance" means a document provided by the unit certifying that the certificate of noncompliance is withdrawn and that the licensing authority may proceed with issuance, reinstatement, or renewal of an obligor's license.

Sec. 2. NEW SECTION. 252J.2 PURPOSE AND USE.

1. Notwithstanding other statutory provisions to the contrary, and if an obligor has not been cited for contempt and enjoined from engaging in the activity governed by a license pursuant to section 598.23A, the unit may utilize the process established in this chapter to collect support.

2. An obligor is subject to the provisions of this chapter if the obligor's support obligation is being enforced by the unit, if the support payments required by a support order to be paid to the clerk of the district court or the collection services center pursuant to section 598.22 are not paid and become delinquent in an amount equal to the support payment for ninety days, and if the obligor's situation meets other criteria specified under rules adopted by the department pursuant to chapter 17A. The criteria specified by rule shall include consideration of the length of time since the obligor's last support payment and the total amount of support owed by the obligor.

3. Actions initiated by the unit under this chapter shall not be subject to contested case proceedings or further review pursuant to chapter 17A and any resulting court hearing shall be an original hearing before the district court.

4. Notwithstanding the confidentiality provisions of chapter 252B or 422, or any other statutory provision pertaining to the confidentiality of records, a licensing authority shall exchange information with the unit through manual or automated means. Information exchanged under this chapter for the purposes of this chapter or chapter 598 shall be used solely for the purpose of identifying licensees subject to enforcement pursuant to this chapter or chapter 598.

Sec. 3. NEW SECTION. 252J.3 NOTICE TO OBLIGOR OF POTENTIAL SANCTION OF LICENSE.

The unit shall proceed in accordance with this chapter only if notice is served on the obligor in accordance with R.C.P. 56.1 or notice is sent by certified mail addressed to the

obligor's last known address and served upon any person who may accept service under R.C.P. 56.1. Return acknowledgment is required to prove service by certified mail. The notice shall include all of the following:

1. The address and telephone number of the unit and the unit case number.

2. A statement that the obligor is not in compliance with a support order.

3. A statement that the obligor may request a conference with the unit to contest the action.

4. A statement that if, within twenty days of service of notice on the obligor, the obligor fails to contact the unit to schedule a conference, the unit shall issue a certificate of noncompliance, bearing the obligor's name, social security number, unit case number, and the docket number of a support order requiring the obligor to pay support, to any appropriate licensing authority, certifying that the obligor is not in compliance with a support order.

5. A statement that in order to stay the issuance of a certificate of noncompliance the request for a conference shall be in writing and shall be received by the unit within twenty days of service of notice on the obligor.

6. The names of the licensing authorities to which the unit intends to issue a certificate of noncompliance.

7. A statement that if the unit issues a certificate of noncompliance to an appropriate licensing authority, the licensing authority shall initiate proceedings to refuse to issue or renew, or to suspend or revoke the obligor's license, unless the unit provides the licensing authority with a withdrawal of a certificate of noncompliance.

Sec. 4. NEW SECTION. 252J.4 CONFERENCE.

1. The obligor may schedule a conference with the unit following service of notice pursuant to section 252J.3, or at any time after service of notice of suspension, revocation, denial of issuance, or nonrenewal of a license from a

licensing authority, to challenge the unit's actions under this chapter.

2. The request for a conference shall be made to the unit, in writing, and, if requested after service of a notice pursuant to section 252J.3, shall be received by the unit within twenty days following service of notice.

3. The unit shall notify the obligor of the date, time, and location of the conference by regular mail, with the date of the conference to be no earlier than ten days following issuance of notice of the conference by the unit. If the obligor fails to appear at the conference, the unit shall issue a certificate of noncompliance.

4. Following the conference, the unit shall issue a certificate of noncompliance unless any of the following applies:

a. The unit finds a mistake in the identity of the obligor.

b. The unit finds a mistake in determining that the amount of delinquent support is equal to or greater than one month.

c. The obligor enters a written agreement with the unit to comply with a support order, the obligor complies with an existing written agreement to comply with a support order, or the obligor pays the total amount of delinquent support due.

d. Issuance of a certificate of noncompliance is not appropriate under other criteria established in accordance with rules adopted by the department pursuant to chapter 17A.

5. The unit shall grant the obligor a stay of the issuance of a certificate of noncompliance upon receiving a timely written request for a conference, and if a certificate of noncompliance has previously been issued, shall issue a withdrawal of a certificate of noncompliance if the obligor enters into a written agreement with the unit to comply with a support order.

6. If the obligor does not timely request a conference or pay the total amount of delinquent support owed within twenty

days of service of the notice pursuant to section 252J.3, the unit shall issue a certificate of noncompliance.

Sec. 5. <u>NEW SECTION</u>. 252J.5 WRITTEN AGREEMENT.

1. If an obligor is subject to this chapter as established in section 252J.2, the obligor and the unit may enter into a written agreement for payment of support and compliance which takes into consideration the obligor's ability to pay and other criteria established by rule of the department. The written agreement shall include all of the following:

a. The method, amount, and dates of support payments by the obligor.

b. A statement that upon breach of the written agreement by the obligor, the unit shall issue a certificate of noncompliance to any appropriate licensing authority.

2. A written agreement entered into pursuant to this section does not preclude any other remedy provided by law and shall not modify or affect an existing support order.

3. Following issuance of a certificate of noncompliance, if the obligor enters into a written agreement with the unit, the unit shall issue a withdrawal of the certificate of noncompliance and shall forward a copy of the withdrawal by regular mail to the obligor and any appropriate licensing authority.

Sec. 6. <u>NEW SECTION</u>. 252J.6 DECISION OF THE UNIT.

1. If an obligor is not in compliance with a support order pursuant to section 252J.2, the unit notifies the obligor pursuant to section 252J.3, and the obligor requests a conference pursuant to section 252J.4, the unit shall issue a written decision if any of the following conditions exists:

a. The obligor fails to appear at a scheduled conference under section 252J.4.

b. A conference is held under section 252J.4.

c. The obligor fails to comply with a written agreement entered into by the obligor and the unit under section 252J.5.

2. The unit shall send a copy of the written decision to the obligor by regular mail at the obligor's most recent address of record. If the decision is made to issue a certificate of noncompliance or to withdraw the certificate of noncompliance, a copy of the certificate of noncompliance or of the withdrawal of the certificate of noncompliance shall be attached to the written decision. The written decision shall state all of the following:

a. That a copy of the certificate of noncompliance or withdrawal of the certificate of noncompliance has been provided to the licensing authorities named in the notice provided pursuant to section 252J.3.

b. That upon receipt of a certificate of noncompliance, the licensing authority shall initiate proceedings to suspend, revoke, deny issuance, or deny renewal of a license, unless the licensing authority is provided with a withdrawal of a certificate of noncompliance from the unit.

c. That in order to obtain a withdrawal of a certificate of noncompliance from the unit, the obligor shall enter into a written agreement with the unit, comply with an existing written agreement with the unit, or pay the total amount of delinquent support owed.

d. That if the unit issues a written decision, which includes a certificate of noncompliance that all of the following apply:

(1) The obligor may request a hearing as provided in section 252J.9, before the district court in the county in which the underlying support order is filed, by filing a written application to the court challenging the issuance of the certificate of noncompliance by the unit and sending a copy of the application to the unit within the time period specified in section 252J.9.

(2) The obligor may retain an attorney at the obligor's own expense to represent the obligor at the hearing.

(3) The scope of review of the district court shall be limited to demonstration of a mistake of fact related to the delinquency of the obligor.

3. If the unit issues a certificate of noncompliance, the unit shall only issue a withdrawal of the certificate of noncompliance if any of the following applies:

a. The unit or the court finds a mistake in the identity of the obligor.

b. The unit or the court finds a mistake in determining that the amount of delinquent support due is equal to or greater than one month.

c. The obligor enters a written agreement with the unit to comply with a support order, the obligor complies with an existing written agreement to comply with a support order, or the obligor pays the total amount of delinquent support owed.

d. Issuance of a withdrawal of the certificate of noncompliance is appropriate under other criteria in accordance with rules adopted by the department pursuant to chapter 17A.

Sec. 7. NEW SECTION. 252J.7 CERTIFICATE OF NONCOMPLIANCE -- CERTIFICATION TO LICENSING AUTHORITY.

1. If the obligor fails to respond to the notice of potential license sanction provided pursuant to section 252J.3 or the unit issues a written decision under section 252J.6 which states that the obligor is not in compliance, the unit shall certify, in writing, to any appropriate licensing authority that the support obligor is not in compliance with a support order and shall include a copy of the certificate of noncompliance.

2. The certificate of noncompliance shall contain the obligor's name, social security number, and the docket number of the applicable support order.

3. The certificate of noncompliance shall require all of the following:

a. That the licensing authority initiate procedures for the revocation or suspension of the obligor's license, or for the denial of the issuance or renewal of a license using the licensing authority's procedures.

b. That the licensing authority provide notice to the obligor, as provided in section 252J.8, of the intent to suspend, revoke, deny issuance, or deny renewal of a license including the effective date of the action. The suspension, revocation, or denial shall be effective no sooner than thirty days following provision of notice to the obligor.

Sec. 8. NEW SECTION. 252J.8 REQUIREMENTS AND PROCEDURES OF LICENSING AUTHORITY.

1. A licensing authority shall maintain records of licensees by name, current known address, and social security number.

2. In addition to other grounds for suspension, revocation or denial of issuance or renewal of a license, a licensing authority shall include in rules adopted by the licensing authority as grounds for suspension, revocation, or denial of issuance or renewal of a license, the receipt of a certificate of noncompliance from the unit.

3. The supreme court shall prescribe rules for admission of persons to practice as attorneys and counselors pursuant to chapter 602, article 10, which include provisions, as specified in this chapter, for the denial, suspension, or revocation of the admission for failure to comply with a child support order.

4. A licensing authority that is issued a certificate of noncompliance shall initiate procedures for the suspension, revocation, or denial of issuance or renewal of licensure to an obligor. The licensing authority shall utilize existing rules and procedures for suspension, revocation, or denial of the issuance or renewal of a license.

In addition, the licensing authority shall provide notice to the obligor of the licensing authority's intent to suspend,

revoke, or deny issuance or renewal of a license under this chapter. The suspension, revocation, or denial shall be effective no sooner than thirty days following provision of notice to the obligor. The notice shall state all of the following:

a. The licensing authority intends to suspend, revoke, or deny issuance or renewal of an obligor's license due to the receipt of a certificate of noncompliance from the unit.

b. The obligor must contact the unit to schedule a conference or to otherwise obtain a withdrawal of a certificate of noncompliance.

c. Unless the unit furnishes a withdrawal of a certificate of noncompliance to the licensing authority within thirty days of the issuance of the notice under this section, the obligor's license will be revoked, suspended, or denied.

d. If the licensing authority's rules and procedures conflict with the additional requirements of this section, the requirements of this section shall apply. Notwithstanding section 17A.18, the obligor does not have a right to a hearing before the licensing authority to contest the authority's actions under this chapter but may request a court hearing pursuant to section 252J.9 within thirty days of the provision of notice under this section.

5. If the licensing authority receives a withdrawal of a certificate of noncompliance from the unit, the licensing authority shall immediately reinstate, renew, or issue a license if the obligor is otherwise in compliance with licensing requirements established by the licensing authority.

Sec. 9. NEW SECTION. 252J.9 DISTRICT COURT HEARING.

1. Following the issuance of a written decision by the unit under section 252J.6 which includes the issuance of a certificate of noncompliance, or following provision of notice to the obligor by a licensing authority pursuant to section 252J.8, an obligor may seek review of the decision and request a hearing before the district court in the county in which the

underlying support order is filed, by filing an application with the district court, and sending a copy of the application to the unit by regular mail. An application shall be filed to seek review of the decision by the unit or following issuance of notice by the licensing authority no later than within thirty days after the issuance of the notice pursuant to section 252J.8. The clerk of the district court shall schedule a hearing and mail a copy of the order scheduling the hearing to the obligor and the unit and shall also mail a copy of the order to the licensing authority, if applicable. The unit shall certify a copy of its written decision and certificate of noncompliance, indicating the date of issuance, and the licensing authority shall certify a copy of a notice issued pursuant to section 252J.8, to the court prior to the hearing.

2. The filing of an application pursuant to this section shall automatically stay the actions of a licensing authority pursuant to section 252J.8. The hearing on the application shall be scheduled and held within thirty days of the filing of the application. However, if the obligor fails to appear at the scheduled hearing, the stay shall be lifted and the licensing authority shall continue procedures pursuant to section 252J.8.

3. The scope of review by the district court shall be limited to demonstration of a mistake of fact relating to the delinquency of the obligor. Issues related to visitation, custody, or other provisions not related to the support provisions of a support order are not grounds for a hearing under this chapter.

4. Support orders shall not be modified by the court in a hearing under this chapter.

5. If the court finds that the unit was in error in issuing a certificate of noncompliance, or in failing to issue a withdrawal of a certificate of noncompliance, the unit shall issue a withdrawal of a certificate of noncompliance to the appropriate licensing authority.

Sec. 10. Section 252H.10, Code 1995, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. The periodic due date established under a prior order for payment of child support shall not be changed in any order modified as a result of an action initiated under this chapter, unless the child support recovery unit or the court determines that good cause exists to change the periodic due date. If the unit or the court determines that good cause exists, the unit or the court shall include the rationale for the change in the modified order and shall address the issue of reconciliation of any payments due or made under a prior order which would result in payment of the child support obligation under both the prior and the modified orders.

Sec. 11. Section 598.21, subsection 4, Code 1995, is amended by adding the following new paragraph:

NEW PARAGRAPH. e. Unless the special circumstances of the case justify a deviation, the court or the child support recovery unit shall establish a monthly child support payment of twenty-five dollars for a parent who is nineteen years of age or younger, who has not received a high school or high school equivalency diploma, and to whom each of the following apply:

(1) The parent is attending a school or program described as follows or has been identified as one of the following:

(a) The parent is in full-time attendance at an accredited school and is pursuing a course of study leading to a high school diploma.

(b) The parent is attending an instructional program leading to a high school equivalency diploma.

(c) The parent is attending a vocational education program approved pursuant to chapter 258.

(d) The parent has been identified by the director of special education of the area education agency as a child requiring special education as defined in section 256B.2.

(2) The parent provides proof of compliance with the requirements of subparagraph (1) to the child support recovery unit, if the unit is providing services under chapter 252B, or if the unit is not providing services pursuant to chapter 252B, to the court as the court may direct.

Failure to provide proof of compliance under this subparagraph is grounds for modification of the support order using the uniform child support guidelines and imputing an income to the parent equal to a forty-hour work week at the state minimum wage, unless the parent's education, experience, or actual earnings justify a higher income.

Sec. 12. Section 598.21, subsection 8, Code 1995, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. The periodic due date established under a prior order for payment of child support shall not be changed in any modified order under this section, unless the court determines that good cause exists to change the periodic due date. If the court determines that good cause exists, the court shall include the rationale for the change in the modified order and shall address the issue of reconciliation of any payments due or made under a prior order which would result in payment of the child support obligation under both the prior and the modified orders.

Sec. 13. NONPUBLIC ASSISTANCE RECIPIENTS CHILD SUPPORT RECOVERY COSTS -- EVALUATION AND RECOMMENDATIONS. The child support recovery unit shall evaluate the costs of services provided by the unit to nonpublic assistance recipients of services and shall submit a report to the general assembly on or before January 1, 1996, which includes recommendations and budget requests for coverage of these costs which are alternatives to payment of any fees by nonpublic assistance recipients of child support. An alternative to payment of fees by nonpublic assistance recipients of child support shall be implemented on or before July 1, 1996.

Sec. 14. IMPLEMENTATION. Sections 1 through 9 of this Act may be implemented by the child support recovery unit and any applicable licensing authority prior to adoption of rules by the licensing authority as required pursuant to section 252J.8. However, a licensing authority shall adopt rules as required by section 252J.8 on or before January 1, 1996.

____
LEONARD L. BOSWELL
President of the Senate

____
RON J. CORBETT
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 431, Seventy-sixth General Assembly.

____
JOHN F. DWYER
Secretary of the Senate

Approved ______________, 1995

____
TERRY E. BRANSTAD
Governor

MAR 8
JUDICIARY

HOUSE FILE 300
BY GRUBBS

Passed House, Date ____________ Passed Senate, Date ____________
Vote: Ayes ______ Nays _______ Vote: Ayes ______ Nays _______
Approved ______________________________

G

A BILL FOR

1 An Act eliminating joint and several liability in comparative
2 fault actions.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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HF 300

TLSB 1894HH 76
mk/cf/24

S.F. ________ H.F. 300

1 Section 1. Section 668.4, Code 1995, is amended to read as
2 follows:
3 668.4 JOINT AND SEVERAL LIABILITY.
4 In actions brought under this chapter, the rule of joint
5 and several liability shall not apply ~~to-defendants-who-are~~
6 ~~found-to-bear-less-than-fifty-percent-of-the-total-fault~~
7 ~~assigned-to-all-parties~~.
8 EXPLANATION
9 This bill eliminates joint and several liability in
10 comparative fault actions. Currently, joint and several
11 liability exists only in the event that a defendant is found
12 to bear at least 50 percent of the total fault assigned to all
13 parties.
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LSB 1894HH 76
mk/cf/24

MAR 2 1995
JUDICIARY

HOUSE FILE 250
BY GRUBBS

Passed House, Date ____________ Passed Senate, Date ____________
Vote: Ayes ______ Nays ______ Vote: Ayes ______ Nays ______
Approved ________________________________

G

A BILL FOR

1 An Act relating to consortium claims under comparable fault.
2 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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HF 250

TLSB 1892HH 76
mk/jw/5

S.F. ________ H.F. 250

1 Section 1. Section 668.3, subsection 1, Code 1995, is
2 amended by adding the following new unnumbered paragraph:
3 NEW UNNUMBERED PARAGRAPH. Contributory fault shall not bar
4 recovery in an action by a claimant to recover damages for
5 loss of services, companionship, society, or consortium, un-
6 less the fault attributable to the person whose injury or
7 death provided the basis for the damages is greater in per-
8 centage than the combined percentage of fault attributable to
9 the defendants, third-party defendants, and persons who have
10 been released pursuant to section 668.7, but any damages
11 allowed shall be diminished in proportion to the amount of
12 fault attributable to the person whose injury or death pro-
13 vided the basis for the damages.
14 Sec. 2. Section 668.3, subsection 2, paragraph b, Code
15 1995, is amended to read as follows:
16 b. The percentage of the total fault allocated to each
17 claimant, defendant, third-party defendant, ~~and~~ person who has
18 been released from liability under section 668.7, and injured
19 or deceased person whose injury or death provides a basis for
20 a claim to recover damages for loss of consortium, services,
21 companionship, or society. For this purpose the court may
22 determine that two or more persons are to be treated as a
23 single party.

24 EXPLANATION
25 This bill provides that the percentage of fault assigned to
26 the person whose death or injury gave rise to a consortium
27 claim shall apply to reduce or bar a judgment for loss of
28 consortium. The bill overrules Schwennen v. Abell, 430 N.W.2d
29 98 (Iowa 1988).
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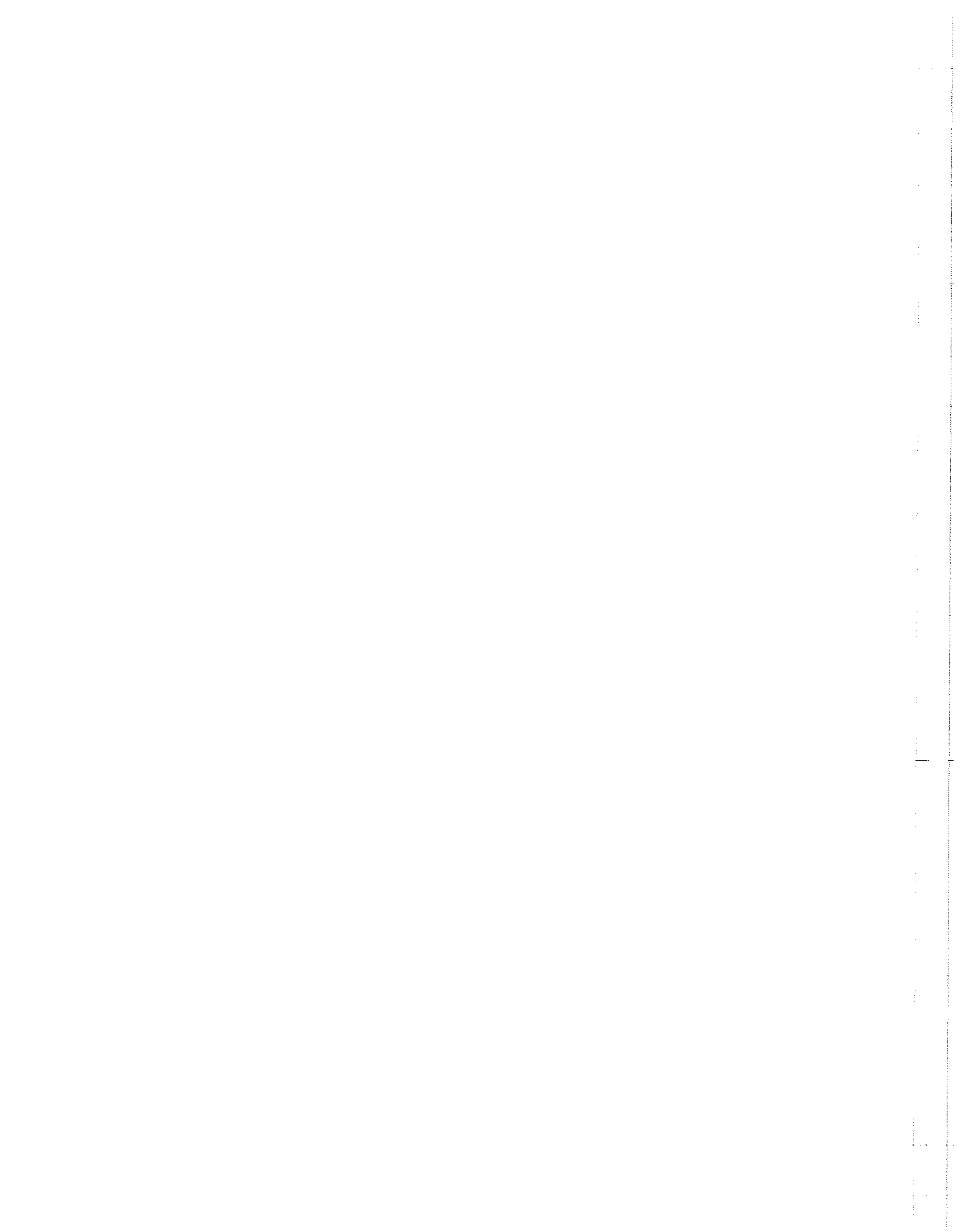
LSB 1892HH 76
mk/jw/5



EMPLOYMENT TERMINATION
TRADITIONAL AND EVOLVING SOURCES OF EMPLOYER LIABILITY

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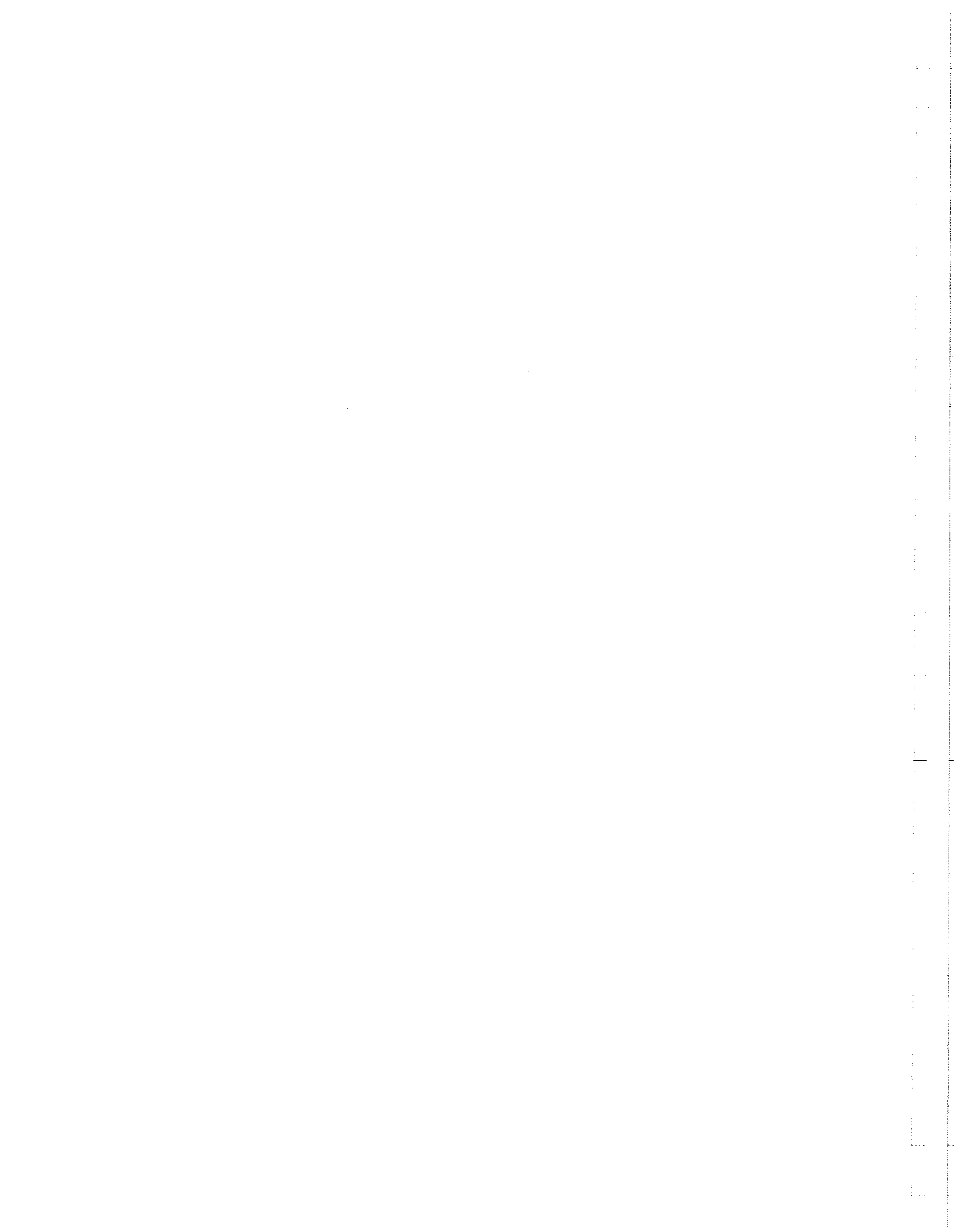

EMPLOYMENT TERMINATION:

TRADITIONAL AND EVOLVING SOURCES OF EMPLOYER LIABILITY

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Iowa Defense Counsel Association Annual Seminar
September 21, 1995

INTRODUCTION

Litigation concerning the employer-employee relationship--and, especially, the termination of that relationship--has principally arisen from two separate perspectives. On the one hand, traditional common law tort and contract theories were raised by attorneys not primarily involved in an employment-related practice of law. In large part because of the specialized statutory nature of much of employment law, and the at-will employment rule which defined the legal basis upon which the employment relationship is premised, those common law theories, traditionally, were not very successful.

Society began to change its thinking regarding the employer-employee relationship. When it did so, the changes were predominantly reflected in statute. Although the common law had failed to develop meaningful theories of recovery, the legislative branch began to enact various types of protection for employees. Initially, these protections were in the nature of progressive era statutes designed to protect workers

nature of progressive era statutes designed to protect workers (primarily women and children) from oppressive employment conditions. Modern worker's compensation statutes arose during this period. Later, Congress began to enact protections relating to workers' freedom of association with each other, the right to engage in concerted "protected" activities, and the right collectively to bargain. As a result of these legislative changes, the focus of labor and employment law shifted away from generalist common law theories to labor and employment law specialists whose attention was directed to statute-based rights. This trend occupied the first half of the twentieth century.

The civil rights era witnessed a major expansion of employee rights with enactment of Title VII of the Civil Rights Act of 1964. On a national level, Title VII protected employees from terminations based upon race, color, religion, national origin and gender. Earlier statutes dealt indirectly with employment termination. That issue was now squarely brought forward in discrimination laws. Later federal legislation established protections for older workers and disabled persons. Shortly after Congress moved to prohibit certain types of discrimination, states and even local governments acted, also, to do so. Only one year after Title VII was passed, Iowa adopted the Iowa Civil Rights Act of 1965. Iowa Code §216.1.

Throughout the "statutory" phase of employment law development, common law employment cases were relatively few. Legislatively, broad groups of employees were, in the last quarter of the twentieth century, protected. Employees interested in union activity, older workers, women and minorities all possessed legal rights that existed in the context of an administrative and judicial system designed to enforce those rights and, in fact, shift the burden of litigation itself from those making claims to those against whom claims were made. Legislative protections, however, were predominantly unavailable in most employment contexts. Legislatively, some employees had been given new rights. Those rights, in part, led to increased expectations among the general employed population.

Concurrent with the expansion of statutory rights, the United States's rapid economic expansion tapered off. Union growth flattened, the economy slowed and the previously optimistic view of American work opportunity became less generally held.

During the "malaise" of the late 1970's and the economic turmoil and excesses of the 1980's, workers stepped up legal challenges to employer rights. Many of the claims came in the statutory arena. At the same time, however, employers were increasingly challenged with old common law theories dressed in new clothes. The courts, increasingly enforcing statutory

rights created within the last twenty or thirty years, began to accommodate more of the newly asserted "traditional" theories of liability and society moved into a period of the expansion of common law employment rights. Not surprisingly, this expansion, like fashion trends, began on the coasts. It did move, however, to Iowa.

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The purpose of this paper is to describe generally the statutory and common law theories presently asserted in litigation involving the termination of the employment relationship. The number of employment cases has increased rapidly over recent years, and there is little reason to think that expansion in common law rights will not continue to fuel the rapid pace of this litigation. Perhaps as much as in any other area of the law, success in prosecuting or defense of employment-based lawsuits is dependent upon issue spotting. Understanding the nature of employment claims being asserted will assist in spotting potential issues that arise in the employment termination context.

I. COMMON LAW THEORIES OF RECOVERY

A. At-Will Employment

Under the traditional doctrine of employment at will, absent contractual restrictions, employment is deemed to be at the discretion of the employer and the employee. In other words, either party has the legal right to terminate the

employment relationship for virtually any reason or for no reason at all. See Boerschell v. City of Perry, 512 N.W.2d 565, 566 (Iowa 1994); Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991); Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985); Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 89, 93 n.6 (Iowa 1982); Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 791 (Iowa 1976); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 135 n.4 (5th Cir. 1979) (applying Iowa law). The legal doctrine is said to be "firmly rooted in Iowa law." Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989) (stating that "only two narrow exceptions" to the rule are recognized).

Although cases in Iowa continue to pay lip service to the at-will employment rule and although there remain fairly broad areas in which employers retain discretion to terminate employment, the legal principal has been and continues to be under challenge.

II. CONTRACT BASED CLAIMS

By its express terms, the Iowa Supreme Court's "any reason or no reason" statement applies only to at-will employees. Boerschell v. City of Perry, 512 N.W.2d 565, 566 (Iowa 1994). Employees working under contract, of course,

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must be viewed differently. By definition, they are not at-will employees.

A. <u>Express Contract</u>

Contractual protections clearly apply to those employees with traditional contracts. Members of labor unions, professional athletes, athletic coaches, teachers and others are, in our common experience, subject to employment contracts. When we think about an employment contract, lay people tend to envision a document signed by both sides setting forth the rights and limitations of each party. Certainly, an employment contract that specifically limits the circumstances under which employment may be terminated should be enforceable. However, very few employees have such written contracts.

Despite Yogi Berra's observation that oral contracts "aren't worth the paper they're written on" employment contract claims may also be based upon alleged oral agreements. In <u>Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc.</u>, 473 N.W.2d 31 (Iowa 1991), plaintiff claimed that the defendant employer terminated an alleged oral contract of employment solely because of his age. Plaintiff, however, failed timely to assert a claim of age discrimination. The Iowa Supreme Court reversed summary judgment, holding that although all discrimination claims are preempted by the exclusive remedies set forth in the Iowa

Civil Rights Act, under Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 197 (Iowa 1985), the independent claim of breach of employment contract survived. In Grahek, the alleged oral contract was based upon a conversation in which plaintiff allegedly showed his employer a written agreement with a previous employer. Plaintiff asserted that the employer orally agreed to certain portions of the earlier written agreement.

Employment contract claims have been hampered in their development by the limitations placed upon contracts for "permanent employment." Under Iowa law, traditionally, a contract for permanent or lifetime employment has been construed as terminable at will by either party, absent "additional consideration" beyond the employee's mere promise to perform services. Wolfe v. Graether, 389 N.W.2d 643, 654-55 (1986). Whether such independent consideration exists to support a lifetime employment agreement must be made on a case-by-case basis. Accordingly, where a tenured faculty member gave up lifetime job protection to accept permanent employment at another institution, the court held there to be sufficient consideration to support permanent employment. Collins v. Parsons College, 203 N.W.2d 594, 599 (Iowa 1973). Similarly, the sacrifice of a partnership interest in a business at the time the business changed from a partnership to a corporate form, also has been held to constitute

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sufficient consideration for lifetime employment. Wolfe v. Graether, 389 N.W.2d 643, 654-55 (1986). On the other hand, giving up secure union employment under a "just cause" collective bargaining agreement is insufficient to support a claim of permanent employment. Albert v. Davenport Osteopathic Hospital, 385 N.W.2d 237 (Iowa 1986).

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B. Employment Handbook Claims

The Iowa Supreme Court's first clear ruling in the employment handbook context arose in Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988). In Cannon, the court affirmatively approved a wrongful termination claim brought by a discharged employee alleging violation of provisions in an employee handbook. In Cannon, the court enforced an award against the employer. Unlike common contract situations, the handbook "contract" was unilaterally prepared, submitted after the commencement of the employment relationship and, in exchange for the employment handbook, the employer got absolutely nothing from the employee. Nonetheless, the Iowa Supreme Court enforced the handbook language based upon the "reasonable expectations" of the employee.

Although the reasoning in Cannon might be criticized under traditional contract analysis, the result is anything but surprising given the language of the handbook at issue. The rule as articulated in Cannon, under the facts of that

case, is not particularly problematic. The handbook provision stated:

> No employee will be suspended, demoted or dismissed without just and sufficient cause. Sufficient cause for discharge shall include, among other reasons, dishonesty, negligence, incompetence, insubordination, intoxication while on duty, failure to report for work or refusal to perform any reasonable work, service or labor.

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In subsequent cases, the court clarified its analysis and narrowed somewhat the circumstances under which a discharged employee might recover based upon employment handbook language. Mainly, the court has turned from a reasonable expectations analysis to more traditional contract principles. In Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989), the Iowa Supreme Court rejected the employee's claim of unilateral expectations, holding that an employee manual may constitute a unilateral contract only if the traditional requirements of contract formation have been met. The court stated these conditions as follows:

> Thus, an employee handbook may create a unilateral contract if (1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook has been communicated to and accepted by the employee so as to create acceptance; and (3) the employee has continued working, so as to provide consideration.

446 N.W.2d at 456. In Fogel, the court observed that "courts are generally reluctant to dismantle an employer's long standing common-law right to terminate at-will employees in

the absence of an express offer by the employer to do so . . . ." Id. (emphasis added).

The question of whether language in an employment handbook is sufficiently definite to create a contract is a question of law for the court to determine. Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 456 (Iowa 1989), French v. Foods, Inc., 495 N.W.2d 768, 770 (Iowa 1993). Where there are disclaimers emphasizing the at-will employment relationship, the courts, following the language from Fogel quoted above, have not held that the language created contractual obligations. See, e.g., French v. Foods, Inc., 495 N.W.2d 768, 770 (Iowa 1993); McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989), Palmer v. Women's Christian Ass'n, 485 N.W.2d 93 (Iowa App. 1992).[1]

C. Implied Covenant of Good Faith and Fair Dealing

Although they are somewhat less frequent now, wrongful discharge claims often include claims for breach of an alleged "duty of good faith and fair dealing." In no Iowa case, has

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[1]Although recent cases setting forth parameters for an employment handbook claim sound favorable to employers, those rules may be somewhat misleading. In 1992, the Iowa Supreme Court affirmed an award of more than $500,000 against a Des Moines employer on the basis of the language of the employment handbook. The handbook at issue addressed employees whose employment terminated because of one of seven identified reasons, including "resignation, retirement or discharge for cause." That language was held sufficiently definite to establish contractual obligations and to support the substantial monetary award. Hunter v. Board of Trustees, 481 N.W.2d 510, 515 (Iowa 1992).

such a claim been accepted in the employment context. It has, however, been rejected. Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 456-57 (Iowa 1989); French v. Foods, Inc., 495 N.W.2d 768, 769 (Iowa 1993); Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31, 34 (Iowa 1991); Porter v. Pioneer Hy-Bred Int'l, Inc., 497 N.W.2d 870, 871 (Iowa 1993) (termination of an independent contractor relationship). This theory does not appear to present plaintiffs very substantial prospects.

D. Promissory Estoppel

Iowa promissory estoppel claims have traditionally arisen in the context of claims of an oral "permanent" contract of employment, discussed above. In this context, sufficient "additional consideration" must be demonstrated to support an award.

III. TORT BASED THEORIES

A. Discharge Against Public Policy

In addition to statutory claims for wrongful discharge (usually on the basis of claimed alleged discrimination) and contract-related claims, the Iowa Supreme Court has also authorized a cause of action based upon tort principles. Analogizing to the claim of tortious interference with contractual relations, Iowa recognizes a viable cause of action when an employee's discharge violates "public policy."

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The first Iowa case to authorize recovery on this ground was Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560-61 (Iowa 1988). There, the court was faced with a claim that the plaintiff had been discharged for filing a worker's compensation claim. Although the worker's compensation system is set forth in statute, no statutory provision specifically prohibited discharge on the basis of an employee's pursuit of worker's compensation benefits. Nonetheless, the court held that such conduct could not be allowed since it would violate clear public policy of the state. See, also, Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990) (discharge prohibited even if it did not interfere with plaintiff's receipt of worker's compensation benefits).

Following remand of the Springer case, the Iowa Supreme Court was again confronted with the litigation. Springer v. Weaks & Leo Company, 475 N.W.2d 630 (Iowa 1991). There, the court addressed "confusion" over the terminology it had employed in the first Springer decision. 475 N.W.2d at 633. The court had acknowledged in the first case that "tortious interference" typically is not a cause of action that can be asserted against a party to a contract. 429 N.W.2d at 561 n.1. Because of analytical problems that arose because of the court's initial choice of language, in the second Springer decision the court abandoned its earlier terminology. The court stated that in the future it would refer to "this type

of claim as [a] retaliatory or wrongful discharge claim." 475 N.W.2d at 633.

The wrongful discharge claim has expanded beyond the worker's compensation context. The Iowa Supreme Court affirmed an award to a discharged employee who was fired because she filed a claim for partial unemployment compensation benefits. Lara v. Thomas, 512 N.W.2d 777, 781-82 (Iowa 1984). See, also, Wilcox v. Hy-Vee Food Stores, Inc., 458 N.W.2d 870, 872 (Iowa App. 1990) (statute prohibited discharge for refusal to take polygraph examination but did not at the time specifically authorize separate claim on that basis). Not all statutes or constitutional provisions, however, will authorize recovery for discharge. In Boerschell v. City of Perry, 512 N.W.2d 565, 567-68 (Iowa 1994), the court acknowledged that the presumption of innocence in criminal matters is "clearly expressed." Nonetheless, recovery was denied since the "right is limited to criminal proceedings" and is not "applicable in the employment context."

In a recent decision, Judge Bennett further examined what constitutes sufficient "public policy" in order to form the basis of a cause of action for termination in violation of public policy. In Thompto v. Coborn's Inc., 871 F.Supp. 1097 (N.D. Iowa 1994), the court considered claims of public policy wrongful termination for plaintiff's (a) inquiring about the

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availability of cancer insurance coverage and challenging the explanation why it was unavailable, and (b) for threatening to consult an attorney to obtain that coverage or an explanation. 871 F.Supp. at 1111.

Analyzing Iowa Supreme Court decisions, the Thompto court summarized that a retaliatory discharge claim lies for "an intentional wrong committed by the employer against an employee who chooses to exercise some substantial right." 871 F.Supp. at 1113 (citing Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355 (Iowa 1989)). In considering the claims asserted, the court conducted its "own examination of whether clear articulations of public policy of the state of Iowa" supported the plaintiff's claim of wrongful discharge.

With respect to the insurance inquiry, the court held that the Iowa Wage Payment Collection Act, Iowa Code §91A.6(3), and the statute regulating group health insurance, Iowa Code §509B.5(4), both provide public policy bases for a wrongful termination claim. 871 F.Supp. at 1115-16. In addition, the plaintiff in Thompto presented a claim that she was discharged for her threat to "get a lawyer." Relying on Iowa Supreme Court language that such clearly articulated public policies "may be expressed in the constitution and statutes of the state . . . .", 871 F.Supp. at 1116 (quoting Boerschell, 512 N.W.2d at 567), the court held that the constitution and statutes of the state are not the "sole

sources of public policy." Analyzing the Iowa Supreme Court's regulation of the practice of law, the needs of the public for legal services and the fact that consultation with an attorney is a "necessary first step in the process of discovery whether an individual has a cognizable claim", 871 F.Supp. at 1120, the court held that a clearly articulated public policy existed that would support a wrongful discharge action. 871 F.Supp. at 1121.

B. Misrepresentation

Former employees also bring litigation based upon misrepresentation. Sometimes that litigation is based upon fraud. In such circumstances, allegations may be based upon claims and representations concerning an employee's future in the employment relationship. See Hagarty v. Dysart-Geneseo Community School Dist., 282 N.W.2d 92, 95 (1979). The burden of proof, however, is high and an employee suing on this theory must show the traditional elements of fraud--that the representation was knowingly false and made with the intention to deceive. Id.; see Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450 (Iowa 1990). In the employment context, that means the plaintiff must demonstrate that, at the time of the representation, the employer had no intention whatsoever of following through on what was represented.

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C. **Negligent Misrepresentation**

The Iowa Supreme Court has also recognized a claim on behalf of terminated employees based on negligent misrepresentation. In Barske v. Rockwell Int'l, Corp., 514 N.W.2d 917 (Iowa 1994), the Iowa Supreme Court held that an employer was liable to discharged employees for misrepresentations made during the employment interview. In Barske, the employer was held liable for discharges, notwithstanding language in the application itself that specifically provided that employment, if established, would be at will in nature. The court accepted plaintiffs' negligent misrepresentation claims.

Iowa adopted Section 552 of the Restatement (Second) of Torts in Ryan v. Canne, 170 N.W.2d 395 (Iowa 1969). Under the Restatement provision, an individual may be liable if, in the course of a business, profession or employment or "any other transaction" in which the person has a "pecuniary interest", that individual does not exercise reasonable care in communicating the information. Although an employer would clearly meet the "pecuniary interest" test, other Iowa case law suggests that Barske may not provide a substantial basis for future employee claims. In Meier v. Alfa-Laval, Inc., 454 N.W.2d 576 (Iowa 1990), Haupt v. Miller, 514 N.W.2d 905 (Iowa 1994), and Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994), the Iowa Supreme Court indicated that recovery for the

tort of negligent misrepresentation will be limited to those defendants in the business of supplying information or opinions. Although the Barske court did not address this issue, it does raise substantial question about the continued viability of employee negligent misrepresentation claims.

Another possible limitation upon negligent misrepresentation employment claims concerns the reliance element of the tort. Under Restatement section 552, only "justifiable" reliance can result in imposition of liability. Accordingly, the employer might also, by clear disclaimer, specifically make clear that no employer representative possesses authority to commit to any sort of contractual or long-term relationship unless that commitment is specifically made in writing, and signed on behalf of the employer by a specified officer or individual.

IV. STATUTORY RESTRICTIONS ON AN EMPLOYER'S RIGHT TO DISCHARGE

The "any reason or no reason" statement of the Iowa Supreme Court, of course, does not apply to specific statutory restrictions upon an employer's discretion to discharge. A fairly representative sampling of some of those statutory restrictions is set forth here:

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A. Federal Law

--Labor Management Relations Act ("LMRA"), 29 U.S.C. §158(a)(1), (3), (4) (prohibits discharge for union activity, protected concerted activity, or filing charges or giving testimony under the Act).

--Fair Labor Standards Act, 29 U.S.C. §§215(a)(3), 216(b) (prohibits discharge for exercising rights guaranteed by minimum wage and overtime provisions of the Act).

--Family and Medical Leave Act, 29 U.S.C. §2615 (discharge for exercising rights under the act prohibited).

--Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §660(c) (prohibits discharge of employees and reprisal for exercising rights under the Act).

--Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815 (prohibits discharge of employees and reprisal for exercising rights under the Act).

--Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e-2, 2000e-3(a) (prohibits discharge based on race, color, religion, sex or national origin and reprisal for exercising Title VII rights).

--Americans with Disabilities Act, 42 U.S.C. §12112(a) (prohibits discharge of a "qualified individual with a disability because of the disability")

--Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§623, 631, 633(a) (prohibits age-based discharge by private employers and federal government of individuals over 40 and reprisals for exercising statutory rights).

--Civil Rights Act of 1866, 42 U.S.C. §1981 (prohibits race discrimination in "making" and "enforcement" of contracts).

--Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985(3) (prohibits deprivation of rights, privileges or immunities).

--Longshoremen's and Harborworkers' Act, 33 U.S.C. §948a (prohibits discharge or discrimination for exercising rights under the Act).

--Vocational Rehabilitation Act of 1973, 29 U.S.C. §793, 794 (1975) (prohibits federal contractors or any program or activity receiving federal financial assistance from discriminating against handicapped persons).

--Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1140, 1141 (prohibits discharge of employees in order to prevent them from obtaining vested employment benefits).

--Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §2021(b)(1), 2024(c) (provides protection--for a limited period--from discharge without just cause of returning service people).

--Energy Reorganization Act of 1974, 42 U.S.C. §5851 (prohibits discharge of employees who assist, participate or testify or are about to do so, in any proceeding to carry out purposes of the Act or the Atomic Energy Act of 1954).

--Clean Air Act, 42 U.S.C. §7622 (prohibits discharge of employees who commence, cause to commence, or testify at proceedings against employer for violation of the Act).

--Federal Water Pollution Control Act, 33 U.S.C. §1367 (prohibits discharge of employees who institute or testify at a proceeding against the employer for violation of the Act).

--Railroad Safety Act, 45 U.S.C. §441(a), (b)(1) (prohibits railroad company from discharge of employees who file complaints, institute or cause to be instituted proceedings under or related to enforcement of the railroad safety laws or who testify at such proceedings or refuse to work under conditions they reasonably believe to be dangerous).

--Consumer Credit Protection Act, 15 U.S.C. §1674(a) (prohibits discharge of employees because of garnishment of wages for any <u>one</u> indebtedness).

--Civil Service Reform Act of 1978, 5 U.S.C. §7513(a) (federal civil service employees protected from discharge except for existence of "such cause as will promote the efficiency of the service").

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--Judiciary and Judicial Procedure Act, 28 U.S.C. §1875 (prohibits discharge of employees for service on grand or petit juries).

--Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101-2109 (prohibits termination of employment in a plant closure absent provision of 60 days' notice of closure to employees, local elected official and to the state "dislocated worker unit") (penalty is payment equal to 60 days of wages and benefits).

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--Employee Polygraph Protection Act of 1988, 29 U.S.C. §2002 (prohibits submission to polygraph examination as a condition of employment or discharge of any employee who refuses such examination or institutes any proceedings related to the Act).

B. **State Law**

--Iowa Civil Rights Act of 1965, Iowa Code §216.6 (prohibits discharge on the basis of age, race, creed, color, sex, national origin, religion or disability).

--Iowa Code §642.21(2) (prohibits discharge of an employee by reason of earnings being garnished).

--Iowa Code §19A.19 (prohibits discharge or reprisals against merit system employees for whistleblowing).

--Iowa Code §49.109-110 (prohibits employer from discharging employee by virtue of exercise of right to vote or for insisting upon time off from work to vote) (criminal penalty, simple misdemeanor).

--Iowa Code §730.4(1)-(6) (prohibits discharge of employees for refusal to submit to polygraph examination, filing a complaint or testifying in a proceeding instituted under the statute).

--Iowa Code §79.28(1)-(3) (prohibits discharge of public employees in reprisal for disclosure to public bodies of information the employee "reasonably believes evidences a violation of law or rule, mismanagement, a gross abuse of funds, abuse of authority, or a substantial and specific danger to public health or safety").

--Iowa Code §55.1, 55.3, 55.4 (prohibits discharge of employees by reason of their service in elected position).

--Iowa Code §607.45(1), (2) (prohibits discharge of employee for jury service).

--Iowa Code §730.5 (prohibits requiring drug/alcohol tests of employees absent specific conditions and prohibits discipline or discharge of employees who test positive [first occurrence] for drug/alcohol presence and then successfully complete evaluation and/or treatment).

--Iowa Code §88.9(3) (prohibits discharge, retaliation or reprisal for commencing or participating in an OSHA proceeding, exercising rights under the statute or refusing to work when under a good faith and reasonable belief that to do so would be dangerous).

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C. **Local Ordinances**

A number of communities in the state have civil rights ordinances protecting employees within the jurisdiction from discharge on the basis of age, race, sex, national origin and disability. Current Iowa City ordinance specifically also includes sexual orientation. Proposals have been considered in Dubuque for adding that also as a prohibited basis of discrimination.

D. **Discrimination Statutes**

In terms of practical effect upon Iowa employees, employers and their attorneys, the most significant areas of statutory protection of employment rights relate to employment discrimination. See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (race, color, religion, sex or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §623 et seq. (age discrimination against individuals over 40); Americans with Disabilities Act, 42 U.S.C. §12112 et seq. (discrimination against "qualified individuals" with disabilities because of the disability); Iowa Civil Rights Act of 1965, Iowa Code §216.6 (discrimination in employment on the basis of age, race, creed, color, sex, national origin, religion or disability "unless based upon the nature of the occupation").

Litigation under each discrimination statute, of course, is dependent upon specific statutory provisions. There are differences. Under federal law, for example, jury trial is available. See 29 U.S.C. §626(c)(2) (age discrimination); 42 U.S.C. §1981(a) (according to racial minorities the same right "to make and enforce contracts . . . as is enjoyed by white citizens"); 42 U.S.C. §1981a(c) (Civil Rights Act of 1991--race, color, religion, sex, disability or national origin). Under state law, however, jury trial is not available. Smith v. ADM, 456 N.W.2d 378 (Iowa 1990); Gray v. Nash Finch Co., 701 F.Supp. 704 (N.D. Iowa 1988). But see, Landals v. George A. Rolfes Co., 454 N.W.2d 891, 892 (Iowa 1994) (state age and disability claims tried to a jury).

Iowa law permits the award of emotional distress damages. See Iowa Code §216.15(8)(a)(8); §216.16(5); Hy-Vee v. Iowa Civil Rights Commission, 453 N.W.2d 512 (Iowa 1990); Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259 (Iowa 1991). On the other hand, until passage of the Civil Rights Act of 1991, compensatory damages were not relief that could be awarded in most employment discrimination cases brought in federal court. See 42 U.S.C. §1981a(A)(1), (2). Under federal law, punitive damages can now be awarded. 42 U.S.C. §1981a(A)(1), (2). The Iowa statute, however, does not authorize awards of punitive damages.[2] Teamsters Local 238 v. Iowa Civil Rights

[2]The federal Age Discrimination in Employment Act incorporates an entirely different statutory remedial scheme. The ADEA is "enforced in accordance with the powers, remedies, and procedures provided in [the Fair Labor Standards Act, 29 U.S.C. §§211(b), 216, 217]." 29 U.S.C. §626(b). That remedial scheme, despite the enactment of the Civil Rights Act of 1991 (42 U.S.C. §1981a(a)) does not include the availability of punitive damages. It does, however, include liquidated (double) damages under the Fair Labor Standards Act. 29 U.S.C. §626(b), incorporating remedial provisions of 29 U.S.C. §216. Despite the difference in the remedial schemes, the Supreme Court has held that liquidated

Commission, 394 N.W.2d 375 (Iowa 1986); High v. Sperry Corp., 581 F.Supp. 1246, 1248 (S.D. Iowa 1984). Compare Iowa Code §216.15(8)(a)(8), §216.16(5) (employment) with Iowa Code §216.17(A)(6)(a) (housing). Possibly the most significant distinction is that the state and federal statutes apply to different groups of employers. See, e.g., 42 U.S.C. §2000e(b)(Title VII--15 employees); 42 U.S.C. §12111(5)(ADA--15 employees); 29 U.S.C. §630(b)(ADEA--20 employees); Iowa Code §§216.2(7), 216.6(6)(a)("employer" includes every "person employing employees" but prohibition against employment discrimination applies only to employers who "regularly" employ four or more individuals).[3]

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damages under the ADEA are "punitive in nature." Trans World Air Lines v. Thurston, 469 U.S. 111, 125 (1985). The liquidated damages approach has also been incorporated on a state level in another context. See Iowa Code §91A.8 (Iowa Wage Payment Collection Act).

[3]There are also important differences between state and federal disability discrimination statutes. Under both, "reasonable accommodation" is required. However, under the federal statute, reasonable accommodation is statutorily defined to include, in appropriate circumstances, making facilities "readily accessible to and usable by" disabled individuals and, restructuring of the job, schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies and other similar accommodations. 42 U.S.C. §12111(9). Under state law, a reasonable accommodation is one that does not "substantially impinge on the rights of other employees or [cause the employer to] incur more than a de minimis cost." Miller v. Sioux Gateway Fire Department, 497 N.W.2d 838 (Iowa 1993). It should be noted that disability discrimination claims are unlike other types of discrimination claims in that the prohibited basis for other types of discrimination claims usually bears no relationship to the individual's ability to perform all aspects of the job. Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d 192, 196 (Iowa 1987). The Iowa Supreme Court has recently established a separate analytical framework for analysis of disability claims. Falczynski v. Amoco Oil Co., ____ N.W.2d ____, No. 93-1575 (Iowa, May 24, 1995); Boelman v. Manson

B. Constructive Discharge

Frequently the potential legal claim does not, strictly speaking, involve a discharge but, rather, a resignation claimed to be involuntary or forced. These claims typically arise in the context of alleged employment discrimination. However, a constructive discharge theory can be asserted, as well, in the context of common law claims. See Reihmann v. Foerstner, 375 N.W.2d 677, 683 (Iowa 1985) (constructive discharge claim asserted by an at-will employee). In the employment discrimination context, a constructive discharge plaintiff must show discrimination and that the employer rendered working conditions intolerable to the extent that a "reasonable person" would be compelled to resign from employment. See, e.g., First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission, 315 N.W.2d 83, 87 (Iowa 1982); Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65 (5th Cir. 1980). In the Eighth Circuit, the employer's purpose must, at least in part, be to drive the employee from employment. Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 472 (8th Cir. 1991); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

The Court of Appeals for the Eighth Circuit has recently decided a constructive discharge claim in a somewhat different context. In Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994), the court analyzed the question whether or not an offer of early retirement, under some circumstances, can constitute constructive discharge. The court held that it could, and affirmed an award in favor of the plaintiff. The court held that the "Hobson's choice" presented to plaintiff--accept early retirement or submit to a process that would result in

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State Bank, 522 N.W.2d 73, 78-79.

termination--was sufficient to establish constructive discharge under Eighth Circuit law. 38 F.3d at 1461-62.

V. COLLATERAL CLAIMS

Employment-related litigation frequently includes tag-along and related claims not specifically premised upon legal authorization to terminate the employment relationship. In any given case, the opportunity to assert such claims may be presented. Unlike contract claims, some of the tort based theories will give rise to the possibility of insurance coverage. They will also authorize a jury trial, etc. Some additional theories raised within the last several years are discussed below.

A. Defamation Claims

The circumstances surrounding the termination (or the events leading to the termination) may give rise to a defamation claim. See, e.g., Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 115 (Iowa 1984); McBride v. City of Sioux City, 444 N.W.2d 85, 92 (Iowa 1989); Lara v. Thomas, 512 N.W.2d 777, 781-85 (Iowa 1984). Privilege issues, of course, frequently arise in the employment context. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d at 116; Lara v. Thomas, 512 N.W.2d at 785; Thompto v. Coborn's Inc., 871 F.Supp. at 1125 (qualified privilege to communicate to governmental agencies and civil rights investigators); Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 104 (Iowa 1985).

B. Emotional Distress

Claims of intentional infliction of emotional distress also arise in the context of employment litigation. See, e.g., Northrup v. Farmland Industries, Inc., 372 N.W.2d 193 (Iowa 1985); Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118 (Iowa 1985); Haldeman v. Total Petroleum,

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Inc., 376 N.W.2d 98 (Iowa 1985); Thompto v. Coborn's Inc., 871 F.Supp 1097, 1122-24 (N.D. Iowa 1994); Reihmann v. Foerstner, 375 N.W.2d 677, 681 (Iowa 1985); Cutler v. Klass, Whicher and Mishne, 473 N.W.2d 178, 183 (Iowa 1991) (law partnership). One of the most substantial burdens facing any plaintiff alleging intentional infliction of emotional distress is the requirement that the conduct be outrageous. See Vinson, 360 N.W.2d at 118; Harsha v. State Sav. Bank, 346 N.W.2d 791, 801 (Iowa 1984). In Thompto, the court held that the conduct alleged--termination for seeking insurance benefits plaintiff believed she had been promised and for which deductions had been made from her paycheck, or for threatening to "get a lawyer"--would "arouse [an average member of the community's] resentment against [defendant employer], and lead the community member to exclaim, 'Outrageous!'" 871 F.Supp. at 1124 (citing Northrup v. Farmland Industries, 372 N.W.2d at 198).

C. Privacy

A cause of action may also arise for invasion of privacy. See Pulla v. Amoco Oil Co., 882 F.Supp. 836, 865-66 (S.D. Iowa 1994) (employer's invasion of employee's "credit" file constituted evidence sufficient to support recovery). The circumstances under which an invasion of privacy claim may arise are, necessarily, limited. Usually, as in Pulla, such claims may lie where the employer wears two hats. In Pulla, the defendant served both as employer and creditor. When the employer confused those roles, the employer violated the rights of its employee who was also a debtor. Substantial recovery resulted.[4]

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[4]Similar "two hat" situations can occur where employer's policies and procedures or the circumstances of the case can be argued to establish the employer also as a physician, as a fiduciary (policies designating an individual to "act on behalf" of

D. **Blacklisting**

In addition to defamation claims, claims for emotional distress, invasion of privacy claims, etc., possible liability will lie for employee "blacklisting" under Iowa Code §730.2. That statute authorizes an award of treble damages against any employer who "attempts" to prevent a discharged employee (or one who voluntarily left employment) from obtaining subsequent employment, except by providing in writing a truthful statement of the reasons the earlier employment relationship ended.

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CONCLUSION

Employment litigation is increasing in frequency and complexity. Although it took some time to develop, plaintiffs are now employing a "one from column A, one from column B" approach to employment lawsuits that combines common law tort and contract theories with statutory claims. Statutory remedies carry with them specific procedural requirements and, ordinarily, court ordered attorneys' fees. Common law claims, of course, have their own advantages.

Advising clients before claims are made is an exercise in issue spotting. Because of the nature of the claims that now are more frequently asserted, defending employment claims is more challenging than before. Although it is not accurate that "fairness" is the governing legal standard for any of the

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employees who pursue grievances), as a landlord (or a tenant) or in any other dual capacity. Such situations are perilous for employers who do carefully keep separate their respective roles. For example, under the Iowa Wage Payment Act, Chapter 91A, Iowa Code, an employer may be in a position in which an employee owes the employer money. The statute does not authorize deductions from wages. If creditor status leads the employer to violate employee rights, e.g., terminate the employee over a disputed debt, cointentious litigation likely will result.

statutory or common law claims, it is correct that, absent fairness (and sometimes even with it), claims are very much more likely.

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SETTLEMENT OF POTENTIAL AND PENDING EMPLOYMENT CLAIMS

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INTRODUCTION

Because of the increasing frequency of employment-related litigation and the dangers of such litigation, employers more and more frequently look to provide consideration to and obtain "peace" with their former employees. The employer often considers the possibility of a separation agreement that will assist the former employee, define the legal rights between the parties and allow both sides to pursue their respective interests without the interference of the litigation context. Whether settling claims before they are asserted (or even conjured up) or settling full-blown lawsuits, a number of practical and legal considerations apply. The attorney should take into account each factor in advising a client with respect to avoidance of a potential claim or in closing out employment litigation.

I. OLDER WORKERS BENEFITS PROTECTION ACT

If the person from whom a release is sought is over forty years of age, that individual, potentially, may have a claim

of age discrimination under the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §621, et seq. In order to release federal age discrimination claims, however, Congress has imposed specific requirements in the Older Workers Benefits Protection Act ("OWBPA"), 29 U.S.C. §626(f).

The OWBPA specifically provides that an individual may not "waive any right or claim" under the age discrimination laws "unless the waiver is knowing and voluntary." 29 U.S.C. §626(f)(1). While that should be true under common law principles for all releases, the OWBPA goes much further. That statute provides that a waiver of federal age discrimination claims cannot be considered knowing and voluntary unless:

A. It is a part of a bilateral agreement between the employee and the employer written in a manner calculated to be understood;

B. The waiver specifically refers to claims arising under the ADEA;

C. The waiver does not release claims that may arise after the date of execution;

D. The waiver of claims arises "only in exchange for consideration in addition to anything of value to which the individual already is entitled;"

E. The individual is advised in writing to consult an attorney;

F. The employee is given at least 21 days in which to consider the agreement; and

G. The agreement must provide for a period of at least 7 days following execution in which the employee may revoke the agreement.

29 U.S.C. §626(f)(1). The statute also provides for certain additional requirements where an early retirement package is proposed. For example, in such circumstances, the employee must be given at least 45 days in which to consider the offer.

The general requirements of the OWBPA apply for all potential ADEA claims, whether asserted or, for that matter, even contemplated. However, where a charge of employment discrimination under the ADEA has been filed with the Equal Employment Opportunity Commission or an action filed in court, some of the restrictions of the statute are relaxed. Under such circumstances, the individual need not be offered 21 days to consider but, rather, only a "reasonable period of time." 29 U.S.C. §626(f)(2). Also, there is no requirement of a 7-day revocation period following execution. Id.[1]

By its terms, OWBPA applies only to releases of federal age claims. There is no analogous provision of Iowa law, and no other federal statute provides similar general restrictions. Nonetheless, in many circumstances, there is at least a theoretical possibility of a federal age discrimination claim. When the affected employee is 40 or more, employers are well advised to comply with the requirements of the statute. With respect to releases of

[1]Note, however, that even in circumstances involving a waiver, the parties do not have the power to effect the rights and responsibilities of the EEOC to pursue enforcement of the statute. 29 U.S.C. §626(f)(2).

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other types of claims, knowing and voluntary waiver would still be necessary. The detailed requirements of the OWBPA, however, would not apply and the determination of whether a release truly was voluntary and knowing is dependent upon the individual facts and circumstances.

As might be expected, a number of employers have been caught unaware of the specific and detailed requirements of the OWBPA. The courts do not agree on the effect of a release that does not conform to the requirements of the statute, especially when the employee refuses to return the consideration provided in exchange for the release. In Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534, 539-40 (5th Cir. 1993), the United States Court of Appeals for the Fifth Circuit held that an employee who refused to tender back benefits paid in consideration for the "promise not to sue, . . . , manifested [an] intention to be bound by the [release] and thus, made a new promise to abide by [the] terms [of the release]." In other words, by keeping the consideration provided for the release, the Wamsley employee remained stuck with his bargain, even though it did not strictly conform to OWBPA requirements.

In contrast, the Court of Appeals for the Seventh Circuit takes a completely different approach from that applied in the Fifth Circuit. In the Seventh Circuit, refusal to return consideration paid for a release that fails to meet all

requirements of the OWBPA does not constitute ratification barring suit. Moreover, the employee is not even required to tender back severance benefits before filing federal age discrimination claims. Oberg v. Allied Van Lines, Inc., 11 F.3d 679, 683-84 (7th Cir. 1993), cert. denied, ___ U.S. ___, 128 L.Ed.2d 665 (May 23, 1994). Since the issue is one of federal law, it is not surprising that it has not yet been addressed by the Iowa Supreme Court. The Iowa Court has, however, specifically enforced a separate provision of a release that failed to satisfy OWBPA requirements. The enforced provision contractually required repayment of severance in the event of legal action. The court carefully separated enforcement of the contract provision from the issue of the viability of the discrimination claim. Fisher Controls Int'l, Inc. v. Marrone, 524 N.W.2d 148, 149-150 (Iowa 1994).

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II. PRACTICAL CONSIDERATIONS

A number of factors suggest the advisability of exploring a release or settlement of potential claims, even before they are threatened. Among those factors are the following:

A. If offered at the time of separation, the employer can help provide a transition toward new employment for the employee. Among the assistance that may be considered is "out placement" help as well as an extension of pay and benefits for a given period of time. This helps the employee psychologically to address the future and not to focus unnecessarily on the past. As a result, the assertion of claims is less likely.

B. The employer can obtain an agreement postponing unemployment compensation claims until obligations under the agreement have been completed. Frequently, the employee will have found work by that time, avoiding an unemployment claim altogether.

C. If confidentiality is a consideration, the parties should make certain to address the issue early. Since, under OWBPA, an employee has 21 days in which to consider an agreement and then 7 days thereafter to revoke, the employee has substantial opportunity to disclose significant information broadly. In order to deal with this possibility, it is advisable to make sure that the employee understands at the start that, in order to benefit from the agreement being offered, he or she must specifically represent that the matter has been maintained as confidential and will be maintained as confidential in the future.

D. The parties can clarify that neither expects or is obligated at any point in the future to recommence or recreate the employment relationship. This avoids the possibility of a claim of refusal to hire in retaliation for earlier pursuit of statutory rights.

E. A full integration clause should help avoid the possibility of claims of any oral arrangements or representations outside the written separation or release agreement.

F. If consistent amounts of separation pay accompany layoffs, for example, there can be said to exist a severance "employee welfare benefit plan" under ERISA. 29 U.S.C. §1002(1). The existence of a plan is a prerequisite to jurisdiction under ERISA. Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir. 1985). A plan under ERISA does not need to be written and may be based upon past practice. At a minimum, however, the court must be able to identify the existence and amount of intended benefits, the person to whom the benefits will be paid, source of financing and a procedure to apply for and collect the benefits. Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc). Where there may be questions about an

unwritten "plan" within the meaning of ERISA, a release agreement can clarify that the agreement is based upon the specific facts and circumstances of a given situation and does not constitute part of a "plan." Such a statement likely would not itself be dispositive. Nonetheless, it would constitute important evidence on the issue of the existence of a plan.

G. The decision whether to offer consideration for a release, or if so, how much, is necessarily a business decision of the client. It is true, however, that employees more and more consider employment an entitlement, regardless of the legal nature of the employment relationship. That means that claims are increasingly likely. Even bad claims, obviously, must be defended.

III. TAX CONSEQUENCES

Where an employment claim release is obtained in exchange for an agreement by the employer to continue salary and benefits for a given period of time, there is ordinarily little question regarding the taxability of the benefits. Cautious practice dictates that the agreement will, under those circumstances, clearly set forth that the ongoing payments (like the wage payments before termination of employment) will be subject to normal withholding. Obviously, employer tax and withholding liability may result if the payments are appropriately subject to withholding and that is not accomplished. From the employee's perspective, at the time of entrance into a separation agreement, there is rarely much objection to continuing salary payments as had been the case prior to termination. That is, in fact, the expectation.

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After a claim has been filed or suit is commenced, the issue of whether any consideration paid for settlement is subject to taxation is more complicated. Unfortunately, although the law appeared to be fairly well settled in this regard, a new decision of the United States Supreme Court renders the issue again uncertain. It now appears as if nearly all settlements in employment cases may be subject to taxation.

Section 104(a)(2) of the Internal Revenue Code specifically excludes from gross income "damages received . . . on account of personal injuries." A regulation of the IRS has long defined that term to mean "an amount received through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. §1.104-1(c) (emphasis added). Under that regulation and earlier case law, it was generally assumed that settlement of an employment case based upon tort claims would result in payments that are not subject to taxation. That assumption is no longer safe.

The United States Supreme Court considered taxability of settlements and awards under employment discrimination statutes in United States v. Burke, 504 U.S. 229, 119 L.Ed.2d 34 (1992). In Burke, at issue was Title VII of the Civil Rights Act of 1964, before its amendment by the Civil Rights Act of 1991. The court, following the analysis of the IRS

regulation referred to above, considered the nature of the remedial scheme then existing under Title VII and based its decision upon the absence under Title VII of compensatory damages, jury trial, recovery for pain and suffering and emotional distress, harm to reputation or other consequential damages generally found in tort cases. 504 U.S. at ____-____, 119 L.Ed.2d at 46-47. Accordingly, the court held that Title VII recoveries did not at that time constitute "damages received . . . on account of personal injuries" within the meaning of the Internal Revenue Code. 504 U.S. at ____, 119 L.Ed.2d at 47. In other words, Title VII awards and settlements were taxable.

In the Civil Rights Act of 1991, Congress took action which, generally, was believed to have changed the taxability of employment discrimination awards under federal law. In that statute, the court specifically authorized the award of fraud, compensatory damages and authorized trial by jury. 42 U.S.C. §1981a(a)(1), (2), (c).[2] Based upon the reasoning of <u>Burke</u>, it was assumed such awards and settlements were no longer taxable.

The IRS clearly made the same assumption. Following enactment of the Civil Rights Act of 1991, in Revenue Ruling

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[2]Iowa statute prohibiting employment discrimination has consistently also provided for broad compensatory relief. <u>See</u> Iowa Code §§216.15(8)(a)(8), 216.16(5).

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93-88, 1993--2 Cum. Bul. 61, the Internal Revenue Service took the position that compensatory damages under the Civil Rights Act of 1991 and under 42 U.S.C. §1981 are excludable from income under the Burke analysis. Employment lawyers thereafter generally considered the issue settled--employment discrimination and employment tort cases were beyond the tax authority's reach.

In a case decided on June 14, 1995, the United States Supreme Court changed things dramatically. The court eschewed the "tort or tort type rights" analysis of Burke and the IRS regulation in the context of an age discrimination statute. The court held that categorization of an action as "tort or tort type is not a substitute for the statutory requirement that the amount be received 'on account of personal injuries or sickness'; it is an additional requirement." Commissioner v. Schleier, ____ U.S. ____, ___ L.Ed.2d ___, 67 Fair Empl. Prac. Cases 1745, 1749 (June 14, 1995). Under Schleier, even if recovery is based upon "tort or tort type rights," settlements or awards will be taxable unless the taxpayer demonstrates that the damages were received "'on account of personal injuries or sickness.'" ___ U.S. at ___, 67 Fair Empl. Prac. Cases at 1751. Accordingly, the Court held federal age discrimination awards subject to taxation.

Following Schleier, the analysis of Burke and of Revenue Ruling 93-88 are called substantially into question. In fact,

in Schleier, the court specifically noted that although the Revenue Ruling was not before the court, IRS "'interpretive rulings do not have the force and effect of regulations.'" ____ U.S. at ___, n.8, 67 Fair Empl. Prac. Cases at 1750 n.8 (quoting Davis v. United States, 495 U.S. 472, 484 (1990)).

Obviously, it is too early to determine how the courts will decide what employment recoveries do constitute personal injury recoveries and what employment recoveries do not constitute personal injury recoveries. A claim for defamation, intentional infliction of emotional distress or invasion of privacy, presumably, would result in awards or settlements for personal injuries that would be excludable from income. Conversely, recovery under federal or state discrimination statutes presumably would be taxable. Issues concerning other, collateral types of tort claims are less clear. Where fraud or negligent misrepresentation claims relate to employment loss, a strong argument can be made that, under Schleier, any settlement would be taxable.

In settling employment cases in the future, defendants will need to be more cautious in order to avoid potential tax liability. To the extent that a settlement can be structured in order to make it excludable from income, that should be done. However, it will not be possible to eliminate questions entirely. Sometimes, an indemnification agreement in the event of tax claims will be sufficient to protect the

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employer. In other circumstances, however, there may be substantial doubt about the value of any such indemnity agreement.

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SEXUAL HARASSMENT

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PART I -- OVERVIEW OF THE LAW

I. Introduction:

No one is immune from allegations of sexual harassment -- the President of the United States; a U.S. Supreme Court Justice; Baker & McKenzie (Secretary Rena Weeks was awarded $50,000 in compensatory damages and $6.9 million in punitive damages based on her claim that one of the firm's managing partners dropped candies into her blouse pocket and pulled back her arms to compare the relative sizes of her breasts. The firm had not acted on prior complaints by other female employees concerning the partner); your clients; your firm; you.

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II. What is sexual harassment?

A. Gender based discrimination is among the employment practices that are prohibited under Title VII of the Civil Rights:

> It shall be an unlawful employment practice for an employer -- . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]
>
> 42 U.S.C. § 2000e-2(a)(1).

Iowa Code Chapter 216 also prohibits gender based discrimination.

B. Sexual harassment is a form of gender based discrimination. It occurs when "unwelcome sexual conduct" is a "term or condition of employment." EEOC Policy Guidance on Current Issues of Sexual Harassment, March 19, 1990

C. There are two forms of sexual harassment.

1. Quid Pro Quo harassment occurs when "submission to or rejection of such [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual." EEOC Guidelines, 29 C.F.R. § 1604.11(a)(2).

   a. The elements of quid pro quo harassment are:

      (1) the plaintiff is a member of a protected class;

         (a) Males may be members of a "protected class" if they are being harassed due to their gender. See Joyner v.

AAA Cooper Transportation, 597 F Supp 537, 541 (M.D. Ala 1983), aff'd 749 F.2d 732 (11th Cir 1984).

(2) the plaintiff was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;

(a) A participant in a consensual (not "unwelcome") relationship with a supervisor may later claim that the supervisor's advances were "unwelcome" if the relationship is broken off and the supervisor later makes advances that are rejected prior to the time the supervisor takes adverse action against the plaintiff Babcock v. Frank, 729 F Supp. 279 (S.D. N.Y. 1990)

(3) the harassment complained of was based upon sex;

(4) the plaintiff's submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment; and

(5) the alleged harasser was a manager or supervisor with significant control over the plaintiff's employment.

(a) A supervisory employee's conduct after working hours and/or off the work site, though it may not have technically been "within the scope of" the supervisor's employment, may be used as evidence of harassment. Haehn v. Hoesingten, 702 F. Supp. 526 (D. Kan. 1988).

Cram v. Lamson & Sessions Co., 49 F 3d 466, 473 (8th Cir 1995); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1988)

b. An employer is strictly liable for quid pro quo harassment committed by its supervisory employees. EEOC Guidelines, 29 C.F.R. § 1604, 11(c); Steel v. Off Shore Ship Building, Inc., 867 F.2d 1311 (11th Cir. 1989); Sparks v. Pilot Freight Carriers, 830 F.2d 1554 (11th Cir. 1988).

2. Hostile work environment harassment occurs when unwelcome sexual conduct of a verbal or physical nature unreasonably interferes with an individual's job performance or produces an intimidating, hostile or offensive working environment. EEOC Guidelines, 29 C.F.R. § 1604.11(a)(3).

a. The elements of a claim for hostile work environment include:

(1) plaintiff belongs to a protected group;

(a) Men can belong to a "protected group" if they are subjected to harassment due to their gender. The operative issue is whether the alleged harasser treats members of one sex differently than members of the other sex. EEOC Compliance Manual, § 615.2(b)(3)

(2) plaintiff was subjected to unwelcome sexual harassment;

(a) Whether conduct is "unwelcome" depends on the plaintiff's workplace conduct and not on conduct outside the workplace. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 1959 (8th Cir. 1993) (vulgar names and comments constitute sexual harassment even though the plaintiff had previously appeared nude and in a vulgar pose in a biker magazine).

(b) Evidence of an employee's own sexual conduct in the workplace is relevant to whether sexual conduct by others was unwelcome, but is not necessarily dispositive as to that issue. Compare Lynch v. City of Des Moines, 454 N.W.2d 827 (Iowa 1990) (although Plaintiff often "gave as much as she got," she repeatedly complained that conduct of fellow officers was offensive and their conduct was, therefore "unwelcome.") with Reed v. Shepard, 939 F.2d 484, 56 F.E.D. 997 (7th Cir. 1991) (plaintiff, by her own conduct, "welcomed" crude conduct on the part of her co-employees; female employees who indicated they did not appreciate such conduct were not subjected to it); and Weinsheimer v. Rockwell International, 754 F. Supp. 1559 (M.D. Fla. 1990) (plaintiff's involvement in sexually related activities indicated that they were not unwelcome).

(3) the harassment was based on gender/sex;

(4) the harassment affected a term, condition, or privilege of employment; and

(5) the employer knew or should have known of the harassment and failed to take remedial action.

Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (8th Cir. 1988).

b. Whether conduct rises to the level of sexual harassment depends on the totality of the circumstances. Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986). Isolated instances of offensive sexual conduct do not generally constitute harassment. The conduct must be sufficiently severe or pervasive to create a hostile or abusive environment. Id. Moylan v. Maries County, 794 F.2d 746, 749-50 (8th Cir. 1986);

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Hensen v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir 1982) (single incident that is particularly offensive may result in liability)

c. Factors relevant to the determination of whether conduct constitutes actionable sexual harassment include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. ___, 114 S Ct. 367, 126 L.Ed 2d 295, 302-03 (1993).

d. Under the Harris standard, whether a workplace atmosphere is hostile or abusive is measured by both an objective and subjective standard -- (1) would a reasonable person find the environment hostile or abusive, and (2) did the plaintiff, in fact, find the conduct hostile or abusive. It is unclear whether Harris' objective standard replaces or incorporates into its "reasonableness" standard, the "reasonable woman" standard previously adopted by the Eighth Circuit, among others. See Burns v. McGregor Electronic Industries, Inc., supra at 962 n. 3; Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) ("reasonable woman" standard is appropriate since women may view conduct of a sexual nature as being more threatening than would a male subjected to similar conduct.)

e. Evidence of sexual harassment of employees other than the plaintiff is relevant to show a hostile work environment. Hall v. Gus Construction Co., supra.

f. Examples of conduct that may give rise to sexual harassment claims (oftentimes several types of conduct are involved in the same case):

(1) unwelcome sexual advances by co-employees or supervisors, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir 1989);

(2) unwelcome touching, Hall v. Gus Construction Co., 942 F.2d 1010 (8th Cir 1988);

(3) gender-based threats or intimidation or violence, Hicks v. Gates Rubber Co., 883 F 2d 1406, 1415 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985);

(4) verbal comments, jokes (need not be specifically directed at the plaintiff), Burns v. McGregor Electronic Industries, Inc., 989 F.2d 1959 (8th Cir. 1993); Morris v. American National Can Corp., 730 F. Supp. 1489 (E.D. Mo 1989);

(5) displays of sexual materials (need not be specifically directed at the plaintiff) (i.e. calendars, pictures, cartoons, computer programs, gag devices, T-shirts), Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla 1991) (calendars and

pictures of nude women displayed at shipyards) but see Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir 1986) (posters and vulgar comments were not directed at plaintiff and were irrelevant to plaintiff's presence); Priest v. Rotary, 634 F Supp. 571, 575 (N.D Col 1986) ("I gagged Linda Lovelace" T-shirt worn at work); Shrout v. Black Clawson Co., 689 F Supp. 774, 779-80 (S.D. Ohio 1988) ("Sex Over Forty" magazine left on desk).

(6) comments reflecting gender based animosity or stereotyping (i.e. regarding inferiority of the other sex; women should stay home with their children; women should dress or act "femininely," women shouldn't travel), Andrews v. Philadelphia, 895 F.2d 1469 (3d Cir 1990); Lehtinan v. Bell Communications, Inc., 58 BNA FEP Case 152, 7 BNA IER Case 343, 58 CCH EPD ¶41, 286 (7th Cir 1992);

(7) favoritism to members of the same sex (i.e in assignments, equipment, etc.), Hall v. Gus Construction Co., supra (male mechanics refusal to repair trucks of female construction workers while promptly making repairs for male workers);

(8) Favoritism shown to a member of the opposite sex who grants sexual favors to the boss also give rise to liability to employees who are treated less favorably unless the incidents of favoritism are isolated. EEOC Policy Guidance on Employer Liability for Sexual Favoritism, 1990; Broderick v. Ruder, 685 F Supp. 1269 (D.C. 1988); Toscano v. Nimmo, 570 F. Supp. 1197, 1198-1201 (D. Del. 1983), but see DeCintro v. Westchester County Medical Center, 807 F.2d 304, 308 (2d Cir. 1986), cert. denied 484 U.S. 825 (1987) (co-workers do not have a viable sexual harassment claim arising out of supervisor's favoritism with respect to employee with whom he was having an affair);

(9) Sabotage of equipment, performance of members of the opposite sex. Hall v. Gus Construction Co., supra (urinating in female worker's water bottle and gas tank)

III. Who is liable for sexual harassment?

A. Employers.

1. Are strictly liable for quid pro quo harassment by supervisors. Steel v. Offshore Ship Building, Inc., 867 F.2d 1311 (11th Cir 1989); Sparks v. Pilot Freight Carriers, 830 F.2d 1554 (11th Cir. 1988).

2 Liability for hostile environment harassment by a supervisor depends on a variety of factors including whether the employer has provided proper training;

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whether the employer has appropriate complaint procedures in place; whether the employer has prior knowledge of offensive conduct by the supervisor; whether the employer takes appropriate remedial action Nash v. Electrospace System, Inc., 9 F.3d 401 (5th Cir 1993) (company not liable when it had existing policy, conducted appropriate investigation of complaint and transferred supervisor to eliminate contact with complainant); Kaufman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992); Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) (company failure to investigate complaints results in liability); Zabkowicz v. West Bend Co., 589 F Supp. 780 (E.D. Wis. 1994) (general "meetings" regarding sexual harassment are not an adequate substitute for an investigation of complaints).

3. Are liable for co-worker harassment only if they have notice or actual knowledge of the harassing conduct and fail to take appropriate remedial action. See Guess v. Bethlehem Steel Corp., 913 F 2d 463, 53 FEP 1547 (7th Cir 1990); Hall v. Gus Construction Co., supra (supervisor "talking to" co-employees who were harassing plaintiff is insufficient corrective action).

4. May be liable for harassment of their employees by third parties if they place the employee into conditions that invite harassment, EEOC v. Sage Realty Corp., 507 F. Supp. 594, 609-10 (S.D. N.Y. 1981) or fail to take any action to protect the employee after being informed of third-party harassment.

B Individuals.

1. Co-employees who have no supervisory authority over the plaintiff are not subject to individual liability under Title VII. Smith v. St. Bernards Regional Medical Center, 19 F.3d 1254, 1255 (8th Cir 1994).

2 There is a split of authority concerning whether an individual supervisory employee is subject to liability under Title VII as an "employer." The term employer is defined as "a person engaged in an industry affecting commerce who has 15 or more employees .... and any agent of such a person." 42 U.S.C. § 2000e(b)

a. The Southern District of Iowa has generally followed the majority of the courts nationwide in finding that individual supervisory employees are not subject to liability under Title VII. See Accordino v. Langman Construction, Inc., 862 F. Supp. 237 (S.D. Iowa 1994); Engstrand v. Pioneer Hi-Bred International, Inc., No. 4-94-CV-80326 (S.D. Iowa filed Nov. 21, 1994).

b. The Northern District of Iowa, in a decision by the Honorable Judge Mark Bennet, has followed the minority view that supervisory employees may be subject to individual liability Schallehn v. Central Trust and Savings Bank, No. C 93-4088 (N. D. Iowa filed Feb. 17, 1995) (opinion contains a thorough discussion of the majority and minority positions and authorities).

3. The Iowa statute subjects any "person," defined as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the State of Iowa and all political subdivisions and agencies thereof," to liability for unfair employment practices Iowa Code §§ 216.2(11); 216.6(1)(a) (1995). Accordingly, individual liability for supervisors and co-employees appears to be available under Chapter 216.

IV. Potential damages.

A. Under Title VII as amended by the Civil Rights Act of 1991 (under which a jury trial is now available).

1. Equitable remedies: back pay, reinstatement, pay in lieu of reinstatement, alteration of job conditions or status (i.e. promotion, pay rate changes), education and training.

2. Compensatory damages, including future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses

a Limited by the size of the employer -- $50,000 for employers with 15-100 employees; $100,000 for employers with 100-200 employees; $200,000 for employers with 200-500 employees; $300,000 for employers with more than 500 employees

3 Punitive damages subject to the same limits as compensatory damages

4 Attorneys' fees.

B. Iowa Code § 216.15 (under which a jury trial is not available, Smith v. ADM Feed Corp., 456 N.W.2d 378 (Iowa 1990)).

1 Equitable remedies.

2. Actual damages (no cap).

3 Attorneys' fees.

PART II -- DEFENDING THE SEXUAL HARASSMENT CASE

I. Handling the Administrative Complaint.

A. Encourage clients to allow counsel to prepare or materially assist in preparing the response to the administrative charge and investigatory materials.

B Thoroughly investigate the case before preparing the employer's response to the complaint and initial investigative requests: interview witnesses, review documents.

C. Strategy for response to complaint/initial investigative requests: summary v. detailed specific responses.

1. Some employers choose to bypass specific questionnaire inquiries and respond in a summary letter only. This approach is generally not appreciated by the administrative agency. They have prepared their questionnaires and requests for documents and expect them to be used. They assume that if the employer "ducks" their specific inquiries, the employer has something to hide.

2. The summary letter is critical. Questionnaire responses alone usually do not present the entire picture and may even be misleading.

3. Combine the summary letter with individual questionnaire responses. Refer to the summary letter in response to questions where appropriate.

4. Provide affidavits.

   a. Affidavits are usually required by ICRC from named parties who plaintiff alleges were involved in the harassment, as well as other knowledgeable managerial employees. Although not requested, co-employee affidavits may be helpful as well.

   b. Preparing affidavits gives you the opportunity to statementize your witnesses early on.

      (1) Hopefully, the preparation of affidavits will give you an opportunity to develop a coherent, consistent, and favorable description of events from your witnesses.

      (2) In cases with bad facts, you will have an early opportunity to learn of the facts and place them in the best possible perspective. Damage control and possible early settlement of bad cases can be facilitated.

5. Packaging is important -- prepare your exhibits (documents, affidavits) with tabs and an index. Refer to them by exhibit number in your summary letter and questionnaire responses. This signals to the agency that the employer has taken the complaint seriously and has thoroughly investigated it and has found it to be without merit.

D. The ICRC choice -- ADR or investigation.

1. In a case with bad facts and potential liability, early mediation may be desirable.

2. If your case is defensible, it is best to request "investigation" and force the plaintiff to either obtain a right-to-sue letter and commence the litigation or allow the claim to sit dormant until the ICRC investigation.

a. During the dormancy period, the plaintiff is likely to find other employment to mitigate losses and also to lose some of the emotional fervor that supports the claim.

b. Plaintiff's evidence may also become "stale" during the dormancy period (you will have preserved your evidence with affidavits and early document investigation).

3 Do not count on mediation to assist in effecting a "nuisance value" settlement if your position is strong but you are willing to make some settlement offer as an economic matter. Employers are generally better off making such offers directly to the plaintiff's counsel at some early point in the proceedings.

a If plaintiff is unrepresented or you don't know the identity of plaintiff's counsel, it is preferable to hold back on any nuisance value settlement overture until counsel becomes involved.

4. If you are interested in trying to settle the case and both parties are represented, it is usually wise to attempt some negotiations prior to mediation to get a feel for whether mediation is likely to be productive.

E. Handling the agency investigation.

1. Be cooperative and accommodating with respect to scheduling employer witnesses.

a. Make a determination as to whether you want to assist in locating and scheduling former employees.

(1) By doing so, you have the opportunity to contact the witness, develop rapport and maintain some degree of control. You will also ensure that you will have an opportunity to be present for the interview.

(2) The only occasion when assistance with former employees may not be desirable is when you don't know where to locate the person (and the agency may not either) and you know that the information they offer is likely to be unfavorable.

2. Offer your office as a location for the interviews

3. Ask to be present for all interviews of current and former employees.

4 Prepare the employer-affiliated witnesses to be interviewed.

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F. Handling agency hearings.

If a probable cause finding is made and the case is headed for hearing, it should be treated like a litigated case -- do discovery as needed, consider using experts and prepare the case as you would for trial.

II. Handling Conflicts of Interest.

A. Where the claim is pursued against the employer as well as individual employees, be sure to make a prompt determination of whether there are conflicts in the respective interests of the parties that would preclude your representation of all parties

B. Whenever there is evidence that some level of conduct of a sexual nature occurred, even if it is minimal, the potential for a conflict exists.

C. There may be an advantage to distancing the employer from the employee's bad conduct by having separate representation. This is especially true in cases where the employer has found the conduct sufficiently egregious to have disciplined the employee

D. Even if you choose to present a case that is supportive in all respects of an individual employee's actions and decisions, advise the employee, in writing, of the potential for conflict and the right to independent counsel.

E. If it appears that the employer should be represented by independent counsel, the employer should consider whether it is willing or obligated to retain counsel for the employee. The employer must be counseled that if they choose to do so, their retention of the lawyer does not give them control over the employee's legal defense in any way.

III. Handling Pretrial and Discovery Issues.

A. Forum selection -- remove to federal court where possible.

1. The law surrounding sexual harassment claims is much more extensively developed and the judges are generally familiar with the law.

2. Federal courts are considerably more likely to grant motions for summary judgment.

3. Trial of the case in a federal forum may preclude plaintiff from taking advantage of Iowa Code § 668.15, which provides:

> **Damages resulting from sexual abuse -- evidence.**
>
> 1. In a civil action alleging conduct which constitutes sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, a party seeking discovery of information concerning the plaintiff's sexual conduct with

persons other than the person who committed the alleged act of sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence

Although there are no cases on point, it is assumed that the federal court will follow the Federal Rules of Civil Procedure and Federal Rules of Evidence, which do not, similarly, limit the discoverability of plaintiff's history of sexual conduct.

B. Discovery litigation investigation issues.

1. If the case is in federal court, consider which discovery limitations may be helpful to the employer and which the employer would be willing to waive at the Rule 16 scheduling conference (i.e., will 10 depositions and 25 interrogatories suffice).

2. Interrogatories -- are they useful at all?

3. Documents

a. Defendant's counsel should consider obtaining the following documents either by way of an internal file search or through formal discovery:

(1) personnel records

(2) any <u>other</u> documents in the employer's files that may relate to the plaintiff but that are not in the plaintiff's personnel file

(3) employee handbooks, policies, affirmative action plans

(4) plaintiff's medical/counseling records -- don't overlook EAP records if such a program is available to employees and the employee has attended

(5) personnel records from prior and subsequent employers

(6) educational records/transcripts

(7) plaintiff's computer mail

(8) plaintiff's calendars, diaries, notes

(9) <u>any</u> documents plaintiff has from the employer

(10) contents of the agency file regarding any unemployment claim; transcript of any hearing regarding claim for unemployment compensation. Although the decision in an unemployment case

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is not binding in other proceedings, Iowa Code § 96.6(4), the statements and hearing testimony may contain admissions or other statements that can be used for impeachment of the plaintiff.

(11) EEOC/ICRC files

b In responding to plaintiff's request for production, do not simply copy all requested documents. Have plaintiff review and select the documents that they want copied. This will allow defense counsel to determine what documents plaintiff believes are important and will provide clues to the plaintiff's theories and focus.

c Be careful to reserve all privileged documents from production.

(1) Determine which documents legitimately fall within the attorney/client and attorney work product privileges.

(a) Attorney involvement in preparing responses to agency complaints will not only assist in developing an effective response, but will also assist in insulating the investigatory efforts involved in preparing the response from discovery.

(b) If an attorney was involved in the investigation of the employee's initial complaint and in recommending remedial action to management, the need for the employer to present evidence of that process may make the attorney a witness (and disqualify him or her from representing the employer in the litigation) and may waive the attorney/client and work product privileges with respect to related documents;

(2) Internal corporate EEO audit and analysis documents may be subject to the "self critical analysis" privilege if:

> (1) the information results from an internal review to evaluate procedures; (2) the original intention was to keep the documents; (3) . . . the information must be of a type which would be curtailed if discovery was allowed. See Etienne v. Mitre Corporation, 146 F.R.D. 145 (E.D. Va. 1993); Tharp v. Sivyer Steel, 149 F.R.D. 177 (S.D. Ia. 1993).

d. Request protective orders where appropriate.

(1) Plaintiffs frequently request personnel files of and/or personal information concerning non-party employees. This type of

information is confidential and proprietary to the employees. The employer should seek to produce the information with employee identities redacted (i.e., for information to be used to compare the treatment of different employees under similar circumstances) or subject to a protective order.

(2) Other types of information that the employer may want to protect may include financial information, details regarding the defendant's business and how it operates

4 Depositions.

a. Plaintiff's deposition

(1) Use plaintiff's deposition to obtain relevant personal, educational, employment, and medical history; a description of the specific claims against the employer and individual defendants; a history of plaintiff's work experience with the defendant; details regarding the plaintiff's workplace conduct; the identity of all witnesses, damage information, mitigation efforts

(2) Set up your motion for summary judgment - be sure you ask questions to close out areas of inquiry, pin down the plaintiff with respect to the fact that <u>all</u> incidents, claims, complaints, have been discussed.

(3) Use the deposition to evaluate how the plaintiff should be handled as a trial witness, i.e., how hard you can push without engendering jury sympathy.

b. Supervisory and co-employees

(1) Prepare, prepare, prepare!

(2) Unless the witness is hostile to the employer (see below), only ask clarifying questions (if absolutely necessary to clear up the record). Do not tip your hand or box yourself in by conducting any "cross examination" during the deposition

c. Consider deposing "hostile" co-employees and former employees who may testify on behalf of plaintiff.

(1) Even though the employees may talk with counsel at the employer's request, counsel may find that their efforts at such investigative conversations come out in testimony as attempts to coerce or influence testimony.

(2) Strategically, it may be best to hold off on deposing such witnesses as long as possible to see if the plaintiff will initiate the deposition.

(3) The plaintiff may, directly or through counsel or an investigator, attempt to interview employees with respect to the lawsuit. As a general rule, though the employer may be entitled to limit such contacts at the workplace, the plaintiff is entitled to contact non-managerial employees and the employees may not be prohibited from talking to the plaintiff or the plaintiff's representatives. The employer should be counseled to ensure that there is no retaliation against employees who provide truthful information or testimony favorable to the plaintiff.

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5. Requests for admissions.

a. Only use them if they can establish "undeniables."

b. Examples of matters for which requests for admission could be helpful include: time line issues -- what happened when; admission that documented performance counseling or disciplinary action took place; admission of documented incidents of plaintiff's workplace conduct; admissions re employment and educational history.

C. Motions for Summary Judgment

1. In proper cases, motions for summary judgment can be very helpful, especially if you are in federal court

2. Motions should be filed only when they have a legitimate chance of success. If only a portion of the case is susceptible to summary judgment, file a partial motion.

a. Motions to "educate the court" or "flush out the plaintiff's case" should be avoided. They needlessly take up court and counsel time and undermine credibility.

3. Motions, especially in federal court, are premised on the trilogy of federal court cases that opened the door to broader acceptability of summary judgment -- Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S 217 (1986); Matsushita Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)

4. Vigorously resist any effort by plaintiff to create a fact issue by:

(a) contradicting his or her deposition testimony by affidavit. See, e.g., Van T. Jenkins & Assoc., Inc. v. U.S. Industries, Inc., (11th Cir 1984) (inconsistencies between deposition given by plaintiff under oath

and plaintiff's affidavit filed in opposition to motion for summary judgment did not create genuine issues of material fact precluding summary judgment); Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975) (plaintiff, the affiant, cannot create an issue of fact by contradicting plaintiff, the deponent).

(b) presenting plaintiff's subjective feelings about defendant's treatment of him/her as "fact." Palucki v. Sears, Roebuck & Co., 50 F.E.P. Cases 553 (7th Cir. 1989)

(c) using inadmissible hearsay to create a factual issue. Carden v. Westinghouse Electric Corp., 850 F.2d 996 (3rd Cir. 1988).

D Issues that are susceptible to summary judgment:

1. Statute of limitations. Attempt to separate out distinct incidents or types of conduct that may not actually be part of a continuing course of conduct

2. After acquired evidence. If the employer has a clear policy and prior practice of discharging an employee for certain types of conduct (i.e., resume fraud, removal from premises of employer's documents) and during discovery the employer obtains evidence of such an infraction by the employee, the claim may be subject to summary judgment.

3. Prompt remedial action by the employer

4. Plaintiff was not exposed to the conduct of which he or she complained due to his or her sex and the conduct is not, itself, sexual

5. The complained-of conduct is not severe and pervasive.

IV. Handling Expert Witnesses.

A. Plaintiff's experts.

1 Economist.

a Plaintiff may use an economist to evaluate wage and benefit loss and project future earnings.

b Areas of vulnerability to explore on cross-examination:

(1) Math errors. Use your own expert to carefully evaluate the plaintiff's economist's calculations. Don't assume they are correct. Any errors substantially undermine the expert's credibility.

(2) Make the economist admit that if the plaintiff becomes employed or realizes higher wages than are factored in as part

of the economist's assumptions, that an award of damages under the economist's calculations would result in a windfall to plaintiff

(3) At the deposition, thoroughly explore all of the economist's assumptions. Your economist can assist in identifying them and in developing alternative assumptions that would result in lower numbers.

(a) Consider whether to follow up with the effect of alternate assumptions that are supported by actual evidence in the case at the deposition or to save such examination for trial.

(4) Understand the discount rate used by the economist and attack it if unrealistically low Use your expert to assist.

(5) Acknowledge the possibility that the plaintiff may not have remained in the employ of the defendant for the term of future damages. You may be able to locate information concerning employee turnover rates that will assist in such inquiries. You may also be able to use information from plaintiff's history (i.e., expressions of interest in other jobs, etc.) to strengthen this line of questioning.

2. Psychological experts.

a. Focus on what the plaintiff may have failed to disclose concerning his/her own history. (Consider whether or not, as a strategic matter, the follow-up "would it have made a difference in your opinion if you knew" question should be asked.)

b Be familiar with DSM criteria for the expert's diagnosis and, where appropriate, examine the expert regarding areas where the diagnosis is inaccurate or a stretch (i.e., post-traumatic stress syndrome is a frequent diagnosis in harassment cases, but most experts will acknowledge that the DSM criteria and professional literature usually require a catastrophic type of stress to trigger the condition -- i.e , war, rape, torture, natural disaster, gory accident. Rarely does workplace harassment rise to the same level of severity.)

3 Workplace environment experts.

a Consider a challenge to introduction of such testimony based on Daubert v. Merrell Dow, 509 U.S. ___, 113 S.Ct. 2286, 125 L.Ed 2d 469 (1993) Daubert requires that, prior to allowing expert testimony into evidence, the judge make a preliminary determination that the expert testimony is based on scientific knowledge and will assist the trier of fact in understanding the evidence or determining a fact in

issue. Whether the testimony is based on "scientific knowledge" depends on:

(1) whether the reasoning or methodology underlying the testimony has been tested;

(2) whether it has been subjected to peer review and publication;

(3) its potential rate of error;

(4) whether it has been generally accepted or rejected in a relevant scientific discipline.

b Workplace experts should be closely examined on the "scientific validity" of their testimony in both deposition and at trial

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B Defendant's experts.

1. Consider using defendant's experts for education of counsel and assistance in cross-examining plaintiff's experts, but not calling them at trial.

a. Calling economists, psychologists, workplace experts focuses the jury's attention on plaintiff's claims and may give them more credence than the jury would otherwise give them.

2. A psychological expert may be helpful at trial if:

a. there is strong psychological evidence that the plaintiff is prone to lie or exaggerate.

b there is psychological evidence of alternative causation for the psychological complaints made by the plaintiff

3 A defense workplace environment expert may be helpful to establish that the employer has done what is appropriate and in conformance with industry practice to educate and police its work force with respect to harassment issues and to deal with complaints, including plaintiff's, in an adequate and appropriate manner. Attempts to have such an expert characterize the incidents about which plaintiff complains as "no big deal" may backfire.

V. Settlement/ADR.

A Identify with the client, early on, whether they are interested in attempting to resolve by settlement either due to litigation risks, defense costs, or a combination of the two Ensure that they factor into the cost of litigation analysis the time and attention of management and employees that will be consumed in the litigation process as well as the cost of retaining counsel. Reevaluate litigation risk issue as discovery proceeds and additional factual issues are raised.

B If the defendant is interested in pursuing settlement, identify the logical points in the litigation to open, or reopen discussions without undermining your negotiating strength -- usually prior to "launch points" where the parties are about to embark on a flurry of activity of expense, i.e., before discovery begins, before depositions begin, before expert depositions, before trial.

C. Consider an <u>unconditional</u> offer of reinstatement

1. In cases where the employee claims constructive discharge, such an offer can cut off the accumulation of lost wage damages. See <u>Ford Motor Co. v. EEOC</u>, 458 U.S. 219 (1982).

2. The offer must be truly unconditional -- dismissal of the lawsuit cannot be required.

3. The offer should be for a comparable job, should involve the same pay and benefits as plaintiff would have been receiving had he/she remained continuously employed, and should include a mechanism by which the plaintiff would be insulated from any alleged harasser by assignment to a different area or otherwise.

4. The offer should be in writing and include a designated time for response.

D Consider settlement conferences/private mediation.

1. Federal court settlement conferences provide many of the advantages of private mediation without the expense

2. Private mediation considerations:

a. Choose a mediator with background knowledge concerning sexual harassment cases.

b. Carefully prepare your written and/or oral presentation of the case to maximize your negotiating position

(1) Provide actual copies of key supportive exhibits and deposition excerpts.

(2) Consider which issues, facts should be withheld at the joint presentation or even the mediation stage, either because they are inflammatory (and likely to cause a breakdown in negotiations) or because you want to preserve the issues for trial.

c. Be prepared to identify and deal with your case weaknesses when talking with the mediator.

d. Determine, before going into the mediation, the range that is acceptable to your client

(1) Be prepared to consider during the course of the mediation when and how to present that information to the mediator.

e Prepare your client representative for the dynamics of a mediation, i e., that the mediator may "pressure" them, disagree with them, present them a parade of horribles regarding the potential outcome of the litigation

I. Trial of the case.

A. Develop a coherent defense theory for the case.

1. The theory must, of course, be based on the facts that are discerned during the initial investigation. Counsel should be flexible in allowing the theory to evolve as discovery proceeds if new and different facts surface

2. The theory may involve any of a number of various approaches to the plaintiff's allegations, including:

a. The conduct never occurred, i.e., plaintiff alleges she was unfairly disciplined (denied promotion, denied salary increases) because she rejected her supervisor's sexual advances The supervisor says the advances never occurred and that any disciplinary or other decisions by the employer were based on plaintiff's performance

b. Some variation of the conduct occurred, but it has been exaggerated or mischaracterized by the plaintiff.

c. The conduct, or some variation of it, occurred, but it had nothing to do with the plaintiff's sex (i.e., plaintiff's supervisor regularly used non-sexual profanity when speaking to plaintiff, but used the same type of language in speaking to all employees, male or female).

d The conduct, or some variation of it, occurred, but it was consented to by plaintiff (i.e., consensual dating arrangements)

e. Some conduct occurred, but it was invited by and/or not offensive to plaintiff based on his or her own workplace conduct (i.e , jokes, sexual comments in the workplace).

f Some sexual conduct occurred, but it was wholly unrelated to the employment decisions or psychological injuries about which plaintiff complains.

g. Some conduct occurred, but it was not pervasive and did not tangibly affect plaintiff's work or work environment (i.e., stray comments or

actions that did not adversely affect plaintiff's performance, advancement, psychological well-being).

3. Proof of some of these theories may be inconsistent with proof of others.

   a. A single supervisory witness who persists in claiming no conduct ever occurred when the bulk of the evidence from other witnesses is to the contrary can damage the case more by the denial than by admitting the conduct. It is critical to encourage employees to "come clean" from the outset, <u>if</u> there was any questionable conduct, so an effective theory can be advanced and damaging changes in an employee's testimony or the problem of the employee's testimony being out of step with the remainder of the evidence can be avoided.

   b. The employee's performance or disciplinary history may be viewed differently under different theories.

      (1) The natural tendency of defense counsel is often to emphasize evidence that plaintiff was a poor or marginal performer.

      (2) Such an approach works well in cases where improper conduct is denied or where, although some conduct occurred, the employee performed consistently poorly, both before <u>and</u> after the complained-of conduct.

      (3) If the employee's performance quality decreased after the complained-of conduct, do not focus on the performance issue. Make plaintiff shoulder the burden of proving that aspect of "job detriment" was causally related to harassment. Present alternative explanations for declining performance, (i.e., marital, family stress, new and different job duties).

4. Use the theory of the case to develop all aspects of the trial presentation. Focus witness questioning.

B. Conducting the trial.

1. Pretrial/trial evidentiary motions

   a. To the greatest extent possible, anticipate evidentiary objections and present motions in limine.

   b. Examples of motions in limine that should be considered:

      (1) Attempt to limit testimony concerning front pay damages or at least limit evidence to a reasonable period of time.

      (2) Attempt to limit testimony concerning treatment of other employees. Such evidence raises collateral, often unproven,

issues and cannot support an inference of improper conduct vis-a-vis the plaintiff if occurring with statistically insignificant frequency. See Soria v. Ozinga Brothers, Inc., 704 F 2d 990, 994-97 (7th Cir. 1983).

(3) Attempt to limit lost pension benefits, which are recoverable only under ERISA.

(4) Attempt to limit prejudicial evidence concerning the employer or alleged perpetrator (i.e., prior verdicts against employer; personal facts re employee such as alcoholism, divorce).

(5) Attempt to limit evidence of workplace attitude or "intent" that is remote in time or relationship to plaintiff (i.e., old documents, handbooks that display outdated corporate attitudes)

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2. Jury selection.

a. Use voir dire to:

(1) educate the jury regarding your theory of the case, both theoretically and specifically;

(2) defuse the shock value of the allegedly offensive conduct about which plaintiff complains;

(3) personalize your employer client and the individuals who have been accused of wrongdoing;

(4) secure commitments to set aside sympathy, follow the Court's instructions.

b. If you are in federal court and the judge is conducting voir dire, ask the judge to ask some of the more sensitive, potentially embarrassing questions of the jurors - i.e., re: prior terminations from employment; prior exposure to unwelcome sexual conduct; prior psychological treatment The same request may be made in state court, but will be less likely to be honored.

c. Jurors to avoid:

(1) "Tenured" employees - teachers, governmental employees;

(2) Individuals who consider themselves "victims";

(3) Individuals who are unemployed;

(4) Individuals who appear anxious to serve on the jury;

(5) Individuals with experiences, characteristics in common with the plaintiff

d. Favorable juror profile:

(1) Individuals with strong work histories, ethic;

(2) Individuals who demonstrate self-confidence and control of their own lives;

(3) Individuals who have supervised employees or owned their own business;

(4) Individuals who have risen through the ranks at their employment;

(5) Individuals with experiences, characteristics in common with the decision-making or accused employee

e. Study your potential jurors:

(1) Carefully review juror biographical data;

(2) Listen carefully to voir dire responses and watch body language;

(3) Consider a juror evaluation service;

(4) Ask your partners or acquaintances if they know panel members;

(5) Consider engaging local counsel for juror selection assistance if you are trying the case out of your home town

3. Opening/closing statement.

a. Personalize your client(s) -- use individual's names, maximize the good.

b. Emphasize your theme and discuss specifically how the evidence fits into it.

c. Focus on the plaintiff's burden of proof and ask that the jury hold her/him to it.

d. In opening, continue the effort to diffuse the shock value of allegedly offensive conduct

e. Attempt to diffuse sympathy for the plaintiff. It is always dangerous to try to paint the plaintiff as undeserving of sympathy. The better approach is to ask that the jurors view plaintiff's conduct (poor performance, welcoming of sexual conduct, telling jokes, etc) from the defendant's perspective and to ask that they set aside their sympathies for someone who has lost their employment or suffered emotional harm (as the law requires and they committed to do in voir dire) in assessing the facts.

f. Use demonstrative evidence:

(1) Display your strong exhibits on the overhead projector as blow-ups;

(2) Time lines are particularly effective in cases where you are arguing conduct was not pervasive;

(3) Use other summary exhibits to categorize and characterize the evidence;

(4) For closing argument, obtain and display transcript excerpts of particularly persuasive witness testimony;

(5) In closing argument, display and discuss important jury instructions

4 Cross-examination of the plaintiff

a Be gentle!

b. Cross-examine, to extent possible, with exhibits that can make your point (i.e., performance appraisals, disciplinary records, computer mail, medical records) or with prior testimony in hand

c. Acknowledge, emphasize plaintiff's strength and competence to demonstrate she/he could withstand a certain amount of rough conduct, could find new employment, and was not emotionally damaged.

d. Have plaintiff acknowledge that events supportive of employer's theory (i.e., discipline, remedial action by the employer, prior personal history) occurred, <u>without</u> allowing her/him to comment on them

5. Company witnesses.

a. Choose a sympathetic corporate representative to sit at counsel table. It is often good to have a woman represent the company in sexual harassment cases

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b. Be extremely selective with respect to the number and identity of witnesses. You do not need to offer repetitive evidence of the same point

c. Keep witness testimony short and to the point. Limit direct examination to the essential facts to be proven by that witness. Avoid the temptation to broaden the witness's testimony to all collaborative information that the witness might have available and thereby open the witness to more extensive cross-examination.

d. Before the witness is called to testify, allow him or her to vent frustrations with being accused of improper conduct or even involved in the litigation. Failure to get these feelings to the surface before trial testimony and to deal with them can lead to the witness blowing up on the witness stand.

e. Assume your key witnesses will be called as adverse witnesses

(1) Prepare the witnesses to respond to plaintiff's counsel's anticipated cross-examination Actually work through a sample hostile examination

(2) Seek the agreement of opposing counsel and/or leave of the Court to allow you to conduct your direct examination while the witness is on the stand as plaintiff's adverse witness.

(a) Not all counsel or courts will allow you to do so, but some will in order to be courteous to the witness and promote efficiency.

(b) By conducting your direct during plaintiff's case, you may sacrifice some continuity, but you can gain a significant advantage by disrupting the plaintiff's case.

6. Exhibits.

a Keep the number and complexity of exhibits to a minimum.

b. If an exhibit is voluminous, prepare a summary (i.e., put the salient information from several years of performance appraisals in chart or graph form) and attach it as part of the exhibit.

c Put exhibits on an overhead projector so the jury can follow along as the witness is examined concerning the exhibit. Highlight or underline the significant portions.

d. Make the judge a full set of exhibits.

7. Mid- and post-trial motions.

a Don't forget to urge your motion for directed verdict at the close of plaintiff's evidence and to renew it as a motion for judgment NOV at the close of the trial

b. In the rare cases where such a motion is appropriate, be prepared to file your motion for defendant's attorney's fees to be assessed against the plaintiff. (See Rule 54(d), Federal Rules of Civil Procedure -- such motions must be filed within 14 days of the judgment)

8. Jury instructions.

a. Most courts have stock instructions that have been used in prior cases and have a preference for using them.

b. Counsel will, nonetheless, be required to propose jury instructions. In preparing (and selling to the Court) your instructions, it is often useful to base favorable instruction language directly on supportive case law from your jurisdiction. Direct quotes are best if they are understandable to a jury (i.e., include language that indicates the jury should not substitute their judgment for management as to whether employment decisions were justified)

c. Be sure to preserve error by objecting to instructions on specific grounds. Don't just object to the instruction generally. Itemize the reasons for your objection and the legal authorities supporting those reasons. Also object to the failure to give specific instructions proposed by defendants.

(1) Be sure that your proposed instructions are numbered so they can be referred to by number when making objections

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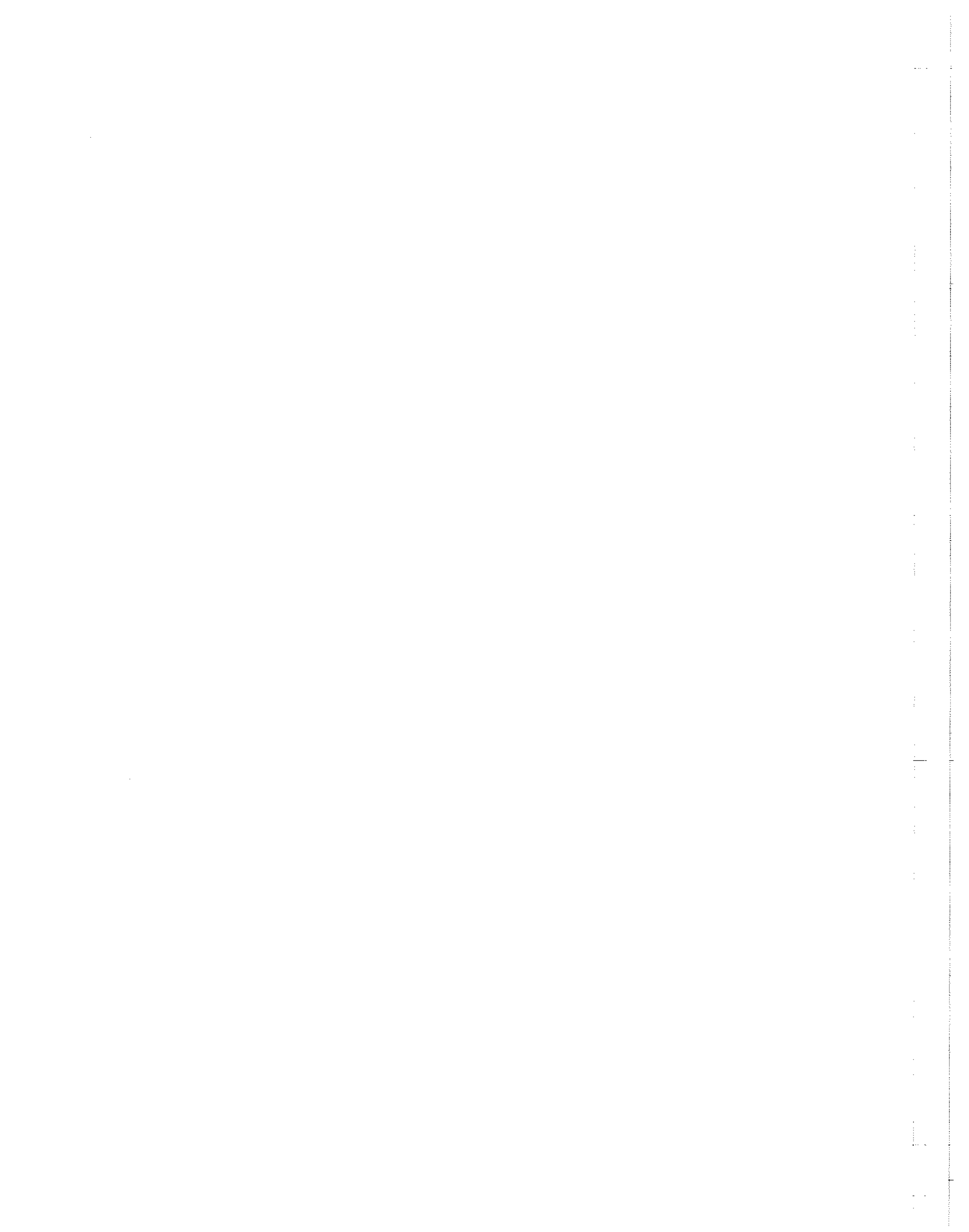

Iowa Defense Counsel
Association Seminar
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VIOLENCE IN THE WORKPLACE

Constance A. Schriver
Lane & Waterman

Fact Pattern:

I. Background.

A. Workplace violence is difficult to define and control. The problem is complex and multi-faceted. Violence in the workplace may occur for a variety of reasons. Many crimes are committed against employees during the course of a robbery or similar crime (liquor and convenient store clerks and taxi drivers are murdered at rates many times higher than the general population.) Angry and unhappy clients or customers are responsible for many crimes against employees. Domestic violence can be carried into the workplace. Other violence may be the result of romantic relationships between employees that fail or are unrequited. Finally, workplace violence occurs because an employee is upset about his or her termination, pending termination, discipline, or perceived harassment.

B. One problem with defining workplace violence is that you have to distinguish between these different situations. Recommended "prevention strategies" might assist in reducing the likelihood of one type of workplace violence, but not address the various other situations. Different situations require different preventative measures and responses.

C. The threat of violence in the workplace is neither out of question nor farfetched. No workplace is immune.

II. Civil Claims.

A. Employee victim.

1. Worker's compensation.

a. Injury or death must occur "in the course of" and "arise out of" the employment. Sheerin

v. Holin Co., 380 N.W.2d 415, 1417 (Iowa 1986).

(1) "arise out of" - relates to the cause and origin of the injury. Id.

(2) This requirement is satisfied by showing a causal relationship between the employment and the injury. Id.

(3) It is not always enough that the injury occur at the employer's place of business during working hours in order to be incurred "in the course of" employment. If an employee deviates sufficiently from the line of duty so that his or her actions are foreign to the employer's work, this may take the employee outside the course of employment. Id.

b. Assuming an employee's injury arises out of and is in the course of employment, the Iowa Worker's Compensation Act provides the exclusive and only remedy. Iowa Code § 85.20 (Iowa 1995).

c. Exceptions to the Worker's Compensation Act provide that no compensation will be allowed for an injury caused: (1) by the employee's willful intent to injure himself or to willfully injure another; and (2) by the willful act of a third party directed against the employee for reasons personal to such employee. Iowa Code § 85.16(1), (3) (1995).

(1) The burden of establishing the exception is on the employer. Everts v. Jorgensen, 289 N.W. 11, 13 (Iowa 1939).

d. Iowa and most jurisdictions which have considered the question have held that an injury from an on-the-job assault by a deranged co-employee arises out of employment. Cedar Rapids Community Schools v. Cady, 278 N.W.2d 298, 303 (Iowa 1979).

(1) But see, Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986). There, an employee was raped and murdered by a co-employee. The administrator of the deceased employee's estate filed a

wrongful death action against the employer. The District Court entered summary judgment in favor of the employer determining that worker's compensation was the exclusive remedy. The Supreme Court found that a fact question existed and that the record did not "negate the possibility that the attack was preceded by departure from the course of employment."

(2) Interestingly, in the Sheerin case, the court moved to find a way to preserve the administrator's tort claim from summary judgment.

e. The "willful injury" defense is not established where an attack is not motivated by reasons personal to the injured employee. Id.

2. Thus, if the victim co-employee's injury arises out of and is in the course of his or her employment, he or she will fall within the protection and exclusive remedy provisions of the Iowa Worker's Compensation Act. Assuming the Worker's Compensation Act does not apply, the injured co-employee would then be free to pursue other potential areas of tort liability.

B. Third Party Victim

1. Respondeat superior.

a. An employer is vicariously liable if the employee's wrongful act was done within the course of the employee's employment. Sandman v. Hagan, 154 N.W.2d 113, 117 (Iowa 1967).

b. In the case of willful or intentional torts, the focus is on whether the conduct of the tort feasor is of the same general nature as that authorized or incidental to the conduct authorized. Id.

(1) "within the scope of employment".

i. An act is within the scope of a servant's employment where such act is necessary to accomplish the purpose of the employment and is intended for such purpose, although

in excess of the powers actually conferred on the employee by the employer. Id.

ii. Deviation from the employer's business or interest to pursue the employee's own business or interest must be "substantial in nature" to relieve the employer from liability. Id. at 118.

iii. Where the tortious act is committed while the employee is not engaged in furthering the employer's business or interests within the scope of his employment, there is generally not liability absent a non-delegable duty such as that imposed by the relationship of carrier and passenger or hotel and guest. Id. at 117-18.

(aa) See D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580 (Iowa App. 1984).

2. Negligent hiring.

a. Iowa does recognize a cause of action for negligent hiring where the employer owes a special duty to the injured party. D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 583 (Iowa App. 1984).

b. The fact that the act of the aggressor was an intentional or criminal act does not constitute a superseding cause as a matter of law. Id. at 585. An employer may be held liable for negligently hiring an employee who commits a criminal act when the employment relationship is instrumental to the employee committing the crime.

c. What is sufficient to create a special duty owed to a third party victim will undoubtedly rest on the facts of each case.

3. Negligent retention.

a. No Iowa cases were found recognizing the tort of negligent retention. On the other hand, the same reasoning that applies to negligent

hiring would seem to apply to negligent retention.

b. The difference between negligent hiring and negligent retention would principally be the time when the employer becomes aware or should have become aware of problems with an employee that indicate potential problems or unfitness, and the employer then fails to take further action to discharge the employee, investigate the matter, or reassign the employee.

4. Negligent supervision.

a. Again, there is no Iowa case law recognizing this tort. However, the Restatement cited by the English Enterprises court specifically includes supervision. Restatement (Second) Agency § 213(c).

b. An employer may be under a duty to exercise reasonable care to control its employees acting outside the scope of their employment if the employee is on the employer's premises or using the employer's property. Restatement (Second) of Torts § 317.

5. Duty to warn.

a. The general rule is that one owes no duty to control the conduct of another or to warn those endangered by such conduct. Tarasoff v. Regents of University of California, 551 P.2d 334 (1976).

b. However, if a special relationship exists between the employer and the victim, courts might impose liability.

c. In addition to a special relationship, the violent act and resulting injury must be reasonably foreseeable and the victim must be specifically identifiable.

6. Other Possible Claims.

a. Wrongful death.
b. Assault.
c. Battery.
d. False imprisonment.
e. Intentional infliction of emotional distress.

f. Negligent infliction of emotional distress.
g. Harassment.
h. Discrimination.
i. Breach of contract.
j. Defamation.

C. The aggressor.

1. Worker's compensation.

2. Violations of any existing collective bargaining agreement.

3. Other claims.

a. Defamation.
b. Slander.
c. Libel.
d. Invasion of privacy.
e. Wrongful discharge.

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III. Other.

A. Criminal Remedies.

1. In addition to exposure to civil liability, the aggressor may also be exposed to criminal charges. Such charges could include rape, battery, assault, extortion, or violation of Iowa's stalking law (Iowa Code § 708(11)).

2. Keep in mind that there may be discrimination implications if an employer terminates an employee simply because he or she has been charged or even convicted of a crime.

B. Restraining Orders.

1. In certain situations it may be appropriate for the employer to seek a restraining order against an employee or third party who the employer has reason to believe may harm an employee while on the employer's premises, or harm property of the employer.

2. A petition for temporary and permanent injunction may be sought with appropriate affidavits and factual pleading of the necessity for the protection. The petition is filed in equity.

3. The employer needs to take into consideration the possible negative ramifications from seeking and

obtaining such an injunction or restraining order, and the means available to enforce it.

IV. Impact of the Americans With Disabilities Act ("ADA") and State Discrimination Laws.

A. One of the most difficult problems for employers is judging what to do about an employee who suffers from an emotional or substance abuse problem, where that employee may be violent.

B. Under the ADA, individuals are disqualified from certain jobs if they fall within the definition of "direct threat".

1. *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r).

2. Determination of "direct threat" must be made on a case-by-case basis.

a. Factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of potential harm;

(3) The likelihood that potential harm will occur; and

(4) The imminence of the potential harm. Id.

3. Accommodation of a potentially violent employee.

a. Once the employer determines that the individual poses a direct threat to the safety of others, it must determine whether a reasonable accommodation can eliminate or reduce that threat without an undue hardship to the employer or its employees.

b. Normally such an accommodation will depend upon the size and nature of the employer's work force, but may include things such as flexible work schedules, counseling, reassignment to another position, or moving the potentially violent employee or the targeted employees.

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(1) If the reasonable accommodation will not eliminate or reduce the direct threat to the health and safety of the individual and others, then it would appear that the employer may, consistent with the ADA, refuse to hire or discharge the individual.

C. Disciplining employees under the ADA and Rehabilitation Act.

1. An employer may discipline an employee with an emotional disorder where that disorder causes the employee to engage in violent conduct. Hindman v. GTE Data Services, 4 AD Cases 182 (Middle Dist. Fla. 1995). (Employer did not violate ADA when it discharged employee after discovering that he had brought loaded gun to workplace in briefcase, despite claim that he suffered from chemical imbalance, where his conduct violated employer's work rules, and it did not know of alleged disability until after it had made a decision to discharge him.

2. Will be determined on a case-by-case basis looking at all facts and circumstances.

V. Legally v. Psychologically Correct Action

A. What may be legally correct or permissible, may not be in the best interests of eliminating or reducing the risk from the potentially violent employee.

B. Use of Psychologists and other community resources.

C. Employee Assistance Program ("EAP").

VI. Violence Prevention Program

A. Typical program has three steps.

1. Pre-incident planning.

2. Incident management.

3. Post-incident response.

B. Pre-incident planning.

1. Conduct a risk audit survey.

a. Assess seriousness in industry and in individual company.

b. Assess the company's readiness for dealing with violence.

2. Prepare policies detailing what is and what is not acceptable.

3. Set up an incident management team.

4. Disseminate policies and inform employees of the ramifications from violations.

5. Attend seminars on workplace violence.

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C. Incident Management Team.

1. Verify allegations.

a. Do not rush into an interview and avoid confrontation if possible.

b. Use all available information.

c. The victim or intended victim should not be present during any of the interview process.

2. Intervene in a way that does not cause reaction or causes the least reaction.

3. Assess risk.

4. Implement options.

a. No action.

b. Warning, verbal or written

c. Suspension, with or without pay.

d. Termination.

e. Retrieve keys or security cards and change any door locks or computer codes.

f. Bring in outside security or police where necessary.

D. Post-incident response.

1. Identify victims.

2. Supportive counselling or EAP.

3. Critical incident stress debriefing.

4. Communication plan.

   a. Can often offset rumors and speculation.

   b. Avoid defamation.

   c. Reassure and stabilize work force.

   d. Prepare press releases or appropriate public announcements.

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Iowa Defense Counsel
Association Seminar
Des Moines, Iowa
September 21, 1995

THE INTERRELATIONSHIP BETWEEN THE AMERICANS WITH DISABILITIES ACT, THE FAMILY AND MEDICAL LEAVE ACT, AND WORKER'S COMPENSATION

Constance A. Schriver
Lane & Waterman

Fact Pattern:

I. Background.

A. A work-related injury may have implications under state worker's compensation statutes, the Americans With Disabilities Act ("ADA") and state discrimination laws, and the Family and Medical Leave Act ("FMLA").

B. The employer needs to assess the fact situation presented under each and determine whether each statute is applicable, and then take appropriate actions.

II. The Americans With Disabilities Act. 42 U.S.C.A. § 12101 et. seq.

A. The Americans With Disabilities Act was enacted as a national mandate to eliminate discrimination against the disabled. 42 U.S.C.A § 12101(b)(1) (1995).

B. Definitions.

1. *Disability*

(a) A disabled individual is either:

(1). an individual with a physical or mental impairment that substantially limits one or more of the major life activities of the individual;

(2). an individual with a record of such an impairment; or

(3). an individual regarded as having such an impairment. 42 U.S.C.A. § 12101(2).

2. *Major life activities* may include walking, seeing, hearing, speaking, breathing, learning, working,

caring for oneself or performing manual tasks. 29 C.F.R. § 1630.2(i).

3. *Substantially limits*, in the context of the major life activity of working, means significant restrictions on the ability to perform either a class of jobs or a broad range of jobs in various classes vs. an average person with similar training, skills and ability. 29 C.F.R. § 1630.2(j).

4. Exclusions from the definition of disability.

   (a) Predisposition to illness.

   (b) An individual who cannot perform a single specialized function.

   (c) An individual who cannot perform a profession that requires extraordinary skill or talent is not substantially limited in the major life activity of working.

   (d) A condition that is non-chronic and of short duration with minimal permanent impact is typically not a disability. 29 C.F.R. App. § 1630.2(j)-Interpretive Guidance on Title I of the ADA.

5. A qualified individual with a disability is an applicant or employee who can, with or without reasonable accommodation perform the essential functions of the employment position held or sought. 42 U.S.C.A. § 12111(8).

6. Reasonable accommodation may be any kind of modification or adjustment to a job. It may include:

   (a) Making existing facilities readily accessible.

   (b) Job restructuring.

   (c) Part-time or modified work schedules and leave policies.

   (d) The acquisition or modification of equipment or devices.

   (e) The appropriate adjustment or modification of examinations, training materials or policies.

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(f) The provision of qualified readers or interpreters for such material; and

(g) Reassigning an employee to a vacant position that the individual qualifies for if the employee becomes disabled and is unable to do the original job. 29 C.F.R. §§ 1630.2(O); See also 29 C.F.R. App. § 1630.2(o).

7. The ADA prohibits discrimination against a qualified individual with a disability, on the basis of that disability, with regard to the terms and conditions of employment. 42 U.S.C.A. § 12112(a).

III. Family and Medical Leave Act. 29 U.S.C.A. § 2601 et seq.

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A. The FMLA applies to private employers engaged in interstate commerce who employ 50 or more employees. 29 U.S.C.A. § 2611. It covers employees who have been employed for at least 12 months by the employer and for at least 1,250 hours of service during the 12-month period preceding the requested leave. Id.

B. The FMLA requires employers to grant up to 12 weeks of unpaid leave per year to cover employees for one or more of the following reasons:

1. The birth or placement of a son or daughter;

2. To care for a spouse, parent, or child who has a serious health condition; or

3. Due to the employee's own serious health condition that makes the employee unable to perform the functions of his or her position. 29 U.S.C.A. § 2612.

C. Any eligible employee who takes leave under the FMLA, upon return from such leave, has to be returned to his or her old position or to an equivalent position with equivalent pay, equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C.A. § 2614 (a).

D. The employer shall maintain coverage under any "group health plan" for the duration of the leave of the eligible employee, at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. 29 U.S.C.A. § 2614(c).

E. Leave due to an employee's own serious health condition.

1. *Serious health condition* is defined as an illness, injury, impairment, or physical or mental condition that involves:

(a) inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care; 29 CFR § 825 114(a)(1) or

(b) continuing treatment by a health care provider, which includes 29 CFR § 825 114(a)(2):

(c) a period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involves:

(1) treatment two or more times by or under the supervision of a health care provider; or

(2) treatment by a health care provider on at least one occasion which resulted in a regimen of continuing treatment under the supervision of a health care provider. 29 CFR § 825.114(a)(2)(i).

(3) Any period of incapacity due to pregnancy or for prenatal care. 29 CFR § 825.114(a)(2)(iii).

(4) Any period of incapacity due to a chronic serious health condition. 29 CFR § 825.114(a)(2)(iv) and (v).

(aa) A chronic serious health condition requires periodic visits for treatment, continues over a period of time and may cause episodic rather than a continuing period of incapacity;

(bb) a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective; and

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(cc) any period of absence to receive multiple treatment.

F. *Health care provider* is defined as a licensed doctor of medicine or osteopathy, or "any other person determined by the Department of Labor to be capable of providing health care services." 29 U.S.C.A. § 2611(6); 29 CFR § 825.118.

G. Under the FMLA three different types of leave may be taken for a single injury or illness. 29 U.S.C.A. § 2612.

a. A leave of up to 12 consecutive weeks.

b. Intermittent leave taken in separate blocks of time due to a single injury or illness.

c. A reduced leave schedule.

(1) Intermittent or reduced leave schedule may be taken when medically necessary. Medically necessary means that there must be a medical need for the leave and it must be that such medical leave can be best accommodated through an intermittent or reduced leave schedule.

(a) If an employee requests and is entitled to intermittent leave or reduced leave, the employer may require the employee to transfer temporarily to an available alternative position:

i. for which the employee is qualified.

ii. that has equivalent pay and benefits but not necessarily equivalent duties; and

iii. that better accommodates the employee's recurring periods of leave. At the end of the leave the employee must be restored to the same or equivalent job as the job the employee had before the leave commenced and the transfer occurred. 29 CFR § 825.117 and 825.204.

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H. FMLA does not require the employer pay the employee while on the leave of absence. 29 U.S.C.A. § 2612(c); CFR § 825.20.

I. An employer may require that a request for FMLA leave on the basis of a serious health condition be supported by certification issued by the health care provider of the employee.

A. The certification must contain the following information.

1. the date on which the serious health condition commenced;

2. the probable duration of the condition;

3. medical facts relating to the condition; and

4. a statement that the employee is unable to perform the functions of the position, or the essential functions of the position of the employee. 29 U.S.C.A. § 2613.

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IV. INTERACTION BETWEEN STATUTE

A. Neither the ADA nor the FMLA will preempt worker's compensation law, except to the extent that state worker's compensation law would be inconsistent and not conflict with the ADA or FMLA. 42 U.S.C.A. § 12201(b).

1. Exclusivity of Iowa Worker's Compensation Law.

(a) Iowa law provides that the rights and remedies of the worker's compensation statute are the exclusive and only rights and remedies of the employee on account of injury, occupational disease or hearing loss against the employee's employer. Iowa Code § 85.20.

(b) A suit under the ADA or FMLA would not be precluded as such a suit would be to recover for the employer's failure to comply with the provisions of that statute, and not a suit on account of the injury.

B. Pre-employment Inquiries.

1. Under traditional worker's compensation law, there was no prohibition from an employer seeking

information from an applicant with respect to past injuries, the applicant's medical condition, and past worker's compensation claims.

2. Under the ADA, employers are prohibited from making inquiries about whether applicants have disabilities or the nature and severity of such disabilities. 42 U.S.C.A. § 12112(d)(2)(A); 29 C.F.R. § 1630.13(a). Pre-employment inquiries concerning physical or mental condition, prior injuries, or prior worker's compensation claims are prohibited. Inquiries must be limited to questions pertaining to directly to the performance of the specific job-related functions. 29 C.F.R. § 1630.14(a). For specific examples of inquiries that are not allowed under the ADA, <u>see</u> EEOC: Enforcement Guidance on Pre-Employment Inquiries under the Americans with Disabilities Act issued May 19, 1994.

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C. Medical examinations and inquiries of applicants.

1. Under traditional state worker's compensation law, there was no prohibition of such.

2. Under the ADA employers are prohibited from conducting medical examinations of job applicants unless a conditional job offer has been made. 42 U.S.C.A. § 12112(d)(2)(a); 29 C.F.R. § 1630.13(a). If a medical examination or ability test is given, the test must be given to all applicants applying in the job category and the examination should be job-related and consistent with business necessity.

3. It is permissible for an employer to require an applicant to submit to a drug test under the ADA. Drug testing is not considered a medical examination under the ADA. 42 U.S.C.A. § 12114(d)(1); 29 C.F.R. § 1630.16(c). <u>But</u> <u>see</u>, Iowa Code § 730.5, Iowa Drug Testing Act.

4. Once the offer is made a medical examination may be required. The requirements are:

   a. The offer of employment has been made to the job applicant;

   b. The offer of employment is conditioned upon the results of the examination;

c. All similarly situated individuals are subject to this examination;

d. All individuals in that job classification are required to undergo an examination. 42 U.S.C.A. § 12112(b)(3); 29 C.F.R. § 1630.14(b).

5. The post-offer medical examination does not have to be job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3); 29 C.F.R. App. § 1630.14(b).

a. However, if the examination or inquiry screens out individuals with disabilities, the basis upon which these individuals are screened out must be job related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3).

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6. Under the FMLA, employers have the right to require a physician's certificate to support a leave request for a serious health condition, but the employer may not require more information on a certificate than the date on which the serious health condition commenced, the probable duration of the condition, medical facts, and a statement that the employee is unable to perform the functions of the position. 29 U.S.C.A. § 2613.

a. An employer can obtain a second opinion, provided that the doctor is not employed on a regular basis by the employer. If the employee's doctor and the second opinion doctor disagree, the employer can obtain a third opinion from a physician designated jointly by the employer and employee. 29 U.S.C.A. § 2613(c) and (d).

7. Under the ADA, medical information must be kept confidential. While employers have a right to medical information that may be necessary to process and manage a worker's compensation claim, the ADA limits the disclosure of such information to those persons who have a need for it.

8. Once a job offer is made inquiries about previous work-related injuries are permissible and an employer may ask an applicant about his or her worker's compensation history. 29 C.F.R. App. § 1630.14(b).

D. Duty to accommodate.

1. Generally, there is no duty to accommodate under state worker's compensation laws.

2. Under the ADA, employers have an affirmative obligation to "reasonably accommodate" a qualified individual with a disability, unless the accommodation would constitute an undue hardship. 42 U.S.C.A. § 12111.

3. The ADA does not require the creation of "light duty" jobs, unless "heavy duty" tasks are only marginal job functions and can be reallocated.

4. An employer can refuse to provide an accommodation under the ADA if an undue hardship would result as a result of the accommodation. An undue hardship would exist where there is a threat to the health or safety of an individual with disabilities or others; the accommodation would involve excessive costs; the accommodation would involve the provision of personal items such as hearing aids and eyeglasses; or it could be achieved only with significant difficulty. 42 U.S.C. § 12111(10), 29 C.F.R. App. § 1630.2(p).

5. Under the ADA, if an employee injured on the job is disabled and seeks to return to work, the employer cannot insist on requiring the employee to obtain a "full and complete" medical release before returning. Rather, the employee, assuming his job remains open and available, has the right to return as soon as he or she is capable of performing the essential functions of the job with or without a reasonable accommodation.

6. Under the FMLA, the only duty to accommodate relates to the injured employee's ability to take intermittent and reduced leave when such leave is medically necessary. 29 U.S.C.A. § 1612(b). Employees needing intermittent or reduced leave must attempt to schedule their leave so as to not to disrupt the employer's operations. An employer may assign an employee to an alternative position with equivalent pay and benefits to better accommodate the employee's intermittent and

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reduced leave schedule. 29 U.S.C.A. § 2612(b). If the individual injured on the job is eligible for FMLA leave, the employee will be entitled to take intermittent or reduced leave when medically necessary to care for his or her injury.

E. Reinstatement

1. Under Worker's Compensation Law often times employers would require that an employee be fully recovered prior to returning to work.

2. Under the ADA, an employer may not require full recovery prior to an employee returning to work. Rather, an employer must accommodate an employer which would allow an individual who is not fully recovered to return to work, as long as that individual can perform the essential functions of the position with or without a reasonable accommodation. In addition, the employer may not require an employee to have a full physical exam, but only a "job-related" medical exam as a condition of returning to work.

3. Under the ADA, reinstatement rights must be evaluated in relationship to the duty to accommodate. Employers are generally not required to create special light duty jobs.

4. Under the FMLA, except for certain situations with respect to highly compensated employees (29 U.S.C.A. § 2614(b)), injured employees have the right to be restored to the position of employment the employee held prior to the leave or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C.A. § 2614(a). Accrued rights may not be taken away from an individual who qualifies for leave under the FMLA. 29 U.S.C.A. § 2614(a)(2).

F. Maintenance of employment benefits.

1. Under most state worker's compensation laws, employers are not required to maintain fringe benefits while an injured worker is out of work.

2. Under the ADA, there are no requirements to maintain fringe benefits while an individual is unable to work because of a work-related injury or disability.

3. Under the FMLA, on the other hand, the employer must maintain group health insurance benefits for the duration of the leave under the same terms and conditions coverage would have been provided if the employee had continued in employment. 29 U.S.C.A. § 2614(c).

   (a) An employer may recover premiums paid during the leave if the employee fails to return at the conclusion of the leave, unless the reason for the failure to return is because of the continuation of the serious health condition or other circumstances beyond the control of the employee. 29 U.S.C.A. § 2614(c)(2).

   (b) If an employee is required to pay a part of the cost of the premiums, the employer may continue to require the employee to pay the part of the cost of the premiums on the same basis that existed prior to the start of the leave. 29 C.F.R. § 825.210. The employer must provide the employee with a 30-day grace period within which to pay. 29 C.F.R. § 825.212.

   (c) In absence of payment by the employee the employer is free to discontinue the provision of health care benefits provided that benefits can be restored upon the employee's return to employment without adverse consequences to the employee. For benefits that are terminated due to the employee's failure to pay premiums, an employee may not be required to meet any new qualification requirements imposed by the plan, including any new pre-existing condition waiting period, to wait for an open season, or to pass a medical examination or to obtain reinstatement of coverage. 29 C.F.R. § 825.212.

G. Drug and Alcohol Use.

1. Under state worker's compensation law, injuries caused by illegal drug use are generally not compensable. Work-related injuries caused by alcoholism or an alcohol-induced impairment may be compensable. However, treatment for alcoholism or drug abuse is generally not contemplated under worker's compensation laws.

2. Under the ADA, individuals who are current users of illegal drugs are not protected. 42 U.S.C.A. § 12114. Qualified individuals with a disability who do not currently use illegal drugs and who are participating in a rehabilitation program or who have successfully completed a drug rehabilitation program are protected. Alcoholics are not excluded from protection under the ADA but employers may hold alcoholics to the same performance standards as other employees, subject to the duty of reasonable accommodation.

3. Under the FMLA, treatment of substance abuse may qualify as a serious health condition where there is inpatient care, or a period of incapacity of more than three calendar days involving continuing treatment by a health care provider. Absence because of the employee's use of the substance, without treatment, does not qualify for leave. The employer is not prevented from taking action against an employee who failed to perform up to standards provided the employer is in compliance with the ADA and state discrimination laws, and does not take action because the employee has exercised his or her right to take FMLA leave for treatment of that condition.

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H. When is an injury under the Worker's Compensation Act a disability under the ADA, and a serious health condition under the FMLA.

1. Worker's compensation benefits are available for those individuals who sustain an injury arising out of and sustained in the course of employment. Iowa Code Chapter 85.

(a) An injury for persons under the Worker's Compensation Law is defined as:

"something whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body and means an injury to the body, the impairment of health....not through the natural building up and

tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. Almquist v. Shenondoa Nurseries, 218 Iowa 724, 254 N.W.35 (1934).

b. Under the ADA an individual is not necessarily "disabled" simply if the individual has a mental or physical impairment. Rather, the impairment must substantially limit one or more major life activities of the individual. 29 CFR § 1630.2(g).

c. Under the FMLA, the leave requirements come into play where the employee is unable to perform his or her job because of the employee's own serious health condition. 39 U.S.C.A § 2612(a)(1).

d. Work-related injuries do not always cause physical or mental impairments that are severe enough to substantially limit a major life activity such as work.

e. Compensable work-related injuries that are non-chronic non-permanent and easily healing are unlikely to constitute a disability under the ADA.

f. The employer should be cautious because the perception of a disability, even when one does not exist, brings into play the protection of the ADA.

g. Under Iowa law, an injury under the Worker's Compensation Act does not in and of itself make the individual a "disabled person" within the meaning of the Iowa Civil Rights Act. Brown v. Hy-Vee Food Stores, Inc., 407 N.W.2d 598 (Iowa 1987). The same reason should apply under the ADA.

h. Where an employee was not incapacitated for more than three days or did not need continuing treatment, the employee would not have a serious health condition for purposes of the FMLA and would not be entitled to any of its benefits or protection.

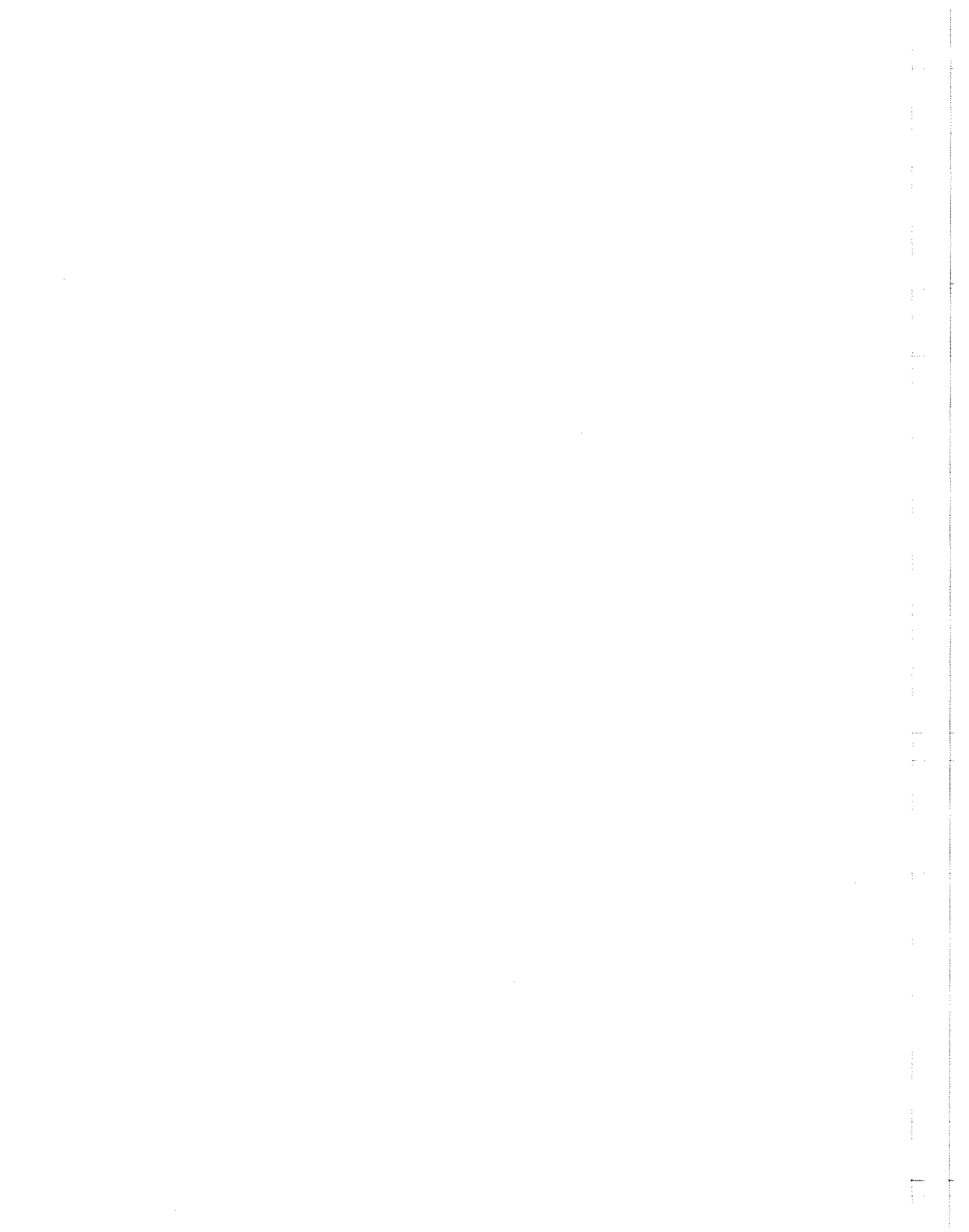
WOMEN AS DEFENSE COUNSEL FACT & FICTION RELATING TO GENDER BIAS IN THE PROFESSION

I

INTRODUCTION

"Why should I care about gender bias?"

Jaki K. Samuelson
Whitfield & Eddy, P.L.C.
Des Moines, Iowa



WOMEN AS DEFENSE COUNSEL FACT & FICTION RELATING TO GENDER BIAS IN THE PROFESSION

INTRODUCTION

"Why should I care about gender bias?"

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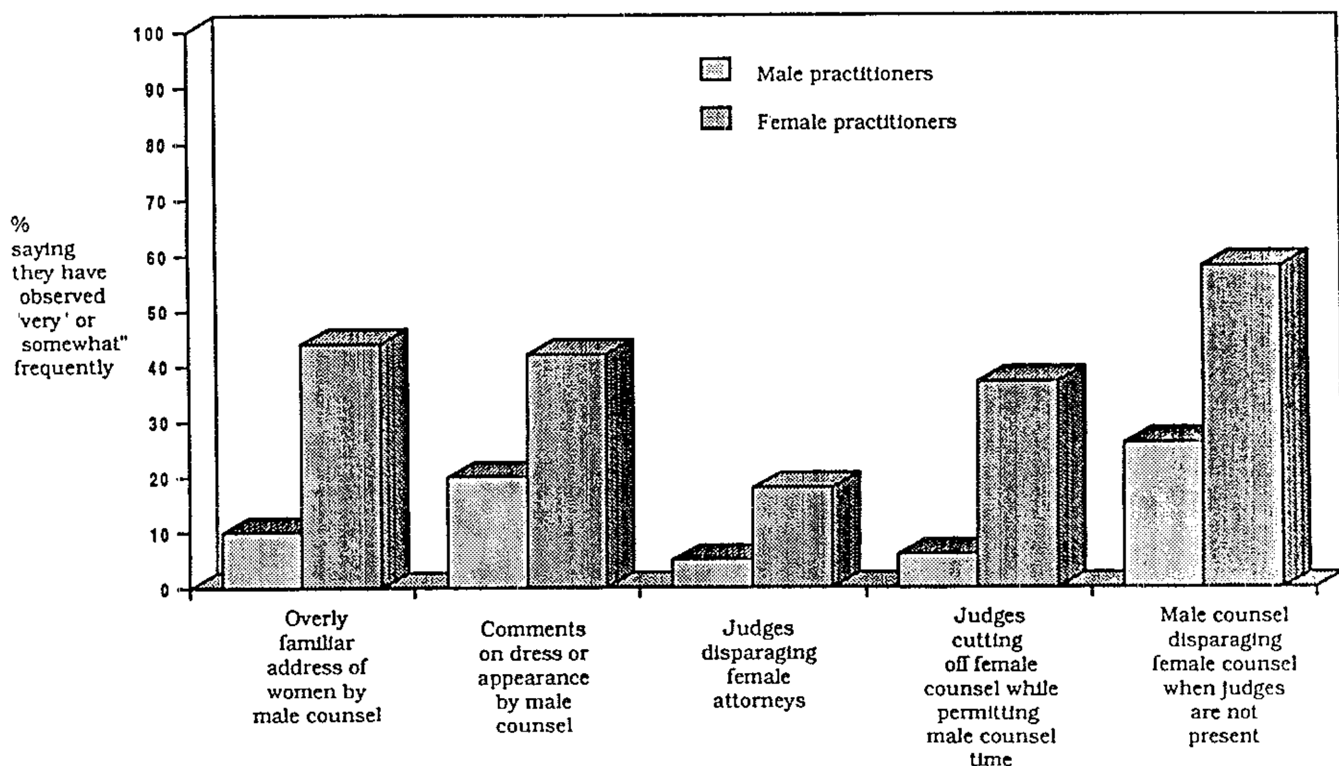
I. Gender Bias Exists.

A. Representation of women in the profession, in private practice, in trial practice, in the judiciary.

B. Treatment of Women in trial practice

Men don't see gender influences on interactions, yet women do



II. Gender Bias Affects You

A. Ethical/Professional Responsibilities.

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise A lawyer should be temperate and dignified, and should refrain from all illegal and morally reprehensible conduct. Because of a lawyer's position in society, even minor violations of law may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

DR 102 Misconduct

(A) A lawyer shall not:

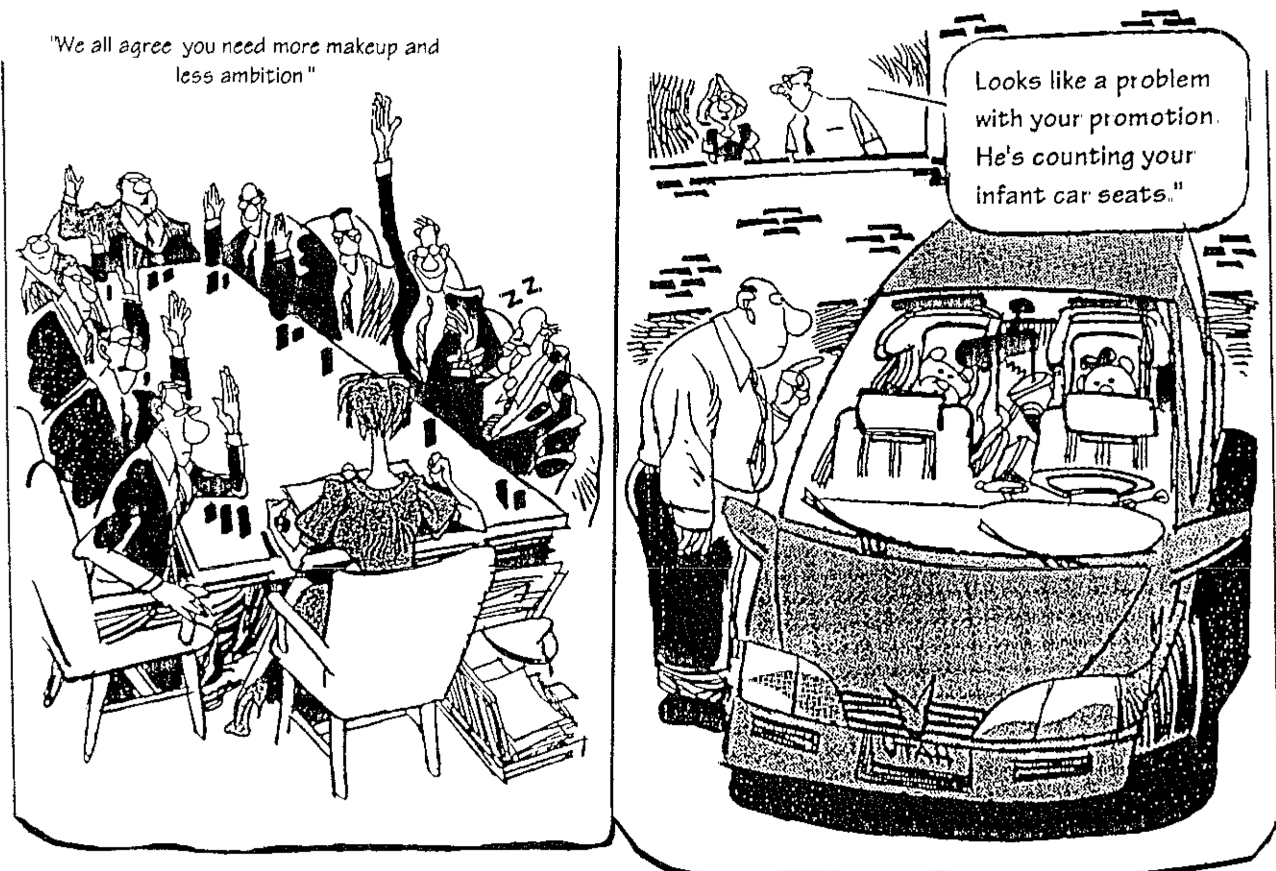
. . .

(7) Engage in sexual harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so

B. Impact on the effectiveness of members and potential members of your firms.

1. Treatment by outsiders -- i.e. opposing counsel, judges.

2. Issues within the firm.

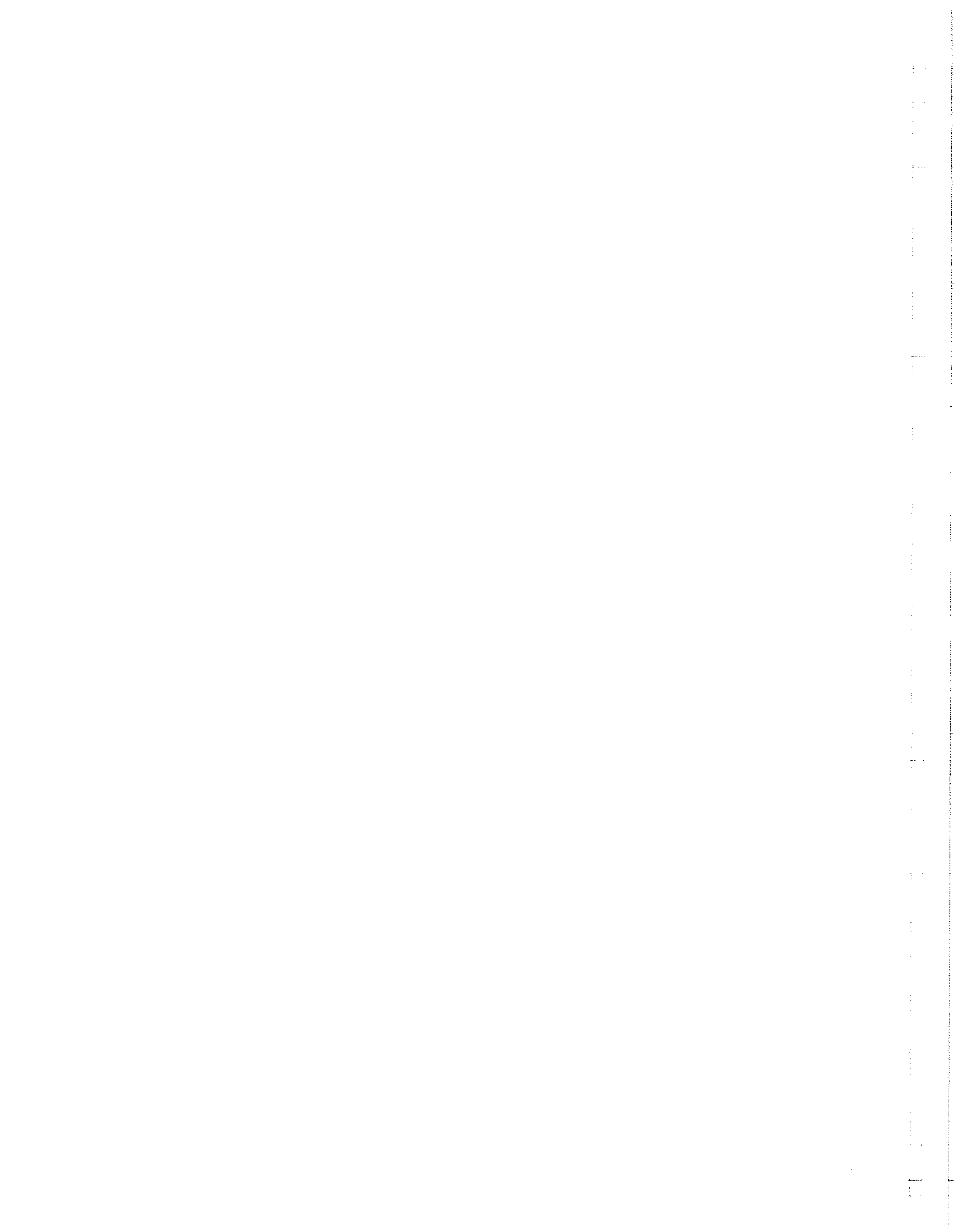


C. Professional dealings and associations -- dealing with women as co-counsel, adversaries, judges and jurors.

'You will not refer to the bench, counsel or the jury as 'distinguished girls of the court'

D. Client Relationships

E. Potential Liabilities.



UNDERSTANDING GENDER BIAS
The Trial Lawyer's Perspective

H. Richard Smith
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100 Court Avenue
Des Moines, Iowa 50309

UNDERSTANDING GENDER BIAS I:
THE TRIAL LAWYER'S PERSPECTIVE

I. Why Iowa trial lawyers need to have a "perspective" on gender bias.

A. Iowa Disciplinary Rule 1-102(A)(7):

> "A lawyer shall not: engage in sexual harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so."

B. Iowa Code of Judicial Conduct Canon 3(A)(9):

> "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon sex, race, national origin, or ethnicity, against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when sex, race, national origin, or ethnicity are issues in the proceedings."

II. Does gender bias exist in the Iowa trial practice?

A. Report of Iowa State Bar Association Study Committee on Women and Minorities issued in June of 1989 concluded that women believe they face substantial barriers to full participation in both the legal and judicial communities in the state.

B. Report of Iowa State Bar Association Committee on Women and Minorities to the Board of Governors dated February 28, 1992, stated there continues to be ongoing problems of an interprofessional nature dealing with the issue of gender.

C. Final report of the Equality In the Courts Task Force created by the Supreme Court of Iowa submitted in February of 1993 stated with regard to courtroom and professional interactions 81% of female attorneys thought there were some problems, with 10% stating that the problems were serious and it was very difficult for women.

D. Other studies report similar findings.

1. Ninth Circuit Gender Bias Task Force Report.

2. D.C. Circuit Task Force Report.

3. Minnesota Supreme Court Task Force For Gender Fairness In the Courts Report.

4. Arkansas Bar Association's Committee On Opportunities For Women and Minorities Report.

5. Nebraska Gender Fairness Task Force Preliminary Summary.

6. Report of Missouri Task Force On Gender and Justice.

7. Report of the North Dakota Gender Fairness Study.

8. Report of South Dakota Gender Fairness Task Force.

III. Fact or perception?

A. Does it really make any difference?

B. Methodologies of studies.

1. Surveys.

2. Focus groups.

3. Public forums.

4. Confidential interviews.

5. Court Watch Projects.

6. Review of public records.

7 Other.

C. Anecdotal versus imperical data.

IV. The stress points.

A. Interactions in court.

1. Interactions between judges and attorneys.

2. Interactions among attorneys in court.

3. Witnesses and parties.

4. Interactions among attorneys and non-judicial court personnel.

B. Litigation interactions outside the courthouse.

1. Discovery.

2. Settlement negotiations.

C. Sexual comments and unwanted sexual advances.

D. Getting into court.

1. Selection by the judiciary for court-related appointments.

2. Assignments and scheduling.

E. Work and family.

F. Other stress points.

V. So what do we do about it?

A. Continue with studies.

1. Beneficial in addition to data collected.

B. Education.

1. Sensitivity training.

C. Peer pressure.

D. Establish reporting procedures.

E. Other.

VI. Conclusion.

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GENDER BIAS
The Client's Perspective

Janet Griffin
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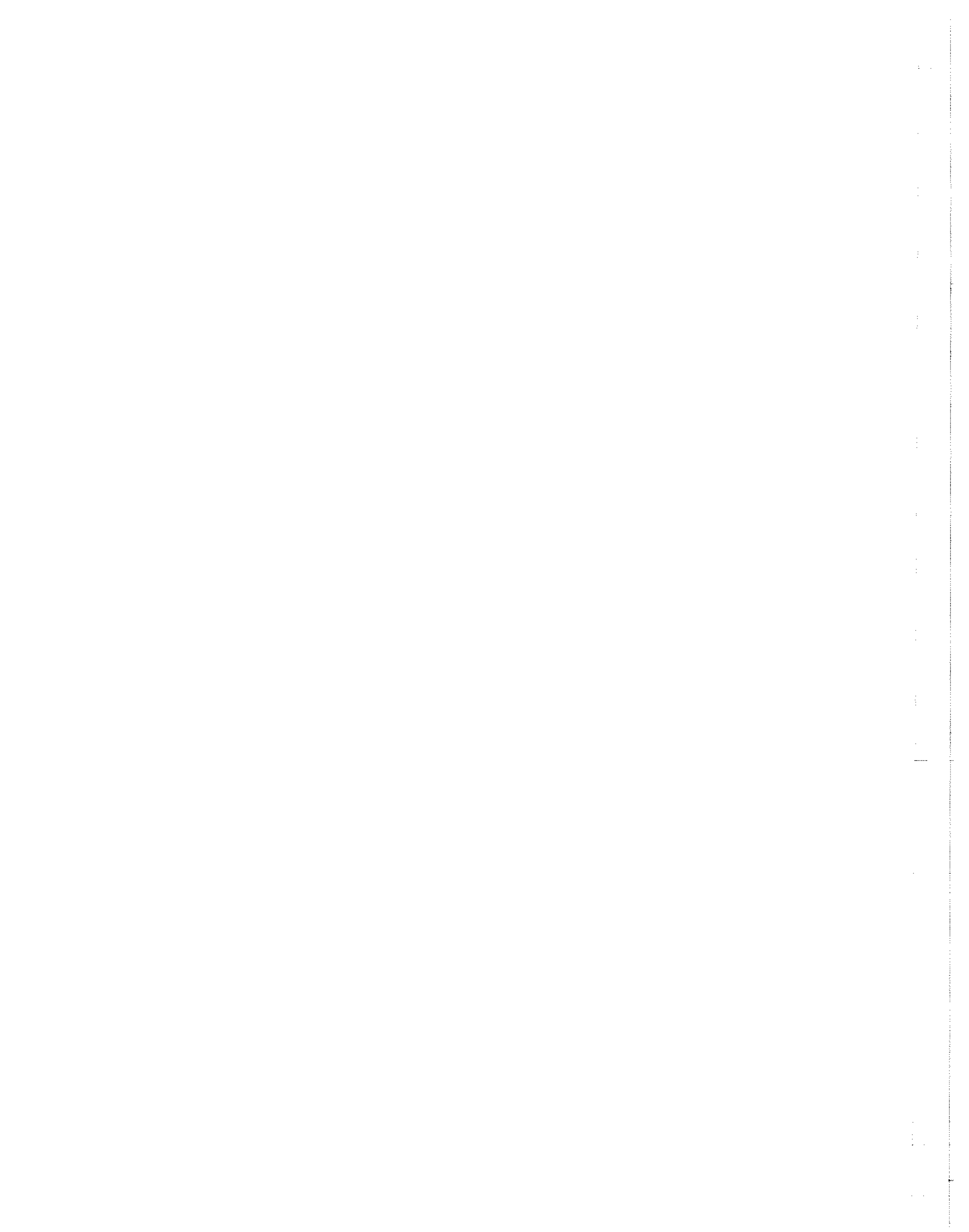
Des Moines, Iowa



Gender Bias: The Client's Perspective

I. Introduction

II. Service/Quality Movement

A. What is it?

B. Why should trial lawyers care about it?

III. Changing Demographics in the Work Force

A. Who is the client?

B. What are the client's needs?

IV. Client's Expectations of Counsel

A. General concerns

B. Gender-related issues

V. Conclusion

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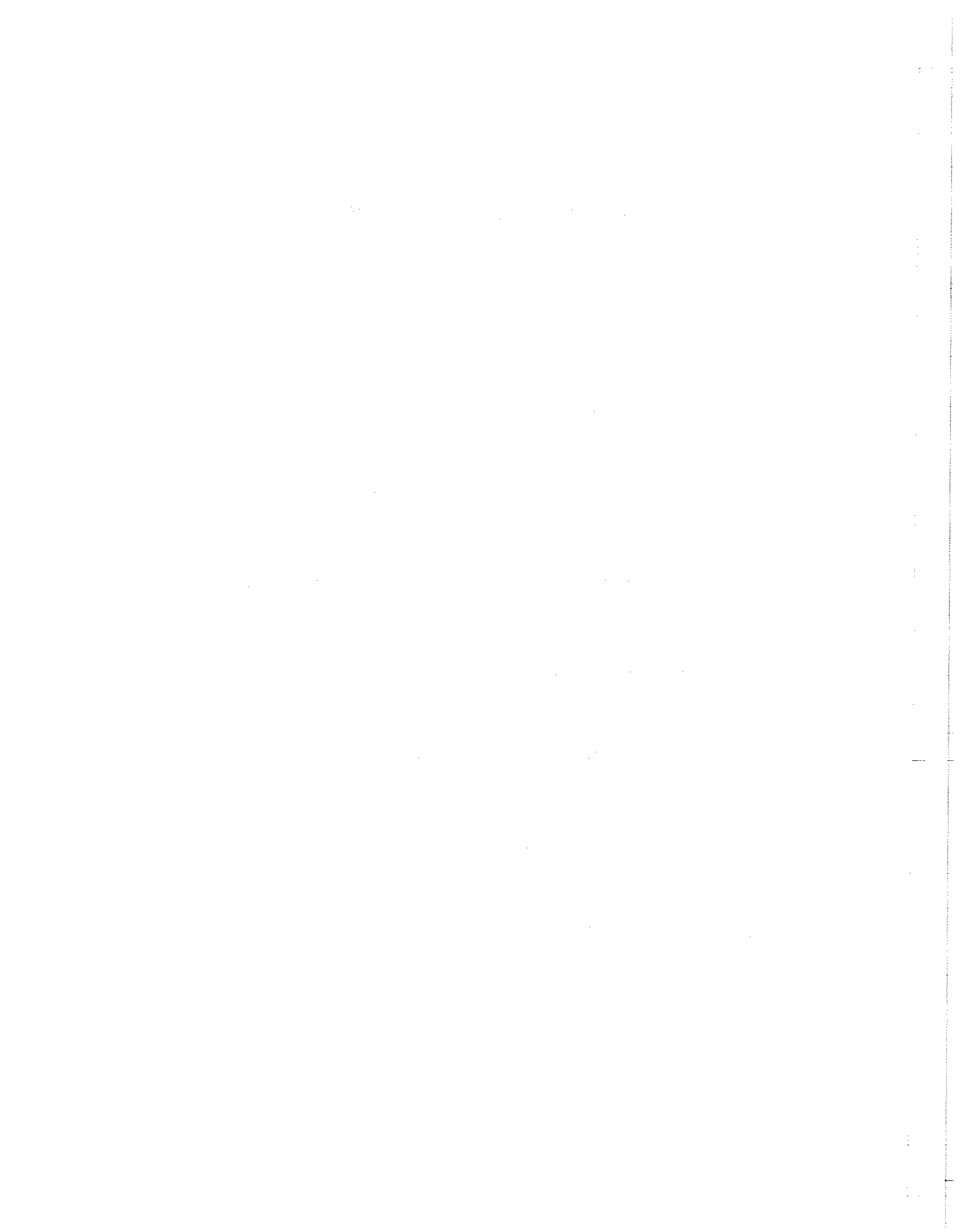
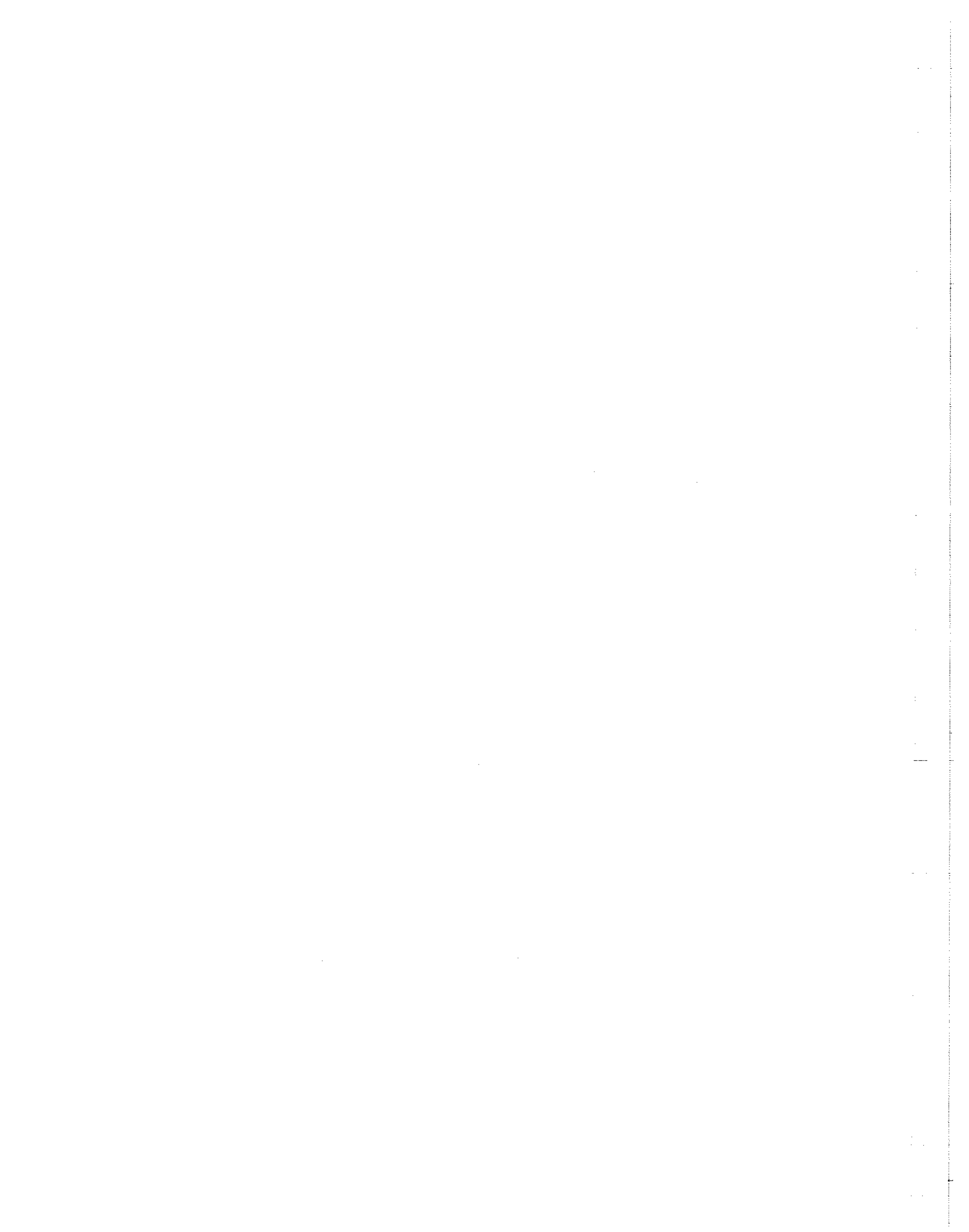


How We Are Doing In Iowa:

Report on the Findings of the Equality in the Courts Task Force.

Chief Judge James R. Havercamp
Seventh Judicial District of Iowa

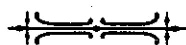


[EXERPTS]

FINAL REPORT

of the

EQUALITY IN THE COURTS TASK FORCE



State of Iowa

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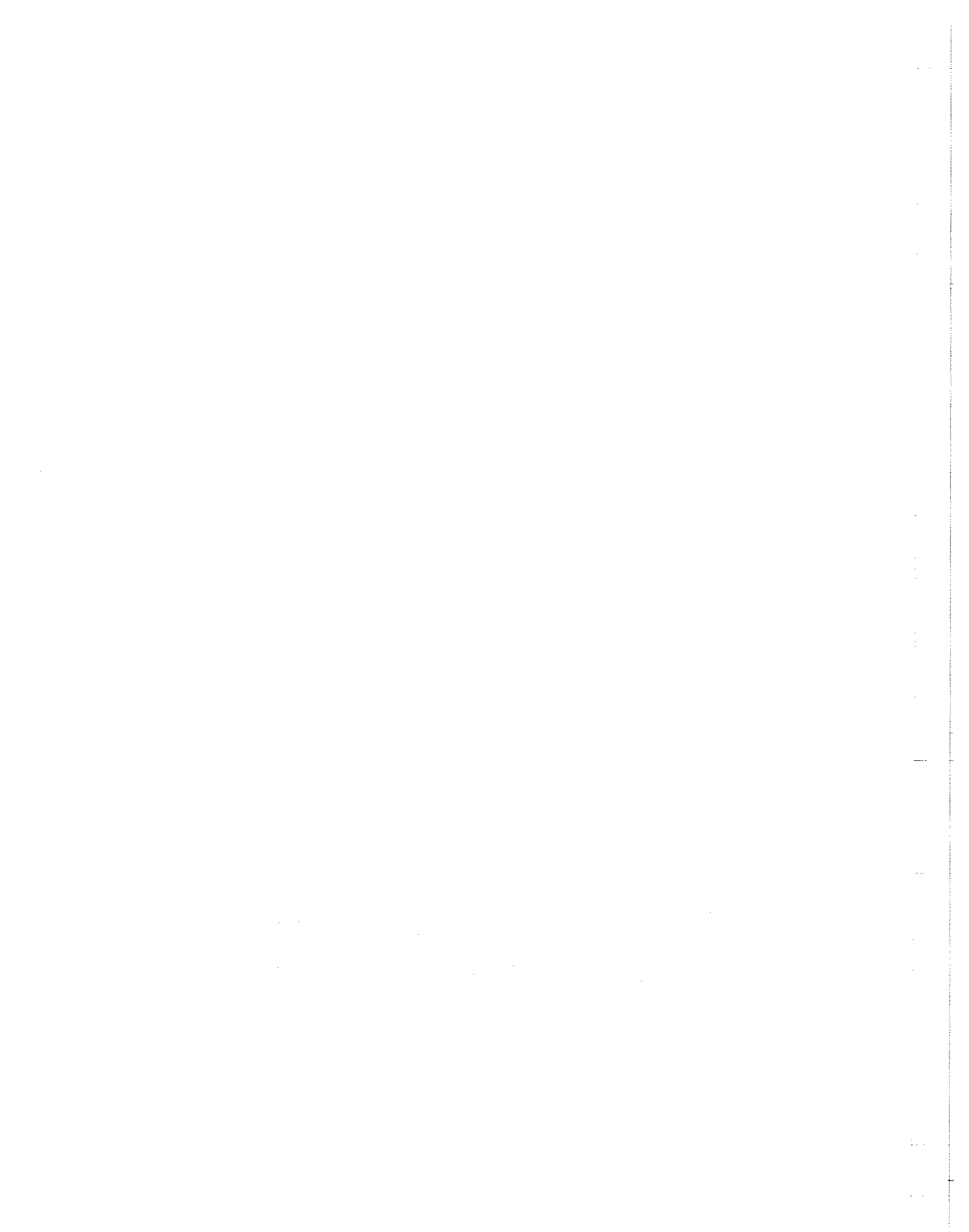
EXECUTIVE SUMMARY

Submitted to the Supreme Court of Iowa

February 1993



EXECUTIVE SUMMARY

PREAMBLE

On December 4, 1990, the Supreme Court of Iowa established the Equality in the Courts Task Force.[1] As framed by the Supreme Court, the mission for the Task Force was ambitious and unique. More than thirty states have studied gender bias; more than ten states have separate task forces focused on racial and ethnic bias. Iowa's is the first study, however, to investigate both race/ethnicity and gender bias in the court system.

The Task Force's simultaneous focus on gender and race/ethnicity has been a source of enlightenment and a challenge. In several instances, the research of the Task Force disclosed that white men, traditionally the most numerous and the dominant group in the legal profession, tend to perceive the world differently from either women or minority members of the profession. The specific concerns of women and minorities may and often do differ and this study demonstrates that it can be important to specify just which "minority" group is being discussed. However, because of their status as nondominant groups in the legal world, both women and racial/ethnic minorities are more vulnerable to bias and more willing to name and detect various forms of bias affecting their professional lives. The Task Force found it useful to develop a habit of looking at issues from multiple perspectives and to consider the possible interactive effects of race and ethnicity as well as gender.

The membership of the Task Force itself reflected the importance placed on diversity (14 of the members are women, seven are racial/ethnic minorities); it included persons from various sectors of the legal system (eight members were judges, 12 members were practicing attorneys, two members were court administrators); and it included representatives from the larger community (two members were state legislators, three members were academics and two members worked in private industry).

Funding was provided by the Iowa Legislative Council, the State Justice Institute and the Lawyers Trust Account Commission. All the Task Force members donated their time to the study and many members decided to use personal funds to defray any expenses incurred in travel and accommodations.

The Task Force conducted extensive independent research to determine how lawyers, judges, court personnel and the public view the court system and to solicit comments from these groups about their first-hand experiences. Our research strategy was designed to yield both qualitative and quantitative data.

The Task Force gathered qualitative data through a variety of methods. At five public hearings in Waterloo, Sioux City, Davenport, Council Bluffs and Des Moines, the Task Force listened to the testimony of 140 citizens who offered their experiences and views on every topic studied by the Task Force. Throughout our two years of study, the Task Force also received written comments from a diverse group of over 300 people, some of whom were members of organizations with special expertise in the problem areas focused upon in this Report. Finally, the surveys themselves elicited an unusually high number of written comments -- many of which are lengthy, detailed and extremely thoughtful -- in addition to responses to the numbered questions.

The qualitative or anecdotal material gives life and texture to the empirical, quantitative findings. From these sources, the Task Force was able to identify key issues, document differences in perceptions, pinpoint some of the many ways bias manifests itself in the courtroom and in professional interactions

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[1] *In the Matter of the Appointment of a Commission on Equality in the Courts*, Order, Supreme Court of Iowa, December 4, 1990.

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and begin to understand the meaning of race and gender in the lives of those who seek justice in the Iowa courts.

To gather and analyze the quantitative data about attitudes and experiences, the Task Force contracted the services of the research firm of Selzer Boddy, Inc. to conduct four major surveys, directed at judges, attorneys, court personnel and the general public. The response rates in each of the written surveys were high: 84% for judges, 54% for attorneys and 43% for court employees. The perceptions of the general public were elicited via a telephone survey of a cross section of Iowans. Special efforts were taken to include enough minority respondents for statistical analysis. The results of these surveys enabled the Task Force to generalize about the attitudes, observations and experiences of participants in the legal process and to contrast the views of the majority group (i.e., white men) with those of women and minorities. The statistical analysis of the survey data gives us confidence that the patterns uncovered are not idiosyncratic or simply the result of chance. However, by their nature, survey instruments only canvass people about what they believe to be the truth. The surveys alone cannot determine the existence of bias or actual disparate treatment based on race or sex.

In addition to the four major surveys, Dr. B. Keith Crew of the University of Northern Iowa undertook a special retrospective study of criminal cases in selected Iowa counties. Funding for the Case Study was provided to the Task Force by the State Justice Institute. The criminal case study was designed to shed light on one pressing question before the Task Force -- the effect of race in the criminal justice process. Controlling for a variety of factors that legitimately could affect either the conviction or sentencing outcome (including prior felonies and severity of the offense), the empirical study compares the treatment of whites and minorities from the moment of formal charging of a crime to imposition of sentence. Like the survey data, the results of the case study can not yield conclusive evidence of the existence of racial bias. However, an unexplained disparity between whites and minorities is suggestive of race bias because it documents a difference in treatment for which we can provide no legitimate explanation.

The mandate to the Task Force from the Iowa Supreme Court identified three major objectives of the project:

1. to investigate bias -- particularly on the basis of race or gender -- which may exist in the court system and its effect upon the judicial process and participants;

2. to collect the information received and make findings with regard to any existing bias;

3. to submit a report to the Supreme Court, including the Task Force's findings and its recommendations of means to heighten awareness and to increase the sensitivity of court participants to forms of bias, and eliminate bias which may demean participants or affect the prospect of equal treatment.

The Task Force members believe that we have accomplished each of these objectives. The four surveys of judges, attorneys, court personnel and the general public together represent the most comprehensive study ever undertaken in the state focusing on gender and race bias in the courts. The criminal case study is a refined empirical analysis that permits us for the first time to measure with some confidence the extent to which racial bias may be affecting the adjudication of criminal proceedings. The extensive qualitative evidence received at the public hearings and through written submissions to the Task Force demonstrates that the work of the Task Force was given serious attention by members of the profession and by the general public.

The Task Force acknowledges that it is impossible to quantify the precise extent of bias in a system as dynamic and complex as the court system in Iowa, or to establish conclusively that any individual report of bias is fully accurate. It also must be noted that this is a consensus report which does

not in all instances reflect the personal views of individual members. However, the Task Force members believe that the data base provided by our independent research has allowed us to fulfill our mandate. Through this research, the Task Force is able to make meaningful generalizations about differences in perceptions and experiences, give concrete examples of what participants in the legal system regard as bias and frame specific recommendations for improving the system.

Distilling the Research: Three General Themes

The research of the Task Force offers a complicated portrait of practices and interactions in the Iowa court system. There is strong evidence that most participants have confidence in the basic fairness of the Iowa courts and do not see the problems of race and gender bias as either overwhelming or intractable. Even when problems are acknowledged, the Task Force is hopeful that this Report will produce enthusiasm for change, rather than cynicism or resignation, notwithstanding testimony it received evidencing a lack of confidence that the Task Force efforts can bring about meaningful change.

The Task Force acknowledges that, in most instances of the day-to-day court procedures and practice of law, biased conduct is not evident, and that most attorneys and judges rarely, if ever, exhibit overtly or intentionally biased conduct. Nevertheless, there is no question that some quantum of race and gender bias exists. The Task Force strongly believes that the increasing diversification of the profession requires a renewed commitment to equality in the courts. The elimination of bias should not have to wait until the numbers of women and minority attorneys substantially increase.

In distilling the problems and concerns, three themes stand out from the wealth of data amassed and analyzed by the Task Force. First, women and minorities are significantly underrepresented in important sectors of the profession and in positions of influence affecting the court system. There is not yet a sizeable number of either women or minority judges, partners in private firms or on faculties in the two state law schools. Even in the judicial department where women make up the majority of court personnel, men disproportionately occupy the higher-paying, higher-status positions. This means that in many professional settings, women and minorities are vastly outnumbered and are likely to stand out as being "different."

Second, the demographics influence the experience of men and women and whites and minorities in their interactions in the courtroom and other professional settings. Not unexpectedly, one consistent finding in the various Task Force studies is that gender and race bias poses a greater problem for women and minorities than for white men. Consequently, women and minorities are less positive in their assessment of the current situation and less optimistic about the future. A majority of both women and minority attorneys report that they have experienced bias in the Iowa court system. These gender and race-related differences in attitudes and perceptions generally held true regardless of number of years in practice. The data give no reason to believe that the disparity will disappear with the passage of time alone.

Third, there is evidence that gender and race may at times negatively affect the interest of certain classes of litigants. There are disturbing reports that domestic violence victims -- the vast majority of whom are women -- feel they have sometimes been treated with disrespect and a lack of understanding by the court system. The criminal case study indicated that minority defendants do not fare as well in all Iowa courts as similarly situated white defendants. Ethnic minorities who are not fluent in English are placed at a disadvantage in Iowa courts because of the lack of availability of interpreters.

The Final Report also notes successes. The Task Force received quite a bit of testimony that, for the most part, the court system does not exhibit bias. There also was testimony at the public hearings and in the surveys praising Iowa judges and acknowledging that many problems have their source outside of the judicial system.

However, the emphasis of this Report is on documenting the depth of racial, ethnic and gender bias problems and concerns. We emphasize the bad news because we are more interested in raising consciousness as to the problems that have yet to be addressed effectively, than focusing on progress that already has occurred. The many recommendations for change, further study, and continued monitoring contained in this Final Report demonstrate the faith of Task Force members that more work and understanding can make a difference. Many of the recommendations require funding, and the Task Force strongly urges the Iowa State Legislature to work with the Supreme Court of Iowa in funding those recommendations which will require monetary assistance. Equality in the courts is both an aspiration and an attainable goal.

I. DEMOGRAPHIC PROFILE OF JUDGES, LAWYERS AND COURT EMPLOYEES

By Gender

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Women make up 51.03% of Iowa's population aged 25 to 69. Women make up 16% of all Iowa attorneys. But women make up only 8.4% of the full-time judicial positions (16 of 191) and only 12.5% of all judicial positions (including part-time magistrates, not all of whom are lawyers, or 43 of 343).

Women make up 16% of all Iowa attorneys. Female attorneys are younger, on average, than male attorneys: 35% of women are under age 35, compared to 15% of men; 62% are under age 40, compared to 34% of men. Female attorneys have been practicing law for shorter periods, on average, than male attorneys. Male attorneys are significantly more likely than female attorneys to hold positions as named partners and senior partners. A larger percentage of female attorneys are government attorneys (apart from prosecutors and public defenders, where the distribution is approximately the same between men and women) and associates in law firms than the percentage of male attorneys in those positions.

The nonjudicial court system is populated predominantly by women. Of the 1569 court employees, 1269 (80.9%) are women, and 300 (19.1%) are men. Breaking the population down by pay grade indicates that male court personnel disproportionately hold more of the highest ranking, highest paying jobs. Twenty-nine percent of female employees responded that their job responsibilities include the supervision of other employees, compared to 41% of men.

By Race and Ethnicity

Minorities make up 2.82% of Iowa's population aged 25 to 69. African Americans make up 1.46% of Iowa's population from that age group; the comparable figure for persons of Hispanic origin is .94%.

Minorities make up one percent of all Iowa attorneys. Currently three of the 343 judicial positions are filled by African Americans, or less than .87%. Only one of the 191 full-time judicial positions (.52%) is filled by an African American. No other minorities are represented on the Bench.

There is no significant difference in the ages of minority and white attorneys. There is no significant difference in the average numbers of years of practicing law between white and minority attorneys. A larger percentage of minority attorneys are prosecutors and sole practitioners than white attorneys.

Minority employees in the court system are dramatically underrepresented. Of the 1569 total employees, 28 are minorities (1.8%). None holds a position in the top pay grade levels.

II. APPOINTMENTS, HIRING AND ADVANCEMENT: PRACTICES AND PERCEPTIONS

Overview

The Task Force asked Iowa attorneys whether they believed that their race or sex had damaged them professionally. The survey reports indicate that women and minorities are significantly more likely than either men or whites to have had an experience with a judge or with another attorney that they believe was detrimental to them professionally because of their sex or race.

- Fifty-six percent of female attorneys reported that they have had an experience with another attorney that they believe was harmful to their career on the basis of their sex; this compares with 3% of male attorneys reporting they had an experience with another attorney or judge that they believe was harmful to their career on the basis of their sex.

- Thirty-four percent of female attorneys reported that they have had an experience with a judge that they believe was harmful to their career on the basis of their sex.

- Twenty-eight percent of minority attorneys reported they have had an experience with an attorney that they believe damaged their career because of their race.

- Twenty-seven percent of minority attorneys indicated that they have had an experience with a judge that they believe damaged their career because of their race

The Judicial Application Process

The percentages of female, male, minority and white attorneys who have applied for judicial appointments are virtually identical.

The Judge Survey indicated that the interviewing process for female judicial applicants often includes questions never or seldom asked of men.[2] For example:

- Female judges were asked significantly more often than male judges during the judicial interviewing process whether they would be willing to work long hours (55% were asked this question), what sort of child care arrangements they had (26%), what their spouses thought of their applications (25%), and whether they would move if their spouses were offered a job in another city (12%).

- In comparison, 39% of male judges were asked whether they would be willing to work long hours, 4% were asked what sort of child care arrangements they had, 11% were asked what their spouses thought of their applications, and 2% were asked whether they would move if their spouses were offered a job in another city.

Among the experiences described by those responding to the Attorney and Judge Surveys are several involving judicial nominating commissioners' discomfort with candidates who they thought might become pregnant, take maternity leave, or have difficulty with child care arrangements once

2 The number of minority judges and of minority attorneys responding to this survey question is not high enough to allow interpretive statistical analysis.

appointed. Others reported being asked questions implying doubts about women's suitability for judgeships. There were reports that some commissioners feared "reverse discrimination" in the judicial selection process and suggested that women expect preferential treatment.

Hiring and Advancement Within Law Firms and Other Professional Settings

The career ambitions of white and minority attorneys are similar. There is no statistical difference between white and minority attorneys in the interest they express in holding a number of positions tested in the Attorney Survey. There are some differences, however, in the ways minority attorneys view their career opportunities compared to whites.

Female attorneys tend to be more interested than male attorneys in becoming the heads of corporate departments or government agencies. Male attorneys tend to be more interested than female attorneys in becoming named or senior partners in law firms. Female attorneys are less optimistic than men about their chances for advancement in the profession.

- A majority of all attorneys -- white (75%) and minority (57%), male (57%) and female (56%) -- say they are very or somewhat interested in becoming partners in law firms.

- Minority and female attorneys are less optimistic than white and male attorneys, respectively, about their chances to become partners in law firms generally or senior partners specifically.

- Male attorneys and white attorneys see their chances of becoming senior partners or partners in law firms as better than either female attorneys or minority attorneys view their chances. Twenty-five percent of whites say their chances are excellent, while no minority attorneys say their chances are this good; in fact, almost half of minority attorneys (46%) say their chances of making partner are poor; a majority (52%) rate their chances of making senior partner as poor.

- Men and women and whites and minorities tend to view their chances of achieving all other positions as approximately the same.

Male attorneys are significantly more likely than female attorneys to hold positions as named partners (21% versus 9%) and senior partners in law firms (14% versus 2%). A larger percentage of female attorneys are government attorneys (apart from prosecutors and public defenders) and associates in law firms than the corresponding percentage for male attorneys. A larger percentage of minority attorneys are prosecutors and sole practitioners than white attorneys. Few minorities are senior partners in law firms.

Some female attorneys commented about the artificial limits placed on hiring opportunities for women. Other women described specific acts of sex discrimination in hiring, salary and retention. Several women commented on biased treatment they have received once they began practicing.

Female attorneys are more likely than male attorneys to have applied for, but not held, positions in law firms of all sizes, as well as positions as prosecutors, positions as other government attorneys and as in-house corporate attorneys.

- Women applying to law firms were asked some questions more than men were. When applying for positions in law firms, female attorneys were asked significantly more often than men whether they would be willing to travel (43% were asked this question, compared to 23% of male attorneys), whether they intended to have children (25%, versus 6% of men), whether they would move if their spouses were offered a job in another city (25%, versus 5% of men), and what sort of child care arrangements they had (14%, versus 2% of men).

For many of the interview questions listed on the surveys, the majority of women reported that they had been asked these questions within the past five years.

Many female attorneys reported being asked questions about their marital status. Many reported questions about their children or plans for children. Many were asked questions about their spouses. Some were told they would not be paid as much as other (male) attorneys. Some women were asked questions implying stereotypical ideas of women or suggesting doubts about their ability to fit into the current environment. Some minority applicants were asked questions implying inferiority of minorities.

Not all of these questions are necessarily sexist in and of themselves. For example, both men and women could be asked legitimately if they are willing to travel. However, because women were asked this and other questions more often than men, it appears that women are being measured by different standards than men. And the large percentages of women asked the questions in the last five years indicates that the tendency to measure women by different standards persists.

Legal Education

At public hearings, speakers emphasized the importance of diversity within the profession. The same speakers identified the state's law schools as the important starting point for diversity initiatives. Of 701 students at the University of Iowa College of Law, 324 (46%) are women and 154 (22%) are minorities. The Drake University School of Law student population is 42% women and 11% minorities. Despite the success of the University of Iowa in attracting minority law students, however, very few remain in the state to practice.

Of the 41 tenure-track faculty members at University of Iowa College of Law, seven (17%) are women and six (13%) are minorities. Of the 22 tenure-track faculty members at Drake University School of Law, five (23%) are women; there are no minority tenure-track faculty members.

The creation of an environment which disdains gender and race bias should begin at the law school level, and specifically should emphasize, through the educational process, the relationship between professional ethics and attitudes and actions which promote an environment of equal opportunity.

Hiring and Advancement of Court Employees

With respect to perceptions of gender equity in the treatment of court employees, a large percentage of court employees (87%) characterized the work environment for female court employees as having no serious problems. A similarly high percentage (89%) characterized the work environment for minority court employees as having no serious problems. Male and female court employees, however, view the work environment somewhat differently. More than half the men (51%) said that the situation for female employees is getting better; only 23% of the women believe the situation for women is getting better. Similarly, 34% of the minority court employees, as compared to 2% of white court employees, think the environment is getting worse for minority court employees.

In their attempts to advance their careers -- and in their records of success -- the survey disclosed no statistically significant differences between male and female or between white and minority employees.

III. COURTROOM AND PROFESSIONAL INTERACTIONS

Overview

The Task Force studied how race, ethnicity and gender affect interactions among lawyers and judges. The surveys conducted by the Task Force revealed significant differences in the perceptions of white males compared to other groups.

- When asked to characterize the current situation for women and minority attorneys in the Iowa court system, the most common response from male attorneys (43%) is that there might be a few problems, but nothing very serious. An additional 25% of male attorneys indicate they see virtually no problems for women or minorities in the court system.
- In contrast, the most common response from female attorneys (71%) is that the current situation has some problems for women and minorities, some of them serious. An additional 10% say the current situation is very difficult for women, with many serious problems.
- Most minorities (57%) describe the current situation as having some problems, some of them serious, and another 20% say the current situation is very difficult for minorities, with many serious problems.

One of the most important findings of the Task Force is that women and minorities see little change in recent years.

- A majority of female attorneys (56%) and a significant number of minorities (44%) state the situation has not changed in the past five years.
- In contrast, 70% of male attorneys and 65% of white attorneys say the situation for women and minorities is changing for the better.

The number of minorities in the legal profession in Iowa has increased only slightly in the past few years, and this underrepresentation is of great concern to the Task Force. Although the minority student enrollment at the University of Iowa Law School now is almost 22%, the number of minority attorneys in the state has not increased much over time.[3] The Task Force heard testimony that it is difficult to convince minority graduates of the state law schools to remain in Iowa to practice law. The participation of minorities in the ISBA is almost negligible, as is the representation of minorities on the Bench.

By some objective standards, the involvement of women in the legal profession has substantially increased during the last five years. All judicial nominating commissions are now fully gender balanced; approximately 50% of the chairs for Iowa Bar Association Committees are now women; and student enrollment at the University of Iowa Law School is 46% women. Nonetheless, a majority of female attorneys do not believe that the problems they encounter in the profession have improved during this period of time.

Because women have entered the legal profession in substantially larger numbers in recent years, a greater percentage of female lawyers are under age 35. However, this demographic fact did not skew

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3 Testimony from the Iowa Branch of the National Bar Association reported that in 1900 there were 30 African American lawyers in Iowa; in 1991 there were only 43.

the survey results. The problems perceived by female lawyers and the problems perceived by male lawyers were not affected by their age or number of years in practice. Both newer and more experienced female lawyers report bias, often occurring within the last five years. The disparity in the perceptions between women and minorities on one hand and white men on the other is noticeable at every age, years in practice, size of firm, size of community, or any other control that was used in the survey.

Given the wide-spread nature of the reported complaints, the Task Force is fully satisfied that the survey data and the testimony it has received provide an adequate basis for concluding that problems exist for female and minority attorneys in Iowa.

Interactions Among Judges and Attorneys

The results of the Judge and Attorney Surveys disclosed that biased conduct poses a distinctive problem for women and minorities. A very large percentage of minority attorneys (83%) and female attorneys (92%) report that they have been the target of or have personally witnessed racially or sexually biased behavior on at least one occasion. A sizeable percentage of this group (44% of minority attorneys and 69% of female attorneys) report such biased conduct on many occasions.

Although there are significant differences in the number of women and minorities reporting such incidents compared to the number of men and whites, it should be noted that most attorneys reported having inappropriate comments or jokes about race and sex made in their presence on few or many occasions.

Women reported having listened to inappropriate comments about their sex, having been called by belittling terms of address, having been called by their first names when others were not, having been the subject of inappropriate comments about their dress or appearance, and having experienced inappropriate physical contact more than male attorneys.

Specifically:

- Seventy-four percent of female attorneys and 39% of female judges report hearing inappropriate comments made about their sex in their presence by other attorneys on many or a few occasions, compared to 7% of male attorneys and 6% of male judges.
- Twenty-three percent of female attorneys and 24% of female judges report hearing inappropriate comments made about their sex by court personnel on many or few occasions, compared to 2% male attorneys and 4% of male judges.
- Women report hearing fewer of these comments from judges; still, 40% of female attorneys and 36% of female judges have had inappropriate comments made about their sex in their presence on many or few occasions by judges, compared to 2% of male attorneys and 4% of male judges.
- Fifty-five percent of female attorneys report having been called by belittling terms of address by other attorneys, compared to 24% of male attorneys.
- Twenty-seven percent of female attorneys report having been called by belittling terms of address by a judge, compared to 8% of male attorneys.
- Twenty-three percent of female attorneys report having been the subject of inappropriate physical contact by other attorneys, compared to 1% of male attorneys.
- Twenty-seven percent of female attorneys report that a judge failed to reprimand or take corrective action when another attorney made inappropriate comments, compared to 3% of men.

- Sixty-two percent of female attorneys report having been excluded from informal conversation about cases by attorneys on few or many occasions, compared to 25% of male attorneys.

- Forty percent of female attorneys and 26% of female judges report having been excluded from informal conversations about cases by judges on few or many occasions, compared with 15% of male attorneys and 7% of male judges.

Minority attorneys also reported a high exposure to racially derogatory comments:

- Fifty-three percent report having heard inappropriate comments about their race made by other attorneys; 29% report having heard inappropriate comments about their race made by judges; and 30% report having heard inappropriate comments about their race made by court personnel.

- Forty-seven percent report having been called by belittling terms of address by judges and 20% report having been called by belittling terms of address by court personnel.

- Thirty percent report having been the subject of racial slurs voiced by attorneys; 10% report they have been the subject of racial slurs by judges, and 9% report they have been the subject of racial slurs voiced by court personnel; 33% report inappropriate comments made about their ethnicity or accent by attorneys, 20% by judges, and 15% by court personnel.

- Thirty-five percent of minority attorneys report that a judge failed to take corrective action when inappropriate racial comments were made by another attorney.

- Virtually no white attorneys report similar incidents.

The Task Force received a great number of comments from judges and attorneys in response to survey questions. Some of the comments related experiences where attorneys or judges exhibited explicitly biased conduct, sometimes of a hostile or intimidating nature. Several women reported specific situations involving sexually inappropriate conduct, ranging from harassment to more subtle forms of sexual baiting. Many reports concerned sexual jokes, including posting and distribution of cartoons and pictures. Reports of this sort came from law firms, county attorney and public defender offices and from the judicial department, from top to bottom.

The results of the Judge and Attorney Surveys indicate that most male and white attorneys believe that judges and attorneys treat female and minority attorneys neutrally. Most female and minority attorneys, on the other hand, believe that judges and attorneys appear to pay less attention or give less credibility to female and minority attorneys.

Several women reported incidents where their legal skills were not taken seriously and their competence was questioned, either explicitly or implicitly. There were several reports in which women felt as if they were invisible or blatantly ignored. There were many reports of female attorneys being called by their first name while male attorneys were called by their last name.

Female attorneys reported that they were treated unprofessionally, reflecting stereotypes of women as "domestic" and lacking in prestige and power. Some also complained that they receive more criticism than their male colleagues. Several respondents noted that they were excluded from informal settings with male judges and attorneys and made to feel like an outsider.

Some women have taken action -- formal and informal -- to complain about conduct they regarded as inappropriate. The survey results show that women are more likely to take action than men, and are less likely to be satisfied with the outcome. Many women described their attempts at using informal avenues to respond to incidents or bias. Several women responded that they suffered some form

of retaliation as a result of their informal action. Some women described their dissatisfaction with the handling or resolution of informal complaints. Testimony provided reasons why more women do not complain about the incidents of bias. Reasons include: they do not know what action they can take without retaliation; they do not want retaliation against them to affect their clients' cases; they are concerned they will not be able to reach their career goals because they may be labeled as trouble-makers or as people who could not fit in with the system; they do not want the public to have the perception that if you hire a woman attorney you might not get the same kind of justice you would otherwise get if you had a male lawyer.

COURTROOM INTERACTION OF LITIGANTS, WITNESSES AND COURT PERSONNEL

Treatment of Litigants and Witnesses

The Public Perception Survey revealed that most court users in the past ten years believed that they had been treated fairly. Seventy percent said that they were treated fairly as compared to only 18% who reported unfair treatment. In this assessment, there were no statistically significant differences between male and female court users or between minority and white court users.

Only a relatively small percentage of these persons reported that they witnessed (4%) or experienced (4%) sexual bias. The percentages were also low for persons who had witnessed (5%) or experienced (2%) racial or ethnic bias. However, minority court users were considerably more likely than whites to report having witnessed or experienced racial or ethnic bias (20% versus 8%). There were no statistically significant differences between men and women in the percentage of first- and second-hand reports of sexual or racial bias in the courts.

Among attorneys and judges, views differ along gender and racial lines as to whether they regard sex or race as affecting the outcome in concrete cases. The results indicate that race and sex are perceived as causal factors -- working to a litigant's disadvantage or advantage -- when women or minorities participate as lawyers or judges in a case. White male attorneys tend to perceive their race or gender as having little significance. Race and sex become a concern principally for women and minority legal professionals. Thus, a majority of female attorneys (55%) say that their sex worked to a client's disadvantage on at least a few occasions, compared to only nine percent of male attorneys. About one in five female judges (19%) believe that their gender worked to a litigant's disadvantage, compared to three percent of male judges. Similarly, a greater percentage of minority attorneys (38%) than white attorneys (4%) believe that their race worked to a client's disadvantage. Conversely, more female attorneys (50%) also believe that their sex sometimes worked to a client's advantage, than do male attorneys (12%) and more minority lawyers (26%) than white attorneys (9%) believe that race sometimes worked to a client's advantage.

There also are differences in opinion regarding whether sex or race bias by another attorney or by a judge -- intended or unintended -- worked to the detriment of minorities or women in cases. Most attorneys and judges do not think sex or race bias on their own parts worked to the detriment of anyone.

This difference in views between male and female attorneys and between minority and white attorneys was also present when each was asked to assess whether various groups, broken down by race, ethnicity or gender (e.g., minority and white criminal defendants; male and female plaintiffs), were treated neutrally in Iowa courts. Both female and minority attorneys were less confident of neutral treatment for female and minority participants and more likely than either male or white attorneys to believe that women and minorities in various roles were treated with less respect than similarly situated whites.

The survey results also indicate that female attorneys are more likely than male attorneys to believe that minorities suffer disadvantage and that minority lawyers are more likely than white lawyers to report disadvantage affecting women. The sensitivity of nondominant groups thus seems to extend beyond their specific race or gender class and to enable them to notice bias more generally. White male lawyers, on the other hand, tend to be more sensitive to bias perceived to affect their own group -- instances such as child custody in which women are thought to have an advantage.

Among attorneys and judges, there is a sharp difference in views as to whether female expert witnesses are given less credibility or afforded less attention than male experts. Fifty-one percent of the female attorneys and 45% of female judges believed that female experts were afforded less credibility and attention, compared to only ten percent of male attorneys and eight percent of male judges. A similar disparity appeared with respect to views as to minority expert witnesses. Fifty-two percent of minority attorneys, compared to 12% of white attorneys, agreed with the statement that judges appear to pay less attention to or give less credibility to minority expert witnesses than to white expert witnesses.

Treatment of Court Personnel

Although a majority of court employees give a favorable report of their work environment, a significant percentage of female and minority court employees report that inappropriate comments or jokes about their gender or race or ethnicity have been made in their presence by judges, attorneys, or other court personnel in the last five years. Twenty-five percent of minority court employees say that inappropriate comments or jokes about their race or ethnicity have been made in their presence by judges. Eighteen percent of female court employees report that comments or jokes about their gender have been made by judges. Twenty-seven percent of minority court employees say that inappropriate comments or jokes about their race or ethnicity have been made in their presence by attorneys. And 26% of female court employees have heard comments or jokes about their gender made by attorneys.

IV. LANGUAGE BARRIERS

Since 1970, non-English speaking parties and witnesses to legal proceedings have been entitled by Iowa law to the assistance of interpreters.[4] Since 1984, the law also has required the Supreme Court to adopt rules governing the qualifications and compensation of interpreters appearing in proceedings before a court or grand jury.[5]

Despite these statutory protections, the issue of whether non-English speaking people have full access to Iowa courts surfaced at each of the public hearings and in several of the written comments. The twin concerns of lack of availability and sometimes poor quality of interpreters were expressed repeatedly. Much of the testimony documented the ways in which language barriers could translate into disparate treatment for linguistic minorities.

Testimony received by the Task Force revealed specific problem areas created by language barriers. Several of those supplying testimony to the Task Force related instances in which they believed that arrested persons had spent more time in jail because they were not fluent in English and no interpreter was available. Some sentencing arrangements which require oral communication -- notably supervised probation -- may not be practical for or provided to defendants who are not fluent in English. If qualified translators who are well-versed in the legal system and in legal terminology are not available,

4 Iowa Code sec. 622A.2 (1991)(enacted 1970)

5 Iowa Code sec. 622A.7 (1991)(enacted 1984).

Recommendations

of the

EQUALITY IN THE COURTS TASK FORCE

1. Minorities and women should be nominated and appointed to increase their presence in judicial and quasi-judicial positions and to progress toward a representational bench.

2. Judicial nominating commissions and appointive authorities should nominate and appoint persons to the bench on a non-discriminatory basis.

3. The Iowa Supreme Court should continue its policy and practice of including minorities, women and lay members on judicial and quasi-judicial boards, committees and commissions in Iowa.

4. Law schools should give priority to efforts to recruit and retain minority and female faculty members and law students.

5. Law schools should reinforce their commitments to train attorneys who will be sensitive to and aware of manifestations of discrimination and bias and their effects.

6. Studies related to different Bar Exam pass rates among men, women and whites and minorities should be brought to the attention of the Board of Examiners for review, to determine whether further inquiry or action needs to be taken related to the Iowa Bar Examination.

7. Law school placement offices and law firms should work with professional associations, bar associations, and the courts to facilitate the entry of women and minority law students into summer clerkships, judicial clerkships, and other opportunities which lead to professional development and permanent employment opportunities in Iowa.

8. A summary of the results of both the court administrators survey and the court employee survey should be distributed to all court administrators.

9. Court administrators and others responsible for hiring should practice equal opportunity. Court administrators should take necessary steps to ensure that all court employees and minority groups within appropriate communities are made aware of position openings as they occur.

10. Employment levels within each county of the Judicial Department should more accurately reflect the minority populations within each county.

11. Women and minorities should have more representation within the administrative and supervisory positions.

12. Supreme Court should maintain and report in its annual report data regarding gender and minority distribution by pay grades and applicant flow.

13. In accordance with Iowa Code section 602.1204, the Supreme Court should review, update, adopt and implement the Affirmative Action plan.

14. The Supreme Court of Iowa should require attorneys and judges to complete two hours of continuing legal education during 1993 and two hours every two years thereafter addressing:

    a. The impact of race, national origin, ethnicity and sex on issues related to court system interaction and case or controversy outcome

    b. Professional relationships between attorneys and judges where race, national origin, ethnicity or sex is a potential factor

    The two hours should be credited towards the 15 hours CLE requirement. Additional workshops with small interactive groups on cultural differences and on male/female professional relationships should be encouraged. The Commission of Continuing Legal Education should be encouraged to make such workshops eligible for CLE accreditation.

15. The Supreme Court of Iowa should provide each Chief District Court Judge, all judges and those persons in quasi-judicial positions, including court-related boards and commissions, training regarding their role and significance in ensuring an environment of equal opportunity and fairness.

16. The Supreme Court of Iowa should provide to the Judicial Department appropriate training to all court personnel to ensure an environment of equal opportunity and fairness

17. The Supreme Court of Iowa should actively encourage Bar associations to increase anti-bias training and education.

18. Law firms should adopt and implement policies to prohibit sexual harassment and discrimination on the basis of race, national origin, ethnicity or sex.

19. The Supreme Court of Iowa should amend the Code of Judicial Conduct to add to Canon 3(A) the following:

    > (8) A judge shall perform judicial duties without bias or prejudice. A judge shall not in the performance of judicial duties by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, race, national origin, or ethnicity, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.
    >
    > (9) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon sex, race, national origin, or ethnicity, against parties, witnesses, counsel or others. This Section 3(A)(9) does not preclude legitimate advocacy when sex, race, national origin or ethnicity are issues in the proceeding.

20. The Supreme Court of Iowa should amend the Code of Judicial Conduct to add (perhaps as Canon 2 (C)) the following:

> A judge shall not hold membership in any organization that the judge knows discriminates on the basis of sex, race, national origin or ethnicity.

21. The Supreme Court of Iowa should amend the Code of Professional Responsibility to add (perhaps as a new DR-1-102 (A)(7)) the following:

> (A) A lawyer shall not:
>
> (7) engage in sexual harassment or other discrimination on the basis of sex, race, national origin or ethnicity in the practice of law and shall prohibit staff and agents subject to the lawyer's direction and control from doing so.

22. The Supreme Court of Iowa should amend the Code of Professional Responsibility to add (perhaps as part of EC 1-5 or EC 9-6, or as a new EC 1-7 or EC 9-7) the following:

> A lawyer shall not hold membership in any organization that the lawyer knows discriminates on the basis of sex, race, national origin, or ethnicity.

23. The Supreme Court of Iowa should amend the Code of Professional Responsibility to add (perhaps as a new EC 5-25), a prohibition against sexual relations between attorneys and their clients.

24. To the extent that it has not already done so, the Supreme Court of Iowa should revise the Code of Professional Responsibility, the Code of Judicial Conduct, all court rules, procedures and the like, so that all the language contained therein is gender neutral.

25. The Equality in the Courts Task Force did not study bias on the basis of religion, disability, age, sexual orientation or socioeconomic status, but it did receive a significant amount of testimony regarding bias on such bases in the Iowa court system. Therefore, although the Equality in the Courts Task Force does not make any findings regarding bias on such bases, it recommends that the Supreme Court of Iowa should study the existence of bias on such bases and should consider expanding the provisions recommended in paragraphs 19, 20, 21, and 22, above, so that, in addition to the prohibitions against discrimination on the basis of sex, race, national origin and ethnicity, the provisions would include, if appropriate, prohibitions against discrimination on any or all of the bases of religion, disability, age, sexual orientation or socioeconomic status.

26. Minorities and women should be nominated and appointed to increase their presence in judicial and quasi-judicial positions, to continue progress toward a representational bench.

27. The Iowa Supreme Court should continue its policy and practice of including minorities, women and lay members on judicial and quasi-judicial boards, committees and commissions in Iowa.

28. The Supreme Court of Iowa should create an informal, confidential dispute resolution process with respect to racial-, ethnic- and gender-biased misconduct for judicial and attorney complainants to utilize, if they choose to do so, prior to or in lieu of filing formal complaints.

29. The Supreme Court of Iowa should develop procedures and provide a designated person to be director of human resources. This person should be designated as the contact for sexual harassment complaints or racial-, ethnic- or gender-biased misconduct. The designated person should investigate and try to resolve any complaints received. If the complaint is serious, it should be referred to the Judicial Qualifications Commission (for complaints about judges) or should be dealt with through ordinary personnel policy procedures (for complaints about nonjudicial court personnel) to investigate the need for sanctions. The designated person should be given the authority to make a finding of sexual harassment or racial-, ethnic- or gender-biased misconduct, if appropriate, which would include information that an attempt was made to resolve the matter, that the attempt was unsuccessful, and that there was substantial evidence of harassment or discrimination. This finding would be submitted to the appropriate authority for determination of the need for remedial action or sanctions. The Judicial Department Employee Handbook should provide that discipline may be appropriate if warranted for acts of harassment or discrimination.

30. The Supreme Court of Iowa should provide educational programs for court personnel related to bias on the basis of sex, race, national origin and ethnicity. Specifically:

    a. Educational programs and standards/procedures should be developed regarding how court personnel can be of assistance to the *pro se* plaintiff.

    b. Education for clerks of court ("Clerk's School") should include training on the following topics.

        i. Sex, racial, national origin and ethnic bias; training regarding racial, ethnic, and cultural diversity; training regarding the stereotypes which may affect their treatment of litigants.

        ii. Sexual harassment (definition and complaint procedures).

        iii. Equal opportunity within the work force.

        iv. Procedures available for court users to make complaints regarding judges, attorneys, and court personnel.

    c. Training regarding the above subjects should be afforded to all court personnel at least once during their employment. Preferably, such training would be provided on a regular basis.

d. The Supreme Court of Iowa recently has developed a new sexual harassment policy. This policy is accompanied by guidelines giving employees examples of inappropriate conduct. The Supreme Court should issue a similar guideline listing the sexual and racial/ethnic stereotypes about which court personnel should be watchful in themselves and in others. The Supreme Court should encourage court personnel to strive to eliminate the effects of such stereotypes in their treatment of those with whom they come in contact in the court system. Included in this memorandum should be an admonishment against evaluating or assessing cases, witnesses, litigants, etc.

31. The Supreme Court of Iowa should provide educational programs for judges and magistrates related to issues of bias on the basis of sex, race, national origin and ethnicity. Specifically:

    a. Require training for judges regarding racial/ethnic/cultural diversity.

    b. Require training for judges regarding the stereotypes based on race, national origin, ethnicity or sex, which may affect their treatment of litigants, may lead them to discount certain testimony, and may otherwise affect their decisionmaking.

32. The Supreme Court of Iowa should provide educational programs for attorneys related to issues of bias on the basis of sex, race, national origin and ethnicity. Specifically:

    a. Require training for attorneys regarding racial/ethnic/cultural diversity.

    b. Require training for attorneys regarding the stereotypes based on race, ethnicity or gender, which may affect their treatment of litigants, may lead them to discount certain testimony, and may otherwise affect their decisionmaking.

33. In accordance with Iowa Code 622A.7 (1991)(enacted in 1984), the Supreme Court of Iowa should adopt rules within six months of this Report governing the qualification and compensation of interpreters.

34. A central, comprehensive list of interpreters should be maintained to facilitate the use of qualified personnel.

35. Financial incentives -- such as the award of a merit step or the reimbursement of tuition -- should be created to encourage court personnel to develop language capacities needed in that district.

36. Bilingual and multilingual persons should be actively recruited to work for the Judicial Department and such language ability should be recognized as a valuable asset for employment.

37. Community colleges and other educational institutions should be encouraged to develop programs to train persons who provide court interpreting, legal translations, and bilingual and multicultural court support services.

38. The Supreme Court should give serious consideration to the implementation of the recommendations made by the League of United Latin Americans Citizens (LULAC), and by the Bureau of Refugee Services of the Iowa Department of Human Services, included in the Final Report.

39. a. The consolidated source list anticipated in Iowa Code Section 607A.22 to be provided by applicable state and local governmental officials should be provided directly to the Clerks of Court.

    b. Names to be used from the consolidated source list, as anticipated in Iowa Code Section 607A.22, should be randomly chosen and consist of either a certain number of names or a certain percentage of all the names in the consolidated list.

    c. All discretion in selection should be eliminated. To this end, the Task Force recommends the elimination of jury commissions.

    d. Section 607A.22 of the Iowa Code should be amended to require monthly updating of the consolidated list.

40. a. Jury questionnaires sent to potential jurors should request prospective jurors to voluntarily indicate their race, with an explanation of why the information is requested.

    b. The Supreme Court should direct Clerks of Court to obtain census figures regarding the percentage of minorities over 18 for a given regional area. Those numbers should be used to determine whether or not minorities are being appropriately represented in a given jury panel.

    c. Statistics on the race and gender of jurors should be obtained immediately to facilitate future studies and to assist in attaining representative jury pools in the future.

    d. If, six months after the date of this Report, it is demonstrated that there is a racially disparate impact in jury selection, other selecting methodology including oversampling of minorities, should be used as a method to ensure that the representation of minorities in the jury panels approximates the percentage of minorities in the county's population.

    e. The Supreme Court should undertake further study in this area once statistics have been maintained.

41. a. The pay for jurors should be increased.

    b. Reimbursement should be made to low-income jurors for day care and/or elderly care expenses incurred because of jury service.

42. The use of race-specific or sex-specific economic data or expert testimony premised on such data is inequitable. Because minorities and women often have earned less than white men for doing the same or equivalent work, the use of race- or sex-specific economic data to predict future earnings tends to perpetuate past discrimination. As a result, the lives and health of minorities and women are undervalued. The Task Force recommends that only race-neutral and gender-neutral economic data be used to evaluate damages in civil cases.

43. The data from other states indicates that jurors are often influenced by gender stereotypes in setting damage awards in civil cases. A survey of Iowa jurors needs to be conducted to determine whether impermissible factors are influencing jury awards and whether the same set of factors govern awards in cases of both male and female injury. In particular, jurors should be asked whether they have considered specific factors (e.g., potential salary increases, continuity of

work, child-raising responsibilities) in their calculations of lost future earnings and what other factors influenced their judgment (e.g., potential of surviving spouse to remarry, importance of physical appearance to men and women). More information from jurors is also needed to determine whether homemaker services are being fairly evaluated. Jurors should be surveyed as to whether any portion of the award represented loss of homemaker services and the basis on which such amount, if any, was derived.

44. Because of the scarcity of studies on the effect of race on damage awards, we lack a basis even for speculation about the specific factors which may possibly reduce awards for minority plaintiffs, assuming that the Washington Task Force finding of lower awards for minority plaintiffs is replicated in other states. An empirical study of decided cases in Iowa, similar to the study of asbestos cases in Washington, should be conducted to determine whether a racial disparity in damage awards exists and to suggest the specific factors (e.g., future earnings, evaluation of pain and suffering) which likely account for the disparity.

45. Little is known about the specific content of jury instructions on damages in civil cases in Iowa and about the types of evidence admitted to prove the amount of damages. A roundtable discussion including trial judges, attorneys who litigate personal injury cases, members of the Supreme Court committee on jury instructions, and experts (such as economists or annuity brokers) who provide evidence in civil suits, should be convened to discuss the issues of gender and race equity raised in this Report.

46. A renewed sensitivity in child custody disputes and enforcement of an equal justice remedy which recognizes the rights of both custodial and non-custodial parents must be encouraged.

47. The Iowa Supreme Court should instruct the educational director to see that the semi-annual judges' seminars regularly include components relating to the dynamics of child custody, the valuation of homemaking services, the expenses of child-rearing, techniques for child support collections, and the prospects of mature women, long out of the work place, obtaining satisfactory and remunerative employment, and the dynamics of domestic abuse.

48. The Supreme Court should adopt such policies that will make judges and lawyers more aware of the value of the services of the woman as wife, mother and homemaker in relation to the division of assets and the awarding of family support and alimony.

49. The Supreme Court should adopt such policies as will improve the sensitivity of judges to the need to give the same consideration to men as to women in child custody matters, and in order to avoid bias in favor of the mother or father.

50. The Supreme Court should adopt policies that will create a more open court hearing system in matters concerning temporary custody, with the view toward making the function of the legal system more visible to the public.

51. The court should study ways to facilitate review of adjustments to awards.

52. The court should study ways to make child support enforcement more effective.

53. The Supreme Court should:

    a. distribute the *Pro Se* Domestic Abuse Assistance Project guide regarding the *pro se* process to all domestic violence shelters and courthouses;

    b. suggest courthouse and party safety measures (in particular, procedures to keep parties separate from each other while waiting for hearings where possible);

    c. develop a bench manual with checklists of considerations for judges to consult in both *ex parte* and full hearings;

    d. clarify how clerks can be of assistance to the *pro se* plaintiff and provide guidance as needed to supplement the statutory requirement that standardized pleadings be made available to *pro se* litigants;

    e. provide guidance regarding the appropriate role of victim advocates and others who accompany domestic violence victims into the courtroom;

    f. develop educational programs for victim advocates regarding the court system, its procedures, and the *pro se* process.

54. A report of the number of *pro se* domestic abuse filings should be included in the Report to the Supreme Court of Iowa by the State Court Administrator.

55. Efforts should be made to make counsel available to the *pro se* litigants. Legal services for the poor should be fully funded to include representation of indigent domestic violence litigants. Attorneys should be encouraged and trained to do their pro bono service in this area.

56. Educational programming should be provided:

    a. for judges on the dynamics of domestic abuse and what is appropriate for them to do to assist *pro se* litigants

    b. for attorneys on the dynamics of domestic abuse and what is appropriate for them to do to assist *pro se* litigants;

    c. for court personnel on how they can be of assistance to *pro se* litigants.

57. Statutory guidelines in Iowa Code section 811.2(2) (1991) regarding the appropriate criteria to use for determining the conditions of pretrial release should be used uniformly.

58. Statutory guidelines in Iowa Code Chapter 907 (1991) regarding the appropriate criteria to use for determining sentencing should be used uniformly.

59. The Criminal Justice system should strive to increase employment opportunities for minorities and women at critical points in the criminal justice system, including county attorney staff, pretrial release staff, public defenders and presentence investigators.

60. Sensitivity training should be provided for judges, attorneys and court personnel regarding racial, ethnic and cultural differences, including the dynamics of domestic violence and sexual assault and the overt and subtle ways bias may manifest itself.

61. Presentence investigation officers, parole officers, juvenile court personnel, and others employed within the criminal justice system should receive cultural sensitivity training, and training regarding racial/ethnic and gender bias.

62. The results of the Criminal Case Study should be discussed at the annual judges conference. The present and future court system database should be monitored periodically, and patterns of racially associated disparities noted, publicly disseminated, and specifically brought to the attention of Districts where disparities occur.

63. County Attorney offices should be required to keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators.

64. The Supreme Court of Iowa should watch for and review the results of study being conducted by the Division of Criminal and Juvenile Justice Planning regarding two years of class "C" nonviolent felony convictions.

65. Criminal defendants should be advised that court-appointed attorneys will be paid by the state regardless of whether they win or lose the case. They also should be advised that, at the disposition of their case they may be required later to reimburse any court-appointed attorney fees.

66. The Judicial Department should develop a brochure to explain the criminal process generally, what participants in the court process might expect to happen, where participants can go to receive answers to questions, and what additional help is available.

67. The Iowa State Bar Association should develop educational programs explaining the criminal system for schools, and brochures for distribution at police stations, county attorneys' offices, courthouses, or other appropriate public places.

68. The Supreme Court of Iowa and local courts should work with the state and the local bar associations to establish a system to disseminate information referenced in Recommendations 66 and 67 above.

69. The Division of Criminal and Juvenile Justice Planning should access information, and make it easily retrievable on a uniform statewide basis, regarding the trends and patterns evolving related to the various stages of the criminal process as regards to the race and sex of defendant and crime reporters or crime victims. The court system, including the Department of Corrections Division of Community-Based Corrections, should keep data similar to that used in the Criminal Case Study, as it relates to pretrial release, to be made available to the Division of Criminal and Juvenile Justice Planning. This same organization should be furnished additional data, all data to be included in their annual report, including:

a. Data regarding whether a defendant used a privately-retained attorney, a court-appointed attorney, a public defender or appeared *pro se*.

b. Data regarding charge reduction and plea bargaining by race and sex of defendant (this could then be compared to charging).

c. Data regarding the makeup by race and sex of jury pools and ultimate jury members selected.

d. Data regarding the ultimate court disposition of each case, with the race and sex of the defendant.

e. Data regarding presentence investigation recommendations by race and sex.

f. Data regarding prior adult commitments, prior juvenile commitments, education and age of defendants.

g. Data regarding probation revocation.

70. A committee or task force should immediately implement the recommendations of the Equality in the Courts Task Force. This committee or task force should include representation from the present Task Force, the Judiciary, court administration, Bar, academic communities in law and the social sciences, and lay persons.

71. Two critical activities must be pursued over the long term.

a. The Supreme Court and the implementation committee should insure that educational programs continue to incorporate materials on gender and racial/ethnic bias in the courts, both in courses principally devoted to antidiscrimination topics and in the entire range of substantive law courses. The implementation committee should disseminate and publicize the findings and recommendations included in the Final Report and any additional findings and recommendations it makes during the course of implementation.

b. The implementation committee should monitor positive changes and identify new problem areas. Specifically, the committee should seek funding for additional studies as recommended in this report, for education as recommended in this report, and for the implementation of other programs and recommendations made in this report. Every other year, the committee should review the progress made toward implementing the recommendations and reducing bias. It should assess the extent to which the findings and recommendations of the Task Force are being integrated into judicial and legal education courses and programs. It should identify new problems rooted in gender and racial/ethnic bias, suggesting appropriate remedial action.

73. The legislature should provide adequate funding to implement the statutory requirements it enacted, as discussed in the Final Report and these Recommendations, and should provide adequate funding to the Judicial Department to implement the Recommendations of the Equality in the Courts Task Force.

GENDER BIAS IN THE LEGAL PROFESSION

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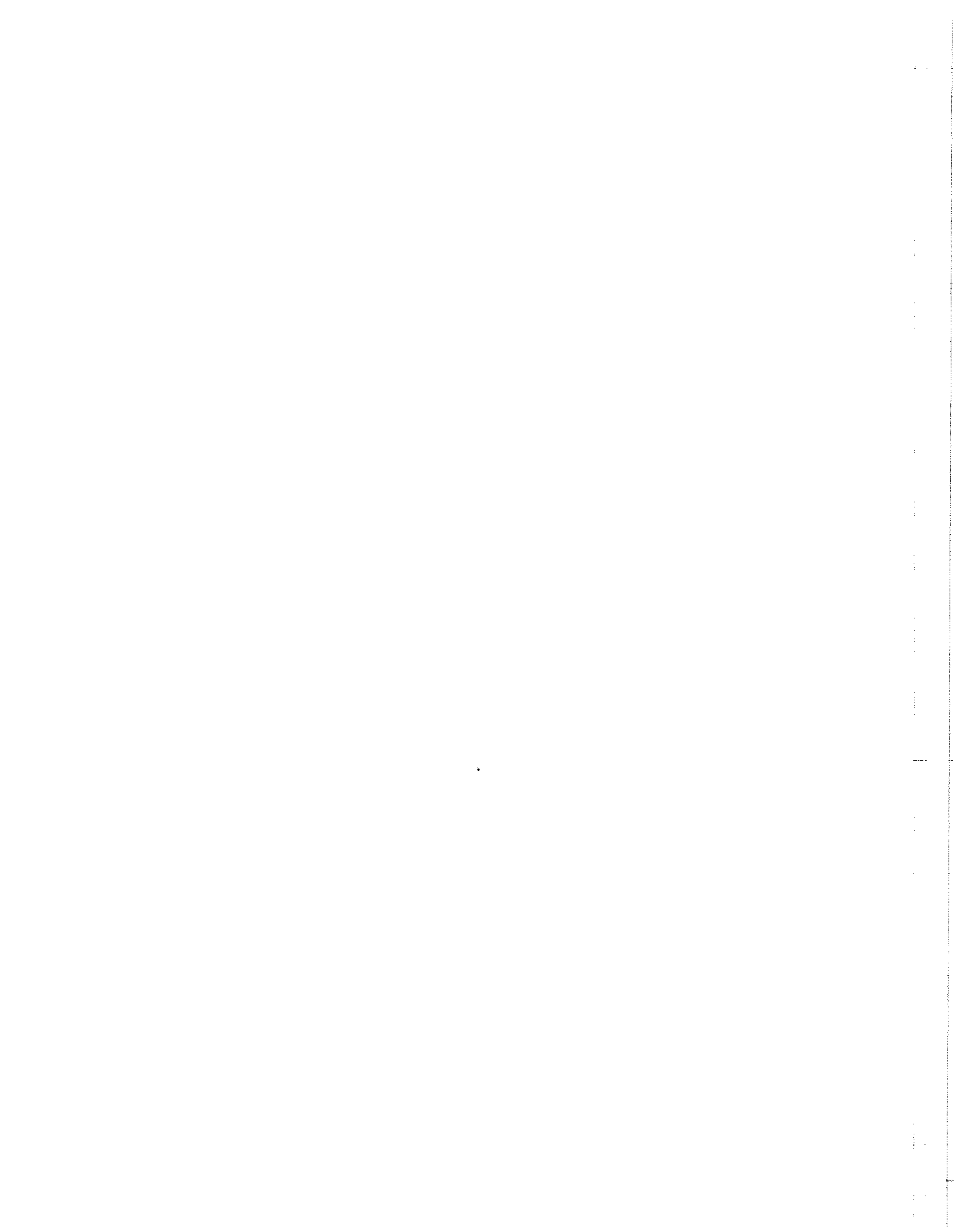


TABLE OF CONTENTS

I. Defining Gender Bias 35

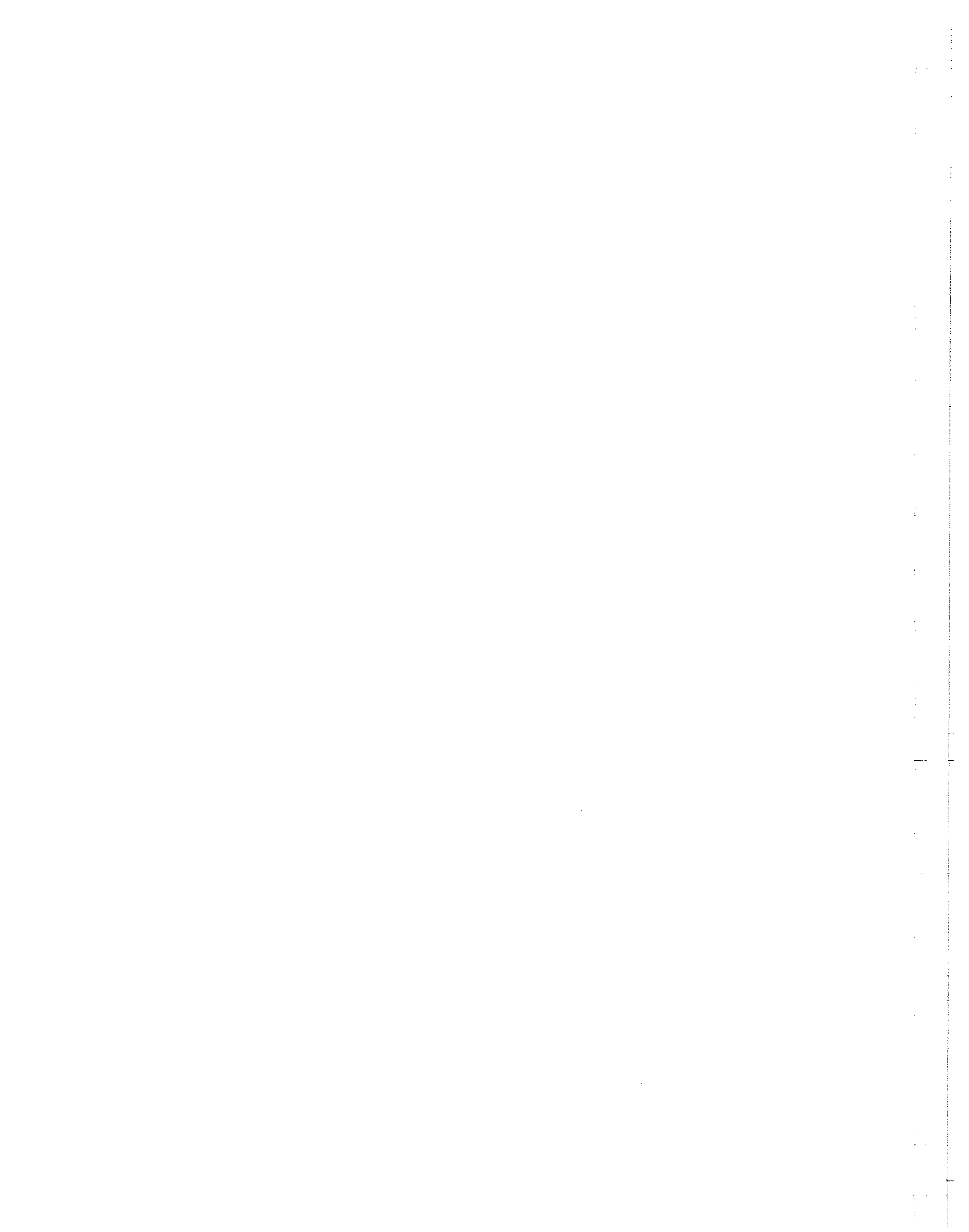
II. Historical Perspective 36

III. Where Gender Bias Exists Today 37

IV. Suggestions for Improvement 52

Appendix I 59

Appendix II 64



I. Defining Gender Bias

A. Definitions

1 "Gender bias is the predisposition or tendency to think and behave toward people on the basis of their sex. It is reflected in attitudes and behavior based on stereotypical beliefs about the sexes' "true natures" and "proper roles" rather than an independent evaluation of each individual's abilities, life experiences and aspirations.

Gender bias also refers to the greater value society places on men, as evidenced by consistent research findings of a preference for male children, as well as to myths and misconceptions regarding the economic and social problems encountered by both sexes.

Often gender bias is expressed in ways which seem so natural to our society that the element of bias is not understood. Sometimes it may be expressed through acts of overt discrimination."

New Jersey Supreme Court Task Force on Women in the Courts

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2 "Gender bias, whether deliberate or an unconscious manifestation of cultural and traditional ways of thinking and acting toward women and men, has influenced judicial decision making, has affected courtroom interaction, and has impacted the fair treatment of women and sometimes men in the Washington State Courts." "Gender Bias in the Legal Profession - Breaking the Glass Ceiling," workshop sponsored by The Washington Women Lawyers and the Washington State Supreme Court's Gender and Justice Implementation Committee

3. "Gender fairness goes right to the heart of judicial administration. It isn't just a matter of being up-to-date with gender neutral terminology or being aware of changing roles and lifestyles. Gender bias affects everything from the way we address women to our judicial philosophy. It's not just window dressing. Gender fairness goes right to the integrity of the entire judicial system." Minnesota Supreme Court Chief Justice Peter Popovich, in his remarks at the Minnesota District Judge Association, Sept. 6, 1989

4. "When the appearance and sexual activity of a female party or attorney becomes the focus of the court's attention, whether by comments by the judge or lawyer, the impartiality of the court must come into question." (Maryland report)

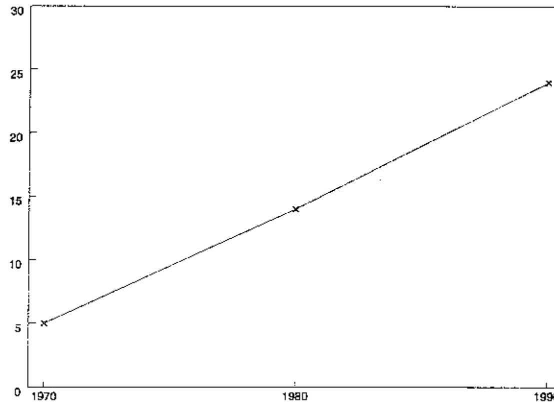
5. "It does not require deliberate intent. It often results from the lack of knowledge. The problem is not simply an aberrational ruling or an isolated judge calling a woman lawyer 'honey'. Rather, it is a problem that permeates the court system and profoundly affects decision making and the entire environment of the courts." "Promoting Gender Fairness Through Judicial Education: A Guide to the Issues and Resources" by Lynn Hecht Schafran, Esq.

II. Historical Perspective

A. Statistics

1. According to the U.S. Census, percent of women out of all judges and lawyers:

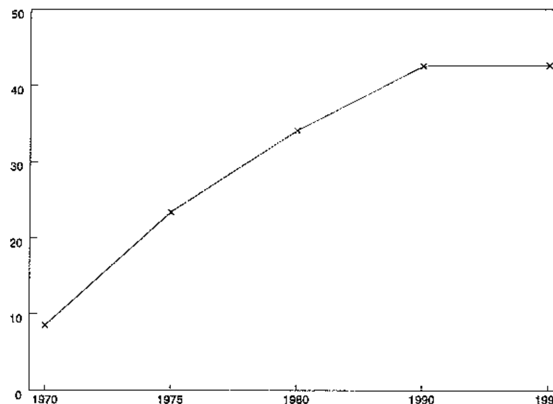
a. 1970 - 274,253 men, 14,225 women - 5%
b. 1980 - 455,642 men, 74,027 women - 14%
c. 1990 - 589,326 men, 190,145 women - 24%



2. According to the ABA - Women currently represent 25% of all ABA members

3. According to the ABA Section of Legal Education & Admissions to the Bar - Percent of Women law students:

a. 1970 - 6,682 women law students - 8.5%
b. 1975 - 26,020 women law students - 23.4%
c. 1980 - 40,834 women law students - 34.1%
d. 1990 - 54,097 women law students - 42.5%
e. 1992 - 56,644 women law students - 42.6%



B. Historical Attitudes

1. "It would be revolting to all female sense of innocence and sanctity of their sex, shocking to men's reverence for womanhood and faith in women, on which hinge all the better affections and humanities of life that women should be permitted to mix professionally in all the nastiness of the world that finds its way into the courts of justice. Discussions are habitually necessary in courts of justice that are simply unfit for female ears." Unanimous opinion of the Wisconsin Supreme Court, denying admission a woman admission to the bar in the late nineteenth century

2. "It has taken us a long time to perceive that equality does not mean that first everyone has to be exactly the same." Judith S. Kaye, "Historical

Observations: Yesterday, Today and Tomorrow," A.B.A. Journal, May 1989, p. 13.

III. Where Gender Bias Exists Today

"Discrimination is perhaps more dangerous now. It is more invidious because people know enough not to be so blatant in their behavior. They're much more careful about what they say. But what they think remains." Jill Wine-Banks, former executive vice president and chief operation officer of the ABA in "Progress for Women? Yes, but ...," ABA Journal, April 1, 1988

"Virtually every state that commissioned a gender-bias task force has come back with harrowing tales of harassment and intimidation of female lawyers by colleagues and judges." "Professional Responsibility: Should sexist comments be a disciplinary offense?," ABA Journal, August 1995.

According to a Prentice Hall Law & Business national survey, 62% of women trial attorneys say they have been harassed by clients, 56% by law firm colleagues, 56% by opposing counsel, 31% by judges, and 10% by courthouse personnel Wade Lambert, "Women Attorneys Cite Bias by Clients," Wall St. J. A6 (Mar. 15, 1993).

"Although women have gained significant access to legal practice, opportunities in the legal profession remain less available to women, at all levels, than to their male colleagues." Martha W. Barnett, Partner, Holland & Knight, Tallahassee, Florida, "Women Practicing Law: Changes in Attitudes, Changes in Platitudes," 42 Florida Law Review 209, 213 (1990)

"The number of women entering the profession has greatly outpaced the profession's responsiveness to women lawyers' needs and difficulties. There has been a widespread failure to recognize or address the particular problems facing women lawyers before their careers are damaged." "It's Getting Better, Slowly," A.B.A. Journal, Dec 1, 1986, p. 54.

"As recently as 1992, it was estimated that 95 percent of the women in law firms and corporations who experience sexual harassment would not use formal complaint procedures to challenge the harasser because of fear of retaliation and loss of privacy. By 1994, however, law firm employees were becoming more inclined to sue, and firms no longer were to so likely to settle." White, Pamela J. & Matluck, Susan R., "Conduct Unbecoming a Lawyer: Expanding tort remedies for sexual harassment," Vol 24, No 4 The Brief 16 (Summer 1995) (Citing *Bias Claims Show Trend of Suits Against Law Firms,* 9 ABA/BNA Lawyers Manual 415 (Jan. 26, 1994).

A Problem Areas

1 Women attorneys have difficulties in trying to juggle both career and family

a. The effect of taking parental leave and/or working part- or flex-time on a woman's ability to make partner or be promoted.

"A lawyer who works part-time is isolated and viewed as aberrant by other members of the firm." ABA Journal, April 1, 1988

b Encouraging women to give birth and quickly return to full-time work, even if the firm has a maternity leave policy and part-time work.

2. The pressure for women to conform to the expected "male" role rather than to bring to the profession the attributes that women, as women, can contribute.

3. The exclusion of women in client development (rainmaking) or company management.

4. Conventional modes of rainmaking do not always work for women.
   a. "You have to be outgoing, committed and unashamed to go after business. A great number of women find that difficult."

   b. "You must be willing to accept a certain amount of rebuff, which is a hard kind of rejection for women. You have to like to compete, in the best sense. And you have to have little guilt. You have to be willing to say, this is what I want and not care whether people say otherwise."

   c. "Women do not generally see themselves from Day One as business partners, or see the need to work a cocktail party from a business perspective. Men always have." Comments from "Is There Life After Partnership?," A.B.A. Journal, June 1, 1988.

   d. "Getting clients is very hard. For the woman lawyer to get clients is a real problem because you are not going to engage in philosophical dialogue with potential client about sexism. If your potential client has a lot of money to plunk down on the table or has a life at stake or has a great deal of money at stake, he wants and he is able to pay for, his idea of the perfect defender or the perfect plaintiff's lawyer. Most people's idea are conditioned to that they think that the perfect lawyer is a man because that's the way they were raised; especially if they are older." Susan B. Jordan, "Courtroom Savvy: What it Takes to be a Lawyer in Control," Women Trial Lawyers: How They Succeed in Practice and in the Courtroom, p 105 - 119, 114 (1987).

5. The lack of role models or mentors for women lawyers.

6. The lack of networks or support for women lawyers within the profession

7. Bias in hiring or promotion/partner selection process

8. Women being called by first names or terms of endearment instead of by surname or title.

a. Such cannot help but cause a client to perceive that his or her lawyer is treated with less dignity than is her male adversary.

b. Causes women to prove competency, while men must prove incompetency

B. State Studies - Information for this section was drawn from 17 states and the 9th Circuit's gender bias survey results. See Appendix I

1. Stated Purposes - Examples

a. **New Jersey Task Force** " to investigate the extent to which gender bias exists in the New Jersey judicial branch and to develop an educational program to eliminate such bias."

b. **California** "Accordingly, this investigation is not an attempt to report to the Judicial Council whether the court system is afflicted with a slight or severe case of gender bias, or to test whether the foundations of our court system are structurally sound. Rather, our purpose is to provide the counsel with a way that points out the pathways to a future that assures decision making based on individual qualities, not on stereotypes, on perceptions that men and women have equal worth and dignity that endure regardless of their cultural or racial identification, and on the knowledge of the realities, both economic and social, that men and women face in their lives." (p.3)

c. **Florida**. "to determine in what areas of our legal society bias based on gender exists, and recommend measures to correct, or at least minimize the effect of, any such bias."

d. **Iowa** "[T]he Task Force is hopeful that this Report will produce enthusiasm for change, rather than cynicism or resignation. The Task Force strongly believes that the increasing diversification of the profession requires a renewed commitment to equality in the courts. The elimination of bias should not have to wait until the numbers of women and minority attorneys substantially increase."

e. **Nevada**. "There is no disposition on the part of the Task Force to absolve those in the legal system who contribute in any way to the kinds of injustice described throughout this report. The Task Force does not, however, deem it prudent or productive to seek out scapegoats or to assign blame. At this stage of the Task Force's labors we are content to define the problem in general terms and to define ways in which we believe gender bias can be reduced and eventually eliminated." (p.9)

f. In August 1987, the ABA created the Commission on Women in the Profession and established these primary objectives:

1. Assess the current status of women in the legal profession and identify their career paths and goals

2. Identify barriers that prevent women lawyers from full participation in the work, responsibilities and rewards of the profession

3. Develop educational programs to address discrimination against women lawyers and the unique problems they encounter in pursuing their professional careers.

4. Make recommendations to the ABA for action to solve problems the Commission identifies.

*The commission also develops programs, policies and products to advance and assist women lawyers and to educate the profession about work and family issues that affect all lawyers.

2. Findings

Arkansas

Women were twice as likely to be employed part-time than men. 50% of women were more likely to be employed in offices that provided formal maternity leave than were men.

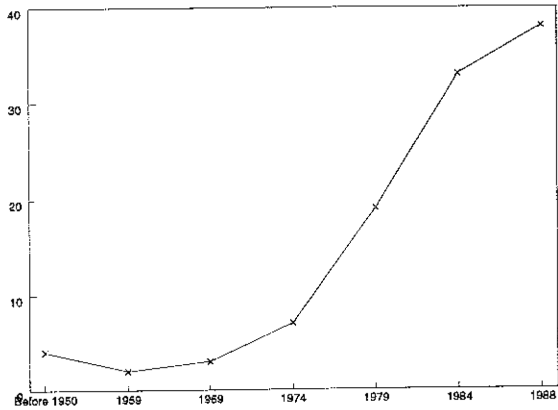
Observations	**Women**	**Men**
More likely to make higher salaries and more likely to be involved in setting rates for legal services	55%	76%
Determine Clients	62%	78%
Determine who will handle cases	52%	68%
Make hiring decisions	60%	77%
Average work week	47	50
Average hours billed	35	34
Average billable rate	$90	$98
Report "old boy network" exists	94%	81%
Report that female attorneys have more difficulty being hired than males	50%	31%
Report that female attorneys have more difficulty being promoted than males	60%	28%
Believe that male attorneys attain partnership status or advancement faster than women	63%	32%
Believe that males are more likely to be assigned the better cases	53%	25%
Believe that female attorneys have more favorable terms and conditions of employment than males	9%	21%
Believe that males tend to attain more respect & status than female attorneys	65%	41%
Believe women fair better than men in the legal profession	<1%	5%
Believe that women fare worse than men	67%	28%
Believe women do about the same as men	32%	68%

Observations	**Women**	**Men**
Optimistic about significantly improving their situations in their jobs	77%	83%
Pessimistic about significantly improving their situations in their jobs	24%	17%

Colorado

Percent of women admitted to the bar

Indicative of the National trend



Connecticut

	BIAS AGAINST MEN		BIAS AGAINST WOMEN	
	Men	**Women**	**Men**	**Women**
ATTORNEYS:				
There is none	32%	3%	46%	60%
Bias exists, but only in a few areas	61%	54%	51%	38%
Bias is widespread but subtle	6%	40%	2%	1%
Bias is widespread and easily seen	1%	3%	1%	1%

	BIAS AGAINST MEN		BIAS AGAINST WOMEN	
	Men	**Women**	**Men**	**Women**
JUDGES:				
There is none	20%	3%	42%	47%
Bias exists, but only in a few areas	70%	47%	55%	54%
Bias is widespread but subtle	11%	47%	3%	0%
Bias is widespread and easily seen	0%	3%	0%	3%

Iowa

Judicial application process -- areas of questioning:

Question asked	Females Asked	Males Asked
Whether they would be willing to work long hours?	55%	39%
What sort of child care arrangements they had?	26%	4%
What their spouses thought of their applications	25%	11%
Whether they would move if their spouses were offered a job in another city?	12%	2%

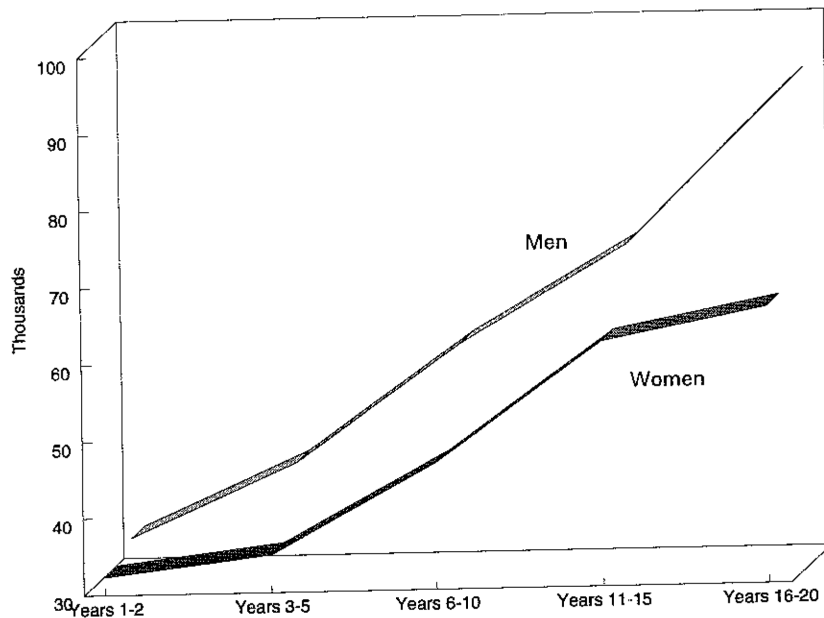
I

Application for position in a law firm -- areas of questioning:

Question asked	Females Asked	Males Asked
Whether they would be willing to travel	43%	23%
Whether they intended to have children	25%	6%
Whether they would move if their spouse was offered a job in another city	25%	5%
What sort of child care arrangements they had	14%	2%

New Mexico

Income by years of practice:



Perceptions: Women had trouble making partner as fast as men; Women feel that they had more trouble being promoted.

Ninth Circuit

[Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, North Mariana Islands, Oregon & Washington]

Statistics - 1991

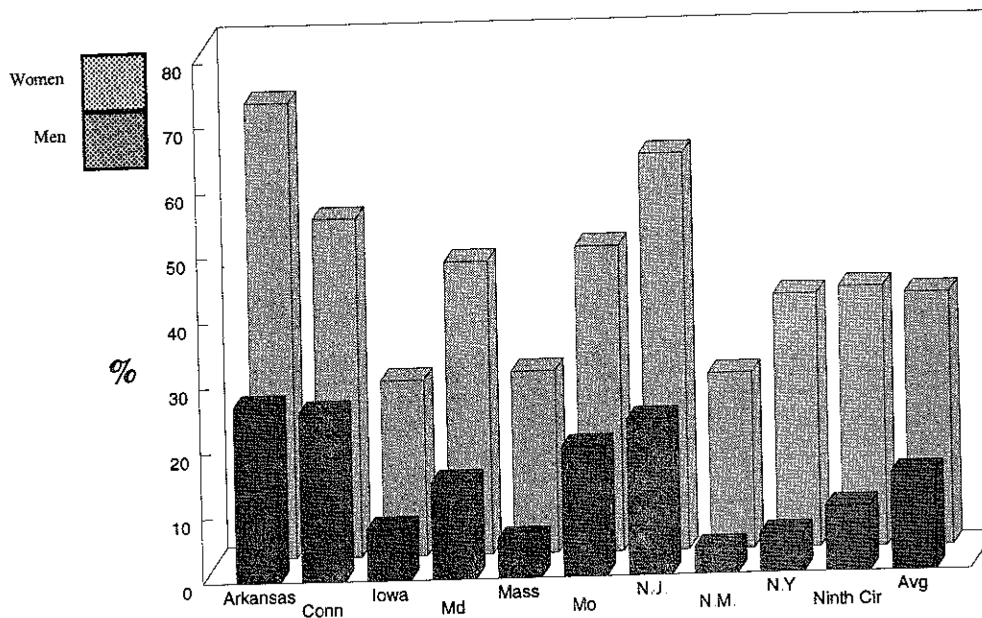
	% Women	% Male
Ninth Circuit Bar	16%	84%
Ninth Circuit Judicial Positions	12%	88%
Administrative Law Judges in the SSA	8%	92%
Immigration judges	27%	73%
Bankruptcy Judges	20%	80%

Statements:

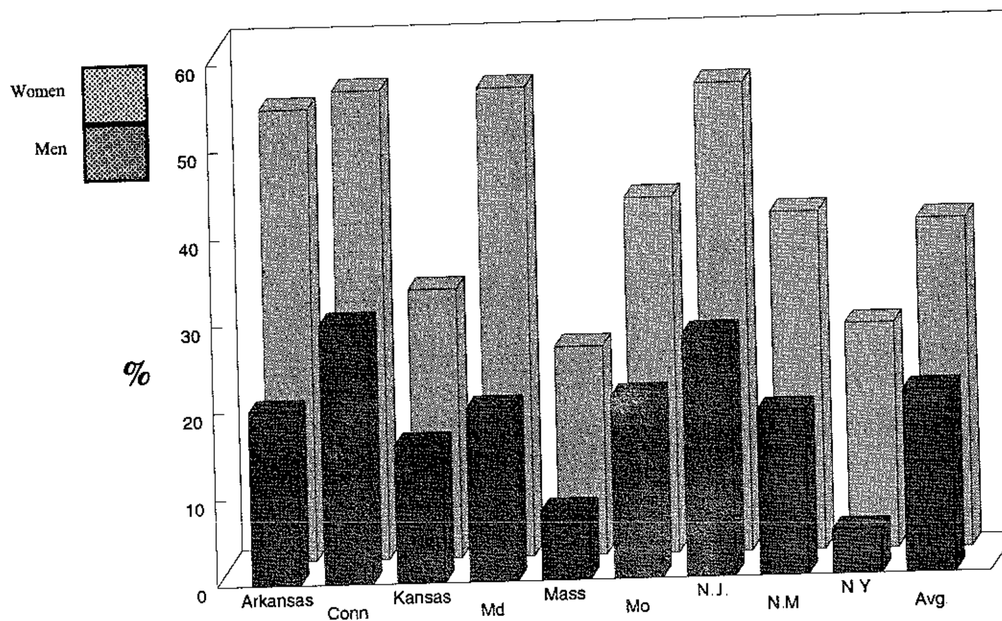
Statement	% Women	% Male
Agree that men have a better chance at being promoted to partner	50%	20%
Believe that gender distinctions in the courtroom interaction may have a significant impact on the outcome of the case	80%	60%
Experience pressure to return to work from parental leave	30%	5%
Report pressure to work during parental leave	30%	5%
Delay in promotion	20%	2%
Reduction or loss of pay	30%	5%

Cross Section of States

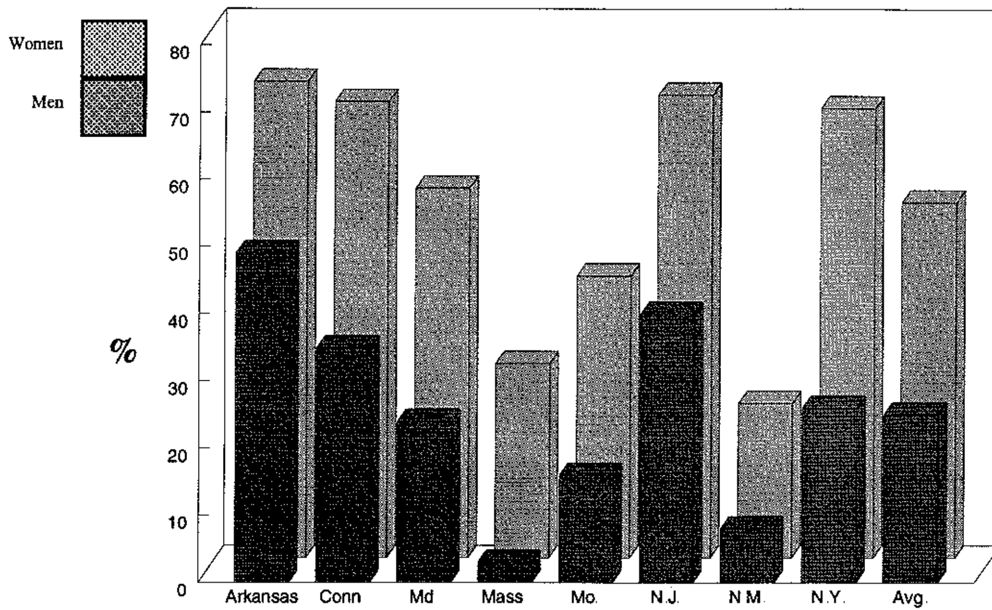
Judges addressed female attorneys by first name or term of endearment when male attorney is not:



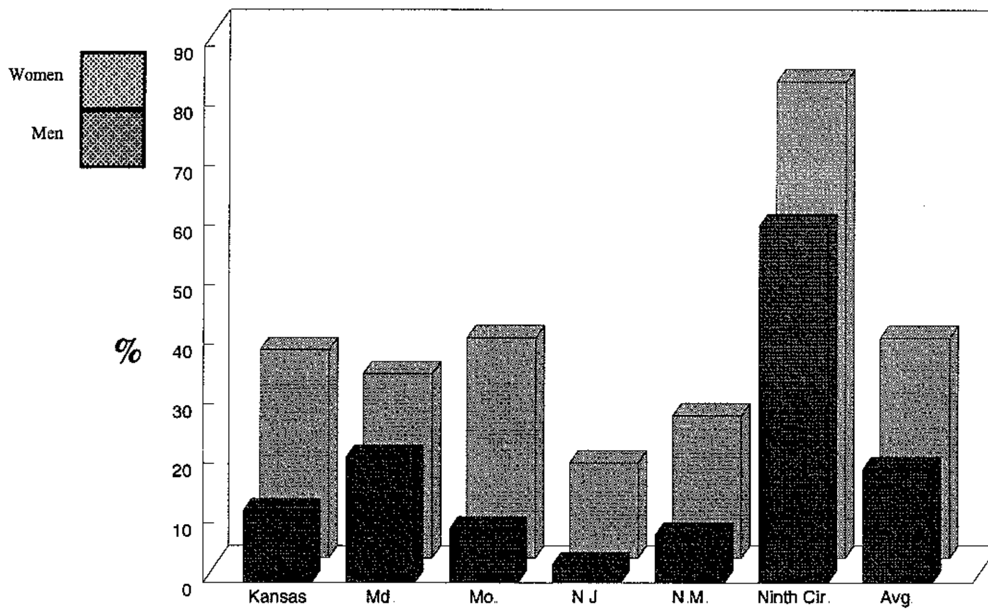
Inappropriate comments by judges on the apparel or appearance of female attorneys:



Remarks or jokes by judges demeaning to women:



Gender bias has affected (or may affect) the outcome of the case:



C Nation - attorneys

1. Income
   a. Median income for junior associates is $30,000 for men, $25,000 for women. Male partners - $ 75,000, female partners - $ 51,000. Male solo practioners - $32,000, women solo practioners - $ 17,000 (survey results by ABA, Young Lawyers Division)

   b 1986 graduates - men made $1,207 more then female graduates (National Association for Law Placement)

2. Partnerships
   a. From 1982 to 1988, the number of women partners rose only 1 percent.

   b. Projections - one in 5 partners will be a woman in 2000.

   c. After 1968 graduates - 44% men, 13% women in private practice are partners (1984 study done by ABA Young Lawyers Division)

   d. 8% of all partners are women

3 Private Practice
   a. Fewer women were employed in private practice (54% women, 76 % men)

   b Women are more likely to be employed in medium and large size firms

4. Feelings about Legal Profession
   a. Almost twice as many women as men are dissatisfied with their jobs
   b. 18% women, 12% men report a lack of intellectual challenge
   c. 23% women, 7% men report that their working atmosphere is cold
   d. 25 % women, 7% men report that their chances of advancement are poor
   e. 21% women, 16% men report that advancement is not determined by the quality of their work
   f. 57% women, 45 % men report a lack of time for themselves

5 Family Life
   a. Women lawyers aged 35 to 44 are more than half as likely as male lawyers to be childless (56% v. 40 %)

   b. Women lawyers in private firms are more likely to be single or divorced than male attorneys (13 % v. 4 %)

6. ABA stats
   a. Only 1 of ABA's 25 sections and divisions was chaired by a woman as of 1991.
   b. The number of sections and divisions without any females increased from 11 to 14 from 1989 to 1991
   c. In the Litigation Section, of the 44 committees in 1994, 20 had a woman as chair or co-chair

d. The ABA now has its first woman president in its 117 year history.

1) Only 2 woman have run for ABA president
2) First Woman President
   a) Roberta Cooper Ramo
   b) Her term began August 1995
   c) She is the Past President of the Albuquerque Bar Association and Former Chair of the ABA's Law Practice Management Section

e. The ABA has only had 1 chief executive officer (she resigned in 1990)

7. Nation - judges
Appointments by President Bush - 36 of 192 judges (18.7%). Tobias, Carl. "Closing the Gender Gap On the Federal Courts," 61 Cincinnati Law Review 1237 (1993).

D Example Stories / Comments

Although a woman went into labor on 8 a.m., she held a 9 a.m. meeting with clients. She finally went to the hospital when her contractions were 4 minutes apart and gave birth 2 hours later. Afterward she called the office from the recovery room. "Progress for Women ? Yes, But . . . ," ABA Journal, April 1, 1988.

"The chief justice of a state supreme court, when asked, "How many women does the Supreme Court have?", replied, "Each of us has one." Martha W. Barnett, "Women Practicing Law: Changes in Attitudes, Changes in Platitudes," 42 Florida Law Review 209, 215 (1990).

"A Texas judge asked a five-foot, two-inch woman lawyer to turn around and face the courtroom. After she turned around, the judge said, 'Ladies and gentlemen, can you believe this pretty little thing is an Assistant Attorney General ?" Id.

"A woman attorney must walk the fine line between being feminine and being assertive. She is held to a different standard than a man. If she is too feminine she is accused of trying to use it to her advantage, and is therefore resented, but if she is equally assertive to her male counterpart, she is accused of being too aggressive." (48 yr. old male from New Jersey state study).

A judge was removed from office in California for, among other things, telling vulgar, offensive jokes. In Ryan v. Commission on Judicial Performance (1988). (California report).

"Until 1991, the questionnaire sent out by the Judiciary Committee of the General Assembly to those nominated for judicial office requests marital status of information in the following manner: "4. Marital status, if married, the maiden name of your wife." (Connecticut report).

One woman attorney reported that during a lunch hour, a judge wolf whistled at her on a crowded street in downtown New Haven (Connecticut report).

At a meeting of the Connecticut Bar Association, a woman attorney felt compelled to rise and express her objection to the telling by a male attorney of a joke concerning rape. No one joined her dissent. (Connecticut report)

"Female attorneys are overly sensitive about gender" (Superior court judge in Georgia).

" I see no [gender bias] in my circuit " (Superior court judge in Georgia)

"The reception woman lawyers receive is better now than it ever has been; however, I still believe prejudice exists, so in the minds of the jury, women lawyers do a disservice to their clients representing them" (Female court reporter in Georgia).

"Over the past 10 years, women with less qualifications (for the bench) are picked over males far greater qualified." (Maryland report).

"Judicial selection has tended to favor females out of a misplaced sense of imbalance of the bench." (Maryland report).

"I have on several occasions observed the use of a demeaning term of pseudo endearment to belittle and undermine the professionalism of a female attorney. Such terms are used by both judges and attorneys, to single out a female attorney and set her on a lower plateau. Rather than a direct attack on the legal issue of the argument advanced, the demeaning term is used to dismiss the female attorney's position or relegate it to a lesser status." (29 yr. old male - New Jersey report).

"Judge X totally humiliated me at a calendar call when he said, 'You get better looking every time I see you. How come I didn't hire you when you applied for that clerkship ?' The other men guffawed freely, since I was the only woman in the courtroom. I'm sure they think I'm a poor sport for fighting back tears of rage instead of being able to take such a compliment." (37 yr. old female - New Jersey report).

"I can't say a case was ever won or lost because of [sexist comments or conduct], but I was so frequently embarrassed that I lost my composure." (34 yr. old female - New Jersey report).

"In response to a statement by a female attorney that she had 'problems' with her case and wanted to be heard at the second call, [the judge] made a pronouncement that 'women are the problem'. This comment, again, was received by the audience with a great deal of amusement, laughter, clapping, etc. What would have happened had this same judge said that Blacks, Catholics, Orientals or Hispanics were the 'problem'. Would that comment have been met

with uproarious laughter ?" (Woman in New Jersey report).

"The premise of your survey appears to be that gender bias occurs only from the female perspective. Yet, my experience also includes situations where a female judge and female opposing counsel overtly acted in a discriminatory manner towards myself and my client. I have negotiated cases with women attorneys who have expressly taken the position that either I accept their settlement position or I was a "macho bigot". (Male respondent in New Mexico report).

"On two separate occasions male attorneys have forcibly taken documents out of my files which I had previously declined to provide them. One the first occasion, during trial, counsel reached over to my table and attempted to pull photographs out of my file. On the second occasion, while we were negotiating a settlement, another counsel attempted to grab a file out of my arms and take the document he wanted. I doubt that either attorney would have resorted so quickly to physical force had I been a man. I suspect that their ready use of force resulted not so much from their perception of my size as of my stature." (New Mexico report).

"A judge intervened to correct court personnel's reference to a female attorney as 'our mascot'." (39 yr. old urban male - New York report).

"I had one member of the judicial nominating commission ask me if I sat on the bench would I be emotional on the bench, the way women were always getting emotional. . . . The chair of that panel did not tell me not to answer. The women on the committee were very upset and said something to the gentlemen who asked the question, but the question was not withdrawn, nor was it overruled, and I answered the question." (Utah report).

One woman lawyer wrote that she was asked to leave a settlement conference in a judge's chambers so the magistrate could "tell a dirty joke". Study by the Ninth Circuit, ABA Journal, Nov. 1992

Another woman lawyer told of a judge who called her "menopausal" when she objected to a ruling. Study by the Ninth Circuit, ABA Journal, Nov. 1992

A federal court judge in Pittsburgh threatened an attorney with jail because she refused to be addressed by her husband's last name. "From here on, in this courtroom you will use Mrs. Lobel; that's your name," he said. When she objected, he continued, "Do what I tell you or you're going to sleep in the county jail tonight. You can't tell me how to run my courtroom." He then told her that the law required her to receive special permission to use her maiden name in court. He later apologized to her and stated that there needed to be mandatory training regarding the proper treatment of women in the courtroom. "Judge Mrs the Point," A.B.A. Journal, Sept. 1, 1988. p.25.

"The range of allowable emotions available to women lawyers is limited. If a woman lawyer begins to argue with another lawyer, it may seem to the judge that

the women is becoming too emotional or agitated I have also at times seen a woman lawyer's attempt to use drama in the courtroom backfire because the judge thinks it is histrionics and too emotional. On the other hand, trying to avoid the sexual stereotype of being an emotional woman is itself a dangerous tactic. If a women tries to be unemotional, she may be accused of being hard or unfeminine. This label will make her presentation less attractive and perhaps less persuasive." "I Don't Think That Ladies Should Be Lawyers," A.B.A. Journal, Dec. 1, 1986, p 49

"Women lawyers take themselves too seriously. When someone says something sexist, they take it personally. It's not the judge's problem. It's their problem. These remarks should roll of their back like water off a duck." Suzanne Saunders, a Jackson, Miss attorney in "I Don't Think That Ladies Should Be Lawyers," A.B.A. Journal, Dec. 1, 1986, p. 53.

"The particular case facts are irrelevant. Older male judges go along with arguments of male counsel 90 % of the time - especially when the opposing attorney is older" (White female attorney - Georgia study).

"Judges seem to help or be more favorable to female attorneys". (White male attorney - Georgia study).

"[Female attorneys display] a 'chip on the shoulder' approach which show she expects to prevail because she is a female, and denial of her expectation is simply a chauvinistic reaction of the court." (Superior court judge - Georgia study)

"Many female attorneys are inexperienced. Troubles with the judge arise from this problem, not gender; although I'm sure they arrive at a different conclusion." (Superior court judge - Georgia study).

"I suspect that much of the alleged gender bias is a product of the investigation of some unusually sensitive women." (Superior court judge - Georgia study).

"It should be noted that the Commission uncovered at least one incident in which a female judge, while in court, referred to a male attorney as 'baby'." (Georgia study).

"It is extremely tiresome and detracts from the time I would otherwise spend representing my clients to continually respond to all the sexist comments and inappropriate statements about the physical appearance of women (but not men) in the courthouse." (33 yr old New York City female).

"Women trial lawyers are schooled by experience to overlook the demeaning remarks from some trial judges. It is an insult they become accustomed to accepting so that they may try the true issue of the case" (66 yr. old suburban female - New York study).

"In Suffolk County . . [i]f a male attorney objects repeatedly during trial he is 'going all out for his client' and is 'a real fighter'. If a female attorney objects similarly, she is a 'bitch' or a 'tough broad'. Do you know one attorney actually came over and tried to kiss me to seal his victory after a hard fought trial ?!!" (37 yr old suburban female - New York study).

"A judge admonished me in front of a jury in the middle of a cross examination for overstepping what he thought were the proper bounds of a woman lawyer. He said, "Young lady, stop that. Would you ever speak to your husband that way? ' Of course this judge would never require the men to address every female witness as though they were addressing loving wives." (50 yr. old New York City female).

IV. Suggestions for Improvement

"Documenting the nature and existence of a problem is only the first step in curing it. The important question is whether court systems are acting on the myriad recommendations of their gender bias task forces." Lynn Hecht Schafran, "Gender and Justice: Florida and the Nation," 42 Florida Law Review 181, 194 (1990).

A. Education
  1. within law schools
    a. establish sensitivity training
    b. increase the number of women tenured within the law school faculty
      1) 41% of "prestigious" law schools have few tenured women on staff - less than 12 % are women (Professor Emma Coleman Jordan - past president of Society of American Law Teachers)
      2) Only 8 of 174 ABA accredited law schools have women deans
  2 within legal profession
    a "Prepare education materials which give credence to the existence of gender bias of this kind, which give illustrations of objectionable conduct and breaches of etiquette and which call upon participants in the legal system to put a stop to gender bias of this kind." (Nevada study, p. 86).

    b. "An educational program should be developed and presented to all Nevada judges [and attorneys] to acquaint them with the way in which verbal and non-verbal communication styles, forms of address, misplaced "courtesies" or compliments, and other forms of interaction may cause either offense to women, or the potential for unequal treatment for women in court - - whether litigants, attorneys, court employees, or others." (Nevada study, p. 87).

    c. Integrating gender fairness issues through the curriculum
      1. Encourage the integration of gender bias issues into the full range of relevant substantive and procedural courses offered in training programs for lawyers

2. Avoid "Isms" Courses - These courses, "racist, sexism," are too abstract and too general to enable people to identify, understand and correct gender bias.
3 Repeat the information about gender bias often.
4. Select gender bias faculty with care
   a. Include not only female but male faculty
   b. Include also non-judicial faculty
5. Examples of integration
   a. Probate
      1) Ask judges and attorneys to monitor their own and others' behavior regarding appointments as estate administrators to insure that women as well as men are fairly represented
      2) Evaluate whether women are receiving a fair share of trustee, guardian, appraiser appointments by the court.
   b Damages in civil cases
      1) Potential topics include:
         - Gender-biased application for damages for loss of consortium
         - Implications of the medical profession's gender-biased treatment of women in medical care negligence
   c. Expert Testimony
      1) Potential topics include:
         - When expert testimony is offered about an issues, how to determine whether the witness is in fact expert in the area, and what his or her gender-related biased may be.
         - Negative attitudes toward female experts' credibility
         - from "Promoting Gender Fairness Through Judicial Education: A Guide to the Issues and Resources," Lynn Hecht Schafran, Esq.

B Establish Mentors
1. for associates
   "Having a powerful mentor - someone supportive to watch over you - propels associates along the partnership track." - "Whatever Happened to the Class of 81'," A.B.A. Journal, June 1, 1988.
2. for law students

C. Work to resolve family & legal career conflicts - professional restructuring?
1. problem areas or concerns
   a. Men structured legal profession when profession was predominately male & two-career family was the exception, rather than the rule

   b. "Lawyers were bread winners and professionals with little or no responsibility for childcare. Although women have made significant progress in entering positions formerly available only to men, they have been unsuccessful in forcing those positions to change in ways that truly would accommodate their needs." (Martha W. Barnett article (Florida Law Review))

2 Popular suggestions
   a. Maternity/paternity leave
      1) Paid leave without recourse on obtaining partnership status
      2) Emergency leave

   b. Half-time schedules, shared positions

   c. Work-at-home or part time arrangements
      1) There are networks to help with this
      2) Example: Chicago Part Time Lawyers Network
         a) This was founded in 1984 and has 350 members
         b) It offers monthly meetings on alternative work schedules, a database that includes information on network members, part-time and flexible-time job listings, support group and mentoring opportunities, yearly conferences.

3. Technological advances.
   a The "out of office" office

   b. Encourage all attorneys to take advantage of nontraditional work schedules.
      1) These alternatives may serve to benefit a firm as well as the individual lawyer because the attorney keeps in touch with clients and helps the firm retain an experienced and promising lawyer in whom it has invested significant time and money in training and development. These things also encourage men to take a more active role in their domestic lives (Martha W. Barnett article <u>Florida Law Review</u>).

      2) "Family and workplace issues are not exclusively women's issues. Indeed, the childcare challenge is a major business problem." (Martha W. Barnett article <u>Florida Law Review</u>).

      3) "There is a need to solve the problem of viewing part-time work as less than professional. They're [women working part-time] either relegated to crummy work or squeezed into working part-time hours that seem more like full-time schedules." "It's Getting Better, Slowly," <u>A.B.A. Journal</u>, Dec 1, 1986, p.56.

D. Amending the state code of Professional Conduct to explicitly bar gender-biased conduct for both attorneys and judges.
   1. EXAMPLE: New York State Bar Association implemented the following:
   AS a Disciplinary Rule - "A lawyer shall not unlawfully discriminate in the practice of law, including discrimination in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability or marital status."
   As an Ethical Consideration- " A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees and other persons involved in the legal process." (New

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   b. Encourage all attorneys to take advantage of nontraditional work schedules
      1) These alternatives may serve to benefit a firm as well as the individual lawyer because the attorney keeps in touch with clients and helps the firm retain an experienced and promising lawyer in whom it has invested significant time and money in training and development. These things also encourage men to take a more active role in their domestic lives (Martha W. Barnett article <u>Florida Law Review</u>).

      2) "Family and workplace issues are not exclusively women's issues. Indeed, the childcare challenge is a major business problem." (Martha W. Barnett article <u>Florida Law Review</u>).

      3) "There is a need to solve the problem of viewing part-time work as less than professional. They're [women working part-time] either relegated to crummy work or squeezed into working part-time hours that seem more like full-time schedules." "It's Getting Better, Slowly," <u>A.B.A. Journal</u>, Dec. 1, 1986, p.56.

D. Amending the state code of Professional Conduct to explicitly bar gender-biased conduct for both attorneys and judges
   1. EXAMPLE: New York State Bar Association implemented the following:
   AS a Disciplinary Rule - "A lawyer shall not unlawfully discriminate in the practice of law, including discrimination in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability or marital status."
   As an Ethical Consideration- " A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees and other persons involved in the legal process." (New

York State Code of Professional Responsibility EC1-7 (1987)).

2 EXAMPLE: American Bar Association Model Code of Judicial Conduct (1990)
"Canon 2C prohibits a judge from 'holding membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.'

Canon 3B(5) states, "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including, but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."

Commentary to Canon 4 states, "Expression of bias or prejudice by a judge, even outside the judge's judicial activities may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status." - from Honorable Shirley S. Abrahamson, "Toward a Courtroom of One's Own: an Appellate Court Judge Looks at Gender Bias," 61 Cincinnati Law Review 1209, 1215.

In several states, those brought up on ethical charges for allegedly making statements or writing letters that included **language** insulting to women lawyers have successfully defended themselves based on First Amendment grounds. U.S. v. Wunch and Swan, 54 F.3rd 579 (9th Cir. 1995).

Commentary on the Swan decision:
1 "If we truly believe in equal access to justice, the courts should have power to discipline lawyers for gender-biased or racist conduct. In that way, we can remove the self-appointed gatekeepers (to the legal system)..... [W]e must make gender-biased conduct universally unacceptable inside and outside of the courts, on and off the record. Otherwise, fully half of the population will not have equal access to justice. If we do not want courts to discipline lawyers for this conduct, we must be willing to admit that justice is available only to certain, select individuals. This is not a matter of theoretical political correctness, but rather of access to justice." Roberta M. Ikemi, "Professional Responsibility: Should sexist comments be a disciplinary offense?," ABA Journal, August, 1995. (Ms. Ikemi authored an *amicus curae* brief in the Swan case).

2. "As a society, we have adopted laws that impose thresholds for when a person may be punished for engaging in discriminatory conduct. These standards define when an individual's right of free expression crosses the bounds of constitutionally protected speech and becomes unlawful

discrimination. Since the U.S. Supreme Court first reviewed principles of sexual harassment law in the 1986 case Meritor Savings Bank v. Vinson,477 U.S. 57, the rule has been that "mere utterance" of biased expression will not be enough to invoke the sanctions of the legal system. The question, then, posed by ethics rules against "offensive personality" is not whether lawyers may be disciplined for bias but whether they should be held to a more exacting standard than anyone else." Carol A. Sobel, "Professional Responsibility: Should sexist comments be a disciplinary offense?," ABA Journal, August, 1995. (Ms. Sobel is with the American Civil Liberties Union of Southern California, practices in the areas of sexual harassment and First Amendment rights and represented attorney Swan).

E Amend court documents to include gender neutral language
  1. Where it is needed
     a. Model jury instructions - both civil and criminal
     b. Benchbooks
     c. Court rules
     d. Court forms and documents
     e. Judicial opinions, orders and correspondence
  2 Why it is needed
     a. "Studies have shown that language influences the absorption of ideas, and that gender-biased language sets up barriers to the full participation of women in society as a whole. There is empirical evidence that the use of such terms can in fact skew perceptions Whether it occurs in court rules, opinions or jury instructions, discourse that refers to men exclusively is indicative of the deeper, underlying problem of excluding women or denying their importance." Honorable Shirley S Abrahamson, "Toward a Courtroom of One's Own: an Appellate Court Judge Looks at Gender Bias," 61 Cincinnati Law Review 1209, 1217.

     b. "Many men do not think the pronoun, 'she' can be defined to include 'he', but they expect women to assume without question that 'he' includes 'she'. The indiscriminate use of 'he' not only excludes women but can cause confusion that can be easily avoided." Id. at 1218

F. Establish public hearings and studies to demonstrate to people that gender bias in the courts is a problem of major proportions
  1. Public Hearings
     Example: In New York, one prominent lawyer on the task force initially resisted holding public hearings, urging the task force to save time by simply asking for written statements. After attending two day-long hearings, he told the task force that he realized that he had been much mistaken in his earlier view. The testimony communicated to him the pain and injustice of gender bias in the courts as the printed page never could have." Comments of Haliburton Fales, II, Esq. to Lynn Hecht Schafran, Florida Law Review, page 205

2. Studies and Task Forces
   a. There are guidelines and suggestions to help begin one
      1) Examples - Women Judges' Fund for Justice puts out publications such as
         a. "Planning for Evaluation: Guidelines for Task Forces on Gender Bias in Courts" (Lynn Hecht Schafran, Esq.)
         b "Promoting Gender Fairness Through Judicial Education: A Guide to the Issues and Resources" (Lynn Hecht Schafran, Esq.)
         c. "Operating a Task Force on Gender Bias in the Courts: A Manual for Action" (Lynn Hecht Schafran, Esq and Norman Juliet Wikler, Ph.D.)

G. Assist and encourage more women to obtain judgeships

1 "Evidence suggests that many women have backgrounds, attitudes and views, particularly of judicial roles, that differ significantly from those of male judges and that this diversity of perspectives will improve the federal courts. The appointment of greater numbers and percentages of women should limit wide-spread gender bias in the federal criminal and civil justice systems. Naming more female judges could concomitantly increase numerous citizens' confidence in the impartiality and fairness of those systems, partly because the courts' composition would more close reflect those of society." (Tobias, Carl. "Closing the Gender Gap On the Federal Courts," 61 Cincinnati Law Review 1237 (1993)).

2. Women's Judges' Fund for Justice. The WJFJ was created in 1980 by women judges committed to strengthening the role of women in the American judicial system and improving the administration of justice. The Fund is the educational and research arm of the National Association of Women Judges (NAWJ) and helped initiate Gender Bias Task forces many states.

H Work to help keep the numbers of women up in both law schools and the legal profession

1. "Bias, discrimination, even when subconscious, is largely amenable to correction by numbers and of course, by time." (Dean Barbara Black, Columbia Law School in the 1989 Judicial Conference - Second Circuit).

2. "We cannot help but examine the direction of the profession itself and ask whether that direction is in the best interest of anyone." (Martha W Barnett article Florida Law Review).

3. "How can any lawyer, male or female, combine such professional demands with outside relationships, children and personal satisfaction ? .... Perhaps the greatest contribution women have made to the legal profession is to make the profession look at its structure and ask whether it is satisfied with the direction it is moving." (Martha W. Barnett article Florida Law Review, quoting the ABA report)

4. "Women are doing this, we are told, forcing the legal profession to ask itself questions about itself, by 'leaving traditional forms of practice, trying to find a setting where they can be good lawyers and responsible human beings." (Colombia Law School Dean Barbara Black, 1989 Annual Judicial Conference - Second Circuit).

I Set goals, not limitations.

1. "The me I see is the me I will be" (Ed Foreman).

Appendix I

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Appendix II

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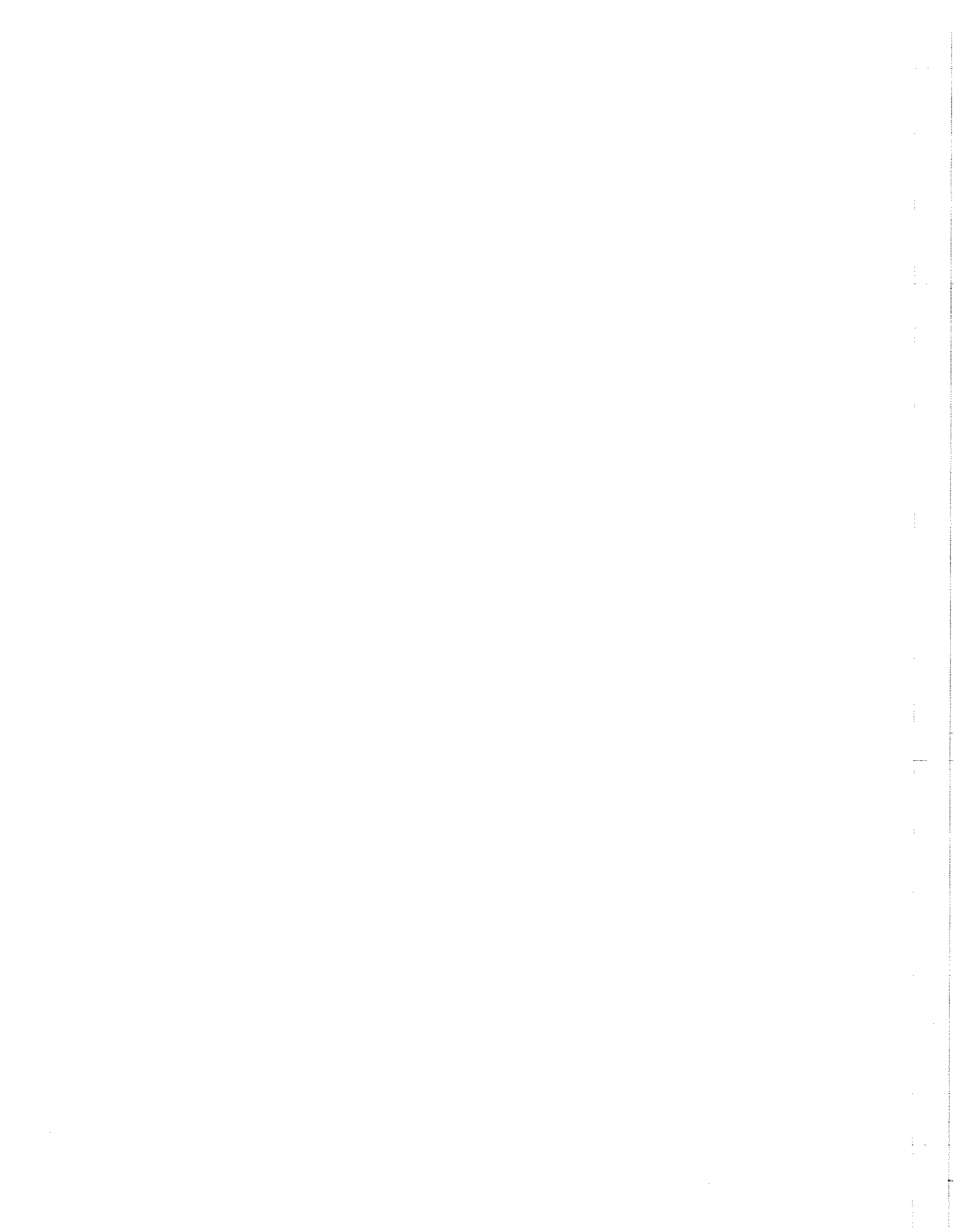

SETTLEMENT ANNUITIES

An Update on New Products, Ideas and Techniques

By

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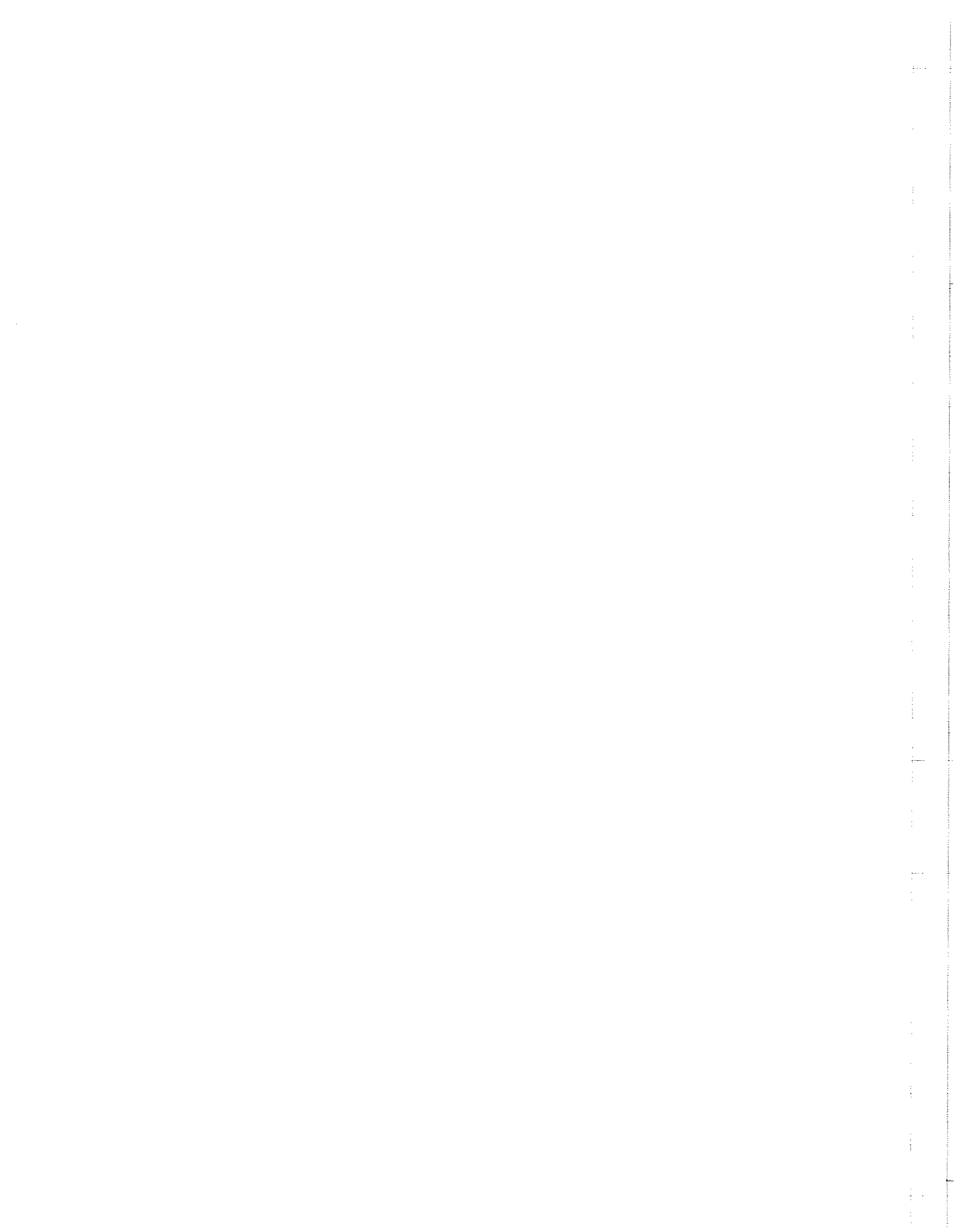

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. CREATING THE SETTLEMENT ATMOSPHERE 2
A. Initial Approach 2
B. Designing the Initial Plans 3
C. Attendance at Settlement Conference or Mediation 4
D. Assisting with the Closing Documents 5

III. UNDERSTANDING THE AGE RATING SYSTEM 6
A. Standard Risk 6
B. Age Rated Risk 6

IV. QUESTIONS AND ANSWERS ABOUT THE CONSTRUCTIVE RECEIPT DOCTRINE 8
A. General Questions 8
B Pre-Verdict Examples 10
C. Post-Verdict Examples 11

V. RATING SERVICES 14
A. A.M. Best's 14
Illustration 5 15
B. Moody's 16
C. Standard & Poor's 16
D. Duff & Phelps 16
Rating Categories and Ratings 17

VI. FUNDS AND PRODUCTS TO ENHANCE THE GUARANTEE 19
A. Guarantee Agreements 19
B. Split Funding Annuities 22
C. U.S. Treasury Bonds as a Funding Vehicle 23
D Secured Creditor Status 25

J

VII. RECENT IDEAS AND PRODUCTS . . . 27
A. IRC §468B - The Designated Settlement Fund . . . 27
B. A Settlement Annuity that Increases with the CPI . . . 29
C. Workers Compensation - Growing Area . . . 31
Exhibit 1 . . . 32
D. Environmental Cleanup Fund . . . 37
Piper Jaffray Income Index . . . 39
Tax-Exempt Municipal Bond v. Tax-Exempt Settlement Annuity . . . 40

BIBLIOGRAPHY . . . 41

APPENDICES . . . 42

Appendix A: "What is a Structured Settlement Annuity?" . . . 42
Appendix B: Approaches . . . 43
Appendix C: Sample Release (w/o Assignment) . . . 44
Appendix D: Sample Release (w/Assignment) . . . 46
Appendix E: Uniform Qualified Assignment Form . . . 49

J

INTRODUCTION

Structured Settlements are an extremely important tool used to negotiate personal injury claims. Before the early 1970's they were unheard of. In 1977, there was approximately $500 million in annuity premium written. In 1984, that figure rose to over $2 billion, and by 1987, annuity premium exceeded $3 billion. Interest rates were in double digits during that time and there was very little concern about the stability of life insurance carriers. However, during the late 1980's, interest rates began to fall. By April of 1990, the prime rate had fallen to 10%, short term certificates of deposit to 7%, and yields on settlement annuities to 8%. This was about one-half the yield of the late 1980's.

During this period of time, the Executive Life debacle created an uncertainty that was not seen before in the life insurance industry. This combined with lower interest rates presented a real challenge to our industry. However, in 1992, Executive Life was purchased by Aurora National Life Insurance Company. The payments to claimants continued, with shortfalls made up by the State Guarantee Fund. New rules for reporting portfolios were implemented, and the Executive Life scare forced life insurance companies to reduce or rid their portfolios of bonds and real estate holdings that were not of high quality. With interest rates "creeping" back up again and tighter regulation in place, the industry has renewed optimism.

The words "quality, guarantees, and security", along with the first-class service are what we hear today. New products, concepts, and approaches are continuously being introduced to make the settlement annuity product a more useful tool to negotiate personal injury claims.

The future looks bright for structured settlement annuities, and for those who become informed about the advantages and techniques of its use, it will become even more useful.

CREATING THE SETTLEMENT ATMOSPHERE

A. **Initial Approach.** Many times when we receive the initial phone call from an adjuster or defense lawyer, they have no idea if the claimant or claimant's lawyer would have any interest in an annuity. Today, we still find that the defense community may ask the question to the plaintiff's lawyer, "Do you have any interest in a structured settlement?" Many times, the attorney will say, "No", and the claimant will undoubtedly say, "What is that?". It may come as a surprise to know that not all attorneys understand structured settlements. If they do, given a choice, they are not particularly interested to save money for the defense. Unrepresented claimants will not accept concepts they are not familiar with, or they simply do not understand. We have found that when we do prepare a set of numbers, it is helpful to enclose a sheet entitled "What is a Structured Settlement Annuity?" (see Appendix A).

There is no question that face to face negotiation is preferable, especially when a settlement annuity is involved. Mailing structured settlement offers without an explanation will almost inevitably result in a cash conclusion to the claim. The average structured case is probably one of the most serious claims the claim person is handling, and mailed or faxed offers of settlement are usually met with silence or indifference. A personal approach is always preferable as it allows for feedback and further communications.

On the initial approach, many defense lawyers or adjusters will simply present the structure as the offer. On minor settlements, the up-front cash is usually for attorneys fees and/or expenses. Rarely do we see cash going to a minor. However, an adult is a different situation. It is unusual when the structured settlement offer is made without any up-front cash to go along with it. We have found the best approach on the up-front cash is to package it. In other words,

up-front cash would include money for expenses, liens, lost wages, and unpaid medical bills, plus attorney's fees and expenses. Since we have no idea what the fee arrangement is between the lawyer and his client, it is best to just offer the up-front cash as a package. As listed on "Approaches" (see Appendix B), this page outlines phrases that can be used to stimulate interest on a structured settlement. Keep in mind that once the offer is presented, there is always a time limit as to how long the offer is valid. Since annuity rates rise and fall, it is imperative that the dates on the proposals be watched.

B. **Designing the Initial Plans.** There is no doubt that the key to plan design is to fulfill the needs of the claimant. The more you know about what the claimant really wants, the more likely you will come up with an offer that appeals to him. The plan designs will consist of monthly or annual benefits which can be offered for life or for a certain period of time; with or without guarantees. They can be offered on a level or compounded basis; with or without joint or survivor benefits. Many times the monthly or annual payments are deferred; for example, most minor settlements do not begin payments until the age of majority. Also, a claimant may wish to defer it until retirement age. In many plan designs, we insert lump sums which can be guaranteed at specified times. They are used as a hedge against inflation, to ensure college education funds, future medical needs, business start ups, down payments on homes and automobiles, as well as for retirement.

Putting an offer in the form of a structure can help the claimant understand what effect the money will have on his standard of living and on his ability to meet financial obligations. A well-designed structure also helps the plaintiff understand that the defense is making and honest attempt to figure out what his needs are and how to meet those needs.

C. **Attendance at Settlement Conference or Mediation.** Many times we are asked to attend a settlement conference or mediation when there has been some interest that they would be receptive in looking at an annuity. Often, the fact that the defense has brought a structured settlement specialist to the conference, telegraphs to the plaintiff's attorney that they are sincere about their desire to settle, and that it is worth his while to come up with a response that will generate some movement. We have certainly found that our attendance at settlement conferences dramatically increases the chances of settling the case with the use of a structure. Having a trained person in attendance at a settlement conference makes sense for several reasons.

1. They know the tax implications.
2. They are familiar with the current yields on the funding amount.
3. They know the life insurance carrier being used.
4. They are familiar with who the owner of the annuity should be.
5. They can answer questions concerning the assignment feature.
6. They can have additional plans and ideas available on the spot to keep the negotiating moving.

During negotiating, the objective is to steer the discussion away from a rehash of liability arguments and towards honest consideration on the claimant's needs. If the attorney dislikes the numbers that are being offered, what does he think of the format? Would annual payments be better than monthly? Should we eliminate lump sums in favor of increased monthly payments? How much would the claimant need per month? If the offered up-front money is not sufficient, how much is necessary? And so on.

The use of a structure can make it more likely that an opening offer will generate a fruitful discussion. Where a lump sum figure might

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be rejected out of hand as too low and not worth a serious response, a structure might not get that kind of reaction. In part, this is because the gross future payout is always far greater than the present value cost. Sophisticated plaintiff lawyers are not that easily fooled, and will in fact, be put out if they sense the structure is being used to make an otherwise unacceptable offer acceptable. Thus, having an experienced structured settlement person available who has attended a number of settlement conferences, will be of great help to both sides in getting the claim settled.

D. **Assisting with the Closing Documents.** Once the claimant decides on a plan, it is imperative that the structured settlement person be notified. There may have been a rate change which would necessitate getting the premium in as soon as possible. Also, once a structured settlement is agreed upon, the plaintiff's counsel should be notified that the first payment shall be paid no earlier than thirty days after receipt of the premium by the life insurance company. Many times we are asked to prepare sample Releases for the clients. The Settlement Agreement and Release Form, as shown in Appendix C, is used often when there is no assignment, and the defendant is the owner of the annuity. The Settlement Agreement and Release Form, as shown in Appendix D, is used when the ownership has been assigned to a third party. A Uniform Qualified Assignment Form (see Appendix E) is the standard form from our National Structured Settlement Trade Association that is accepted by most life insurance companies.

Negotiating the settlement is only part of our job. It is vitally important that the settlement annuity broker follows through to completion in getting all the closing documents to the right people in order for the annuity to be issued on a timely basis.

Understanding the Age Rating System

A. **Standard Risk.** When a life insurance company is to issue an annuity which will provide payments for a lifetime rather than for a set number of years, the company will thoroughly review the annuitants medical history and present condition to calculate actual life expectancy. If the annuitants medical history is not severe or life threatening, they will be called a standard risk.

B. **Age Rated Risk.** If the annuitant is a paraplegic, quadriplegic, comatose, severely burned, or if the injury is life threatening, they may be age rated, or "rated-up". Assume that the plaintiff is a comatose 22 year-old male who sustained a severe head injury and multiple internal injuries to such an extent that he is rated IV on the Glasgow Coma Scale. The scale ranges from III, which is brain dead, to XV, which is phasing in and out of cognizance. The assumption is that plaintiff is in a permanent vegetative state; his life expectancy is materially reduced. This patient normally would have a life expectancy of 50.5 years. On the day before the accident, the plaintiff could have purchased an annuity which would provide monthly payments for the remainder of his life and it would have been priced and issued as a standard risk based upon the life expectancy tables for a healthy 22 year-old male. However, because the injury is life threatening, the annuity company has the problem of estimating how long the critically injured plaintiff will actually live. Assume that after a careful review of the medical records, the annuity company determines that the plaintiff has approximately 10 years to live. He will be rated-up to age 62, which would then give him a theoretical life expectancy of 10.2 years. In other words, he will now be treated, for insurance purposes, like a 62 year-old.

This age rating process provides an exceptional opportunity to shop for the most competitive annuity prices. Annuity prices are based upon the prognosis of the annuity company's medical experts as to the actual life expectancy of the plaintiff, a totally subjective standard.

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Estimates of plaintiff's actual life expectancy by different medical experts for different annuity companies will vary substantially and will cause substantial disparity in costs for exactly the same benefits.

In order to acquire these increased benefits, the age rating must be done quickly. The structured settlement specialist should, well in advance of the prospective settlement date, supply copies of the plaintiff's medical records to all the life insurance companies which will be bidding on the risk. This is because the age rating is done by the medical reviewers for the life insurance company. Thus, to avoid undue delays and prevent loss of favorable quotes in the waiting process, attempt to complete the age rating 15 to 30 days in advance of seeking annuity quotes.

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Questions and Answers About the Constructive-Receipt Doctrine[1]

Question: What is "constructive-receipt?"

Answer: It's a doctrine that taxes income before the income is actually received. The two other doctrines that tax income are the "actual receipt" doctrine (i.e., you really receive it) and the "economic benefit" doctrine (not applicable to structured settlements).

Question: Where can I find the doctrine in the law?

Answer: The constructive receipt doctrine is in the Treasury's regulations, as follows: "(a) General rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had not been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions." Treas. Reg. § 1.451-2(a).

Question: Is it often a problem in litigation?

Answer: No. The two situations where the constructive receipt doctrine usually applies are (i) completed settlement negotiations and (ii) final judgements.

Question: How can it affect structured settlements?

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Answer: If the settlement is complete or the judgement is final, then a structured settlement can't be used. The constructive-receipt doctrine would cause the present value of the settlement to be treated as the nontaxable compensation for the personal injury. Any interest earned on the annuity or bond that funded the settlement would be taxed to the plaintiff. Rev. Rul. 76-133, 1976-1 C.B. 34 (settlement deposited in court was tax free but interest earned was taxable to the plaintiff); Rev. Rul. 65-29, 1965-1 C.B. 59 (actual receipt of present value of future damages is not taxable, but earnings are taxable).

Question: Where does it operate in daily life?

Answer: Savings account interest is an example. Such interest is taxed to you even if you haven't gone to the bank to pick it up. Such interest is constructively received by you, because there is no limitation on your ability to get it. On the other hand, if there is a substantial limitation on your ability to receive it (a penalty if you pick it up, for example), then you are not in constructive receipt of the interest until the limitation is removed.

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Question: What's the general rule that governs each of the following examples?

Answer: The general rule is that the plaintiff cannot be in constructive receipt of the defendant's lump-sum offer if the plaintiff has not agreed to provide a release. Like a penalty imposed on receiving savings-account interest, the requirement that the plaintiff agree to release her claim is a "substantial limitation" that prevents the constructive-receipt doctrine from operating. If the plaintiff has agreed to give a release or drop an appeal, then the plaintiff is in constructive receipt of the offered money, assuming the money is collectible and no other limitations are present on its receipt.

1. Pre-Verdict Examples.

Question: Lump-sum offer. The defense has offered a lump-sum to settle the claim, which the plaintiff is considering. Does the plaintiff have a constructive receipt problem?

Answer: No. Mere negotiations do not trigger the constructive receipt doctrine. A structured settlement can be used to settle the claim.

Question: Lump-sum conditioned on structure. The plaintiff has agreed to the amount, conditioned on agreeing to a structured settlement using that amount. Is there a constructive receipt problem yet?

Answer: No. Discussing the amount the defendant will spend on the structured settlement will not cause the plaintiff to be in constructive receipt of that amount. Priv. Ltr. Rul. 83-33-035 (May 16, 1983) ("disclosure by defendant of the existence, cost, or present value of the annuity will not cause you to be in constructive receipt of the present value of the amount invested in the annuity"); Priv. Ltr. Rul. 90-17-011 (Jan. 24, 1990) ("knowledge of the existence, cost, and present value of the annuity contract used to fund the settlement offer....will not cause the family to be in constructive receipt of the amount payable under the annuity contract or the amount invested in the annuity contract").

Question: Discussion of periodic payments. The plaintiff has rejected the amount that was offered. The plaintiff has countered with a higher amount, conditioned on agreeing to a structured settlement. The defendant has agreed to the higher amount. We are now discussing the timing and amount of the periodic payments. Any problem yet?

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Answer: No. As long as the plaintiff has not agreed to release the claim, the negotiations can continue without a constructive receipt problem.

Question: Conditioned on a settlement agreement. We have agreed on the amount the defendant will spend. We have also agreed on the timing and amount of each periodic payment. The plaintiff has agreed to release the claim if a mutually acceptable settlement agreement can be drafted. Can the structured settlement still be modified?

Answer: Yes. Conditioning the release on a mutually acceptable settlement agreement will prevent the constructive-receipt doctrine from operating. Until the settlement is final, the parties can continue to negotiate.

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2. Post-Verdict Examples.

Question: Verdict reached. A verdict has been reached. Is the plaintiff in constructive receipt of the verdict amounts?

Answer: No. Verdict findings cannot be reduced to the plaintiff's possession and the doctrine therefore does not operate. A structured settlement can still be used.

Question: Judgement entered. The judgement has been entered in the amounts found by the jury. Is the plaintiff in constructive receipt of the judgement amounts?

Answer: No. The judgement must be final and non-appealable. A structured settlement can still be used if good faith appellate issues exist that would put the amount of the judgement in doubt.

Question: Judgement is final. The judgement has been entered and the time within which to seek reconsideration of the judgement or to appeal the judgement has expired. Is the plaintiff in constructive receipt of the judgement amounts?

Answer: Yes. If the defendant is willing and able to pay the amount of the judgement, then the plaintiff is in constructive receipt of the judgement amount. A structured settlement cannot be used in those circumstances.

Question: Effect of appeal. How does an appeal affect the constructive receipt doctrine?

Answer: A good-faith appeal that puts the amount of the judgement in doubt prevents the constructive receipt doctrine from operating. A structured settlement can be used to settle the case during such an appeal.

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Question: Appeal to negotiate. Can the parties file an appeal solely to allow more time to negotiate a structured settlement?

Answer: No. A tax-motivated appeal will probably be ignored by the Internal Revenue Service. The appeal must be a good-faith appeal that puts the amount of the judgement in doubt.

Question: Offer to pay judgement. The defendant has offered to pay the judgement if the appeal is dropped. Is the plaintiff in constructive receipt of either the judgement amount or the offered amount?

Answer: No. Conditioning the payment on dropping the appeal prevents the constructive receipt doctrine from operating, in the same way that a pre-verdict settlement offer conditioned on a release prevents it from operating. A structured settlement can still be used to settle the appeal.

Question: No-strings offer to pay. What if the defendant offers to pay a part of the judgement with no strings attached while the appeal is pending?

Answer: If the plaintiff refuses a no-strings offer to pay, then the plaintiff will be in constructive receipt of the amount offered. Such offers are rare, however. Normally, a defendant will condition such an offer on dropping further appeals. Where no such condition is present, however, the amount offered will trigger the constructive receipt doctrine. See, e.g., *Howard A. Fromson v. U.S.*, No. 92-98T (Cl. Ct. Aug. 11, 1994) (check received in 1986 from judgement debtor, with no strings attached, was taxable in 1986, even though cashed by the plaintiff in 1987).

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[1] Brobeck, Phleger & Harrison, Attorneys at Law, September 1994.

Rating Services

The financial stability of a life insurance company must be evaluated before selection as the company that will be used to place the settlement annuity. There are several independent sources that continually review the performance of life insurance companies. The most well known of the group is the A.M. Best Company.

A. **A.M. Best.** A.M. Best Company provides two ratings of life insurance companies: one based on the relative strengths of the company against industry averages; the other based on the financial size of the life insurance company. I would suggest that attorneys involved in structured settlements obtain a copy of Best's Insurance Reports, Life / Health Edition. It is an invaluable reference tool.

The relative strength rating takes into account the soundness of the company's underwriting, management skill, level of reserves, availability of resources to meet unexpected events, the company's investments, and any other matters deemed important.

The financial size categories are based on the reported policyholders' surplus with adjustments for some reserves that are counted as liabilities by the companies. See Illustration 5.

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FINANCIAL SIZE CATEGORY	ADJUSTED POLICYHOLDERS' SURPLUS (IN MILLIONS OF DOLLARS)
CLASS I	UP TO 1
CLASS II	1 TO 2
CLASS III	2 TO 5
CLASS IV	5 TO 10
CLASS V	10 TO 25
CLASS VI	25 TO 50
CLASS VII	50 TO 100
CLASS VIII	100 TO 250
CLASS IX	250 TO 500
CLASS X	500 TO 750
CLASS XI	750 TO 1,000
CLASS XII	1,000 TO 1,250
CLASS XIII	1,250 TO 1,500
CLASS XIV	1,500 TO 2,000
CLASS XV	2,000 TO MORE

ILL. 5

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B. **Moody's.** Moody's rates an insurer's credit quality. As such, the ratings are Moody's opinion of the ability of insurance companies to repay senior policyholder obligations and claims punctually. This service makes an effort to consider worst case scenarios in the future in assigning ratings, and includes qualitative, as well as quantitative, factors in its ratings.

C. **Standard & Poor's.** Standard and Poor's ratings for claims-paying ability include both quantitative and qualitative analyses. S & P meets with an insurance company's top management to understand its investment philosophy and return on assets with more insight than a financial statement alone can provide. The company believes this is the best way to judge claims-paying ability over time.

D. **Duff & Phelps.** Duff & Phelps combines quantitative and qualitative analyses. Key factors include the amount of surplus, profitability and asset quality. This service also considers its meeting with the company managers highly important. These sessions measure top managers' experience and goals, as well as their ability to match investments with obligations.

It is not uncommon for the casualty companies that we represent to tell us to use only those companies that are in the "A" category with at least two rating services.

Listed below are some of the major life insurance companies that write settlement annuities and what their ratings are.

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RATING CATEGORIES
RATINGS

RANK	S & P	MOODY'S	D & P	WEISS[1]	BEST
1	AAA	Aaa	AAA	A+	A++
2	AA+	Aa1	AA+	A	A+
3	AA	Aa2	AA	A-	A
4	AA-	Aa3	AA-	B+	A-
5	A+	A1	A+	B	B++
6	A	A2	A	B-	B+
7	A-	A3	A-	C+	B
8	BBB+	Baa1	BBB+	C	B-
9	BBB	Baa2	BBB	C-	C++
10	BBB-	Baa3	BBB-	D+	C+
11	BB+	Ba1	BB+	D	C
12	BB	Ba2	BB	D-	C-
13	BB-	Ba3	BB-	E+	D
14	B+	B1	B+	E	E
15	B	B2	B	F	F
16	B-	B3	B-		
17	CCC	Caa	CCC+		
18	R	Ca	CCC		
19		C	CCC-		

* The rating categories in any given rank are not equivalent to one another.
[1]Weiss uses the letter "S" immediately preceding the rating to designate "smaller companies".

COMPANY	S & P	D & P	MOODY'S	AM BEST
Aetna	AA	AA+	Aa2	A++/X
Allstate	AA+	N/R	Aa3	A+/XIV
Commonwealth	AAA	AA+	Aa3	A+/IX
First Colony	AA+	AA+	Aa3	A++/IX
Great Northern	AA	AA	Aa3	A+/IX
GE Capital Corp.	AA	AA -	Aa3	A/IX
Hartford	AA+	AAA	Aa2	A++/XI
Metropolitan	AA+	AAA	Aa1	A+/XV
Prudential	AA -	AA	Aa3	A/XV
SAFECO Life	AA	AA	Aa2	A++/IX
Transamerica Occidental	AA+	AA+	Aa3	A+/XI

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GUARANTEE AGREEMENTS

Prompted by plaintiffs' concerns regarding the financial stability of third party assignment companies used in assigned cases, most of which are unrated, life companies now issue some form of guarantee agreement. These agreements provide a guarantee by the issuing life insurance company, that they will honor the payment obligations undertaken by their assignment companies, should the assignment companies fail to make said payments. The original guarantee agreement is issued along with the annuity policy; however, specimen guarantee agreements are available. Examples of the guarantees issued by Transamerica Occidental Life Insurance Company and Commonwealth Life Insurance Company are shown on the following two pages.

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No. ______________

Statement of Irrevocable Guarantee

Claimant: ______________________________ Date of Qualified Assignment: ______________

Transamerica Insurance Corporation of California ("TICC"), an insurance company domiciled in the state of California, hereby states and represents as follows:

Whereas, TICC has created Transamerica Annuity Service Corporation ("TASC"), a wholly owned subsidiary domiciled in the State of New Mexico, to act as assignee and third party owner with respect to Qualified Assignments as provided in Section 130(c) of the Internal Revenue Code;

Whereas, TASC has entered into a Qualified Assignment in the above referenced case; and

Whereas, TICC guarantees all of the obligations of TASC, including the above referenced obligation.

Now, therefore, TICC states that if TASC shall fail to make any payment as assumed under said Qualified Assignment, then TICC, by virtue of said guarantee of all of the obligations of TASC, shall make such payment as and when due. Said guarantee is irrevocable as to the above referenced case.

This Statement is sealed and dated this ______________ day of ______________, 19 ________.

Transamerica Insurance Corporation of California

By ______________________
Louise K. Neal, Vice President

By ______________________
Stephen W. Pinkham, Secretary

SAMPLE

IRREVOCABLE CERTIFICATE OF GUARANTEE

Policy Number(s) : ______________________

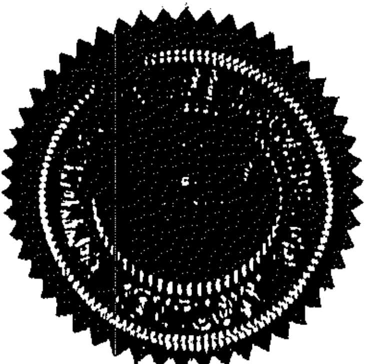
Commonwealth Life Insurance Company ("Guarantor"), an insurance company domicled in the state of Kentucky, hereby states and represents the following:

Whereas, Capital Assignment Corporation ("Assignee") has assumed certain obligations owed to ________________________ ("Payee") pursuant to a Qualified Assignment between Assignee and ________________________, dated ____________________.

Whereas, Guarantor guarantees the above referenced obligations of Assignee to the Payee.

Now, therefore, Guarantor states that if Assignee shall fail to make any payment as assumed under the above referenced Qualified Assignment, Guarantor shall make such payment or payments within ten (10) days after receipt of notice of default in payment from Payee. Notice to Guarantor shall be delivered by certified or registered mail to: Commonwealth Life Insurance Company, Attention: Structured Settlements Administrator, P.O. Box 32940, Louisville, Kentucky 40232.

This Statement is sealed and dated this ______________________ day of ________________, 19__.



COMMONWEALTH LIFE INSURANCE COMPANY

Title: Vice President

SAMPLE

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Split-Funding Annuities

Often times on larger cases we hear that the claimant and/or claimant's attorney does not want to put the entire annuity premium with one life insurance company. One solution is to split the annuity between two, or even three life insurance companies. This would create additional safety and enhance the guarantee for the claimant. Below is an example of split-funding:

Assume the claimant was to get $2,400.00 per month for life. One option would be to use a single life insurance company to make the entire payment. The other option would be to split-fund the monthly payment and have two life insurance companies each pay the claimant $1,200.00 per month for life. This gives the additional security of another life insurance carrier and avoids the objection, "I don't want to put all my eggs in one basket."

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U.S. Treasury Bonds as a Funding Vehicle

In selecting a U.S. Treasury bond structure, *reliability* of the periodic payment transaction *in all its dimensions* is vital. The plaintiff must be assured of receiving all payments due free of income tax. It is not enough that Treasury bonds are utilized to fund the transaction. Also critical are arrangements which assure that (1) the plaintiff's security interest in the bonds be absolutely invincible and (2) the tax law is scrupulously observed, so that there is no risk of an adverse tax result. After all, true reliability in a settlement transaction means achieving all the intended results. In addition, certain product features and services can make a vast difference in the practical utility of a Treasury bond product.

Look for these elements:

The Assignee

In order for the future payment obligation to be properly secured by U.S. Treasury bonds, there first must be an assignment which complies with the requirements of IRC §130. That statute is premised on the idea that an entity which is in an arms-length relationship with the injured party (i.e., not a trust relationship, but instead a creditor-debtor relationship) will own the Treasury bonds and grant the recipient a security interest in those bonds. A trust may be used by the assignee as the custodian or depositary of the bonds, but the assignee should not be the trust itself. The plaintiff should not be a beneficiary of a trust because such an arrangement give him or her economic benefit or constructive receipt.

The Custodian (Depositary) of the Bonds

A federal depositary (i.e., reputable federal bank) should be the custodian of the bonds, which are actually held by it in a computerized "book entry" account with the Federal Reserve Bank. The particular bonds which fund a plaintiff's payments should be in a segregated account at the depositary.

The Security Interest

The Assignment Agreement grants the security interest. That interest has to be *perfected* to serve its function properly. No chances

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should be taken with this aspect of the transaction; "perfection" is the make-or-break element of the security interest.

The Offer

It is very helpful if the offer of a Treasury bond structure does not change on a daily basis, even though the market in such bonds can move every day. Especially in tough negotiations, a "firm" quote (good for at least a few business days) may be required.

Service

It is standard practice for the structured settlement company to produce or help draft the Assignment Agreement. Otherwise tax pitfalls might not be avoided. Also, in view of the stakes to the plaintiff, the structured settlement company should be able to answer any reasonable question.

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Additional aspects

1.) The minimum size case is usually $100,000.00
2.) Deferrals are permitted.
3.) No life contingencies are available.
4.) Maximum length of time is 30 years.
5.) The principal is always returned at the end of time period chosen.

SECURED CREDITOR STATUS

Before the 1988 amendment to Section 130, a periodic payment recipient could be no more than a general creditor of the obligor (asset owner) -- with no direct right, in the event of the obligor's insolvency. The amendment of Section 130 allowed the plaintiff to have a security interest in the funding asset. Provided the transactor is properly configured, the injured party's receipt of income-tax-free payments is secured by invulnerable assets.

While this option is available with most life companies, there are some that have a different view as to the merits of a secured creditor. For example, SAFECO Life Insurance Company, which is a major writer of annuity business takes this approach:

> SAFECO Life gives you better security without the difficulties of the Secured Creditor process. When liability is assigned to SAFECO Assigned Benefits Service Company (SABSCO), it purchases an annuity from SAFECO Life. SABSCO pledges not to sell, change the ownership, or in any way encumber the annuity, nor will it grant any creditor a priority interest in that annuity. Because SABSCO has no creditors other than those for whom the annuities are purchased, the benefits due to each claimant are covered by a specific annuity contract
>
> Because all creditors of SABSCO are in a single class, and there is an annuity for each creditor over which no other creditor has higher rights, the result is the same as a formal secured interest.
>
> SABSCO's charter does not permit it to enter into any other form of business. This eliminates other risk factors that might affect solvency. However, if SABSCO should somehow become involved in other activities which cause it to fail, SAFECO Life has pledged that it will assume SABSCO's liabilities and see that payments to claimants continue on schedule. A corporate Guarantee Letter to this effect accompanies each contract involving an assignment.

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As you can see, there are different options to consider. The key point to remember is that the Secured Creditor is available to those who feel they desire the additional security.

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RECENT IDEAS AND PRODUCTS

IRC §468B - THE DESIGNATED SETTLEMENT FUND

With the enactment of Internal Revenue Code §468B in 1986 Congress introduced favorable tax treatment for a new entity in the tax law, the Designated Settlement Fund. The legislation was crafted primarily with litigation involving mass tort claims in mind, such as asbestos, aircrash, and toxic chemicals lawsuits. The result is a marked expansion in opportunities for using structured settlements, medical expense trusts, and other innovative remedies in a variety of contexts.

Overview

The operation of §468B (as well as Treasury Regulations and a recently promulgated Revenue Procedure), can best be analyzed using a simple example. Suppose Defendant Dauntless, Inc. is alleged to have allowed a leak of toxic heavy metals which exposure has caused illness among a group of plaintiffs, Polly, Patrick, Peggy, and others. Dauntless wishes to (1) pay over $5 million in 1994 to a fund which will be used to satisfy the claims of Polly, *et al.* in exchange for a general release, and (2) take a deduction on its income tax return of $5 million in 1994.

It seems simple enough, but let us further suppose that firstly, it hasn't yet been decided whether Polly will be paid more or less than Patrick and Peggy; and secondly, it is not, in any event, practicable and/or desirable for all of the plaintiffs to receive full payment from Dauntless in 1994.

This potentially complicates the tax results for Dauntless. The complexity arises from the fact that, under the "economic performance" doctrine embodied in IRC §461(h), (added to the Code in 1984), the general rule is that Dauntless cannot deduct all $5 million it would pay in 1994; *instead,* it can only deduct its outlays *as they are received* by Polly and her co-plaintiffs. Section §468B was enacted specifically to address the tax problem which would otherwise face Dauntless, if Dauntless issues its $5 million check to a Designated Settlement Fund pursuant to §468B, Dauntless may *deduct its full outlay in 1994.*

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Statutory Requirements and Functions

Generally, to meet the requirements of the statute, (1) the Designated Settlement Fund must be independent of Dauntless, (2) it must be established pursuant to directive or order of a government agency or a court, and (3) all further liability of the defendant/payor must be completely extinguished.

The critical function of the §468B Designated Settlement Fund (hereafter "DSF") is that the DSF takes over the responsibility of funding and administering a variety of remedial payments to or for the benefit of the injured parties. For example, the DSF is authorized to act as an assignor of a periodic payment (structured settlement) obligation

under IRC §130, just as a liability insurer or a defendant can. (See Rev. Proc. 93-94.) In practice, the liability/control which formally rested on the shoulders of the defense may be transferred to the DSF in exchange for Dauntless's complete discharge of liability.

Moreover, the DSF may be authorized or directed to, e.g., create medical expense programs covering some or all of the plaintiffs, provide for educational funds to benefit minors, or establish research funds to further investigate the consequences of the toxic exposure.

Summary

In a broad perspective, §468B's provision for Designated Settlement Funds may be understood as a significant adaptation of the tax law to accomodate the much wider variety of remedies which modern tort litigation requires. For structured settlement professionals, Rev. Proc. 93-94 creates new opportunities for tax-sanctioned remedial plans without the necessity for a prolonged negotiations between adverse parties over the exact date and amount of each future benefit to every claimant.

A Settlement Annuity That Increases With the CPI

While the product has not been formally introduced, Transamerica is coming out with a product that will increase with the Consumer Price Index (CPI). Here are the features of this new product:

* **Benefit payments increase.** After the first year, the CPI linked benefit payments automatically increase when the CPI increases. The annual adjustment is effective on the payment anniversary date.

* **Benefit payments can never go down.** The payments will not decrease even if the CPI decreases The benefit payments will never be less than those in the prior policy year. In other words, benefit payments can increase but will never go down.

* **Increases are not fixed.** Increases in benefit payments will be determined by the movement in the Consumer Price Index.

* **The maximum payment increase for any given year is 10%.**

* The **Inflation Fighter** sm structured settlement annuity endorsement offers tremendous flexibility. It can be sold in the following formats:

    * Life only
    * Certain and life
    * Certain only
    * Joint and survivor

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Additional Information

* Benefit payments must be at least annual in frequency.

  The initial benefit payment must be fixed as to the amount and date, i.e., the first benefit payment cannot be deferred and indexed without a known starting amount, Thereafter, the amount of benefit payments will only be redetermined on each anniversary of the first payment date.

* In the absence of CPI increases, benefit payments will remain level.

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Workers Compensation - Growing Area

Structured settlement annuities on worker's compensation cases are handled differently than the standard tort claim. Work Comp annuities fall under Internal Revenue Code 72(u) which states that the annuities must be immediate. An immediate annuity:

1) is purchased with a single premium;

2) has a payment commencement date no later than one year after the purchase date, and

3) provides for a series of substantially equal payments with payment intervals not greater than one year. "Substantially equal" has been defined as a 10% compounded annual increase or less.

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Due to these requirements, periodic lump sum payments cannot be done unless coupled with annual or monthly benefits. The total of these payments cannot exceed a 10% compounded annual increase. In addition, if payments are made monthly, the payment amount must be at least $100.00.

Work Comp annuities must meet the above qualifications of an immediate annuity or the owner will have an income tax liability for the interest credited each year. This applies whether the ownership is assigned to a third party owner or retained by the Insurer.

Since Work Comp annuities do not meet the requirements of Internal Revenue Code 130, they are non-qualified and the Qualified Assignment form is not used. The Assignment and Release form (Exhibit 1) is used instead. This form assigns the ownership of the annuity to a third party owner, and releases the Insurer of any obligation to make the future periodic payments.

Exhibit 1

ASSIGNMENT AND RELEASE

"Claimant"

"Assignor"

"Assignee"	SAFECO National Life Insurance Company, a Washington corporation
"Annuity Issuer"	SAFECO Life Insurance Company

Effective Date

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WHEREAS, the Assignor is a party to a Stipulation for Settlement dated ____________________, which is incorporated herein by reference; and

WHEREAS, the Stipulation for Settlement calls for the Assignor to make certain periodic payments in connection with the settlement; and

WHEREAS, the Assignor desires to assign its liability to make such periodic payments under the Stipulation for Settlement, the Assignee agrees to assume such liability, and Claimant consents to said assignment and releases Assignor of all of its liability to make said payments;

NOW, THEREFORE, in consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. The Assignor assigns and the Assignee assumes liability to make periodic payments as follows:

   (Outline future annuity payments here.)

   These periodic payments do not include any amounts required by the Stipulation for Settlement to be paid in cash to the Claimant, or cash payments to the attorney(s) of the Claimant, if any.

Any payments to be made after the death of the Claimant shall be made to *(Outline beneficiary information here.)*, as requested by the Claimant, or to such person or entity as shall be designated in writing by the Claimant to the Insurer or the Insurer's Assignee. If no person or entity is so designated by the Claimant, or if the person designated is not living at the time of the Claimant's death, such payments shall be made to the estate of the Claimant.

2. Claimant consents to the assignment and assumption in Paragraph 1 above and releases and forever discharges the Assignor from all liabilities and obligations to make the periodic payments agreed to in the Stipulation for Settlement. The Assignor has and shall have no future liability or obligation with respect to the liabilities and obligations assigned to and assumed by the Assignee under this agreement.

3. SAFECO National Life Insurance Company assumes liability only for the periodic payments as scheduled in the Stipulation for Settlement. SAFECO National Life Insurance Company will not be liable for any changes, revisions or future claims arising out of this same cause of action

4. Assignee's obligation to Claimant on account of this assignment is no greater than that of the Assignor immediately preceding this assignment. None of the payments called for may be accelerated, deferred, increased, or decreased. Nor shall they be sold, mortgaged, pledged, encumbered, or anticipated, by assignment or otherwise.

5. The Assignee will provide for its liability to make payments by purchasing an annuity contract issued by SAFECO Life Insurance Company of Redmond, Washington, and will discharge its liability hereunder by mailing on the due date a valid check in the specified amount to the address of record.

6. Each of the Parties hereby acknowledges that it understands the legal effects of this Assignment, and represents that it has not relied upon any representations or warranties of any other party hereto.

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7. This agreement shall be binding on the successors, heirs and assigns of Claimant and of the Assignee.

8. This agreement constitutes the full and entire understanding and agreement of the parties with regard to the subject matter hereof and any prior agreement, understanding or representation concerning the same is hereby terminated and is of no further force and effect. The parties cannot alter or modify this agreement except by instrument in writing executed by each of them.

9. This Assignment and Release shall be construed and interpreted in accordance with the laws of the State of ________________.

10. In the event that this Assignment and Release is found to be or becomes null and void, the Assignee shall assign its ownership in any annuity contract purchased pursuant to Paragraph 5 to the Assignor.

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IN WITNESS WHEREOF, the Parties have executed this Assignment and Release on the date appearing above.

CLAIMANT:

________________________________ Date:________________

ASSIGNOR:

By________________________________ Date:________________

Title________________________________

ASSIGNEE: SAFECO National Life Insurance Company

By________________________________ Date:________________

Title________________________________

Another option is available if an immediate annuity will not suit the needs of a particular employee. There is a reinsurance product available whereby the life company assumes the liability to make future periodic payments to the employee from the Insurer. There is no annuity involved; simply a reinsurance agreement outlining the future payments to be paid by the life company.

A copy of the executed Stipulation for Settlement, and Award on Stipulation are required to obtain both an annuity contract and a reinsurance agreement.

We also have contract enhancements available which may save you thousands of dollars in commuted value, ***if your company retains ownership of the annuity, and does not utilize a third party assignment.*** They are:

1) Elimination of Liability Upon Death of Annuitant
   This endorsement provides that if the employee dies during the deferral period, or before the total amount paid equals the premium, the balance necessary to equal the premium is paid in a lump sum to the designated beneficiary, which in this case, would be the contract owner.

2) Remarriage Endorsement
   This endorsement gives the contract owner the exclusive right to receive the commuted value of any remaining ***life contingent and/or guaranteed*** annuity payments upon the remarriage of the widowed spouse.

3) Elimination of Liability
   This endorsement gives the contract owner the exclusive right to receive the commuted value of any remaining ***guaranteed*** payments upon the elimination of liability as defined by the endorsement. For example, a contract owner's liability to

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provide income to a minor for college tuition may be eliminated if the minor does not enroll in school. This particular type of endorsement is reviewed on a case-by-case basis.

The elimination of Liability Upon Death of Annuitant endorsement is also available when the ownership of the annuity is assigned to a third party; however, the balance of guaranteed payments due under the contract are paid as scheduled, not in a lump sum. For example, an employee is scheduled to receive $500.00 per month for 5 years guaranteed, but dies after 12 payments have been paid. The Insurer was established as the beneficiary, so the remaining 48 monthly payments will continue to be paid monthly to the Insurer.

J

Environmental Cleanup Fund

According to a recent RAND study, approximately $410 million, or close to 90 percent of the money that insurers pay yearly for environmental cleanup, is actually being spent on legal fees to contest liability. And the RAND study didn't even examine the legal fees spent by polluting companies or government agencies.

One way to put an end to the legal dispute between insurers and insured regarding responsibility for environmental cleanup is through an environmental structured settlement.

A recent case will illustrate how an annuity can work:

The dispute began when a California company was contacted by a state environmental regulatory agency regarding the cleanup of polluted groundwater from petroleum seepage at one of its sites. An engineering firm determined the cleanup would take seven years.

The company turned to its property and casualty insurance companies to pay for the pollution cleanup. Because of the unsettled state of the law, all parties faced an uncertain outcome of an impending trial, but the parties were convinced that a structured settlement would serve everyone's best interest. The total payout over the cleanup period will increase the amount received to clean up this environmentally endangered site.

In addition to the actual savings, a potential four-month trial was avoided, which saved significant expense dollars as well. The insurers can also "take-down" the reserves set up to cover the claim. And finally, as part of the settlement, a "policy buy-back," whereby the insurance company agreed to buy back the original insurance policies as if they had never been issued, was used. The insurers now have no further liability.

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Although only a handful of carriers have used structured settlements for toxic cleanups, I think you will see a lot more of them settling this way in the future once they realize how much money can be saved, how much litigation can be avoided, and how beneficially this disposes of the environmental hazard for all parties.

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Star Tribune
Monday
July 24, 1995
1D

Piper Jaffray income index

	Current rate	Previous week	Net chng.
Short-term interest rates			
Prime rate	8.75%	8.75%	—
Money-market mutual funds	5 57	5.61	-.04
Bank money-market savings	3 28	3 33	-.05
Bank interest checking accounts	1 19	1.19	—
3-month T-bills (prevailing dealer rate)	5.40	5.40	—
3-month bank certificate of deposit	5.20	5.15	+ 05
6-month T-bills (prevailing dealer rate)	5 45	5.40	+.05
1-year T-bills (prevailing dealer rate)	5.40	5.35	+.05
Intermediate-term interest rates			
2 5-year certificate of deposit	5.45%	5.30%	+ 15
5-year certificate of deposit	5 65	5.40	+.25
5-year T-notes (prevailing dealer rate)	6.00	5.70	+ 30
10-year T-notes (prevailing dealer rate)	6.25	6 00	+ 25
5-year zero coupon bonds	5 80	5 70	+.10
10-year zero coupon bonds	6 25	6.10	+.15
5-year finance company notes	6.40	6.20	+ 20
10-year finance company notes	6.65	6.45	+.20
GNMA bonds	6.60	6.40	+.20
Long-term interest rates			
20-year zero coupon bonds	7 00%	6.70%	+.30
30-year T-bonds (prevailing dealer rate)	6 75	6.52	+ 23
30-year A-rated industrial bonds	7.35	7.10	+ 25
30-year A-rated utility bonds	7.40	7.10	+.30
Tax-exempt Minnesota municipal bonds			
5-year A-rated general obligation	4.55%	4 50%	+ 05
5-year Aa-rated housing revenue	4.70	4 80	-.10
10-year A-rated general obligation	5 10	5 00	+ 10
10-year A-rated hospital revenue	5.40	5 35	+.05
10-year Aa-rated housing revenue	5.25	5.20	+.05
20-year A-rated general obligation	5 80	5.75	+ 05
30-year A-rated hospital revenue	6.30	6 25	+.05
30-year Aa-rated housing revenue	6.30	6.25	+.05

The above rates, gathered and supplied by Piper, Jaffray Inc., are representative rates available from banks, savings institutions and broker-dealer firms in the Twin Cities area. Rates may vary according to locality, size of purchase and rating, and they do not reflect transaction charges if any The figures for investments with maturities shorter than a year reflect annualized rates of return

Stock market indexes			
Dow Jones industrial average	4641.55	4708 82	-67.27
NYSE composite index	296.67	298.90	-2.23
Standard & Poor's 500-stock index	553.62	559 89	-6.27
NASDAQ composite index	961.70	999.30	-37.60
Precious metals prices			
Gold price per troy ounce	386.80	389 30	-2.50
Silver price per troy ounce	5.179	5 216	-0.04

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TAX-EXEMPT MUNICIPAL BOND
VERSUS
TAX-EXEMPT SETTLEMENT ANNUITY

	TAX-EXEMPT MUNICIPAL BOND[1]		TAX-EXEMPT SETTLEMENT ANNUITY[2]	
	Interest Rate	Annual Rate	Interest Rate	Annual Rate
20-Year	5.80%	$5,800.00	6.24%	$6,238.00

Please note: In each example, $100,000.00 is returned at the end of the period indicated.

Figures are effective as of July 24, 1995.

[1]General obligation state and local bonds rated "A" by Moody's Investor Service. Source: Piper, Jaffray & Hopwood, Inc.

[2]Based on an immediate annuity with level payments from an A. M. Best's "A+" rated life company.

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J

APPENDIX A

WHAT IS A STRUCTURED SETTLEMENT ANNUITY?

The purpose of a structured settlement, as opposed to a lump sum settlement, is to provide the injured party with a guaranteed stream of **tax-free** payments which will provide for the claimant's needs now and in the future

The best means of providing these guaranteed payments is by using an "annuity" in which the benefit schedule is prepared in advance. This way, the claimant is not burdened with investment decisions and management worries.

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Simply put, an annuity is a legal contract between an insurance company and a second party which guarantees periodic payments to a named payee. Unlike life insurance, which pays upon a person's death, an annuity makes payments while the person is living.

Using a single premium payment, the annuity contract is purchased through a life insurance carrier which offers these annuities specifically for settlement purposes.

Benefit payments are then made directly from the annuity carrier to the claimant, as scheduled.

Under current tax law, the payments received by the claimant from this annuity contract are **tax-free** as a result of Internal Revenue Service handed down Revenue Ruling 79-220, which is the leading and controlling precedent for this concept. This ruling was codified by Congress in 1983 with the passage of Public Law 97-473.

APPENDIX B

APPROACHES

1. "Would you be interested in looking at a program our company offers which spreads out the dollars on a tax-free basis?"

2. "We can offer you cash for your settlement, but I would like to show you three optional programs in which the payments come to you periodically on a tax-free basis?"

3. "You may have heard or read about something called Settlement Annuities, whereby the claimant receives his settlement spread out into the future on a tax-free basis. Would you be interested in something like that?"

4. "I am excited to be able to show you some plans that will pay large dollar sums in the future on a tax-free basis."

5. "I would like to show you some plans that I believe may fit your situation today and into the future. The great thing about these plans is that the future payments are tax-free and there are no fees or management costs to worry about."

6. "In addition to a cash settlement, i would like to show you a plan that I have put together for you where you can receive the money periodically over time on a tax-free basis."

7. "Would you be interested in looking at some plans that will provide tax-free dollars for your child during his.her college years?"

8. "I would like to show you some numbers (or a plan our company offers) which would supplement your retirement on a tax-free basis. Would you be interested in something like that?"

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APPENDIX C

Sample/Adult

Settlement Agreement and Release

This Agreement is entered into this _______ day of ____________, 1994, between ________________ ("Claimant"), and _____________ ("Insured"), together with _________________ Insurance Company ("Insurer").

It is agreed that in consideration for the full discharge of past, present and future claims arising out of an occurrence on or about / / , at or near ____, as a result of the alleged actions or omissions of the Insured, the Insured agrees to pay the sums hereinafter specified. This Release shall apply to all claims, whether known or unknown, on the part of all parties to this Agreement, to the effect that this Agreement shall be a full, binding and complete settlement between the parties to this Agreement.

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1. The Insured, together with the Insurer, shall arrange for payments of the following amounts and at times hereinafter set forth:

   A. Payment of $______________ directly from the Insurer, to ____, upon the proper execution of this Agreement.

   B. *(Outlined future annuity payments here.)*

2. The Insured, through his/her/their Insurer, ______________________ Insurance Company, as additional security for said periodic payments, shall purchase an annuity contract through or with ___________ Life Insurance Company. Payments made pursuant to this said contract shall operate as a pro tanto discharge of periodic payments set forth in the preceding paragraph.

3. In the event of the death of ______________________ at any time prior to the guaranteed periodic payments being paid, payments will be paid to *(Outline beneficiary information here.)*, as requested by the Claimant, in writing, to the Insurer.

Executed at ____________________________, on ______________, 1994.

______________________________	______________________________
Claimant:	Claimant's Attorney:
_____________ Insurance Company	By: ___________________________
Insurer	Authorized Representative

APPENDIX D

Sample/Adult

Settlement Agreement and Release

The undersigned hereby release and forever discharge ________________________ ("Insured"), and ________________________ Insurance Company ("Insurer"), his/her/their heirs, executors, administrators, agents and assigns, and all other persons, firms, or corporations liable, or who might be claimed to be liable, none of whom admit any liability but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of whatsoever kind or nature, and particularly on account of loss of or damage to property and on account of bodily injuries, known and unknown and which have resulted or may in the future develop, or arising out of damage or loss, direct or indirect, sustained by ______________ ("Claimant"), in consequence of an occurrence on or about __/__/____, at or near ____________________________________.

1. Insurer, on behalf of its Insured, shall arrange for payments of the following amounts at the times hereinafter set forth:

   A. Payment in the amount of $________ to ____________________ for ____________________________, upon the proper execution of this agreement.

   B.

   (Outline future annuity payments here.)

All sums set forth herein constitute damages on account of personal injuries and sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

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2. Within the meaning of Section 130(c) of the Internal Revenue Code of 1986 as amended (the "Code"), __________________ Insurance Company ("Assignor") may make a "qualified assignment" to ______________________________ ("Assignee") of Assignor's obligation to make the future payments described in Paragraph 1(B) hereof (the "Periodic Payments"). The undersigned hereby consent to such an assignment and agree (a) that Claimant's rights to the Periodic Payments and against the Assignee shall be no greater than those of a general creditor, (b) that Assignee is not required to set aside specific assets to secure such Periodic Payments, (c) that Assignee's obligation to make Periodic Payments shall be no greater than those of Assignor immediately preceding the Assignment and (d) that Periodic Payments from the Assignee cannot be accelerated, deferred, increased or decreased by the Claimant or any payee, nor shall Claimant or any payee have the right to anticipate, sell, mortgage, assign, or otherwise encumber the Periodic Payments. Upon assignment, Assignee or its designee shall mail future payments directly to the Claimant or designated payee(s).

3. Upon making such a "qualified assignment", Assignor shall be fully released from all obligations to make the Periodic Payments and only Assignee shall be obligated to make the Periodic Payments. Assignee's obligation to make each Periodic Payment shall be discharged upon mailing of a valid check in the amount due to the address so designated by the Claimant or designated payee(s).

4. Assignee will fund the Periodic Payments by purchasing a "qualified funding asset", within the meaning of Section 130(d) of the Code, in the form of an annuity policy from ______________ Life Insurance Company. All rights of ownership and contract of such annuity policy shall be vested in the Assignee, but Assignee will have ___________________ Life Insurance Company make payments directly to or for the benefit of the Claimant or designated payee(s) for Assignee's convenience.

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5. In the event of the death of Claimant at any time prior to the guaranteed Periodic Payments being paid, payments will be paid to *(Outline beneficiary information here).*, as requested by Claimant, or to such other person or entity designated by Claimant, in writing, to the Insurer or Assignee. If no person or entity is so designated by Claimant, or if the person or entity is not living at the time of Claimant's death, payments will be made to the Claimant's estate.

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Executed at ______________________________, on _______________, 1994.

____
Claimant:

____
Claimant's Attorney: (If applicable)

______________ Insurance Company
Insurer

By______________________________
Authorized Representative

Uniform Qualified Assignment

"Claimant"

"Assignor"

"Assignee"

"Annuity Issuer"

"Effective Date"

This Agreement is made and entered into by and between the parties hereto as of the Effective Date with reference to the following facts:

A. Claimant has executed a settlement agreement or release dated ______________________, 19____ (the "Settlement Agreement") that provides for the Assignor to make certain periodic payments to or for the benefit of the Claimant as stated in Addendum No. 1 (the "Periodic Payments"); and

B. The parties desire to effect a "qualified assignment" within the meaning and subject to the conditions of Section 130(c) of the Internal Revenue Code of 1986 (the "Code")

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties agree as follows:

1. The Assignor hereby assigns and the Assignee hereby assumes all of the Assignor's liability to make the Periodic Payments. The Assignee assumes no liability to make any payment not specified in Addendum No. 1.

2. The Periodic Payments constitute damages on account of personal injury or sickness in a case involving physical injury or physical sickness within the meaning of Sections 104(a)(2) and 130(c) of the Code.

3. The Assignee's liability to make the Periodic Payments is no greater than that of the Assignor immediately preceding this Agreement. Assignee is not required to set aside specific assets to secure the Periodic Payments. The Claimant has no rights against the Assignee greater than a general creditor. None of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned or encumbered.

4. The obligation assumed by Assignee with respect to any required payment shall be discharged upon the mailing on or before the due date of a valid check in the amount specified to the address of record.

5. This Agreement shall be governed by and interpreted in accordance with the laws of the State of ______________________

6. The Assignee may fund the Periodic Payments by purchasing a "qualified funding asset" within the meaning of Section 130(d) of the Code in the form of an annuity contract issued by the Annuity Issuer. All rights of ownership and control of such annuity contract shall be and remain vested in the Assignee exclusively.

7. The Assignee may have the Annuity Issuer send payments under any "qualified funding asset" purchased hereunder directly to the payee(s) specified in Addendum No. 1. Such direction of payments shall be solely for the Assignee's convenience and shall not provide the Claimant or any payee with any rights of ownership or control over the "qualified funding asset" or against the Annuity Issuer.

8. Assignee's liability to make the Periodic Payments shall continue without diminution regardless of any bankruptcy or insolvency of the Assignor.

9. In the event the Settlement Agreement is declared terminated by a court of law or in the event that Section 130(c) of the Code has not been satisfied, this Agreement shall terminate. The Assignee shall then assign ownership of any "qualified funding asset" purchased hereunder to Assignor, and Assignee's liability for the Periodic Payments shall terminate.

10. This Agreement shall be binding upon the respective representatives, heirs, successors and assigns of the Claimant, the Assignor and the Assignee and upon any person or entity that may assert any right hereunder or to any of the Periodic Payments.

Assignor: ____________________

By: ____________________

Authorized Representative

Title ____________________

Assignee: ____________________

By: ____________________

Authorized Representative

Title ____________________

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Addendum No. 1
Description of Periodic Payments

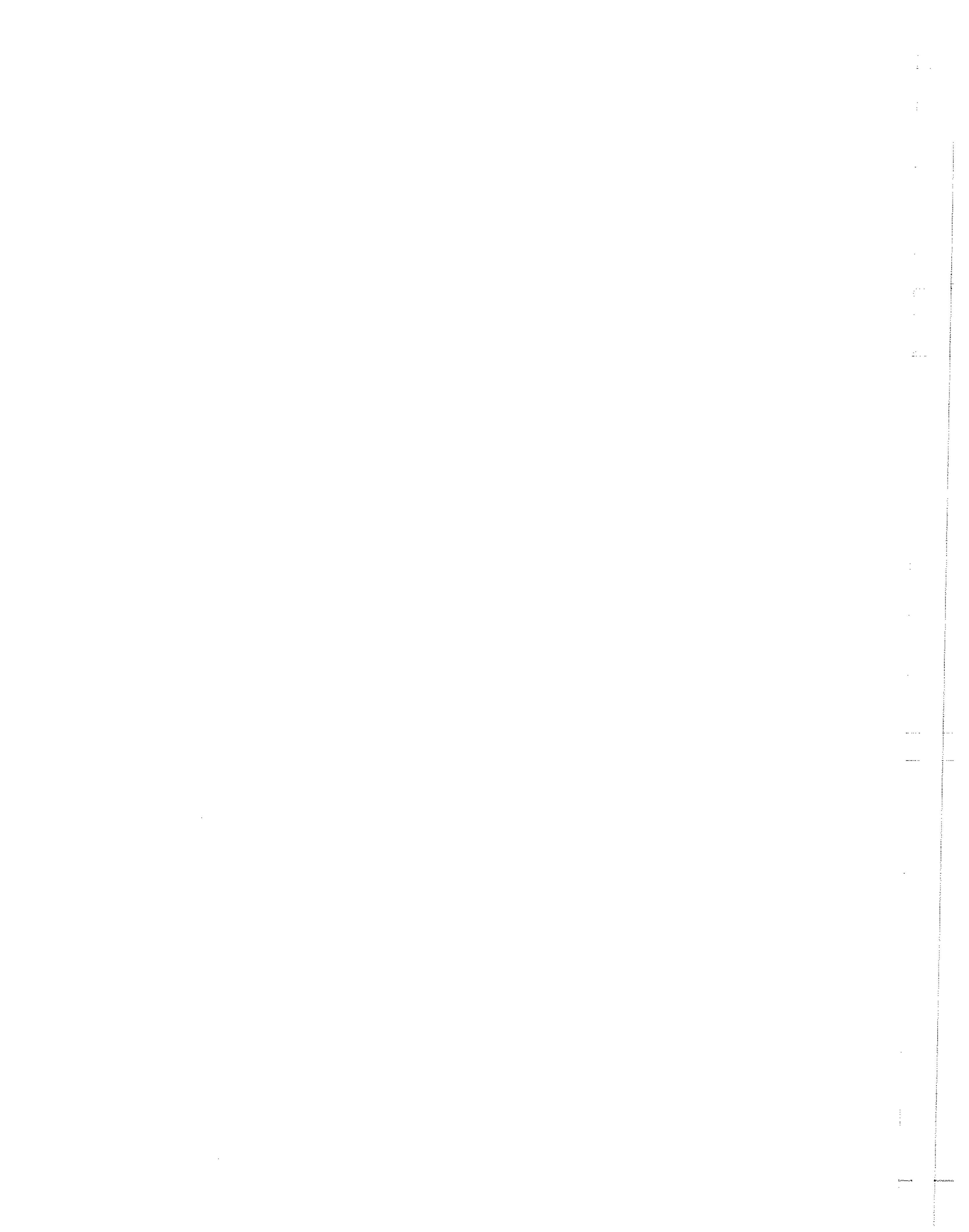
Initials

Assignor: ____________

Assignee: ____________

UQA ED. 4-88

Printed in USA



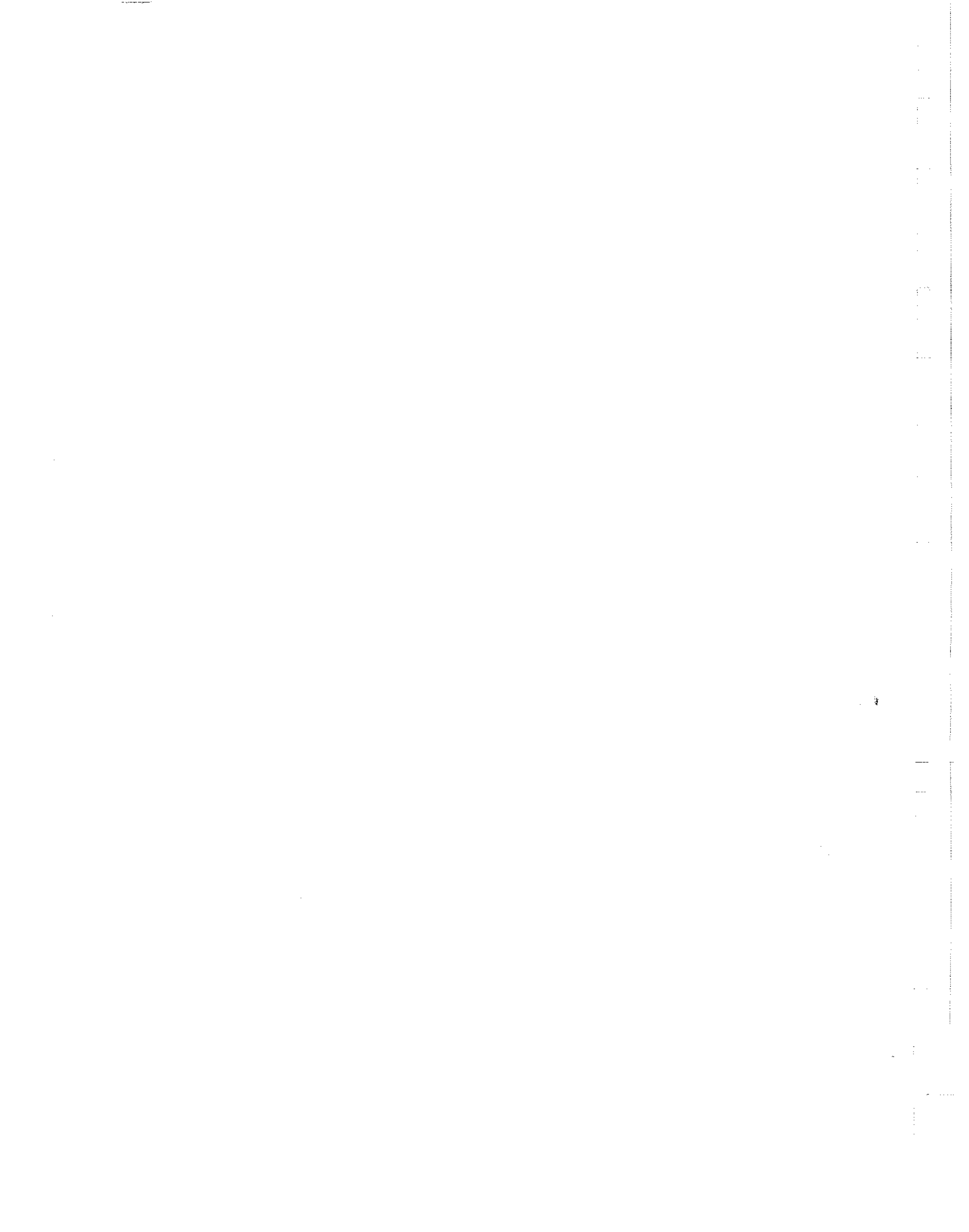
ETHICS AND BILLING

Joseph C. Holland
Iowa City, Iowa

ETHICS AND BILLING

Joseph C. Holland
Iowa City, Iowa

K



ETHICS AND

ALTERNATIVE BILLING

"I don't charge by the hour or by the day. I'm not a mechanic. I am an artist. If you are going to use the time to be a bookkeeper, you can't be a trial lawyer. --Percy Foreman

I. Why be concerned about fees and billings (other than getting paid)?

A. Public perception of legal fees & billing practices.

1. One of the most negative parts of the public perception of lawyers. ". . .lawyers are not generally regarded by the public as particularly ethical. One major contributing factor to the discouraging public opinion of the legal profession appears to be the billing practices of some of it's members. "ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-379

2. ". . .disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public." ABA Special Committee on Resolution of Fee Disputes.

3. ". . .clients don't always appreciate that justice can carry an expensive price tag. But they at least expect us to put a price on the tag. Without price tags, legal fees become a real source of client discord. . . . Would you commission an artist to do a painting without a price? You can bet your law degree you would not. To clients, legal bills always seem too late and too large, and the time spent and the work done too vague. The solution is to establish a clear fee structure and put it in writing." Milton W. Zwicker, "What Clients Really Want from Their Lawyers", Law Practice Management: September 1994

B. Importance of billing as a communication practice.

2. The fee arrangement may (should) allow for changes in conditions of representation - with notice to the client.

C. The lawyer will suffer the consequences of misunderstandings, and if your fee agreement is oral you can guess who will probably lose.

D. In Iowa the burden is on the lawyer to prove:

1. That the agreement is fair and equitable, and
2. That the client understood the agreement.
3. See, Committee v. Chipokas, 493 NW2d 414 (Iowa 1992) (one year suspension for failing to explain implications of fee contract. The court suggested that Chipokas should have advised the client to consult other counsel regarding the implications of the fee agreement.)

E. The fee contract can't be changed without notice to the client.

1. Hourly rate can't be changed without notice. Severson & Werson v. Bolinger, 235 Cal. App. 3d 1569, 1 Cal. Rptr 2d 531 (1991).
2. Changes may be subject to Chipokas problems, e.g. duty to refer to other counsel.
3. Good fee contract provides right to change fees and to withdraw from representation for nonpayment.

F. Even if it's only a generic letter to clients about fees, put something in writing. It benefits both parties.

G. Consider potential civil and even criminal liability for deviating from the fee contract. An attorney in Raleigh, North Carolina, was indicted on 13 counts of mail or bank fraud, 2 counts of misleading financial institutions about billing practices, and a federal RICO violation. The Indictment follows this outline. More about this in IV.

III. What are reasonable fees?

K

A. Fee schedules are no longer a valid basis for fees, but some of the principles expressed in the fee schedules are the same principles underlying the Ethics Opinions:

[In formulating the advisory fee schedule] special consideration was given to the fact that not only are lawyers entitled to a fair compensation for their services, but that, under the economic necessities of the day, they must receive such compensation as will enable them to fairly and freely carry out their duties as administrators of justice.

For these reasons an advisory schedule of minimum fees, covering the services listed in the schedule, performs a useful function.

* * *

Clients and lawyers should realize that failing to receive fair compensation will, in the long run, tend to produce discrimination between clients, hasty and careless work and a cheapening of the relationship of confidence and respect necessary between client and attorney. Advisory Schedule of Minimum Fees, Iowa State Bar Association, December 1968.

B. Compare this with EC 2-19 "A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter lay persons from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable to lawyer to serve his client effectively and to preserve the integrity and independence of the profession."

C. DR 2-106.

1. "A lawyer shall not enter into an agreement for, charge, or collect . . . [a] clearly excessive fee."
2. Eight criteria for determining the reasonableness of a fee:

K

2. The fee arrangement may (should) allow for changes in conditions of representation - with notice to the client.

C. The lawyer will suffer the consequences of misunderstandings, and if your fee agreement is oral you can guess who will probably lose.

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C. DR 2-106.

1. "A lawyer shall not enter into an agreement for, charge, or collect . . . [a] clearly excessive fee."
2. Eight criteria for determining the reasonableness of a fee:

K

a. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

b. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

c. The fee customarily charged in the locality for similar legal service.

d. The amount involved and the results obtained.

e. The time limitations imposed by the client or by the circumstances.

f. The nature and length of the professional relationship with the client

g. The experience, reputation, and ability of the lawyer or lawyers performing the services.

h. Whether the fee is fixed or contingent.

IV. Methods of determining fees and allowable arrangements.

A. Hourly rate

1. Probably the prevailing practice, at least as of today, but is declining in use.

An ABA poll of 250 law firms with 10 or more attorneys, published in the February 1995 ABA Journal, indicates 43 percent of those firms intend to decrease billings based on standard hourly rates and 51 percent intend to increase billings based on project billing or flat fees. Forty-two percent intend to increase task based billings.

2. An hourly fee cannot be characterized as a "reasonable fee" because the total fee can vary depending upon the hours spent. EC 2-10. This opinion relates most directly to advertising, but is a consideration whenever discussing fees

with clients. Don't use the Chipokas approach "Trust me. I'm the lawyer."

3. United States v. Kirby, No. 93-157-01BR5, Eastern District of North Carolina.

   a. Kirby was indicted on federal criminal charges for his practices in billing Resolution Trust Corporation. This case was reported on two occasions in Lawyers Weekly USA. According to those reports the prosecution alleged that Kirby billed clients for more than 90 hours on some days. The prosecution further contended that he billed 1547 hours in May of 1991, nearly 50 hours per calendar day. The government also alleged that he billed over 13,800 hours in a 12 month period.

   b. Kirby charged between $65.00 and $175.00 per hour. However, some tasks were reportedly subject to a minimum increment.

      Kirby also employed 8 support staff and used automation to turn out "massive amounts of letters and documents in a day."

   c. According to Lawyers Weekly "the prosecution did not take issue with what Kirby charged, but rather focused on whether Kirby's clients were aware of how he charged." In other words, the government treated this as a case of misrepresentation, because the task based billing was not disclosed as part of the fee agreement.

   d. In the original trial the jury hung. Kirby subsequently pleaded guilty to one count according to reports.

B. Flat fee\task based billing\project billing

1. One of the hottest current concept in billing, pricing based on cost of providing service plus profit.

2. Task based billing reduces legal services to discrete tasks, which can be the entire product, or part of a larger body of work. This is sometimes called unit billing.

   a. There are various schemes which reduce legal tasks to code numbers to be used in billing systems, so that each task can be separately priced.

   b. Computer software using the coding system requires the attorney to carefully categorize the task by the three digit code.

   c. Examples of task based billing can be found in the Appendix, they include:

      1. Task based billing of the Discovery process, from the Uniform Task-Based Management System, developed by the ABA Section of litigation and others; and

      2. Task based billing of document review from the American Corporate Counsel Association's Law Department Management Committee.

3. Project billing is the sum of all of the tasks, but is not priced for each separate task in the overall project.

4. Each of these methods places great importance upon the lawyer being able to accurately price these services, in advance of the service being rendered. The advantage to the client is the very ability to have the task or project priced in advance.

   a. The client can also price shop more easily when able to access a price list by task from a number of law firms.

5. Technology is a key component in task or project billing.

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a. Use of forms and pattern documents makes pricing easier.

b. Computers can lessen attorney and staff time on a project and raise the profit margin in task based billing.

c Document assembly can be your office forms or canned material available for numerous areas of practice.

d. Such resources almost compel task based fees because if used properly the attorney's time (billable hour) is minimal. The fee basis needs to be clear to the client.

6. Ethics Opinion (EO) 86-13 started from the premise that a flat fee is improper:

"In matters which involve continuing legal evaluation and more than limited, specific professional service the potentials for interference with counsel's exercise of professional judgements or for "cutting corners" or limiting professional service are significant."

Compare this to the language from the 1968 fee schedule quoted above.

7. The flat fee was reconsidered in EO 93-2. In that opinion, the Committee backed away from a blanket presumption that flat fees are improper and laid out the need to make it very clear what services were included in a flat fee and when fees become payable. The basic concepts of client knowledge of what the fee is for and adequate compensation to the lawyer are left intact from earlier pronouncements.

a. Only if the work is very predictable is a flat fee justified. e.g. EO 92-12 flat fee for FmHA closing

services is acceptable if EO 86-13 relating to disclosures is satisfied.

8. This analysis works most appropriately with maximum fees, but does not appear to prohibit minimum fees.

9. A non-refundable retainer is a minimum fee concept that hasn't found much favor in the Courts.

   a. New York has banned non-refundable retainers in matrimonial cases. Some other jurisdictions also prohibit nonrefundable fees.

   b. The New York Court of Appeals recently suspended a lawyer for two years for refusing to refund "non-refundable" fees in a number of cases, among them a criminal defense case. In re Cooperman, New York Court of Appeals, March 17,1994.

      i. the result of this case appears to have been based upon on the client's right to discharge counsel and the chilling effect created by loss of a large retainer if the unearned fee is not refunded.

      ii. the Oregon Supreme Court has reached a similar result (one year suspension) but based it's decision on collecting an excessive fee, in violation of DR 2-106, when the unrefunded fees are out of proportion to the work done.

10. See the "Random Bibliography" for sources of additional information.

C. Contingent fees.

1. Not in criminal cases and rarely in domestic relations. Rationale is there is no "res" from which payment can be made.

2. Typical in civil, PI cases and allowable, but be sure to have it in writing. Even substantial fees which on the surface

might appear excessive are acceptable, if the case is novel or difficult.

3. Delinquent support apparently can be collected on a contingent fee basis. EO 80-2, EO 77-22. The plain language of DR 2-106(C) prohibits contingent fees in ". . . any action involving domestic relations." But the EOs are clear that contingent fees are acceptable in such cases. There is a res from which the fee can be paid.

    a. a contingent fee may be allowable in an action to void a Dissolution of Marriage Decree. Committee v. McCullough, 468 NW2d 458 (Iowa 1991).

4. Workers Compensation cases have special considerations. If benefits are already paid, the contingent fee must be calculated only upon the additional benefit achieved. EO 93-14. Again, the fee comes from the res.

5. Contingent fees are working their way in defense litigation as a part of "value billing." Defense contingent fees have several variations but none appear to have the "no success, no fee" provision typical in Plaintiff contingent fee agreements. An hourly rate plus a contingency based on outcome is the most discussed.

    a. The lawyer is guaranteed the hourly rate plus a premium if the case is resolved under a target goal agreed. The premium can be a higher hourly rate or a percentage of the difference between the target goal and actual outcome.

    b. The hourly rate can be replaced by a project fee plus a contingency if the outcome is successful.

6. The contingency fee can also be used in business acquisitions, with the fee based on whether the acquisition

is accomplished. The hourly may be one figure if the effort is not successful and another if successful.

a. This has an ethical dilemma posed when the lawyer acquires an economic interest in the transaction closing and risks the lawyer's advice not being independent and disinterested.

b. There have been a number of disciplinary actions in Iowa based upon involvement with clients in business affairs. A fee arranged like this pushes the edge on when a lawyer is involved in a business opportunity belonging to the client.

7. According to Formal Opinion 94-389 (December 5, 1994), American Bar Association Standing Committee on Ethics and Professional Responsibility, the following factors should be considered and discussed with the client in determining whether a contingent fee is appropriate and the structure of that contingent fee:

a. The likelihood of success;

b. The likely amount of recovery savings, if the case is successful;

c. The possibility of an award of exemplary or multiple damages and how that will affect the fee;

d. The attitude and prior practices of the other side with respect to settlement;

e. The likelihood of, or any anticipated difficulties in, collecting any judgment;

f. The availability of alternative dispute resolution as a means of achieving an earlier conclusion to the matter;

g. The amount of time that is likely to be invested by the lawyer;

h. The likely amount of the fee if the matter is handled on a non-contingent basis;

i. The client's ability and willingness to pay a non-contingent fee;

j. The percentage of any recovery that the lawyer would receive as a contingent fee and whether that percentage will be fixed or on a sliding scale;

k. Whether the lawyer's fees would be recoverable by the client by reason of statute or common law rule;

l. Whether the jurisdiction in which the claim will be pursued has any rules or guidelines for contingent fees; and

m. How expenses of the litigation are to be handled.

D. Value billing: This is a buzzword for the move away from the billable hour which emphasizes time spent, rather than efficiency, skill, or result.

1. The client doesn't know in advance how the fee is based. This is a very important consideration in the EO's.

2. Consider again the ABA Declaration of Commitment to Clients, which makes a commitment from every lawyer:

   To charge a reasonable fee and to explain in advance how that fee will be computed and billed.

3. Clients and lawyers may easily disagree upon value:

   A cynic knows the cost of everything and the value of nothing. - Oscar Wilde

V. Advertising fees.

A. EC 2-10 and 2-11 emphasize the duty and difficulty of disclosure of what is being advertised.

B. "Fee advertising involves special concerns. With rare exception, lawyers render unique and varied services for each client, even as to so-called "routine" matters. When consulted about any matter,

whether or not "routine", a lawyer should make relevant inquiries which may uncover the need for different services than those which the client originally sought. These factors make it difficult to set a fixed fee or a range of fees for a specific legal service in advance of rendering the service and provide temptation to depart from an advertised fee or to fail to render a needed service. . . . A lawyer should also scrupulously avoid the use of fee advertising as an indirect means of attracting clients in the hope of performing other, more lucrative, legal services." EC 2-11.

C. This is an area in which to tread very carefully. It is properly the subject of a presentation all its own.

VI. What can properly be included in legal fees? Bundled vs. Unbundled fees

A. Overhead expenses for equipping and operating an office must be included the lawyer's professional fees and cannot be charged separately. EO 88-16.

1. A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office. ABA Formal Opinion 93-379.

2. This means secretarial time cannot be billed separately. EO 84-11.

B. Expenses engendered by the clients representation can be itemized and billed to the client. This includes (but isn't limited to) travel,long distance phone,court costs, and "professional or semi-professional personnel and services" such as paralegals, accountants, computer research, experts. EO 88-16.

1. A lending institution may not "profit" by charging borrowers for services rendered by in house counsel. It may pass along the actual cost to the lender, but must disclose that the lawyer represents only the lender. EO 92-1.

C. Work product can be recycled to the benefit of future clients, but the future client cannot be billed for previously generated work product.

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1. ABA Formal Opinion uses the example of research for one client which becomes relevant for the later client. If that latter client is being billed on an hourly basis he or she cannot be billed for the research previously done and changed to another client.
2. This affects form banks, research memos, etc. This has serious implications for use of technology.
3. The same reasoning applies to an hour at the Courthouse for 3 different clients. The time must be allocated, each client cannot be billed for the entire hour.
4. If the client agrees to a fee based upon some basis other than time, e.g. flat fee, this does not appear to apply.

VII. Some fees are subject to administrative or court approval and alternative billing must pass muster.

A. Probate fees.

1. All probate fees are subject to court approval and regulated by statute and the probate rules.
2. Fees can be less than statutory. EO 80-3, even if a judge approves statutory fees.
3. Expenses of the fiduciary advanced by an attorney can be reimbursed without court order. EO 90-42.

B. Workers compensation fees.

1. By industrial commissioner. §86.39 Iowa Code.
2. By court if court proceedings are involved. §86.39 Iowa Code.

C. State tort claims.

1. Court, or state appeals board, or attorney general determines reasonable fees. §25A.15 Iowa Code.
2. Collecting fee in excess of allowed fee is a misdemeanor. §25A.15 Iowa Code.

D. Medical malpractice cases.

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1. Court determines the reasonableness of contingent fee. §147.138 Iowa Code.

VIII. Payment of fees by someone other than the client is sometimes "alternative billing".

A. Living trust referrals - subject of lengthy and comprehensive ethics opinions EO 90-1, 90-22, and 90-32. These are very problematic and require great care.

B. Participating in a "discount" program sponsored by a City to encourage new business is inappropriate. EO 92-2.

C. Referral fees per se are improper as not related to legal services or responsibility. EO 79-34 fee from auction firm selling estate property is improper; EO 81-16 regarding sharing of an auction commission; EO 88-2 regarding fee for referral to insurance agents.

Consider the ABA Declaration of Commitment to Clients, which states a commitment to clients:

> To exercise independent professional judgement on your behalf.

D. Accepting payments from third parties can jeopardize the independence and client loyalty.

CONCLUSION

Remember three principles:

1. The client is entitled to know how the fee is determined and the lawyer is obligated to provide that information in advance of representation. This is emerging as the most important factor in attorney ethics as the hourly rate is being supplanted by "alternative" methods of billing.

2. Fair compensation for the lawyer is important to the integrity of attorney relationship. The client gets quality work and the lawyer is happier. This relates to both amount and payment itself.

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3. Fees should come from the client alone to insure the lawyer's unconflicted advice and representation. The lawyer acquiring a stake in the out come can compromise what is the ethical core of the attorney client relationship.

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RANDOM BIBLIOGRAPHY

The following sources are anything but an exhaustive review of legal literature or opinions on billing. These are sources generally available to many attorneys and which offer a view of the current discussion of alternative billing.

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2. When - When Billing Strategies: Alternatives that satisfy your clients and you, American Bar Association (1992)
3. "Alternative Pricing Options for Law Firms" - Legal Management July/August 1993
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6. "Some Reflections on Value Billing" - Probate & Property - September/October 1993

   "Billing Beyond Fees" - ABA Journal - April 1992
7. "The Vanishing Hourly Fee" - ABA Journal - March 1994
8. "The Non-refundable - Fee Mindfield" - ABA Journal - April 1994
9. "Greed, Ignorance and Overbilling" - ABA Journal - August 1994
10. "Overcoming the Billing Bugaboo" - ABA Journal - April 1995
11. "No More Billable Hour?" - Law Practice Management - April 1994
12. "What Clients Really Want from Their Lawyers" - Law Practice Management - September 1994
13. "Warning! Fixed Fees Ahead (Engage All Systems)" - Law Practice Management - March 1995
14. Lawyers Weekly - frequently has articles focusing on legal management -including fees.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JAN 25 '94 ... EL, CLERK ... T COURT ... CAR.

NO. 93-157-01-CR-5-BR

UNITED STATES OF AMERICA

v.

MARK CLAYTON KIRBY

INDICTMENT
(Superseding)

Count	Charge
Count One:	18 U.S.C. § 1962(c) (Racketeer Influenced and Corrupt Organizations)
Count Two:	18 U.S.C. § 1341 (Mail Fraud)
Count Three:	18 U.S.C. § 1341 (Mail Fraud)
Count Four:	18 U.S.C. § 1341 (Mail Fraud)
Count Five:	18 U.S.C. § 1341 (Mail Fraud)
Count Six:	18 U.S.C. § 1341 (Mail Fraud)
Count Seven:	18 U.S.C. § 1341 (Mail Fraud)
Count Eight:	18 U.S.C. § 1341 (Mail Fraud)
Count Nine:	18 U.S.C. § 1341 (Mail Fraud)
Count Ten:	18 U.S.C. § 1341 (Mail Fraud)
Count Eleven:	18 U.S.C. § 1341 (Mail Fraud)
Count Twelve:	18 U.S.C. § 1341 (Mail Fraud)
Count Thirteen:	18 U.S.C. § 1344 (Bank Fraud)
Count Fourteen:	18 U.S.C. § 1005 (False Entry)
Count Fifteen:	18 U.S.C. § 1006 (False Entry)
Count Sixteen:	18 U.S.C. § 1032 (Impeding the Functions of the Resolution Trust Corporation)

1-26 to: USA, USPO, PTS, USM, Britt, Smith Dennison, Atty. Chestnut

16

The Grand Jury charges that:

COUNT ONE
(Title 18, United States Code, Section 1962(c))

INTRODUCTION

At all times material to this Indictment:

A. The Defendant

1. The defendant, MARK CLAYTON KIRBY ("MARK C. KIRBY"), was an attorney licensed and admitted to the practice of law in the State of North Carolina. From on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, was a named partner in the law firm of Brown, Kirby & Bunch. On or about July 25, 1991, the defendant, MARK C. KIRBY, was expelled from the law firm of Brown, Kirby & Bunch.

B. The Enterprise

2. From on or about June 1, 1990 and continuing thereafter through and including on or about July 25, 1991, within the Eastern District of North Carolina and elsewhere, the law firm of Brown, Kirby & Bunch constituted an "enterprise" as that term is defined in Title 18, United States Code, Section 1961(4), that is, any partnership, association or other legal entity, and any group of individuals associated in fact although not a legal entity.

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C. The Law Firm of Brown, Kirby & Bunch

3. The law firm of Brown, Kirby & Bunch was a partnership formed by the defendant, MARK C. KIRBY, and others, on or about June 1, 1990 under the laws of the State of North Carolina to engage in the practice of law. From on or about June 1, 1990 through on or about July 25, 1991, Brown, Kirby & Bunch employed approximately ten partners, eight associate attorneys and numerous paralegals and other support staff. Brown, Kirby & Bunch maintained offices in Durham and Raleigh, North Carolina. The defendant, MARK C. KIRBY, worked in the firm's Raleigh office along with several other partners, associates and staff.

4. Brown, Kirby & Bunch was principally a litigation firm focusing primarily on commercial, bankruptcy, banking, real property and construction litigation. From on or about June 1, 1990 through and including on or about July 25, 1991, Brown, Kirby & Bunch represented federally-insured banks and savings and loans, corporations, small businesses and individuals in state and federal courts within the Eastern District of North Carolina and elsewhere, and before administrative tribunals and arbitrators. The firm's practice also included antitrust and general business litigation, commercial and residential real estate transactions and appellate practice in state and federal courts.

5. The partners, associates and paralegals at Brown, Kirby & Bunch generally worked within "practice groups" or "sections" of the firm based on the major areas of the firm's practice, including litigation, real estate and bankruptcy. Each section was organized differently, but generally consisted of a senior partner or lead attorney who was responsible, among other things, for developing clients and supervising the activities of the attorneys and paralegals assigned to the section.

6. From on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, was the head of the Bankruptcy and Collections sections (referred to hereinafter as the "Bankruptcy section") of Brown, Kirby & Bunch. During this period, various associates and paralegals were assigned to the Bankruptcy section and worked for and under the direction of the defendant, MARK C. KIRBY. As the head of the Bankruptcy section, the defendant, MARK C. KIRBY, was responsible, among other things, for obtaining clients for the section and for supervising the legal services provided to those clients by the defendant, MARK C. KIRBY, or by other attorneys or paralegals.

7. Under the leadership and direction of the defendant, MARK C. KIRBY, the Bankruptcy section represented primarily creditors in bankruptcy, foreclosure and collection matters in state and federal courts within the Eastern District of North Carolina and elsewhere. The creditors represented by the Bankruptcy section included financial institutions, credit agencies, trade creditors and various corporations and individuals. The Bankruptcy section also represented financial institutions in the restructuring of loan arrangements and in lender liability defense cases and represented various clients in the area of construction law. Additionally, the Bankruptcy section handled appeals on behalf of its clients in state and federal courts within the Eastern District of North Carolina and elsewhere.

8. From on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, actively solicited clients on behalf of Brown, Kirby & Bunch. During this period, the defendant, MARK C. KIRBY, was responsible for originating or obtaining a majority of the clients represented by the Bankruptcy section and was usually

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designated as the primary, or responsible, attorney for nearly every client represented by the Bankruptcy section. From time to time, the defendant, MARK C. KIRBY, would assign or transfer certain clients or cases to another partner or associate to handle as the primary attorney.

9. As the head of the Bankruptcy section, the defendant, MARK C. KIRBY, would decide which clients would be represented by the Bankruptcy section, whether the client was originated by the defendant, MARK C. KIRBY, or by another attorney. Before agreeing to represent a particular client, the defendant, MARK C. KIRBY, was responsible, among other things, for determining whether the representation of a particular client would create a conflict of interest with existing clients of Brown, Kirby & Bunch.

10. With respect to clients represented by the Bankruptcy section, the defendant, MARK C. KIRBY, would direct the type and nature of legal services to be provided to each client, including issues relating to litigation and settlement, and would decide which associates or paralegals would be assigned to assist the defendant, MARK C. KIRBY, on a particular case. For each client, the defendant, MARK C. KIRBY, would also determine the manner or method by which the client would be charged for legal services, whether on an hourly basis or under a contingency or fixed fee arrangement, and the hourly rate or other fee to be charged to each client. The hourly rate charged by the defendant, MARK C. KIRBY, was usually between $65.00 and $175.00 per hour. At all times material herein, the defendant, MARK C. KIRBY, had ultimate authority within the Bankruptcy section to determine the total amount of the fee to be charged for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, or by others at his direction.

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11. In the course of representing a client, the defendant, MARK C. KIRBY, was required to maintain daily records of the legal services performed on behalf of each client, as well as administrative activities performed by the defendant, MARK C. KIRBY, such as partnership meetings, personnel matters and seminars, and the amount of time that he worked on each matter. The defendant, MARK C. KIRBY, would usually record this information on a "chargeable time slip." Each chargeable time slip contained a general description of the work performed on behalf of a particular client, indicated the date on which the work was performed and showed the amount of time, in hours or portions of an hour, that the defendant, MARK C. KIRBY, worked, or claimed to have worked on behalf of the client. These records were used to prepare billing statements describing the legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, and to calculate the legal fees owed by the clients to Brown, Kirby & Bunch.

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12. By or about the end of each month, the defendant, MARK C. KIRBY, would submit his chargeable time slips or other time records to the billing department of Brown, Kirby & Bunch for use in preparing monthly billing statements. At or about the middle of the following month, or thereafter, the billing department would prepare computerized billing records known as "Work-In-Process Reports" or "prebills" for review by the attorney who had been designated as the primary or responsible attorney for the case. A separate prebill was prepared for each client, or for each separate file or case if the firm represented a particular client on several different cases. Each prebill contained a general description of all legal services performed on behalf of the client throughout the month, and indicated whether the work was performed by the defendant, MARK C. KIRBY, or by another attorney or paralegal. The

prebill also showed the total amount of time, in hours or portions of an hour, that the defendant, MARK C. KIRBY, or another attorney or paralegal, worked or claimed to have worked on behalf of the client during the month, and the corresponding fee to be charged to the client for each legal service. The billing department would also prepare similar computerized records which showed the dates and amount of time recorded by the defendant, MARK C. KIRBY, for administrative activities such as partnership meetings, personnel matters and seminars.

13. The defendant, MARK C. KIRBY, was responsible for reviewing and editing the prebills for clients or cases in which he was the primary or responsible attorney, and, as such, was responsible for reviewing all or a majority of the prebills for clients represented by the Bankruptcy section. The defendant, MARK C. KIRBY, would indicate on the prebills themselves whether there were any errors in time, spelling or other corrections to be made before the final billing statement was mailed to the client or whether the billing statement should be placed on "hold" if the prebill related to a contingency or fixed fee case, or for some other reason. After the prebills had been reviewed by the defendant, MARK C. KIRBY, the prebills were returned to the billing department for use in preparing the final billing statements to be mailed directly to the clients.

14. The clients of Brown, Kirby & Bunch were usually billed on a monthly basis for legal services and for disbursements or expenses incurred in connection with the representation of the client. A separate billing statement was prepared for each separate client, or for each separate file or case if the firm represented a particular client on several different cases. Each billing statement contained a description of the work performed, or claimed to have been

performed by the defendant, MARK C. KIRBY, or by other attorneys or paralegals, and indicated the amount of time expended, or claimed to have been expended on behalf of the client during the month. The billing statement also indicated the billable rate for each attorney or paralegal and the total fee charged to the client. The law firm of Brown, Kirby & Bunch used the U.S. Postal Service to deliver the monthly billing statements to its clients.

15. Legal fees paid by clients for services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, or by other attorneys or paralegals, were paid to and held by the law firm of Brown, Kirby & Bunch. As a partner in Brown, Kirby & Bunch, the defendant, MARK C. KIRBY, was entitled to receive all fees paid by clients for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, less an allocated portion of the partnership expenses and losses, such as rent, partnership taxes, malpractice insurance and staff salaries. Legal fees owed to the defendant, MARK C. KIRBY, from Brown, Kirby & Bunch were distributed to the defendant, MARK C. KIRBY, in the form of monthly draws or in other payments. From on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, received monthly draws and other payments from Brown, Kirby & Bunch in the approximate amount of $1,037,000.00.

16. As a result of his representation of clients of the law firm of Brown, Kirby & Bunch, and his receipt of substantial fees from the representation of these clients, among other things, the defendant, MARK C. KIRBY, associated with the law firm of Brown, Kirby & Bunch which constituted an enterprise, as defined above, and conducted and participated, directly and indirectly, in the affairs of the enterprise.

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D. Other Relevant Entities and Persons

17. The Federal Deposit Insurance Corporation ("FDIC") was an agency of the United States and, at all times material herein, was authorized, in part, to regulate, supervise and protect financial institutions, and their depositors, against substantial loss by insuring the deposits of banks and savings and loan associations in amounts up to $100,000.00 per account.

18. Ameribanc Savings Bank, FSB was a financial institution organized and existing under the laws of the State of Virginia, and having its principal place of business in Annandale, Virginia. At all times material herein, the deposits of Ameribanc Savings Bank, FSB were insured by the FDIC (Certificate No. 31355-2).

19. Barclays Bank of North Carolina was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Charlotte, North Carolina. At all times material herein, the deposits of Barclays Bank of North Carolina were insured by the FDIC (Certificate No. 26741-4).

20. Branch Banking and Trust Company was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Wilson, North Carolina. At all times material herein, the deposits of Branch Banking and Trust Company were insured by the FDIC (Certificate No. 9846-9).

21. Central Carolina Bank and Trust Company was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Durham, North Carolina. At all times material herein, the deposits of Central Carolina Bank and Trust Company were insured by the FDIC (Certificate No. 2033-8).

22. First Federal Savings and Loan Association of Raleigh was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Raleigh, North Carolina. At all times material herein, the deposits of First Federal Savings and Loan Association of Raleigh were insured by the FDIC (Certificate No. 33276-3). On or about December 7, 1990, First Federal Savings and Loan Association of Raleigh was placed into the Receivership of the Resolution Trust Corporation.

23. NCNB National Bank of North Carolina was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Charlotte, North Carolina. At all times material herein, the deposits of NCNB National Bank of North Carolina were insured by the FDIC (Certificate No. 4892-5).

24. The Poughkeepsie Savings Bank, FSB was a financial institution organized and existing under the laws of the State of New York, and having its principal place of business in Poughkeepsie, New York. At all times material herein, the deposits of The Poughkeepsie Savings Bank, FSB were insured by the FDIC (Certificate No. 31995-3).

25. The Resolution Trust Corporation was established in 1989 as a Government corporation and an instrumentality of the United States Government. At all times material herein, the Resolution Trust Corporation was responsible for the management and liquidation of failed or insolvent financial institutions, the deposits of which had been insured by the Federal Deposit Insurance Corporation, or by its predecessor in the savings and loan industry, the Federal Savings and Loan Insurance Corporation. On or about December 7, 1990, the Resolution Trust Corporation was appointed Receiver for First Federal Savings and Loan Association of Raleigh by the Office of Thrift Supervision. On or about that date, FFSLAR was

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rechartered as First Federal Savings Association of Raleigh and continued to operate as a financial institution under the direction and management of the Resolution Trust Corporation, the deposits of which continued to be insured by the FDIC (Certificate No. 33276-3). From on or about December 7, 1990, the Resolution Trust Corporation became responsible for the management and liquidation of First Federal, including, among other things, the evaluation of the assets of First Federal and the maintenance or resolution of legal proceedings previously instituted on behalf of First Federal.

26. Seaboard Savings and Loan Association was a financial institution organized and existing under the laws of the State of Virginia, and having its principal place of business in Virginia Beach, Virginia. On or about October 4, 1990, Seaboard Savings changed its corporate name to Seaboard Savings Bank, F.S.B.. At all times material herein, the deposits of Seaboard Savings and Loan Association and Seaboard Savings Bank, F.S.B. were insured by the FDIC (Certificate No. 31912-1).

27. Southern National Bank of North Carolina was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Lumberton, North Carolina. At all times material herein, the deposits of Southern National Bank of North Carolina were insured by the FDIC (Certificate No. 4899-2).

28. Tar Heel Farm Credit, ACA, Federal Land Bank of Columbia and South Atlantic Production Credit Association (referred to hereinafter collectively as Tar Heel Farm Credit, ACA) were federally-chartered instrumentalities of The Farm Credit Administration, having a place of business in Raleigh, North Carolina. At all times material herein, Tar Heel Farm Credit, ACA was a financial institution as defined in Title 18, United States Code, Section 20.

29. United Carolina Bank was a financial institution organized and existing under the laws of the State of North Carolina, and having its principal place of business in Whiteville, North Carolina. At all times material herein, the deposits of United Carolina Bank were insured by the FDIC (Certificate No. 2026-5).

30. Wilmington Savings Fund Society, FSB was a financial institution organized and existing under the laws of the State of Delaware, and having its principal place of business in Wilmington, Delaware. At all times material herein, the deposits of Wilmington Savings Fund Society, FSB were insured by the FDIC (Certificate No. 17838-1).

E. Objects of the Racketeering Activity

31. Among the objects and goals of the racketeering activity of the defendant, MARK C. KIRBY, were the following:

a. To defraud the financial institution, corporate and individual clients of Brown, Kirby & Bunch by issuing monthly billing statements to clients which were "padded" to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom; and

b. To "bill clients more than one million dollars ($1,000,000.00) in legal fees in a single year" and "to become the richest attorney in Wake County."

F. Means and Methods of the Racketeering Activity

32. Among the means and methods utilized by the defendant, MARK C. KIRBY, to achieve the fraudulent objects and goals of the racketeering activity were the following:

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a. Between on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, withheld and concealed information from and made false and misleading statements to clients and potential clients about the manner and method by which the client would be charged for services performed, or claimed to have been performed by the defendant, MARK C. KIRBY;

b. Between on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, made or attempted to make false and misleading statements to the partners and associates of Brown, Kirby & Bunch during Partnership meetings or at other times about his billing practices and about disclosures made by the defendant, MARK C. KIRBY, to clients concerning the manner and method by which the client would be charged for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY;

c. Between on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, used or attempted to use his position of trust, as an attorney and as a named partner in the law firm of Brown, Kirby & Bunch, and his knowledge of the firm's internal billing procedures and practices to facilitate the scheme and to conceal its existence;

d. Between on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, submitted billing statements to various financial institutions, corporations and individual clients of Brown, Kirby & Bunch which were "padded" to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom; and

e. Between on or about June 1, 1990 through and including on or about July 25, 1991, and for the purposes of "padding" billing statements to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom, the defendant, MARK C. KIRBY, among other things:

1. charged clients for legal services that were not performed by the defendant, MARK C. KIRBY, or for services that were, in actuality, performed in substantially less time than claimed by the defendant, MARK C. KIRBY;

2. charged the same time spent performing legal services on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually worked on a particular day; and

3. charged the same time spent in court on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually spent in court on a particular day.

STATUTORY ALLEGATIONS

33. From on or about June 1, 1990 and continuing thereafter through and including on or about July 25, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, being a person employed by and associated with the enterprise

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described in Paragraph 2 of this Indictment, to wit, the law firm of Brown, Kirby & Bunch, did unlawfully, knowingly and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise, which enterprise was engaged in, and the activities of which affected, interstate commerce, through a pattern of racketeering activity as defined in Title 18, United States Code, Sections 1961(1) and 1961(5), as hereinafter described.

34. The purpose of the racketeering activity was to fraudulently obtain money and funds in the form of legal fees from the clients of Brown, Kirby & Bunch identified below for the personal and business use and benefit of the defendant, MARK C. KIRBY, and his family.

35. To accomplish this purpose, during the period from on or about June 1, 1990 through and including on or about July 25, 1991, the defendant, MARK C. KIRBY, devised and participated in, and attempted and intended to devise, a scheme and artifice to prepare billing statements which were "padded" to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to submit the billing statements to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below.

36. During the twelve-month period from on or about June 1, 1990 and continuing thereafter through and including on or about May 31, 1991, the defendant, MARK C. KIRBY, claimed to have worked in excess of 13,800 hours on behalf of clients or performing various administrative activities. During this period, the defendant, MARK C. KIRBY, charged clients approximately $1,500,000.00 in legal fees for services performed, or claimed to have been performed solely by the defendant, MARK C. KIRBY. The number of hours that the defendant, MARK C. KIRBY, claimed to have worked during each month and the amount of legal fees charged by the defendant, MARK C. KIRBY, are set forth separately by month below:

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	Month	Hours	Legal Fees
a.	June, 1990	1,060	$ 94,000.00
b.	July, 1990	1,110	$ 102,000.00
c.	August, 1990	1,190	$ 114,000.00
d.	September, 1990	1,052	$ 98,000.00
e.	October, 1990	1,395	$ 156,000.00
f.	November, 1990	1,102	$ 121,000.00
g.	December, 1990	876	$ 91,000.00
h.	January, 1991	851	$ 91,000.00
i.	February, 1991	1,040	$ 115,000.00
j.	March, 1991	1,365	$ 156,000.00
k.	April, 1991	1,258	$ 142,000.00
l.	May, 1991	1,547	$ 179,000.00

THE PATTERN OF RACKETEERING ACTIVITY

37. The pattern of racketeering activity consisted of the following acts:

Racketeering Act No. One: Mail Fraud

38. For the period of on or about June 1, 1990 and continuing thereafter through on or about June 30, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Two of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Two: Mail Fraud

39. For the period of on or about July 1, 1990 and continuing thereafter through on or about July 31, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Three of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Three: Mail Fraud

40. For the period of on or about August 1, 1990 and continuing thereafter through on or about August 31, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Four of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

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Racketeering Act No. Four: Mail Fraud

41. For the period of on or about September 1, 1990 and continuing thereafter through on or about September 30, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Five of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Five: Mail Fraud

42. For the period of on or about October 1, 1990 and continuing thereafter through on or about October 31, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Six of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Six: Mail Fraud

43. For the period of on or about November 1, 1990 and continuing thereafter through on or about November 30, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Seven of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Seven: Mail Fraud

44. For the period of on or about December 1, 1990 and continuing thereafter through on or about December 31, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Eight of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

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Racketeering Act No. Eight: Mail Fraud

45. For the period of on or about January 1, 1991 and continuing thereafter through on or about January 31, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Nine of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Nine: Mail Fraud

46. For the period of on or about February 1, 1991 and continuing thereafter through on or about February 28, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Ten of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Ten: Mail Fraud

47. For the period of on or about March 1, 1991 and continuing thereafter through on or about March 31, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Eleven of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Eleven: Mail Fraud

48. For the period of on or about April 1, 1991 and continuing thereafter through on or about April 30, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of mail fraud as alleged in Count Twelve of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1341.

Racketeering Act No. Twelve: Bank Fraud

49. For the period of on or about May 1, 1991 and continuing thereafter through on or about May 31, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, knowingly and willfully committed and caused the commission of bank fraud as alleged in Count Thirteen of this Indictment, which Count is realleged and incorporated by reference as if fully set forth herein, all in violation of the provisions of Title 18, United States Code, Section 1344.

All in violation of the provisions of Title 18, United States Code, Section 1962(c).

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FORFEITURE
(Title 18, United States Code, Section 1963)

1. The allegations contained in Count One of this Indictment are realleged and incorporated by reference as if fully set forth herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 1963.

2. The defendant, MARK C. KIRBY, participated, directly and indirectly, in the conduct of the affairs of the enterprise described in Count One of this Indictment, and, through the aforesaid pattern of racketeering activity:

a. has interests that he acquired and maintained in violation of Title 18, United States Code, Section 1962, which interests, in whatever form, wherever located and in whatever names held, are therefore subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1); and

b. has property constituting and derived from proceeds that he obtained, directly and indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962, thereby making all such property, in whatever form, wherever located and in whatever names held, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3).

3. The interests acquired and maintained by the defendant, MARK C. KIRBY, in violation of Title 18, United States Code, Section 1962, and the property constituting and derived from proceeds obtained, directly and indirectly, by the defendant, MARK C. KIRBY, from racketeering activity in violation of Title 18, United States Code, Section 1962, as alleged in Count One of this Indictment, and which are subject to forfeiture to the United States pursuant to Title 18, United States Code, Sections 1963(a)(1) and (a)(3), include but are not limited to the money and funds received by the defendant, MARK C. KIRBY, or owing to the same from the law firm of Brown, Kirby & Bunch, or its successors, together with any property

constituting and derived from said money and funds, in connection with or arising from the representation of the financial institutions, corporations and individuals identified in this Indictment from on or about June 1, 1990 through and including on or about July 25, 1991, in an aggregate amount not to exceed approximately $1,500,000.00.

4. If any of the property described in paragraphs 2 and 3 above, which is subject to forfeiture to the United States pursuant to Title 18, United States Code, Sections 1963(a)(1) and (a)(3), as a result of any act or omission of the defendant, MARK C. KIRBY:

a. cannot be located upon the exercise of due diligence,

b. has been transferred to, or sold, or deposited with, a third party,

c. has been placed beyond the jurisdiction of the court,

d. has been substantially diminished in value or

e. has been commingled with other property which cannot be divided without difficulty,

it is the intent of the United States, pursuant to Title 18, United States Code, Section 1963(m), to seek forfeiture of any other property of such defendant up to the value of the property described in subparagraphs (a) through (e) above as being subject to forfeiture.

Pursuant to the provisions of Title 18, United States Code, Section 1963.

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COUNT TWO

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 30 of Count One of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. Beginning on or about June 1, 1990 and continuing thereafter through on or about July 25, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, did knowingly and willfully devise and intend to devise a scheme and artifice to defraud the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below and to obtain money and property of said financial institutions, corporations and individuals by means of false and fraudulent pretenses, representations and promises.

3. It was a part of the scheme and artifice that the defendant, MARK C. KIRBY, would withhold and conceal information from and make false and misleading statements to clients and potential clients about the manner and method by which the client would be charged for services performed, or claimed to have been performed by the defendant, MARK C. KIRBY.

4. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would make or attempt to make false and misleading statements to the partners and associates of Brown, Kirby & Bunch during Partnership meetings or at other times about his billing practices and about disclosures made by the defendant, MARK C. KIRBY, to clients concerning the manner and method by which the client would be charged for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY.

5. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would use or attempt to use his position of trust, as an attorney and as a named partner in the law firm of Brown, Kirby & Bunch, and his knowledge of the firm's internal billing

procedures and practices to facilitate the scheme and to conceal its existence.

6. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would submit and would cause or permit billing statements to be submitted to financial institution, corporate and individual clients of Brown, Kirby & Bunch which were "padded" to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom.

7. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, for the purposes of "padding" billing statements to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom, would, among other things:

a. charge clients for legal services that were not performed by the defendant, MARK C. KIRBY, or for services that were, in actuality, performed in substantially less time than claimed by the defendant, MARK C. KIRBY;

b. charge the same time spent performing legal services on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually worked on a particular day; and

c. charge the same time spent in court on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually spent in court on a particular day.

8. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of June 1, 1990 through June 30, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

Racketeering Act No.	Client Name	Date of Mailing (on or about)
1-1A	Ameribanc Savings Bank, FSB	July 1990
1-1B	Barclays Bank of North Carolina	July 1990
1-1C	Branch Banking and Trust Company	July 1990
1-1D	Central Carolina Bank and Trust Company	July 1990
1-1E	First Federal Savings and Loan Association	July 1990
1-1F	NCNB National Bank of North Carolina	July 1990
1-1G	Seaboard Savings and Loan Association	July 1990
1-1H	Tar Heel Farm Credit, ACA	July 1990
1-1I	Wilmington Savings Fund Society, FSB	July 1990
1-1J	Allen, R. Reed, Jr.	July 1990
1-1K	Collinson, Allan	July 1990
1-1L	Construction Management Co. of Raleigh, Inc.	July 1990
1-1M	Crites, James	August 1990
1-1N	E & E Farm Equipment Company	July 1990
1-1O	First Leasing Company	July 1990
1-1P	First Washington Development Group, Inc.	July 1990
1-1Q	Ford Motor Credit Company	July 1990 and August 1990
1-1R	Gardens by William	July 1990
1-1S	George R. Barefoot Utility, Inc.	July 1990
1-1T	Gray & Creech, Inc.	July 1990
1-1U	Greenview Properties, Inc.	July 1990
1-1V	Investors Title Insurance Company	July 1990

Racketeering Act No.	Client Name	Date of Mailing (on or about)
1-1W	J.M. Kane & Company	July 1990
1-1X	Lawrence & Lawrence Architects	July 1990
1-1Y	Miles Home Division of Insilco Corporation	July 1990
1-1Z	Plaza Associates	July 1990
1-2A	Recapitalization Advisors, Inc.	July 1990
1-2B	Saieed, Thomas A.	July 1990
1-2C	Saieed Construction Corporation	July 1990
1-2D	Security Union Title Insurance Company	July 1990
1-2E	Simonovich, Nick & Louise	July 1990
1-2F	Singleton, C. E./Buildecon Associates	July 1990
1-2G	Steel Performance, Inc.	July 1990
1-2H	Telerent Leasing Corporation	July 1990
1-2I	The Douglas Company	July 1990
1-2J	Thetford Property Management, Inc.	July 1990
1-2K	Tipton, Mark	July 1990
1-2L	Town of Garner	July 1990
1-2M	Waterford Place Homeowners Association	July 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

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COUNT THREE

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of

July 1, 1990 through July 31, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

Racketeering Act No.	Client Name	Date of Mailing (on or about)
2-1A	Ameribanc Savings Bank, FSB	August 1990
2-1B	Barclays Bank of North Carolina	August 1990
2-1C	Branch Banking and Trust Company	August 1990
2-1D	Central Carolina Bank and Trust Company	August 1990
2-1E	First Federal Savings and Loan Association	August 1990
2-1F	NCNB National Bank of North Carolina	August 1990
2-1G	Seaboard Savings and Loan Association	August 1990
2-1H	Southern National Bank of North Carolina	August 1990
2-1I	Tar Heel Farm Credit, ACA	August 1990
2-1J	Wilmington Savings Fund Society, FSB	August 1990
2-1K	Collinson, Allan	August 1990
2-1L	Construction Management Co. of Raleigh, Inc.	August 1990
2-1M	E & E Farm Equipment Company	August 1990
2-1N	First Leasing Company	August 1990
2-1O	First Washington Development Group, Inc.	August 1990
2-1P	Ford Motor Credit Company	August 1990
2-1Q	Gardens by William	August 1990
2-1R	General Electric Capital Corporation	August 1990
2-1S	George R. Barefoot Utility, Inc.	August 1990
2-1T	Gray & Creech, Inc.	August 1990
2-1U	Greenview Properties, Inc.	August 1990
2-1V	Industrial Contractors	August 1990
2-1W	Investors Title Insurance Company	August 1990
2-1X	J.M. Kane & Company	August 1990
2-1Y	Kaufman, George	August 1990
2-1Z	Lawrence & Lawrence Architects	August 1990
2-2A	Miles Home Division of Insilco Corporation	August 1990
2-2B	Plaza Associates	August 1990
2-2C	Recapitalization Advisors, Inc.	August 1990
2-2D	Saieed, Thomas A.	August 1990
2-2E	Saieed Construction Corporation	August 1990
2-2F	Security Union Title Insurance Company	August 1990
2-2G	Simonovich, Nick & Louise	August 1990
2-2H	Singleton, C. E./Buildecon Associates	August 1990

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
2-2I	Sprinkle, W. Glynn	August 1990
2-2J	Steel Performance, Inc.	August 1990
2-2K	Telerent Leasing Corporation	August 1990
2-2L	Temme, Larry D.	August 1990
2-2M	The Douglas Company	August 1990
2-2N	Thetford Property Management, Inc.	August 1990
2-2O	Town of Garner	August 1990
2-2P	Triangle Materials, Inc.	August 1990
2-2Q	Vogel, Sy	August 1990
2-2R	Waterford Place Homeowners Association	August 1990
2-2S	Waterside Associates Limited Partnership	August 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT FOUR

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of August 1, 1990 through August 31, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

Racketeering Act No.	Client Name	Date of Mailing (on or about)
3-1A	Ameribanc Savings Bank, FSB	September 1990
3-1B	Barclays Bank of North Carolina	September 1990
3-1C	Branch Banking and Trust Company	September 1990
3-1D	Central Carolina Bank and Trust Company	September 1990
3-1E	First Federal Savings and Loan Association	September 1990
3-1F	NCNB National Bank of North Carolina	September 1990
3-1G	Seaboard Savings and Loan Association	September 1990
3-1H	Southern National Bank of North Carolina	September 1990
3-1I	Tar Heel Farm Credit, ACA	September 1990
3-1J	Wilmington Savings Fund Society	September 1990
3-1K	Allen, R. Reed, Jr.	September 1990
3-1L	Cambridge Filter Corporation	September 1990
3-1M	Chrysler Financial/Credit Corporation	October 1990
3-1N	Collinson, Allan	September 1990
3-1O	Construction Management Co. of Raleigh, Inc.	September 1990
3-1P	E & E Farm Equipment Company	September 1990
3-1Q	Feimster, Harold	September 1990
3-1R	First Leasing Company	September 1990
3-1S	First Washington Development Group, Inc.	September 1990
3-1T	Ford Motor Credit Company	September 1990
3-1U	Gardens by William	September 1990
3-1V	General Electric Capital Corporation	September 1990
3-1W	Gray & Creech, Inc.	September 1990
3-1X	Green Glen, Ltd.	September 1990
3-1Y	Greenview Properties, Inc.	September 1990
3-1Z	Industrial Contractors	September 1990
3-2A	Investors Title Insurance Company	September 1990
3-2B	J. M. Kane & Company	September 1990
3-2C	Kaufman, George	September 1990
3-2D	Lawrence & Lawrence Architects	September 1990
3-2E	Plaza Associates	September 1990
3-2F	Recapitalization Advisors, Inc.	September 1990
3-2G	Saieed Construction Corporation	September 1990
3-2H	Security Union Title Insurance Company	September 1990
3-2I	Simonovich, Nick & Louise	September 1990
3-2J	Singleton, C.E./Buildecon Associates	September 1990
3-2K	Steel Performance, Inc.	September 1990
3-2L	Telerent Leasing Corporation	September 1990
3-2M	The Douglas Company	September 1990

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
3-2N	Thetford Property Management, Inc.	September 1990
3-2O	Town of Garner	September 1990
3-2P	Triangle Materials, Inc.	September 1990
3-2Q	Vogel, Sy	September 1990
3-2R	Wastek, Inc.	September 1990
3-2S	Waterford Place Homeowners Association	September 1990
3-2T	Waterside Associates Limited Partnership	September 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT FIVE

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of September 1, 1990 through September 30, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
4-1A	Ameribanc Savings Bank, FSB	October 1990
4-1B	Barclays Bank of North Carolina	October 1990
4-1C	Branch Banking and Trust Company	October 1990
4-1D	Central Carolina Bank and Trust Company	October 1990
4-1E	First Federal Savings and Loan Association	October 1990
4-1F	NCNB National Bank of North Carolina	October 1990
4-1G	The Poughkeepsie Savings Bank, FSB	October 1990
4-1H	Seaboard Savings and Loan Association	October 1990
4-1I	Southern National Bank of North Carolina	October 1990
4-1J	Tar Heel Farm Credit, ACA	October 1990
4-1K	Wilmington Savings Fund Society, FSB	October 1990
4-1L	Allen, R. Reed, Jr.	October 1990
4-1M	Cambridge Filter Corporation	October 1990
4-1N	Collinson, Allan	October 1990
4-1O	Credit Facts of America	October 1990
4-1P	E & E Farm Equipment Company	October 1990
4-1Q	Feimster, Harold	October 1990
4-1R	First Leasing Company	October 1990
4-1S	First Washington Development Group, Inc.	October 1990
4-1T	Ford Motor Credit Company	October 1990
4-1U	General Electric Capital Corporation	October 1990
4-1V	Gray & Creech, Inc.	October 1990
4-1W	Green Glen, Ltd.	October 1990
4-1X	Greenview Properties, Inc.	October 1990
4-1Y	Investors Title Insurance Company	October 1990
4-1Z	Jones, McKeithan d/b/a Native Construction Co.	October 1990
4-2A	J.M. Kane & Company	October 1990
4-2B	Kaufman, George	October 1990
4-2C	Lawrence & Lawrence Architects	October 1990
4-2D	Mamoulides, George	October 1990
4-2E	Miles Home Division of Insilco Corporation	October 1990
4-2F	Plaza Associates	October 1990
4-2G	Saieed Construction Corporation	October 1990
4-2H	Security Union Title Insurance Company	October 1990
4-2I	Simonovich, Nick & Louise	October 1990
4-2J	Sprinkle, W. Glynn	October 1990
4-2K	Steel Performance, Inc.	October 1990
4-2L	Telerent Leasing Corporation	October 1990

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
4-2M	The Douglas Company	October 1990 and November 1990
4-2N	Thetford Property Management, Inc.	October 1990
4-2O	Transamerica Commercial Finance Corporation	November 1990
4-2P	Vogel, Sy	October 1990
4-2Q	Wastek, Inc.	October 1990
4-2R	Waterford Place Homeowners Association	October 1990
4-2S	Waterside Associates Limited Partnership	October 1990
4-2T	77 Tyvola Associates	October 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT SIX

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of October 1, 1990 through October 31, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
5-1A	Ameribanc Savings Bank, FSB	November 1990
5-1B	Barclays Bank of North Carolina	November 1990
5-1C	Branch Banking and Trust Company	November 1990
5-1D	Central Carolina Bank and Trust Company	November 1990
5-1E	First Federal Savings and Loan Association	November 1990
5-1F	NCNB National Bank of North Carolina	November 1990
5-1G	The Poughkeepsie Savings Bank, FSB	November 1990
5-1H	Seaboard Savings Bank, F.S.B.	November 1990
5-1I	Southern National Bank of North Carolina	November 1990
5-1J	Tar Heel Farm Credit, ACA	November 1990
5-1K	Wilmington Savings Fund Society, FSB	November 1990
5-1L	Allen, R. Reed, Jr.	November 1990
5-1M	Cambridge Filter Corporation	November 1990
5-1N	Chrysler Financial/Credit Corporation	November 1990 and December 1990
5-1O	Construction Management Co. of Raleigh, Inc.	November 1990
5-1P	Credit Facts of America	November 1990
5-1Q	Feimster, Harold	November 1990
5-1R	First Leasing Company	November 1990
5-1S	First Washington Development Group, Inc.	November 1990
5-1T	Fulkerson, Daniel & Cathy	November 1990
5-1U	Gardens by William	November 1990
5-1V	General Electric Capital Corporation	November 1990
5-1W	Gray & Creech, Inc.	November 1990
5-1X	Green Glen, Ltd.	November 1990
5-1Y	Greenview Properties, Inc.	November 1990
5-1Z	Industrial Contractors	November 1990
5-2A	Investors Title Insurance Company	November 1990
5-2B	Jones, McKeithan d/b/a Native Construction Co.	November 1990
5-2C	J.M. Kane & Company	November 1990
5-2D	Kaufman, George	November 1990
5-2E	Lawrence & Lawrence Architects	November 1990
5-2F	Miles Home Division of Insilco Corporation	November 1990
5-2G	Saieed, Thomas A.	November 1990
5-2H	Saieed Construction Corporation	November 1990
5-2I	Security Union Title Insurance Company	November 1990
5-2J	Simonovich, Nick & Louise	November 1990
5-2K	Singleton, C.E./Buildecon Associates	November 1990
5-2L	Telerent Leasing Corporation	November 1990
5-2M	The Douglas Company	November 1990

K

Racketeering Act No.	Client Name	Date of Mailing (on or about)
5-2N	Thetford Property Management, Inc.	November 1990
5-2O	Tipton, Mark	November 1990
5-2P	Transamerica Commercial Finance Corporation	November 1990
5-2Q	Triangle Materials, Inc.	November 1990
5-2R	Vogel, Sy	November 1990
5-2S	Wastek, Inc.	November 1990
5-2T	Waterford Place Homeowners Association	November 1990
5-2U	Waterside Associates Limited Partnership	November 1990
5-2V	77 Tyvola Associates	November 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT SEVEN

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of November 1, 1990 through November 30, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
6-1A	Ameribanc Savings Bank, FSB	December 1990
6-1B	Barclays Bank of North Carolina	December 1990
6-1C	Branch Banking and Trust Company	December 1990
6-1D	Central Carolina Bank and Trust Company	December 1990
6-1E	First Federal Savings and Loan Association	December 1990
6-1F	NCNB National Bank of North Carolina	December 1990
6-1G	The Poughkeepsie Savings Bank, FSB	December 1990
6-1H	Seaboard Savings Bank, F.S.B.	December 1990
6-1I	Southern National Bank of North Carolina	December 1990
6-1J	Tar Heel Farm Credit, ACA	December 1990
6-1K	Wilmington Savings Fund Society, FSB	December 1990
6-1L	Allen, R. Reed, Jr.	December 1990
6-1M	Cambridge Filter Corporation	December 1990
6-1N	Chrysler Financial/Credit Corporation	December 1990
6-1O	Credit Facts of America	December 1990
6-1P	E & E Farm Equipment Company	December 1990
6-1Q	Feimster, Harold	December 1990
6-1R	First Leasing Company	December 1990
6-1S	First Washington Development Group, Inc.	December 1990
6-1T	Ford Motor Credit Company	December 1990
6-1U	Gardens by William	December 1990
6-1V	General Electric Capital Corporation	December 1990
6-1W	Gray & Creech, Inc.	December 1990
6-1X	Green Glen, Ltd.	December 1990
6-1Y	Greenview Properties, Inc.	December 1990
6-1Z	Hunt Properties, Inc.	December 1990
6-2A	Industrial Contractors	December 1990
6-2B	Investors Title Insurance Company	December 1990
6-2C	Jones, McKeithan d/b/a Native Construction Co.	December 1990
6-2D	J.M. Kane & Company	December 1990
6-2E	Kaufman, George	December 1990
6-2F	Lawrence & Lawrence Architects	December 1990
6-2G	Miles Home Division of Insilco Corporation	December 1990
6-2H	Newnam, Dee K.	December 1990
6-2I	Plaza Associates	December 1990
6-2J	Robbins, Frances V.	December 1990
6-2K	Saieed, Thomas A.	December 1990
6-2L	Saieed Construction Corporation	December 1990
6-2M	Security Union Title Insurance Company	December 1990 and January 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
6-2N	Singleton, C. E./Buildecon Associates	December 1990
6-2O	Telerent Leasing Corporation	December 1990
6-2P	The Douglas Company	December 1990
6-2Q	Thetford Property Management, Inc.	December 1990
6-2R	Town of Garner	March 15, 1991
6-2S	Transamerica Commercial Finance Corporation	December 1990
6-2T	Vogel, Sy	December 1990
6-2U	Waterford Place Homeowners Association	December 1990
6-2V	Waterside Associates Limited Partnership	December 1990
6-2W	77 Tyvola Associates	December 1990

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT EIGHT

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of December 1, 1990 through December 31, 1990, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

K

Racketeering Act No.	Client Name	Date of Mailing (on or about)
7-1A	Ameribanc Savings Bank, FSB	January 1991
7-1B	Barclays Bank of North Carolina	January 1991
7-1C	Branch Banking and Trust Company	January 1991 and March 15, 1991
7-1D	Central Carolina Bank and Trust Company	January 1991
7-1E	First Federal Savings and Loan Association	January 1991
7-1F	NCNB National Bank of North Carolina	January 1991
7-1G	The Poughkeepsie Savings Bank, FSB	January 1991
7-1H	Resolution Trust Corporation	January 1991
7-1I	Seaboard Savings Bank, F.S.B.	January 1991
7-1J	Southern National Bank of North Carolina	January 1991
7-1K	Tar Heel Farm Credit, ACA	January 1991
7-1L	Wilmington Savings Fund Society, FSB	January 1991
7-1M	Cambridge Filter Corporation	January 1991
7-1N	Credit Facts of America	January 1991
7-1O	E & E Farm Equipment Company	January 1991
7-1P	Feimster, Harold	January 1991
7-1Q	First Leasing Company	January 1991
7-1R	First Washington Development Group, Inc.	January 1991
7-1S	Ford Motor Credit Company	January 1991
7-1T	Gardens by William	January 1991
7-1U	General Electric Capital Corporation	January 1991
7-1V	Gray & Creech, Inc.	January 1991
7-1W	Green Glen, Ltd.	January 1991
7-1X	Greenview Properties, Inc.	January 1991
7-1Y	Hunt Properties, Inc.	January 1991
7-1Z	Industrial Contractors, Inc.	January 1991
7-2A	Investors Title Insurance Company	January 1991
7-2B	Jones, McKeithan d/b/a Native Construction Co.	January 1991
7-2C	J. M. Kane & Company	January 1991
7-2D	Lawrence & Lawrence Architects	January 1991
7-2E	Miles Home Division of Insilco Corporation	January 1991
7-2F	Newnam, Dee K.	January 1991
7-2G	Reynolds, Jim	March 15, 1991
7-2H	Robbins, Frances V.	January 1991
7-2I	Saieed, Thomas A.	January 1991
7-2J	Saieed Construction Corporation	January 1991
7-2K	Security Union Title Insurance Company	January 1991
7-2L	Singleton, C. E./Buildecon Associates	January 1991
7-2M	Steel Performance, Inc.	January 1991
7-2N	Telerent Leasing Corporation	January 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
7-2O	The Douglas Company	January 1991
7-2P	Thetford Property Management, Inc.	January 1991
7-2Q	Tipton, Mark	January 1991
7-2R	Transamerica Commercial Finance Corporation	January 1991
7-2S	Triangle Materials, Inc.	January 1991
7-2T	Vogel, Sy	January 1991
7-2U	Waterford Place Homeowners Association	January 1991
7-2V	Waterside Associates Limited Partnership	January 1991
7-2W	77 Tyvola Associates	January 1991

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT NINE

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of January 1, 1991 through January 31, 1991, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

K

Racketeering Act No.	Client Name	Date of Mailing (on or about)
8-1A	Ameribanc Savings Bank, FSB	March 15, 1991
8-1B	Barclays Bank of North Carolina	March 15, 1991
8-1C	Branch Banking and Trust Company	March 15, 1991
8-1D	Central Carolina Bank and Trust Company	March 15, 1991
8-1E	NCNB National Bank of North Carolina	March 15, 1991
8-1F	The Poughkeepsie Savings Bank, FSB	March 15, 1991
8-1G	Resolution Trust Corporation	March 15, 1991
8-1H	Seaboard Savings Bank, F.S.B.	March 15, 1991
8-1I	Southern National Bank of North Carolina	March 15, 1991
8-1J	Tar Heel Farm Credit, ACA	March 15, 1991
8-1K	Wilmington Savings Fund Society, FSB	March 15, 1991
8-1L	Allen, R. Reed, Jr.	March 15, 1991
8-1M	Cambridge Filter Corporation	March 15, 1991
8-1N	Chrysler Financial/Credit Corporation	March 15, 1991
8-1O	Credit Facts of America	March 15, 1991
8-1P	E & E Farm Equipment Company	March 15, 1991
8-1Q	Feimster, Harold	March 15, 1991
8-1R	First Leasing Company	March 15, 1991
8-1S	First Washington Development Group, Inc.	March 15, 1991
8-1T	Ford Motor Credit Company	March 20, 1991
8-1U	Fowler Contracting Corporation	March 15, 1991
8-1V	Gardens by William	March 15, 1991
8-1W	General Electric Capital Corporation	March 15, 1991
8-1X	Gray & Creech, Inc.	March 15, 1991
8-1Y	Green Glen, Ltd.	March 15, 1991
8-1Z	Greenview Properties, Inc.	March 12, 1991
8-2A	Hunt Properties, Inc.	March 11, 1991
8-2B	Industrial Contractors	March 15, 1991
8-2C	Investors Title Insurance Company	March 15, 1991
8-2D	Jones, McKeithan d/b/a Native Construction Co.	March 15, 1991
8-2E	J. M. Kane & Company	March 15, 1991
8-2F	Kaufman, George	March 15, 1991
8-2G	Miles Home Division of Insilco Corporation	March 15, 1991
8-2H	Newnam, Dee K.	March 18, 1991
8-2I	Robbins, Frances V.	March 15, 1991
8-2J	Saieed, Thomas A.	March 15, 1991
8-2K	Saieed Construction Corporation	March 18, 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
8-2L	Security Union Title Insurance Company	March 15, 1991
8-2M	Singleton, C. E./Buildecon Associates	March 15, 1991
8-2N	Telerent Leasing Corporation	March 15, 1991
8-2O	The Douglas Company	March 15, 1991
8-2P	Thetford Property Management, Inc.	March 15, 1991
8-2Q	Tipton, Mark	March 15, 1991
8-2R	Transamerica Commercial Finance Corporation	March 15, 1991
8-2S	Vogel, Sy	March 15, 1991
8-2T	Waterside Associates Limited Partnership	March 15, 1991
8-2U	77 Tyvola Associates	March 15, 1991

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT TEN

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of February 1, 1991 through February 28, 1991, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

K

Racketeering Act No.	Client Name	Date of Mailing (on or about)
9-1A	Ameribanc Savings Bank, FSB	April 18, 1991
9-1B	Barclays Bank of North Carolina	April 18, 1991
9-1C	Branch Banking and Trust Company	April 18, 1991
9-1D	Central Carolina Bank and Trust Company	April 18, 1991
9-1E	NCNB National Bank of North Carolina	April 18, 1991
9-1F	The Poughkeepsie Savings Bank, FSB	April 18, 1991
9-1G	Resolution Trust Corporation	April 25, 1991
9-1H	Seaboard Savings Bank, F.S.B.	April 18, 1991
9-1I	Southern National Bank of North Carolina	April 18, 1991
9-1J	Tar Heel Farm Credit, ACA	April 18, 1991
9-1K	United Carolina Bank	April 18, 1991
9-1L	Wilmington Savings Fund Society, FSB	April 18, 1991
9-1M	Brueggeman, Gerald H.	May 10, 1991
9-1N	Cambridge Filter Corporation	April 18, 1991
9-1O	Chrysler Financial/Credit Corporation	April 18, 1991
9-1P	Credit Facts of America	April 18, 1991
9-1Q	E & E Farm Equipment Company	April 18, 1991
9-1R	Feimster, Harold	April 19, 1991
9-1S	First Leasing Company	April 18, 1991
9-1T	First Washington Development Group, Inc.	April 18, 1991
9-1U	Ford Motor Credit Company	April 19, 1991
9-1V	Fowler Contracting Corporation	April 18, 1991
9-1W	General Electric Capital Corporation	April 18, 1991
9-1X	Gray & Creech, Inc.	April 18, 1991
9-1Y	Green Glen, Ltd.	April 18, 1991
9-1Z	Greenview Properties, Inc.	May 10, 1991
9-2A	Hunt Properties, Inc.	April 18, 1991
9-2B	Investors Title Insurance Company	April 18, 1991
9-2C	Jones, McKeithan d/b/a Native Construction Co.	April 19, 1991
9-2D	J. M. Kane & Company	April 18, 1991
9-2E	Kaufman, George	April 18, 1991
9-2F	Lawrence & Lawrence Architects	April 18, 1991
9-2G	Newnam, Dee K.	April 18, 1991
9-2H	Robbins, Frances V.	April 18, 1991
9-2I	Saieed, Thomas A.	April 18, 1991
9-2J	Saieed Construction Corporation	April 18, 1991
9-2K	Security Union Title Insurance Company	April 18, 1991
9-2L	Steel Performance, Inc.	April 18, 1991
9-2M	Singleton, C. E./Buildecon Associates	April 18, 1991
9-2N	Telerent Leasing Corporation	April 18, 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
9-2O	The Douglas Company	April 18, 1991
9-2P	Thetford Property Management, Inc.	April 18, 1991
9-2Q	Tipton, Mark	April 18, 1991
9-2R	Transamerica Commercial Finance Corporation	April 18, 1991
9-2S	Triangle Materials, Inc.	April 18, 1991
9-2T	Vogel, Sy	April 18, 1991
9-2U	Waterford Place Homeowners Association	April 18, 1991
9-2V	Waterside Associates Limited Partnership	April 18, 1991
9-2W	77 Tyvola Associates	April 18, 1991

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT ELEVEN

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of March 1, 1991 through March 31, 1991, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

K

Racketeering Act No.	Client Name	Date of Mailing (on or about)
10-1A	Ameribanc Savings Bank, FSB	May 10, 1991
10-1B	Barclays Bank of North Carolina	May 10, 1991
10-1C	Branch Banking and Trust Company	May 10, 1991
10-1D	Central Carolina Bank and Trust Company	May 10, 1991
10-1E	NCNB National Bank of North Carolina	May 10, 1991
10-1F	The Poughkeepsie Savings Bank, FSB	May 10, 1991
10-1G	Resolution Trust Corporation	May 20, 1991
10-1H	Seaboard Savings Bank, F.S.B.	May 10, 1991
10-1I	Southern National Bank of North Carolina	May 10, 1991
10-1J	Tar Heel Farm Credit, ACA	May 10, 1991
10-1K	United Carolina Bank	May 10, 1991
10-1L	Wilmington Savings Fund Society, FSB	May 10, 1991
10-1M	Brueggeman, Gerald H.	May 10, 1991
10-1N	Cambridge Filter Corporation	May 10, 1991
10-1O	Chrysler Financial/Credit Corporation	May 10, 1991
10-1P	Credit Facts of America	May 10, 1991
10-1Q	E & E Farm Equipment Company	May 10, 1991
10-1R	Feimster, Harold	May 10, 1991
10-1S	First Leasing Company	May 10, 1991
10-1T	First Washington Development Group, Inc.	May 10, 1991
10-1U	Ford Motor Credit Company	May 10, 1991
10-1V	Fowler Contracting Corporation	May 10, 1991
10-1W	General Electric Capital Corporation	May 10, 1991
10-1X	Gray & Creech, Inc.	May 10, 1991
10-1Y	Green Glen, Ltd.	May 10, 1991
10-1Z	Greenview Properties, Inc.	May 10, 1991
10-2A	Hunt Properties, Inc.	April 29, 1991
10-2B	Industrial Contractors	May 10, 1991
10-2C	Investors Title Insurance Company	May 10, 1991
10-2D	Jones, McKeithan d/b/a Native Construction Co.	May 10, 1991
10-2E	Kane, George W., III	May 10, 1991
10-2F	J. M. Kane & Company	May 10, 1991
10-2G	Kaufman, George	May 10, 1991
10-2H	Lawrence & Lawrence Architects	May 10, 1991
10-2I	Miles Home Division of Insilco Corporation	May 10, 1991
10-2J	Newnam, Dee K.	May 10, 1991
10-2K	Robbins, Frances V.	May 10, 1991
10-2L	Saieed, Thomas A.	May 10, 1991
10-2M	Saieed Construction Corporation	May 10, 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
10-2N	Security Union Title Insurance Company	May 10, 1991
10-2O	Singleton, C. E./Buildecon Associates	May 10, 1991
10-2P	Steel Performance, Inc.	May 10, 1991
10-2Q	Taylor Ramsey Corporation	May 10, 1991
10-2R	Telerent Leasing Corporation	May 10, 1991
10-2S	Thetford Property Management, Inc.	May 10, 1991
10-2T	Transamerica Commercial Finance Corporation	May 10, 1991
10-2U	Triangle Materials, Inc.	May 10, 1991
10-2V	Vogel, Sy	May 10, 1991
10-2W	Wastek, Inc.	May 10, 1991
10-2X	Waterside Associates Limited Partnership	May 10, 1991
10-2Y	77 Tyvola Associates	May 10, 1991

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT TWELVE

(Title 18, United States Code, Sections 1341 and 2)

1. The allegations contained in Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. On or about the dates set forth below, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, having devised and intending to devise, and for the purpose of executing the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly place, and did aid, abet, command, induce, counsel and cause mail matter, namely, billing statements for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of April 1, 1991 through April 30, 1991, to be placed in authorized depositories for mail matter to be delivered by the United States Postal Service according to the directions thereon to the financial institution, corporate and individual clients of Brown, Kirby & Bunch identified below:

Racketeering Act No.	Client Name	Date of Mailing (on or about)
11-1A	Ameribanc Savings Bank, FSB	June 4, 1991
11-1B	Barclays Bank of North Carolina	June 4, 1991
11-1C	Branch Banking and Trust Company	June 4, 1991
11-1D	Central Carolina Bank and Trust Company	June 4, 1991
11-1E	NCNB National Bank of North Carolina	June 4, 1991
11-1F	The Poughkeepsie Savings Bank, FSB	June 4, 1991
11-1G	Resolution Trust Corporation	June 7, 1991
11-1H	Seaboard Savings Bank, F.S.B.	June 4, 1991
11-1I	Southern National Bank of North Carolina	June 4, 1991
11-1J	Tar Heel Farm Credit, ACA	June 4, 1991
11-1K	Wilmington Savings Fund Society, FSB	June 4, 1991
11-1L	Ace Rug Cleaning Company	June 1991
11-1M	Allen, R. Reed, Jr.	June 4, 1991
11-1N	Blue Ridge Obstetrics and Gynecology, P.A.	June 4, 1991
11-1O	Brueggeman, Gerald H.	June 4, 1991
11-1P	E & E Farm Equipment Company	June 4, 1991
11-1Q	Feimster, Harold	June 4, 1991
11-1R	First Leasing Company	June 4, 1991
11-1S	First Washington Development Group, Inc.	June 4, 1991
11-1T	Ford Motor Credit Company	June 4, 1991
11-1U	Fowler Contracting Corporation	June 4, 1991
11-1V	General Electric Capital Corporation	June 4, 1991
11-1W	George R. Barefoot Utility, Inc.	June 4, 1991
11-1X	Gray & Creech, Inc.	June 4, 1991
11-1Y	Green Glen, Ltd.	June 4, 1991
11-1Z	Greenview Properties, Inc.	June 4, 1991
11-2A	Hunt Properties, Inc.	June 4, 1991
11-2B	Industrial Contractors	June 4, 1991
11-2C	Investors Title Insurance Company	June 4, 1991
11-2D	Jones, McKeithan d/b/a Native Construction Co.	June 4, 1991
11-2E	J.M. Kane & Company	June 4, 1991
11-2F	Kaufman, George	June 4, 1991
11-2G	Lawrence & Lawrence Architects	June 4, 1991
11-2H	Miles Home Division of Insilco Corporation	June 4, 1991
11-2I	National Union Fire Insurance Company	June 4, 1991
11-2J	Newnam, Dee K.	June 4, 1991
11-2K	Robbins, Frances V.	June 4, 1991
11-2L	Saieed, Thomas A.	June 4, 1991
11-2M	Saieed Construction Corporation	June 4, 1991
11-2N	Security Union Title Insurance Company	June 4, 1991
11-2O	Simonovich, Nick & Louise	June 4, 1991

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Racketeering Act No.	Client Name	Date of Mailing (on or about)
11-2P	Singleton, C. E./Buildecon Associates	June 4, 1991
11-2Q	Steel Performance, Inc.	June 4, 1991
11-2R	Taylor Ramsey Corporation	June 4, 1991
11-2S	Telerent Leasing Corporation	June 4, 1991
11-2T	The Douglas Company	June 4, 1991
11-2U	Thetford Property Management, Inc.	June 4, 1991
11-2V	Transamerica Commercial Finance Corporation	June 4, 1991
11-2W	Triangle Materials, Inc.	June 4, 1991
11-2X	Waterford Place Homeowners Association	June 4, 1991
11-2Y	Waterside Associates Limited Partnership	June 4, 1991
11-2Z	77 Tyvola Associates	June 4, 1991

All in violation of the provisions of Title 18, United States Code, Sections 1341 and 2.

COUNT THIRTEEN

(Title 18, United States Code, Sections 1344 and 2)

1. The allegations contained in Paragraphs 1 through 30 of Count One of this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. Beginning on or about May 1, 1991 and continuing thereafter to on or about July 25, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, did knowingly and willfully execute, and attempt to execute, a scheme and artifice to defraud the financial institution clients of Brown, Kirby & Bunch identified below, the deposits of each of which were then insured by the Federal Deposit Insurance Corporation or which otherwise constituted financial institutions as that term is defined in Title 18, United States Code, Section 20, and to obtain the money, funds and other property of said financial institutions by means of false and fraudulent pretenses, representations and promises.

3. It was a part of the scheme and artifice that the defendant, MARK C. KIRBY, would withhold and conceal information from and make false and misleading statements to

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clients and potential clients about the manner and method by which the client would be charged for services performed, or claimed to have been performed by the defendant, MARK C. KIRBY.

4. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would make or attempt to make false and misleading statements to the partners and associates of Brown, Kirby & Bunch during Partnership meetings or at other times about his billing practices and about disclosures made by the defendant, MARK C. KIRBY, to clients concerning the manner and method by which the client would be charged for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY.

5. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would use or attempt to use his position of trust, as an attorney and as a named partner in the law firm of Brown, Kirby & Bunch, and his knowledge of the firm's internal billing procedures and practices to facilitate the scheme and to conceal its existence.

6. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, would submit and would cause or permit billing statements to be submitted to financial institution clients of Brown, Kirby & Bunch which were "padded" to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom.

7. It was a further part of the scheme and artifice that the defendant, MARK C. KIRBY, for the purposes of "padding" billing statements to falsely and fraudulently inflate the number of hours worked by the defendant, MARK C. KIRBY, and to falsely and fraudulently inflate the legal fees calculated therefrom, would, among other things:

a. charge clients for legal services that were not performed by the defendant, MARK C. KIRBY, or for services that were, in actuality, performed in substantially less time than claimed by the defendant, MARK C. KIRBY;

b. charge the same time spent performing legal services on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually worked on a particular day; and

c. charge the same time spent in court on a particular day to more than one client, thus resulting in the defendant, MARK C. KIRBY, charging clients for substantially more time than the defendant actually spent in court on a particular day.

8. On or about May 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, in execution of the scheme and artifice described in Paragraphs 2 through 7 above, and attempting to do so, did knowingly and willfully prepare, and did aid, abet, command, induce, counsel and cause chargeable time slips and other billing records to be prepared for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, during the period of May 1, 1991 through May 31, 1991, on behalf of the financial institution clients of Brown, Kirby & Bunch identified below:

Racketeering Act No.	Client Name
12-1A	Ameribanc Savings Bank, FSB
12-1B	Barclays Bank of North Carolina
12-1C	Branch Banking and Trust Company
12-1D	Central Carolina Bank and Trust Company

Racketeering Act No.	Client Name
12-1E	NCNB National Bank of North Carolina
12-1F	The Poughkeepsie Savings Bank, FSB
12-1G	Resolution Trust Corporation
12-1H	Seaboard Savings Bank, F.S.B.
12-1I	Southern National Bank of North Carolina
12-1J	Tar Heel Farm Credit, ACA
12-1K	Wilmington Savings Fund Society, FSB

All in violation of the provisions of Title 18, United States Code, Sections 1344(1) and (2) and 2.

COUNT FOURTEEN

(Title 18, United States Code, Sections 1005 and 2)

On or about July 23, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, with intent to injure and defraud Central Carolina Bank and Trust Company ("CCB"), the deposits of which were then insured by the Federal Deposit Insurance Corporation, and to deceive any officer of the same and any agent or examiner appointed to examine the affairs of such bank, did knowingly and willfully make, and did aid, abet, counsel, command and cause a false entry to be made in a report or statement of such financial institution, in that the defendant, MARK C. KIRBY, made representations to CCB in a letter dated on or about July 23, 1990 concerning the manner and method by which CCB would be charged for legal services performed by the defendant, MARK C. KIRBY, when, in truth and fact, the defendant, MARK C. KIRBY, well knew that CCB would not be charged for legal services in such manner and that the defendant, MARK C. KIRBY, did not intend to charge CCB for legal fees in the manner set forth therein.

All in violation of the provisions of Title 18, United States Code, Sections 1005 and 2.

COUNT FIFTEEN
(Title 18, United States Code, Sections 1006 and 2)

On or about October 25, 1990, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, being connected in any capacity with Tar Heel Farm Credit, ACA ("Tar Heel"), Raleigh, N.C., a Farm Credit institution and a federally chartered instrumentality of the Farm Credit Administration, with intent to defraud Tar Heel and to deceive any officer, auditor, examiner or agent of the same, did knowingly and willfully make, and did aid, abet, counsel, command, induce and cause a false entry to be made in a report or statement of or to such financial institution, in that the defendant, MARK C. KIRBY, made representations to Tar Heel in a letter dated on or about October 25, 1990 concerning the manner and method by which Tar Heel would be charged for legal services performed by the defendant, MARK C. KIRBY, when, in truth and fact, the defendant, MARK C. KIRBY, well knew that Tar Heel would not be charged for legal services in such manner and that the defendant, MARK C. KIRBY, did not intend to charge Tar Heel for legal fees in the manner set forth therein.

All in violation of the provisions of Title 18, United States Code, Sections 1006 and 2.

COUNT SIXTEEN
(Title 18, United States Code, Sections 1032(2) and 2)

1. On or about December 7, 1990, the Resolution Trust Corporation ("the RTC") was appointed Receiver for First Federal Savings and Loan Association of Raleigh by the Office of Thrift Supervision ("OTS"). On or about that date, First Federal Savings and Loan Association of Raleigh was rechartered as First Federal Savings Association of Raleigh and was

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placed into the Conservatorship of the RTC by the OTS. As used hereinafter, the term "First Federal" shall refer to First Federal Savings and Loan Association of Raleigh or First Federal Savings Association of Raleigh. At all times material herein, First Federal was a financial institution operating under the direction and management of the RTC, the deposits of which were insured by the FDIC.

2. From on or about December 7, 1990, the RTC became responsible for the management and liquidation of First Federal, including, among other things, the evaluation of the assets of First Federal, the maintenance or resolution of legal proceedings instituted on behalf of First Federal and various real estate related services. In its capacity as Receiver and Conservator for First Federal, the RTC was responsible for contracting with private or "outside" law firms for legal services incident to the RTC's management and liquidation of First Federal.

3. On or about December 7, 1990, among other things, the RTC sent a "First Night" letter to the law firm of Brown, Kirby & Bunch notifying the firm and the defendant, MARK C. KIRBY, of the appointments of the RTC as Receiver and Conservator for First Federal. The RTC also advised the law firm of Brown, Kirby & Bunch and the defendant, MARK C. KIRBY, of the requirements and application procedures involved in becoming an approved contractor to provide legal services incident to the RTC's management and liquidation of First Federal.

4. Beginning on or about December 7, 1990 and continuing thereafter through on or about July 25, 1991, within the Eastern District of North Carolina and elsewhere, the defendant, MARK C. KIRBY, did corruptly impede and endeavor to impede the functions of the RTC, and did aid, abet, counsel, command and cause the same to be impeded, in its capacity

as Receiver and Conservator for First Federal in contracting with the law firm of Brown, Kirby & Bunch to provide legal services incident to the RTC's management and liquidation of First Federal, in that the defendant, MARK C. KIRBY, deceived and mislead and attempted to deceive and mislead the RTC and its agents or representatives about the manner and method by which the RTC had been or would be charged for legal services performed, or claimed to have been performed by the defendant, MARK C. KIRBY, or by other attorneys or paralegals at the law firm of Brown, Kirby & Bunch.

All in violation of the provisions of Title 18, United States Code, Sections 1032(2) and 2.

A TRUE BILL

Deborah S. Thomas
FOREPERSON

DATE: January 25, 1994

J. DOUGLAS McCULLOUGH
United States Attorney

BY: [signature]
SCOTT L. WILKINSON
Assistant United States Attorney
Criminal Division

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I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By: [signature]

APPENDIX

Uniform Task-Based Management System

L300 Discovery

- L310 Written Discovery
- L320 Document Production
- L330 Depositions
- L340 Expert Discovery
- L350 Discovery Motions
- L390 Other Discovery

L300 Discovery. Includes all work pertaining to discovery according to court or agency rules.

L310 Written Discovery. Developing, responding to, objecting to, and negotiating interrogatories and requests to admit, including mandatory meet-and-confer sessions. Also covers mandatory written disclosures as under Rule 26(a).

L320 Document Production. Developing, responding to, objecting to, and negotiating document requests, including the mandatory meet-and-confer sessions to resolve objections. Includes identifying documents for production, reviewing documents for privilege, effecting production, and preparing requested privilege lists. (While a general review of documents produced by other parties falls under this task, coding and entering produced documents into a data base is Task L140 and reviewing documents primarily to understand the facts is Task L110.)

L330 Depositions. All work concerning depositions, including determining the deponents and the timing and sequence of depositions, preparing deposition notices and subpoenas, communicating with opposing or other party's counsel on scheduling and logistics, planning for and preparing to take the deposition, discussing the deposition strategy, preparing witnesses, reviewing documents for deposition preparation, attending depositions, and drafting any deposition summaries.

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L340 Expert Discovery. Same as L330, but for expert witnesses.

L350 Discovery Motions. Developing, responding to, and arguing all motions that arise out of the discovery process. Includes the protective order process.

L360 Other Discovery. Less frequently used forms of discovery, sucha medical examinations and on-site inspections.

American Corporate Counsel Association

The following are the ACCA-suggested Litigation Document, Preparation/Review task categories:

Code	**Category**
225	Work on litigation documents
226	Review opposing party/third party documents
227	Review documents from/for production
228	Review documents for privilege log
229	Review medical records and medical literature
230	Class action settlement
231	Settlement documents

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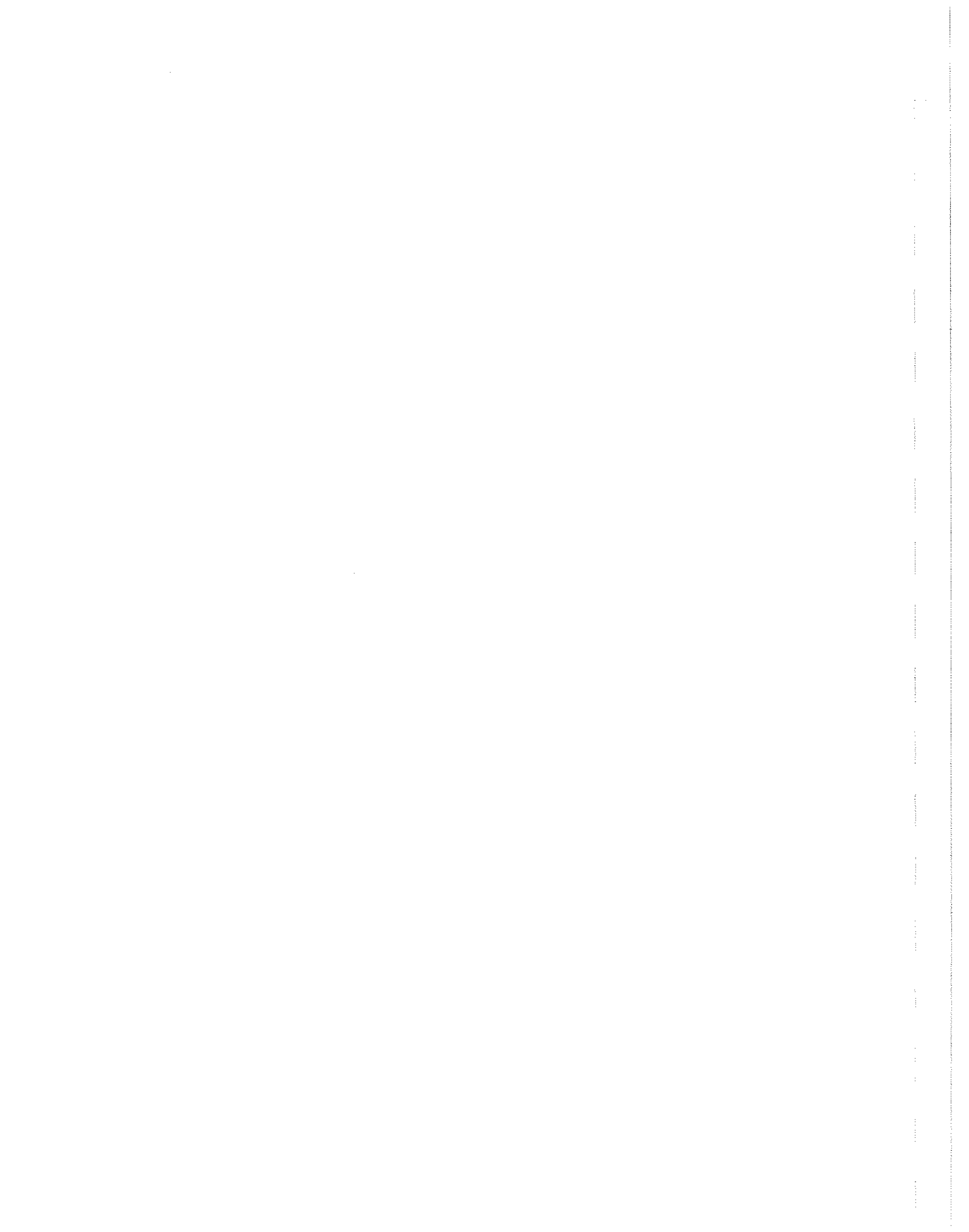

CLIENT RELATIONS: IMMINENT PRESSURE POINTS AND THE RESULTING ETHICAL PROBLEMS

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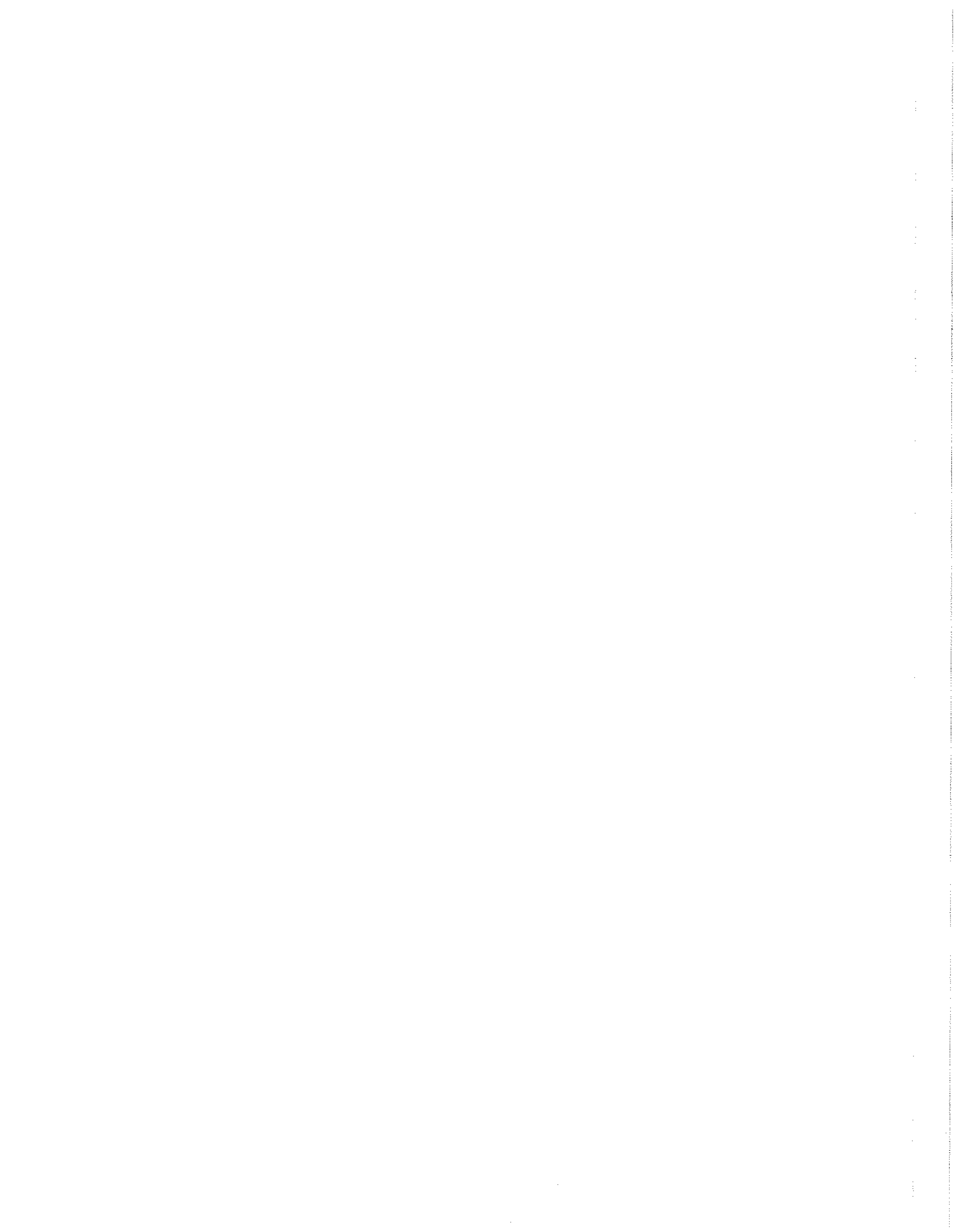
Sharon Soorholtz Greer
Cartwright, Druker & Ryden
Marshalltown, Iowa

Wendy N. Munyon
Grinnell Mutual Reinsurance Company
Grinnell, Iowa



CLIENT RELATIONS:
IMMINENT PRESSURE POINTS
AND THE RESULTING ETHICAL PROBLEMS

BY

SHARON SOORHOLTZ GREER & WENDY N. MUNYON

Pressure Points

A. Attorney-Client Relationship in the insurance context

1. Section 215 of Preliminary Draft #11 of Restatement of the Law Governing Lawyers.

   a. Client must be notified and give informed consent if one other than client pays fees;
   b. Client must be notified and give informed consent if one other than the client has any control over the defense.

2. Case Law -- Atlanta International Ins. Co. v. Bell, 448 N.W.2d 804 (Mich. App. 1989) etc.

B. Restrictions on In-House Counsel for Insurers:

1. Conflicts limiting in-house counsel

   a. Potential excess
   b. Coverage issues
   c. Multiple insureds

2. Unauthorized Practice of Law -- In Re Youngblood, 895 S.W.2d 322 (Tenn. 1995)

3. Fiduciary Duty

C. Restrictions Placed on Outside Counsel by Insurers

1. Limited defense restrictions

2. Limits reduced by defense costs (professional liability policies especially)

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D. Practical Problems

1. Problems Defense Counsel Face

a. Breaking the billings into minute detail
b. Requiring permission to do routine file workups
c. Requiring reports that are timed by the company, but do not correspond to the activity on the case
d. Not paying for research or paralegal time
e. Requiring cost estimates before a serious evaluation can be obtained
f. Wanting help from time-strapped insurance company personnel
g. Not wanting the attorney to "reinvent the wheel" but failing to provide a full report when the file is initially sent
h. Each carrier having its own unique billing format, but requiring the same information
I. Allowing costs of efficiency in the billing
j. Billing for travel time
k. Others

2. Problems Insurance Companies Face

a. Associate abuse
b. Depositions and discovery without reason or need
c. Overbilling, such as a standard charge for any size letter
d. Multiple staffing. Paying for too many file reviews by different attorneys
e. Not providing regular reports or knowing the file status on call-ins
f. Billing secretaries as paralegal time
g. Auditing and the pressure on the relationship
h. Failure to use work product already established by company
i. Too little use of technology
j. Too many attorneys attending court and depositions
k. Others

E. Some Difficult Scenarios - Examples and Solutions

1. The team approach
2. The audit
3. Budget contraints
4. Zealous representation/contract billing
5. Good relationship with insurer. What about insured?
6. Appropriate/cost effective assignment of cases
7. Litigation support
8. Others

F. Ethical Considerations and the Impact on the Solution

1. Conflicts
2. Learning confidential information from the insured
3. Defense decisions that cause conflict between the insured and the insurer
4. Iowa Code of Professional Responsibility

   a. Ethical Considerations 4-1 and 4-2
   b. Ethical Considerations 5-1, 5-14 through 5-19
   c. Ethical Considerations 7-1 and 7-8

5. Others

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REASONS FOR HIGH DEFENSE LITIGATION COSTS
ALL RESPONDENTS

	Number Responding	Percent
Abusive litigation tactics and lack of civility by plaintiff's lawyers	161	75
Overuse of (unnecessary) discovery	156	73
Difficulty in budgeting litigation matters	118	55
Over reliance on formal discovery when informal means might resolve the issue	116	54
Lack of responsiveness by plaintiff's lawyers	110	51
Over reliance on motions when informal means might resolve the issue	108	50
Too little emphasis on early case resolution by defense counsel	104	49
Unnecessary, multiple staffing of litigation cases	96	45
Too little emphasis on early case resolution by claims counsel	93	43
Getting so involved in the ligation matter that the defense lawyer loses sight of the overall cost or the client's or claim person's objectives	92	43
Difficulty in adhering to budgets	91	43
Lack of trust between defense counsel and clients or claims personnel	89	42
Lack of responsiveness by claims personnel or clients	87	41
Low hourly rates paid by clients or claims personnel in defense or insurance defense litigation	86	40
Continuances and postponements sought by plaintiff's lawyers	81	38
Failure to more effectively utilize paralegals (legal assistants) in litigation matters	77	36
Abusive litigation tactics and lack of civility by defense counsel	75	35
Getting so involved in the litigation matter that the client or claims person loses sight of the overall cost or objectives	75	35
Failure to more effectively utilize associates in litigation matters	60	28
Failure of defense counsel to utilize prior work product (i.e., "reinventing the wheel")	57	27
Too little settlement authority given to defense counsel by claims personnel or clients	56	26
Unnecessary meetings or conferences among members of the defense team	53	25
Billing practices whereby paralegal and clerical tasks are billed as lawyer fees	49	23
Timekeeping practices such as recording standard time units for litigation events rather than recording actual time expended	46	21
Continuances and postponements sought by defense counsel	42	20
Billing practices whereby clients are charged separately, for expense items rather than having them covered by the defense lawyer's hourly fee	31	14
Failure of clients or claims personnel to require or enforce case budgets in hourly fee litigation	30	14
Lack of responsiveness by defense counsel	29	14
Billing practices whereby expenses are not billed separately, but instead are covered by the defense lawyer's hourly fee	26	12
Other	21	10
Too much settlement authority given to defense counsel by claims personnel or clients	18	8

Question: Indicate your opinion whether any or all of the items listed are responsible for contributing to the high cost of defense litigation (please check as many as apply). For purposes of these questions "client" refers to carrier, not policyholder.

REASONS FOR HIGH DEFENSE LITIGATION COSTS
BY TYPE OF ORGANIZATION
LAW FIRMS

	Number Responding	Percent
Abusive litigation tactics and lack of civility by plaintiff's lawyers	128	74
Overuse of (unnecessary) discovery	118	68
Difficulty in budgeting litigation matters	90	52
Over reliance on formal discovery when informal means might resolve the issue	85	49
Low hourly rates paid by clients or claims personnel in defense or insurance defense litigation	84	49
Lack of responsiveness by plaintiff's lawyers	83	48
Over reliance on motions when informal means might resolve the issue	82	47
Lack of responsiveness by claims personnel or clients	72	42
Lack of trust between defense counsel and clients or claims personnel	70	40
Too little emphasis on early case resolution by claims counsel	70	40
Too little emphasis on early case resolution by defense counsel	69	40
Difficulty in adhering to budgets	69	40
Unnecessary, multiple staffing of litigation cases	64	37
Getting so involved in the litigation matter that the defense lawyer loses sight of the overall cost or the client's or claim person's objectives	61	35
Abusive litigation tactics and lack of civility by defense counsel	58	34
Failure to more effectively utilize paralegals (legal assistants) in litigation matters	56	32
Continuances and postponements sought by plaintiff's lawyers	55	32
Getting so involved in the litigation matter that the client or claims person loses sight of the overall cost or objectives	55	32
Too little settlement authority given to defense counsel by claims personnel or client	52	30
Failure to more effectively utilize associates in litigation matters	42	24
Billing practices whereby paralegal and clerical tasks are billed as lawyer fees	27	16
Continuances and postponements sought by defense counsel	27	16
Unnecessary meetings or conferences among members of the defense team	27	16
Failure of defense counsel to utilize prior work product (i.e., "reinventing the wheel")	25	14
Timekeeping practices such as recording standard time units for litigation events rather than recording actual time expended	23	13
Billing practices whereby expenses are not billed separately, but instead are covered by the defense lawyer's hourly fee	18	10
Lack of responsiveness by defense counsel	17	10
Too much settlement authority given to defense counsel by claims personnel or clients	15	9
Billing practices whereby clients are charged separately for expense items rather than having them covered by the defense lawyer's hourly fee	10	6
Failure of clients or claims personnel to require or enforce case budgets in hourly fee litigation	10	6
Failure of defense counsel to comply with case budgets in hourly fee litigation	2	1
Other	2	1

Question: Indicate your opinion whether any or all of the items listed are responsible for contributing to the high cost of defense litigation (please check as many as apply). For purposes of these questions "client" refers to carrier, not policyholder.

REASONS FOR HIGH DEFENSE LITIGATION COSTS BY TYPE OF ORGANIZATION INSURERS

	Number Responding	Percent
Overuse of (unnecessary) discovery	31	94
Too little emphasis on early case resolution by defense counsel	30	91
Failure of defense counsel to utilize prior work product (i.e., "reinventing the wheel")	28	85
Abusive litigation tactics and lack of civility by plaintiff's lawyers	27	82
Over reliance on formal discovery when informal means might resolve the issue	26	79
Unnecessary, multiple staffing of litigation cases	25	76
Getting so involved in the litigation matter that the defense lawyer loses sight of the overall cost or the client's or claim person's objectives	25	76
Difficulty in budgeting litigation matters	23	70
Unnecessary meetings or conferences among members of the defense team	22	67
Over reliance on motions when informal means might resolve the issue	22	67
Lack of responsiveness by plaintiff's lawyers	21	64
Billing practices whereby paralegal and clerical tasks are billed as lawyer fees	20	61
Timekeeping practices such as recording standard time units for litigation events rather than recording actual time expended	20	61
Too little emphasis on early case resolution by claims counsel	20	61
Continuances and postponements sought by plaintiff's lawyers	20	61
Billing practices whereby clients are charged separately for expense items rather than having them covered by the defense lawyer's hourly fee	19	58
Getting so involved in the litigation matter that the client or claims person loses sight of the overall cost or objectives	18	55
Failure of clients or claims personnel to require or enforce case budgets in hourly fee litigation	18	55
Failure to more effectively utilize paralegals (legal assistants) in litigation matters	17	52
Difficulty in adhering to budgets	17	52
Lack of trust between defense counsel and clients or claims personnel	16	48
Abusive litigation tactics and lack of civility by defense counsel	14	42
Failure to more effectively utilize associates in litigation matters	14	42
Lack of responsiveness by claims personnel or clients	13	39
Continuances and postponements sought by defense counsel	13	39
Failure of defense counsel to comply with case budgets in hourly fee litigation	11	33
Lack of responsiveness by defense counsel	9	27
Billing practices whereby expenses are not billed separately, but instead are covered by the defense lawyer's hourly fee	5	15
Other	2	6
Too little settlement authority given to defense counsel by claims personnel or clients	2	6
Too much settlement authority given to defense counsel by claims personnel or clients	2	6
Low hourly rates paid by clients or claims personnel in defense or insurance defense litigation	1	3

Question: Indicate your opinion whether any or all of the items listed are responsible for contributing to the high cost of defense litigation (please check as many as apply). For purposes of these questions "client" refers to carrier, not policyholder.

STATISTICAL PROOF OF DISCRIMINATION: AN OVERVIEW

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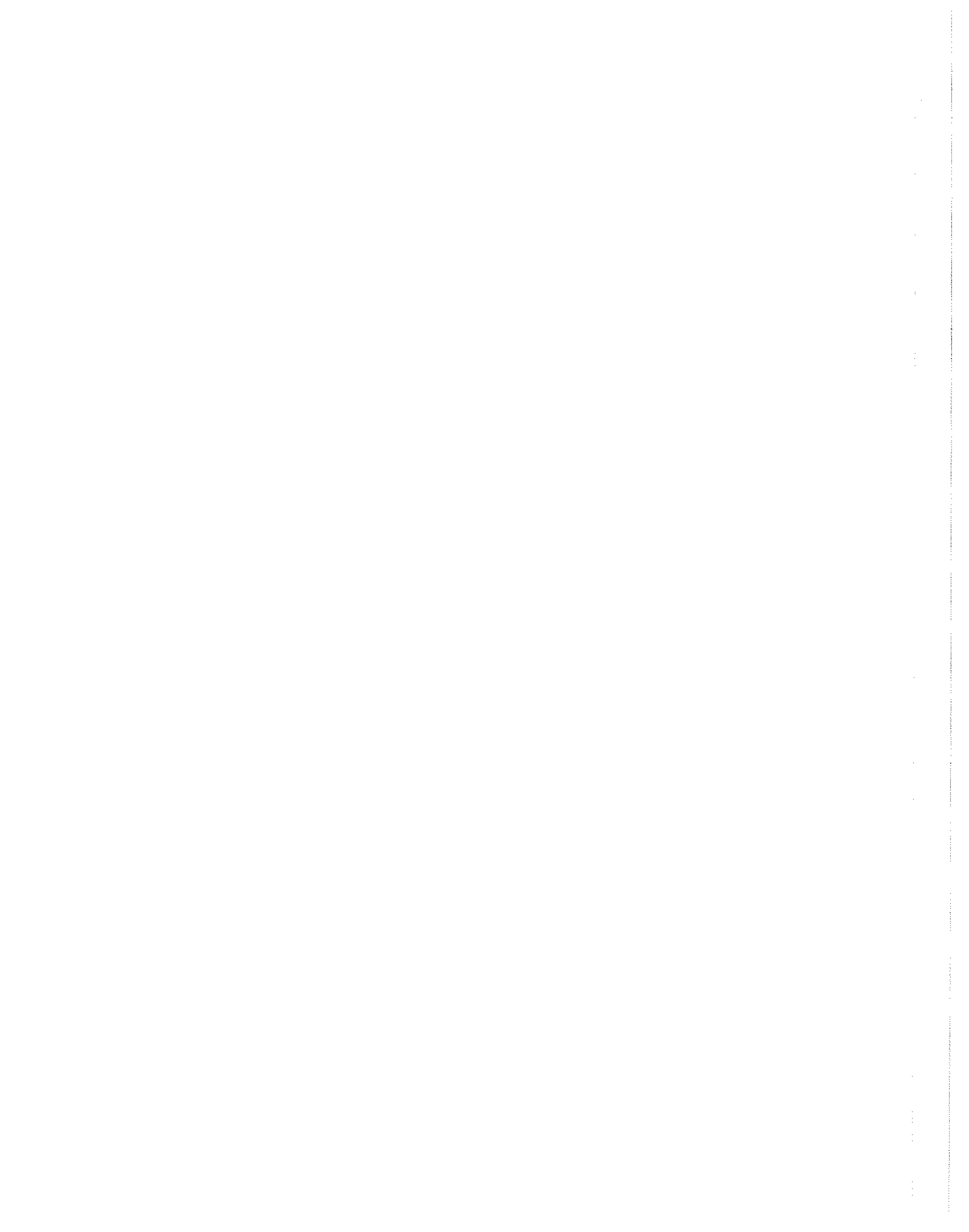
David C. Baldus
University of Iowa
Iowa City, Iowa



Iowa Defense Counsel Association Seminar
Des Moines, IA
September 22, 1995

Statistical Proof of Discrimination: An Overview
David C. Baldus
University of Iowa

I. Smith v. ABC Corp.: A Disparate Treatment Case

ABC Corp. manufactures carpets and sells them through a force of 60 traveling salesmen. John Smith, a 30 year old black male, responded to an advertisement for an opening in one of the sales positions. Smith had three years experience as a rug salesman at a Sears & Roebuck store but not on the road. His application for the ABC Corp. sales job was rejected and ABC subsequently hired a 25 year old white male with no rug sales experience of any kind. An ABC representative said that Smith was rejected because of his personality -- too taciturn

Of ABC's 60 salesmen, all of whom were hired within the last two years, .17 (10/60) are black.* During this two-year period, the proportion of blacks between 18 and 65 years of age in the labor force of the Standard Metropolitan Statistical Area (SMSA) in which ABC operates was .25. Thirty-three percent (50/150) of the 150 applicants for the rug salesman job during this period were black;* .50 (50/100) of the white applicants and .20 (10/50) of the black applicants

*These statistics are "representation rates," which indicate the proportion of a given population with certain characteristics, in this case racial.

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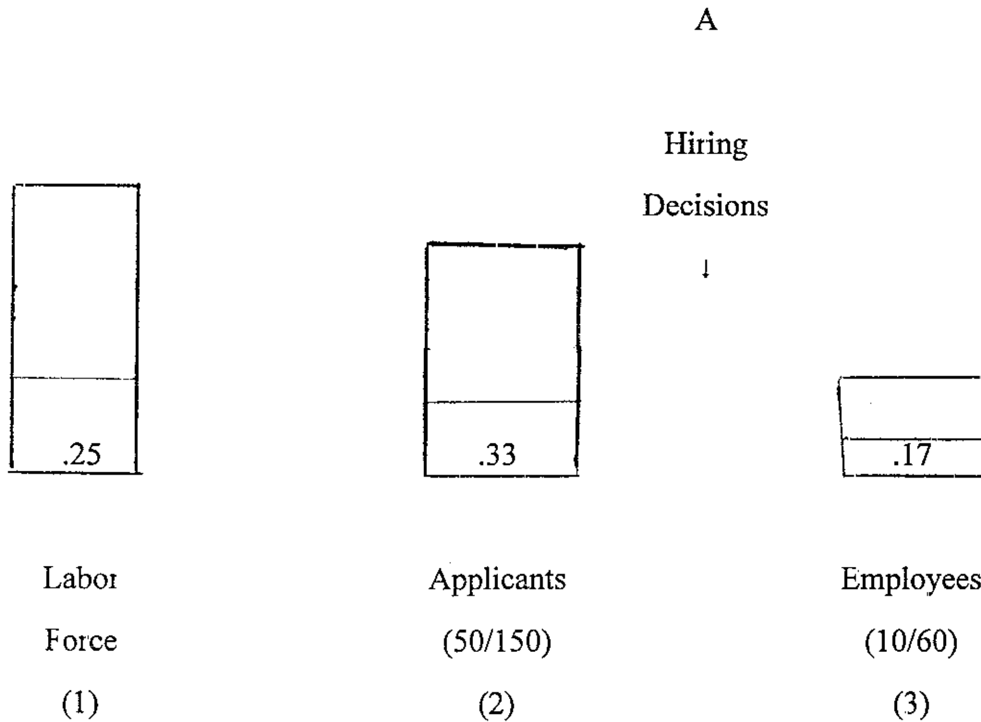
were hired.** The employer claims that this disparity is caused by chance and because of qualification levels among the black applicants.



Smith claims intentional discrimination (disparate treatment) against himself individually and against the class of black applicants during the preceding two years.

A. Individual Disparate Treatment Claim -- <u>McDonnell-Douglas Corp. v. Green</u>, 411 U.S. 792(1973) and <u>Texas Dept. of Comm. Affairs v. Burdine</u>, 450 U.S. 248 (1981) -- The

**The statistics are "selection rates which indicate the proportion of persons from each racial group that was hired

ultimate issue is whether ABC's decision to reject plaintiff was based on his race.

1. Prima facie case: four non-quantitative elements

2. Rebuttal: ABC articulated a legitimate non-discriminatory reason for the rejection

3. Pretext: the only issue on which statistical proof is relevant.

B. Classwide Disparate Treatment Claim -- is there a pattern or practice of race or gender discriminations.

1. Is there a statistical disparity?

a. A comparison of representation rates -- the proportion of black employees (.17) compared with the proportion of blacks in the labor force or the proportion of black applicants.

(1) Labor force comparison

(a) .25 - .17 = 8 point disparity

(b) .25/.17 = 1.5 multiplier

(2) Applicant comparison

(a) .33-.17 = 16 point. disparity

(b) .33-.17 = 1.9 point multiplier

b. A comparison of selection rates for the black and white applicants

(1) .50 - .20 = 30 point disparity

(2) .50/.20 = 2.5 multiplier

*which comparisons are most relevant?

*which measures of the disparity are most relevant?

2. Can the disparity be explained by chance?

The "two or three standard deviation rule" and statistical significance at the .05 and

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.01 level. Hazelwood School District v. United States, 433 U.S. 229, 309-11 & notes 14 & 17 (1977).

3. Can the disparity be explained by differential qualifications among the black and white applicants? The answer requires:

   (a) a determination that the job requires special qualifications not available in the population generally or easily acquired. Hazelwood School District v. United States, 433 U.S. 299, 308-09 & n. 13 (1977)

   (b) data on the qualifications of labor force members and/or the actual applicants.

   (c) a further statistical analysis which measures the magnitude of the disparity and its statistical significance after adjustments for the relevant qualifications.

4. Is the disparity, when considered with the nonstatistical evidence in the case, sufficient support an inference of purposeful discrimination? Bazemore v. Friday, 478 U.S. 385 (1986).

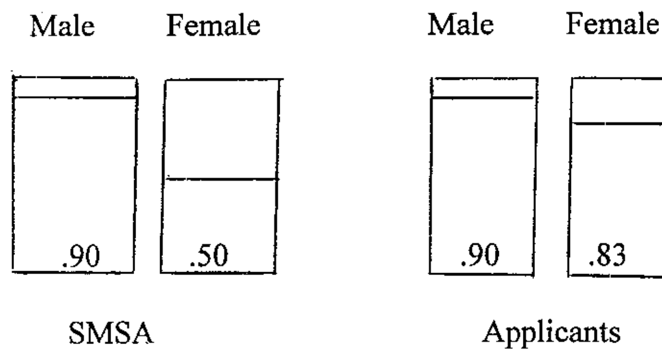
   (a) How well does the method of proof adjust for the qualification and chance rival hypotheses -- i.e., what is the pedigree of the numbers?

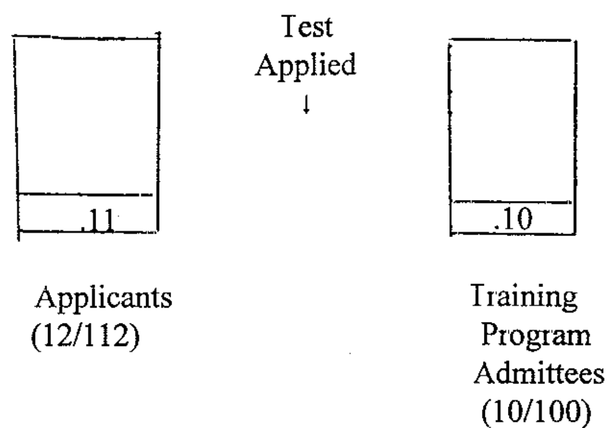
   (b) How large is the disparity -- is it "gross" as a matter of law?

II. Able v. Green City: A Disparate Impact Case -- Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The Green City Police Department accepts for its training program only people who are 5'2" or taller in height. Mary Able was denied admission into the program because she was only 5' tall. She also learned that only 83% (10/12) of the women who applied met the height requirement, while 90% (90/100) of the male applicants were over 5'2". Eleven percent (12/112)

of the applicants were women; 10% (10/100) of those admitted into the program were women.
In the relevant SMSA, 90% of the males between 18 and 40 years of age were over 5'2" in height while only 50% of the women in this age category stand 5'2" or taller. She challenges the test on a disparate impact theory.





A. Is there a statistical Disparity?

1. A comparison of representation rates proportion of women applicants compared with the proportion of women admittees.

.11 - .10 = 1 point disparity

.11/.10 = 1.1 multiplier

2. A comparison of qualification rates of the male and female applicants.

.90 - .83 = 7 point disparity

.90/.83 = 1.1 multiplier

3. A comparison of the qualification rates of men and women in the SMSA labor force.

.90 - .50 = 40 point disparity

.90/.50 = 1.8 multiplier

B. Can the disparity be explained by chance?

C. Can the disparity be explained by differential qualifications among the male and female applicants? Wards Cone Packing Co. Inc. v. Antonio 109 S. Ct. 2115 (1989) & Civil Rights Act of 1991. The answer requires a determination that:

(a) the job requires further legitimate qualifications beyond a height over 5'2", e.g., a high school diploma,

(b) the law requires an adjustment for these additional qualifications,

(c) there are data available on the distribution of these additional qualifications in the SMSA labor force or among the actual applicants, e.g., qualification rates among male and female high school graduates. Further statistical analysis can then measure the magnitude of the disparity and its statistical significance after adjustment for the additional qualifications.

D. Is the disparity sufficiently "substantial" to establish a prima facie case and require a demonstration of job-relatedness.

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Deposition Dilemmas And The Ethics Of Effective Objections

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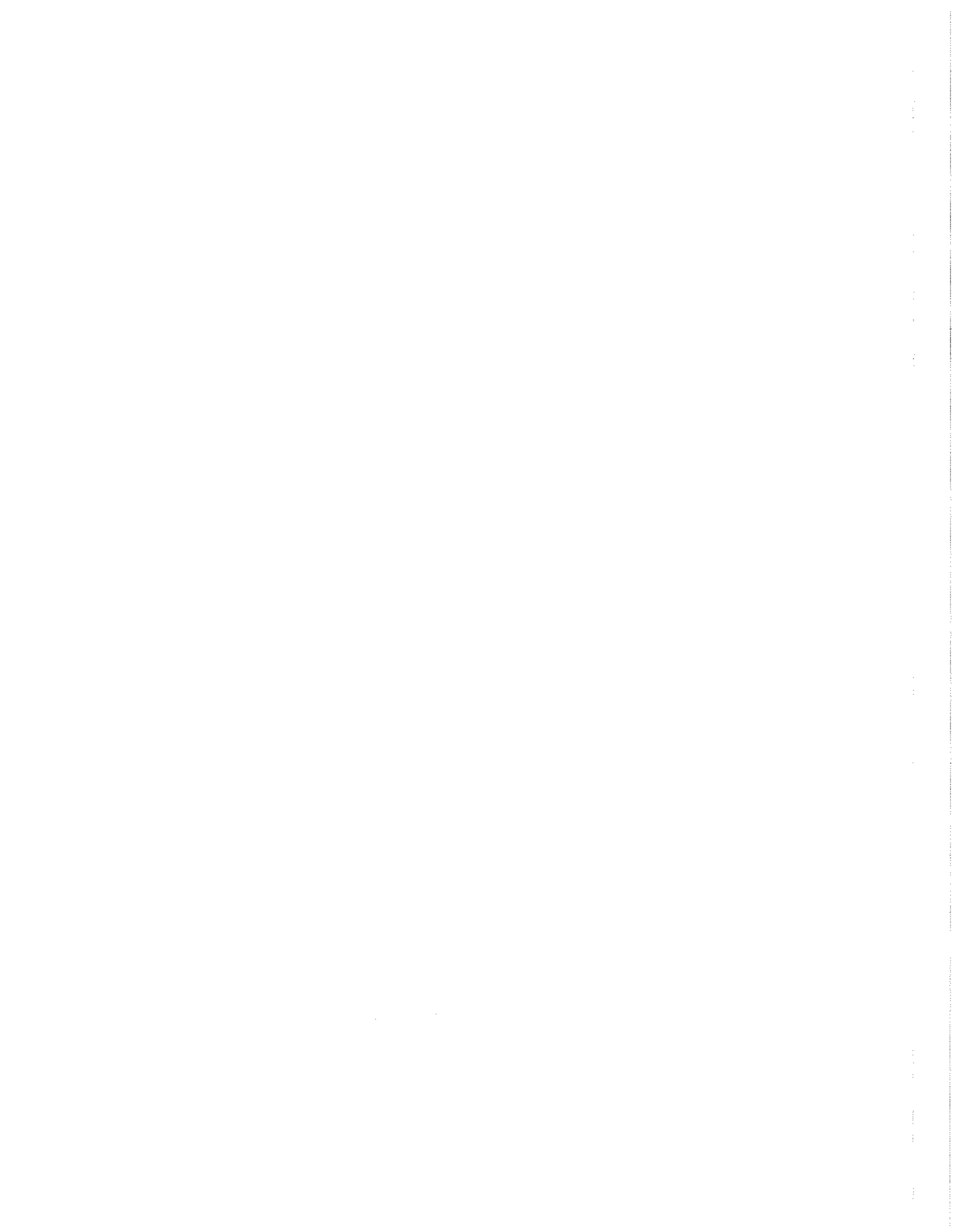

TABLE OF CONTENTS

I. **INTRODUCTION TO CHALLENGING EVIDENCE**

A. Purpose

B. Four Aspects
1. Competency
2. Professionalism
3. Strategy
4. Form

C. Timing of Objections

II. **DEPOSITION DILEMMAS**

A. Depositions for Trial
1. The Rules
2. Usage at Trial

B. Preparation for Deposition Evidence
1. Protective Orders
2. Stipulations

C. Objections
1. Competency Aspect
a. Privileges
b. Qualified Privileges
c. Form of Question
d. Other Objections
2. Professionalism Aspect
3. Strategy Aspect
4. Form Aspect

D. Instructing the Witness Not to Answer
1. Making the Record
2. Stipulations After Instruction
3. Motions to Adjourn

E. Video Depositions

III. **PRESERVATION AND THE PRE-TRIAL ORDER**

IV. **ADMISSIBILITY: PRELIMINARY QUESTIONS**

V. **MOTIONS IN LIMINE**

VI. **PRESENTING OFFERS OF PROOF**

VII. **MOTIONS TO STRIKE**

VIII. **UNDERSTANDING THE FORM OF SPECIFIC, GENERAL AND CONTINUING OBJECTIONS**

N

A. Introduction to Trial Objections

B. Phrasing Objections

C. General and Specific Objections

D. Trial Objections
   1. Objections on Procedural Matters
   2. Objections on Content of Questions
   3. Protecting the Witness

IX. CURATIVE, CAUTIONARY AND LIMITED INSTRUCTIONS

X. APPEALING JUDICIAL ERROR: REVERSIBLE, HARMLESS OR PLAIN

XI. MAKING AND PRESERVING THE RECORD

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Caveat

This article has been written for the use of entrants in the **Iowa Defense Counsel Annual Meeting** in September, 1995. It is intended for background and instructional purposes. Although every effort has been made to assure its accuracy, it is not intended to be applicable to any specific legal problem.

I. INTRODUCTION TO CHALLENGING EVIDENCE

A. Purpose

Challenging evidence can serve numerous purposes. The essential purpose is to maintain the fairness of trial. Objections prevent the trier of fact from being exposed to inappropriate evidence[1] and inappropriate trial conduct.[2] They also preserve the errors for appellate review.[3]

From an advocate perspective, the purpose of objecting is to shape the case.[4] The trial lawyer prepares and presents the case to advance his clients position. "Of all the things you do..., your efforts to shape the case by offering and objecting to evidence are among the most]important."[5]

Some authors present numerous other purposes of objecting. For instance, Dombroff lists tactical reasons, such as keeping an opponent off stride, forcing an opponent to change litigation plans and exposing your opponent's weaknesses as a litigator.[6] These other purposes for objecting may be effective tactics. They do cause concerns in that they foster a game mentality of trials. Accordingly, they diminish the focus on the fairness of trials and diminish "the ascertainment of truth and the just determination of legal proceedings." See Fed. R. Evid. 102, Iowa R. Evid. 102.

Certain rules have been generally recognized concerning the purposes of objections. These have been included in codes of ethics, codes of professionalism and customs. The starting point in Iowa is the Iowa Code of Professional Responsibility, EC 7-1, which states, in part,

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> The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes disciplinary rules and enforceable professional regulations.

The zealous advocate is also cautioned by EC 7-10, which states:

> The duty of the lawyer to represent a client with zeal does not militate against a concurrent obligation to treat with consideration all persons involved in the legal process and avoid the infliction of needless harm.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. IA CODE PROFESSIONAL RESPONSIBILITY, EC 7-24. Further ethical considerations provide further direction. One states:

> Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, a lawyer is not justified in consciously violating such rules and should be diligent in efforts to guard against unintentional violation of them. As examples, . . . a lawyer should not ask a question solely for the purpose of harassing or embarrassing; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider. IA CODE

PROFESSIONAL RESPONSIBILITY, EC 7-25.

These ethical considerations have been repeated in the disciplinary rules. Disciplinary Rule 7-106 states, in part:

> (C) In appearing in a professional capacity before a tribunal, a lawyer shall not:
>
> . . .
>
> (2) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and is intended to degrade a witness or other person.
>
> . . .
>
> (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of an intent not to

comply.
(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
(7) Intentionally or habitually violate any established rule of procedure or of evidence. IA CODE OF PROFESSIONAL

RESPONSIBILITY, DR 7-106.

The American Bar Association has adopted the Model Rules of Professional Conduct in 1983. Rule 3.1 maintains a ban on objections unless there is a basis for doing so that is not frivolous. Rule 3.4, Fairness to Opposing Party and Counsel, addresses some of the same concerns as the Iowa Code of Professional Responsibility. It states, in part:

A lawyer shall not:

(a) unlawfully obstruct another partys access to evidence.
. . .
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
. . .

Similarly, Rule 3.5 prohibits a lawyers conduct intended to disrupt a tribunal.

Further, these types of objections are more likely to offend standards of professionalism. It is clear the federal courts are giving increasing attention to this aspect. See, Judicial Conference, Federal Circuit, 146 F.R.D. 205, 216-232 (1992); Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371 (1991) and Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992). The Seventh Circuit Report has made its way into a Southern District of Iowa Case,[7] the 1993 Federal Practice Seminar in Des Moines;[8] and a

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1994 Iowa Supreme Court Case.[9] As more emphasis is placed on professionalism, these rationale for objections become riskier.

Customs and courtroom etiquette also create an obligation on attorneys and the purposes of objections. A good listing of rules of courtroom customs and etiquette is contained in J. Alexander Tanford, The Trial Process: Law, Tactics and Ethics, 2nd Ed., 9-12, (1993). That list, entitled Model Rules of Courtroom Etiquette includes:

> . . .
> Rule 3. Behavior of persons in the courtroom. - Dignity and solemnity should be maintained in the courtroom at all times by attorneys, court officers, witnesses and other persons; unseemly behavior shall be grounds for removal from the courtroom.
> . . .
> Rule 12. Officer of court. - The lawyer is an officer of the court and should at all times uphold the honor and maintain the dignity of the profession, maintaining at all times a respectful attitude toward the court, its personnel, and other lawyers.
> . . .
> Rule 19. Objections without argument. - Lawyers shall state their objections and the grounds thereof without argument; if there is to be an argument or offer of proof, it shall be made out of the hearing of the jury. When speaking to an objection or any other point of law, the lawyers shall address all remarks to the bench, and not address each other directly.
> . . .
> Rule 22. Courtesy toward opposing counsel and witnesses. - The lawyer shall treat opposing counsel and witnesses with courtesy and respect.
> Rule 23. Interruption of other lawyers. . . - The lawyers as far as possible shall refrain from interrupting each other or speaking at the same time in order to assist in making a proper record. . . J. Alexander Tanford, <u>The Trial Process: Law, Tactics and Ethics</u>, 2nd Ed., 9-12 (1993) citing <u>Rules of Uniform Decorum in the District Courts of Minnesota</u> (1978) and Catherine T. Clarke, Missed Manners in Courtroom Decorum, 50 Md. L. Rev. 945 (1991).

B. Four Aspects

There are essentially four aspects of challenging evidence. They are:

1). Competency - knowing that a legitimate challenge is available;

2). Professional - determining if a legitimate challenge is acceptable conduct;

3). Strategical - recognizing if a legitimate challenge is advisable conduct;

4). Formal - performing the most effective challenge.

A solid grasp of these components are essential for every successful trial lawyer.

C. Timing of Challenges

James McElhaney has stated, "Trying to shape the case by responding for the first time to what your opponent does in the middle of trial is like trying to carve a statute by running past a rock and hitting it with a hammer each time your go by."[10] His point is clear. Challenges to evidence are part of the trial lawyer's preparation and objections are easier and better when made before trial.

II. DEPOSITION DILEMMAS

A. Depositions for Trial

Perhaps no area of pre-trial procedure is so demanding as the deposition. As part of the discovery process, the rules provide liberal procedures. The rules provide access to any information which is not privileged and is relevant. Fed. R. Civ. P. 26(b)(1), Iowa R. Civ. P. 122(a). Inadmissible information can be obtained if it is reasonably calculated to lead to the

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discovery of admissible evidence. Id. Further, information objected to is normally received in the record subject to the objections. Fed. R. Civ. P. 30(c); Iowa R. Civ. P. 148(a).

1. The Rules

The rules provide no distinction between discovery depositions and depositions to be used at trial. Farley v. Seiser, 316 N.W. 2d 857,858 (Iowa 1982).

> "It is no secret that the deposition is one of the most productive discovery devices available. What is not so commonly appreciated are the creative and effective uses to which deposition transcripts can be put at trial.
>
> The trick is knowing when and how to use a transcript to best advantage. The lawyer who recognizes that a 'discovery' deposition can be a powerful weapon at trial will fit it into his overall strategy and take steps to stymie his opponent from later using the transcript against him."[11]

Three rules apply to the use of depositions at trial. These rules include rules of civil procedure and rules of evidence. The rules involved are: Fed. R. Civ. P. 32/Iowa R. Civ. P. 144; Fed. R. Evid. 801/Iowa R. Evid. 801, and Fed. R. Evid. 804/Iowa R. Evid. 804.

The rule of Civil procedure (Fed. R. Civ. P 32/Iowa R. Civ. P. 144) provides the basic parameters. As long as the deposition is otherwise admissible under the rules of evidence, the deposition may be used for:

a) impeachment of a witness;

b) for any purpose if deponent is the adverse party;

c) for any purpose if the witness is sufficiently unavailable under this rule; or,

d) for any purpose if upon application and order the Court finds exceptional circumstances making it desirable and in the interests of justice. See Fed. R. Civ. P. 32; Iowa R. Civ. P. 144.

Accordingly, the rules of civil procedure permit the usage of depositions for both impeachment and substantive evidence.

Evidence Rule 801 provides another rule regarding deposition usage at trial. It provides that neither a witness's prior inconsistent deposition testimony nor a previous admission by a party or his agent is hearsay. Fed. R. Evid. 801(d); Iowa R. Evid. 801(d). "So, if deposition testimony is either at odds with what a witness says on the stand or is the testimony of a party or his agent, it may be offered both for impeachment and as substantive evidence."[12]

Evidence Rule 804 provides another rule regarding deposition usage at trial. Rule 804 provides an exception to hearsay rules when the deponent is "unavailable" under this rule. The rule of evidence "unavailable" is different from the rule of civil procedure "unavailable." Among other things, Rule 804 includes in its definition of unavailable:

a) witnesses who claim a privilege to avoid testifying;

b) witnesses who refuse to testify despite a court order; or

c) witnesses who testify as to a lack of memory. See Fed. R. Evid. 804(a)(1); Iowa R. Evid. 804(a)(1).

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This rule has been cited as a proper basis for introducing a deposition independent of the Rule of Civil Procedure. See United States v. IBM, 90 F.R.D. 377, 384 (S.D.N.Y. 1982).

The rules apparently provide alternate means of introducing deposition testimony at trial. Even so, it is appropriate to remember:

> "Ironically, perhaps the worst off will be those rare lawyers who actually know the details of Rule 32 and the relevant hearsay exceptions. They will soon realize that the two rules - one of procedure and one of evidence - seem to treat the same subject in slightly different ways. Such lawyers will find themselves in the kind of legal twilight zone that professionals love to write about. Unfortunately, a litigator does not have a study grant and a summer to write an article. He has a case to try and more pressing-about fifteen seconds to meet the other side's objection.[13]

2. Usage at Trial

It is clear from the rules that depositions can be used for impeachment and as substantive evidence. Depositions are not mere discovery tools. Accordingly, great care should be used when the witness is likely to be unavailable (over one hundreds of miles away from the courthouse, beyond subpoena power, elderly, ill, etc...).

Similarly, expert witness depositions are always more demanding. See Gill v. Westinghouse Electric Corp., 714 F. 2d 1105, 1107 (11th Cir 1983). That "discovery deposition" may become substantive evidence. One should always be prepared that discovery depositions may be introduced into evidence.

B. Preparation for Deposition Evidence

Knowing that depositions may be used at trial, the trial lawyer must complete sufficient deposition preparation. Analysis and evaluation of potential evidentiary concerns become essential. Some concerns include confidential information, privileged information or embarrassing information. The two best ways to prepare for these types of information prior to a deposition is through the protective order or stipulation.

1. Protective Orders

A party or witness may seek a protective order if discovery is unjustly annoying, embarrassing, oppressive, burdensome, expensive or requires disclosure of confidential or privileged information. Fed. R. Civ. P. 26(c); Iowa R. Civ. P. 123. The court has the authority to direct the discovery not to be had, that discovery be made under specific conditions, that inquiry be limited to certain matters, that only certain people be present, that information will not be disclosed or disclosed in a certain way, or that different discovery means will be used to acquire the information. The court can also control the right to disseminate the information even though there are constitutional requirements. Seattle Times v. Rhinehart, 467 U.S. 20 (1984).

A person requesting a protective order must demonstrate good cause for the limitation. Fed R. Civ. P. 26(c); Iowa R. Civ. P. 123. The person resisting discovery has the burden of showing the privilege or reason exists and that the privilege or reason applies. See Agrivest Partnership v. Central Iowa Production

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Credit Association, 373 N.W. 2d 479, 482 (Iowa 1985). Privileges are narrowly defined in the discovery context. Id.

"If a protective order is not obtained before the examination has begun, then you should consider moving to terminate or limit the examination under Rule 30(d) [Iowa R. Civ. P. 148(b)], which requires a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party."[14] "Although Rule 30(d), [Iowa R. Civ. P. 148(b)] as strictly construed, does not allow the deposition to be halted simply because allegedly privileged information is being sought, some courts have nevertheless given the rule a literal interpretation and permitted counsel to terminate a deposition and apply for a protective order, rather than have a witness reveal information believed to be privileged."[15]

2. Stipulations

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Parties can agree on the handling of evidentiary concerns and enter voluntary stipulations. These stipulations can address any matter, such as from "confidentiality stipulations" to procedural issues of withholding objections. The stipulation should be placed on the record.

In areas of privilege or confidentiality, if opposing counsel varies from the stipulation, then counsel should be reminded of the stipulation's content. Noting possible issues of waiver, it is always safest to enforce stipulations by directing the witness

not to answer when the attorneys disagree. Then the issue should be preserved for further review.

As to stipulations on objections, at least one author recommends not stipulating anything in regards to objections.

> "For several reasons, it is useful to state during deposition your objections and the grounds, whether they go to form or substance. Remember, you are making an evidentiary record. This colloquy will remind you, when you fall under the tension of the courtroom, which questions were important and why. If the deposition is offered as evidence in support of a motion for summary judgment, the objection will be evident to the judge who reads it, even though you cannot be there to point it out. Your objections at deposition can also help another lawyer who takes over the trial of the case."[16]

C. Objections

> "There are three simple reasons why objections at depositions present some difficult problems:
>
> * We mainly use depositions for discovery;
> * Nevertheless, depositions can be used as evidence at trial;
> * The judge rarely is present at depositions."[17]

The first two reasons have been discussed. The third reason has professionalism implications and will be discussed later. (See II.C.2., infra).

One author has suggested there are three types of deposition objections: one, those clearly permitted by the rules; two, those arguably permitted by the rules; and three, those not permitted by the rules to the point where the opposition has to threaten judicial sanctions.[18] "The third category enriches lawyers and

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court reporters but does nothing to facilitate the search for truth."[19]

1. Competency Aspect

The rules provide evidence is taken subject to objections. Fed R. Civ. P. 30(c); Iowa R. Civ. P. 148(a). Objections as to form of questions or answers must be presented or they are waived. Fed R. Civ. P. 32(d)(3)(B); Iowa R. Civ. P. 158(d),(e).

Objections for errors of any kind that could be obviated, removed or cured must be presented or they are waived. Id. Objections to "competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Fed. R. Civ. P. 32(d)(3)(A). Iowa's rule reads "objections to testimony or competency of a witness" need not be made unless the grounds thereof could be cured. Iowa R. Civ. P. 158(e). Iowa has stated hearsay objections need not be made prior to or during a deposition. Benn v Thomas, 512 N.W.2d 537 (Iowa 1994).

The rules clearly show the test for objections at deposition is whether the problem could have been cured. The distinction, that an objection goes to the form of the question, versus an objection to the substance of the question is not the test. Even substantive objections must be made if they could have been cured during the deposition. Objections to the form of the questions are merely the most common.

a. Privileges

Objections to privileged information must be made and enforced by an instruction to the witness not to answer. These are matters outside the scope of discovery. Fed. R. Civ. P. 26(b)(1); Iowa R. Civ. P. 122(a). The rules of evidence do not modify or supersede privileges. See Fed. R. Evid. 501; Iowa R. Evid. 501. The saws regarding privileges apply to all stages of all actions. Fed. R. Evid. 1101(c); Iowa R. Evid. 1101(b).

The law of privileges in Iowa is predominantly statutory. Most common law privileges have been codified.

Testimonial privileges permit a person to refuse to disclose information and prohibits others from disclosing certain confidential communications. These privileges are typically premised on a goal to promote free communication on topics to certain professional service providers or a goal to establish certain zones of privacy.

i.) Attorney-Client Privilege

Perhaps the most common asserted privilege is the Attorney-Client Privilege. A frequently cited definition is:

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to be a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which his attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the

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client."[20]

Iowa's Attorney-Client Privilege is statutory. Iowa Code Sec. 622.10. To apply, the communication must be with an attorney, arise in the course of an attorney-client relationship and must be of such a nature as is necessary for the attorney to properly represent the client. Id. It includes certain attorneys' employees when the communications are essential to the professional relationship.

The Attorney-Client Privilege extends to some corporate employees. Upjohn Co. v. United States 449 U.S. 383, 389-87 (1981).[21]

There are certain exceptions to the Attorney-Client Privilege. They include disputes between the attorney and client; information about the fact of employment, identity of client[22] , payment of fees and circumstances of crime or fraud.[23]

The Attorney-Client Privilege can be waived. It can be waived by a failure to object at deposition or trial. Other actions constituting waiver include: putting privileged information in issue, intentional disclosure, disclosure by mistake, refreshing the witness's memory with a privileged document and disclosing during negotiations.[24]

ii.) Physician-Patient Privilege

It is said, the Physician-Patient Privilege was not recognized at common law.[25] Accordingly, in cases where state law does not apply,

the federal courts have been reluctant to recognize this privilege as a matter of federal common law.[26]

Iowa has a statutory Physician-Patient Privilege. See Iowa Code Sec. 622.10. Generally, the communications must be to the physician, arise in the course of the physician-patient relationship and must be of such a nature as is necessary for the employment of the physician. Id. The word "communication" includes all knowledge and information gained by the physician in the observation and examination of the patient. State v. District Court of Iowa, In and For Linn County, 218 N.W. 2d 641, 643 (Iowa 1974). It includes certain assistants when the communications are essential to the professional relationship.

There are exceptions to the Physician-Patient Privilege. In Iowa, there is no privilege concerning the treatment of wounds of violence. Iowa Code Sec. 147.111. Similarly, there is no privilege in child abuse cases arising under Iowa Code Sec. 232. There is no privilege in a court ordered mental or physical evaluation. State v. Cole, 295 N.W. 2d 29, 33 (Iowa 1980). Further, there is no privilege in an involuntary hospitalization proceeding. Matter T.C.F., 400 N.W. 2d 544, 549 (Iowa 1987). Some jurisdictions exempt other areas such as public reporting in areas of public health or safety.[27]

The Physician-Patient Privilege can be waived. See Iowa Code Sec. 622.10. In a civil case, it is waived as to the condition put in issue. Id. "Although the law in particular jurisdictions may vary, the fundamental principle is that there is a waiver of the physician-patient privilege only as to the particular medical

condition involved. This does not mean that there is a total breakdown of that privilege. The plaintiff can in no way generally rely on the confidentialities of communications with physicians regarding unrelated medical conditions. Where an inquiry is made of a plaintiff as to unrelated medical attention, then a proper objection as to privilege would lie."[28]

iii.) Marital Communications Privilege

It has been stated there are two spousal privileges.[29] They include the privilege against adverse spousal testimony and the privilege for marital confidences.[30]

Iowa's marital communications privilege is established in Iowa Code Sec. 622.9. It protects confidential communications between husband and wife during the course of marriage. The privilege extends to all forms of communication between husband and wife while married. Rodskier v. Northwestern Mutual Life Insurance Co., 248 NW 295 (Iowa 1933); Vacuum Oil Co. v. Carstens, 231 NW 380, 382-383 (Iowa 1930).

There are exceptions to the privilege in areas of child abuse. State v.Johnson, 318 N.W. 2d 417, 438-439 (Iowa 1982); See Iowa Code Sec. 232.74. Also, the privilege does not apply in crimes committed by one spouse against the other. State v. Klindt, 389 N.W. 2d 670,676 (Iowa 1986). Further, there are other cases where the spouse may voluntarily testify. See Iowa Code Sec. 622.8 & 726.4.

the communication. State v. Pepples, 250 N.W. 2d 390 (Iowa 1977). Further, it can be waived when the communication is made in front of third persons. Id.; Shepperd v. Pacific Mutual Life Insurance Co., 300 N.W. 2d 556, 559 (Iowa 1941).

iv.) Clergy-Penitent Privilege

Iowa recognizes a Clergy-Penitent Privilege. Iowa Code Sec. 622.10. It protects confidential communications between the penitent and member of the clergy, occurring within the professional relationship where confidentiality must be necessary for the clergy to properly perform their duties. Id; State v. Burkett, 357 N.W. 2d 632, 636-37 (Iowa 1984).

v.) School Guidance Counselor-Student Privilege.

Iowa recognizes a School Guidance Counselor-Student privilege. Iowa Code Sec. 622.10. It requires a qualified school guidance counselor. See Iowa Code Sec. 257.25(9). The privilege protects confidential communications from a student, parent or guardian, made to the counselor in the role of school guidance counselor which is of the nature that it is necessary and proper to enable the counselor to perform their duties. Iowa Code Sec. 622.10.

vi.) Public Officer Privilege

Iowa recognizes a Public Officer Privilege. Iowa Code Sec. 622.11. It protects communications made to public officers in official confidence when the public interests would suffer by disclosure. Id. The statute is designed to protect matters effecting the affairs of the state, such as state secrets, and

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communications by informers. See State ex rel Shanahan v.Iowa District Court, 356 N.W. 2d 523, 527 (Iowa 1984).

vii.) Self-Incrimination Privilege

This privilege is founded in the United States Constitution, Fifth Amendment. It has been held applicable to the states. Malloy v. Hogan, 378 U.S. 1, 11 (1964). The privilege is personal to the witness and must be raised by the witness or their attorney. State v. McDowell, 247 N.W. 2d 499, 500 (Iowa 1976).

The privilege can be waived by a witness giving direct testimony on the subject. See Conkling v. Conkling, 185 N.W. 2d 777, 783-84 (Iowa 1971).

> "Should you be representing a witness at a deposition who reveals that he or she did something willfully, or with gross disregard for the safety of another and the conduct might be considered criminal, you should give consideration to instructing him not to answer certain questions on the grounds that it may tend to incriminate him. Remember, that in a civil setting, certain nferences may be drawn from the assertion of the privilege. (cite omitted)."[31]

viii.) Other Iowa Privileges

Iowa recognizes other statutory privileges. These include:

a) Trade secrets discovered in the course of OSHA investigations or proceedings. Iowa Code Sec. 88.12;

b) Railroad accident reports prepared by the Department of Transportation. Iowa Code Sec. 327C.37;

c) In civil cases, airplane accident reports prepared by the Department of Transportation. Iowa Code Sec. 328.12 (8)(b);

d) Accident reports filed by the driver. Iowa Code Sec. 321.271;

e) A 321A accident report and the findings or actions of

the Department of Transportation based on that report. Iowa Code Sec. 321A.11;

f) Certain public health records Iowa Code Sec. 140.3 and

g) Communications with the tax preparers except as required by statutes. Iowa Code Sec. 423A.2.

b. Qualified Privileges

There are certain privileges which apply unless the requesting party can make an affirmative showing of certain conditions. These are referred to as qualified privileges.

i). Work Product Protection

Material gathered in anticipation of litigation is protected by the Work Product Doctrine. "Items that can be considered work-product normally include theories of the attorney, case analysis by employees of the client, work of consultants and technicians of the client performed in anticipation of litigation at the request of the attorneys, as well as written analytical reports created in anticipation of litigation.[32]

These materials are protected from discovery unless the requesting party can show "substantial need" and that they "are unable to obtain without undue hardship the substantial equivalent of the material by other means." See Fed. R. Civ. P. 26(b)(3); Iowa R. Civ. P. 122(c). Even with disclosure, the mental impressions, conclusions, opinions and legal theories should be protected. Id.

In Iowa, the standard for materials gathered "in anticipation of litigation" has been held to be "whether, in light of the nature of the documents and the factual situation in the

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particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." Asmead v. Harris, 336 N.W. 2d 197, 200 (Iowa 1983).

"You should always consider asserting the work-product privilege when the deponent is called upon to supply information that is the intellectual property of the attorney."[33]

ii.) Journalist Protection

A common law privilege attaches to journalists acting as news gatherers protecting them from being required to disclose their confidential sources of information. Winegard v. Oxberger, 258 N.W. 2d 847, 850 (Iowa 1977). The privilege is personal to the journalist.

The protection can be overcome by the requesting party showing:

a) the information is necessary or critical to the action;

b) other reasonable means of gathering the information have been exhausted; and

c) the action or defense is not patently frivolous.

iii). Governmental Protection

The United States government has presented several governmental privileges.[34] These are sometimes attempted by state and local governments.

The "deliberative process", critical self-analysis or "official information" privilege was a protection of "documents reflecting advisory opinions, recommendations and deliberations

comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck and Company, 421 U.S. 132, 150 (1975). Probably the two best sources for information on this group of privileges are: Ostoin v Waterford Township Police Department, 471 N.W. 2d 666 (Mich Ct App 1991) and Dowling v American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992). Its aim was to "prevent injury to the quality of agency decisions." Id., at 151.[35]

Other possible governmental protection include military and state secret protection, informer's privilege and "law enforcement privilege."[36] There are a variety of other privileges protecting governmental information. Some are based on specific statutes.

Iowa has certain statues which give qualified protection to certain government information. See, for example, Iowa Code Sec. 21.5(4); Iowa Code Sec. 22.7.

v.) Privacy Protection

Iowa recognizes a qualified privilege of privacy. Brown v Johnston, 328 N.W. 2d 510 (Iowa 1983); Chidester v Needles, 353 N.W. 2d 849 (Iowa 1984).

v.) Miscellaneous Protections

The list provided is not exhaustive. There are trade secrets and other types of confidential communications. Similarly, there are other privileges and qualified privileges which appear or are argued from time to time. The foregoing should present the more common privileges.

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c. Form of Question Objections

By far the most common objections to deposition testimony relate to the form of the question (or response). These are clearly a type of objection which could be cured if presented at the deposition.

i.) Objections to Specific Types of Questions

I.) Leading questions

One of the most common objections regards leading questions. Leading questions on direct examination are prohibited unless a specific exception is applicable. Fed. R. Evid. 611(c); Iowa R. Evid. 611(c). Leading questions either assume a fact in controversy or indicate the truth of an assumption. Giltner v. Stark, 219 N.W. 2d 700, 713 (Iowa 1974). This does not normally include questions in the alternative. State v Wilckliff, 64 N.W. 2d 282 (Iowa 1985). Further, it is not enough that the question calls for an unfavorable answer. Cochran v Miller, 13 Iowa 128 (1862). "A leading questions is one that coaches the witness, or suggests the answer."[37]

On direct examination leading questions are normally limited to those areas "necessary to develop that witness' testimony" or when a "hostile witness, an adverse party or witness identified with an adverse party" is called to testify. Fed. R. Evid. 611(c); Iowa R. Evid. 611(c). This rule has been held to include: the establishment of preliminary or uncontroverted foundation matters, c.f. French v. Universal C.I.T. Credit Corporation, 120 N.W. 2d 476, 482-483 (Iowa 1963); to refresh the

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recollection of a witness, State v. Menke, 227 N.W. 2d 184, 189 (Iowa 1975); and in the examination of young children, State v. Jones 271 N.W. 2d 761, 767 (Iowa 1973). There are also limited examples of permitted leading questions when the witness is sufficiently embarrassed, (State v Bradford, 175 N.W. 2d 381 (Iowa 1975) and when the witness is sufficiently confused or agitated (State v Peterson, 82 N.W. 329 (Iowa 1900). The trial court has discretion to permit some leading questions. Giltner, supra at 713.

Leading questions are "ordinarily" permitted on cross-examination. Id. This infers there may be circumstances of inappropriate leading questions on cross-examination, such as when the question is too suggestive and there is a danger of unfair suggestion.[38]

II.) Argumentative Questions

Argumentative questions typically occur on cross-examination, but may occur during direct examination. Essentially, the attorney confronts the witness in an attempt to argue with, or badger the witness, so as to effect the witness' testimony. For instance, it is improper for an attorney to state to a witness there is no testimony to support his or her statements. Harmsen v. Iowa State Highway Commission, 105 N.W. 2d 660, 664 (Iowa 1960). Argumentative questions are a form of harassment prohibited by rules of evidence. See Fed. R. Evid. 611(a); Iowa R. Evid. 611(a).

> "There are at least two types of argumentative questions. First, there is the question which provides counsel with a device to engage in an

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argument with the witness, typically attempting to change his or her answer...
A second type is one which embraces argument to the jury within the interrogation format. The argumentative question is thus a way to ask a question and simultaneously recite the questioner's theory of the case. (cite omitted)."[39]

Indefinite III.) Ambiguous/ Confusing/ Vague/ Unintelligible/ to Time or Place Questions

This category of questions include imprecise questions with multiple meanings, words with contradictory meanings or words that are somehow indefinite. There is a likelihood of witness confusion with such questions. The Court can control the questioning pursuant to Fed. R. Evid. 611(a); Iowa R. Evid. 611(a). Since this type of question can lead to unclear responses, Fed. R. Evid. 403 and Iowa R. Evid. 403 may come into play.

IV.) Compound/Multiple Questions

These are questions which actually contain two or more questions. Accordingly, there is a high probability of confusion. There is a chance the witness may only answer part of the question. Further, the questioner and witness may not agree on which part of the question has been responded to. This is an area where the court can control the questions pursuant to Fed. R. Evid. 611(a); Iowa R. Evid 611(a). The typical cure is to rephrase the question.

V.) Repetitious Questions/ Asked and Been Answered/

Cumulative Questions

This objection addresses the overemphasis or repetition of a particular question by an attorney. "The rationale for the objection is that cumulative questions waste time and also place undue emphasis on a single portion of questions."[40] It may also be used to protect the witness from harassment by repetitive questions. Mennenga v. Mennen, 166 N.W. 2d 486, 489 (Iowa 1918).

The Court has discretion to allow some repetitive questions. Id. The Court should allow the cross-examining attorney to address questions first brought out on direct examination. See United States v. Caudle, 606 F.2d 451 (CA4 1979).

VI.) Harassing/Insulting Questions

Rule of Evidence 611(a) clearly instructs the Court to protect witnesses from harassment or undue embarrassment. These types of questions can come from the form of the question, (repetitious, argumentative, etc.), from subject area of the question (sensitive information, irrelevant information, etc.) or by the manner of questioning. See Wander v Brady, 105 N.W. 86 (Iowa 1960).

VII.) Religious Beliefs

Rule of Evidence 610 prohibits questions on religious beliefs or opinions for the purpose of either showing the witnesss credibility is impaired or enhanced. Accordingly, these questions are usually objectionable.

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VIII.) Narrative Answers

Questions calling for narrative answers can also be considered too broad or too general. The questioner illicits a witness's answer which could inject all types of objectionable evidence into the proceeding. Opposing counsel is placed in the unenviable position of predicting if, and when, such evidence will be introduced. Accordingly, the question is objectionable. This allows the Court and attorneys to control the introduction of objectionable or excludable evidence.

IX.) Calls for Opinion or Conclusion

Rules of Evidence numbers 701 and 702 distinguish between lay witness opinions and expert witness opinions. Lay witness opinions are limited to "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701; Iowa R. Evid. 701.

> "Lay witnesses may testify about the speed of a car, (cites omitted) about whether someone who appeared to be angry (cites omitted) or about whether someone was drunk. (cites omitted) However, when the testimony would be more helpful if given in more specific form, or when the question calls for an expert answer, the objection should be sustained. (cites omitted).[41]

X.) Calls for Speculation

Closely related to the objection that a question calls for an opinion or conclusion is the objection that a question calls for speculation. In essence, this is a way of stating the witness lacks appropriate personal knowledge - that the testimony is not

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based on the first hand perceptions of the witness. See Fed. R. Evid. 602, 701 and Iowa R. Evid. 602, 701. It can also be a short-hand method of stating the testimony requested from the witness is either expert in nature or beyond the expertise of the witness.

ii.) Objections to Content of Questions

I.) Assumes Facts Not in Evidence / Misstates Facts in Evidence

> "Of all the improper forms of questioning, this is the one most difficult to detect and the most dangerous. It can occur both during direct and cross-examination by your opponent. It is really an attempt on the part of an advocate to editorialize and to incorporate in the form of questioning either: (1) facts which as yet have not been introduced and may never be introduced by a witness, or (2) a coloring or outright misstatement of facts that have been introduced. In either instance, the offending information is usually stated parenthetically in the course of a question and sometimes inserted in such an offhand fashion that it is difficult to determine the import of your opponent's act."[42]

The problems with such evidence are readily apparent. In the absence of the proper foundation, the question is tricky and potentially confusing.[43] It may mislead the jury about the truth of the fact, it may mislead the jury to believe the witness adopted the fact and the answer may not make clear whether the witness did adopt the fact.[44]

II.) Counsel Testifying.

In many respects this is a form of leading question, but is distinct when counsel includes an assertion or statement not

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supported by the evidence.[45] This conduct may inject the attorneys personal credibility into the action, which is not permitted.[46]

III.) Improper Hypothetical Questions

Hypothetical questions must be phrased in ways that do not mislead, confuse or prejudice the trier of fact.[47] The hypothetical question may be objectionable on four grounds; one, it omits material facts which are not in dispute; two, the question refers to facts that are not in evidence [See Nelson v Langstrom, 108 N.W. 2d 58 (Iowa 1961)]; three, the question refers to facts that are irrelevant and prejudicial [See State v Keul, 5 N.W. 2d 849 (Iowa 1942)]; and four, the question requires the expert's opinion be based on unreliable hearsay.[48]

d. Other Objections

i.) Nonresponsive Answers

The party asking a question can object to the responsiveness of the answer. Miller v. Miller, 23 N.W. 2d 760,766 (Iowa 1946). Failure to object at the deposition may allow the testimony to be admissible at trial. See Kirschner v. Broadhead, 617 F. 2d 1034 (7th Cir. 1982)

ii.) Other objections

It is clear that other objections which could be cured need to be made at the deposition or they are waived. Although the federal rules specify objections to competency, relevancy and materiality are not waived unless the ground for objection could

have been cured, there may be some examples where they need to be made.

2. Professionalism Aspect

The professionalism aspect of objections has received more attention than any other area of deposition practice. As stated previously, the federal courts are adopting more active approaches to the problems of "Rambo" litigators. Their various approaches are filtering down into case law. Recently, the Iowa judiciary made gestures of starting a more active posture.

The Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit reported survey responses including:

> (C) Depositions and Other Forms of Discovery Depositions conducted by lawyers without direct judicial supervision, can be one of the most uncivil phases of trial practice. Lawyers made scores of written comments about the difficulties of depositions, abusive conduct in written discovery and the combined harmful impact on lawyer relations. These comments show that discovery is being abused by a failure to cooperate and to adhere to the spirit of the Rules of Civil Procedure:
>
> * Abusive and unethical conduct re: coaching of witnesses during deposition question and answer.
>
> * Attorneys are frequently unnecessarily hostile towards their opponents, particularly in depositions. Also, briefs are more and more strident and include personal attacks.
>
> * Refusal to answer interrogatories and produce documents; playing "hard ball" at depositions; forcing unnecessary motions rather than cooperating voluntarily.
>
> * Unreasonable responses to written discovery, inappropriate remarks and instructions to

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witnesses in depositions.

* Some attorneys are unwilling to cooperate in scheduling of depositions at mutually convenient times, refuse to return telephone calls, will not respond to letters. When depositions are noticed, they seek postponements the day before the deposition because of a "conflict." They either procrastinate or are so overworked that they should decline new cases.

* Deliberate stall tactics forcing motions to compel; objections at depositions on grounds other than form; counsel testifying for witnesses at depositions; lengthy arguments over inane matters at depositions.

* Refusing to cooperate in scheduling depositions, refusing to comply with the rules, pushing the other side to move to compel before giving in.

* Ignoring discovery requests-setting depositions without notice.

* Failure to respond properly to discovery. Improper conduct at depositions-advising witnesses not to answer questions; harassing questions.

* Hard-ball/hard-nose deposition tactics mainly. Also, some attorneys have a hair trigger when it comes to seeking or threatening sanctions.

* Discovery abuses, such as failure to respond to discovery in good faith, improper depositions objections, improper interrogatory objections, failure to admit. Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 388 (1991).

As a result of that study, the committee made several proposed standards specifically addressing deposition objections:

Lawyers' Duties to Other Counsel

...

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. We will make good faith efforts to resolve

> by agreement our objections to matters contained in pleadings and discovery requests and objections.
> ...
> 20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
>
> 21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.
>
> 22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.
> ...
> 27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information. Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D 441, 449-50 (1992).

The Code of Professionalism of the Iowa State Bar Association has two provisions which address professionalism and encompass the deposition practice.

> 6. Effective advocacy does not require antagonistic or obnoxious behavior. Lawyers should adhere to the higher standard of conduct which judges, fellow attorneys, clients and the public may rightfully expect.
> ...
> 8. In litigation, the lawyer should not employ procedures which are only intended to cause delay, annoyance or insult to opposing Counsel, the parties or witnesses.

Case law is developing around professionalism, its relationship to the rules of civil procedure and deposition practice. Probably first and foremost is Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa 1993). One commentator described that case in the following manner, "Hall is a case that

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tries to clean up the deposition mess by virtually gagging the witness's lawyer."[49]

Hall held that a lawyer and a client do not have an absolute right to confer during the course of the client's deposition. Hall, supra at 528. "If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question." Id. at 528-29. A conference is only permissible if the purpose of the conference is to decide whether to assert a privilege. Id. at 529.

The Court in Hall also addressed "on-the-record witness coaching through suggestive objections." Id. at 530. The Court stated, "The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question." Id. at 530-531.

The Hall case has already been cited by the United States District Court, Southern District of Iowa. Van Pilsum v. Iowa State University of Science and Technology, 152 F.R.D. 179 (S.D. Iowa 1993). In that instance counsel restated his colleague's questions in order to "clarify" them and made "objections" which were "thinly veiled instructions." Id., 180. The court, in

response, sanctioned the attorney by requiring the attorney to personally pay for the wasted time at the deposition, appointed a discovery master (with costs to be born by the objecting attorney for the completion of the first deposition and the costs split equally between the attorneys for subsequent depositions.) Id. at 181.

3. Strategy Aspect

Some strategy for objections has previously been discussed. See I.A.,C., supra. Essentially, objections are to shape your case. Few, if any, lawyers would propose objections for every possible rule application. Such a procedure would waste time and be costly. Further, it would alienate both judge and jury. "Generally, objections should be made only when the question is objectionable and the answer will be harmful to the objecting party's case."[50]

An appreciation for the consequences of objections must be gathered. First, if the objection is sustained, what is the likely response? Can the questioning attorney complete the foundation? If so, there is a question as to why one should object. Similarly, what are the inferences to be drawn from the testimony cut short by a objection? Have you left your defendant at a restaurant/lounge because its irrelevant only to infer he's been drinking?

Another apparent consequence is the disruption caused by an objection. The objection disrupts the flow of the case. To the judge or jury, this may become irritating. Too frequent

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of objections could make the attorney appear as an obstructionist or guilty of wanting to hide something.

Many assert that objections and the rulings upon the objections reflect on the attorneys credibility. Accordingly, the theory is each objection is a risk of losing credibility. Such risks should not be taken lightly.

Returning to the primary purpose of objecting, you should choose your objections to shape your case. Important evidence, both good and bad, demands the most attention. Weigh your objections, both those that are important and those that are insignificant. Be willing to sacrifice the insignificant.

Another area of strategy is timing. Again, most objections are best made as early as possible. This means pre-trial whenever possible. In depositions, they should be inserted before the answer. If the witness starts to answer, interrupt - politely. If after the answer, objections should be requested to be inserted before the answer and an explanation given as to why the objection did not precede the answer.

A final aspect is to remember who you are addressing. In depositions, your objections are mainly to the judge. Those that are sustained are normally removed from any reading of the transcript. Be careful, though, because some objections may be read to the jury. This is particularly true when the objections help explain the testimony. See Fed. R. Evid. 106; Iowa R. Evid. 106. Remember, your objections are never addressing your opposing counsel.

As the judge's individual predilections are important,

it's best to know your particular judge's views on objections. If the judge is active in moving cases along and presents a technical approach to evidence, this may diminish some of your borderline objections. If possible, the lawyer should know how the judge prefers objections to be stated. Do they prefer reference to the Rule Number? Do they allow explanatory sentences?

d. Form Aspect

> "No matter what your purpose in making an objection, you should make it properly. Failure to do so can (1) permit the trier of fact to hear the inadmissible evidence, making it virtually impossible for you to eliminate the damage, (2) waive the objection, for an appellate court will seldom allow an issue to be raised for the first time on appeal, (3) incur the displeasure of the judge and possibly an admonishment from him in the hearing of the jury."[51]

"To fulfill the legal requisites, objections must be properly timed to afford the court an ample opportunity to make a proper ruling on the objection made."[52] See also State v. Reese, 259 N.W. 2d 771 (Iowa 1977). Generally, an objection made after an answer is not timely. Wickmann v.Illinois Central, 114 N.W. 2d 627 631-632 (Iowa 1962). If the objection is made after the answer, good cause is required for the delay. Id. Then, the objecting attorney should make the objection, state the good cause for the delay, make a motion that the objection precede the answer and make a motion to strike the answer. Id. at 632; State V. Taylor, 310 N.W. 2d 174, 177 (Iowa 1981).

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As an additional matter, the trail lawyer should be aware of questioning which may or may not be admissible due to lack of foundation. If there is a likelihood of lack of foundation, for reasons such as lack of personal knowledge or expert credentials, counsel may need to voir dire the witness for the purpose of determining if an objection is available.[51] The procedure is to request permission, make your inquiry, and then make your objection or decide not to object.[52]

In addition to being timely, an objection must be specific; generally a distinct legal ground must be asserted."[53] See also, Frederick v.Sherman, 147 N.W. 2d 478 (Iowa 1966); Fed. R. Evid. 103(a); Iowa R. Evid. 103(a). General and specific objections are addressed at Section VIII, infra.

There are no magic words for an objection, it is sufficient if it alerts the trial court to the principle sought to be invoked. State v. Nimmo, 247 N.W. 2d 228, 230 (Iowa 1976.) The objection "lack of foundation" has been found insufficiently specific to preserve error. Carter v. Wiese Corp., 360 N.W. 2d 122 (Iowa App. 1984). The objection "calling for an opinion and conclusion" without more has been found insufficiently specific. Rudolph v. Iowa Methodist Center, 293 N.W. 2d 550 (Iowa 1980). An objection that the testimony was "incompetent" has been found insufficiently specific. Wirtanen v. Provin, 293 N.W. 2d 252 (Iowa 1980). With this in mind, if your objection is to the form of the question, state the specific reason.

It is permissible to have multiple objections to certain questions. When this occurs, all objections should be stated.

Some authors have proposed combining general objections with specifics. See, for example, M. Ladd, Common Mistakes in the Technique of Trial, 22 Iowa L. R. 609 (1937).

Tanford, in The Trial Process: Law, Tactics and Ethics recommends a straight-forward procedure in objecting. He recommends:

* Stand up.
* Tell the judge that you object.
* State the exact legal grounds.
* Cite the legal authority.
* Give a one sentence explanation.
* Allow your opponent to speak without interruption.
* Remain standing until the judge rules on the objection.
* Accept the judges ruling gracefully.

J. Alexander Tanford, The Trial Process: Law, Tactics and Ethics, 2nd Ed., 190-91, (1993).

D. Instructing The Witness Not To Answer

An attorney can only instruct his own client not to answer a question.

> "An attorney cannot advise a non-client deponent not to answer. The attorney may suggest to the witness that the question need not be answered, but the witness must decide on his or her own. Further, the objecting attorney may not be able to advise a non-client deponent that he or she may be waiving a privilege, because such advice may violate the Code of Professional Responsibility."[54]

Iowa Code of Professional Responsibility, Disciplinary Rule

DR 7-104 states:

> During the course of representing a client, a lawyer shall not:
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> (2) Give advice to a person who is not represented by a lawyer, other than the

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> advice to secure counsel, if the interests of such persons are or have a reasonable possibility of being in conflict with the interests of his client. Iowa Code Professional Responsibility DR 7-104.

"Although it happens, instructing a witness not to answer a deposition question is usually inappropriate."[55] The rules will normally permit discovery. See Section II. A., supra.

> "However, in practice it is considered entirely proper to instruct a witness not to answer when the answer would reveal information protected by privilege, trade secrets or other confidential information. (cites omitted) In addition, some courts have upheld instructions not to answer clearly argumentative or misleading questions." (cites omitted)[56]

1. Making the Record

Upon confronting an instruction not to answer, the trial lawyer must make a record. First, make certain the opposing counsel has made a definite statement that the witness should not answer.[57] There should be no doubt from reading the record at a later time. Next, you should ask the opposing counsel for his or her specific ground for the instruction. This may allow resolution by rephrasing the question or avoiding the objection.[58] Finally, ask the witness if he could answer, but for the instruction no to do so.[59] That should complete the record for review.

It may be worth the effort to try and obtain follow up information by subsequent questioning. Sometimes the follow up questions or remaining questions will make a hearing on the one question unnecessary.

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It is also advisable to seek a compromise regarding the instruction not to answer. See Iowa R. Civ. P. 122(e). This can be discussed off the record, but some statement should be made on the record concerning the attempt. Finally, the examining attorney needs to request the Court Reporter to certify the Question.

2. Stipulations

If instructions not to answer become more frequent, a stipulation may solve some of the record. For instance, a stipulation such as "The parties stipulate, through their attorneys, that an instruction not to answer a question propounded by the examining attorney, shall be considered a refusal to answer by the deponent."[60] Such a stipulation must be a part of the record. Further, it may be advisable to have the witness confirm such a stipulation on the record. Of course this stipulation, or a similar stipulation, can be made at any time during the deposition process.

3. Moving to Adjourn

> "If the lawyer insults, intimidates, hovers over, or in any other manner offends the witness, stop the deposition and state on the record what has occurred. You may want to request a hearing and call the court reporter as a witness. Move for a protective order, and, if necessary, for appointment of a special master or a magistrate to preside over the deposition.[61]

This is a last option in objecting to evidence at deposition. It is used when the purposes of the deposition have deteriorated

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into something other than legitimate discovery or opposing counsel continues to seek discovery in protected areas.

E. The Video Deposition

"Although there is no substitute for alive witness in court, a videotaped deposition provides the next best cure to the problem. It also presents the most reliable record of the deposition that can be produced with today's technology."[62]

> "There is little doubt that watching a videotaped deposition is preferable to reading the transcript. Judges who have considered the option provide eloquent arguments for the videotape, as the court did in Burlington City Board of Education v. United States Mineral Products Co., 115 F.R.D. 188 (M.D.N.C. 198), where it stated, 'In general, video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition.'"[63]

The federal rules of civil procedure permit video depositions by either stipulation in writing or by order of the court. Fed. R. Civ. P. 30(b)(4). Iowa rules appear more lenient. "Leave of court is not required to record testimony by nonstenographic means if the deposition is also to be recorded stenographically." Iowa R. Civ. P. 140(b)(4). An Order of the court is required if one wants to eliminate the stenographic transcription. Id.

An excellent discussion of video tape depositions under the federal rules was written by Michael J. Henke in "The Taking and Use of Videotaped Depositions," Vol.16 J. of Trial Advoc. 151 (Summer 1992). That article was recently supplement for the ABA

Section of Litigation, 18th Annual Fall Meeting in Washington D.C. (October 1993).[64] His conclusion was:

> As a general proposition, courts today are apparently much more willing to allow videotaped depositions than in the past. While factors such as the importance of particular witnesses and their potential availability may still play a role, neither should be dispositive, ... However, in some courts, a party seeking permission to videotaped a deposition will still need to make a showing of need; that is, more than a mere personal preference for videotaping may be required. (cite omitted)[65]

In Iowa, videotaped depositions are within the discretion of the Court, but may not be rejected merely for their potency. State v. Jackson, 259 N.W. 2d 796 (Iowa 1977)

There are numerous practical concerns in taking depositions. See, In re "Agent Orange" Product Liability Litigation, 28 Fed. R. Serv. 2d 993 (E.D.N.Y. 1980) and In the Matter of Daniels, 69 F.R.D. 579 (N.D.Ga. 1975). A thorough review of procedures and proposed stipulations/orders is recommended.[66]

If the parties do not stipulate otherwise, the attorneys should be prepared to make the same objections as are made at other depositions. Since the objections have a chance at being played in front of the jury, the trial attorney should review the techniques associated with trial objections. These may be more explanatory to the jury.

Objections to the videotaped deposition will include those to the procedure of taking the videotape. The procedure adopted may cause misleading or confusing results. See Fed. R. Evid. 403;

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Iowa R. Evid. 403. There are issues of waiver of these concerns if they are not made before the deposition. See Section II.C.1.

The editing phase of a videotaped deposition becomes more problematic. Fast-forwarding the tape through objections and discussions is time-consuming and potentially disruptive. Even so, edited versions may become confusing or misleading. See Fed. R. Evid. 403; Iowa R. Evid. 403. A word of caution, too numerous objections which require editing that destroys the effectiveness of the testimony has been a reason for granting a mistrial. See Kelly v. Gaf Corp., 115 F.R.D. 257 (E.D.Pa. 1987).

Even more difficult is the editing of videotape for content. Obviously, splicing and taping could significantly enhance the presentation. This also presents more significant concerns regarding misleading and confusing results. Fed. R. Evid. 403; Iowa R. Evid. 403. Similarly, there may be completeness concerns under Fed. R. Evid. 106; Iowa R. Evid. 106. These issues were addressed in Attorney Henkle's article.[67] The importance of pretrial objections to this type of evidence becomes even more involved.

III. PRESERVATION AND THE PRE-TRIAL ORDER

The courts are becoming increasingly active in case management. As the court's calendars become more congested, it is anticipated they will assume an even greater role to expedite proceedings. The pretrial order is one way the local courts are demonstrating their resolve.

In federal court, Local Rule of the Northern and Southern Districts of Iowa No.16 provides for the Final Pre-trial Conference. It is set after the expiration of discovery.

Both the Northern and Southern Districts require extensive preparation for this conference. The Final Pre-trial Conference Rule specifically states, "Prior to the final pretrial conference, counsel for all parties shall meet, prepare and sign a proposed order in the form supplied by the Clerk and submit the same to the Court at least three (3) days prior to the ...conference...." United States District Court, Districts of Iowa, Local Rule 16(c). (effective July 1, 1994). This was formerly the rule in the Northern District and the unwritten expectation of the Southern District. The subjects included at these final pre-trial conference include:

> (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
>
> (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;
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> ...
>
> (57) the identification of witness and documents, the need and schedule for filing and exchanging pre-trial briefs, and the date or dates for further conferences and for trial; Fed. R. Civ. P. 16

It is typical for the final pre-trial order to require the listing of exhibits with objections. Chief Magistrate Judge

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Jarvey's Order setting the final pre-trial conference includes the following language: "Any exhibits not listed in the order will be subject to exclusion at trial and any objection not indicated will be deemed waived unless this order is modified prior to trial to prevent manifest injustice." Compare with the new Fed. R. Civ. P. 26(a)(3)(c), which states objections to deposition testimony and objections to exhibits (other than objections for relevancy or too prejudicial) are waived if not presented at the pre-trial stage. That waiver is applicable unless the court finds good cause. Id.

The Iowa Courts have similar subjects to be discussed at the final pre-trial conference. Iowa R. Civ. P. 136(c),(d). Although many of the scheduling orders from the various judicial districts have deadlines for exchanging exhibits, the practice is not generally as formalized as in federal court. Even so, it is important to plan your evidentiary objections to exhibits and be prepared to present the objections by the final pre-trail conference. See Hillrichs v AVCO Corp., 513 N.W. 2d 94 (Iowa 1994), where failure to produce a model prior to stipulation and settlement conference precluded use. It is likely Iowa Courts will become more stringent and require more complete disclosure of evidence and objections prior to trial.

IV. ADMISSIBILITY: PRELIMINARY QUESTIONS

Rule of Evidence 104 permits pre-trial determination on the admissibility and exclusion of certain evidence. Iowa R. Evid. 104, Committee Comment. That rule states

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivisions "b". In making its determination it is not bound by the rules of evidence except those with respect to privileges. Fed. R. Evid. 104(a); Iowa R Evid. 104(a).

By including the terms, "or the admissibility of evidence", a Rule 104 hearing has far reaching potential. Examples in the Federal Advisory Committee's Notes include: unavailability of a witness; waiver of a privilege; hearsay; and personal knowledge under Rule 602. Advisory Committee Notes 56 F.R.D. 183, 196.

The judge is not bound to the rules of evidence in his or her determination of admissibility. This recognizes present practices of permitting the judge to know the subject matter of the evidence (such as the alleged hearsay statement) in the court's determination of the evidence's admissibility.

The Rule 104 hearing is a potent arena for objections and determinations on evidence. It is clear that objections should be made to opponents Rule 104 Application, and if unsuccessful, also at the trial in chief.

V. MOTIONS IN LIMINE

The motion in limine is defined as a motion at the threshold. It is a preliminary motion concerning evidence. It is prevalent in both federal and state courts.

The function of the motion in limine is generally to exclude any reference to, any comment upon and any questioning concerning an evidentiary item during the course of the trial. See Twyford

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v. Weber, 220 N.W. 2d 919 (Iowa 1974). Since this can affect voir dire, these motions are normally made before the trial. In federal courts, they are often part of the Rule 16 pre-trial conference.[68]

There are two types of motions in limine: one seeking a preliminary determination to exclude evidence and one seeking a preliminary determination to admit evidence. The far more common is the exclusionary motion. This is particularly true with the advent of the Rule of Evidence 104 hearings.

Most instances of these types of motions have been with highly prejudicial or inflammatory evidence. Even so, any evidentiary objection can be made by a motion in limine. As such, it serves an excellent purpose of alerting the court to evidentiary concerns. Another purpose is to obtain the court's preliminary position on evidentiary issues. It can also alert the trial attorney to the opponents position on evidentiary issues.

Most motions in limine are made in writing before trial. Even so, there are instances of oral motions in limine. In fact, some judges regularly invite oral motions in limine by asking, "Is there anything you want to take up before the jury returns?"[69]

It should be remembered that a motion in limine is not a conclusive ruling on the evidence. It is not the equivalent of a motion to suppress. Twyford v. Weber, 220 N.W. 2d 919 (Iowa 1974). It is not the same as an exclusionary ruling on the

evidence, it merely adds a procedural step to offering evidence. Id.

Accordingly, if a motion in limine is granted and the trial lawyer advised not to comment on the evidence, the ruling is without prejudice to the attorney's right to offer proof at trial. Id. The attorney must advise the court, then either make his inquiry into the forbidden area or make an offer of proof. This preserves any error for review. Johnson v. Interstate Power Co., 481 N.W. 2d 310 (Iowa 1992). Further, if the attorney inquires into the forbidden area in violation of the granted motion in limine, and an objection to the inquiry is sustained, a mistrial or reversal will not be granted "unless it appears probable that a different result would have been reached but for the claimed misconduct of counsel..." Baysinger v. Haney, 155 N.W. 2d 493 (Iowa 1968).

If a motion in limine is denied, no grounds of error are preserved for trial. State v. Judkins, 242 N.W. 2d 266 (Iowa 1976). The trial attorney is still required to make appropriate objections at the proper time of the trial or else the objections are waived. Rush v. Sioux City, 240 N.W. 2d 431 (Iowa 1976); Adams v. Fuqua Industries, Inc. 820 F. 2d 271 (CA 8 Mo.1986).

VI. PRESENTING OFFERS OF PROOF

Rule of Evidence 103 states, in part:

> (a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> ...
>
> (2) **Offer of Proof.** In case the ruling is one excluding evidence, the substance

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of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. Fed. R. Evid. 103; Iowa R. Evid. 103.

"Offers of proof form another important subject in the field of making the record. If counsel is interrogating a witness and the opposing counsel objects to certain questions, a judicial ruling which sustains the objection and forecloses proof will normally not be appealable in the absence of an offer of proof."[70] Generally, facts which are known by the judge, but are not part of the record are insufficient. In re Brown, 183 N.W. 2d 731 (Iowa 1971). Unless the question itself discloses the answer sought to be elicited, an offer of proof is essential, and its absence will generally make the trial court's ruling harmless error or no error. Stevenson v Abbott, 99 N.W. 2d 429 (Iowa 1959). Generally, offers of proof are not necessary on cross-examination. Bainard v Cedar Rapid's City Cab Co., 133 N.W. 2d 884 (Iowa 1965).

An offer of proof should be made after the Court has sustained an objection to a question put to a witness. Miller v Scholte, 191 N.W. 2d 773 (Iowa 1971). Offers of proof are made outside the presence of the jury. They can be made at a side-bar, in chambers or after the jury has been excused. This helps insure the jury is not exposed to inadmissible evidence.

"Before making the offer of proof, the attorney should be certain he or she understands the grounds for the objection so that the grounds may be addressed in the offer."[71]

In cases of general objections, counsel may be wise to request the specific basis for the objection. State v Buckner, 214 N.W. 2d.164,168 (Iowa 1974).

The offer of proof can be made in a variety of fashions. Normally, it is done in a narrative fashion or by question and answer of a witness. It can also be made in writing. Question and answer has the benefit of providing the actual responses in the record. It may have the disadvantage of educating the witness.[72]

"When the evidence has been excluded on direct examination, the proponent must show:

1. That a pertinent question was asked
2. What the answer should have been
3. That the testimony was relevant and how it would have benefited the case (cite omitted)
4. Why the proponent believes it is admissible under the rules of evidence (cites omitted)"[73]

If the trial court excludes a line of questioning or an area of testimony it is wise to breakdown the testimony into parts. An offer should be made after each question or part. The trial court may reject the entire evidence on the basis of one part if it is not broken down sufficiently. England v Younker Brothers, Inc., 142 N.W. 2d 530 (Iowa 1966). A ruling should be requested on each question or part.

The appropriately prepared attorney will often be able to predict the areas of these offers of proof. When this is done, a

short written brief on the evidentiary concern can be most persuasive.[74]

VII. MOTIONS TO STRIKE

Rule of Evidence 103 directs that specific motions to strike must be made to preserve error. "The ruling sustaining an objection does not by itself, strike the evidence from the record. When an objection is sustained, counsel may believe that the question evoking the objection was prejudicial. ... If answer or other evidence which the court has excluded has been heard or seen by the jury, a motion to strike is important."[75]

The motion to strike testimony must be made as soon as practical after the grounds for the motion become apparent. State v Whitfield, 212 N.W. 2d 402 (Iowa 1973). If the answer is made, or the evidence comes in, counsel must request the objection precede the answer and offer an excuse for its lateness. State v Jones, 271 N.W. 2d 761 (Iowa 1978). The procedure should include a request to have the jury admonished to disregard any objectionable statement. Milks v Iowa Oto-Head & Neck Specialists, 519 N.W. 2d 801 (Iowa 1994). The trial court has discretion in granting belated motions to strike. Trachta v Iowa State Highway Commission, 86 N.W. 2d 849,854 (Iowa 1957). Accordingly, its best to provide either an excuse or justification for any delay.

Normally only the examining attorney may move to strike testimony as non-responsive to a question. State v Warff, 134 N.W. 2d 922 (Iowa 1965). Even so, the non-examining counsel may

question as an excuse for delay in making a motion to strike. Tracta v Iowa State Highway Commission, 86 N.W. 2d 849,854 (Iowa 1957).

Ordinarily striking of improper testimony cures any error. State v LeMatty, 263 N.W. 2d 559 (Iowa 1978). Only in extreme cases does the mere presentation of the evidence require reversal. Id.

The motion to strike is normally accompanied by a curative instruction. Generally, improper testimony is not unduly prejudicial if the jury is admonished to disregard it. Berg v Des Moines General Hospital Company, 456 N.W. 2d 173 (Iowa 1990). See Section IX, infra.

Normally, there are three occasions when a motion to strike becomes necessary.

> "1. The question was proper but the answer was improper. ...
>
> 2. The witness answers the question before you have an opportunity to interpose an objection. ...
>
> 3. The witness gives testimony which is either conditionally received or at the time it is received appears to be proper. However, later evidence or lack thereof indicates that the evidence was improperly received... ."[76]

In the latter example an objection as to the missing condition at the time the conditional testimony is admitted is not sufficient to preserve the error. State v Christianson, 186 N.W. 462,464 (Iowa 1922). Necessary is a subsequent motion to strike upon the condition's failure to be proved is necessary. Id.

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A witness's failure to submit to cross-examination may result in a motion to strike the witness's direct testimony. State v Davis, 19 N.W. 2d 655,658 (Iowa 1945). Such a decision is within the discretion of the court.

> "The risk of a motion to strike (especially when accompanied by a request for a curative instruction) is that it focuses the jury's attention on exactly the matter you want them to forget. It highlights the harmful and improper evidence instead of camouflaging it. Still, the benefits outweigh the risks in most situations."[79]

VIII UNDERSTANDING THE FORM OF SPECIFIC, GENERAL AND CONTINUING OBJECTIONS

A. Introduction to Trial Objections

This outline has previously addressed objections. See Sections I., and Section II.C., supra. Much of what was said is equally applicable to objections at trial. In addition, there are several "trial" aspects which need to be addressed.

The most immediate "trial" aspect of objections is that most objections are in front of the jury. Accordingly, the judge's reaction and the jury's reaction must be appropriately weighed. Dombroff offers several important rules regarding trial objections:

> "Determine prior to trial whether your judge wishes you to state the grounds for your objection....
>
> Determine prior to trial whether the judge will permit bench conferences to discuss objections.
>
> State your objection loudly enough to be heard by the judge and the witness. ...
>
> Make sure the witness stops answering the question once you have made an objection. ...

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> Begin your objection by stating "Objection, Your Honor."
>
> Once you have the judge's attention, you should, consistent with the court's indications, state the basis for your objection. ...[80]

Another suggestion is "Avoid interrupting opposing counsel while he is still framing his question. If counsel injects inadmissible or unproven facts into his questions, however, apologize to the court and promptly object."[81]

B. Phrasing Objections

> "In view of the wide range of the purposes of the objection, it is well to remember that the making of an objection is going to have more than a single effect. Although your purpose in making the objection might be for some legal relief, in most instances the actual statement of objection in front of the jury will have some effect on them that goes far beyond the type of relief you are seeking from the Court. Consequently, you should not be content that your objection meets all of the legal requirements of specificity and timeliness, and that it has been properly incorporated into the record. You must seek another purpose, and this is to make the objection meaningful to the jury and effective as a means of persuasion."[82]

Much of the technique of objections will be controlled by the particular judge. The court's preferences may permit a style of objections which communicate some information to the jury, but the court's preferences could also result in an admonition if the words are chose unwisely. Accordingly, the trial lawyer needs to know the judge.

Most judges will permit some characterization on an objection. For instance, a hearsay objection could take any of the following forms:

1. Objection, hearsay.

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2. "Objection, the statement which counsel attempts to elicit is hearsay and does not come under any of the specific exceptions to the hearsay rule or the catch-all exception."[83]

3. "Objection, hearsay, we can't cross-examine a person who isn't in court."[84]

Each of these objections produce a different message to the jury. All portray the same information to the judge and the record.

A speaking objection is inappropriate. With speaking objections, counsel editorializes upon the objection. They also may be an attempt to state certain matters to the jury or witness. These type of objections risk an admonition of the court.

Care should be taken in the descriptions used. A example of a choice of words that deserves some comment would be:

> "Objection, counsel is attempting to elicit unreliable and improper hearsay from the witness."[85]

Although an argument could be made that all produced evidence that is contrary to the rules of evidence is "unreliable" and "improper", this objection infers some inappropriate conduct on the opposing attorney. Such objections bring concerns of professionalism.

C. General and Specific Objections

General objections include irrelevant, immaterial, incompetent and lack of foundation. Although they are used quite often, they are not the best phrases to alert the court to the specific reason of the objection. See Fed. R. Evid. 103(a)(1); Iowa R. Evid. 103(a)(1).

If the trial court knows the reason of a general objection and erroneously overrules the objection, the error is preserved for appeal. Lende v Ferguson, 23 N.W. 2d 824 (Iowa 1946). Generally, such a ruling is not reversible as the court is not alerted to the specific reason. Fed. R. Evid. 103(a)(1); Iowa R. Evid. 103(a)(1).

If a general objection is sustained, it will be upheld on appeal if any appropriate grounds exist for excluding the evidence. Jettre v Healy, 60 N.W. 2d 541 (Iowa, 1953). In responding to a general objection, it may be appropriate for the attorney to request the court to advise of the specific reasons for the general objection being sustained. State v Buckner, 214 N.W. 2d 164, 158 (Iowa 1974).

Specific objections address the particular rule and/or the particular type of evidentiary concern. "The purpose of specificity is two-fold: to allow the judge to make an intelligent ruling and to allow the proponent of the evidence to cure the defect. (cite omitted)"[86]

Generally, when an objection is sustained, it will not be reversed if the evidence was inadmissible under any theory, whether in the objection or not. Iowa Power and Light Co., 217 N.W. 2d 221 (Iowa 1974).

An error in permitting evidence into the trial is normally not reversible unless a "substantial right of the party is affected." Fed. R. Evid. 103(a); Iowa R. Evid. 103(a).

Objecting to exhibits also has some peculiarities. The normal procedure for exhibits is to edit the objectionable parts.

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If a material exhibit is offered which is only partially objectionable, an objection made to the whole exhibit may be too broad to reverse on appeal. See Trachel v Essex Group, Inc., 452 N.W. 2d 171 (Iowa 1991).

D. Trial Objections

Deposition objections were covered in Section II.C. All deposition objections can be reasserted at trial. Also objections to relevancy, competency, hearsay, opinions, expert opinions as well real and demonstrative evidence are available at trial. Specifically included in these topics are: exclusions on grounds of prejudice, confusion or waste of time; character evidence; exhibit evidence; subsequent remedial measures; compromise and offers to compromise; payment of expenses; pleas and plea discussions, liability insurance; relevance of victims past behavior in sexual abuse cases; lack of personal knowledge; evidence of character and conduct of a witness; impeachment by conviction of a crime; religious belief; use of writings; authentication and identification of documents; and the admission of documents in general. These have been detailed in other portions of this seminar material and will not be repeated here.

1. Objections to Procedural Matters.

a. Variance Between Proof and Pleadings

Events that occur before the trial can effect trial evidence. Pleadings and pretrial procedures define the nature and scope of the litigation. Those processes define what is relevant at trial.

Whenever a party strays from the pleadings, there is the objection as to relevancy and surprise. The court has discretion in these areas and normally balances the various interests.

It should be remembered that both the federal and Iowa Rules of Civil Procedure allow liberal amendments pleadings. Fed. R. Civ. P. 15(b); Iowa R. Civ. P. 88.

b. Variance Between Proof & Discovery Statements

Normally answers to deposition inquiry and interrogatories are not binding. Variance with those statements at trial will result in impeachment testimony.

Under Federal and Iowa Rules of Civil Procedure, a party has a responsibility to supplement their responses. Fed. R. Civ. P. 26(e); Iowa R. Civ. P. 122(d). Violation of that duty to supplement may result in exclusion of the evidence.

Similarly, this evidence can be objected to on grounds of unfair prejudice and surprise. Fed. R. Evid. 403; Iowa R. Evid. 403.

c. Variance Between Proof and Admissions or Stipulation

Once a matter is admitted, evidence to the contrary is not admissible unless the trial judge allows the party to amend or withdraw the statement. Fed. R. Civ. P. 36; Iowa R. Civ. P. 128. The standard for the amendment or withdrawal is that the "merits of the action will be subserved" and the party obtaining the admission fails to demonstrate that the amendment or withdrawal "will prejudice the party in maintaining the action or defense on the merits." Id.

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Stipulations normally have the same effect, although the standard of review may change. See Graen's Mens Wear v. Stille-Pierce Agency, 329 N.W. 2d 295, 299-300 (Iowa 1983). One court has held the standard is "manifest injustice." See Morrison v Genuine Parts Co., 828 F.2d 708,709-710 (11th Cir. 1987), cert. denied, 484 U.S. 1065 (1968). The amendment or withdrawal of an admitted or stipulated fact is normally within the discretion of the trial court. Grean, supra.

2. Content of Questions

a. Exceeds the scope of direct examination/cross-examination

Scope of cross-examination is limited to matters covered in direct examination. Fed. R. Evid. 611(b); Iowa R. Evid. (611(b); Avery v Harms Implement Co., 270 N.W. 2d 646,649-650 (Iowa 1978). The extent of that examination is with the discretion of the trial court. Id. Matters covered in direct examination may be fully explored, including credibility. Fed. R. Evid. 611(b); Iowa R. Evid. 611(b). It may cover anything which touches upon the accuracy, veracity or credibility of the witness. State v. Orozco, 190 N.W. 2d 839 (Iowa 1971). Exceeding these matters is objectionable under Rules of Evidence. Fed. R. Evid. 611(b); Iowa R. Evid. 611(a).

The purpose of redirect examination is to explain the evidence brought out on cross-examination. State v Kendall, 203 N.W. 806 (Iowa 1925). Where cross-examination creates an inference, that inference can be explored on redirect

examination. State v Munro, 295 N.W. 2d 437 (Iowa 1980). The trial court has discretion in these areas. State v Reynolds, 250 N.W. 2d 434,440-41 (Iowa 1977).

3. Protecting the Witness Objections

The court has responsibility to protect witnesses from inappropriate interrogation. Fed. R. Evid 611(a); Iowa R. Evid. 611(a). The rules would infer that witness protection is not an attorneys concern in a non-client situation. Accordingly, there are concerns of an attorney interjecting objections for a non-client witness's protection.

In some instances the objecting attorney has more information as to where the testimony is leading. Clearly, embarrassing or privileged material which would otherwise be excludable should be brought to the court's attention to minimize the effects on the witness. If confronted with such a line of questioning, it would be appropriate for the attorney to protect the non-client witness. A sidebar conference would be in order to explain the concern.

This is not an endorsement to objections in front of the jury to protect non-client witnesses. Although such objections are prevalent, they raise professionalism concerns.

4. Completeness

Fed Rules of Evidence permit the introduction of the remaining portions or related acts, declarations, conversations, writings or recorded statements when the remaining portion is "necessary in the interest of fairness, a clear-understanding, or

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an adequate explanation." Fed. R. Evid. 106(a); Iowa R. Evid. 106(a). Accordingly, the completeness of such evidence may be objected to and a request can be made to admit the remainder of the evidence.

e. Continuing Objections

A request to make a continuing objection is a manner to avoid repeating the same objection every time a question is asked. It is a request for a standing objection.

When an objection is properly asserted, the same objection does not need to be continuously made to the same class of evidence. Stutsman v Des Moines City Ry Co., 163 N.W. 580 (Iowa 1917). The key is the definition of "the same class of evidence." or "the same type of evidence." Withholding objections based upon an improper belief of the same type of evidence can be risky.

Normally, the proper procedure is to object to each question separately. State v Jeffs, 246 N.W. 2d 913,916 (Iowa 1976). The continuing, or standing, objection is not preferred, but is allowable to the same class or type of evidence. Id., See also Prestype Inc. v Carr, 248 N.W. 2d 111, 117 (Iowa, 1976).

IX. CURATIVE, CAUTIONARY AND LIMITING INSTRUCTIONS

> "You must continually remind yourself of the purpose of objections from the standpoint of the legal record. You will be bringing to the court's attention a wrong that will occur or has occurred, which will or had adversely affected your client and the administration of justice.
>
> One possible goal is prophylactics to prevent the wrong from occurring. A second possible goal is remedial; to repair the harm that is done, if possible. A third is reconstructive: to abort

> the irremediable proceedings and begin again.
> ...
> But once the harm has been done, the advocate is presented with a number of options he may invoke. First, he must decide whether he wants to clean it up or throw it out, seek a remedial repair, or start from scratch.
>
> The remedial options will be to:
> (1) strike the evidence from the record
> (2) instruct the jury to disregard the evidence, or
> (3) request an admonition of the offending counsel or witness.
>
> The reconstructive goal can be achieved by a single request: a plea for mistrial.[87]

The motion to strike has previously been discussed. See Section VII, supra. The court has discretion to provide further remedial relief. A curative instruction is a statement by the judge to the jury advising them to disregard the evidence. Unless the evidence is particularly prejudicial, the curative instruction should be sufficient to make any error harmless. But see Berg v Des Moines General Hospital Co., 456 N.W. 2d 173 (Iowa 1990).

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If the conduct or questioning of counsel is particularly egregious, or such conduct or inappropriate questioning has repeatedly occurred, more drastic measures may be necessary. Under these circumstances a cautionary instruction or admonition may be requested. Professionalism should minimize the necessity of these occurrences.

Another unusual curative step is within the Court's discretion. If one party introduces inadmissible evidence, with or without objection, the trial court does have discretion to allow the opposing attorney to offer otherwise inadmissible

evidence on the same subject. State v. Griffin, 386 N.W. 2d 529 (Iowa App 1986). This is the doctrine of curative admissibility. It is limited to responsive evidence. Id. Further, it has very limited applications.

A limiting instruction is a statement by the judge to the jury advising them that certain evidence is to being admitted for a specific purpose and is not being generally admitted. The rules of evidence provide for such an instruction "upon request". Fed. R. Evid. 105; Iowa R. Evid. 105. This rule could have increased significance if used more often for impeachment evidence.

X. APPEALING JUDICIAL ERROR: REVERSIBLE, HARMLESS OR PLAIN

There are essentially two types of errors, prejudicial and harmless. Harmless error is an error that did not affect "a substantial right of the party" or did not significantly affect the outcome of the case. See Fed. R. Evid. 103(a); Iowa R. Evid. 103(a). It is not significant enough to be the basis for a reversal by a reviewing court.

Prejudicial error is significant enough to effect a substantial right of a party and significantly affect the outcome of the case. Accordingly, it is synonymous with reversible error. It can be the basis for a reversal by a reviewing court.

"The purpose of the prejudicial error/harmless error doctrine is to avoid clogging the appellate courts with appeals from technical violations and to avoid unnecessary reversals where no real injustice was done."[88]

Plain error is a doctrine wherein a reviewing court can reverse a lower court decision even though no objection was made at trial. The plain error doctrine is accepted by the federal courts. Fed. R. Evid. 103(d). "Plain error is not easily defined and allows for substantial judicial discretion."[89] It necessarily incorporates the concept of prejudicial/reversible error.

Plain error is not an accepted doctrine in Iowa Civil cases. See, Yeager v. Durflinger, 280, N.W. 2d 1, 5 (Iowa 1979). It was specifically omitted from the Iowa Rules of Evidence. Iowa R. Evid. 103, Committee Comments, 1983.

XI. MAKING AND PRESERVING THE RECORD

The record is the only matter reviewed on appeal. Accordingly, it is one of the most significant purposes for objecting to evidence.

Throughout this article, making and preserving the record has been discussed. The appropriate manner of making objections for the record was previously reviewed in Section II.C., supra. It is important to obtain the courts ruling on each objection on the record. If a ruling is not on the record, it is not preserved for appeal.

Sometimes the court takes objections under advisement. This can be called reserving the ruling. It is the objecting partys obligation to obtain a ruling. State v. Walker, 304 N.W. 2d 193, 195-96 (Iowa 1981). A ruling must be made on all reserved

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matters before the case is submitted to the jury. State v. Ryder, 315 N.W. 2d 786, 789 (Iowa 1982).

It is also necessary to follow up on any conditionally admitted evidence. If the condition is not subsequently proven, a new objection and ruling must be obtained.

Shaping the evidence and preserving the record are the two essential functions of the trial lawyer. The skills associated with these functions should be continually fine tuned.

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[1] Mark A. Dombroff, *Trial Objections,* Section 100 (1988).

[2] *Id.*

[3] *Id.*

[4] James W. McElhaney, *Creative Objecting*, 80 ABA L J 80, 81 (1994).

[5] *Id* at 80.

[6] Dombroff, *supra* at Section 100.

[7] Van Pilsum v. Iowa State University of Science and Technology, 152 F.R.D. 179 (S.D. Iowa 1993).

[8] *Eighth Annual Federal Practice Seminar*, sponsored by the Iowa State Bar Association, December 17, 1993.

[9] Central National Insurance Company of Omaha v. INA, 513 N.W. 2d 750 (Iowa 1994).

[10] McElhaney, *supra* at 81.

[11] Thomas J. McNamara and Paul T. Sorenson, *Deposition Traps and Tactics*, 12:1 Litigation 48 (1985).

[12] *Id.*

[13] Scott E. Perwin, *Use of Depositions in Federal Trials: Evidence or Procedure?,* 16:1 Litigation 37 (1987).

[14] Mark A. Dombroff, *Discovery*, 306 (1986).

[15] *Id*, citing Perrignon v. Bergen Brunswig Corp.,77 F.R.D. 455 (N.D. Cal. 1978); Preyer v. United States Lines, Inc., 64 F.R.D. 430 (E.D. Pa 1973); Shapiro v. Freeman, 38 F.R.D. 308 (S.D. NY 1965).

[16] Phillip J. Kolczynski, *Depositions as Evidence*, 9:2 Litigation 25, 27 (1983).

[17] James W. McElhaney, *Objecting at Depositions*, 14:4 Litigation 51 (1988).

[18] Lloyd B. Ericcson, *Raising Skeletons and Objections, Deposition Defense Strategy*, The Brief 39, 40 (Spring 1986).

[19] *Id.*

[20] Judge Wyzanski, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[21] Further reading includes Diversified Industries, Inc. V. Meredith, 572 F. 2d 596 (CA 8 1977), which was cited by the Upjohn decision; and compare Elgin Federal Credit Union v. Cantor, Fitzgerald Securities Corp., 91 F.R.D. 414, 418 (N.D. GA 1981) with United States v. Willis, 565 F. Supp. 1186, 1206 (S.D. IA 1983).

[22] But see State v. Bean, 239 N.W. 2d 556, 560 (Iowa 1976) where the person entitled to the privilege was not a party.

[23] See generally, Roger C. Park, *Trial Objections Handbook*, Sections 5.08-5.10 (1991). As to the crime exception, see also Committee on Professional Ethics and Conduct v. Crary, 245 N.W. 2d 298 (Iowa 1976).

[24] Park, *supra* at Section 5.12.

[25] 8J. Wigmore, *Evidence in Trials at Common Law*, Section 2380, rev. ed. 1961.

[26] See S. Stone and R. Liebman, *Testimonial Privileges*, Section 7.01 (1983).

[27] Park, *supra* at Sections 5.17.

[28] Dombroff, *Discovery, supra* at Section 8.16.

[29] Park, *supra* at Sections 5.20-5.22.

[30] *Id.* At Section 5.20.

[31] Dombroff, *Discovery, Supra* at Section 8.15.

[32] *Id.* At Section 8.13, citing Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed. 2d 584 (1981); Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

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[33] Dombroff, *Discovery, supra* at Section 8.13, citing see e.g. Thrill Securities v. New York Stock Exchange, 57 F.R.D. 133 (E.D. WI 1972).

[34] See Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977).

[35] For a thorough explanation, see Daniel J. Capra, *Secret Government Thoughts*, 20:3 Litigation 36 (1994).

[36] *Id.,* and Park, *supra* at Section 5.26.

[37] Ronald L. Carlson, *Successful Techniques Civil Trials*, 2d, Section 2.3, (1992).

[38] Dombroff, *Trial Objections, supra* at Section 443.

[39] Carlson *supra* at Section 2.8.

[40] *Id.* at Section 2.10.

[41] Park, *supra* at Section 6.07.

[42] James W. Jeans Sr., 2 *Litigation* Section 13.03-4 (1992).

[43] Park, *supra* at Section 6.04.

[44] Dombroff, *Trial Objections, supra* at Section 414.

[45] Park, *supra* at Section 6.03.

[46] *Id.*

[47] *Id* at Section 8.08.

[48] *Id.* at Sections 8.08-8.14

[49] R. Bruce Becker, *Advance Sheet*, 20:3 Litigation 49, 52 (1994).

[50] Park, *supra* at Section 1.14.

[51] Dombroff, *Trial Objections, supra* at Section 101.

[52] Jeans, *supra* at Section 13.21.

[53] *Id.* at Section 13.20.

[54] Jeans, *supra* at Section 13.20.

[55] Carlson, *supra* at Section 2.30.

[56] Hadcock and Herr, *DISCOVERY PRACTICE*, Section 3.7.6.

[57] Kolcynski, *supra* at 28.

[58] Dennis R. Supplee & Diana S. Donaldson, *The Deposition Handbook*, 2d, Section 7.34 (1992).

[59] *Id.*

[60] See Kolcynski, *supra* at 29.

[61] *Id.*

[62] Recommended in *Discovery Practice* at Section 3.7.5.

[63] *Kolcynski, supra* at 29.

[64] Phillip J. Kolcynski, *How to Take Effective Video Depositions*, The BRIEF, a publication of the Tort & Insurance Practice Section of the ABA (1985).

[65] Ernest Figari, Jr. & Alan S. Loewinsohn, *Video Depositions Come to Court*, 14:3 Litigation 35 (1988)

[66] Attorney Henke's supplement analyzed cases since his article, the most notable was Windsor Shirt Co. v. New Jersey National Bank, 793 F. Supp. 589 (E.D. PA 1992). There were no Eighth Circuit cases in his supplement.

[67] Michael J. Henke, *The Taking and Use of Videotaped Depositions*, 16 Am. J. of Trial Advoc. 151, 157 (1992).

[68] See for examples, Kolcynski, *How to take Effective Video Depositions, supra*; Dombraff, *Discovery, supra* at Sections 9.04-9.09; and the cases cited in Henkle's *The Taking of Videotaped Depositions, supra*.

[69] Henkle, *supra* at 162.

[70] Robert J. Smith, *A Practical Guide to Motions in Limine*, The Brief 49 (1994).

[71] The Honorable Joseph F. Murphy, Jr., *Oral Motions in* Limine, 14:3 Litigation 15 (1988).

[72] Carlson, *supra* at Section 2.37.

[73] Park, *supra* at Section 1.09.

[74] *Id.*

[75] *Id.*

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[76] See Dombroff, *Trial Objections*, *supra* at Section 144.

[77] Park, *supra* at Section 1.11.

[78] Dombroff, *Trial Objections*, *supra* at Section 121.

[79] *Id.* at Section 120.

[80] *Id.* at Section 101.

[81] *Id.*

[82] Jeans, *supra* at Section 13.19.

[83] Dombroff, *Trial Objections*, *supra* at Section 101.

[84] Carlson, *supra* at Section 2.31.

[85] Dombroff, *Trial Objections*, *supra* at 101.

[86] Park, *supra* at Section 1.05.

[87] Jeans, *supra* at Section 13.23.

[88] Park, *supra* at Section 12.02.

[89] *Id.* at Section 12.03.

ATTORNEY ADVERTISING

Dorothy L. Kelley
Davison, Burnette & Kelley
Des Moines, Iowa

ATTORNEY ADVERTISING

Some will remember when, prior to 1977, it was considered unethical to have your name and telephone number printed in the telephone directory in bold print. That all ended with the US Supreme Court decision in *Bates v. The State Bar of Arizona*[1], when, in a 5-4 decision, the court struck down a rule of the Supreme Court of Arizona that prohibited lawyer advertising in any form. The Legal Clinic of Bates & O'Steen had published in the *Arizona Republic*, a daily newspaper of general circulation, an advertisement[2] stating their name, address, telephone number and a list of basic services with the fees to be charged for such services. Actually, a pretty bland advertisement by today's standards.

In *Bates*, as in most of its progeny, First Amendment issues were of paramount importance. The court compared the practice of law to the operation of a drug store when it looked to its prior decision in a case where a Virginia statute prohibiting advertisement of the prices of prescription drugs was declared

[1] 433 US 350, 97 S Ct 2691, 53 L Ed 2d 810 (1977).

[2] 433 US at 385.

contrary to the principles of free speech.[3] In that case, the court had held that "commercial speech" is within the protection of the First Amendment, that a purely economic interest does not disqualify protection and that "professionalism" is not to be preserved by keeping the public in ignorance of the lawful terms that competing pharmacies were offering. Thus, in the Virginia case the doctrine of "Commercial Speech" was born.

The parallel was drawn, the die was cast!

Bates created a flurry of activity in state bar associations and state Supreme Courts to create rules and regulations that governed lawyer advertising. The American Bar Association published revisions to its model codes[4] and the various state committees and commissions drew upon the work of each other. Initially, Florida relied heavily on the Iowa rules related to lawyer advertisements, but subsequent changes and modifications of the Florida Rules have greatly opened up the permissible scope for solicitation issues.[5] However, the United

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[3] *Virginia State Board of Pharmacy, et al, v. Virginia Citizens Consumer Council, et al,* 425 US 748, 96 S Ct 1817, 48 L Ed 2[d] 346 (1976)

[4] MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Proposal B (1970), as revised

[5] *The Florida Bar Petition to Amend Rules,* 571 So. 2[d] 451 (Fla. 1990).

States Supreme Court continued to publish guidance. A revision[6] of the Missouri rule that prohibited lawyer advertising, permitted print media publication by a lawyer or law firm of identification data and, in the event the advertising lawyers desired, also permitted a suggestion of the type of matters handled. The lawyers were required to select from 23 categories, <u>in the exact language published in the rule</u>. A young lawyer, fresh from a Washington, D.C. experience, opened a solo practice in St. Louis. He advertised a specialty in securities law not listed in the Missouri rule, and made various other representations, ie: "Admitted to practice before THE UNITED STATES SUPREME COURT". The US Supreme Court, with comments about "bad taste" and the State's failure of proof, reversed the reprimand issued by the Missouri court, holding that the advertising lawyer's description of his practice was clearer that the provisions of the state rule, and was protected by the First Amendment[7].

A few years earlier, and hard on the heels of *Bates*[8], the first of two

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[6] 455 US at 194.

[7] *In the Matter of R. M. J.*, 455 US 191, 102 S Ct 929, 71 L Ed 2d 64 (1982).

[8] Supra.

significant cases appeared before the court. An Ohio lawyer, on a tip from his friendly postmaster's brother, visited Carol, a recent automobile accident victim, in the hospital. While there he met Wanda, who had been injured in the same accident (involving an uninsured motorist), and he assured them both that he was the lawyer to press their claims for uninsured motorist insurance benefits. They both signed one-third contingency contracts. The case for Carol was later actually handled by another lawyer, and Carol was sued for breach of contract. Carol thereupon complained to the county bar association. The Ohio Supreme Court issued a reprimand; the US Supreme Court affirmed[9]. In sustaining the Ohio Court, Justice Powell said:

> " *** The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of the professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public."[10]

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[9] *Ohralik v. Ohio State Bar Association*, 436 US 447, 98 S Ct 1912, 56 L Ed 2d 444 (1978)

[10] 436 US at 468.

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[9] *Ohralik v. Ohio State Bar Association*, 436 US 447, 98 S Ct 1912, 56 L Ed 2d 444 (1978).

[10] 436 US at 468.

On the same day[11], the court handed down another opinion related to a South Carolina problem[12] where a cooperating lawyer with a branch of the American Civil Liberties Union (ACLU) spoke to an assembled group of women who had been sterilized as a condition of receiving public medical assistance, suggesting a violation of their rights and the suggestion of obtaining redress in the courts. This was perceived as a direct solicitation, and condemned by the South Carolina Court. On appeal, the Supreme Court held that solicitation of prospective litigants by a nonprofit organization as a form of political expression is protected by the First Amendment. Justice Renquist comparing the two cases, wrote in his dissent:

> " *** We can, of course, develop a jurisprudence of epithets and slogans in this area, in which 'ambulance chasers' suffer one fate and 'civil liberties lawyers' another. ***"

The distinction Justice Renquist made, in addition to being an opportunity to express some critical language, had a previous basis in law. Long prior to the

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[11] May 30, 1978

[12] *In re Edna Smith Primus*, 436 U.S. 412, 98 S.Ct 1893, 56 L.Ed 2d 417 (1978)

opening of the flood gates by *Bates*, the court had distinguished[13] between commercial speech and political statement, holding that the former was not protected by the Free Speech First Amendment, however, the latter was.

At about this time, three Iowa lawyers concluded that the Iowa court's restrictive rule relative to television advertisements violated the US Constitution, and fell within the protected areas of public communication described by the Supreme Court[14]. In finding that the Iowa rule met First Amendment muster, but the lawyers had violated the ban on television advertising imposed on Iowa lawyers, the Court, interestingly enough, abandoned its usual practice of imposing disciplinary sanctions and merely issued a writ restraining the lawyers from further television advertising.

Another Ohio case[15] wherein a lawyer was disciplined for advertising a contingent fee in a criminal matter, "full legal fee will be refunded if found guilty of drunken driving", and for publishing an illustrated ad to attract Dalkon Shield

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[13] *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

[14] *Committee on Professional Ethics v. Humphrey*, 355 NW2d 565 (Iowa 1984)

[15] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed 2d 652 (1985)

victims, gave rise to the Supreme Court vacating the writ previously issued in the Iowa case. The court issued a remand to the Iowa Supreme Court for further consideration in the light of this recent decision that approved of using accurate and non-deceptive illustrations in lawyer advertising.

Upon reconsideration, the Iowa court re-issued the writ[16] with a citation filled special concurring opinion by then Chief Justice W. W. Reynoldson[17]. Justice Reynoldson followed with an article published in the *American Bar Association Journal*[18] wherein lawyers' advertising was equated and discussed in the context of First Amendment purposes, with the "commercial speech" doctrine, nude dancing[19], exhibition of adult motion pictures[20] anti-abortion picketing[21] labor union picketing[22] and the sale of housewares in a university

[16] *Committee on Professional Ethics v. Humphrey*, 377 NW2[d] 643 (Iowa 1985)

[17] 337 NW2[2] at 347

[18] ABA Journal, *The Case Against Lawyer Advertising*, January, 1989, at Page 60

[19] *Barnes v. Glen Theaters*, 501 U.S ___, 111 S.Ct. ___, 115 L.Ed. 2[d] ___ (1991)

[20] *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2[d] 29 (1986)

[21] *Frisby v. Schultz*, 487 U.S 474, 108 S.Ct. 2495, 101 L.Ed. 2[d] 420 (1988)

[22] *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed. 2[d] 263 (1980)

dormitory[23].

In 1988, the US Supreme Court[24] struck down the Kentucky rule that prohibited solicitation of persons previously unknown to the lawyer, but who were known to have legal problems, and approved of direct mail solicitation of persons recently involved in real estate foreclosure proceedings.

Notwithstanding all of this clear authority, and the steady relaxation of rules, the Supreme Court of New Jersey, as recently as 1992[25] issued a public reprimand for the direct solicitation of the father of a victim immediately following the Pan Am crash over Lockerbie, Scotland.

A Florida lawyer named McHenry operated a wholly owned referral service called, "Went for it". McHenry felt unduly constrained by the Florida Rule of Conduct that prohibited lawyer contact with an accident victim for 30 days after the incident and filed an action for declaratory and injunctive relief in the Middle District of Florida. The trial court entered a summary judgement for McHenry,

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[23] *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S Ct. 3028, 106 L.Ed. 2[d] 388 (1989)

[24] *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct 1916, 100 L. Ed. 2[d] 475 (1988).

[25] *In the Matter of Anis*, 126 NJ 338, 599 A 2[d] 1265 (1992)

based, in part, on the Supreme Court's decision in *Bates*[26]. The Florida Bar appealed to the Eleventh Circuit who affirmed the District Court[27], but Mr. McHenry had other problems. Because of some alleged sexual misconduct, the Florida court ordered his disbarment in 1992[28] and the case was then taken forward by another Florida lawyer, John T. Blakely. The U. S. Supreme Court, on writ of certiorari, assumed jurisdiction.

Please remember that the issue presented involved a Florida Rule that, in essence, stated that solicitation (or "ambulance chasing" as characterized by Chief Justice Renquist) is all right, however, you must remain in the starting blocks for 30 days after the incident or injury.

Justice Sandra Day O'Connor, writing for a 5-4 majority, approved the starting blocks delay in the Florida Rule, and thus gave approval to direct solicitation, if the act is delayed. In a comprehensive review of the law on the issue, she relied upon liberal interpretations of the First Amendment, and particularly the "commercial speech doctrine", in approving most of the types of

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[26] *Bates v. State Bar of Arizona*, supra

[27] *McHenry v. The Florida Bar*, 21 F.3rd 1038 (11th Cir., 1994)

[28] *The Florida Bar v. McHenry*, 605 So. 2d 459 (Fla. 1992)

solicitation that "Went for it" desired. In short, Justice O'Connor, joined by Justices Renquist, Scalia, Thomas and Breyer, permitted "Went for it" to go for it, but not right away.

So where does this leave the Iowa Bar? Where is our profession now? Where are we headed with lawyer advertising and solicitation?

The courts have interpreted, weighed and relied upon the First Amendment, in advertising or direct contact, in one form or another, and have given us a highly complex and somewhat confusing set of guidelines for advertising or for various direct approach means of attracting clients.

One only has to travel to the borders of Iowa, or to travel to other states to find blatant commercials for lawyers on television, or in print. Texas is a prime example of what can happen if the advertising mode is left open and not seriously restrained for lawyer use. (Or, if the advertising budget of a lawyer or law firm includes funds for large multi-color productions in directories and telephone books.) Sometime perhaps in the not too distant future we may in some other area find billboard ads, touting: "TOP DAMAGES EVERY TIME - SUE TO SOLVE YOUR PROBLEMS - "NO CASE TOO SMALL" - "DIAL 1-800-

LAW-SUIT".

Most, if not all, of the decisions seem to turn on activities that we would, at first blush, say relate only to the more flamboyant Plaintiffs' Bar, and those of us who normally enter the fray for Defendants, or their Insurance carriers would not be involved. Actually, all of the cases don't directly relate only to plaintiffs' counsel. Remember the Kentucky lawyer who wrote to people suffering foreclosure[29].

While these cases have First Amendment considerations, we must examine our Iowa rules in some detail. *Canon 2* of the *Iowa Code of Professional Responsibility for Lawyers* tells us generally that:

"A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."

Expanding that simple concept, two Disciplinary Rules seem worthy of examination.

First, Disciplinary Rule 2-101(B)(4)(a), which states:

"(a) In-Person Solicitation. A lawyer may not engage in the in-

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[29] *Shapero v. Kentucky Bar Association*, supra.

person or telephone solicitation of legal business under any circumstance."

And, second, Disciplinary Rule 2-103(B), which states:

"**(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend the lawyer's employment by a client, or as a reward for having made a recommendation, resulting in the employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations** (Approved legal aid, military assistance, bar association referral service and other bona fide organizations that recommend, provide or pay for legal services to its members or its beneficiaries.) **listed in DR-103(D)."**

With those two injunctions in mind, let's just for a minute browse through and consider activities such as the advertising in the attached yellow pages. Compare the more local of the ads with those of the advertisements found in a Texas phone book. Perhaps, we should even expand our consideration to a client Christmas party, a date with the Claims Manager or an Adjuster at your club for

lunch and a round of golf, the bottle of Scotch at Christmas, a couple of tickets to the ball game, a little non-fee producing advice about personal problems, gratis use of a copy machine, or the loan of a summer lake cottage for the week.

No, the defense lawyer is not at all immune. No lawyer is untouched. With the increase in ALL forms of attorney advertisements and client solicitation, we must be ever vigilant against the decline and demise of our professionalism and integrity. Let us not promote or provide new material for late night television lawyer jokes.

Where do we want to go from here? -- probably not a good idea to ask the United States Supreme Court. The answer best lies with each of us in our future singular and collective actions.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FLORIDA BAR *v.* WENT FOR IT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-226. Argued January 11, 1995—Decided June 21, 1995

Respondent lawyer referral service and an individual Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Bates* v. *State Bar of Arizona*, 433 U. S. 350, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Florida Bar rules do not violate the First and Fourteenth Amendments. Pp. 3–16.

(a) *Bates* and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the "intermediate" scrutiny framework set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "'narrowly drawn,'" *id.*, at 564–565. Pp. 3–5.

(b) The Florida Bar's 30-day ban on targeted direct-mail solicitation withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have

the services are provided for them. Even persons of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

Amended May 20, 1993, effective July 1, 1993.

EC 2-27. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Amended May 20, 1993, effective July 1, 1993.

Acceptance and Retention of Employment

EC 2-28. A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become a client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of the lawyer's share of tendered employment which may be unattractive both to the lawyer and the bar generally.

Amended May 20, 1993, effective July 1, 1993.

EC 2-29. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

Amended May 20, 1993, effective July 1, 1993.

EC 2-30. The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify rejection of tendered employment.

Amended May 20, 1993, effective July 1, 1993.

EC 2-31. When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, the lawyer should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

Amended May 20, 1993, effective July 1, 1993.

EC 2-32. Employment should not be accepted by a lawyer who is unable to render competent service or who knows or it is obvious that the person seeking to employ the lawyer desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if intense personal feelings, as distinguished from a community attitude, may impair effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, the lawyer should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

Amended May 20, 1993, effective July 1, 1993.

EC 2-33. Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent the client by advising whether to take an appeal and, if the appeal is prosecuted, by representing the client through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

Amended May 20, 1993, effective July 1, 1993.

EC 2-34. A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal the lawyer must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of withdrawal. Even when withdrawal is justified, a lawyer should protect the welfare of the client by giving due notice of withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, a lawyer should refund to the client any compensation not earned during the employment.

Amended May 20, 1993, effective July 1, 1993.

DISCIPLINARY RULES

DR 2-101 Publicity

(A) Advertising in General. A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2-101 and DR 2-102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable", "moderate", and "very reasonable", but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate", "lowest", "give-away", "below-cost", "discount", and "special". All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

(B) Method of Dissemination. Subject to the limitations contained in these rules:

(1) *General Print Media.* Lawyer advertising may be communicated to the public in newspapers, periodicals, trade journals, "shoppers", and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, PROVIDED THAT the

publisher agrees in writing to print all the disclaimers required by these rules in type size not smaller than 9-point on each page bearing the ad.

(2) *Lawyer Telephone and City Directory Listings.* A lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The lawyer's name, address, and telephone number and designation as a lawyer, only, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys" except that a lawyer who has complied with DR 2-105(A)(4) may be listed in no more than three classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2). By further exception, a lawyer qualified under DR 2-105 to practice in the field of taxation law also may be listed under the general heading "Tax Preparation" or "Tax Return Preparation," either in lieu of or in addition to, the general heading "Lawyers" or "Attorneys". The disclaimers required by these rules must also appear under any heading in which the lawyer is listed.

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertisements, shall include the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published as provided in DR 2-101(B)(1).

(3) *Law Firm Telephone and City Directory Listings.* A law firm, all of whose lawyers are licensed to practice law in Iowa, may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The firm name, a list of its members, address, and telephone number, may be listed alphabetically in the residential, business, and classified section of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2) in which one or more members of the firm is qualified.

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertising, may contain the firm name, address, and telephone number, and the names of the individual lawyer members of the firm. All display or box advertisements shall include within the ad the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published as provided in DR 2-101(B)(1).

(4) *Solicitation.*

(a) In-person Solicitation. A lawyer may not engage in the in-person or telephone solicitation of legal business under any circumstance.

(b) Written Solicitation. A lawyer who wishes to engage in written solicitation by direct mail to persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could upon reasonable inquiry be known to the soliciting lawyer shall, prior to the dissemination of the solicitation, file all such proposed written documents or solicitations with the Iowa Supreme Court Board of Professional Ethics and Conduct. The soliciting lawyer shall, in addition thereto, bear the burden of proof regarding:

(i) the truthfulness of all facts contained in the proposed communication;

(ii) how the identity and specific legal need of the potential recipient were discovered; and

(iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

All such written solicitations shall contain the disclosures required by DR 2-101(A), (D), and (F). No such dissemination shall be made until the board or its designee shall, upon the facts presented, render a written finding that the solicitation is not

false, deceptive, or misleading. No information disseminated by the soliciting lawyer shall make any reference to such submission and finding. Each separate written solicitation intended for dissemination must be submitted for a finding in accordance herewith.

(c) Direct Mail. Information permitted by these rules may be communicated by direct mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. All such communications shall contain the disclosures required by DR 2-101(A), (D), and (F).

(d) All communications authorized by paragraphs "b" and "c" hereof and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in 9-point or larger type: "ADVERTISEMENT ONLY". A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the Iowa Supreme Court Board of Professional Ethics and Conduct, acting as commissioners of the supreme court as provided by court rule 118, contemporaneously with the mailing of the communications to the general public and shall contain the disclosures required by DR 2-101(A), (D), and (F).

(5) *Electronic Media.* Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, and shall contain the disclosures required by DR 2-101(A), (D), and (F) and DR 2-105(A)(3).

(6) *Biographical and Informational Brochures.* Brochures or pamphlets containing biographic and informational data, as permitted by these rules, shall only be disseminated directly to clients, members of the Bar, or in response to direct request, and shall include the disclosures required by DR 2-101(A), (C), (D), and (F), and DR 2-105(A)(3).

(7) *Record Retention.* Whether or not it contains fee information, a lawyer shall preserve a copy of each advertisement placed in a newspaper, the classified section of the telephone or city directory, or periodical, and a tape of the radio, television, or other electronic or telephonic media commercial, or recording, for at least three years and a record of the date or dates and name of the publication in which it appeared or the name of the medium through which it was aired.

(C) **Content (Informational).** The following information shall be presumed to be informational and not solely promotional.

(1) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer", "attorney", "law firm", or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments in bar associations;

(11) Memberships and offices in legal fraternities and legal societies;

(12) Technical and professional licenses; and

(13) Memberships in scientific, technical, and professional associations and societies.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

If the publication of any of the foregoing items (1) through (13) inclusive would indicate an area or field of practice such as, but not limited to, those set out in DR 2-105(A)(2), there shall be contained within such communication and contained in any electronic media communication the disclosure required by DR 2-101(A) and also a "notice to the public" in the following form:

> Memberships and offices in legal fraternities and legal societies, technical and professional licenses, and memberships in scientific, technical and professional associations and societies of law or field of practice does not mean that a lawyer is a specialist or expert in a field of law, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.
>
> All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

(D) **Content (Fee Information).** The following fee information may be communicated to the public in the manner permitted by DR 2-101(B):

(1) Fee for an initial consultation;

(2) Availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; and

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement discloses:

(a) That the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

All such information shall be presented in a dignified manner.

Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone or city directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall within the described services. In that event or if a range of fees is stated, the lawyer shall render the service for the estimated fee given the client in advance of rendering the service.

A lawyer shall not, individually or on behalf of a law firm or association, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom the lawyer performs other legal services not related to the specific legal services publicized.

(E) **Content (Specific Legal Services).** For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support or property settlement [see DR 5-105(A)];

(3) Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds;

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;

(11) Powers of attorney; and

(12) Bills of sale.

The Iowa Supreme Court Board of Professional Ethics and Conduct, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or constricting the above list of "specific legal services". In considering such amendments the board shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

(3) The service does not normally involve a substantial amount of legal research, drafting of unique documents, investigation, court appearances, or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The board shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said board may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(F) **Content (Institution of Litigation).** In the event that the communication seeks to advise the institution of litigation, the communication must also disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.

(G) **Content (Designation as Legal Clinic or Center).** The term "clinic", "center", or any other similar term shall not be used in any communication to the public unless the practice of the lawyer or the lawyer's firm is limited to specific matters as described in DR 2-101(E) for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures.

(H) A lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize, permit, or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(I) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when the professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which the lawyer serves as a director or officer;

(4) In and on legal documents prepared by the lawyer;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(J) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

(K) All disclosures required to be published by these rules shall be in 9-point type or larger.

Amended April 28, 1989, effective June 1, 1989; Feb. 18, 1992, effective July 1, 1992; March 23, 1993, effective July 1, 1993; May 20, 1993, effective July 1, 1993; March 9, 1994, effective July 1, 1994; Dec. 15, 1994, effective Jan. 3, 1995; Jan. 17, 1995, effective March 1, 1995.

United States Supreme Court

Advertising by lawyers, see Bates v. State Bar of Arizona, U.S.Ariz.1977, 97 S.Ct. 2691, 433 U.S. 350, 53 L.Ed.2d 810, rehearing denied 98 S.Ct. 242, 434 U.S. 881, 54 L.Ed.2d 164.

Commercial speech, truthful, targeted, direct-mail solicitation, see Shapero v. Kentucky Bar Ass'n, 1988, 108 S.Ct. 1916, 486 U.S. 466, 100 L.Ed.2d 475, on remand 763 S.W.2d 126.

Notes of Decisions

2. **Television advertisements**

Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Humphrey, 1985, 377 N.W.2d 643, appeal dismissed 106 S.Ct. 1626, 475 U.S. 1114, 90 L.Ed.2d 174, rehearing denied 106 S.Ct. 2293, [main volume] 476 U.S. 1165, 90 L.Ed.2d 734.

DR 2-102. Professional notices, letterheads, offices, and signs

(A) A lawyer or law firm shall not use professional cards, signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or restricting the permitted list of fields of law practice.

(1) A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer's law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in the lawyer's association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105. A dignified announcement of a change in location of office, the addition of a new partner, equity holder or associate, or a change in the name of a law firm may be published in one or more newspapers of general circulation over a period of no more than four weeks.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying the lawyer by name and as a lawyer and giving the lawyer's addresses, telephone numbers, the name of the lawyer's law firm, associates, and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates related to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if the

lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation, professional association, professional limited liability company, or registered limited liability partnership may contain "P.C.", "P.A.", "P.L.C.", "L.L.P." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, public, executive, or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(C) A lawyer, professional corporation, professional limited liability company, or registered limited liability partnership shall not be held out as having a partnership with one or more other lawyers, professional corporations, professional limited liability companies, or registered limited liability partnerships unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible public communications and listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer be identified as a lawyer in any publication in connection with the lawyer's other profession or business.

(F) The text of a lawyer's letterhead, office sign, professional card, or other authorized notice or listing shall not violate the provisions of DR 2-101(A).

Amended April 28, 1989, effective June 1, 1989; Oct. 12, 1990, effective Jan. 2, 1991; July 12, 1991, effective January 2, 1992; Oct. 23, 1992, effective Jan. 4, 1993; May 20, 1993, effective July 1, 1993; May 26, 1994, effective July 1, 1994.

DR 2-103. Recommendation of Professional Employment

(A) Lawyers shall not, except as authorized in DR 2-101, recommend employment, as a private practitioner, of themselves, their partners, or associates to a nonlawyer who has not sought advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of a partner or associate, or any other lawyer affiliated with the lawyer's firm, as a private practitioner, except as authorized in DR 2-101, and except that:

(1) A lawyer may request referrals from a lawyer referral service operated, sponsored, or approved by the bar association and may pay its fees incident thereto.

(2) The Iowa Supreme Court Board of Professional Ethics and Conduct, acting as a commission of this Court, may authorize participation and directory listing by Iowa lawyers in an organization or association of lawyers engaged in a particular area of practice, upon a showing to the satisfaction of the board that:

(a) All Iowa participants have complied with the requirements of DR 2-105 and,

(b) Participation is based upon meeting stated high standards of professionalism and competence in the area of practice and,

(c) The organization or association regularly conducts training and/or professional learning and exchange concerning the area of practice involved and,

(d) Neither the organization or association nor anyone other than the Iowa lawyer has any part in or share in the conduct or practice of law in the area of practice of law involved and does not participate in any way in fees charged by the Iowa participant and,

(e) Any published directory shall carry the disclaimers required in DR 2-101(A) and DR 2-105(A) on any page on which the names of Iowa lawyers appear.

The board may revoke such authorization at any time for any reasons it deems appropriate.

(3) A lawyer may co-operate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he or she was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise independent professional judgment on behalf of the client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partners or associates or any other lawyer affiliated with the lawyer's firm, except as permitted in DR 2-101. However, this does not prohibit a lawyer, a partner, associate, or any other lawyer affiliated with the lawyer or firm, from being recommended, employed or paid by, or co-operating with, one of the following offices or organizations that promote the use of the lawyer's services or those of a partner, associate, or any other lawyer affiliated with the lawyer or the firm if there is no interference with the exercise of independent professional judgment on behalf of a client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or its beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor any partner, associate, or other lawyer affiliated with the lawyer's firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the person's own expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved.

(f) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that the representation by counsel

furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(g) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(h) Such organization has filed with the client security and attorney disciplinary commission at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person seeking legal services does so as a result of conduct prohibited under this disciplinary rule.

Amended May 20, 1993, effective July 1, 1993; Oct. 26, 1994, Jan. 3, 1995.

DR 2-104. Suggestion of Need of Legal Services

(A) A lawyer who has given in-person unsolicited advice to a layperson to obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from personal participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (4), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as such activities do not emphasize the lawyer's own professional experience or reputation and the lawyer does not undertake to give individual advice.

(5) If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Amended May 20, 1993, effective July 1, 1993.

DR 2-105. Description and Limitation of Practice

(A) A lawyer may be identified as practicing in or limiting practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card, letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR

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The Case Against Lawyer Advertising

BY W. WARD REYNOLDSON

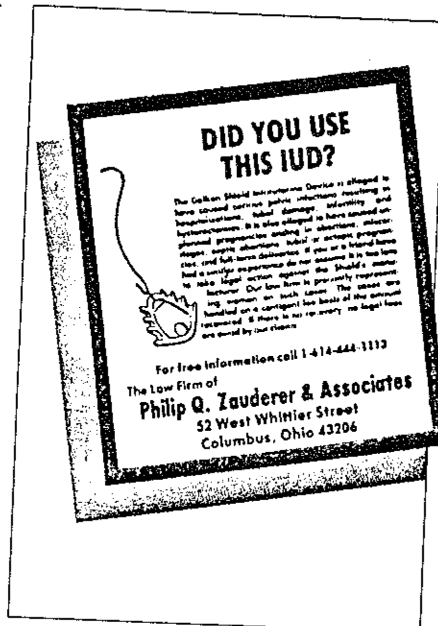
Following the Supreme Court's recent *Shapero* decision (*Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 [1988]), when a published obituary probably will trigger for the grieving widow a bushel of solicitation letters filled with alarming legal advice, a pessimist might conclude the bell has tolled for the concept of professionalism in the law field.

Today, as we examine this troublesome area of lawyer advertising, I confess a continuing great admiration for Justice Powell, who since his retirement has been quoted as saying: "One of the developments that I personally regret is virtually unlimited advertising by lawyers ... I like to think of one who is a lawyer as not practicing law primarily to make money. I realize you have to make enough to pay your overhead and to provide for your family, so I'm not suggesting that lawyers should not be adequately compensated.

"But our system depends on the rule of law, and lawyers are officers of the court. And the courts persevere only with the aid and assistance of lawyers [in protecting] the liberties and freedoms of our people."

I also agree with Justice O'Connor, dissenting in *Shapero*, that in one way or another, time will uncover the folly of the approach of the current Supreme Court majority. In this connection, however, we ought to note that most of the cases that appear to treat our profession as a business have arrived at the Supreme Court without any evidentiary record to support those restraints that

W. Ward Reynoldson is a retired chief justice of the Iowa Supreme Court, now on senior judge status. This article was adapted from a speech to the National Conference of Bar Presidents, given at the 1988 ABA Annual Meeting.



many lawyers and judges have long considered essential to our role as officers of the court.

The question for most bar leaders and courts, awaiting the day Justice O'Connor envisions, is whether to retreat—or stay entrenched—with mild admonitions to do nothing undignified or misleading, or to devise and enforce rules, supported by evidentiary records, that confine lawyer advertising, and particularly television advertising, to the parameters that can be traced in the Supreme Court decisions.

In this connection you may want to examine Iowa's *Humphrey* decisions, which have withstood Supreme Court scrutiny. At the heart of this controversy was an Iowa Supreme Court rule that prohibits television advertisements containing background sound, visual displays other than those allowed in print, more than a single, non-dramatic voice, and self-laudatory statements.

Following the *Bates* opinion (*Bates v. State Bar of Arizona*, 433 U.S. 350 [1977]), the Iowa court had requested the Committee on Profe sional Ethics and Conduct of the Iow State Bar Association to investiga the matter of lawyer advertising, an to file a report with recommend advertising rules for the professio After hearings and extensive stud the committee filed its report an proposed rules. The court consider and eventually adopted these rules i 1980, including the rule at issue in th *Humphrey* cases.

The defendant lawyers in *Hum phrey*, believing Iowa's electroni media rule to be unconstitutional, ran advertisements that featured dram atizations of personal injury cases, including dialogues that the choice of a lawyer was important, and that this was something to "think about." This was followed immediately by a solicitation to call the defendants' firm.

The committee brought an injunction action in the Iowa Supreme Court. The court appointed former Chief Justice Moore as hearing of cer. A complete evidentiary reco was obtained, including a public su vey on attitudes and opinions regarding advertising for law firms. The survey questioned a group of representative persons on their attitudes about lawyers both before and after viewing television commercials.

Following the viewing the opinions dropped significantly with respect to these characteristics of a lawyer: trustworthy, from 71 percent to 14 percent; professional, from 71 percent to 21 percent; honest, from 65 percent to 14 percent; and dignified, from 45 percent to 14 percent.

The Iowa court, examining the record in light of *Bates*, found its rule constitutional and restrained the defendants from continuing to place these television advertisements. This opinion is found at 355 N.W.2d 565, a 1984 decision.

The defendants appealed. The Supreme Court vacated the judgment and remanded the case to the Iowa court in light of the *Zauderer*

MAC SHAFFER

Philip Zauderer (right) and his attorney David Frank in 1984

decision That was the Dalkon Shield case involving a printed advertisement that contained legal advice and a drawing of the shield *Zauderer v. Office of Disciplinary Counsel*, 471 U S 626 (1985)

As directed, the Iowa court en banc reconsidered its decision following further oral arguments Its analysis distinguished, as had the Supreme Court in *Bates*, print advertising from the special problems of advertising on the electronic broadcast media The Iowa Supreme Court again ordered that the writ issue. This second *Humphrey* decision (377 N W 2d 643) was filed in 1985

Defendants again appealed In 1986, the U S Supreme Court dismissed the appeal for want of a substantial federal question 106 S Ct 1627 Such a dismissal, under *Hicks v Miranda*, is considered a holding on the merits as to those questions properly before the court

After *Shapero*, the Iowa State Bar Association is in the process of formulating proposed rule changes to submit to the Iowa Supreme Court, designed to regulate direct mail solicitations The association commissioned a second public opinion survey that reinforced the prior survey's finding that advertising lowers the public's perception of lawyers A measurable number of the surveyed persons were even willing to admit that, if serving as jurors, they would be prejudiced against a party who retains an advertising lawyer

Further surveys might develop empirical proof to establish what many of us have concluded: The public perceives a strong nexus between courts and the lawyers who serve as officers of the court

As a result, marketplace lawyer advertising, using all the sights, color, sounds, subliminal messages and not-so-hidden persuaders of commercial television, adversely affects not only the public's perception of those court officers, but also of the courts and the total judicial system I am elsewhere on record as saying: "Solemn forums for the litigation of cases whose lawyer-officers resemble carnival barkers at the doors scarcely can avoid being viewed as carnivals, or at least, places where justice is bought and sold as in any marketplace "

Reverting to Justice Powell's observations, I suggest that the legal profession is a calling that, unlike a business, still involves the unique and basic concept that a client's interests must be put before that of the lawyer It follows that the pursuit of clients and fees must not be the all-consuming goal of the practitioner

Judgelike, I pose some questions—not answers—for your consideration.

Has the bar fallen into lockstep with those who would equate the practice of law with an ordinary commercial venture? If not, why (for example), are clients characterized as "consumers" in the ABA/BNA "Lawyers Manual on Professional Conduct"?

Is our national organization suffering from a type of schizophrenia, with its current emphasis on professionalism on the one hand and, on the other, its publication's unrelenting emphasis on enhancement of incomes, with such articles as "Successful Marketing Plans," "Fine Tuning a Newsletter," and, in a single issue, "A Guide to Successful Marketing," "Hawking Legal Services," and "Improving Your Firm's Profitability "

Despite its more sprightly appearance, does the present *Journal* now come off as merely another trade journal, managed not by lawyers but by journalists who may not appreciate the goals of professionalism, being nurtured in the notion that advertising, the financial life-blood of most publications, is without reservation a worthy endeavor?

Does it enhance professionalism for the *Journal* to print a "law-firm management consultant's" suggestion that firms conduct seminars because they allow "lawyers to meet face-to-face with prospects"? Can that device really be distinguished from the direct in-person solicitation that the Supreme Court in *Ohralik* held could be totally banned? *Ohralik v Ohio State Bar Association*, 436 U S 447 (1978)

Like most judges, I find it easier to ask the questions than to answer them.

EVIDENCE PROBLEMS WITH GOVERNMENTAL STUDIES, INVESTIGATIONS AND REPORTS

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EVIDENCE PROBLEMS WITH GOVERNMENTAL STUDIES, INVESTIGATIONS AND REPORTS

By

James W. Carney

RULE 803(8) Public records and reports. Records, reports, statements, or data compilations, in any form, or public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

I. INTRODUCTION

The utilization of public records and reports can be the key element of success in any case where such documents are at issue. Is the exhibit going to be allowed into evidence or kept out of evidence? That is often a million-dollar question.

Before a plaintiff expends a substantial amount of costs advanced in what is viewed to be a big recovery case, this evidentiary issue must be given a tremendous amount of thought if the case is going to be built around the admissibility of such reports. Similarly, if defense counsel is going to advise their client as to whether a large exposure case should be settled, great consideration needs to be given to whether such reports will be admitted into evidence or kept out of evidence.

From the plaintiff's perspective, records, reports, statements, or data compilations can be the equivalent of a smoking gun or, in some respects, even better than a smoking gun. It can be of tremendous advantage to be able to argue that an independent

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agency that specializes in the area concurs with arguments being advanced by you. From the defendant's perspective, it can be of tremendous advantage to argue that your client has received the "Good Housekeeping Seal of Approval." It is very helpful to argue that an independent agency that specializes in the area and that is charged with the responsibility of regulating the area on behalf of the public has found your client to be in total compliance with governmental regulations, etc.

Federal Rule of Evidence 803(8) regarding public records and reports and state counterparts have the capability to cut both ways against both plaintiffs and defendants. Rulings by the trial court can make or break a party's case.

FOR THE DEFENDANT

Example: You are defending a drug company. The FDA has approved your company's drug, and there has been no regulatory action against the company by the agency. You want to have admitted into evidence the FDA's letter of approval of the drug and other regulatory records, reports and data compilations that are complimentary to your client, all of which show that the drug is "safe and efficacious." You want the "Good Housekeeping Seal of Approval" as a part of your case.

FOR THE PLAINTIFF

Example: You are representing a plaintiff, a farmer who has lost milk production in his dairy herd and, additionally, claimed that the farmer's prized cows have lost productive abilities due to the use of illegal drugs or, in veterinary lingo, "improper" extra-label use of drugs in food animals. You analyze the case and see that there is a potential of $500,000 in actual damages and a potential punitive damage claim which you believe could result in a verdict of $2.5 million or more. The FDA conducted an investigation of the veterinary clinic and issued a "warning letter" which you believe clearly illustrates the veterinarians are bad apples and violated the law.

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II. PRACTICAL CONSIDERATIONS

To a large extent, the success of either party in both examples turns on the Court's ruling as to the admissibility of the public records and reports. Each case represents one to three months of trial time, the equivalent amount of time or more in preparation, and will cost plaintiff and defendant $150-300,000 in out-of-pocket costs for expenses alone to try or defend the cases.

III. PRACTICE SUGGESTION

As soon as you know the admission of any such public records or reports will be pivotal to a case, consideration should be given to making an application for pre-trial ruling on evidentiary matters under Federal Rule of Evidence 104 or its state counterpart. Iowa Rule of Evidence 104 is virtually identical to the Federal Rule, and the Iowa courts have allowed a fairly liberal application of Rule 104 in regard to its timing. An appropriate way to phrase the matter would include in your motion allegations such as:

1. That pursuant to the inherent powers of the Court, Iowa Rule of Civil Procedure 136 (which governs pretrial conferences) and Iowa Rule of Evidence 104, parties may obtain a ruling on evidence prior to trial to ensure the orderly admission of evidence, to prevent prejudice and to allow both parties to assess the management of their case consistent with the Court's ruling on evidence.

2. That matters raised in motions in limine present evidentiary issues that can and should be ruled upon prior to trial to avoid unnecessary prejudice by allowing interrogation of witnesses during the trial when such interrogation is clearly inappropriate and testimony relating to such matters is not admissible.

3. That the preliminary question relates to the admissibility of public records, reports, statements or data compilations which are well-known to both parties and have been

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considered by various experts by both parties who will be testifying during the trial of this matter.

4. That the Court can at this time appropriately rule on the admissibility of the proposed exhibits and the use of such exhibits by any party or witness during the course of the trial without the necessity of having the matter presented within the context of the trial itself.

5. That it would be in the interest of judicial expedience and both parties to know the Court's determination of the admissibility of such evidence prior to trial, and it would also prevent highly prejudicial and inflammatory matters coming before the jury; justifying pretrial evidentiary rulings on these matters prior to trial.

There are obviously some significant advantages and disadvantages to seeking such a ruling, depending upon whether you are plaintiff or defendant. From the plaintiff's perspective, the introduction of such records is the equivalent of the loaded gun to the head of a defendant and obviously provides a great deal of leverage as it relates to settlement. An adverse ruling prohibiting the introduction of records which the plaintiff believes will be of assistance to them will diminish the value of the case. Regardless, isn't it best to know the rules of the game and, therefore, the chances of success as soon as possible? You can then properly evaluate the case and know whether to advise a client to settle, not to mention the advisability of advancing huge sums of money for costs advanced? Something you and your client need to know. The flip side is obviously true for a defendant. The value of the case goes up or down depending upon the admissibility of certain reports and a willingness to settle based upon the exposure the defendant may have.

IV. EVER-EXPANDING AREA

The proliferation of watchdog agencies and governmental investigatory units and the investigative reports such agencies generate has provided both

plaintiffs and defendants with potentially powerful evidence. These governmental reports appear in a variety of contexts. In products liability and medical malpractice litigation, reports by the Food and Drug Administration ("FDA") and Center for Disease Control ("CDC") are highly prized by the advantaged party. See Toole v. McClintock, 999 F.2d 1430 (11th Cir. 1993) (Plaintiff attempts to introduce FDA document regarding breast implants and the health risks they pose); Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984) (Plaintiff attempts to introduce CDC toxic shock syndrome studies); Sabel v. Mead, Johnson & Company, 737 F.Supp. 135 (D. Mass. 1990) (Plaintiff attempts to introduce FDA opinion letter regarding the sufficiency of Defendant's warning label). The Department of Housing and Urban Development ("HUD") and the Equal Employment Opportunity Commission ("EEOC") generate similar investigations and reports in housing discrimination and discrimination suits generally. See See Moss v. Ole South Real Estate, Inc., 933 F.2d 1300 (5th Cir. 1991); Denny v. Hutchison Sales Corp., 649 F.2d 816 (10th Cir. 1991).

In almost every personal injury or wrongful death suit involving a vehicle or vessel, some governmental agency performs an investigation. In any maritime disaster, the United State Coast Guard and Department of Transportation will investigate. In airplane accidents the National Transportation Safety Board or the Federal Aviation Agency will investigate. See Petition of Cleveland Tankers, Inc., 821 F.Supp. 463 (E.D. Mich. 1992); In Re Air Crash Disaster at Stapleton Intern., (D. C. Colo. 1989). In my home state of Iowa, the variety of such public records and reports which have been considered by the Court include:

> Bureau of Epidemiology of the United States Consumer Products Safety Commission Report entitled "Hazard Analysis of Carbonated Soft Drink Bottles" was not admissible under public records exception as hazard analysis did not have indicia of reliability and much of the material would be misleading or prejudicial. Hinkle v. R & S Bottling Co., 323 N.W.2d 185 (Iowa 1982).

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The "Consumer Price Index" of Bureau of Labor was admissible over hearsay objection. Hunt v. State, 252 N.W.2d 715 (Iowa 1977).

Portion of death certificate stating decedent suffered certain injuries were statements of "fact" and not of "opinion" within statute making certified copy of record of death presumptive evidence of facts stated in their certificate to prove injuries sustained, but not to show cause of death. Beardsley v. Ostrander, 118 N.W.2d 61 (Iowa 1962).

Reports of epidemiological studies conducted by CDC and various state health departments admitted and court allowed plaintiff's expert, a former member of the CDC to testify about the studies. The studies analyzed the statistical relationship between tampon use and the incidence of toxic shock syndrome. Kehm v. Proctor & Gamble Mfg. Co., 724 Fed.2d 613 (8th Cir. 1983).

Report of psychiatrist who interviewed father, father's wife, children of father's previous marriage, children's maternal grandparents, and children's mother pursuant to court-ordered investigation was inadmissible hearsay. In Re Marriage of Reschly, 334 N.W.2d 720 (Iowa 1983).

Automobile accident report prepared by officer which did not state the cause of the accident in the sense of allocating fault but, rather, contained a chronological description of events support by the evidence was admissible in a dram shop action. Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992).

In motorist's action against a city to recover for personal injuries sustained in collision with police officer, trial court reversibly erred in ruling that the accident report proven to have been signed by the officer was inadmissible. Rumley v. City of Mason City, 320 N.W.2d 648 (Iowa App. 1982).

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V. QUESTION OF THE MOMENT

A police officer in an unmarked car suffers personal injury sustained in automobile accident. Officer files suit and the party in other automobile files counterclaim. The city conducts an internal investigation and docks the officer points for conduct involved in accident. Department claims that any internal investigation is a part of "critical self-analysis" and is privileged. Is the investigation discoverable? Is the investigation admissible under 803(8)?

VI. IS IT HEARSAY? AN EXCEPTION TO HEARSAY OR AN EXCEPTION TO THE EXCEPTION?

We all know hearsay evidence is not admissible. Federal Rule of Evidence 802 and companion state rules of evidence (Iowa Rule of Evidence 802) so state. The effect of Rule 802 is that evidence which meets the hearsay definition is inadmissible unless it falls within the hearsay exception provided in Rule 803 or 804. Even if a report or record meets the requirement of the hearsay exception, it is extremely important to remember that admission of the evidence is not assured or required. To be admissible under 803(8), the records, reports, statements or data compilations must be trustworthy. Careful consideration, therefore, must be given to the language contained in Rule 803(8) which states "unless the sources of information or other circumstances indicate lack of trustworthiness." Also, considerable attention needs to be given to whether the proposed exhibit contains material which satisfies the definitional requirement of "factual findings." A key requirement for approaching a Rule 803(8) evidentiary matter is intimate knowledge of the rule under which you are operating. Compare Federal Rule of Evidence 803 with your state rule. For example, Iowa Rule of Evidence 803(8) is much different than the Federal rule.

VII. STATE RULE OF EVIDENCE -- A COUSIN OR NOT?

Iowa Rule of Evidence 803(8) is patterned after the Uniform Rule of Evidence 803(8). Note the specific

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exception to the hearsay rule within the hearsay exception itself:

> RULE 803(8). Public records and reports. (A) To the extent not otherwise provided in (B) records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. (B) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the State or political subdivision in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. This subdivision, however, shall not supersede specific statutory provisions regarding the admissibility of particular public records and reports.

The specific exceptions to the exception are:

1. Investigative reports by police and other law enforcement personnel.

2. Investigative reports prepared by or for a government, public office or an agency when offered by it in a case in which it is a party.

3. Factual findings offered by the State or political subdivision in criminal cases.

4. Factual findings resulting from special investigation of a particular complaint, case or incident.

5. Any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

A list of states that have adopted the Uniform Rule as compared to the Federal Rule are:

Alaska	Arizona	Arkansas	California
Colorado	Delaware	Florida	Guam
Hawaii	Iowa	Kansas	Maine
Michigan	Minnesota	Montana	Nebraska
Nevada	New Hampshire	New Jersey	New Mexico
North Carolina	North Dakota	Ohio	Oklahoma
Oregon	Puerto Rico	South Dakota	Tennessee
Texas	Utah	Vermont	Washington
Wisconsin	Wyoming	Virgin Islands	

Regardless of jurisdiction, it must be kept in mind that the basic philosophical background for the public records hearsay exception is necessity, convenience and trustworthiness. The concept of convenience merges with the necessity concept because it is often difficult or impossible to call as witnesses preparers of a report, and it is more practical to admit into evidence the hearsay statement of a public official than to have the official testify in person. The trustworthiness concept is based upon the presumption that public records are presumed to be accurate and reliable because they are both public in nature and there is a duty of government officials to perform with integrity.

VIII. THE PROBLEMATIC AREA OF "EVALUATIVE" REPORT

The disagreement among decisions as it relates to "evaluative" reports is due to the variety of situations encountered as well as to the differences in principle applied by the courts. Examples of cases sustaining admissibility are cases such as:

United States v. Dumas, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; McCarty v. United States, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in

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action on contract to purchase and remove waste food from Army camp; Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; In Re Naturalization of Grete W., 164 F.Supp. 659 (E.D. Pa. 1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married.

Cases to the opposite effect and denying admissibility are:

Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in processing passport applications.

IX. FACTORS OF ASSISTANCE IN ARGUING FOR OR AGAINST ADMISSIBILITY OF EVALUATIVE REPORTS

1. Timeliness of the investigation?

2. Special skill or experience of the official?

3. Was a hearing held and at what level was the hearing conducted?

4. Possible motivation problems?

5. Ability to attack the bias of the agency or a specific individual, investigator or author of the report?

6. Are there procedural safeguards involved in the report? Was there some type of hearing, presentation of evidence, cross-examination of witnesses, or any other type of procedural safeguard?

7. Do the proposed reports contain legal opinions or conclusions of persons whose qualifications, skills and competence are

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unknown? (For example, surveys have been taken the indicate the vast majority of persons in positions of an investigative nature with the FDA have no demonstrated veterinary education or competency.)

8. Other circumstances indicating a lack of trustworthiness?

Obviously, depending upon whether you are the proponent or opponent of the exhibit, you need to develop strong arguments which address the above considerations.

X. OTHER INTERESTING CASES

Cases sustaining admissibility of records of matters observed:

Chandler v. Roudebush, 425 U.S. 840 (1976)(findings made by Civil Service Commission admissible under Rule 803(8)(C)

American Airlines, Inc. v. U.S., 418 F.2d 180 (5th Cir. 1969)(Opinion testimony should be excluded only when it embraces the probable cause of the accident of the negligence of the defendant)

U.S. v. Meyer, 113 F.2d 387 (7th Cir. 1940)(map prepared by government engineer from information furnished by men working under his supervision)

Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945)(weather bureau records of rainfall)

Additional cases sustaining admissibility of evaluative" reports:

U.S. v. Costanzo, 581 F.2d 28 (2d Cir. 1978) (IRS audit reports are public record)

U.S. v. MacDonald, 688 F.2d 224 (4th Cir. 1982)(findings and conclusions of Army investigating officer contained in pretrial investigation report)

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Other cases denying admissibility of evaluative reports:

> Koonce v. Quaker Safety Products & Mfg. Co., 798 F.2d 700 (5th Cir. 1986)(memo outlines future inquiries and offers opinions on expected results; not characteristic factual findings)
>
> Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980)(Coast Guard report discussing properties of benzene, which was carried on sunken vessel, was admissible; evaluation opinions should not have been admitted but no prejudice occurred due to cumulative nature of information)
>
> Complaint of American Export Lines, Inc., 73 F.R.D. 454 (S.D. N.Y. 1977)(factual findings in Coast Guard maritime collision report admissible; evaluative opinions not admissible)

XI. EFFECT OF STATE LAW AND FEDERAL STATUTES

It is surprising the number of evaluative reports and documents that are admissible by state law or federal statute. Whenever 803(8) is at issue, you should do a thorough search of both state and federal law to determine applicability. For example:

> 7 U.S.C. §78: Findings of Secretary of Agriculture prima facie evidence of true grade of grain.
>
> 7 U.S.C. §210(f): Finds of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner
>
> 7 U.S.C. §292: Order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly.
>
> 7 U.S.C. §1622(h): Department of Agriculture inspection certificates of products shipped in interstate commerce, prima facie evidence.

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8 U.S.C. §1440(c): Separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship.

18 U.S.C. §4245(e): Certificate of Director of Facility in which person with a mental disease or defect is hospitalized determining that such person is no longer in need of custody for care or treatment.

42 U.S.C. §269(b): Bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations.

46 U.S.C. §679: Certificate of counsel presumptive evidence of refusal of master to transport destitute seamen to United States.

XII. BLUE-RIBBON TREATMENT

Additionally, you should satisfy yourself regarding availability of witnesses to appear to authenticate documents or obtain appropriate certification as provided for by state law or statute. An example is certification by FDA. 21 CFR §20.1 prohibits any officer or employee of the FDA to give testimony pertaining to any function of the FDA or with respect to any information acquired in the discharge of the employee's official duties, unless authorization is given by the Commissioner of Food and Drugs. This prohibition applies even when a subpoena has been served on the employee. The regulation permits the employee to appear and "respectfully decline to testify" unless authorization is given by the Commissioner.

Federal Rule of Civil Procedure 44, Proof of Official Record and Authentication.

49 U.S.C. App. §1441(e) states:

> No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action

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for damages growing out of any matter mentioned in such report or reports.

NTSB does not permit investigators to give testimony in a civil action, but only in deposition form and even then is limited to factual information they obtain during the course of an investigation. NTSB investigators are prohibited from testifying as to the likely cause of an accident. See 49 CFR §835.3(b) and In Re Air Crash Disaster at Sioux City, Iowa, 780 Fed. Supp. 1207 (N.D. Ill. 1991).

XIII. MANDATORY READING

If you have an 803(8) issue, read the now-landmark case of Beech Aircraft Corp. v. Rainey, 448 U.S. 153, 109 S.Ct. 439, L.Ed.2d 445 (1988). In Rainey, the United States Supreme Court refused to narrowly define the term "factual findings." A Navy flight instructor and student were killed during training exercises when their airplane crashed. In determining whether pilot error or equipment malfunction caused the accident, defense counsel sought to introduce the Judge Advocate General's (JAG) report. The investigator set out a reconstruction of a possible set of events in the report and concluded that pilot error was the most likely cause of the accident. Portions of the JAG report concerning crash of the military aircraft, which were labeled "Opinions" and which contained the author's statement as to probable cause of the crash, were not inadmissible simply because they contained conclusions or opinions. Upon determination that the conclusions were trustworthy, they were admissible under public records and reports hearsay exception 803(8)(C). Justice Brennan, writing for the majority, rejected a narrow definition advanced by the House Judiciary Committee's notes for a more broad interpretation advanced by the Senate Judiciary Committee. Justice Brennan ultimately embraced the notion that the terms "factual findings and facts" are not synonymous. He observed that to restrict "factual findings" to encompass only objective facts is to disregard a most common definition, that being a "finding of fact" is a conclusion by a way of reasonable inference from whatever the evidence might be. As a result, in the federal courts at least, a party disadvantaged by a public record or report must

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resort to the "lack of trustworthiness" requirement to prevent the admission of harmful conclusions contained in governmental reports.

Litigants with a choice of forum would be well advised to note that several states' counterpart to Fed. R. Evid. 803(8) often times are significantly different than their federal cousin. Always compare the State Rule with Federal Rule 803(8).

XIV. CONCLUSION

To properly advise a client, whether they be plaintiff or defendant, on the merits of a case that may turn on the admissibility of public records or reports requires due diligence. Know your rules and research the appropriate body of law to include state and federal statutes. A very fine Law Review article on the subject is "The Trustworthiness Standard for Public Records and Reports Hearsay Exception," 12 Western State University Law Review, 53. Also see, Uniform Laws Annotated (Uniform Rules of Evidence).

P

FOOD AND DRUG ADMINISTRATION

St. Louis, MO. 63102

314-425-[illegible]

NAME OF INDIVIDUAL TO WHOM REPORT ISSUED

TO: Dr. [redacted]

PERIOD OF INSPECTION | C.F. NUMBER

[redacted]

TITLE OF INDIVIDUAL

Partner

TYPE ESTABLISHMENT INSPECTED

Veterinary Clinic

FIRM NAME

[redacted]

NAME OF FIRM, BRANCH OR UNIT INSPECTED

same

STREET ADDRESS

[redacted]

STREET ADDRESS OF PREMISES INSPECTED

same

CITY AND STATE (Zip Code)

[redacted]

CITY AND STATE (Zip Code)

same

DURING AN INSPECTION OF YOUR FIRM WE OBSERVED:

1. Drugs being used in an extra label manner. This included using individual drugs for non approved species, mixing drugs together in unapproved combinations, using drugs at unapproved levels, and using drugs in other unapproved ways. Extra label use concerns include the following:

A. These drugs appeared to be used in a routine manner rather than in specific life threatening situations. A stock of approximately one dozen drugs was being maintained which were pre-labeled with [redacted] labels. These labels contained extra label use directions.

B. There appeared to be approved drugs available which could have been used in place of the extra label drugs.

C. Treated animal identity was not always maintained.

D. At least one tissue residue and two milk residues were possibly related to these extra label drug uses.

2. Drugs being relabeled, repackaged, and compounded without adequate labeling or manufacturing controls. These included:

A. Drugs were being relabeled without justification. These relabeled drugs did not contain lot numbers which would permit tracing to original manufacturer. Expiration dates were also not being recorded.

B. No Master Formulas were available.

C. No Production Records were being maintained.

3. Fifty pound bags of feed grade Oxytetracycline were present in the drug storage area. Although the labeling had been removed from these bags, printing remaining on the bag closure seam indicated that the product had expired in December, 1991. This product was being repacked as "Pneumonia Powder".

SEE REVERSE OF THIS PAGE

[redacted]

EMPLOYEE(S) NAME AND TITLE (Print or Type)

[redacted] Investigator

DATE ISSUED

[redacted]

FORM FDA 483 (5/85) | PREVIOUS EDITION MAY BE USED | INSPECTIONAL OBSERVATIONS | PAGE OF

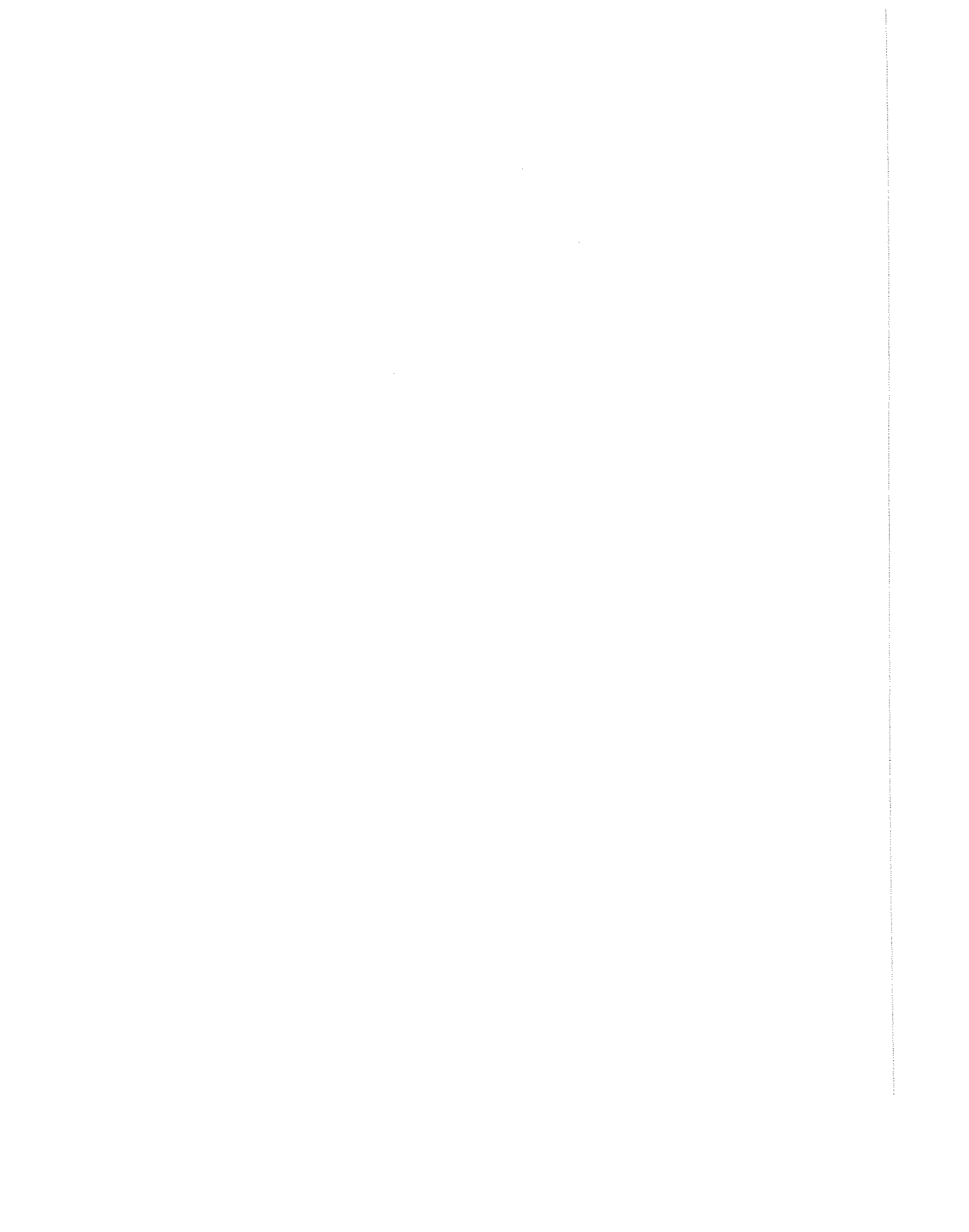
Charting The Future Of Iowa's Courts

Q

Iowa Supreme Court

Commission On Planning

for the 21st Century



Points of Departure

In Iowa

Between 1984 and 1994

- Trial court filings increased by 63%
  - civil filings grew by 35%
  - criminal filings soared by 98%
- Juvenile court filings jumped by 49%
- Appellate court filings increased by 14%
  - civil appeals grew by 8%
  - criminal appeals rose by 28%
- The number of district court judges rose by 38%
- The number of appellate court judges remained the same
- Iowa's population declined by 3% during the same period

In fiscal 1994

- Judicial branch funding accounted for 2.3% of Iowa's total State General Fund Appropriation

Nationally

A 1994 Gallup Poll commissioned by the *ABA Journal* asked Americans about their nation's justice system (including courts, police, prosecutors and prisons) and found that:

- 96% of those responding endorsed the concept of equal justice for all
- 14% felt it very likely the legal system can achieve equal justice in the future
- Respondents believed that 27% of federal, state and local government spending is allocated to justice activities
  - the true figure is just above 3%
- 58% favored a tax increase to improve the justice system

Planning for the Future

As the statistics show, the people of Iowa are turning to the courts for help now more than at any other time in the history of our state. The number of case filings has soared to an all-time high - attributable in part to increases in the most difficult types of cases: criminal, juvenile and domestic abuse. Criminal cases now account for the lion's share of our courts' dockets. They outnumber civil filings and the gap is widening. Such significant growth has burdened judges and court personnel and dramatically affected the amount of time allotted to each case. Unless there is a change soon, the judicial branch will break under the weight of this case load. Delay in the resolution of civil cases is inevitable - a sober expectation that threatens our state government's ability to safeguard the rights of Iowans.

After several years in which resources have failed to keep up with demands, it is obvious that commencement of a formal, long-range strategic planning process is a critical necessity. To that end, the state's highest court in August 1994 established the Iowa Supreme Court Commission on Planning for the 21st Century. The commission is designed as a public-private partnership that will plan for the future so that delivery of equal, affordable and accessible justice to all Iowans can be ensured.

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Spearheading the Effort

The work of the commission is being guided by a 13-member steering committee. Composed of three Supreme Court justices, a trial judge, a legislator, the state court administrator, attorneys and business leaders, the steering committee is responsible for developing and implementing a long-range strategic planning effort for Iowa's courts. The Supreme Court has directed the committee to convene a broadly representative body of citizens that will examine social, economic, political and technological trends, identify current and future issues confronting the courts, and assess the resources needed to establish a foundation for strategic management and organizational innovation. Based on the commission's findings, the steering committee will develop a long-range plan for the Iowa judicial branch that:

- clearly articulates the court system's mission
- assesses its capacity for providing services
- proposes an enduring, future-oriented service strategy that will deliver the highest quality of justice to the citizens of Iowa

The steering committee will report its findings and recommendations to the Iowa Supreme Court by March 31, 1996.

Q

Steering Committee

- Justice Linda K. Neuman (chairperson)
  Iowa Supreme Court
- David D. Beckman
  Attorney, Beckman, Hirsch, Ell & Lewis
- Mark A. Haverland
  President, Consumer Health Information, Inc.
- Ted M. Hutchison
  Vice Chairman, The Principal Financial Group
- Dwight W. James
  Attorney, The James Law Firm P.C.
- Senator Mary Kramer
  Vice President, Human Resources
  Blue Cross and Blue Shield of Iowa
- William J. O'Brien
  State Court Administrator
  Iowa Judicial Department
- Judge Donna L. Paulsen
  Polk County District Court
- MacDonald Smith
  Attorney, Smith, McElwain & Wengert
- Justice Bruce M. Snell, Jr.
  Iowa Supreme Court
- Janelle L. Swanberg
  Deputy Director, HELP Legal Assistance
- Justice Marsha K. Ternus
  Iowa Supreme Court
- Thomas N. Urban
  Chairman & President
  Pioneer Hi-Bred International, Inc.

Strategic Issues

The steering committee has formed five 12-member eams to identify and prioritize strategic issues in the ollowing areas:

lanning

This team will study the need for institutionalized lanning within Iowa's court system, paying particular ttention to the data collection and retrieval essential) such a function. It will familiarize itself with how ther governmental units, as well as businesses, ystematically plan for the future. Applying that nowledge, the task force will propose a structure for ddressing the long-term future of our court system, icluding facilities, personnel, education, citizen input nd interaction with allied governmental units.

echnology

This team will address the technology necessary to nplement the strategic goals of Iowa's court system will make a comprehensive assessment of current eeds and future trends in word-processing, data-rocessing, record storage and retrieval, case anagement, the reporting of court proceedings, ectronic legal research, electronic filing of court ocuments, interactive video communication and articipation in judicial proceedings, electronic ommunication between court personnel and others, d use of the Iowa Communications Network

elivery of Justice: Access and Quality

This team will determine whether changes are cessary to ensure that our courts fairly and ficiently carry out their task of adjudicating ntroversies while preserving the statutory and nstitutional rights of Iowa's citizens. It will examine tential barriers to court access, the availability of urt services, and alternatives to the current manner which criminal, civil, family and juvenile cases are ministered and resolved The team will also explore ys to enhance public understanding of our court stem

Administration

This team will consider the allocation of resources and administrative structure necessary to staff the judicial branch. It will examine judicial, managerial and clerical functions and how those roles overlap in the courts' adjudicative/policy-making function The team will study the operational and structural issues facing trial and appellate courts, including volume, delay reduction and management responsibilities It will also assess judicial performance evaluation and discipline, as well as effective personnel management of court employees.

Funding

This team will examine the historical methods of financing the judicial branch in Iowa and elsewhere, in order to determine whether changing the current system might aid the delivery of justice. It will also consider issues such as salary levels, the allocation of federal, state and local resources, public/private financing of litigation, the relationship of court funding to collection of fees, fines and costs, and the impact of new legislation on courts

CONTRIBUTIONS TO IOWA'S COURT PLANNING EFFORT

A charitable corporation has been established
for solicitation of private donations
to help fund the Commission's work

Those wishing to contribute should make checks payable to:
Committee on Justice in the 21st Century
Federal I.D. No. 42-1126665

For forwarding to:
Ted M. Hutchison
c/o The Principal Financial Group
711 High Street
Des Moines, IA 50392-0100

For further information please contact:
Kate Corcoran
Project Director
Phone: (319) 353-5670
Fax: (319) 353-5671

INDEX

Iowa Defense Counsel Association

1965 through 1994 Annual Meetings

This Index is supplied as a service to the members of the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
c/o DeWayne Stroud
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

ADMINISTRATIVE LAW

The Here and Now of The Iowa Administrative Law, 1977

AFFIRMATIVE DEFENSES (See PLEADINGS)

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act Applicability to the State Courts and Impact on Trial Practice, 1993

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

APPEALS

Appellate Procedure - New Rules and Some Often Asked Questions, 1993

Innovations in Appellate Review, 1968

New Appellate Court and Backlog, 1976

Rules (See RULES - Appellate)

APPELLATE DECISIONS REVIEW

(Reviews of Iowa Appellate Court Decisions have been presented in 1969 and 1975 through 1994)

Issues Presented to Supreme Court in Schmidt vs. Jenkins Truck Lines, Inc., 1969

Recent Tort Cases - 8th Circuit and Iowa Court of Appeals, 1978

BANKRUPTCY

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Litigation in Bankruptcy Court, 1982

BANKS

Due Process and the Federal Banking System, 1985

FDIC Practices and Procedures in Closed Banks, 1987

BUSINESS INTERRUPTION

Discovery in the Business Interruption Case, 1989

CIVIL RIGHTS

Civil Rights Actions Under Section 1983, 1980

Evaluating the Employment Discrimination Case, 1987

CLASS ACTION

Iowa's New Class Action Law, 1980

CLOSING ARGUMENT

The Art Of Summation, 1991

Defending Punitive Damage Claims - Closing Argument, 1988

Law of Closing Argument, 1987

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

"Voir Dire - Opening and Closing Arguments", 1985

COLLATERAL ESTOPPEL (See PRECLUSION)

COLLATERAL SOURCE

Collateral Source Rule - Is It Still Reasonable?, 1985

COMMERCIAL LITIGATION

Commercial Litigation, 1994

COMPARATIVE FAULT

The Beat Goes On: Chapter 668 In Flux, 1993

Comparative Fault Update, 1989

Comparative Negligence, 1969

Comparative Negligence, 1980

Comparative Negligence and Comparative Fault: Review and Update, 1985

Comparative Negligence Update, 1981

Comparative Negligence Update, 1983

Defense Considerations Under Iowa's Comparative Fault, 1984

Defense Techniques Under Iowa's Comparative Fault Act, 1984

Effect of Comparative Fault on Consortium Claims, 1988

The Effect Of Comparative Fault On The Trial, 1991

Instructions - Comparative Negligence, 1983

Recent Developments Under the Iowa Comparative Fault Statute - Has Chapter 668 Reached Maturity?, 1992

Trial Strategy Under Comparative Negligence and Contribution - The Defense Perspective, 1984

COMPLEX LITIGATION

Handling of Complex Litigation as Viewed from the Bench, 1981

Individual and Group Defense of Complex Litigation, 1981

COMPUTERS

Computerized Legal Research - WESTLAW, 1980

Using Computerized Litigation Support -- Friend or Folly?, 1981

CONFLICTS OF INTEREST

Conflicts of Interest, 1980

"Conflicts of Interest - The Mushrooming Problem", 1985

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

CONSORTIUM

Effect of Comparative Fault on Consortium Claims, 1988

CONSTRUCTION CASES

Defending Construction Cases, 1988

CONTRIBUTION/INDEMNITY

Allocating Contribution Among Tortfeasors, 1975

Contractual Indemnity, 1975

Contribution, 1980

Contribution and Indemnity After Goetzman v. Wichern, 1987

Indemnity and Contribution in Iowa, 1975

Procedural Questions Relating to Contribution and Indemnity, 1975

Trial Strategy Under Comparative Negligence and Contribution - The Defense Perspective, 1984

CORPORATIONS

Defending Corporate Clients and Officers in Criminal Cases, 1987

Directors' and Officers' Liability, 1986

Emerging Approach to Products Liability of Successor Corporations, 1979

When Corporations Choose Counsel, 1980

COUNTERCLAIMS

Permissive and Compulsory Counterclaims, 1978

CRASHWORTHINESS

Crashworthiness, 1994

Enhanced Injury Claims, 1994

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

CRIMINAL

Defending Corporate Clients and Officers in Criminal Cases, 1987

CROP DAMAGE

Strategy and Discovery in Crop Damage Cases, 1994

CROSS EXAMINATION

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Cross-Examination of the Chiropractor, 1984

Testimonial Objections And Cross-examination, 1991

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

DAMAGES

Closed Head

Evaluation and Defense of Closed Head Injury Cases, 1988

Death

Elements of Damage in the Wrongful Death Case 1982

Preparing for the Plaintiff's Economist in a Death Case, 1968

A Trial: A New Technique in Proving Damages for the Death of a Wife and Mother, 1966

Emotional Distress

Defending Against the Emotional Distress Claim, 1994

Emotional Distress, 1983

General

Damages From the Defendant's Point of View, 1979

"The Question of Damages Resulting From Recent Iowa Legislative Changes", 1965

Undermining the Value of Plaintiff's Case by Cross-Examination - The Seventh Juror, 1987

Hedonic

Hedonic Damages: Pleasure or Pain, 1992

Psychological

Traumatic Neurosis - The Zone of Danger, 1980

Punitive

Punitive Damages, 1978

Punitive Damages: The Doctrine of Just Enrichment, 1980

Punitive Damages in Strict Liability Claims, 1983

Selected Aspects of Punitive Damages, 1976

Rehabilitation

Use of Rehabilitation - In Theory and In Practice, 1978

Vocational

Vocational Disability Evaluations, 1984

DIRECTORS AND OFFICERS (See CORPORATIONS)

DISCOVERY

Artful Discovery, 1978

Defending Products Liability Cases Under OSHA and CPSA; Obtaining Information From Government Agencies, 1976

Deposition of Expert Witnesses, 1977

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Discovery in the Business Interruption Case, 1989

Discovery As A Weapon And A Response - Part I, 1991

Discovery As A Weapon And A Response - Part II, 1991

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Motion Practice, 1991

Reminders and Suggestions on the Use and Nonuse of Depositions Under the Iowa Rules, 1989

Rule 125, Iowa Rules of Civil Procedure and Discovery Sanctions, 1989

Use of Request for Admissions in the No Liability Case, 1982

What is Work Product, 1982

DRUNK DRIVING

Iowa's Drunk Driving Law, 1983

Iowa O.M.V.U.I. Law, 1986

DUTY

When the Violation of a Statute, Ordinance or Administrative Rule Will Not Support an Action For Damages -- Public Vis-A-Vis Private Duties, 1979

EMPLOYEES

Actions Between Co-Employees, 1978

Common Law Employee Termination Claims, 1988

Defending the Co-Employee Case -- Some Unanswered Questions, 1981

The Developing Law of Wrongful Discharge in Iowa, 1993

Evaluating the Employment Discrimination Case, 1987

Offensive Defenses: Turning the Table on the Plaintiff in Employment Litigation, 1994

Recent Developments and Emerging Issues in the Area of Employment Discrimination Law, 1993

Statutory Limitations on an Employer's Right to Discharge Employees, 1989

ENHANCED INJURY

Enhanced Injury Claims, 1994

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

ENTERPRISE

Enterprise Liability, 1981

ENVIRONMENT

Defense Issues For Environmental Damage to Real Estate, 1993

ERISA

Erisa: Some Basics, 1990

ETHICS (See PROFESSIONAL RESPONSIBILITY)

EVIDENCE

Admissibility of Evidence of Other Accidents and Subsequent Remedial Measures and Warnings in Products Liability Litigation, 1977

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

The Hearsay Objection, 1982

Hospital Records and Their Use in Court, 1969

Industry Codes as Evidence, 1983

Rules (See RULES - Evidence)

Thermography - Is It On The Way Out?, 1990

EXCLUSIVE REMEDY

The Exclusive Remedy Doctrine: Dead or Alive, 1980

EXPERTS

Chiropractor

Cross-Examination of the Chiropractor, 1984

Economist

Preparing for the Plaintiff's Economist in a Death Case, 1968

INDEX

General

Defense Challenges to Expert Testimony, 1987

Deposition of Expert Witnesses, 1977

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Handling the Expert Witness, 1981

The Problem of Unreliable Expert Witness Testimony, 1989

The Selection, Care and Feeding Of Experts And Their Dismemberment, 1991

Thermography - Is It On The Way Out?, 1990

A Trial: A Trial Problem re Expert Proof or Physical Facts, 1967

Human Factors

Human Factors Experts, 1986

Medical

Independent Medical Experts, 1978

Use of Experts: Preparation of Medical Witnesses; Medical Malpractice, Cross Examination - Experts, 1976

Product Liability

Handling Expert Witnesses in the Defense of Product Liability Cases, 1993

Radiology

Diagnostic Radiology - Interpreting Radiographs, 1984

Thermography

Thermography - Is It On The Way Out?, 1990

Toxic Torts

Perceptions of Toxic Hazards: The View From the Expert Witness Stand, 1980

FEDERAL PRACTICE

Federal Jurisdiction, Removals, Procedures & The New Duties of the Federal Magistrate, 1976

Latest Information From U.S. District Court, 1988

Notes -- Report - U.S. Court of Appeals - 8th Circuit, 1985

Rules (See RULES - Federal Rules of Civil Procedure)

FIDUCIARY DUTY

Breach of Fiduciary Duty, 1986

A Survey of the Law of Fiduciary Relationships, 1992

GENERAL INTEREST

Evolution, Not Revolution, 1967

History Of IDCA, 1991

Proposed Rule 122, with Advertising and Report on the Activities of the Iowa State Bar Association, 1992

Resources, 1979

The Role of the American Lawyer - Today, 1969

IMMUNITIES

Immunities in Iowa, 1987

INDEMNITY (See CONTRIBUTION/INDEMNITY)

INSTRUCTIONS

Civil Jury Instructions - An Update, 1992

Iowa Jury Instructions - An Update, 1993

Instructions - Comparative Negligence, 1983

Overview of the Iowa Defense Counsel Task Force Report, 1990

INSURANCE

Arson

Arson Investigation and Prosecution from the Insurance Company's Perspective, 1990

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Investigation and Adjustment of Arson Claims, 1987

Investigation and Adjustment of Arson Claims, 1990

Bad Faith

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Dealing with Bad Faith Claims, 1986

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

First Party Claims, 1983

First and Third Party Bad Faith Theory and Issues, 1993

Coverage

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

"Claims Made" Policies, 1986

Controlling Defense Costs When Possible Policy Defenses are Available, 1987

Coverage and Liability of Architects, Engineers, and Accountants and Comments on New Comprehensive Policy, 1966

Insurance Coverage Issues in Sexual Abuse, Failure to Supervise or Prevent, Sex Discrimination, and Sexually Transmitted Diseases, 1993

"Intentional Acts" vs. "Accidents", 1979

The Intentional Acts Exclusion of Personal Liability Insurance Policies. Is it Still Viable?, 1992

A Practicing Lawyer's Approach to Automobile Coverage Problems, 1966

Excess Liability/Extra Contractual Damages

Avoiding Insurers' Excess Liability, 1982

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977
Extra Contractual Damages - Iowa Eases the Burden, 1989

Extra Contractual Liability, 1986

General

Attorney Liability - Excess Limits Case - Insurance Attorney vs. No Attorney for Insured - Conflicts - Errors & Omissions - Client Security, 1976

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Conflicts of Interest - Inside Counsel's Perspective, 1990

Defending the Agent/Broker: Serving Two Masters, 1990

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

Expanding Liability, The Claim Executive; Defense Counsel, 1976

Guidelines for Insurer-Defense Counsel Relations, 1994

Insurers Supervision, Rehabilitation and Liquidation Act, Chapter 507.C, 1987

The Labyrinth of Conflicts Between Primary and Excess Insurers, 1990

The Past vs. Present vs. Future for the Insurance Defense Lawyer, 1981

Primary/Excess Carriers -- What Are Their Rights and Duties?, 1981

Recent Developments in Iowa Insurance Law, 1993

Relations with Outside Counsel, 1990

Reservation of Rights and Tenders of Defense, 1977

Retaining and Working with Outside Counsel, 1993

Rock and a Hard Place, Defense Counsel's Duty to Insured and Insurer, 1990

The Settlement Alternative - Some Peculiar Problems: What Happens When Your Carrier Will Not Accept Your Advice or When Your Client & Carrier Disagree, 1991

Property

Adjustment of Creditor Claims to Property Insurance Proceeds, 1987

Defense of Fraudulent Property Insurance Claims, 1985

Subrogation

Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation, 1992

Subrogating Economic Loss, 1983

Uninsured/Under Insured Motorist

Developments in the Area of Uninsured/Underinsured Motorist Law, 1994

Selected Issues in Handling Iowa Uninsured and Under Insured Motorist Claims, 1987

Underinsured Motorist Coverage - Where We've Been - Where We're Going, 1992

Uninsured Motorists Problems; Contribution By 3rd Parties; Policy Interpretation; Limitations, 1976

Uninsured and Under Insured Motorist Claims, 1987

INTENTIONAL INTERFERENCE

Intentional Interference Cases - A Defense Perspective, 1988

JUDGES

"The Iowa Judicial Selection Law -- How It Works", 1965

LAW OFFICE MANAGEMENT

Closing the Communications Gaps, 1985

Economics of Defense Practice, 1982

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

LEGISLATION

(Legislative Updates had been provided in meetings of 1979, 1981, 1982, 1983, 1984, 1985, 1988, 1990, 1993, and 1994)

Analysis of House File 196 - The New Medical Privilege Act, 1967

Legislative Changes and Products Liability, 1980

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

Proposed Uniform Product Liability Law 1, 1979

"The Question of Contributory Negligence Resulting From Recent Iowa Legislative Changes", 1965

"The Question of Damages Resulting From Recent Iowa Legislative Changes", 1965

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

MALPRACTICE (See PROFESSIONAL LIABILITY)

MEDICAL

Experts (See EXPERTS - Medical)

Eye Injuries

The Medical Legal Aspects of Eye Injuries, 1967

General

Physicians in the Litigation Process, 1994

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

A Psychologist Looks at the Medical Profession, 1968

Legislation

Analysis of House File 196 - The New Medical Privilege Act, 1967

Records

Access To Medical Records, 1979

Evaluation of Medical Records, The Search for Truth, 1990

Hospital Records and Their Use in Court, 1969

X-Rays

Diagnostic Radiology - Interpreting Radiographs, 1984

The Validity and Interpretation of X-Ray Reports of the Cervical Spine and Low Back, 1966

MOTIONS

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Motion Practice, 1991

MUNICIPAL/STATE LIABILITY (See TORTS)

NEGLIGENCE

Comparative Negligence (See COMPARATIVE FAULT)

General

Plaintiff's Negligence Revisited and Significant Supreme Court Decisions in the Negligence Field, 1968

"The Question of Contributory Negligence Resulting From Recent Iowa Legislative Changes", 1965

Recent Developments in Negligence Litigation, 1967

Sudden Emergency and Legal Excuse, 1969

NUISANCE

An Anatomy of a Nuisance, 1979

OPENING STATEMENT

Effective Opening Statement, 1986

Opening Statement, 1991

The Opening Statement, 1988

Opening Statements and Closing Arguments - The First Word and The Last Word, 1990

"Voir Dire - Opening and Closing Arguments", 1985

PERSONAL INJURY

General

Law and Order and the Personal Injury Lawyer, 1968

PLEADINGS

Checklist for Affirmative Defenses, 1982

Permissive and Compulsory Counterclaims, 1978

PRECLUSION

Collateral Estoppel in the Multi-Plaintiff Products Case, 1980

Issue Preclusion, 1975

Preclusion, 1976

PREMISES LIABILITY

Premises/Interloper Liability: The Duty of a Possessor of Land to Control or Protect Third Persons, 1994

PRETRIAL

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Pretrial Motion Practice, 1991

PRODUCTS LIABILITY

Admissibility of Evidence of Other Accidents and Subsequent Remedial Measures and Warnings in Products Liability Litigation, 1977

Collateral Estoppel in the Multi-Plaintiff Products Case, 1980

Coping with Multiple Defendants and Products Liability Cases, 1982

Crashworthiness, 1994

Defending Products Liability Cases Under OSHA and CPSA Obtaining Information from Government Agencies, 1976

Emerging Approach to Products Liability of Successor Corporations, 1979

Enhanced Injury Claims, 1994

Handling Expert Witnesses in the Defense of Product Liability Cases, 1993

Legislative Changes and Products Liability, 1980

Preventing Negligent Plaintiffs from Having "A Second Bite at the Apple:" Defending Against Enhanced Injury Claims in Emergency Stop Devices Cases, 1994

Product Liability -- Medical Appliances, 1986

Product Warnings and Labeling, 1985

"Products Liability", 1965

Products Liability Update, 1988

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

Proposed Uniform Product Liability Law 1, 1979

Protection for the Middleman, 1992

PROFESSIONAL LIABILITY

Attorney's Liability to Third Parties, 1977

A Defense Lawyer Looks at the Professional Liability of Trial Lawyers, 1977

Lawyer Malpractice - Iowa Grievance Commission, 1985

Legal Malpractice, 1978

Medical Malpractice Update, 1992

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Defending Municipal or State Highway Torts, 1988

Defending Truckers, 1992

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A Fresh Look at Voir Dire, 1989

Jury Communication and Selection, 1984

Jury Selection, Method And Ethics, 1991

Post Trial Jury Visits, 1978

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