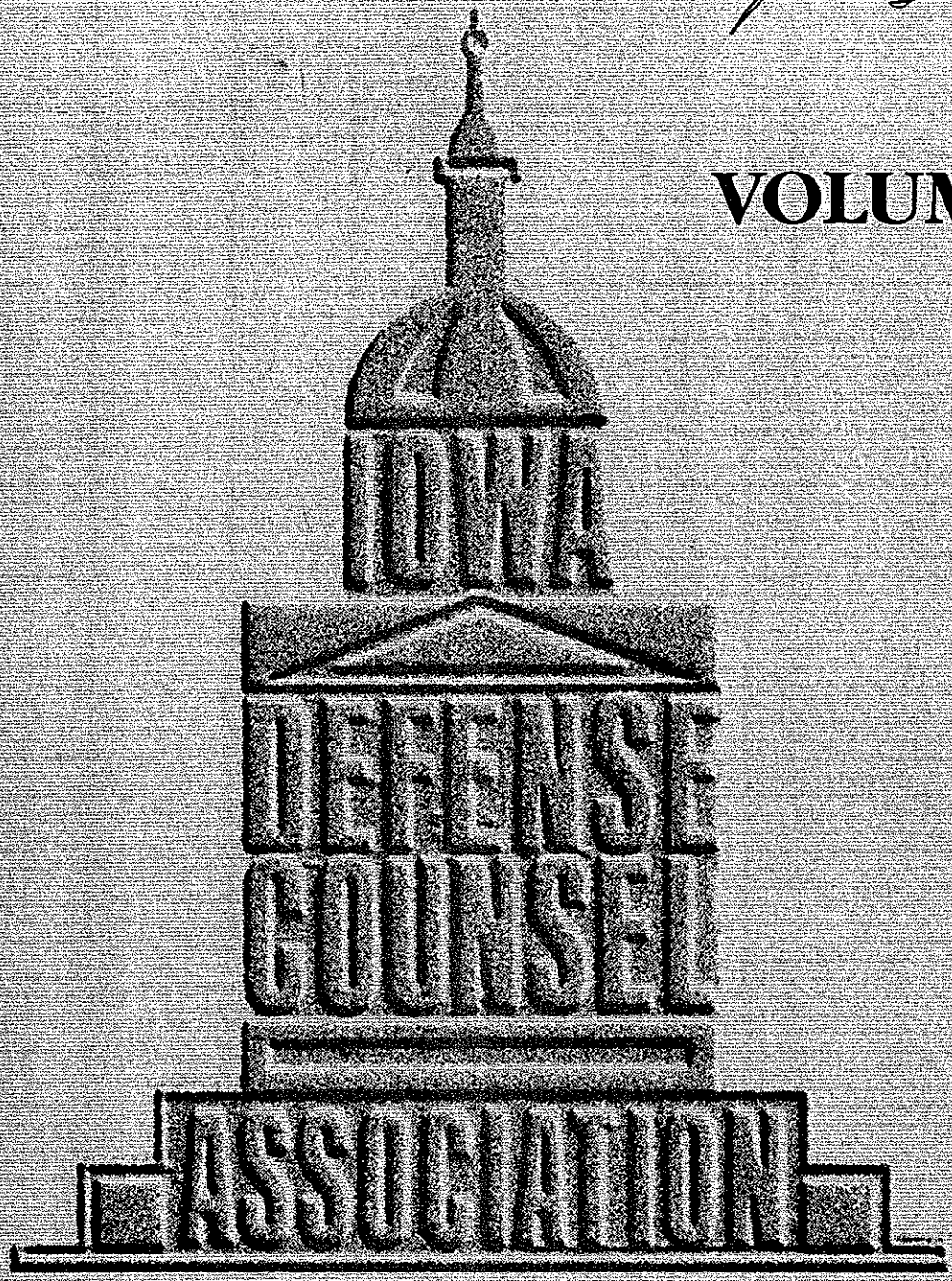
De Wayne Stoced

VOLUME 1



1996
ANNUAL MEETING

SEPTEMBER 25, 26 & 27
EMBASSY SUITES HOTEL ON THE RIVER
101 EAST LOCUST STREET
DES MOINES, IOWA 50309

1996 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 25

9:00 a.m.	Registration
11:00 a.m.	Board of Directors Meeting
1:00 p.m.	Introduction & Report of Association
1:15 - 2:00	Annual Appellate Update, Part I • Steven L. Serck Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C. Des Moines, IA
2:00 - 2:30	Annual Legislative Review • Robert M. Kreamer Des Moines, IA
2:30 - 3:00	An Updated Look at Premises Liability Law in Iowa • Michael W. Ellwanger Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser Sioux City, IA
3:00 - 3:15	BREAK
3:15 - 3:45	Effective Mediation—Meeting the Insurance Carrier Expectations • Susan M. Brown Litigation Manager, Farmland Insurance Company, Des Moines, IA
3:45 - 5:15	Defending the Traumatic Brain Injury Claim • Steven B. Bisbing, Psy.D., J.D. 7406 Aspen Avenue Takoma Park, MD
5:15 - 8:00	COCKTAILS–Des Moines River Amphitheater West side of Embassy Suites Hotel Entertainment - Kuhlmann Sisters Dinner on your own in Des Moines

THURSDAY, SEPTEMBER 26

8:30 - 9:30	* Brain and Psychological Injury Case Clinic • Steven B. Bisbing, Psy.D., J.D. 7406 Aspen Avenue Takoma Park, MD
9:30 - 10:00	Recent Developments in Administrative Law • David L. Brown Hansen, McClintock & Riley Des Moines, IA
10:00 - 10:15	BREAK
10:15 - 11:00	Workers Compensation Update • Honorable Iris Post Iowa Industrial Commissioner
11:00 - 11:30	The Voodoo of Claim Reserves • D. Samuel Waters, Claims Attorney Continental Western Insurance Company Des Moines, IA
11:30 - 12:00	Navigating the Rapids in Communicating with the Insurance Carrier • Neal Sharmer, Claims Attorney United Fire & Casualty Cedar Rapids, IA
12:00 - 12:45	LUNCH — Embassy Suites Hotel
12:45 - 1:15	Supreme Court Report • Honorable James H. Andreasen Justice, Iowa Supreme Court
1:15 - 2:00	Civil Conspiracy, RICO, & the Common Law • David L. Phipps Whitfield & Eddy, P.L.C. Des Moines, IA
2:00 - 2:45	Ethics Update: The Prosecutor's View • Charles L. Harrington Ethics Counsel to Iowa Supreme Court Board of Professional Ethics & Conduct
2:45 - 3:00	BREAK
3:00 - 3:45	Product Liability: Status of Restatement and Punitive Damages • Gregory M. Lederer Simmons, Perrine, Albright & Ellwood Cedar Rapids, IA
3:45 - 4:30	Annual Appellate Update, Part II • Rex B. Staub Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, IA
4:30 - 5:00	Election of Officers and Directors and Annual Meeting of IDCA
6:30 - 9:00	Reception and Banquet GLEN OAKS COUNTRY CLUB 6:30 - Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 27

7:30 - 8:30	Board of Directors Meeting
8:30 - 9:00	The A.D.A. & Civil Tort Liability • Gene R. Krekel Hirsch, Adams, Krekel, Putnam, Cahill, & Miller Burlington, IA
9:00 - 10:00	Allocation of Fault & Mitigation of Damages • Philip J. Willson Willson & Pechacek, P.L.C. Council Bluffs, IA
10:00-10:15	BREAK
10:15 - 11:00	Pretrial Media Statements: Where are the Ethical Safe Harbors • Honorable Robert D. Wilson Judge, 5th Judicial District • Sharon K. Malheiro Davis, Hockenberg, Wine, Brown, Koehn, & Shors, P.C. Des Moines, IA
11:00 - 11:45	Intentions & $4 Will Get You a Microbrew, But It Won't Get You Understood: Perception is the Key to Communication in Litigation, Part 1 • Mary E. Ryan Speech Communication Specialists Denver, CO
11:45 - 12:30	LUNCH
12:30 - 1:00	Federal Court Report • Honorable Charles R. Wolle, Chief Judge, Southern District of Iowa
1:00 - 1:30	Communication in Litigation, Part 2 • Mary E. Ryan Speech Communication Specialists Denver, CO
1:30 - 2:15	What Does the Grievance Commission Do and What Do Lawyers Do – Some Surprising Cases • R. Bruce Haupert Chair, Iowa Supreme Court Grievance Commission
2:15 - 3:00	Annual Appellate Update, Part III • Webb L. Wassmer Simmons, Perrine, Albright & Ellwood Cedar Rapids, IA

OFFICERS AND DIRECTORS
1995 - 1996

PRESIDENT

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

PRESIDENT-ELECT

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

SECRETARY

Jaki K. Samuelson - 1996
1300 First Interstate Bank Bldg
Des Moines, IA , 50309

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
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Decorah, IA , 52101

DISTRICT II

Stephen G. Kersten - 1997
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Emmanuel S Bikakis - 1996
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DISTRICT IV

Gregory G Barnsten - 1997
P.O Box 249
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DISTRICT VI

Robert D Houghton - 1997
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DISTRICT VII

Carol A H Freeman - 1996
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DISTRICT VIII

Wendy N. Munyon - 1998
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AT LARGE

J. Michael Weston - 1996
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Mark L. Tripp - 1997
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Des Moines, IA , 50309-2727

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 (Honorary) 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
Gregory M Lederer 1994-1995

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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 - Robert A. Engberg

* Deceased

1996 ANNUAL MEETING
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A

ANNUAL APPELLATE DECISIONS REVIEW

September 1995 - August 1996
537 N.W.2d through 550 N.W.2d

By

Steven L. Serck
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APPELLATE PROCEDURE
Rex Staub

McIntyre v. Paige County Sheriff's Office, 538 N.W.2d 305 (Iowa Ct. App. 1995)

Appeal Briefs

Writ of Certiorari

After McIntyre was charged with domestic abuse, his weapons permit was revoked by the Paige County Sheriff. McIntyre then filed a petition for writ of cert contending that the Paige County Sheriff had improperly revoked the permit. McIntyre's petition for writ was denied by the district court. McIntyre appealed and the Sheriff failed to file a brief in response.

HELD: In the absence of an appellee's brief the Court of Appeals limits its consideration to those issues raised in the appellant's brief.

HELD: A writ of cert shall only be granted where the lower court is alleged to have acted illegally; when findings on which the lower court based its conclusions of law did not have substantial evidentiary support; or when the lower court simply misapplied the proper rule of law.

In re Marriage of Flattery, 537 N.W.2d 801 (Iowa Ct. App. 1995)

Attorneys Fees – Appellate

This case involves an appeal from a District Court order modifying a parent's child support obligation. On appeal, both parents sought an award of appellate attorneys' fees.

HELD: An award of appellate attorneys' fees is not a matter of right but rests within the court's discretion. When considering this issue, the court will look to the parties respective financial positions, the needs of the party making the request for the attorneys' fees, the ability of the other party to pay, and whether the party making the request was obligated to defend the action on appeal. In this particular case, attorneys' fees were not awarded to either party.

Bergquist v. Mackay Engines Inc., 538 N.W.2d 655 (Iowa Ct. App. 1995)

Preservation of Error – Jury Instructions

Bergquist was injured when the engine to his four-wheel drive mud racer blew apart. Before the accident, Bergquist had

sent the engine to a garage to be cleaned and inspected. The garage owner then sent the engine to Mackay for rebalancing. As a result, Bergquist filed suit against Mackay on the claims of negligence, breach of implied warranty of fitness, breach of implied warranty of merchantibility, and strict liability.

The jury returned a verdict in favor of Bergquist. On appeal, Mackay contends the district court should not have submitted an instruction on the count of breach of implied warranty of fitness for a particular purpose ("implied warranty") as Bergquist had presented no evidence showing Mackay was aware the engine was to be used in a mud racer. Although this was argued in Mackay's motion for directed verdict and motion for JNOV, Bergquist contends Mackay failed to preserve error on this issue by failing to object to the implied warranty jury instruction.

HELD: The question of whether an issue should have been submitted to the jury is preserved when a party moves for directed verdict on the same issue. As in this case, if the motion for directed verdict is denied, a party does not waive error by simply agreeing to a jury instruction which correctly states the law. Agreement between the parties that the jury instructions are correct does not necessarily mean the parties agree there is a case for the jury.

Rosen v. Board of Medical Examiners, 539 N.W.2d 345 (Iowa 1995)

Preservation of Error - Motion for Leave to Present Additional Evidence

Rosen's application to practice medicine in Iowa was denied by the Board of Medical Examiners ("Board") on the grounds that he had fraudulently obtained his medical license to practice in Iowa by: (1) signing a blank application which was later completed by a physician who wanted to hire him; and (2) failing to make full complete and accurate disclosures in the application. Rosen's appeal to the district court was decided in favor of the Board. On appeal, Rosen claims the district court erred because it failed to enter a ruling on his motion for leave to present additional evidence responsive to an argument raised in the Board's trial brief.

HELD: The issue of whether the trial court should have granted Rosen's motion for leave to present additional evidence was not preserved for appellate review because the trial court did not rule on the motion and the movant, Rosen, did not then move to enlarge the ruling in accordance with Iowa R. Civ. P. 179(b).

Notelzah, Inc. vs. Destival, 537 N.W.2d 687 (Iowa 1995)

Standard of Review – Actions In Equity/Constitutional Claims

Application of Rule Dictated in Prior Appeal

Notelzah, Inc. purchased a railroad right of way from Chicago, Rock Island, and Pacific Railroad in 1981 which the railway had abandoned in 1976. More than eight years after the abandonment, Notelzah filed a quiet title action against the adjoining landowners claiming ownership to five parcels of land in the right of way. The district court quieted title to all five parcels in Notelzah and the adjacent landowners appealed.

On appeal, (Notelzah I), the Iowa Supreme Court reversed the district court, concluding the adjacent landowners had obtained title to four of the tracts because, under Iowa Code Section 473.2, the Railroad's easement to those tracts had expired eight years after the 1976 abandonment. The key here is that Section 473.2 was in effect at the time of the abandonment in 1976, but had been amended favorably to Notelzah and renumbered as Section 327G.77 before Notelzah's purchase in 1981.

On remand, the district court quieted title to the land in the adjacent landowners in reliance on the Supreme Court's application of Section 473.2. Notelzah filed a second appeal contending the district should have applied Section 327G.77.

HELD: Actions in equity and constitutional claim of due process are reviewed de novo.

HELD: When a case is retried under a rule dictated on appeal (e.g. Section 473.2), that rule becomes the law of the case. Accordingly, the District Court properly applied Section 473.2 as opposed to it's successor section, Section 327G.77. Judgment affirmed.

In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995)

Standard of Review – Adjudication of Law Points

After John Gallagher filed a petition for dissolution of their marriage, his wife, Amy Gallagher, applied for adjudication of law points contending John was not the biological or adoptive father of the child born during their marriage. Consequently, she argued he had no parental rights. The district court ruled in favor of Amy the adjudication of law points.

HELD: A district court's adjudication of law points is reviewed for error. Further, unresolved controverted facts cannot be used to form a basis for the adjudication, and on

appeal are presumed to be in favor of the party against whom the adjudication was entered.

State v. Terry, 541 N.W.2d 882 (Iowa 1995)

Standard of Review – Declaratory Judgment Action

HELD: A declaratory judgment action is ordinarily tried at law. However, when a declaratory judgment action is submitted to a district court proceeding in equity, it is tried as any other equitable action and reviewed on a de novo basis.

Courtney vs. American National Can Co., 537 N.W.2d 681 (Iowa 1995)

Standard of Review – Disability Discrimination Appeals

Courtney was reassigned to a lower paying job after his employer, American National Can, discovered that he was legally blind in one eye. Thereafter, Courtney brought a state law disability discrimination claim against American National Can. Judgment was rendered in favor of American National Can after a bench trial. Courtney appealed on various grounds.

HELD: Disability discrimination claims tried to the court are reviewed for errors of law. Accordingly, the Iowa Supreme Court is bound by the trial court's findings of fact if supported by substantial evidence and will view the evidence in the light most favorable to upholding the district court's judgment.

HELD: It was for the district court, as the trier of fact in a disability discrimination case, to determine the weight of the evidence.

Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889 (Iowa 1996)

Standard of Review – Jury Instructions

During the trial of Foggia's slip and fall action against Bowl-O-Mat, he objected to the submission of the Iowa uniform civil jury instruction on proximate causation. The jury returned a verdict in favor of Foggia awarding him minimal damages. Foggia appealed contending, among other things, the district court erred in submitting the uniform jury instruction on proximate causation and burden of proof.

HELD: The supreme court reviews jury instructions for errors of law. So long as the requested instruction correctly states the law, has application to the case, and is not stated

elsewhere in the instructions, the court must give the requested instruction. Foggia was not prejudiced simply because the court chose the civil jury instruction submitted by the defendant as opposed to his own tailored instruction on proximate causation. Decision affirmed.

In re Marriage of Pothast, 539 N.W.2d 199 (Iowa Ct. App. 1995)

Standard of Review – Marriage Dissolution Proceeding

HELD: The appellate courts will perform a de novo review of economic and child custody provisions in a marriage dissolution decree. In doing so, the appellate court is not bound by but will give weight to the trial court's findings.

HELD: If the issues have been properly presented and preserved on appeal, de novo review entails a review of all of the facts and law in the case with the goal of determining the parties rights anew.

ATTORNEYS

Steve L. Serck*

Board of Professional Ethics and Conduct v. Humphrey, WL 411859, ___ N.W.2d ___ (Iowa 1996)

Discipline

The Board's complaint accused Humphrey of failing to resolve a real estate title problem, of failing to properly appeal from the denial of an application for post-conviction relief on behalf of an inmate at the Iowa penitentiary, and of committing numerous acts of unprofessional and unethical conduct in district court cases.

The Grievance Commission found that Humphrey committed several violations of disciplinary rules: conduct involving dishonesty, fraud, deception or misrepresentation; conduct prejudicial to the administration of justice; conduct that adversely reflects on the fitness to practice law; and neglect of a client's legal matters. The Grievance Commission recommended suspension of Humphrey's license for a period of at least three years.

HELD: Affirmed.

Board of Professional Ethics & Conduct v. Scheetz, 549 N.W.2d 828 (Iowa 1996)

Discipline

A

Complaint regarding neglect of probate matters. Scheetz had failed to respond to numerous inquiries by clients and had neglected to make timely filings with the clerk's office. The Commission found that Scheetz had violated several disciplinary rules: engaging in conduct that is prejudicial to the administration of justice, neglecting a client's legal matter, and handling a legal matter which the lawyer knows or should know he is not competent to handle. The Commission recommended that Scheetz receive a public reprimand.

HELD: Given Scheetz' voluntary remedial actions of limiting his practice to areas he was comfortable with, not including probate matters, and his ready admission that he was not proficient in such matters, the most appropriate sanction was a public reprimand. However, if Scheetz ever returns to probate practice, he must first align himself with an attorney experienced in the area.

Board of Prof. Ethics & Conduct v. Sylvester, 548 N.W.2d 144 Iowa 1996)

Discipline

Defendant attorney was discharged by his law firm after firm discovered that defendant had converted various client fees to his own use over several years. Defendant pled guilty to theft in the second degree, a class D felony. Defendant failed to cooperate in law firm's efforts to investigate the incident. Nor did he cooperate in the grievance commissioner's investigation. Grievance commission recommended revocation of defendant's license.

HELD: License revoked. Conviction of a felony is conclusive evidence of unfitness to practice law.

Board of Professional Ethics and Conduct v. Plumb, 546 N.W.2d 215 (Iowa 1996)

Discipline

Defendant attorney threatened client of opposing counsel with criminal prosecution and recorded a conversation with opposing counsel in counsel's judicial chambers without consent. Grievance commission dismissed allegation that defendant's secret recording violated DR 1-102(A) and Formal Opinion 83-16 but found that defendant's threats of criminal prosecution violated DR 7-105(A) and that defendant should be publicly reprimanded. On appeal, the Board maintains that defendant should be sanctioned for secret recording of conversation with counsel in violation of DR 1-102(A) and Formal Opinion 83-16.

HELD: Public reprimand imposed by commission is adequate. Attorney's recording of conversation under the circumstances does not warrant additional punishment.

Board of Professional Ethics and Conduct v. D.J.I., 545 N.W.2d 866 (Iowa 1996)

Discipline

In 1991, respondent's former clients prevailed in a civil action against respondent on theories of fraud, legal malpractice, constructive fraud, and conspiracy to defraud. The district court also found that defendant had violated various sections of the Iowa Code of Professional Responsibility. The court's judgment was not appealed and became a final judgment.

In 1995, the Board of Ethics filed a complaint against defendant for violations of the Code of Professional Responsibility based upon the conclusions reached by the district court. The Board sought to apply Supreme Court rule 118.7 which allows issue preclusion to be used in lawyer discipline cases. The grievance commission concluded that the issue preclusion amendment applied retroactively, thus allowing the Board to rely upon the findings of the district court and preventing defendant from re-litigating those issues.

HELD: Affirmed. Issue preclusion amendment to supreme court rule 118.7 applies retroactively and bars the re-litigation of the charges against defendant. The defendant is, however, allowed to present evidence of mitigating circumstances in the upcoming sanction hearing.

Board of Professional Ethics and Conduct v. Marcucci, 543 N.W.2d 879 (Iowa 1996)

Discipline

Defendant received a felony conviction for his third offense of operating a motor vehicle while intoxicated. The Grievance Commission recommended a public reprimand. The Iowa Supreme Court found that a felony conviction for OWI adversely reflected on an attorney's fitness to practice law in violation of the Code of Professional Responsibility. The court noted that "fitness" as used in the Code of Professional Responsibility embraces more than legal competence. Sanctions for violation of the rule can be given for conduct that lessens public confidence in the legal professional as well. Thus, while the defendant's legal skills were not affected by his use of alcohol, public confidence in the legal profession would be lessened by the knowledge of such abuse.

HELD: The defendant's license to practice law in the State of Iowa is suspended with no possibility of reinstatement for six months.

Board of Professional Ethics and Conduct v. Winkel, 542 N.W.2d 252 (Iowa 1996)

Discipline

Winkel handled numerous probate matters. His neglect and inaction on several cases generated 71 delinquency notices from the clerk of court. The grievance commission recommended suspension of Winkel's license for three months.

HELD: Winkel's license to practice law is suspended indefinitely with no possibility of reinstatement for six months. Upon application for reinstatement, Winkel will have to show satisfactory proof of a plan to handle future probate matters or show he has engaged other qualified counsel to assist him.

Board of Professional Ethics and Conduct v. Winkel, 541 N.W.2d 862 (Iowa 1995)

Discipline

At the strong insistence of the testator, the attorney's secretary typed a will which contained a $20,000 bequest to the attorney. The attorney later disclaimed the bequest but did serve as a compensated executor and attorney for the estate.

HELD: DR5-101(B) provides that a lawyer or the lawyer's partners or associates shall not prepare an instrument in which a client desires to name the lawyer beneficially unless the lawyer is related to the client. It is no defense that the idea originates with the client or that the bequest is not actually enjoyed. We believe a public reprimand for this violation is sufficient.

Board of Ethics and Conduct v. Ralph William Hill, 540 N.W.2d 43 (Iowa 1995)

Discipline

In 1989, Mr. Hill's license to practice law was suspended for three months for having sexual relations with a dissolution client. In 1990, he was disciplined for neglecting an appeal and for misleading his client regarding it. He received a public reprimand for this violation.

Presently, Mr. Hill is charged with making sexual advances toward a different client.

HELD: License suspended for twelve months.

Board of Ethics and Conduct v. Evans, 537 N.W.2d 783 (Iowa 1995)

Discipline

The commission charged that Evans took part or all of his attorney fees before the probate court entered an order authorizing payment with regard to two estates. In addition, he was charged with receiving fees of $7300 in excess of the amount to which he was entitled on one of the estates.

HELD: Receipt of a probate fee without prior court authorizing is in violation of Iowa statutes and therefore violates our disciplinary rules. Unfamiliarity with the statutes is not an excuse.

Evans' proffered excuses for receipt of the excessive fee: that he calculated incorrectly in the "rush" of attorneys present on motion day and that there was a mistake by the executor are insufficient as it is Evans' responsibility to make sure all calculations are correct. Acceptance of the excessive fee violated DR2-106(A) which prohibits a lawyer from charging or collecting an illegal or clearly excessive fee.

The commission recommended a private reprimand. However, Evans has been previously reprimanded publicly and we take that into consideration in imposing discipline. Evans' license is suspended for 30 days.

Lehigh Clay Prod. v. Department of Transp., 545 N.W.2d 526 (Iowa 1996)

Fees

Plaintiff was a lessee of mineral rights that were condemned by the Department of Transportation in an eminent domain proceeding. The value of the condemned interest was determined to be $3,000 by the compensation commission but a jury later determined the value to be $350,000. On appeal, the Iowa Supreme Court reversed the district court's ruling granting defendant's motion for a new trial and remanded the case back to district court to reinstate the jury verdict and to determine reasonable attorney fees. On remand, the district court awarded plaintiff a substantial sum for attorney fees incurred during the initial district court proceedings but determined that appellate attorney fees were not recoverable under section 6B.33 (1933) pursuant to the decision in Wilson v. Fleming, 32 N.W.2d

798 (1948). Plaintiff appealed claiming that the plain meaning of the statute allows for the award of appellate fees and that Wilson should be overruled.

HELD: Reversed. The clear purpose of section 6B.33 is to make whole the property owner whose land has been taken and who must litigate to ascertain the fair market value of the taken property. Requiring an appealing party to pay its own legal costs would hinder this process and there is no evidence that the legislature intended to distinguish between fees incurred during district court proceedings and those incurred during the appellate process. The plain meaning of the statute provides for the recovery of all attorney fees and Wilson must be overruled.

Nelson Cabinets, Inc. v. Peiffer, 542 N.W.2d 570 (Iowa Ct. App. 1995)

Fees

Action on account. Defendants counterclaimed. On appeal, defendants claimed they were entitled to recover attorney fees and court costs under Iowa Code § 535.11(8) because plaintiffs had made an unlawful claim for finance charges. The defendants' original counterclaim did not include a claim for attorney fees. Two days after the verdict, counsel for the defendants filed an application for attorney fees and court costs as provided under § 535.11(8). The district court denied that application.

HELD: Affirmed. Attorney's fees are a special kind of compensatory damages. As such, they must be specifically pleaded before they may be awarded. Defendants made their application too late in the proceedings and may not recover attorney's fees.

Sunrise Development Co. v. IDOT, 540 N.W.2d 465 (Iowa Ct. App. 1995)

Fees

Plaintiff's land was condemned by the DOT and the condemnation commission awarded $124,750. Plaintiff appealed the award and the jury returned a verdict of $200,000.

Plaintiff then filed an application for attorney's fees and costs pursuant to Iowa Code § 6B.33 seeking $37,625 in attorney's fees and $4,640.42 in costs. The district court awarded plaintiff $10,000 for attorney's fees and $1,692 for expenses. The district court found that the litigation was not complex and required only 40 hours of pretrial preparation. It also observed that no detailed documentation of the time spent by

the attorney was presented at the hearing. Plaintiff appealed the fee award.

HELD: Affirmed. The claimant bears the burden of showing the services rendered and the values thereof. A claim for fees in a condemnation case requires appropriate documentation so the judge can determine the time actually spent and the expenses incurred. Here, plaintiff's counsel failed to make contemporaneous records of his pretrial preparation.

Hagge v. Iowa Dept. of Revenue and Finance, 539 N.W.2d 148 (Iowa 1995)

Fees

The Iowa Federation of Chapters, National Association of Retired Federal Employees ("NARFE") retained a law firm to secure state income tax refunds to which its members believed they were entitled.

In 1993, in Hagge I (504 N.W.2d at 452), the Iowa Supreme Court ruled favorably in a test case with the result that the state was liable to the federal retirees in the amount of approximately $33 million. After the Hagge I decision, the law firm filed in the district court a petition for an award of attorney's fees in the amount of 5% of the refunds or approximately $1.65 million. The district court ruled in favor of the law firm, ordering 5% of the "common fund" be paid by the Department of Revenue to the law firm. The Department of Revenue and various retirees appealed.

HELD: Reversed. The district court incorrectly held that the Hagge I decision created a "common fund" from which the law firm could petition for attorney's fees.

An attorney may generally recover fees only for services rendered pursuant to an express or implied contract. One of the exceptions to this rule is that a lawyer may assess a fee against a fund which his or her services have recovered or preserved and in which a number of people are interested. After the common fund is created, the judge's role changes to that of a fiduciary on behalf of those who are supposed to benefit from the common fund.

Here there is no common fund because the Department of Revenue owes each retiree a separate refund based on each retiree's individualized circumstances. Under Iowa law, the Department of Revenue is not authorized to pay refunds to anyone other than the taxpayer who is rightfully owed the refund. Each refund was the individual property of each taxpayer and therefore the district court had no authority to instruct the Department of

Revenue to withhold any portion of those refunds for the law firm.

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996)

Malpractice

Individual trustees of Iowa Trust brought suit against trust custodian and law firm representing the trust for negligence and defamation. Plaintiff claimed that Steven Wymer's misappropriation of $65 million in trust assets was made possible by defendants' negligence. District court granted summary judgment for defendants (bank and law firm).

HELD: Affirmed. Neither bank nor law firm was liable for negligence due to claimants' failure to demonstrate that defendants could reasonably have foreseen claimants' reliance on defendants' custodial and legal services. In order for law firm to be held liable to a third party based on a non-testimonial event, claimant must establish that claimant was specifically intended to benefit from the execution of instrument and that this benefit was lost or diminished as a result of lawyer's negligence. A looser rule would expose lawyers to unlimited liability to third parties.

Ruden v. Jenk, 543 N.W.2d 605 (Iowa 1996)

Malpractice

Jenk was retained by the plaintiffs, sisters who had been appointed administrators of their deceased brother's estate, to represent the estate in probate. Prior to his death, the brother executed an assignment in which he transferred his interest in a real estate contract to the plaintiffs. The assignment form noted that it was to take affect upon the brother's death. Ultimately, the plaintiffs sued Jenk, alleging he was negligent for incorrectly advising them about the validity of the assignment and that he failed to advise them of a potential claim against the drafter of the assignment prior to the running of the statute of limitations. The district court entered an order granting Jenk's motion for summary judgment.

HELD: The factors necessary to establish a prima facie claim of legal malpractice are: (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to 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 injuries, loss or damage. Here, the alleged incidents of Jenk's negligence were not the proximate cause of the plaintiffs' damages. In addition, Jenk was not the proximate cause of the

plaintiffs' failure to pursue a legal malpractice claim against the drafter of the assignment because the plaintiffs had hired an attorney to represent their individual interests in the estate. The other attorney was retained prior to the running of the statute of limitations for the legal malpractice claim. Thus, Jenk had no responsibility to inform the plaintiffs regarding that potential cause of action.

Dudden v. Goodman, 543 N.W.2d 624 (Iowa Ct. App. 1995)

Malpractice

Plaintiffs alleged that defendant attorney negligently caused the estate of the plaintiff's uncle to pay excess federal estate taxes and Iowa inheritance taxes. While the tax returns for the estate were filed in February of 1983, this action was not filed until 1993. The attorney defended on the basis of the expiration of the five-year statute of limitations. Plaintiff claimed that the discovery rule tolled the statute of limitations. The evidence showed that defendant continued to represent plaintiff until 1992. Plaintiff had no reason to know of any mistakes by defendant until 1990 when an accountant advised plaintiff to seek another legal opinion. The district court agreed with the plaintiff's reasoning and overruled the defendant's motion for summary judgment.

HELD: Affirmed. Prior case law provides that clients are presumed to know when an attorney has committed malpractice by violating applicable law. Here, however, the continuous attorney-client relationship provides a basis to waive the presumption of knowledge of the wrongdoing of the attorney and toll the statute of limitations. Thus, the continuous attorney-client relationship in this case requires an exception to the presumption of knowledge of an injury or breach of law. The statute of limitations in such an instance begins to run when a plaintiff first becomes aware of facts that would prompt a reasonably prudent person to begin seeking information as to the problem and its cause.

Kubic v. Burk, 540 N.W.2d 60 (Iowa Ct. App. 1995)

Malpractice

Proceeding *pro se* a former client brought a legal malpractice action against the attorney who represented him in a criminal proceeding. Plaintiff failed to designate an expert by the deadline set forth in the trial scheduling order. Plaintiff also failed to designate an expert within 180 days after the defendant filed her answer as required by Iowa Code § 668.11. The trial court granted the defendant attorney's motion for

summary judgment because plaintiff could not prevail without expert testimony.

HELD: Affirmed. The district court acted within its discretion in finding the *pro se* plaintiff had failed to show good cause for failing to comply with § 668.11. Ignorance of § 668.11, even by a *pro se* litigant, is not good cause for failure to comply with that section.

Expert testimony is required in an attorney malpractice action unless proof is so clear that a trial court can rule as a matter of law that the professional failed to meet an applicable standard. The issues raised by plaintiff are beyond the common knowledge of laypersons and require expert evidence.

Bindel v. Larrington, 543 N.W.2d 912 (Iowa Ct. App. 1995)

X Sanctions

In civil case, an order compelling the plaintiff's response to discovery was issued by the court, however, the plaintiff failed to respond. The defendant moved for imposition of sanctions and the district court imposed the sanction of dismissal. The plaintiff appealed, alleging the trial court abused its discretion.

HELD: Affirmed. The sanction was within the trial court's discretion because the non-compliance was willful. A finding of willful disobedience by the client is not necessary. Clients are responsible for their attorney's failure to comply with discovery orders. (NOTE: Judge Sackett dissented in favor of sanctions solely against plaintiff's attorney.)

Breitbach v. Christenson, 541 N.W.2d 840 (Iowa 1995)

Sanctions

Prospective purchaser of farm land signed an offer to buy real estate which contained the following clause:

> It is understood that the tenant living in the farm residence has a week from this date to match this offer and if he does, this offer is void and the down payment shall be returned.

Tenants in fact exercised their right of first refusal and were allowed to purchase the property. Prospective purchaser filed suit in equity seeking specific performance on his bid to purchase.

The district court dismissed the prospective purchaser's claims and he appeals. The executors cross-appealed from the district court's failure to award Rule 80 sanctions.

HELD: We reverse the district court's failure to award Rule 80 sanctions. Our examination of the record convinces us this lawsuit is totally meritless. Therefore, the attorney's fees of all defendants both in the district court and on appeal shall be apportioned one-half to plaintiff purchaser and one-half to William S. Smith, his attorney.

*My thanks to Leah Hill and John Wicks for assisting me with this portion of the Appellate Update.

CIVIL PROCEDURE

Rex Staub

State v. Miller, 542 N.W.2d 241 (Iowa 1995)

Appointment of Counsel

HELD: A defendant can waive the right to counsel and assert a right of self-representation so long as the waiver is voluntary, knowing, and intelligent. However, the defendant's election to proceed pro se must be clear and unequivacable. Further, right to counsel of choice does not include the right to be represented by an unlicensed attorney.

Chung v. ~~Legacy Corp.~~ Carnes, 548 N.W.2d 147 (Iowa 1996)

Discovery - Medical Records

Chung filed a personal injury suit against ~~Donovan~~ Carnes as a result of a motor vehicle collision between the two. In his petition, Chung alleged that Carnes was negligent "in operating a vehicle while under the influence of alcohol" - an allegation that Carnes denied in his answer. Chung then filed an application for the court's permission to take the deposition of the physician who treated Carnes immediately after the accident. Chung also sought a court order directing the production of Carnes' medical records "to show Carnes condition and particularly his state of intoxication". In reliance upon the physician/patient privilege, Carnes resisted the application. The district court granted the application and this interlocutory appeal followed.

HELD: The physician/patient privilege is subject to the patient-litigant exception "when the condition of a party is an issue". However, this exception requires the "condition" be an element or a factor of the claim or the defense raised by "the person claiming the privilege". In this case, the party

asserting the privilege, Carnes did not place his condition in issue, Chung did. In addition, Carnes did not place his condition in issue by simply denying Chung's allegation. The district court's ruling was reversed. Case remanded for trial.

Kubik v. Burk, 540 N.W.2d 60 (Iowa Ct. App. 1995)

Expert Designation – Malpractice Actions

Proceeding pro se, Kubik filed a malpractice suit against the attorney who had represented him in a criminal proceeding. In his answers to the attorney's interrogatories, he stated he had no expert witnesses he intended to call to trial. Thereafter, he signed a stipulated scheduling order agreeing to designate experts by December 31, 1993. In February 1994, the attorney filed a motion for summary judgment on the grounds that Kubik had failed to designate an expert within 180 days after the attorney filed her answer - a requirement in professional liability cases under Iowa Code § 668.11. Kubik resisted claiming that, as a pro se litigant, he was unaware of the requirements of Iowa Code § 668.11. He also requested an extension of time to designate his expert.

The District Court ruled against Kubik finding he had failed to show good cause to extend the time period for designation under Section 668.11. The court noted that Kubik had been aware of the need to designate an expert in light of his answers to the expert interrogatory and the stipulated scheduling order he had earlier agreed to.

In his appeal, Kubik argued that Section 668.11 should not apply because he relied on Iowa Rule of Civil Procedure 136(b) which does not set any specific deadlines for the designation of experts. Further, because he was a pro se litigant untrained in the law and relied on Rule 136(b), there was good cause for his failure to comply with § 668.11.

HELD: "The law does not judge by two standards, one for lawyers and another for lay persons. Rather, all are expected to act with equal competence. If lay persons chose to proceed pro se, they do so at their own risk." Iowa Code Section 668.11 governs expert designation with respect to professional liability actions. Ignorance of this section is no excuse nor does it provide sufficient good cause for failing to comply with it. Judgment affirmed.

Golden Circle Air, Inc. v. Sperry, 543 N.W.2d 629 (Iowa Ct. App 1995)

Expert Designation

Motion for New Trial - Timeliness

In April 1992, Sperry was served with interrogatories which included an expert interrogatory requesting the substance of the facts and opinions on which his expert was expected to testify. The case was then continued several times due to Sperry's change of counsel. Finally, on August 19, 1993, Sperry designated an expert but failed to supplement the expert interrogatory. On August 22, 1993, Golden Circle's attorney requested an immediate response to the expert interrogatory and dates to depose the expert. Sperry failed to respond and, on September 23, 1993, he filed another motion for continuance. During the hearing on the motion for continuance, Golden Circle moved to exclude Sperry's expert for failure to supplement the expert interrogatory as required by Iowa R. Civ. P. 125(c). The court denied the motion for continuance and granted Golden Circle's motion to exclude the expert.

The jury returned a verdict against Sperry on October 15, 1993. However, the court did not file the jury verdict form until October 19, 1993. Sperry then filed his motion for new trial on October 29, 1993 which was denied.

On appeal, Golden Circle Air claims that, because Sperry's motion for new trial was untimely, he had filed an untimely notice of appeal. Sperry appealed contending he was prejudiced by the court's decision to exclude his expert.

HELD: The time for filing a motion for new trial does not begin to run until the verdict is filed with the clerk of court. Accordingly, Sperry's motion for new trial was timely because it was filed within 10 days of verdict filing.

HELD: Rule 125(c) requires a party to supplement answers to expert interrogatories concerning the opinions held by that expert no less than thirty days prior to trial. The record in this case shows that Sperry never supplemented his answers despite repeated requests by Golden Circle to do so. Exclusion of that expert is a permissible sanction and was warranted in this case.

State v. LaGrange, 541 N.W.2d 562 (Iowa Ct. App. 1995)

Motion for Continuance – During Trial

LaGrange subpoenaed a witness for trial on the charges of driving while barred and operating a motor vehicle while intoxicated (2nd offense). The witness honored the subpoena and appeared on the morning of the trial but left before being called. When LaGrange was ready to call the witness he learned the witness had returned to his home and was intoxicated. The district court denied LaGrange's motion to continue trial to

obtain the witness noting the trial was nearly completed and that it would be extremely inconvenient to the jurors to grant the continuance. The court further noted that there was no guarantee the witness would show up the following day, sober or otherwise.

HELD: It was an abuse of discretion to deny the defendant's request for continuance in light of the following factors: (1) there was no evidence that the defendant sought a continuance for the purpose of delaying trial; (2) it was no fault of the defendant that the witness left the courthouse and became intoxicated; (3) this was not a case in which the defendant had failed to subpoena the witness; and (4) the witness had demonstrated an ability to honor the subpoena by appearing for the morning session. LaGrange's conviction was reversed and remanded for trial.

Hunt v. State, 538 N.W.2d 659 (Iowa Ct. App. 1995)

Motion to Dismiss – Failure to State a Cause of Action

HELD: As a motion to dismiss is a waiver of any ambiguity or uncertainty in the pleadings, a motion to dismiss based on failure to state a cause of action should be granted only when it appears "to a certainty the pleader failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted".

Johnson v. Farmer, 537 N.W.2d 770 (Iowa 1995)

Motion for Judgment on Pleadings - Hearings

Johnson, a passenger in a vehicle owned by her employer and operated by her supervisor, was injured when the supervisor drove the vehicle into a utility pole. As a result of the accident, Johnson was found to be eligible for workers compensation benefits and checks for these benefits were issued to her. Thereafter, Johnson filed a civil suit against her supervisor (Farmer) and employer (DMACC) claiming the accident did not arise in the course of her employment. DMACC immediately filed a motion for judgment on the pleadings in accordance with Iowa R. Civ. P. 103. After a hearing on DMACC's motion, the court dismissed the suit finding that Johnson's claims were precluded by the exclusive remedy provisions of the workers compensation statute.

HELD: A District Court's findings of fact rendered in hearings conducted under a rule of civil procedure which governs preliminary hearings (i.e. Rule 103) are binding on the reviewing court if supported by "substantial evidence" in the record.

Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995)

Motion for New Trial - Newly Discovered Evidence

Benson and other creditors obtained a favorable nondischargable ruling against Gary and Phyllis Richardson in a bankruptcy action. In a subsequent proceeding in federal district court, the Benson filed a fraudulent conveyance action with respect to the Richardsons' bank account transaction, real estate payments and transactions. After the court ruled in favor of Benson and the other creditors, the Richardsons filed a post-judgment motion for new trial under Rule of Civ. P. 244(g) to admit newly discovered evidence which arose after the trial. The court denied the motion finding that rule 244(g) only applied to evidence **which existed at the time of trial** but could not, with reasonable diligence, be discovered and produced at trial.

HELD: A party seeking new trial on the ground of newly discovered evidence must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) evidence will probably change the verdict if new trial is granted. With respect to element (1), "newly discovered evidence" is evidence which existed **at the time of trial**, but which, for some excusable reason, could not be produced at trial.

HELD: Trial courts are given "broad but not unlimited discretion" in ruling on motions for new trials. Motions for new trial based on newly discovered evidence are not viewed with favor by the Iowa Supreme Court and a denial of this motion will be disturbed only in those rare instances where the evidence clearly shows the court has abused its discretion. The court did not abuse it's discretion in this case, judgment affirmed.

State v. Jefferson, 545 N.W.2d 248 (Iowa 1996)

Motion for New Trial - Newly Discovered Evidence

Motion to Reopen Evidence

Jefferson was charged with first-degree robbery. At trial, Jefferson's alleged accomplice, Rizer, testified that Jefferson was not involved in the robbery. Rather, Rizer claimed that "Che" (whose last name and address were unknown), was his accomplice. Jefferson also took the stand and denied his participation in the robbery but stated he too knew a "Che". A sheriff's deputy overheard the testimony regarding Che and recalled having dealt with an individual by the name of Che Moore who lived close to the crime scene. By the time the deputy discovered the information the jury was already deliberating,

however, he did pass the information on to Jefferson's attorney. Jefferson's attorney did not raise the issue at that time by moving to reopen the evidence and instead raised the issue in a motion for new trial after Jefferson was convicted. The motion was denied and Jefferson appealed on this ground.

HELD: To prevail on a motion for new trial based on newly discovered evidence, the movant must be able to show: (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative; and (4) the evidence probably would have changed the result of the trial. In this case the evidence was discovered before the verdict was returned. Therefore, Jefferson's attorney should have moved the court to reopen the evidence. This would have avoided the necessity of a new trial and could have immediately corrected any deficiency in the record.

HELD: Although this is a case of first impression with respect to reopening the record after the jury commences its deliberation, the Supreme Court specifically found that a district court has the power to reopen the record after the jury commences deliberations if the remaining prongs of the newly-discovered evidence test are met.

Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995)

Motion for Summary Judgment - Late Filing

Anderson was terminated from Douglas and Lomason Company after he was caught taking a box of pencils. He responded with a breach of contract action based on the company's employee handbook. Less than 45 days before trial, Douglas and Lomason filed a motion for summary judgment on all claims which was granted by the district court without explanation. Among other issues raised on appeal, Anderson claims the motion for summary judgment was untimely under the provisions of Iowa R. Civ. P. 237(c) which specifies that summary judgment motions must be filed not less than 45 days before trial. * Although this case was briefed solely on the procedural issue, it is a must see for counsel defending breach of employment contract claims predicated on personnel policy manuals.

HELD: The trial court is vested with considerable discretion to consider a summary judgment motion filed after the 45 day deadline expressed in Rule 237(c). Accordingly, the late filing of Douglas & Lomason's summary judgment motion does not provide a basis for reversal.

Kulish v. West Side Unlimited Corp., 545 N.W.2d 860 (Iowa 1996)

Parental Consortium Claims – Iowa R. Civ. P. 8

Kulish and his wife brought an action to recover consortium damages arising from the wrongful death of their adult son, Matthew Kulish. West Side Unlimited moved for dismissal for failure to state a claim, pointing out that Iowa R. Civ. P. 8 provides only for consortium claims in the context of injury or death to a minor child. The district court granted the motion for dismissal and the Kulishes appealed seeking to have the Iowa Supreme Court recognize a common law right of recovery for parental consortium claims involving adult children.

HELD: Iowa R. Civ. P. 8 is clear and unambiguous. It provides for consortium claims only in cases of injury or death of a minor child. Adult children do not fall within the ambit of Rule 8 and the Iowa Supreme Court refused to recognize a common law right of recovery for injuries or death to adult children.

IES Utilities v. Department of Revenue and Finance, 545 N.W.2d 536 (Iowa 1996)

Petition for Declaratory Judgment - Administrative Action

IES brought a petition for declaratory judgment against the Department of Revenue contending it had failed to follow certain statutory procedures when it made a valuation of utility property. Although IES fully admitted they had failed to exhaust their administrative remedies before filing the petition, they contended administrative exhaustion is not required in this case as in other instances where it is alleged an agency violates the administrative procedure act. The district court denied the petition for declaratory judgment and the Utility appealed.

HELD: The exception relied upon by the Utility provides for a petition for judicial review as opposed to a petition for declaratory judgment. Accordingly, the Utilities had failed to exhaust their administrative remedies before filing the declaratory judgment action in district court.

State ex rel. Miles v. Minar, 540 N.W.2d 462 (Iowa Ct. App. 1995)

Petition for Intervention

The Department of Human Services brought an action against Minar to establish paternity and support on behalf of his illegitimate child - Miles. Shortly before trial, Minar's wife filed a petition to intervene in the proceeding claiming the two children born to their marriage would be harmed if Minar was

required to pay child support for Miles. The district court denied the petition for intervention, found that paternity had been established, and imposed child support on Minar.

HELD: The trial court is given some discretion in denying petitions for intervention in proper cases and its decision in this regard is reviewed for error.

HELD: Non-parties to litigation are permitted to intervene only when they are "interested" in the subject of litigation or the success of either party to the lawsuit. This requires more than speculation or a claim of contingent interest on the part of the potential intervener. In this case, the trial court did not abuse its discretion because Minar himself could adequately represent the interests of his wife and their two children. Further, if the court allowed the wife to intervene, it would not reduce litigation nor would Minar's wife have been able to assist in the efficient disposition of the case.

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)

Pleadings – Affirmative Defenses

Dutcher filed suit against her employer, Randall Foods, claiming she had been discriminated against in violation of the Equal Pay Act and Iowa Civil Rights Act. She sought back wages, liquidated damages, punitive damages, and attorneys fees. Randall Foods neglected to plead the affirmative defense of good faith at any point in time prior to verdict.

The jury returned a verdict in favor of Dutcher awarding her lost wages and benefits but it refused to award her liquidated damages, damages for emotional stress and attorneys fees. On appeal, Dutcher claims Randall Foods waived the defense of good faith to liquidated damages by failing to raise good faith as an affirmative defense.

HELD: Although good faith and reasonable grounds can constitute a defense to liquidated damages under the Equal Pay Act, under Iowa R. Civ. P. 101 this is an affirmative defense that must be pled. Because Randall Foods failed to plead this as an affirmative defense, it is not entitled to rely on good faith to avoid liability for liquidated damages. The court's failure to award liquidated damages was reversed.

Double D Land and Cattle Co. v. Brown, 541 N.W.2d 547 (Iowa Ct. App. 1995)

Requests for Admissions

During the pretrial of an action for breach of oral contract, fraud, negligent misrepresentation and conversion, the defendants served plaintiff with request for admissions. The plaintiff did not file responses to the request for admissions within 30 days as required by Iowa R. Civ. P. 127. Consequently, the court granted the defendant's motion to deem admitted all of the requests in their admissions. The court then denied the plaintiff's motion to reconsider this ruling.

On appeal, the plaintiff argued the district court applied an incorrect standard to the requests for admissions, that it should have permitted the filing of late responses, and that the defendants suffered no prejudice in receiving late responses.

HELD: Under Rule 127, the district court's decision regarding late responses is reviewed for abuse of discretion.

HELD: In affirming the district court's ruling, the court pointed out "a party on whom a request for admissions of fact is served runs the risk that the facts set forth in the request for admissions will be conclusively binding if the choice is made not to file an answer to the request for admissions or file objections to the request". The court order deeming the answers admitted was affirmed.

Bindel v. Larrington, 543 N.W.2d 912 (Iowa Ct. App. 1995)

Sanctions - Discovery

On October 8, 1993, Bindel filed suit against Larrington for injuries he sustained in a motor vehicle collision with Larrington. On November 19, 1993 the Larringtons served Bindel with 22 interrogatories and 10 requests for production. Bindel did not respond and the Larringtons were forced to file a motion to compel on March 22, 1994. In it's ruling on the motion to compel, the district court ordered Bindel to file discovery responses by May 16, 1994. On May 16, 1994, Bindel's attorney contacted Larrington's attorney and requested an extra week to provide responses. When Bindel failed to respond within the week, Larrington filed a motion for sanctions. The district court granted the motion for sanctions and dismissed Bindel's suit.

HELD: The court acted within its discretion to dismiss Bindel's claim as a discovery sanction. The severity of the sanction imposed in this case was justified by Bindel's counsel's willful failure to comply with the district court's discovery order.

Breitbach v. Christenson, 541 N.W.2d 840 (Iowa 1995)

Sanctions - Rule 80

Breitbach made a high bid of $725 per acre on a parcel of land. The owners rejected the bid stating they would accept no less than $800 per acre but that Breitbach would be given one week to match this amount. In addition, Breitbach was informed the tenants on the parcel retained the right of first refusal. Breitbach responded by bidding $800 per acre which was subject to the tenants ability to match the offer within one week. Within that week the tenants matched the offer and Breitbach's deposit was returned. As a result, Breitbach brought suit seeking specific performance of his bid to purchase the property, reformation of the offer to buy and a reopening of the bidding process. The defendants separately filed motions to dismiss and a motion for sanctions under Iowa R. Civ. P. 80. At trial the court dismissed the case but denied the motion for sanctions. Both parties filed an appeal.

HELD: Under Rule 80, when a counsel places a signature on a pleading he or she is certifying that the claims contained in the pleading are well-grounded in fact and warranted by existing law or are based on a good-faith argument of the extension, modification or reversal of existing law. If Rule 80 is violated, the court "shall" impose sanctions for violations upon the represented party, his or her counsel, or both.

HELD: Although courts have exhibited a reluctance to impose Rule 80 sanctions because this may discourage access to the courts for purposes of resolving honest disputes that have arguable merit, after reviewing the evidence in this case, the Iowa Supreme Court found the lawsuit was totally meritless. Rule 80 sanctions were imposed upon Breitbach and his attorney and the case was remanded for entry of judgment in favor of the defendants on the sanctions issue.

COMMERICAL LAW

Steven L. Serck

Prenger v. Baker, 542 N.W.2d 805 (Iowa 1995)

Buyer in Ordinary Course/Replevin

Baker boarded two pairs of ostriches at a farm owned by Rasmus. In June, 1993, Missouri Ratite Center ("MRC") purchased the same two pairs from Rasmus for $75,000. MCR then sold one pair to Gary Prenger for $37,500. Both Prenger and MRC left the ostriches with Rasmus to board. In September, 1993, Baker removed several animals from the Rasmus farm, including the pair purchased by Prenger and the male purchased by MRC. Prenger and MRC filed an action in replevin against Baker, alleging he had

wrongfully retained the birds. Baker answered, alleging the birds were owned by him and his father. The trial court found that Prenger was the owner of one male ostrich and that MRC was the owner of one male ostrich.

HELD: Affirmed. Under Iowa Code § 554.2403(2), "any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business." The birds were delivered to Rasmus by Baker to be boarded at the Rasmus farm. Rasmus bought and sold exotic animals on his own and on behalf of Baker. Thus, Rasmus was a "merchant" under the UCC. Both Prenger and MRC were "buyers in the ordinary course of business." They acted in good faith with no knowledge or notice of any adverse title or ownership claims. (Iowa Code § 554.1201(9).)

Tannahill v. Aunspach, 538 N.W.2d 871 (Iowa Ct. App. 1995)

Corporate Veil

Defendant is the president and shareholder of American Delivery Services Corporation. In 1992 plaintiff agreed to lease American Delivery Services several vehicles for use in its delivery business. American Delivery made its payments for a short time and then its assets were sold to another corporation. The second corporation did not assume American Delivery's obligations under the leases and the vehicles were returned to plaintiff. Plaintiff then sued defendant Aunspach personally as doing business under the name American Delivery Services. The district court ignored the corporate structure of American Delivery and found defendant personally liable stating that defendant did not establish a "corporate character under which he now claims to have been operating."

HELD: Reversed. There is insufficient evidence to support the district court's disregard of American Delivery's corporate entity. The district court's only reasons for its decision are defendant's failure to scrupulously follow unspecified corporate formalities. This alone does not justify piercing the corporate veil. There is no evidence suggesting that defendant ever concealed his corporation from plaintiff. Also there is no indication that defendant represented that the leases were personal undertakings.

Beck v. Equine Estates Development Co., 537 N.W.2d 798 (Iowa Ct. App. 1995)

A

Corporate Veil

Rosenbergers purchased a tract of land and sold part of it to Equine. Equine simultaneously sold a smaller part to plaintiffs the Becks. Robert and Peggy Lapsley, defendants, were the sole officers, directors and shareholders of Equine. Because of financial problems, in 1986 Equine assigned its property interest, including the property sold to the Becks, to R.L. Lapsley. Becks were unaware of the assignment and continued to make payments to Equine, which passed them on to Rosenbergers.

In 1988 Becks learned Rosenbergers had financial problems and notified Equine that Becks wished to pay off the contract and receive a deed. Equine ignored the tender and Becks stopped payments under the contract. Rosenbergers had not paid their seller for some time and in 1989 he began forfeiture proceedings which were completed in 1990. At that time Equine became assetless and did not file its annual report. It was dissolved in late 1990. In 1991 Equine accepted a 'reconveyance" of the Rosenberger and Beck property from R.L. Lapsley.

In 1991 Becks filed an action against Equine and Robert and Peggy Lapsley for recovery of the $97,000 they had paid on the contract. They amended to include R.L. Lapsley as a defendant.

The district court found Equine breached the contract of sale when it was unable to deliver a deed to the Becks. The court determined Robert and Peggy were personally liable because they used Equine to promote illegality when they accepted reconveyance from R.L. in an attempt to transfer R.L.'s liability to the defunct Equine. The court further found that R.L. was obligated to perform on the contract by virtue of assignment.

HELD: We find insufficient evidence to pierce the corporate veil. There is no evidence that Equine was continually undercapitalized. Each of its transactions with the Becks occurred while it was in good corporate standing. The record does not suggest it was merely a sham.

However, district court correctly found the assignee, R.L. Lapsley, liable for performance of the real estate contract. The Restatement (Second) of Contracts, section 328 provides that an assignment of "the contract" is "an assignment of the assignor's rights and delegation of his unperformed duties under the contract." Here, R.L. clearly received an assignment of all obligations of Equine pursuant to the real estate contract. Therefore, R.L. is liable to Becks for the full amount of the judgment.

Ely, Inc. v. Wiley, 546 N.W.2d 218 (Iowa Ct. App. 1996)

Dissenter's Rights

Defendant, a dissenting shareholder of plaintiff corporation, obtained a judicial appraisal of his shares based upon the value prior to the sale of the company excluding evidence of the actual transaction amount. Plaintiff contends that the value of defendant's shares was lower as evidenced by actual sale amount. District court excluded evidence of sale amount based on its interpretation of Iowa Code section 490.1301(3) and adopted the valuation presented by defendant's witness.

HELD: Reversed and remanded. The actual transaction price should not be ignored when assessing the value of shares. Section 490.1301(3) is intended to exclude only the appreciation or depreciation in anticipation of a sale. The trial court erred in excluding valuation testimony which took into account the sale price.

Davis-Eisenhart Marketing, Inc. v. Baysden, 539 N.W.2d 140 (Iowa 1995)

Dissenter's Rights

Minority shareholder dissented from proposed merger of two corporations and one of the corporations brought suit pursuant to Iowa Code § 490.1330 to value his interest for buy-out purposes. The district court set the value of the shareholder's interest and he appealed contending that the value was too low and that the trial court erred in refusing to impose attorney's fees and costs against the plaintiff corporation.

HELD: The district court correctly valued the stock. We have identified three of the more widely used methods of appraisal: market value, investment value and net asset value. Here the district court considered eight bases for valuation: book value, adjusted asset value, amount actually paid for the company in connection with the merger, amount suggested by a consultant two years before the merger, amount the shareholder himself had agreed to pay for the company's stock approximately one year before the merger and three appraisals offered by experts.

The district court concluded that the most appropriate measure was the price that two other minority shareholders had sold their stock for just prior to the merger. We agree.

The district court also correctly refused to award Baysden his attorney's fees and costs. Iowa Code § 490.1331(2) provides sanctions against the corporation or the dissenting

shareholder if the court finds that either acted arbitrarily, vexatiously or in bad faith. Even though the corporation initially offered Baysden 1/3 of the amount that the district court eventually determined the shares were worth, this disparity was not so great as to constitute sanctionable conduct.

Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724 (Iowa 1995)

Franchises

Holiday Inns filed suit in the Iowa district court for the Southern District of Iowa challenging the Iowa Franchise Act. It subsequently filed a motion for partial summary judgment which challenged prospective application of the Act. The Southern District of Iowa then certified two questions to the Iowa Supreme Court as follows:

> (1) Does the last sentence of § 523H.2 mean that an Iowa franchisor, when dealing with an out-of-state franchisee who operates a franchise within Iowa, need not comply with Iowa Code chapter 523H?
>
> (2) Does the first sentence of § 523H.6(1) apply to a franchisor who seeks to establish "a new outlet, company-owned store, or carry out store" located in a state other than Iowa but within an "unreasonable proximity of an existing franchisee" located in Iowa?

The last sentence of Iowa Code § 523H.2 provides as follows:

> The provisions of this chapter do not apply to any existing or future contracts between Iowa franchisors and out-of-state franchisees.

Holiday Inn argues that this last sentence means that an Iowa franchisor need not comply with the Act when it deals with an out-of-state franchisee, even if the out-of-state franchisee is operating a franchise within Iowa. Defendants claim that the provision is ambiguous.

HELD: Section 523H.2 is ambiguous because reasonable minds could disagree as to the inter-relationship of the section's first and last sentences. The legislature enacted the statute in response to complaints by franchisees that some franchisors engaged in abusive acts. It was enacted to provide greater power to franchisees and place greater restrictions on franchisors.

Holiday Inn's interpretation would not further the goals of the legislature. The last sentence of § 523H.2 provides that Chapter 523H shall not apply to contracts between Iowa franchisors and franchisees when the agreement is for the operation of a franchise outside of the state of Iowa.

Iowa Code §523H.6(1) provides as follows:

> If a franchisor seeks to establish a new outlet, company-owned store, or carryout store within an unreasonable proximity of an existing franchise, the existing franchisee, at the option of the franchisor, shall have either a right of first refusal with respect to the proposed new outlet, company-owned store or carryout store or a right to compensation for market share diverted by the new outlet.

Holiday Inns argues that this language is ambiguous and applies to franchisors even if they establish new stores outside Iowa if the new store is in "unreasonable proximity of an existing franchise."

The legislature did not intend Chapter 523H to apply to any stores operated outside of the state of Iowa. Therefore, the term "unreasonable proximity" does not encompass stores outside the borders of Iowa.

We note that effective July 1, 1995 the last sentence of Iowa Code § 523H.2 was amended by striking the words "out-of-state" and adding the word "franchises" and the words "who operate franchises located out of state." This amendment clarifies the legislature's intent and is consistent with our interpretation in this opinion. Also, the legislature amended Iowa Code §523H.6 by striking the entire section and enacting in lieu thereof a new section. This move was consistent with our interpretation of Chapter 523H as not applying to out-of-state franchises.

Our answers to the certified questions are "no" and "no."

Innk Land and Cattle Co. v. Kenkel, 546 N.W.2d 585 (Iowa 1996)

Fraudulent Conveyances

Defendants transferred assets and failed to satisfy obligations to plaintiff corporation under subscription agreements. Plaintiff brought action to invalidate transfers as being fraudulent and an attempt to impede collection by plaintiff. District court found in favor of plaintiff/creditor.

On appeal, defendants/debtors contend (1) that the district court erred in its application of the statute of limitations; (2) that plaintiff was not an "existing creditor" at the time of many of the conveyances; and (3) that plaintiff was not prejudiced by transfers.

HELD: Affirmed. Plaintiff brought action within five years of the time that it could have known of the asset drain and thus was within statute of limitations. Plaintiff was an existing creditor and thus needed only to show that the conveyances lacked valuable consideration and did not need to show actual fraudulent intent by defendant. Lastly, the plaintiff was prejudiced by the transfers which were of sufficient value so as not to be consumed by preexisting indebtedness.

Textron Financial Corp. v. Kruger, 545 N.W.2d 880 (Iowa Ct. App. 1996)

Fraudulent Conveyances

Defendant/debtor conveyed interest in family farm to a third party after plaintiff/creditor initiated legal proceedings for a default judgment. Plaintiff/creditor claims that defendant's conveyance to third party, who was a long-time friend and associate of the defendant, was fraudulent on the grounds that the consideration received by the defendant from the third party was inadequate and due to the suspicious circumstances surrounding the transfer.

The district court held that consideration paid by the third party was not inadequate due to the wide disparity of valuation estimates. In addition, the court held that the plaintiff failed to demonstrate prejudice as a result of the transfer.

HELD: Reversed and remanded. Fraud is established by examining the circumstances of the conveyance and the evidence of fraud must be clear and convincing. The circumstances surrounding defendant's conveyance provide clear and convincing evidence that the conveyance was fraudulent and that the plaintiff was prejudiced. The timing of the conveyance, the amount of consideration paid for the land, and the relationship between the defendant and the third party all suggest that the conveyance was fraudulent. In addition, the plaintiff was prejudiced by the transfer since the land was unavailable to the plaintiff to enforce the judgment.

Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995)

Fraudulent Transfers/Corporate Veil

In 1990 plaintiffs obtained a judgment in excess of $1,000,000 against Gary Richardson. Three days after the judgment was entered, Gary's wife Phyllis withdrew $40,000 from the couple's joint account and deposited it into her personal checking account. Through 1990 and 1991 Gary did not maintain a bank account of his own and continued to deposit his earnings into Phyllis' personal account.

From 1987 through 1992 several homes were purchased in Phyllis's name. A few months after the entry of the federal judgment against Gary, Gary and Phyllis formed a PC corporation which issued 99 shares to Phyllis and one share to Gary. Thus, 99 percent of the PC's earnings went to Phyllis and only 1 percent to Gary. These earnings typically were in the range of $425,000 annually.

The district court found that the bank account transfers, house payments and establishment of Richardson, P.C. constituted fraudulent transfers to Phyllis and awarded judgment against Phyllis in the amount of $577,938 and imposed a constructive trust in favor of plaintiffs on one of the Richardson's homes.

HELD: Affirmed in part; reversed in part. When a debtor disposes of property with the intent to delay or defraud creditors we deem the disposition a fraudulent conveyance and will set it aside. When determining whether a transaction constitutes a fraudulent conveyance we look for a number of "badges" of fraud: inadequacy of consideration, insolvency of the transferor, pendency or threat of litigation, secrecy or concealment, departure from usual method of business, any reservation of benefit in the transferor, and the retention by the debtor of possession of the property. The existence of a blood relationship strengthens the inference of a fraudulent conveyance.

Here, Gary's placement of his earnings in Phyllis's personal account constituted clear and convincing evidence of fraudulent conveyance. All transfers occurred without consideration. With regard to one of the homes in question, Gary used his year-end bonuses to make payments of $50,000 and $94,000 to pay off the mortgage. As a result, Phyllis obtained equity in the home in the amount of $144,000. A debtor husband may not accomplish a transfer without consideration to his wife to the frustration of his creditors.

The district court also correctly placed the Richardsons' home in a constructive trust. The law requires that a party seeking a constructive trust establish his right by clear and convincing evidence. Gary's demonstrated intent of placing

his earnings beyond the reach of his creditors provides this evidence.

The trial court entered a judgment against Phyllis for $267,300 in dividends Richardson, P.C. paid to her. The court held that dividends constituted another fraudulent conveyance of property from Gary to Phyllis. However, the trial court refused to enter judgment against Richardson, P.C. in favor of plaintiffs. When the corporate form is invoked to subvert the ends of the justice it should be disregarded by the courts. Here, the evidence showed that the corporation was merely Gary's alter ego. Therefore, we hold the trial court erred in denying the plaintiffs a judgment against Richardson, P.C. We direct entry of judgment against Richardson, P.C. for the full amount of the $1,000,000 district court judgment against Gary.

East Broadway Corp. v. Taco Bell Corp., 542 N.W.2d 816 (Iowa 1996)

Landlord/Tenant

McBluffs, Inc. entered into a 20-year lease agreement with Taco Bell as the tenant. The base rent was determined by the value of the leased premises. The lease also required additional rent of 5% of the gross sales in excess of $17,000 per month. The lease did not contain a provision requiring Taco Bell to continuously operate the restaurant during the 20-year period of the lease. For 19 years, Taco Bell paid both the base rent and the percentage rate based upon gross sales. Taco Bell then closed its operation at the leased site and began operating at a new location. While Taco Bell continued to pay the fixed base rent, it did not pay the percentage based on gross sales for the last year of the lease. The plaintiff sued to recover that amount. At the district court level, a jury found for the plaintiff-landlord. The Court of Appeals found the rent was primarily based on the fixed rent and that there was no substantial evidence to prove an implied covenant for continued operation existed. Thus, it reversed the district court's decision.

HELD: Court of Appeals vacated; district court reinstated. A covenant of continuous use and operation will be implied in cases when a tenant is obligated to pay a significant portion of the rent from a percentage of the tenant's gross receipts. Substantial evidence supported the jury's finding that Taco Bell's lease was primarily based on a percentage of earnings and thus an implied covenant of continued operation could be found. In determining whether a covenant of continuous use and operation will be implied, other factors could be considered: the intent of the parties, the fact that the landlord constructed a building of unique design, that the percentage rental payment was included in lieu of a cost of living provision, and that the

percentage rental would be substantial when compared with the base rent.

Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293 (Iowa Ct. App. 1995)

Mechanics Lien/Construction

Bidwell contracted with Midwest Solariums for construction of a sun room on her house. Bidwell claimed the construction was defective. Bidwell paid all but $3,800 of the $19,000 contract price. Bidwell brought suit claiming breach of contract and seeking rescission. Midwest counterclaimed, seeking foreclosure on its mechanic's lien. The district court granted Bidwell damages for breach of contract in the amount it would cost to fix the defects. With regard to Midwest's counterclaim, however, the court refused to foreclose on the mechanic's lien because Midwest did not establish it had substantially performed the contract terms.

HELD: To successfully enforce a mechanic's lien, substantial performance of the contract is required. Omissions or deviations from the contract must be inadvertent or unintentional and must not impair the structure as a whole. Any omissions or deviations must be remediable without doing material damage to other portions of the construction, and may be compensated for by deductions in the contract price.

Here, Midwest substantially performed the contract. Substantial performance of the contract, however, did not completely discharge Midwest's promissory duty to Bidwell and she could still sue for damages. In defective construction cases, "damages may include diminution in value, cost of construction and completion in accordance with the contract." Thus, the district court's award of damages for the cost to fix the defects was supported by the evidence. Because Bidwell's award of damages was larger than Midwest's mechanic's lien, Midwest was not entitled to foreclosure on the lien. Bidwell had also sought rescission of the original contract. In order to obtain a rescission "there must be a breach so substantial it defeats the object of the contracting parties." Such a substantial breach did not occur in this case.

Donald Newby Farms, Inc. v. Stoll, 543 N.W.2d 289 (Iowa Ct. App. 1995)

Mortgages

Children with remainder interest in property resisted foreclosure proceedings on theory that mortgage and note upon which plaintiff sued were not the same to which their

subordination agreement applied. The district court granted the plaintiff's petition for foreclosure.

HELD: Affirmed. The subordination agreement subordinated the children's remainder interest for the entire amount of the mortgage, including principal and interest.

Whalen v. Connelly, 545 N.W.2d 284 (Iowa 1996)

Partnership; Securities Regulation; Parol Evidence

Suit by limited partner against other partners for breach of partnership agreement and fiduciary duties. Plaintiff was a limited partner in a partnership comprised of two limited partners and two general partners which was created for the purpose of conducting river boat gambling operations in Iowa. When one general partner desired to "cash out," a new company was formed with the intent of offering stock to the public. This new company would expand operations into Missouri.

Plaintiff claims he was wrongfully denied a management role in the hospitality services related to the Iowa operations in breach of an oral contract and that he had not been allowed a fair share in the expansion of the gambling operations into other jurisdictions. Accordingly, plaintiff claims that he is entitled to a five percent share of defendant's gambling enterprises regardless of their location whereas defendant maintains that plaintiff's interest is limited only to a five percent interest in the original Davenport operations. The district court granted summary judgment against plaintiff.

HELD: Affirmed.

(1) Under the terms of the partnership agreement, it was not a breach of the partnership agreement for general partner and affiliate to engage in projects in other jurisdictions at the exclusion of plaintiff. Partnership agreement was fully integrated and thus, according to rules of contract construction, the parol evidence rule prevents the admission of extrinsic evidence to contradict the terms of the written agreement.

(2) Plaintiff's claim that a management fee charged to the limited partnership by the general partners is without merit since the partnership agreement authorized such payments.

(3) Arrangement in which general partners offered cash plus shares to plaintiff satisfied terms of partnership agreement which was clear and unambiguous. Because arrangement did not breach terms of agreement, general partner was not liable for a breach of fiduciary duty.

(4) Plaintiff's claim that general partners were mismanaging and wasting partnership assets was derivative in nature because plaintiff was not "directly or independently"

injured. Plaintiff failed to make a demand on general partners to instigate litigation and failed to plead an explanation as to why he made no such demand as required by Delaware law for derivative claims against a partnership.

(5) Plaintiff's claim of an oral partnership agreement with defendant regarding the provision of food and beverage services in Iowa and the expansion of gambling enterprises into other jurisdictions is untenable. An oral partnership requires: (1) and intent by the parties to associate as partners, (2) an agreed business, (3) earning of profits, and (4) co-ownership of profits, property, and control. Subsequent written contracts between plaintiff and defendant necessarily supersede prior oral agreement by application of integration clause and parol evidence rule.

(6) No oral contract existed concerning the provision of hospitality services since a contract is generally not found to exist when the parties agree to contract on a basis to be settled in the future.

(7) Plaintiff is barred by the statute of limitations from his claim of fraudulent representation with respect to the first partnership and letter agreement, the second partnership and letter agreement, and the creation of the corporation and the IPO. Because testimony and evidence demonstrated that plaintiff was aware of these alleged misrepresentations more than two years prior to filing suit, he is barred by Iowa Code section 502.504(2).

(8) Plaintiff's claims that he was misled with respect to the sale of unregistered shares of stock also fail because he never purchased shares in the Missouri partnership. Bystanders do not have a cause of action under Iowa Code 502.502 and 502.401.

Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597 (Iowa 1996)

Set-Off

Cas had an arrangement with customers of its feed store under which the customers prepaid for future expenses such as chemicals, seed and fertilizer. Cas deposited some of those payments in its account at Farmers' Savings Bank. Cas also borrowed money from this bank. In connection with Cas' loan, a set-off agreement was executed which allowed the bank to set-off any amount owed to the bank against any right to receive money from the bank. Although the bank was aware that some of the funds in the Cas' accounts were prepayments from customers, those funds were not placed in a separate trust account or otherwise identified as separate funds. When Cas defaulted on its loan, the bank seized all funds in Cas' account which included various farmers' prepayments. The customers subsequently sued the bank, alleging intentional interference with a contract and the existence of a constructive trust, which prohibited the use of

their funds to satisfy Cas' debt. A jury awarded damages to the plaintiffs, and the Court of Appeals affirmed this verdict.

HELD: Reversed. A bank is not required to investigate the source of funds of a depositor against which it exercises a set-off right. Such a holding would be impractical, requiring a bank to trace the source of all deposits, even if deposits are not identified as separate funds. The bank is not liable for intentional interference with the plaintiff's contracts even though it knew some of the funds in Cas' account represented prepayments for products which Cas had not yet delivered. The bank did not act with the predominant purpose of injuring Cas' customers. It merely exercised its legal right to set-off.

Pancratz v. Monsanto Company, 547 N.W.2d 198 (Iowa 1996)

Successor Liability

Plaintiff sustained personal injuries when he fell from a ladder attached to the building where he was working. Plaintiff sued Knutson Construction Company, who was the corporate successor to the general contractor for the building. Knutson argued that no basis existed for imposing liability against it as the successor to the corporation that constructed the building. At the close of the evidence, the district court granted Knutson's motion for a directed verdict, holding that the record contained no proof of any exceptions to the general rule of successor nonliability.

HELD: Affirmed. Generally, a corporation that purchases the assets of another corporation does not assume liability for the purchased corporation's debts and liabilities. There are, however, several exceptions to this rule of nonliability: where the buyer agrees to be held liable, where two corporations consolidate or merge, where the buyer is a "mere continuation" of the seller, or where the transaction amounts to fraud. The mere continuation exception focuses on continuation of the corporate entity. A key element of continuation is the common identity of officers, directors and stockholders in both the buying and selling corporations. No such continuation existed between Knutson Construction Company and the company which it purchased. Absent evidence of common ownership or management, other factors such as the same employees, location, and trade name are irrelevant to the mere continuation determination.

Economy Roofing and Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995)

Trade Secrets/Fiduciary Duty

Former corporation president and his mother left employment of the corporation and started a competing business. Plaintiff corporation sued the son and the mother and the competing business alleging breach of fiduciary duties as to the son, intentional interference with contractual expectancies as to the son and the competing business and violation of the Trade Secrets Act as to all three defendants. Jury returned a verdict in favor of the plaintiff and against the son for compensatory and punitive damages as to the breach of fiduciary duty claims. The district court granted the son a new trial.

The son, Douglas, allegedly removed customer information from the computer, removed used equipment from the business and set up a company in direct competition with plaintiff.

HELD: Reversed. The district court erred when it granted a directed verdict on plaintiff's trade secrets claim. Iowa Code §550.2 defines what may constitute a "trade secret." The concept of trade secret is not limited to the listed examples. Trade secrets can range from customer information, to financial information, to information about manufacturing processes or the composition of products. We believe that a broad range of business data which, if kept secret, provide the holder with an economic advantage over competitors or others qualify as trade secrets. Here, plaintiff claimed that defendants had misappropriated correspondence to and from customers, bid information, bid estimates, customer lists, pricing lists, profit margin reports and supply cost information. This stated a claim for violation of Iowa Code §550.4 which allows recovery of damages for misappropriation of trade secrets.

Also, a principal and agent relationship necessarily gives rise to a fiduciary relationship. Given this relationship, we think a fact finder could find that defendants had a fiduciary duty to maintain the secrecy of the information on plaintiff's computer. Although employees can take with them general knowledge acquired during their employment, this situation is different because defendants surreptitiously copied and stole the information.

The district court correctly sustained defendants' motion for directed verdict as to the intentional interference with contract claims. The contract that allegedly was interfered with was unenforceable because it lacked mutuality of obligation.

The district court improperly sustained defendants' motion for directed verdict on the interference with prospective business claim. The testimony was uncontroverted that before leaving plaintiff's employ Douglas solicited Alcoa, a major customer, to leave plaintiff and do business with Douglas' new

business. The jury could reasonably infer that Douglas interfered with Economy's prospective contractual relationship and knew his conduct was substantially certain to interfere with this relationship.

Goodale v. Bray, 546 N.W.2d 212 (Iowa 1996)

Vendor & Purchaser; Forfeiture

Plaintiffs, purchasers of a 40 acre tract of farmland on contract, brought action to set aside forfeiture, claiming that notice had not been served on wife as required by Iowa Code chapter 656 (1993). District court dismissed plaintiff's claim on grounds that wife was not in possession of the land and was thus not entitled to notice of forfeiture. Court of appeals reversed stating that all parties were on notice that wife was in possession of the land as evidenced by her sharing of farm income and attendance at mediation meetings.

HELD: Vacated and district court judgment affirmed. Status as wife of vendee alone does not entitle wife to notice under section 656 and there was no evidence that wife exercised "dominion or control" over land at issue. Wife's residence in home on land contiguous with subject farm does not establish her "possession" of subject farm. Accordingly, notice did not need to be given to wife and plaintiff failed to show noncompliance with forfeiture proceedings.

COMPARATIVE FAULT

Webb L. Wasmer

Collins v. King, 545 N.W.2d 310 (Iowa 1996)

Collateral Source

Collins worked for HSN. She was involved in a car accident with King. HSN paid Collins disability benefits while she was off work due to injuries suffered in the accident. No subrogation right attached to these benefits.

Collins sued King for negligence. The jury awarded Collins damages against King. The trial judge reduced Collin's judgment by the amount of the disability payments based on the belief that Iowa Code § 668.14(1) mandated that result. The Supreme Court reversed.

HELD: At common law, a plaintiff's damages against a tort defendant are not reduced by any amount that the plaintiff received from a collateral source. This rule led to plaintiffs receiving double recoveries, once from the collateral source and once from the tortfeasor. On the other hand, if a plaintiff's

damages are reduced by payments from a collateral source, the defendant is relieved of the consequences of his tortious conduct.

The Court looked to the specific language of Iowa Code § 668.14(1) that that section is addressed to payments for "necessary medical care, rehabilitation services, and custodial care." The Court held that disability payments do not fall within this definition. Disability payments are in the nature of payment for "loss of earnings" which the legislature did not include in § 668.14(1).

Kubik v. Burt, 540 N.W.2d 60 (Iowa Ct. App. 1995)

Experts - Legal Malpractice

Kubik sued former attorney Burk for legal malpractice relating to Burk's representation of Kubik in criminal proceedings. Kubik represented himself pro se in malpractice action. Burk filed a motion for summary judgment on the basis that Kubik had failed to designate any experts as required by Iowa Code § 668.11. The trial court granted the motion. Affirmed.

HELD: A pro se litigant is required to conform to Section 668.11 just as an attorney is required to do so. Kubik failed to show good cause for failing to comply with Section 668.11.

Expert testimony that an attorney's conduct is negligent is required, unless the proof is so clear that the trial court can rule that the attorney was negligent as a matter of law or negligence can be clearly recognized or inferred by a person who is not an attorney. The allegations of negligence raised by Kubik are beyond the common knowledge of laypersons and, accordingly, expert testimony was required. Having no expert testimony, Kubik's claims were properly dismissed.

Weatherwax v. Koontz, 545 N.W.2d 522 (Iowa 1996)

Juror Misunderstanding of Comparative Fault Instructions

In medical malpractice case alleging lost chance of survival resulting from a misdiagnosis, jury found non-settling doctor ten percent at fault. The jury awarded $96,134 in damages. Plaintiff's counsel subsequently obtained ex parte affidavits from the jurors indicating that the jurors had misunderstood the comparative fault instructions. The trial court subsequently held an evidentiary hearing at which the jurors all agreed that $96,134 was a portion of some larger amount but had differing

opinions as to what the larger amount was. The trial court subsequently entered judgment for $96,134, finding that there was no consensus among the jury which would provide a basis for reforming the verdict. The Supreme Court affirmed.

HELD: The Court first observed that the affidavits and juror testimony were probably inadmissable pursuant to Rule of Evidence 606(b) as constituting an improper inquiry into the jury's deliberative process. The District Court properly denied reformation of the verdict on the argument that the $96,134 was a ministerial error in recording the jury's actual verdict based on the evidence that there was no consensus by the jurors as to what the verdict actually was.

The Court also noted that Iowa Code § 668.3 provides a mechanism for the trial court to assure that the jury's verdict is consistent with the Comparative Fault Act. The Court stated that "[w]e again emphasize the importance of satisfying the statutory guidelines when submitting a comparative fault case to a jury and when receiving the verdict."

Dudley v. GMT Corp., 541 N.W.2d 259 (Iowa Ct. App. 1995)

Juror Misunderstanding of Comparative Fault Instructions

Dudley injured her hand in an assembly machine manufactured by GMT. The jury found Dudley fifty-five percent at fault and GMT forty-five percent at fault. Dudley submitted affidavits and testimony from several jurors stating that they had misunderstood the instructions and thought that the court would determine Dudley's damages and award her forty-five percent of that amount. The District Court denied Dudley's motions for JNOV and a new trial. The Court of Appeals affirmed.

HELD: The jurors' affidavits and testimony are not admissible pursuant to Rule of Evidence 606(b). The jury was specifically instructed as to the effect of finding Dudley more than fifty percent at fault. Jury dissatisfaction with the result is not a basis for setting aside the verdict.

Schoborg v. Anderson, 548 N.W.2d 180 (Iowa Ct. App. 1996)

Liability, Municipal - Iowa Code § 668.10(2)

Following automobile accident, plaintiff sued Coralville and Iowa City for failure to properly maintain a road, which was a boundary line between the two cities. The District Court granted the cities' motions for summary judgment on the basis that the cities were immune pursuant to Iowa Code § 668.10(2). The Supreme Court affirmed.

HELD: Iowa Code § 668.10(2) provides that a municipality may not be assigned a percentage of fault for the failure to remove snow or ice, or to place sand, salt or other substances on the road, if the city establishes that it complied with its policy or level of service for doing so.

Although Coralville's policy was that sufficient sand and salt should be applied so that curves "can be safely negotiated," that statement is a goal and does not create a standard of care. As there was no evidence that Coralville and Iowa City did not follow their own policies, summary judgment was properly granted.

Hunt v. State, 538 N.W.2d 659 (Iowa Ct. App. 1996)

Liability, State - Iowa Code § 668.10(1)

On September 25, 1991, the Iowa Department of Transportation decided to install four-way stop traffic control signals at the intersection of Highway 13 and County Home Road. Prior to this decision, traffic on County Home Road was required to stop. Traffic on Highway 13 was not. The DOT placed signs at the intersection stating "4-Way Stop To Be Installed On Nov. 20, 1991."

On October 24, 1991, Hunt was killed while attempting to cross Highway 13 after coming to a stop on County Home Road. Her administrator sued the State, alleging that the State was negligent in failing to timely install four-way stop signs after the State had determined that such signing was necessary.

The trial court granted the State's motion to dismiss. The Court of Appeals affirmed.

HELD: Iowa Code § 668.10(1) provides that the State shall not be assigned a percentage of fault for "the failure to place, erect, or install a stop sign," but once the "device has been placed, created or installed" the State may be assessed a percentage of fault for "failure to maintain the device." Hunt argued that the September 25, 1991, decision constituted the "creation" of a stop sign and that the State had failed to maintain the sign by timely installing it.

The Court rejected this construction and held that the State's decision as to when to install a sign falls within the State's discretion whether to install a sign at all. Accordingly, the State is entitled to immunity under § 668.10(1).

Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889 (Iowa 1996)

Proximate Cause

Plaintiff claimed that he had fallen on snow and ice while exiting bowling alley. There was evidence that Foggia had numerous other injuries both prior and subsequent to this fall. The jury apportioned 49% of the fault to Plaintiff, 51% to Defendant and awarded Plaintiff $100 in damages. Judgment affirmed.

HELD: Plaintiff requested and was refused the following instruction, which was modeled after a concurrent proximate cause instruction in Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 861 (Iowa 1994):

> When two or more separate conditions combine, so that, when viewed as a whole the conditions proximately caused plaintiff's injuries, the separate fault of each of those parties may be a proximate cause even those individually the separate conditions would not have alone produced the plaintiff's injuries if the conduct substantially contributed to plaintiff's injuries.

The Court held that this instruction was properly refused. Concurrent proximate cause was not at issue in this case. Concurrent proximate cause is only applicable when two or more defendants are involved. Here, the fault of Plaintiff and the fault of Defendant were at issue. The case was properly submitted under comparative fault instructions.

CONSTITUTIONAL LAW

Steven L. Serck

City of Iowa City v. Hagen Elec., 545 N.W.2d 530 (Iowa 1996)

Eminent Domain; Zoning & Planning

In 1986, the city petitioned to enjoin defendant from continuing activities on his property in violation of an airport ordinance. Defendant counterclaimed stating that the ordinance constituted an illegal taking and inverse condemnation of his property and that his civil rights had been violated under 42 U.S.C. § 1983. City responded that defendant had failed to exhaust his administrative remedies and thus his legal claims were not ripe for review. The district court ruled in favor of defendant by holding that defendant was not required to exhaust his administrative remedies since to do so would be futile and that the airport ordinance constituted an uncompensated taking of defendant's property.

HELD: Reversed. Landowner had failed to exhaust administrative remedies and thus was precluded from pursuing his claim of an illegal taking. The city had a rational basis for adopting the zoning ordinance and thus landowner's substantive due process rights under § 1983 were not violated.

Currans v. Linn Co. Civ. Serv. Com'n, 540 N.W.2d 469 (Iowa Ct. App. 1995)

Equal Protection

Currans, a sergeant in the Linn County Sheriff's Department, was suspended without pay for failing to respond to a dangerous situation involving an inmate and failing to abide by jail policy in not properly keeping documentation of checks on that inmate.

Currans claimed that her suspension was not for "good cause" as required by Iowa Code chapter 341A. She also claimed that Chapter 341A violates the equal protection clause because it provides different disciplinary review procedures for county law enforcement officials than Iowa Code Chapter 400 provides for city police officers.

The County Civil Service Commission affirmed the sheriff's suspension but the district court reversed, holding that the record was inadequate to show just cause for the suspension.

HELD: Reversed and Civil Service Commission decision reinstated. "Just cause" requires a focus on the ability and fitness of an employee to discharge the duties of his or her position. This suspension meets that standard.

With regard to the equal protection attack, this case does not involve a suspect classification such as race, sex, or national origin. Also, the right to public employment is not a fundamental right under Iowa law. Therefore, we apply the rational basis test. Under this test the classification will be sustained unless the challenging party can demonstrate that it is patently arbitrary and bears no rational relationship to a legitimate government interest.

While it is true that the judicial review afforded to a sheriff's deputy is less than that afforded to police officers, the legislature could reasonably conclude that their differing duties necessitated this arrangement. A sheriff's deputy is appointed by an elected sheriff who is subject to electoral accountability. Also, counties employing deputies vary in size and resources.

A

Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)

Fences

The Graverts and Nebergalls are adjoining landowners. The Graverts are located within the city limits of Tipton and use their land primarily for a residence and some crop farming. The Nebergalls' land is located outside the city limits and is used for raising livestock. A controversy arose between the parties concerning the maintenance of a partition fence which lies between the two. Fence viewers, sitting pursuant to Iowa Code Chapter 359A, entered an order requiring the Graverts to maintain 344 feet of the fence and the Nebergalls to maintain 494 feet of the fence.

The Graverts appealed to the district court which held that the fence-viewing statute was unconstitutional as applied to the Graverts. The district court held that the fence-viewing statute provided no benefit to the Graverts (city dwellers) and provided the Nebergalls (livestock raisers) with an unfair benefit, especially in light of the obligation of the Nebergalls to protect the general public from their animals in any event. The district court further held that even if the statute was constitutional it was preempted by Iowa Code § 364.1.

HELD: Reversed. The fence-viewing statute was enacted pursuant to the legislature's police power and therefore it will be upheld if there is some reasonable relation to the public welfare. The law is not unconstitutional simply because it works a hardship on the Graverts. Also, the Graverts do receive a benefit in freedom from unwanted intrusion by their neighbor's livestock. Because the Graverts have not shown the fence statute to be unduly oppressive, it therefore passes our constitutional test.

The district court's fall-back position was that the grant of authority to fence-viewers under Iowa Chapter 359A is preempted by Code § 364.1 -- the home rule statute for cities. Our previous decisions make it clear that the grants of home rule power are preempted when they conflict with a state statute. The power of home rule must always yield to a state statute with which it conflicts. Thus, Chapter 359A is not preempted by the grant of home rule to cities.

Kuelish v. West Side Unlimited Corp., 545 N.W.2d 860 (Iowa 1996)

Loss of Consortium

Plaintiff parents seek to recover consortium damages arising from the wrongful death of their adult son. The trial court dismissed for failure to state a claim. Plaintiffs appeal on the ground that equal protection principles give them the same

right to recover for loss of consortium arising from the death of their adult child that an adult child has to recover for the death of his or her parents.

HELD: Affirmed. There is no common law right of adult children to recover for loss of parental consortium. Because plaintiffs do not challenge the constitutionality of Section 613.15, we express no opinion on whether that statute violates equal protection by allowing adult children to recover for loss of parental consortium while denying a corresponding right to parents of adult children to recover damages upon the child's death or injury. (Inferring that an equal protection challenge to Section 613.15 might be successful).

Des Moines Register and Tribune Co. v. Dwyer, 542 N.W.2d 491 (Iowa 1996)

Political Question

The Des Moines Register and the Freedom of Information Council sought release of the Iowa Senate's long distance telephone call records. Plaintiffs sought a declaratory judgment that state officials had violated Iowa's open records law by refusing to release the records. The Senate's refusal to release its itemized call records was based on the belief that release of such records could be harmful to the public and to the Senate's ability to carry out its responsibilities. The district court found that the Senate's policy regarding release of these records involved a "textually demonstrable constitutional commitment of power to the Senate and therefore the matter constituted a nonjusticiable political question." The district court granted the defendants' motion for summary judgment.

HELD: Affirmed. The text of the Iowa Constitution in Article III, Section 9, commits to the Senate the power to determine its rules of proceedings. The Senate's policy governing release of the itemized call records constitutes a rule of proceeding. Thus, it constitutes a nonjusticiable political question.

Burmeister v. Muscatine County Civil Service Commission, 538 N.W.2d 877 (Iowa Ct. App. 1995)

Property Interest

Plaintiff was a deputy sheriff in Muscatine County when he was notified by the sheriff that his employment was terminated. Plaintiff claims that he has a constitutionally protected property interest in his employment and should have been given a pre-termination hearing in compliance with due process. The Commission responded that plaintiff does not have a

property interest in his employment. The district court reversed, finding that Burmeister had a property interest in future employment and should have been afforded a pre-termination hearing. It reinstated Burmeister.

HELD: Reversed. If plaintiff had a constitutionally protected property interest in his employment, he would be entitled to a pre-termination hearing. Our Supreme Court has found that police officers do not have a property interest in their employment because of the need to maintain proper discipline and avoid disruption or impairment of the officers' public duties.

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Public Employee

Van Baale, a 17-year veteran of the Des Moines Police Department, plead guilty to domestic abuse and obstruction of justice charges and was terminated. Before the Civil Service Commission and in subsequent appeals, Van Baale's firing was upheld. Van Baale then filed a petition in district court against the City of Des Moines, the Chief of Police and other public officials alleging breach of contract, promissory estoppel, denial of equal protection and intentional infliction of emotional distress.

HELD: Van Baale's claims for breach of contract and promissory estoppel are really wrongful discharge claims which were appropriately heard exclusively before the Civil Service Commission pursuant to Chapter 400. With regard to the equal protection claim, Van Baale argued he received disparate treatment for his alleged misconduct. However, his claim did not specify any persons who, as a class, were treated in a manner different than him. Van Baale's claim was merely that other officers, people within his own class, were given less severe punishments for similar misconduct. Such an argument is nothing more than inconsistency in meting out punishment. The equal protection clause does not require "similar ad hoc determinations for persons in the same class." District court dismissal affirmed.

Schaller v. State, 537 N.W.2d 738 (Iowa 1995)

Taking

County conservation board vacated a portion of a road and title reverted to Schaller. Schaller attempted to negotiate a lease of his portion of the road to DNR, who owned remainder of road. The public had used the road for approximately 30 years and the DNR claimed it had a prescriptive easement for continuing

public use. Therefore, it refused to negotiate a lease with Schaller. Schaller instituted mandamus proceedings to compel DNR to lease his portion of the road. DNR alleges that the county conservation board had no right to vacate the road to Schaller because of the public's prescriptive right to use the vacated road. District court sustained Schaller's summary judgment motion and ordered DNR to condemn Schaller's portion of the road and either purchase or lease it.

HELD: The county's vacation of the road to Schaller was proper. No prescriptive rights were ever acquired because the use by the public was not without legal authority. Permissive use of the road was therefore not adverse.

The public trust doctrine does not apply because Schaller is not attempting to deny the public access to the lake. He merely wants just compensation for the public's use.

The Iowa and federal constitutions provide that private property shall not be taken for public use without just compensation. A taking exists if there is a substantial interference with the use and enjoyment of property. Mandamus is the proper procedural device to compel condemnation when there has been a taking of private property without just compensation.

Here there was a taking of private property by DNR and the district court correctly ordered institution of condemnation proceedings. As damages, Schaller is entitled to recover the difference between the fair market value of the property immediately before condemnation and before it has been affected by the proposed public use, and the fair market value of what is left after the taking.

Frideres v. Schlitz, 540 N.W.2d 241 (Iowa 1995)

Vagueness

The United States District Court for the Northern District of Iowa certified the question of whether the statute of limitations for bringing actions for injuries suffered as a result of sexual abuse which occurred when the victim was a child, but which was not discovered until the victim reached the age of majority, was void for vagueness.

A noncriminal statute is unconstitutionally vague under the due process clause only when its terms fail to convey sufficiently definite warning of the proscribed conduct as measured by common understanding.

HELD: Section 614.8A is not void for vagueness because a reasonable person would not be forced to guess at its scope.

CONTRACTS

Steven L. Serck

Beck v. Equine Estates Development Co., 537 N.W.2d 798 (Iowa Ct. App. 1995)

Assignment

Rosenbergers purchased a tract of land and sold part of it to Equine. Equine simultaneously sold a smaller part to plaintiffs the Becks. Robert and Peggy Lapsley, defendants, were the sole officers, directors and shareholders of Equine. Because of financial problems, in 1986 Equine assigned its property interest, including the property sold to the Becks, to R.L. Lapsley. Becks were unaware of the assignment and continued to make payments to Equine, which passed them on to Rosenbergers.

In 1988 Becks learned Rosenbergers had financial problems and notified Equine that Becks wished to pay off the contract and receive a deed. Equine ignored the tender and Becks stopped payments under the contract. Rosenbergers had not paid their seller for some time and in 1989 he began forfeiture proceedings which were completed in 1990. At that time Equine became assetless and did not file its annual report. It was dissolved in late 1990. In 1991 Equine accepted a 'reconveyance" of the Rosenberger and Beck property from R.L. Lapsley.

In 1991 Becks filed an action against Equine and Robert and Peggy Lapsley for recovery of the $97,000 they had paid on the contract. They amended to include R.L. Lapsley as a defendant.

The district court found Equine breached the contract of sale when it was unable to deliver a deed to the Becks. The court determined Robert and Peggy were personally liable because they used Equine to promote illegality when they accepted reconveyance from R.L. in an attempt to transfer R.L.'s liability to the defunct Equine. The court further found that R.L. was obligated to perform on the contract by virtue of assignment.

HELD: We find insufficient evidence to pierce the corporate veil. There is no evidence that Equine was continually undercapitalized. Each of its transactions with the Becks occurred while it was in good corporate standing. The record does not suggest it was merely a sham.

However, district court correctly found the assignee, R.L. Lapsley, liable for performance of the real estate contract. The Restatement (Second) of Contracts, section 328 provides that an assignment of "the contract" is "an assignment of the assignor's rights and delegation of his unperformed duties under the contract." Here, R.L. clearly received an assignment of all obligations of Equine pursuant to the real estate contract.

Therefore, R.L. is liable to Becks for the full amount of the judgment.

Faught v. Budlong, 540 N.W.2d 33 (Iowa 1995)

Binding Agreement

The Faughts sued the Federal Land Bank for breach of contract, claiming that the bank had agreed to sell back to the Faughts a parcel of real estate earlier lost through foreclosure. The jury found in favor of the Faughts, awarding a verdict in excess of $43,000. The district court sustained the bank's motion for judgment notwithstanding the verdict.

HELD: Affirmed. One of the grounds raised by the bank in support of its motion for directed verdict was that the parties never reached a binding agreement. We agree. There were lengthy negotiations with several proposals and counterproposals. In light of the distrust between the parties, reasonable minds could only conclude that both parties contemplated a written and signed agreement before either would be bound. Thus, the parties' prior dealings were simply preliminary negotiations and the parties never reached a binding agreement.

Taggart v. Drake University, 549 N.W.2d 796 (Iowa 1996)

Employment

Plaintiff was employed by Drake University's fine arts department first as a lecturer and subsequently as an instructor and assistant professor. During the period of time she worked for Drake University, she was considered a "tenure track" employee. During her sixth year of working at the college, plaintiff received a letter of appointment for the following year. However, rather than noting the plaintiff's status as a "tenure track" employee, the letter offered plaintiff a one-year terminable appointment, noting she was no longer being considered for tenure and would be terminated at the end of the following year. Plaintiff sued Drake University, the Chair of the Fine Arts Department and the Academic Dean, alleging breach of employment contract, intentional infliction of emotional distress and defamation. The district court granted the defendants' motion for summary judgment on all claims.

HELD: Plaintiff's employment was not at-will as Drake argued. Drake's academic charter and an accompanying appendix outlining procedural standards for the renewal or nonrenewal of appointments of probationary faculty members was sufficient to create an enforceable contract. Her employment consisted of a series of one-year terms.

While plaintiff was able to prove that a contract for employment existed she was unable to prove a breach of that contract. Thus, the district court's grant of summary judgment for defendants is affirmed.

Bowser v. PMX Indus., Inc., 545 N.W.2d 898 (Iowa Ct. App. 1996)

Employment

Plaintiff claimed that defendant employer wrongfully discharged him in breach of an oral contract. Plaintiff testified that employer asked him to relocate to Cedar Rapids from California and that the employer told him that his employment in Cedar Rapids would last at least five years where he would receive at least the same level of benefits.

The trial court granted employer's motion for a JNOV on the contract claim. It found that the evidence presented at trial was insufficient to establish the existence of an oral contract.

HELD: Affirmed. The employee knew that the company did not utilize written contracts. The employer's statement concerning the duration of his employment in Cedar Rapids and the benefits he would receive was merely an "estimate". Thus, there was insufficient evidence regarding the terms of employment such as time, salary increases, benefits and employee duties.

Anderson v. Douglas and Lomason Co., 540 N.W.2d 277 (Iowa 1995)

Employment

Employee who was discharged brought breach of contract action against employer alleging that employer failed to follow progressive discipline policies contained in employee handbook. The district court entered summary judgment for the employer on the ground that the handbook did not constitute a contract.

HELD: Affirmed. An employee handbook may create a contract such that an employer may discharge the employee only under certain conditions, which may require the employer to follow progressive disciplinary procedures set forth in the handbook. It is not necessary that an employee seeking to enforce a promise have prior knowledge of the promise. Thus, the fact that the plaintiff did not read the employee manual does not prevent him from relying on the promises contained therein.

The handbook contained a disclaimer stating that the handbook was not intended to create any contractual rights in favor of the employee or the company and the company reserved the right to change the terms of the handbook at any time.

Therefore, even though there were provisions for progressive discipline in the manual, in light of the disclaimer a reasonable person would not believe that the employer had consented to be bound to the provisions contained in the manual. Therefore, there was no contract between the employer and the employee.

Kabe's Restaurant, Ltd. v. Kinter, 538 N.W.2d 281 (Iowa 1995)

Employment

Kabe's Restaurant sued its former employee Kinter for breach of fiduciary duty, conversion and fraud. Kinter counterclaimed for breach of a permanent employment contract. In a separate suit Kinter sued one of Kabe's directors, Hall, for tortious interference with Kinter's employment contract. The jury returned all verdicts in favor of Kinter. In post-trial motions the district court granted Hall's motion for judgment notwithstanding the verdict on Kinter's claim for tortious interference against him.

HELD: The testimony at trial supported Kinter's claim of an employment contract. In addition to evidence of a promise for employment, there must be evidence of additional consideration offered by the employee. Here, the evidence showed that prior to establishment of the business Kinter located the site and invested at least $60,000 to purchase the restaurant and sought out additional investors for it. This supported the jury's finding of a contract for employment until Kinter's retirement.

Kinter challenges the district court's granting of Hall's motion for judgment e verdict. Because iduciary duty to ge to interfere with :ion and a third .l exceeded his :'s Restaurant on this issue.

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vick claimed that the employee handbook created a unilateral contract of employment. The district court held that no contract of employment was created by the handbook.

The manual provided that "it is not a part of an employment contract."

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 an acceptance; (3) the employer has continued to work so as to provide consideration.

HELD: We affirm the district court. The handbook contains an express disclaimer of any contract of continuing employment.

Smuck v. National Management Corp., 540 N.W.2d 669 (Iowa Ct. App. 1995)

Employment at Will

National terminated Smuck's employment because of complaints received by tenants in the low income apartment complex that Smuck managed. Smuck claims his termination breached a written contract of employment and that he was terminated in violation of public policy. Smuck claims that he was fired because he discovered a scheme to defraud the FMHA by National.

The district court granted National's motion for summary judgment, holding that the documents which Smuck contended created an employment contract were not definite enough to create such a contract and because Smuck's discharge was grounded in federal law rather than state law and therefore he did not show that it contravened a clearly expressed public policy of Iowa.

HELD: Affirmed in part and reversed in part. With regard to the contract claim, the policy manual suggests that warnings may be given in some cases but does not require that warnings be given in all cases. Therefore, the presumed at-will relationship between National and its employees continued. Furthermore, the policy manual contained a statement that National was an at-will employer. Therefore, we affirm the district court on the breach of contract claim.

With regard to the wrongful termination claim, we hold that federal law can serve as an appropriate source for state public policy. We believe it is contrary to public policy to fire an employee for refusing to break any law, be it state or federal. Summary judgment on the wrongful termination claim was improperly entered.

RTL Distrib. v. Double S Batteries, Inc., 545 N.W.2d 587 (Iowa Ct. App. 1996)

Interference with Contract

Competing battery wholesalers entered into agreement containing a non-competition agreement and a provision to notify the other in the event that one company no longer desired to service one of its accounts. Plaintiff wholesaler alleged that defendant wholesaler interfered with plaintiff's contract with one of its salesmen when defendant company began negotiating an employment contract with the salesman and taking over former accounts of salesman while he was still employed with plaintiff. District court held that defendant company improperly interfered with salesman's at-will contract with plaintiff when it violated the non-competition agreement and failed to follow agreement to notify plaintiff of its takeover one of salesman's accounts.

HELD: Reversed. With respect to both at-will and prospective employment contracts, a claim of wrongful interference must be supported by substantial evidence that shows that the accused party was motivated to interfere with a contract for improper reasons and with an improper purpose. Where the record does not indicate that the accused was motivated to terminate an at-will contract between the claimant and its employee with improper motives, a claim for improper interference shall fail.

East Broadway Corp. v. Taco Bell Corp., 542 N.W.2d 816 (Iowa 1996)

Landlord/Tenant

McBluffs, Inc. entered into a 20-year lease agreement with Taco Bell as the tenant. The base rent was determined by the value of the leased premises. The lease also required additional rent of 5% of the gross sales in excess of $17,000 per month. The lease did not contain a provision requiring Taco Bell to continuously operate the restaurant during the 20-year period of the lease. For 19 years, Taco Bell paid both the base rent and the percentage rate based upon gross sales. Taco Bell then closed its operation at the leased site and began operating at a new location. While Taco Bell continued to pay the fixed base rent, it did not pay the percentage based on gross sales for the last year of the lease. The plaintiff sued to recover that amount. At the district court level, a jury found for the plaintiff-landlord. The Court of Appeals found the rent was primarily based on the fixed rent and that there was no substantial evidence to prove an implied covenant for continued operation existed. Thus, it reversed the district court's decision.

HELD: Court of Appeals vacated; district court reinstated. A covenant of continuous use and operation will be implied in cases when a tenant is obligated to pay a significant portion of the rent from a percentage of the tenant's gross receipts. Substantial evidence supported the jury's finding that Taco Bell's lease was primarily based on a percentage of earnings and thus an implied covenant of continued operation could be found. In determining whether a covenant of continuous use and operation will be implied, other factors could be considered: the intent of the parties, the fact that the landlord constructed a building of unique design, that the percentage rental payment was included in lieu of a cost of living provision, and that the percentage rental would be substantial when compared with the base rent.

Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293 (Iowa Ct. App. 1995)

Mechanics Lien/Construction

Bidwell contracted with Midwest Solariums for construction of a sun room on her house. Bidwell claimed the construction was defective. Bidwell paid all but $3,800 of the $19,000 contract price. Bidwell brought suit claiming breach of contract and seeking rescission. Midwest counterclaimed, seeking foreclosure on its mechanic's lien. The district court granted Bidwell damages for breach of contract in the amount it would cost to fix the defects. With regard to Midwest's counterclaim, however, the court refused to foreclose on the mechanic's lien because Midwest did not establish it had substantially performed the contract terms.

HELD: To successfully enforce a mechanic's lien, substantial performance of the contract is required. Omissions or deviations from the contract must be inadvertent or unintentional and must not impair the structure as a whole. Any omissions or deviations must be remediable without doing material damage to other portions of the construction, and may be compensated for by deductions in the contract price.

Here, Midwest substantially performed the contract. Substantial performance of the contract, however, did not completely discharge Midwest's promissory duty to Bidwell and she could still sue for damages. In defective construction cases, "damages may include diminution in value, cost of construction and completion in accordance with the contract." Thus, the district court's award of damages for the cost to fix the defects was supported by the evidence. Because Bidwell's award of damages was larger than Midwest's mechanic's lien, Midwest was not entitled to foreclosure on the lien. Bidwell had also sought rescission of the original contract. In order to obtain a rescission "there must be a breach so substantial it defeats the

object of the contracting parties." Such a substantial breach did not occur in this case.

Whalen v. Connelly, 545 N.W.2d 284 (Iowa 1996)

Partnership; Securities Regulation; Parol Evidence

Suit by limited partner against other partners for breach of partnership agreement and fiduciary duties. Plaintiff was a limited partner in a partnership comprised of two limited partners and two general partners which was created for the purpose of conducting river boat gambling operations in Iowa. When one general partner desired to "cash out," a new company was formed with the intent of offering stock to the public. This new company would expand operations into Missouri.

Plaintiff claims he was wrongfully denied a management role in the hospitality services related to the Iowa operations in breach of an oral contract and that he had not been allowed a fair share in the expansion of the gambling operations into other jurisdictions. Accordingly, plaintiff claims that he is entitled to a five percent share of defendant's gambling enterprises regardless of their location whereas defendant maintains that plaintiff's interest is limited only to a five percent interest in the original Davenport operations. The district court granted summary judgment against plaintiff.

HELD: Affirmed.

(1) Under the terms of the partnership agreement, it was not a breach of the partnership agreement for general partner and affiliate to engage in projects in other jurisdictions at the exclusion of plaintiff. Partnership agreement was fully integrated and thus, according to rules of contract construction, the parol evidence rule prevents the admission of extrinsic evidence to contradict the terms of the written agreement.

(2) Plaintiff's claim that a management fee charged to the limited partnership by the general partners is without merit since the partnership agreement authorized such payments.

(3) Arrangement in which general partners offered cash plus shares to plaintiff satisfied terms of partnership agreement which was clear and unambiguous. Because arrangement did not breach terms of agreement, general partner was not liable for a breach of fiduciary duty.

(4) Plaintiff's claim that general partners were mismanaging and wasting partnership assets was derivative in nature because plaintiff was not "directly or independently" injured. Plaintiff failed to make a demand on general partners to instigate litigation and failed to plead an explanation as to why he made no such demand as required by Delaware law for derivative claims against a partnership.

(5) Plaintiff's claim of an oral partnership agreement with defendant regarding the provision of food and beverage services in Iowa and the expansion of gambling enterprises into other jurisdictions is untenable. An oral partnership requires: (1) and intent by the parties to associate as partners, (2) an agreed business, (3) earning of profits, and (4) co-ownership of profits, property, and control. Subsequent written contracts between plaintiff and defendant necessarily supersede prior oral agreement by application of integration clause and parol evidence rule.

(6) No oral contract existed concerning the provision of hospitality services since a contract is generally not found to exist when the parties agree to contract on a basis to be settled in the future.

(7) Plaintiff is barred by the statute of limitations from his claim of fraudulent representation with respect to the first partnership and letter agreement, the second partnership and letter agreement, and the creation of the corporation and the IPO. Because testimony and evidence demonstrated that plaintiff was aware of these alleged misrepresentations more than two years prior to filing suit, he is barred by Iowa Code section 502.504(2).

(8) Plaintiff's claims that he was misled with respect to the sale of unregistered shares of stock also fail because he never purchased shares in the Missouri partnership. Bystanders do not have a cause of action under Iowa Code 502.502 and 502.401.

Hyler v. Garner, 548 N.W.2d 864 (Iowa 1996)

Recision

Plaintiffs, purchasers of a motor home, brought suit against defendant dealer for recision of a sale contract based on misrepresentation and sought consequential damages after R.V. required numerous repairs and after plaintiffs discovered that manufacturer had ceased operations. Trial court found that defendant/seller, knowing the financial problems of the manufacturer, had misrepresented the value and validity of warranty and had misrepresented the extent of repairs necessary during the first year of ownership.

HELD: Affirmed. Where seller had knowledge of buyer's desire of an adequate warranty and where seller had knowledge of manufacturer's bankruptcy and failed to disclose such information, the failure to inform buyer constitutes misrepresentation and is grounds for recision of the sale contract after buyer experienced many problems with the mobile home. The elements of an equitable claim for recision based on misrepresentation are: (1) a representation; (2) falsity; (3) materiality; (4) an intent to induce the other to act or refrain from acting; and (5) justifiable reliance. Importantly, there is

no requirement that plaintiffs prove an intent to deceive on the part of the dealer. The restitution remedy is return of the purchase price less a deduction based on the buyer's use of the R.V.

Clark v. McDaniel, 546 N.W.2d 590 (Iowa 1996)

Recision

Buyer of automobile that was later discovered to have been "clipped" (i.e., front and rear of car were from different cars originally) brought suit against seller for recision. District court dismissed claim.

HELD: The buyer is not entitled to recision since an adequate remedy is available at law. Recision is only granted where: (1) the injured party is not in default; (2) the breach must be substantial and go to the heart of the contract; and (3) remedies at law must be inadequate.

Breitbach v. Christenson, 541 N.W.2d 840 (Iowa 1995)

Specific Performance/Reformation

Prospective purchaser of farm land filed suit in equity seeking specific performance on his bid to purchase farm land. District court dismissed his case and he appeals.

On the day that he made his bid the prospective purchaser signed an offer to buy real estate which contained the following clause:

> It is understood that the tenant living in the farm residence has a week from this date to match this offer and if he does, this offer is void and the down payment shall be returned.

The tenants in fact exercised their right of first refusal and therefore were allowed to purchase the property.

HELD: Specific performance is to be granted by a court of equity only in extraordinary, unusual cases in which irreperable harm will result in its absence. The remedy will generally be granted where failure to do so would produce hardship and injustice on the other party.

Here the prospective purchaser agreed that the tenants had a right of first refusal. Therefore, there is no wrong for this court to remedy. The prospective purchaser fails to present any evidence as to why the contract should be set aside.

The prospective purchaser next requests reformation of the contract so as to provide no right of first refusal to the tenants. Reformation may be granted only upon clear, satisfactory and convincing evidence of fraud, deceit, duress or mutual mistake. There is no evidence of that here. The district court's dismissal of the prospective purchasers' action was proper.

COURTS

Rex Staub

State v. Means, 547 N.W.2d 615 (Iowa Ct. App. 1996)

Continuance — For Purposes of Laying Foundation

The facts of this case are identical to the facts discussed in the preceding case, State v. Voelkers. Means was Voelkers co-defendant and also filed a motion for change of venue due to extensive pre-trial media coverage. In support, Means sought to introduce surveys conducted by a research company which allegedly showed the community was prejudice to such a degree that a fair trial would be impossible in Scott County. The state objected on the grounds of lack of foundation. Means' counsel responded that the research company was attempting to find a witness to for purposes of laying the foundation. After hearing Means' offer of proof, the district court denied the motion for change of venue. On appeal, Means contends he should have been allowed a continuance to obtain the foundational witness.

HELD: Although Means made reference to an attempt to obtain a witness for foundation, he failed to request a continuance in the trial. As a result, no error was preserved on this issue.

HELD: Even if an adequate motion for continuance had been lodged, Means' counsel gave the trial judge no indication as to the amount of time it would take to secure the witness, the actual existence of the witness, and ability of the witness to lay foundation for the survey. The Court of Appeals affirmed the district court's denial of Means' motion for change of venue.

Smith v. State, 542 N.W.2d 853 (Iowa Ct. App. 1995)

Correction of Prior Rulings before Final Judgment

After being convicted of first-degree murder, Smith filed an application for post-conviction relief. After his first application was denied, Smith then filed the second application and the State filed a motion for summary disposition contending the second application was untimely. Relying on existing case

law, the district court denied the State's motion for summary disposition. However, before the court rendered judgment on the second application for post-conviction relief, the Iowa Supreme Court rendered an opinion which served to support the State's motion. Accordingly, the trial court reversed itself and granted the motion for summary disposition.

HELD: It is well established that a district court may correct its prior ruling any time before final judgment.

Currans v. Lynn County Civil Service Comm'n, 540 N.W.2d 469 (Iowa Ct. App. 1995)

District Court Review of Civil Service Commission Decision

At district court, Linn County Deputy Currans appealed a decision by the Civil Service Commission ("Commission") affirming her suspension without pay for unsatisfactory performance of duties. The district court granted her appeal and reversed the Commission's decision.

HELD: In reviewing decisions of the Civil Service Commission, the district court's determination is limited to whether the Commission's decision was made in good faith and for just cause. Under this analysis, the district court is to employ the "substantial evidence" rule and reverse the Commission's decision only if reasonable minds could not accept the evidence as adequate to reach the Commission's conclusion. In this case, the district court erred in reversing the Commission's decision.

State v. Voelkers, 547 N.W.2d 625 (Iowa Ct. App. 1996)

Judges — Substitution

In a highly publicized trial in Scott County, Voelkers was convicted of first-degree murder, first-degree robbery, first-degree kidnapping, criminal gang participation, conspiracy to commit robbery and possession of an offensive weapon. At trial, the potential jurors underwent individual voir dire. During this voir dire the district court judge made comments concerning the questioning tactics employed by the defense counsel. Additionally, during the second day of voir dire a local newspaper ran a number of articles about the trial which included a discussion of Voelkers' prior criminal records. After the article appeared, Voelkers renewed his motion for change of venue which the district court denied.

At close of evidence, the district court judge became ill and a substitute judge presided over jury instructions and deliberations. Voelkers was convicted and appealed his conviction claiming, among other things, that the district court

erred in failing to declare a mistrial after the sudden illness of the original trial judge and in denying his motion for change of venue.

HELD: Pretrial publicity warrants a change of venue when "such a degree of prejudice exists in a county in which a trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with the jury selected from that county". Under this standard, a juror need not be completely ignorant of the issues and events involved in the trial and is not prejudiced simply because the juror is exposed to news accounts.

HELD: In determining whether the news accounts rise to the level of actual prejudice, the court considers whether the accounts: rendered an opinion on the guilt of the accused; are factual and informative or inflammatory in tone; contain editorial denunciations of the defendant; contain emotional stories regarding the defendant or victim; or whether they are inaccurate, misleading or unfair. In this case, the court properly found the news accounts were not inflammatory or misleading and were factual, informative, and accurate. Even though many of the jurors read the news accounts, each juror stated they could be impartial and would lay aside any preconceptions. Accordingly, the jury was not prejudiced to a degree that change of venue was improperly denied by the court.

HELD: The trial judge's conduct in intervening in the voir dire process was within that judge's discretion. Although the Iowa Court of Appeals did not condone all of the district court judge's comments made during voir dire, the statements themselves did not reflect hostility toward the defense or bias in favor of the prosecution.

HELD: The substituted judge did not make any particularized, written or oral certifications on the record, and it was clear he had sufficiently familiarized himself with the case after the original trial judge became ill. Consequently, the substitute trial judge complied with Iowa Rule Civ. P. 18(c)(b)(1) and possessed the ability to see the trial through to its conclusion. Voelkers suffered no prejudice from the substitution, particularly in light of the fact the substitute judges participation was limited to jury instructions, closing arguments, and jury deliberations.

Campbell v. Quad City Times, 547 N.W.2d 608 (Iowa Ct. App. 1996)

Judges — Recusal

Campbell brought an action against the Quad City Times contending it had libeled him by publishing a report concerning his arrest on tax-related charges. After the Quad City Times

moved for summary judgment, Campbell filed a motion for change of venue out of a county in the Seventh Judicial District. The motion for change of venue was primarily based on the claim that Campbell had previously filed complaints with the Judicial Qualifications Commission against three Seventh Judicial District judges. One of the those judges denied his motion for change of venue and a different judge granted the Quad City Times' motion for summary judgment. Among other issues, Campbell appealed the Court's denial of its motion for change of venue contending the judge should have recused himself from considering that motion.

HELD: In support of his motion for change of venue, Campbell claimed that he had previously filed a complaint against a judge because the judge was a "criminal" and a member of an organized crime business. The judge responded that he did not recall ever having a complaint filed against him and absolutely no evidence was presented to indicate otherwise. As Campbell failed to provide any evidence whatsoever supporting these allegations, the judge properly concluded he did not need to recuse himself. Further, Campbell's motion for change of venue was properly denied.

McKinley v. Iowa Dist. Court for Polk County, 542 N.W.2d 822 (Iowa 1996)

Judges - Recusal

During a contempt proceeding arising from a dissolution action between Susan McKinley and Timothy McKinley, Timothy McKinley's counsel attempted to introduce certain evidence into the record at which point Susan McKinley's counsel objected. The trial judge, obviously annoyed at what he considered to be unnecessary delay, adjourned the proceeding to allow counsel to find a proper witness but stated "and I want it on the record that I will take this into account on my determination of attorneys' fees". Thereafter, Susan McKinley's counsel filed a motion to recuse the judge contending his comment on an award of attorneys' fees clearly indicated he had already reached his conclusion on the merits of the case before the close of evidence. The judge denied the motion and appeal was taken on this and other issues.

HELD: Although a litigant is entitled to a neutral and detached judge, actual prejudice must be shown before recusal is necessary. The test is whether a reasonable person would question the judge's impartiality. In this case, it was undisputed that Susan McKinley had committed an act in default of the dissolution decree and the court's seeming anger at her attorney's insistence on strict proof of the default does not automatically show the judge was biased on the question of contempt.

Schrock v. Iowa Dist. Court for Polk County, 541 N.W.2d 256 (Iowa 1995)

Small Claims Court - Power to Rule on Post-trial Motions

After Schrock confessed judgment in small claims court, the court entered an ex parte judgment on the amount demanded. Thereafter, the plaintiff filed a motion to set aside the judgment contending she would be barred by principles of res judicata from pursuing her remaining claims for damages in district court. After a hearing, the district associate judge, sitting in small claims court, granted the plaintiff's motion to set aside the ex parte judgment. Schrock then filed the petition for writ of cert challenging the small claims court's power to set aside a judgment entered in small claims court.

HELD: The small claims court does not have jurisdiction to consider and rule on post-trial motions emanating from a small claims action. Post-trial motions are properly addressed to the district court pursuant to § 631.13 of the Iowa Code.

Becker v. Wright, 540 N.W.2d 250 (Iowa 1995)

Venue - County as Named Party

Charges of child endangerment and assault against Becker were filed but later dropped. Shortly thereafter, Becker, his girlfriend and children filed a malicious prosecution suit in **Linn County** against Benton County, its sheriff and sheriff's detective. The defendants moved for a change of venue to Benton County on three grounds. First, the cause of action was based on events that had occurred in Benton County. Second, all of the parties to the case resided in Benton County. Finally, two of the defendants were public officials of Benton County who, pursuant to Iowa Code § 616.3 must be sued where the cause of action arose. The motion was granted and the case was transferred to Benton County where the defendants obtained judgment in their favor. On appeal, Becker argued that Linn County was the proper venue in accordance with Iowa R. Civ. P. 167.

HELD: Under Rule 167 change of venue is mandatory in cases in which suit is filed in a county named that has also been named as a party to the suit. However, this rule is subject to a timely motion for change of venue. Although Becker resisted change of venue from Linn County to Benton County, once the case was transferred, he failed to file a motion for change of venue out of Benton County.

DAMAGES

Steven L. Serck

Foster v. Pyner, 545 N.W.2d 584 (Iowa Ct. App. 1996)

Adequacy

Mother brought action on behalf of minor child who suffered injuries to her lip as a result of dog bite. Jury returned verdict awarding $1,000 for past pain and suffering and $84.00 for past medical expenses. No damages were awarded for past loss of function, future loss of function, and future pain and suffering.

The district court found the verdict to be inadequate and ordered that $10,000 be added to the verdict to compensate for loss of function of the body, past and future. The order further provided for a new trial if the defendants rejected the additur. Defendants rejected the district court's additur and defendants appealed the order for a new trial.

HELD: Affirmed. The evidence indicated the remaining scar is conspicuous and permanent. The surgeons who testified stated that females with facial scars experience emotional distress as they mature. We remand for a new trial on the issue of all elements of both the mother and the daughter's damages.

Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889 (Iowa 1996)

Adequacy/Burden of Proof

The plaintiff, while carrying two bowling balls, exited a bowling alley through a door clearly marked "emergency exit only" onto a concrete slab covered with snow and ice. Once outside, the plaintiff slipped and fell. The plaintiff did not seek medical attention until nearly three months later when he saw his chiropractor. Prior to seeking medical advice, the plaintiff continued to manage a restaurant he and his wife owned and never missed a day of work. At trial, medical testimony showed the plaintiff sustained numerous other injuries prior to and subsequent to the fall. The jury returned a verdict in favor of the plaintiff, but awarded him only $100 in damages for past pain and suffering. The jury made no award for future pain and suffering, past medical expenses or loss of past and future function. Plaintiff filed a motion for a new trial which was denied. Plaintiff appealed on the basis that the verdict was inadequate and not supported by sufficient evidence.

HELD: Affirmed. An award of damages depends on the facts of the case. The test which a reviewing court must apply is whether the verdict fairly and reasonably compensated the injury the party sustained. Even though evidence presented at trial may

justify a higher award, the key question is whether, giving the jury its right to accept or reject whatever portions of conflicting evidence it chose, the verdict effects substantial justice between the parties. A plaintiff in a premises liability suit has the burden to establish that he did not suffer from disability prior to the accident. A defendant's liability is limited to injuries caused by his own acts of negligence and not for injury or impaired health due to other causes.

McHose v. Physician & Clinic Services, Inc., 548 N.W.2d 158 (Iowa Ct. App. 1996)

Adequacy/Mitigation

Plaintiff physician and defendant corporation entered into agreement under which defendant was to construct and equip a clinic facility at which plaintiff and a second physician hired by defendant were to practice. Plaintiff was to be paid $15,000 per year by the defendant as the medical director and the plaintiff, at the end of two and five years, would have the option of purchasing the building and the hard assets at a depreciated value. Ultimately, defendant pursued other options for the clinic and plaintiff brought action for breach of contract. The district court held that defendant breached its contract and awarded plaintiff $37,312 plus interest. Plaintiff appealed claiming that the damages were an inadequate remedy and that the district court wrongly applied mitigation principles when assessing damages.

HELD: Reversed and remanded. Defendant failed to plead mitigation as a defense. Thus, district court erred because it applied mitigation principles without limiting their application to the circumstances where testimony of plaintiff did not provide full or sufficient evidence. In addition to misapplying mitigation principles, the district court failed to properly account for various elements of loss suffered by plaintiff and the award is inadequate. The lower court's opinion is reversed and remanded for a new trial on damages only.

Collins v. King, 545 N.W.2d 310 (Iowa 1996)

Collateral Source

Plaintiff was injured in a car accident and sued defendant for negligence. The trial court deducted the amount of disability payments that plaintiff had received from her employer after the accident from the sum of the damages awarded to plaintiff. The trial court ordered these deductions based on the court's belief that Iowa Code section 668.14 incorporated disability income payments within the meaning of "medical care, rehabilitation services, and custodial care."

HELD: Reversed. The language of section 668.14 does not specify that disability income payments from employers are to be deducted from damage awards. The common law collateral source rule requires that a plaintiff's recovery from a tortfeasor is not to be reduced by the sum of payments received from another source, i.e. an employer. Accordingly, section 668.14 does not apply to disability income payments and the plaintiff is entitled to keep the payments that she received from her employer.

Lamb v. Newton-Livingston Inc., 1996 WL 411878 (Iowa Ct. App.)

Excessiveness

Plaintiff, daughter of deceased who committed suicide while in nursing home operated by defendant, brought suit for damages associated with loss of consortium resulting from the death of her mother. Jury awarded plaintiff $400,000 for loss of parental consortium. Trial court ordered a remittitur of the verdict to $100,000.

HELD: Affirmed. Trial court did not err in finding verdict of $400,000 excessive. A damage award will not be set aside unless it is: (1) flagrantly excessive or inadequate, or (2) shocks the conscience or sense of justice, or (3) raises a presumption it is the result of passion, prejudice, or other ulterior motive, or (4) lacks evidential support. Support for setting aside verdict as excessive was found in a previous decision suggesting that an emotional distress award of $150,000 might be considered excessive.

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)

FLSA

Plaintiff appealed from a decision of the district court awarding damages for lost wages and benefits under the Federal Equal Pay Act and the Iowa Civil Rights Act but denying liquidated damages, damages for emotional distress, and attorney's fees. Plaintiff had brought action against her employer for violations of equal pay statutes after she discovered that male employee was paid one dollar per hour more than she was.

HELD: Affirmed in part, reversed in part, and remanded. Plaintiff was entitled to liquidated damages equal to her lost wages since employer had failed to plead 29 U.S.C. § 260 as a good faith defense. Because substantial evidence showed that plaintiff's emotional distress was not caused by discriminatory practice, she was not entitled to recover for these damages. Attorney fees should have been awarded under both the FLSA and Iowa Civil Rights Act because plaintiff prevailed. We adopt the

federal analytical framework for calculating attorney's fees in Iowa Civil Rights cases.

Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.,
540 N.W.2d 647 (Iowa 1995)

Indemnity

Midwest performed repair work at Pirelli's place of business under a contract whereby Midwest agreed to defend, indemnify and hold harmless Pirelli and its employees from any and all liability and damages due to injury or death to any persons, including employees of Pirelli.

A Pirelli employee was killed due to Midwest's negligence. Pirelli paid the worker's surviving beneficiaries a workers' compensation settlement. As part of the settlement, Pirelli withdrew its statutory lien and indemnity rights against any damages recovered by the employee's estate in a tort case against Midwest. Six days later Midwest agreed to a consent judgment against it and in favor of the employee's estate.

The district court allowed Pirelli to recover a large portion of its workers' compensation benefits paid to the surviving beneficiaries from Midwest pursuant to the indemnity terms of the contract.

On appeal, Midwest argues that Pirelli forfeited its indemnification rights by releasing its lien and subrogation rights against the injured employee's tort recovery from Midwest.

HELD: Reversed. We agree with Midwest. Here, the consent judgment entered against Midwest exceeded Pirelli's workers' compensation liability. Under such circumstances Midwest cannot be forced to pay a workers' compensation satisfaction. This would lead to double recovery by the employee's beneficiaries and double payout by Midwest for the same loss. Pirelli should have continued in force its lien and indemnity rights and then it would have been made whole when the beneficiaries recovered from Midwest. Pirelli released its subrogation rights against Midwest in the settlement with the beneficiaries. Under guaranty law, where a party whose obligation is guaranteed by another releases security for that obligation then the guarantor is discharged.

Aurora Business Park Assoc. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa 1996)

Liquidated Damages

Landlord sued tenant to recover unpaid back rent and remaining future rents under the lease after abandonment by tenant. The lease contained a rent acceleration clause which allowed landlord to recover balance of remaining unpaid rents less rents received as a result of re-letting of premises. Tenant claimed that provision amounted to a "penalty" and thus was non-enforceable while landlord viewed provision as a valid liquidated damages clause. District court held in favor of landlord and construed accelerated rent provision as a valid liquidated damages clause but did not adjust damages to account for future rents obtained by landlord due to the re-letting of premises.

HELD: Affirmed as modified and remanded. A provision for damages that reasonably approximates the anticipated or actual loss will be construed as a valid liquidated damages clause. The accelerated rent provision contained in the lease is a valid liquidated damages clause where it places landlord in position it would have occupied had the tenant performed and where it takes into account landlord's duty to mitigate damages by offsetting claim by amounts received in re-letting the property. District court must determine if property was relet and, if so, must adjust damages accordingly.

Kuelish v. West Side Unlimited Corp., 545 N.W.2d 860 (Iowa 1996)

Loss of Consortium

Plaintiff parents seek to recover consortium damages arising from the wrongful death of their adult son. The trial court dismissed for failure to state a claim. Plaintiffs appeal on the ground that equal protection principles give them the same right to recover for loss of consortium arising from the death of their adult child that an adult child has to recover for the death of his or her parents.

HELD: Affirmed. There is no common law right of adult children to recover for loss of parental consortium. Because plaintiffs do not challenge the constitutionality of Section 613.15, we express no opinion on whether that statute violates equal protection by allowing adult children to recover for loss of parental consortium while denying a corresponding right to parents of adult children to recover damages upon the child's death or injury. (Inferring that an equal protection challenge to Section 613.15 might be successful).

Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655 (Iowa Ct. App. 1995)

Lost Income

A racing engine that had been modified by defendant exploded and propelled shrapnel into plaintiff's leg. He was unable to work for three months and ultimately returned to work on a limited basis. Plaintiff testified that he was no longer as active as in the past and this had caused reduced earning capacity. He also claimed that he had lost significant potential winnings from mud racing. The jury awarded plaintiff $97,195.

HELD: We find that plaintiff presented insufficient evidence to submit to the jury the issue of his future lost income. The jury awarded $36,000 for loss of future income. However, plaintiff failed to present any evidence to show what his income would have been if not for the injury, or to project his future income after the injury. Plaintiff additionally failed to even introduce any evidence of the annual average wage increase of a person in his trade. Further, the evidence showed only a loss of income in the year plaintiff was injured. Plaintiff's income in subsequent years returned to the level that it had been previous to the injury.

Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293 (Iowa Ct. App. 1995)

Mechanics Lien/Construction

Bidwell contracted with Midwest Solariums for construction of a sun room on her house. Bidwell claimed the construction was defective. Bidwell paid all but $3,800 of the $19,000 contract price. Bidwell brought suit claiming breach of contract and seeking rescission. Midwest counterclaimed, seeking foreclosure on its mechanic's lien. The district court granted Bidwell damages for breach of contract in the amount it would cost to fix the defects. With regard to Midwest's counterclaim, however, the court refused to foreclose on the mechanic's lien because Midwest did not establish it had substantially performed the contract terms.

HELD: To successfully enforce a mechanic's lien, substantial performance of the contract is required. Omissions or deviations from the contract must be inadvertent or unintentional and must not impair the structure as a whole. Any omissions or deviations must be remediable without doing material damage to other portions of the construction, and may be compensated for by deductions in the contract price.

Here, Midwest substantially performed the contract. Substantial performance of the contract, however, did not completely discharge Midwest's promissory duty to Bidwell and she could still sue for damages. In defective construction cases, "damages may include diminution in value, cost of construction

and completion in accordance with the contract." Thus, the district court's award of damages for the cost to fix the defects was supported by the evidence. Because Bidwell's award of damages was larger than Midwest's mechanic's lien, Midwest was not entitled to foreclosure on the lien. Bidwell had also sought rescission of the original contract. In order to obtain a rescission "there must be a breach so substantial it defeats the object of the contracting parties." Such a substantial breach did not occur in this case.

Service Unlimited, Inc. v. Elder, 542 N.W.2d 855 (Iowa Ct. App. 1995)

Mechanics Lien/Construction

Service Unlimited entered into a contract with the Elders for remodeling work. The contract price was $78,977. The contract included a provision requiring Service to provide approximately 2,800 square feet of concrete for the main floor of the building and to insulate the ceiling to a certain level. The Elders paid Service over $63,000, but refused to make a final payment, alleging that the work had not been completed. Service filed a mechanic's lien and sought to foreclose on it. The Elders filed a counterclaim alleging breach of contract and negligence for the alleged failure of Service to complete the project as required in the contract. The district court found that Service was entitled to recover the unpaid contract balance, however, that amount would be reduced by an amount for work improperly performed. As a result of this ruling, Service was not entitled to recover on its mechanic's lien because the sum Service owed the Elders was more than the amount the Elders owed Service.

HELD: Affirmed. With regard to damages, the cost of correcting the defects or completing the omissions is the proper measure and the general rule. These costs can be limited, however, by the concept of economic waste. If the only way the defects can be corrected is at a cost grossly disproportionate to the benefit obtained by the owner or if correcting the defect would involve destruction of the builder's work, the proper measure of damages is the reduced value of the building. The diminution in value is then measured by the difference between the value of the building if the contract had been correctly performed and the value of the performance actually received. The cost of correcting the defects was correctly used to determine damages in this instance because the cost was not grossly disproportionate to the possible benefit to be received by the owners through correction.

J. M. Grimstad, Inc. v. Scangraphics, Inc., 539 N.W.2d 732 (Iowa Ct. App. 1995)

Mitigation

Landlord of a commercial property commenced an action to recover damages for unpaid rent after tenant vacated premises. Tenant counterclaimed for certain lease payments it had previously made. The trial court denied both claims.

HELD: Affirmed. When a tenant abandons leased premises, the landlord has a duty to mitigate damages by using reasonable diligence to relet the property at the best rent available. The burden is on the lessor to show due diligence. Here, a prospective tenant had made inquiries about leasing the premises but the landlord had not actively sought to lease the premises to that tenant. Therefore, there was substantial evidence in the record to support the trial court's finding that the landlord did not exercise reasonable diligence.

Hawkeye Motors, Inc. v. McDowell, 541 N.W.2d 914 (Iowa Ct. App. 1995)

Motor Vehicles

Defendant admitted liability for damage to a 1990 Buick Reatta convertible owned by plaintiff. Plaintiff argued it would be required to inform potential purchasers of the accident under Iowa Code section 321.69 because the damage exceeded $3,000. It presented expert testimony that the car was a collector's item and that buyers would be unwilling to pay full price after hearing it had been damaged. The district court awarded damages in the amount of $4,000 and plaintiff appealed.

HELD: Affirmed. When a motor vehicle cannot by repair be placed in as good a condition as it was before the injury, then the measure of damages is the difference between the market value before and after the injury plus the value of the use of the vehicle for the time reasonably required to repair or replace it, plus cost of repairs.

Here, plaintiff takes issue with the trial court's use of NADA book value of the car which showed that its book value between the date of the accident and the time of trial had actually declined $2,000. The range of evidence in this case indicated that damages could be between zero and $7,000. The evidence supported the trial court's award of $4,000.

Hughes v. Burlington N. R.R. Co., 545 N.W.2d 318 (Iowa 1996)

Offer to Confess

Plaintiff accepted defendant's offer to confess judgment for $50,000 "together with costs accrued to the date of this offer." The district court denied prejudgment interest and court costs associated with depositions not filed at the time of the filing of the offer to confess judgment. It awarded plaintiff deposition costs filed prior to filing the offer to confess.

HELD: Affirmed. An offer to confess judgment is a voluntary agreement and not a court-imposed resolution. As such, the parties are free to make provisions to cover issues such as interest and court costs. If there is no express agreement, the judgment amount draws interest from the date of the judgment and not before. The costs associated with the depositions submitted to the court after the offer to confess judgment had been filed are not recoverable because the depositions were not admitted at trial and, therefore, were not taxable as expenses. (Inferring that none of the depositions were properly taxable as costs because there had been no trial. The court observed that defendant failed to appeal from the district court's award of deposition costs on file prior to filing of the offer to confess.)

Rosenberger Enterprises, Inc. v. ISCI, 541 N.W.2d 904 (Iowa Ct. App. 1995)

Punitive Damages

Jury found that insurance agent negligently placed liability insurance with foreign reinsurer that was not licensed to do business in Iowa. The district court correctly granted defendant's motion for directed verdict on plaintiff's punitive damages claim. Although the agent could have been more careful in his investigation of the company, there was no evidence from which the jury could infer that the agent intentionally or recklessly placed the policy with a financially irresponsible insurer.

Economy Roofing and Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995)

Punitive Damages

Former corporation president and his mother left employment of the corporation and started a competing business. Plaintiff corporation sued the son (Douglas) and the mother and the competing business alleging breach of fiduciary duties as to the son, intentional interference with contractual expectancies as to

the son and the competing business and violation of the Trade Secrets Act as to all three defendants. Jury returned a verdict in favor of the plaintiff and against Douglas for compensatory and punitive damages as to the breach of fiduciary duty claims. The district court granted Douglas a new trial.

HELD: Reversed. The district court erred in granting a new trial on the punitive damages award in the amount of $75,000 and the compensatory damages award in the amount of $30,000 based on breach of fiduciary duty by Douglas. The district court supported its ruling on the punitive damages issue partially based on the reasoning that there was very little evidence introduced as to Douglas' financial condition so that the jury had nothing upon which to base its punitive damages award. We have never held that evidence of a defendant's financial condition is a pre-requisite to an award of punitive damages. We agree with those states that do not require such evidence to support a punitive damages award. Courts considering the issue have reasoned that the defendant should bear the burden of introducing evidence of lack of financial resources to pay a punitive damage award. Here, because Douglas failed to introduce evidence of his lack of resources to pay punitive damages, he cannot now complain because of the lack of such evidence.

The district court also reasoned that the punitive damage award was "so large as to be conclusively the result of passion and prejudice which shocks the conscience of the court." Here, Douglas' actions were willful and designed to financially harm plaintiff. We find it significant that the jury awarded only half of the $150,000 that Economy requested for punitive damages. If the verdicts were the result of passion and prejudice then it is likely the jury would have awarded the full amount allowable under the pleadings and instructions. We think that the evidence more than adequately establishes that $75,000 was a reasonable amount to award for punitive damages.

Schaller v. State, 537 N.W.2d 738 (Iowa 1995)

Taking

County conservation board vacated a portion of a road and title reverted to Schaller. Schaller attempted to negotiate a lease of his portion of the road to DNR, who owned remainder of road. The public had used the road for approximately 30 years and the DNR claimed it had a prescriptive easement for continuing public use. Therefore, it refused to negotiate a lease with Schaller. Schaller instituted mandamus proceedings to compel DNR to lease his portion of the road. DNR alleges that the county conservation board had no right to vacate the road to Schaller because of the public's prescriptive right to use the vacated road. District court sustained Schaller's summary judgment

motion and ordered DNR to condemn Schaller's portion of the road and either purchase or lease it.

HELD: Here, there was a taking of private property by DNR and the district court correctly ordered institution of condemnation proceedings. As damages, Schaller is entitled to recover the difference between the fair market value of the property immediately before condemnation and before it has been affected by the proposed public use, and the fair market value of what is left after the taking.

Notelzah, Inc. v. Destival, 537 N.W.2d 687 (Iowa 1995)

Wrongful Possession

District court found that plaintiff was in wrongful possession of a tract of land, quieted title in adjacent landowners and awarded adjacent landowners' rent for the years in which plaintiff was in wrongful possession. Plaintiff argues the district court erred in failing to award it the value of improvements made upon the land during plaintiff's occupation.

HELD: Affirmed. When an occupant of real estate holds color of title and has in good faith made valuable improvements such person may petition the court for the value of the improvements pursuant to Iowa Code Chapter 560.1. However, the petition must accurately establish the value of the land and the improvements. Here, plaintiff failed to provide proof of its expenditures on the land or evidence of any enhanced market value. No expert appraisers testified regarding any added value, nor were any receipts for improvements presented. The only evidence was vague testimony from plaintiff's president.

Plaintiff also argues the district court erred in awarding the adjacent landowners' rent for the years 1984 through 1993 while it occupied the land. Where a party has been in wrongful possession of property damages may be assessed in the form of rent payable to the rightful owners. Thus, the district court correctly awarded rent for those eight years.

EVIDENCE

Rex Staub

Gaskey v. Iowa Dep. of Transp., 537 N.W.2d 695 (Iowa 1995)

Administrative Hearings

HELD: Generally, hearsay evidence is admissible at administrative hearings and may constitute "substantial evidence" to uphold an agency decision.

HELD: Evidence is substantial and requires affirmance of an agency decision when a reasonable person could accept it as adequate to reach the same finding. Additionally, evidence in support of an agency decision is not insubstantial simply because two inconsistent conclusions can be drawn from the evidence.

Bigalk v. Bigalk, 540 N.W.2d 247 (Iowa 1995)

Admission by a Party Opponent - Competency at Time of Admission

Bigalk filed suit against a property owner after he was injured in a fall down the owner's stairwell. Bigalk claimed the property owner was negligent in failing to properly illuminate, cover or place railings around the stairwell. At trial, the defendant was permitted to cross-examine Bigalk with respect to the contents of a tape-recorded statement she had given to an insurance adjuster four days after the fall. Bigalk objected contending the statement was incomplete and that she was under the influence of heavy medication at the time. The jury returned a verdict in favor of the defendant and on appeal the Iowa Court of Appeals concluded the use of this statement was improper. The Iowa Supreme Court granted review.

HELD: In reversing the Court of Appeals, the Iowa Supreme Court held the contents of the plaintiff's recorded statement to the insurance adjuster contained relevant information concerning the plaintiff's knowledge of the hazard. Accordingly, it could be used for more than impeachment and was admissible as an admission by a party opponent.

HELD: The facts surrounding the plaintiff's physical condition and state of medication at the time the statement was given goes to the weight of the evidence not to its admissibility. Therefore, it was within the sound discretion of the trial court to allow use of this statement during defendant's cross-examination of the plaintiff.

Hyler v. Garner, 548 N.W.2d 864 (Iowa 1996)

Compromise Offers

Hyler purchased a motor home from Ed Garner's Autorama RV Center. After experiencing numerous problems with the motor home, Hyler's attorney wrote Garner and in his letter he indicated that Hyler was rescinding the purchase agreement and tendering back the motor home. Garner's attorney wrote back denying the rescission and refusing the tender. Numerous other letters were written between the attorneys concerning rescission and issues of warranty coverage.

When Hyler took the motor home in for a final attempt at repairs, Garner refused to release the motor home unless Hyler agreed to release Garner from all further warranty liability. As a result, Hyler filed suit against Garner and Autorama on a number of various contract-based theories.

During trial, the district court admitted into evidence twelve letters written by the parties' attorneys. Garner contends the letters were inadmissible under Rule of Evidence 408 as they constituted evidence of settlement negotiations offered solely to prove or disprove liability or damages.

HELD: Although the letters contained offers of compromise, they were admissible because they were relevant on the following issues: (1) mutual rescission of the purchase agreement; (2) whether Hylers had tendered the motor home to Autorama; (3) whether Autorama assumed the manufacturer's written and implied warranties; and (4) whether Hylers should have been awarded attorneys' fees under the Magnuson-Moss Act. Accordingly, the district court acted properly in admitting the letters.

HELD: In any event, Garner's statement in his brief that he disputed "fully and completely the trial court's findings of fact, conclusions of law and judgment entry. The trial court's findings are not supported by the evidence of the law and do not reflect judicial balance" was not sufficient to identify specific error as required by the Supreme Court's de novo review. Accordingly, no error was preserved by Garner on this issue.

State v. Puffinberger, 540 N.W.2d 452 (Iowa Ct. App. 1995)

Double Hearsay

Puffinberger was tried and convicted of terrorism and possession of an offensive weapon. During the trial, over Puffinberger's objection, the State was allowed to introduce two written statements taken from Puffinberger's co-defendant. The statements implicated Puffinberger in the shooting and made several references to comments that Puffinberger made to the co-defendant. The co-defendant did not take the stand and therefore was not subject to cross-examination over his written statements. On appeal, Puffenberger contended the Court committed reversible err in admitting the statements into evidence.

HELD: The written statements clearly were hearsay under Rule of Evidence 801. Further, because the co-defendant's statements contained statements made by Puffinberger, the statements constituted double hearsay or hearsay within hearsay. When considering double hearsay, both statements must be found to conform to a hearsay exception for purposes of admissibility. Although Puffinberger's statements were admissible because they constituted an admission by a party opponent under Rule

801(d)(2)(A), the co-defendant's statements did not fit within any exception. The only conceivable exception would have been statements by a co-conspirator, however, that exception was inapplicable because the state failed to establish a conspiracy existed between Puffinberger and the co-defendant.

State v. Campbell, 539 N.W.2d 491 (Iowa Ct. App. 1995)

Hearsay – Excited Utterances/Statements for Medical Treatment

Campbell was charged and convicted of domestic abuse. Prior to trial, Campbell learned the state did not intend to call his wife as a witness and, instead, intended to introduce evidence of conversations between his wife, Tammie and others "to show that she was a victim and that the defendant was the aggressor". Tammie did not appear at trial and the court allowed her treating nurse to read into the record her notes of Tammie's description as to how she received her injuries. Additionally, the investigating police officer was allowed to testify as to what Tammie told him at the police station at which time she was hysterical and crying. Campbell's appeal of the conviction is based, in part, on admission of the victims two hearsay statements without allowing Campbell the opportunity to confront his accuser.

HELD: Tammie's hearsay statement to the officer was admissible as an excited utterance and her statement to the nurse was admissible as a statement made for purposes of medical diagnosis or treatment. Because the statements contained enough guaranties of reliability, the state was not required to show the witness was unavailable and thus did not violate the defendant's confrontation rights.

State v. Rice, 543 N.W.2d 884 (Iowa 1996)

Hearsay

During Rice's criminal trial on charges of robbery and theft, the state introduced a police report which contained clear hearsay. On appeal, Rice claims the district court erred in admitting the hearsay statement over his objection.

HELD: Without reaching the issue as to whether the hearsay was admissible, the Iowa Supreme Court pointed out that admission of hearsay alone is not a valid ground for reversal in cases where the state upholds its burden of proving the evidence did not have an impact on the jury's verdict of guilty. In essence, the Supreme Court found the hearsay was harmless and it did not prejudice the defendant regardless of its admissibility. Conviction affirmed.

Economy Roofing and Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995)

Jury Affidavits

After several unsuccessful attempts to purchase Economy Roofing, Economy's president, Zumaris, resigned his position and started a new business in direct competition with Economy. Economy then brought suit against Zumaris and the business he formed alleging breach of fiduciary duties, intentional interference with Economy's contractual and business expectancies and misappropriation of Economy's trade secrets. At trial, the jury returned a verdict in favor of Economy on some, but not all, of the claims. Economy was awarded $30,000 in compensatory damages and $75,000 in punitive damages. Zumaris's motion for new trial was granted by the court based on two juror affidavits which indicated the jury had based their punitive damage award on evidence presented on two claims withdrawn from their consideration via directed verdict.

HELD: In accordance with Rule of Evidence 606(b) jurors are incompetent to testify to any matters or statements **occurring in the course of deliberations**. Although there is an exception to this rule in instances where the jury considers "extraneous prejudicial information", that exception does not apply here because the affidavits concern information that was a matter of record, albeit on claims that were subsequently dismissed. The district court committed reversible err by considering the jury affidavits.

State v. Kinsel, 545 N.W.2d 885 (Iowa Ct. App. 1996)

Lay Witness Testimony

HELD: "Lay witnesses may give opinion testimony, but only when the opinions or inferences are: (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

State v. Zeliadt, 541 N.W.2d 558 (Iowa Ct. App. 1995)

Prior Bad Acts

Zeliadt was charged with indecent exposure after he was caught riding his bicycle nude across the Iowa State campus on April 24, 1994. At trial, the prosecution sought to introduce the testimony of a witness who saw him nude on two other occasions within a year of the April 24th incident as evidence of prior bad acts under Rule of Evidence 404(b). The court allowed

the prosecution to introduce this testimony and Zeliadt was convicted.

HELD: Given the fact the prior bad acts occurred within eleven months of the incident resulting in his charges, the acts were not too remote to preclude admission of the prior bad acts.

HELD: Prior bad acts evidence with different victims is properly admitted where the evidence tends to demonstrate a sexual pattern engaged in by the defendant. In light of the facts in this case, the district court properly admitted evidence of Zeliadt's prior bad acts. Conviction affirmed.

State v. Johnson, 539 N.W.2d 160 (Iowa 1995)

Prior Consistent Statements

Johnson was convicted of indecent contact with a child. During his trial, in rebuttal to his testimony, the state was allowed to introduce the child victim's video taped statement as a prior consistent statement to rebut a charge of recent fabrication in accordance with Iowa Rule of Evidence 801(d)(1)(B).

HELD: The appellate court reviews a ruling on the admissibility of video taped prior consistent statement for abuse of discretion.

HELD: The trial court abused its discretion by admitting the prior consistent statement because the videotaped statement was made after the alleged motive to fabricate arose. This case serves to overrule the Iowa Supreme Court's apposite position in Gardner v. State, 490 N.W.2d 838 and is in accord with Tome v. United States, 513 U.S. _____, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995).

State v. Berry, 549 N.W.2d 316 (Iowa Ct. App. 1996)

Prior Inconsistent Statements

HELD: The procedure for impeachment by use of a prior inconsistent statement is to: (1) ask witness if the prior statement was made; (2) give its substance; (3) identify the time and place of the statement; and (4) identify the person to whom it was made. If the witness admits to making the prior statement, no extrinsic evidence of the statement is needed to impeach the witness. If the witness denies making the statement, extrinsic evidence is permitted and the witness is given the opportunity to explain or deny the statement.

HELD: If extrinsic evidence of a prior inconsistent statement is necessary, that extrinsic evidence must be authenticated before admission into evidence.

McIntosh v. Best Western Steeplegate Inn, 546 N.W.2d 595

Subsequent Remedial Measures

McIntosh injured himself in a slip-and-fall on ice in Best Western's parking lot. At trial, McIntosh offered pictures of the area where the fall took place taken the day after the fall. Although the pictures indicated there was no ice in the area, the photographer testified that the same location had been icey the day before. Best Western's witness testified the photograph showed the condition as it existed at the time of McIntosh's fall. As a result, McIntosh sought to admit the testimony of the hotel manager who testified, via an offer of proof, that she had applied deicing compound to the area immediately after learning of McIntosh's fall. Relying on Rule of Evidence 407, (Subsequent Remedial Measures), the district court refused to allow the jury to hear this testimony.

HELD: Although Rule 407 precludes the evidentiary use of remedial measures to prove negligence, remedial measures are admissible to prove other legitimate matters. In this case, McIntosh should have been permitted to offer evidence that a deicing agent had been applied for purposes of showing the change in conditions between the time of the fall and the time of the taking of the photographs.

HELD: When admissible evidence is presented with respect to the condition of the area where the fall occurred, it should not be excluded under Rule 407 on the basis that it might also tend to establish negligence. The remedy for this situation is a limiting instruction to the jury.

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

Use of Agency Determinations – Discrimination

Vaughan was terminated from his employment at a Must Company fast-food restaurant. Following the termination, he filed a complaint with the Equal Employment Opportunity Commission and the Iowa Civil Rights Commission on the grounds of age discrimination. The EEOC ultimately found there was insufficient evidence of age discrimination to establish a violation.

Vaughan then filed suit against Must claiming his termination constituted an act of discrimination under the federal Age Discrimination in Employment Act (ADEA). At trial, the court refused to allow the defendant to submit the EEOC's

determination into evidence. The court's determination of this issue, among others, was appealed by Must.

HELD: The Iowa Supreme Court relied upon Johnson v. Yellow Freight Systems, 734 F.2d 1304 (8th Cir. 1984), which stated, "there is little probative value in the Equal Employment Opportunity Commission's conclusory statements regarding the same evidence presented to the jury. To admit the report under these circumstances would amount to admitting the opinion of an expert as to what conclusion the jury should draw, even though the jury had the opportunity and ability to draw its own conclusions". The trial court's exclusion of the EEOC report was affirmed.

GOVERNMENT

Steven L. Serck

State v. Terry, 541 N.W.2d 882 (Iowa 1995)

Cemeteries

Table Mound Township appeals the district court's holding that it was required to maintain a privately owned cemetery that is devoted to public use. It also appeals the district court's holding that the Township is to preserve the cemetery's burial records.

The facts showed that the cemetery's private owners have effectively abandoned it and it is being maintained by volunteers. The state argues that the Township has a statutory obligation to preserve the burial site and records pursuant to Iowa Code section 566.33 which provides that a governmental subdivision with a burial site within its jurisdiction shall preserve and protect the burial site and maintain its physical integrity.

HELD: Because the private owners are not currently maintaining the cemetery, the Township is obligated to do so. However, the district court incorrectly ordered the Township to maintain the burial records because the records are currently being maintained by a receiver. The Township's duties in all respects are limited by the funds available through appropriate Township tax levies for that purpose.

Glawe v. Ohlendorf, 547 N.W.2d 839 (Iowa Ct. App. 1996)

Condemnation

County officials condemned land owned by the plaintiff. Pursuant to Iowa Code § 6B.4 (1933), the Board of Supervisors "appointed not less than 28 residents of the county" whose names were placed on a list as being eligible to serve as members of a

compensation commission. The statute further provided that of the initial 28 persons, one-fourth must be licensed real estate sales persons or real estate brokers. Plaintiffs were not satisfied with the amount determined as proper compensation by the commission and filed a petition for writ of certiorari. While conducting discovery, plaintiffs learned that one of the members appointed to serve in the real estate category was not licensed. Plaintiffs amended their petition to allege the actions by the commission were illegal because the membership did not comply with the statute. The district court quashed the writ of certiorari and the plaintiffs appealed.

HELD: Affirmed. The member in question meets the essential requirements of being a "de facto officer." A person who assumes and performs duties of public office under color of authority and is recognized and accepted as a rightful holder of office by those who deal with him is a de facto officer, even though there may be defects in the manner of his appointment. To constitute a de facto officer, there must be an office de jure to be filled and the appointment to that office must be made by proper authority. The appointment in question fulfilled these requirements. In addition, the commissioner in question was recognized as a person possessed with the necessary qualifications to act as a commissioner. Furthermore, there was no hint of fraud, deception or untruthfulness in the commissioner's appointment to the commission.

Medco Behavioral Care Corp. of Iowa v. State of Iowa, Department of Human Services, WL 411928, ___ N.W.2d ___ (Iowa 1996)

Conflict of Interest

The Iowa Department of Human Services awarded a $200 million contract to provide managed mental health care for Iowa's Medicaid program to Value Behavioral Health. The award was challenged by Medco Behavioral Care Corporation who alleged a conflict of interest. The district court found, under applicable federal law, that the conflict of interest alleged was serious enough to disqualify Value from the bidding process. On remand, the agency complied with the district court's order disqualifying Value and subsequently awarded the contract to Medco. Value appealed the decision of the district court and the action of the agency in disqualifying it.

HELD: Affirmed. Federal regulations provide three broad categories in which an organizational conflict of interest may arise: (1) instances in which a firm, by virtue of its performance of a government contract, has to some degree set the ground rules for the government contract at issue by either writing the work statement or drafting the contract specifications; (2) when a firm's work under one government contract might require an evaluation of its own performance under

another government contract; and (3) when a firm has access to nonpublic information as part of its performance of an earlier government contract that may provide a competitive advantage in the current government contract in question. Cases interpreting these regulations require a moderate level of proof to establish a violation. Here, the evidence supporting disqualification was overwhelming, with Medco establishing a paper trail detailing the conflict of interest.

Kane v. City Council of Cedar Rapids, 537 N.W.2d 718 (Iowa 1995)

Development/Spot Zoning

Plaintiffs are property owners challenging the approval by the city council of a revised site development plan for a condominium project. Plaintiffs claim the approval plan did not receive the statutorily required three-fourths majority vote of the council and that the approval by the council constituted illegal spot zoning. In 1992 Peiffer, an architect, submitted a revised site development plan for the area in question which would permit the construction of twin six story condominium towers. The plan also included the development of an access road over an adjacent residential lot. The council approved by resolution the Peiffer revised site development plan by a vote of 3 to 2. The district court found in favor of the city.

On appeal, plaintiffs claim that the council is required to have four votes to approve by ordinance the Peiffer revised site development plan. Plaintiffs claim that the approval of a revised site development plan requires both the favorable vote of at least three-fourths of all council members and that the approval be accomplished by adoption of an ordinance, not merely a resolution.

HELD: Affirmed. Pursuant to Iowa Code §414.5, there was no three-fourths super majority required and the city had power to act by resolution rather than ordinance. Administrative decisions by a city council may be made by resolution. The city's code provides the council may approve, approve with modification or disapprove a revised site development plan by resolution after recommendation from the city planning commission.

Spot zoning results when a zoning ordinance creates a small island of property with restrictions on its use different from those imposed on the surrounding property. In determining whether there is a reasonable basis for spot zoning we consider the size of the spot zone, the uses of the surrounding property, the changing conditions of the area, the use to which the subject property has been put and the suitability and adaptability for various uses. We agree with the trial court that the approval of

the revised site development plan did not constitute illegal spot zoning.

City of Iowa City v. Hagen Elec., 545 N.W.2d 530 (Iowa 1996)

Eminent Domain; Zoning & Planning

In 1986, the city petitioned to enjoin defendant from continuing activities on his property in violation of an airport ordinance. Defendant counterclaimed stating that the ordinance constituted an illegal taking and inverse condemnation of his property and that his civil rights had been violated under 42 U.S.C. § 1983. City responded that defendant had failed to exhaust his administrative remedies and thus his legal claims were not ripe for review. The district court ruled in favor of defendant by holding that defendant was not required to exhaust his administrative remedies since to do so would be futile and that the airport ordinance constituted an uncompensated taking of defendant's property.

HELD: Reversed. Landowner had failed to exhaust administrative remedies and thus was precluded from pursuing his claim of an illegal taking. The city had a rational basis for adopting the zoning ordinance and thus landowner's substantive due process rights under § 1983 were not violated.

Currans v. Linn Co. Civ. Serv. Com'n, 540 N.W.2d 469 (Iowa Ct. App. 1995)

Equal Protection

Currans, a sergeant in the Linn County Sheriff's Department, was suspended without pay for failing to respond to a dangerous situation involving an inmate and failing to abide by jail policy in not properly keeping documentation of checks on that inmate.

Currans claimed that her suspension was not for "good cause" as required by Iowa Code chapter 341A. She also claimed that Chapter 341A violates the equal protection clause because it provides different disciplinary review procedures for county law enforcement officials than Iowa Code Chapter 400 provides for city police officers.

The County Civil Service Commission affirmed the sheriff's suspension but the district court reversed, holding that the record was inadequate to show just cause for the suspension.

HELD: Reversed and Civil Service Commission decision reinstated. "Just cause" requires a focus on the ability and fitness of an employee to discharge the duties of his or her position. This suspension meets that standard.

With regard to the equal protection attack, this case does not involve a suspect classification such as race, sex, or national origin. Also, the right to public employment is not a fundamental right under Iowa law. Therefore, we apply the rational basis test. Under this test the classification will be sustained unless the challenging party can demonstrate that it is patently arbitrary and bears no rational relationship to a legitimate government interest.

While it is true that the judicial review afforded to a sheriff's deputy is less than that afforded to police officers, the legislature could reasonably conclude that their differing duties necessitated this arrangement. A sheriff's deputy is appointed by an elected sheriff who is subject to electoral accountability. Also, counties employing deputies vary in size and resources.

Teague v. Mosley, WL 411928, ___ N.W.2d ___ (Iowa 1996)

Immunity

Plaintiff alleged his civil rights were violated when he was assaulted while an inmate in the Black Hawk County jail. He claimed that the Black Hawk County Supervisors violated their duties under the Iowa Code by failing to provide a safe environment at the jail. The district court granted summary judgment in favor of the Supervisors on the basis that they were entitled to absolute immunity for their actions.

Plaintiff argued that the court erred in granting summary judgment because the Supervisors were acting outside the scope of their legislative immunity. In addition, plaintiff contended a factual issue existed regarding whether the Supervisors provided adequate funding for the board and care of inmates as required by Iowa Code § 331.658.

HELD: Affirmed. Absolute immunity applies to local officials who take action in a legislative capacity. The Iowa Code mandates that "the County shall pay the costs of the board and care of the prisoners in the County jail, which costs, in the Board's judgment, are necessary to enable the Sheriff to carry out the Sheriff's duties under this section." The determination of what costs are necessary to provide board and care were expressly reserved to the Board of Supervisors by the legislature. Thus, the Supervisors were acting in a legislative capacity when they determined how much money should be allocated to security and safety at the jail.

Dickerson v. Mertz, 547 N.W.2d 208 (Iowa 1996)

Immunity

Plaintiff filed a civil lawsuit against the Department of Natural Resources and two officers, alleging the intentional torts of abuse of process, malicious prosecution and intentional infliction of emotional distress. The plaintiff also asserted a federal law claim under 42 U.S.C. § 1983, alleging defendants deprived him of due process under the 14th Amendment. The district court granted summary judgment for the defendants.

HELD: Affirmed. Via the Iowa Tort Claims Act, defendants are statutorily immune from plaintiff's claims of abuse of process and malicious prosecution. The tort of intentional infliction of emotional distress, however, is included in the waiver of sovereign immunity. We find as a matter of law, however, that the defendants' actions did not constitute outrageous conduct.

With regard to the § 1983 claim, defendants allege qualified immunity as an affirmative defense. Such a defense shields government agents from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Here, defendants had probable cause to issue the citations in question and thus were entitled to qualified immunity from liability in the plaintiff's § 1983 action.

City of West Branch v. Miller, 546 N.W.2d 598 (Iowa 1996)

Immunity

City of West Branch brought suit against the county assessor and auditor for loss of tax revenue resulting from defendants' failure to add annexed property to city's tax base. City claimed that defendants waived governmental immunity under Iowa Code § 670.4(2) due to the County's purchase of errors and omissions insurance. The District Court held that the County and defendants did not waive immunity and granted defendants' motion for summary judgment.

HELD: Reversed and remanded. The County's purchase of errors and omissions liability insurance waived governmental immunity for claims against auditor and assessor for their failure to assess taxes properly. Even though County's policy did not expressly address liability associated with tax assessment, such failure was covered as a "wrongful act" within the meaning of the policy.

Hunt v. State, 538 N.W.2d 659 (Iowa Ct. App. 1995)

Immunity

Action against state to recover for death of motorist who died at intersection that had been designated for installation of four-way stop signs but that had not yet had those signs installed. The district court granted the state's motion to dismiss pursuant to Iowa Code §668.1 which grants the state immunity for failing to erect traffic control devices.

HELD: We affirm the decision of the district court finding that the case should be dismissed for failure to state a cause of action upon which relief may be granted.

City of McGregor v. Janett, 546 N.W.2d 616 (Iowa 1996)

Immunity/Ultra Vires

Landowners allege that they relied upon representations by City Council that the City would not pursue condemnation proceedings against landowner's property. As a result, they did not appeal to district court to contest the condemnation and assessed value. Landowner brought suit against City for fraudulent misrepresentation by Council. District Court held in favor of landowners and entered judgment for the amount of the difference between the condemnation award and the fair market value of the property and for landowners' attorney fees.

HELD: Reversed. Unlike the State Tort Claims Act, the Municipal Tort Claims Act contains no immunity exception for misrepresentation. Thus, a municipality may be held liable for misrepresentations of its agents. However, a city council exercises power only through passage of motions, resolutions, amendments or ordinances. Informal statements or assurances by council members cannot establish the requisite elements of fraudulent intent.

Eilers v. City of Burlington, 544 N.W.2d 463 (Iowa Ct. App. 1995)

Municipal Corporations

Plaintiff, Burlington Police Captain, encouraged a fight between two juveniles on his front yard while off duty. In addition, plaintiff himself became involved in a scuffle with one of the boys. The Civil Service Commission of Burlington claimed that plaintiff's conduct constituted misconduct and imposed a five-day suspension without pay. The district court found no misconduct and reversed the decision of the Commission.

HELD: Reversed. Police officers must conduct themselves with good judgment and sound discretion. "Misconduct," as used in the Iowa Code, is conduct that is detrimental to the public interest. The actions of plaintiff did not reflect the leadership required of a law enforcement official and that they constituted misconduct justifying suspension without pay.

Burmeister v. Muscatine County Civil Service Commission, 538 N.W.2d 877 (Iowa Ct. App. 1995)

Property Interest

Plaintiff was a deputy sheriff in Muscatine County when he was notified by the sheriff that his employment was terminated. Plaintiff claims that he has a constitutionally protected property interest in his employment and should have been given a pre-termination hearing in compliance with due process. The Commission responded that plaintiff does not have a property interest in his employment. The district court reversed, finding that Burmeister had a property interest in future employment and should have been afforded a pre-termination hearing. It reinstated Burmeister.

HELD: Reversed. If plaintiff had a constitutionally protected property interest in his employment, he would be entitled to a pre-termination hearing.

Our Supreme Court has found that police officers do not have a property interest in their employment because of the need to maintain proper discipline and avoid disruption or impairment of the officers' public duties.

Davis v. City of Waterloo, WL 411876, ___ N.W.2d ___ (Iowa 1996)

Public Employees

Davis, a white male, sued the City of Waterloo after the City promoted an African-American to a position for which Davis had applied and for which Davis was most qualified. The district court found for Davis on his federal and state civil rights claims because race played a controlling role in the selection process. The district court ordered the City to appoint Davis to the position of foreman within 30 days of its order and it awarded Davis $10,000 in damages for emotional distress, as well as attorneys' fees.

HELD: Affirmed. The Iowa and federal anti-discrimination laws protect white persons as well as minorities from discrimination. Consideration of race is permitted only to remedy "conspicuous racial imbalance in traditionally segregated job categories." Here, the City failed to show evidence of such

an imbalance. Also, the use of race as a factor violates the City's own affirmative action plan, which forbids this practice. With regard to the district court's mandate that Davis be promoted to a foreman position, which would require the City to create an extra position, he is entitled to be placed in the position that he or she would have held but for the discrimination. Thus, because the district court found the City would have promoted Davis but for the improper consideration of race, this relief was appropriate.

The district court's award of emotional distress damages was supported by testimony from Davis and his wife regarding his suffering of embarrassment, frustration, depression and life changes as a result of the City's actions. Davis is entitled to recover his attorney's fees from the date of the City's improper hiring decision to the present.

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Public Employee

Van Baale, a 17-year veteran of the Des Moines Police Department, plead guilty to domestic abuse and obstruction of justice charges and was terminated. Before the Civil Service Commission and in subsequent appeals, Van Baale's firing was upheld. Van Baale then filed a petition in district court against the City of Des Moines, the Chief of Police and other public officials alleging breach of contract, promissory estoppel, denial of equal protection and intentional infliction of emotional distress.

HELD: Van Baale's claims for breach of contract and promissory estoppel are really wrongful discharge claims which were appropriately heard exclusively before the Civil Service Commission pursuant to Chapter 400. With regard to the equal protection claim, Van Baale argued he received disparate treatment for his alleged misconduct. However, his claim did not specify any persons who, as a class, were treated in a manner different than him. Van Baale's claim was merely that other officers, people within his own class, were given less severe punishments for similar misconduct. Such an argument is nothing more than inconsistency in meting out punishment. The equal protection clause does not require "similar ad hoc determinations for persons in the same class." District court dismissal affirmed.

Bahr v. Council Bluffs Civil Service Commission, 542 N.W.2d 255 (Iowa 1996)

Public Employees

Plaintiff was a reserve police officer in Council Bluffs who applied for a permanent position. The police chief made a conditional offer of employment, subject to testing required of all applicants. Psychological testing revealed that he was not well-suited to serve as a police officer. Therefore, the police chief revoked the conditional offer and also revoked his status as a reserve officer. The Civil Service Commission upheld the police chief's action. The district court reversed and directed the police chief to hire the plaintiff as a permanent police officer.

HELD: Reversed. Iowa Code § 400.8 states that the Civil Service Commission should conduct medical examinations for the position of police officer after a conditional offer of employment is made to an applicant. Psychological testing is considered a part of a medical examination under Iowa Code § 400.8 and thus the Commission was acting within its authority in conducting the tests. Iowa Code § 400.8(3) holds that probationary employees may be removed or discharged without the right of appeal to the Commission. The district court did not have jurisdiction over the matter.

Deppe v. Poweshiek County, 542 N.W.2d 6 (Iowa Ct. App. 1995)

Special Relationship

Plaintiff was stopped for speeding by a deputy sheriff of the defendant county. The officer requested the plaintiff to get into the back seat of the police vehicle. Plaintiff had to walk around the front of the police vehicle toward the back passenger door, which was open and facing a ditch. As he negotiated his way around the open door, he fell into an open culvert and sustained substantial injuries. The trial court submitted to the jury the issues of whether a special relationship existed between the plaintiff and the county and whether the plaintiff was deprived of his normal opportunity for protection in this instance. The jury answered these questions in the affirmative and assigned 65% fault to the defendant and 35 % fault to the plaintiff. Defendant alleges that the court should have decided as a matter of law that no special relationship existed.

HELD: Affirmed. When police officers take citizens into custody, they owe those citizens a special duty to aid and protect. For this special relationship to exist, the state must take the citizen into custody or control and the citizen must have lost the ability to protect him or herself. In this instance, the plaintiff's normal opportunity for self-protection was made unavailable when the officer commanded him to enter the back seat.

A

Schaller v. State, 537 N.W.2d 738 (Iowa 1995)

Taking

County conservation board vacated a portion of a road and title reverted to Schaller. Schaller attempted to negotiate a lease of his portion of the road to DNR, who owned remainder of road. The public had used the road for approximately 30 years and the DNR claimed it had a prescriptive easement for continuing public use. Therefore, it refused to negotiate a lease with Schaller. Schaller instituted mandamus proceedings to compel DNR to lease his portion of the road. DNR alleges that the county conservation board had no right to vacate the road to Schaller because of the public's prescriptive right to use the vacated road. District court sustained Schaller's summary judgment motion and ordered DNR to condemn Schaller's portion of the road and eitehr purchase or lease it.

HELD: The county's vacation of the road to Schaller was proper. No prescriptive rights were ever acquired because the use by the public was not without legal authority. Permissive use of the road was therefore not adverse.

The public trust doctrine does not apply because Schaller is not attempting to deny the public access to the lake. he merely wants just compensation for the public's use.

The Iowa and federal constitutions provide that private property shall not be taken for public use without just compensation. A taking exists if there is a substantial interference with the use and enjoyment of property. Mandamus is the proper procedural device to compel condemnation when there has been a taking of private property without just compensation.

Here, there was a taking of private property by DNR and the district court correctly ordered institution of condemnation proceedings. As damages, Schaller is entitled to recover the difference between the fair market value of the property immediately before condemnation and before it has been affected by the proposed public use, and the fair market value of what is left after the taking.

Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995)

Zoning

The district court held that proposed hog confinement facilities were exempt from county zoning restrictions pursuant to Iowa Code § 335.2 (the "agricultural purpose" exemption).

HELD: Affirmed. We have held that "agriculture is the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock."

Here, the Thompsons have been farming some portion of this land for the past 20 years and they have other types of livestock in addition to the hogs. They will continue to raise crops on the land. Therefore, the proposed hog confinement facilities are part of the "evolving agricultural functions" associated with this farming operation and are therefore exempt from county zoning pursuant to § 335.27.

INDEMNITY

Webb L. Wassmer

Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc., 540 N.W.2d 647 (Iowa 1995)

Indemnity - Contractual

Pirelli and Midwest agreed that Midwest would conduct repair work at Pirelli's premises. Midwest and Pirelli's negligence caused injury to Pirelli's employee Avitt, who sought workers' compensation benefits from Pirelli and civil damages from Midwest. Avitt settled with Pirelli on terms that included Pirelli's withdrawal of its lien and indemnity rights in Avitt's claim against Midwest. Then Avitt settled with Midwest for an amount more than double the amount of compensation benefits paid.

The original agreement between Midwest and Pirelli contained the following clause:

> [Midwest] agrees to defend, indemnify and hold harmless [Pirelli] and its employees from and against any and all liability, claims, losses or damage due to injury or death to any persons (including employees of [Pirelli]) or damage to or the destruction of any property (including property of [Pirelli]) arising or resulting from the performance of this contract.

Pirelli argued that this clause required Midwest to indemnify it for 100% of its workers' compensation liability to Avitt. Midwest argued that Pirelli forfeited whatever rights were created by the clause by releasing its lien and indemnity rights as part of its settlement with Avitt.

HELD: Assuming without deciding that an indemnity clause that does not mention Pirelli's own negligence is effective in imposing liability on Midwest for Pirelli's workers' compensation obligation, Pirelli forfeited whatever rights were created by the clause when Pirelli waived its lien and indemnity rights to Avitt's recovery against Midwest.

> [A] purported indemnitor who has paid the injured worker a full tort satisfaction [does not owe] a workers' compensation satisfaction, in whole or in part, where the tort satisfaction exceeds the workers' compensation liability.

Allen v. Allen Water and Wastewater Engineering, Inc., 549 N.W.2d 516 (Iowa 1996)

Indemnity - Who Decides Amount?

Thomas Allen was killed in a work-related automobile accident. Allen's estate settled with the tortfeasor in the wrongful death action. Allen also sought workers' compensation death benefits. Allen Water's workers compensation insurer, Kemper Insurance Company, asserted its right to indemnity from the settlement with the tortfeasor.

Although Allen and Kemper agreed that Kemper had a right to indemnity, but disputed the amount, the Industrial Commissioner found that Kemper did not have a right to indemnity. Both Allen and Kemper sought judicial review. The District Court found that Kemper had a right to indemnity and remanded to the Commissioner to determine the proper amount. Allen appealed, arguing that the District Court, and not the Commissioner, should determine the amount of the indemnity.

HELD: The Court clarified its statement in Thomas v. Hansen, 524 N.W.2d 145, 148 (Iowa 1994), and Fisher v. Keller Industries, Inc., 485 N.W.2d 626, 628 (Iowa 1992), that "it is always for the court, not the agency, to determine matters of indemnity." In those cases, the issue was the right to indemnity. However, the question as to the proper amount of indemnity is a factual question for the Industrial Commissioner. The District Court's role is to review the Commissioner's findings of fact pursuant to the substantial evidence standard set forth in Iowa Code § 17A.19(8)(f).

United Fire & Casualty Co. v. Acker, 541 N.W.2d 517 (Iowa 1995)

Indemnity - Statutory Bond

Larry McDowell owned and operated Big River Harley Davidson. As required by Iowa Code § 322.4(7), he took out a retail motor vehicle dealer's surety bond with United Fire. Elworth Harley Davidson Sales and Service, Inc., purchased two motorcycles at wholesale from Big River. Elworth intended to resell the motorcycles. Big River failed to deliver one of the motorcycles. The District Court held that Elworth, as a wholesaler, could not make a claim under the bond and granted United Fire's motion for summary judgment. The Supreme Court affirmed.

HELD:

1. The scope of a statutory bond is measured by the statute. Elworth's claim that the actual terms of the bond provided greater coverage than the statute is rejected.

2. Iowa Code § 322.4(7) provides that a motor vehicle dealer shall furnish a surety bond "indemnifying any person who buys a motor vehicle from a dealer from any loss or damage occasioned by the failure of the dealer to comply with any of the provisions of chapter 321 and this chapter." At issue was whether "any person" included another dealer purchasing at wholesale or was limited to consumers. The Court held that "any person" does not include other dealers. The Court noted that Section 322.4 in its entirety demonstrated the legislature's intent that the bonding requirement applies only to sales to consumers. Further, the Court stated that the underlying purpose of the statute is to protect consumers from fraud and deception.

INSURANCE
Rex Staub

Barron v. State Farm Mut. Auto. Ins. Co., 540 N.W.2d 423 (Iowa 1995)

Antistacking Provision - Iowa Code Section 516A.2

Barron was injured in a two-vehicle accident with an underinsured (UIM) motorist in June 1990. Before September 15, 1991, he filed an action against the UIM motorist and the case was ultimately settled for the motorist's insurance limits of $50,000. Barron then filed a claim for UIM benefits with his own insurer, State Farm. State Farm paid Barron $30,000 combined UIM/med. pay limits under the policy insuring the vehicle Barron was operating at the time of the accident, but refused to pay UIM limits on a second vehicle Barron owned and had insured with State Farm. As a result, after September 15, 1991 he brought a separate cause of action against State Farm for further UIM benefits.

This case involves the antistacking provisions contained in Iowa Code § 516A.2 which applies to "all causes of action accruing on or after July 1, 1991 and to those accruing before July 1, 1991 which are filed on or after September 15, 1991.

HELD: Because the antistacking provision is enforceable with respect to all causes of action accruing before July 1, 1991 and which are filed on or after September 15, 1991, it applied to Barron's claim for underinsured motorist's benefits even though Barron had sued the underinsured motorist before September 15, 1991. To escape the antistacking provision, Barron should have, but failed to sue State Farm before September 15, 1991.

Gabe's Construction Co. v. United Capitol Ins. Co., 539 N.W.2d 144 (Iowa 1995).

Choice of Law

This case involved an insurance coverage dispute arising from the defense and settlement of a personal injury lawsuit. The underlying plaintiff was injured in an automobile accident at a roadside construction project. The general contractor and one of its liability insurers sought to recover defense costs and amounts paid in settlement of the underlying suit from United Capitol Insurance Company, the general contractor's other liability insurer. United Capitol denied coverage relying in part on the policy's auto exclusion as construed under Minnesota law. In the alternative, United Capitol argued the two liability policies were excess and any amounts paid in settlement or defense of the underlying suit should be prorated among the two insurers. The district court used Iowa law to interpret the United Capitol policy and held the United Capitol policy provided primary coverage for defense costs and amounts paid in settlement by the general contractor.

On appeal, United Capitol argued the district court should have used Minnesota law to interpret the auto exclusion because the policy's named insured -- a Minnesota subcontractor on the project - purchased the insurance in Minnesota for its operations throughout the United States. The general contractor was identified by endorsement as an additional insured under the policy but only for the construction project in Iowa

HELD: Affirmed. In the absence of a choice-of-law clause in the policy, the rights of the parties are determined by the law of the state having the most significant relationship to the transaction and the parties. Although the policy was procured in Minnesota by a Minnesota corporation for the purpose of providing liability coverage for the subcontractor's operations throughout the United States, the Court concluded that the relationship between United Capitol and the general contractor was for the express purpose of protecting the general contractor from liability arising out of the project in Iowa. Hence, Iowa law would apply to the interpretation of the policy's auto exclusion and under Iowa law the auto exclusion did not apply.

Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995)

Coverage - Intoxication

Benavides purchased a life insurance policy from J. C. Penney which contained an exclusion for death resulting from "an injury occurring while the (insured) is intoxicated". After

spending several hours at a favorite bar, Benavides drove himself home, pulled into his garage, closed his garage door and passed out. Shortly thereafter, he was found dead with his feet on the accelerator and brake of the car. The coroner ruled Benavides died as a result of carbon monoxide poisoning although alcohol intoxication was a contributing factor to the death.

Benavides' estate brought an action to recover under the J. C. Penney Life Insurance policy. On J.C. Penney's motion for summary judgment, the court found that Benavides' state of intoxication precluded coverage.

HELD: "Intoxicated" within the meaning of an intoxication policy exclusion means "under the influence of alcohol". It does not mean a blood alcohol content of .1 or higher. The facts of this case indicated there was significant alcohol consumption on the part of Benavides and that he was "intoxicated within meaning of intoxication exclusion". Judgment affirmed.

Firemen's Fund Ins. v. ACC Chemical, 538 N.W.2d 259 (Iowa 1995)

Coverage – Notice of Loss

In 1984, Chemplex (ACC Chemical) entered into a consent decree with the Environmental Protection Agency (EPA) obligating it to clean up it's plant located in Clinton, Iowa. Operations at this plant had resulted in the dumping of toxic liquid into the ground water and soil at the site at the rate of 7500 to 30,000 gallons per day. After Chemplex spent several million dollars to correct the problem it was estimated that total cleanup costs could exceed 40 million dollars.

During the time period of Chemplex's dumping of toxic liquids, Chemplex had primary and excess comprehensive general liability (CGL) coverage with a number of different insurers. After the insurers denied coverage, this coverage suit was filed.

At trial, the insurers contended that Chemplex's act of polluting was not a covered "occurrence" under the CGL policies and that Chemplex had failed to provide the insurers with timely, sufficient notice of the claim. The jury returned a verdict in favor of Chemplex and awarded it approximately $20,000,000 for clean-up costs and $1.5 million for defense costs. Ultimately, the trial court reduced the total amount of damages to $5,000,000. On appeal, the Supreme Court's opinion was limited to the notice issue.

HELD: Although Chemplex had notified it's "pollution liability company" of a prospective claim for environmental liability in 1984, this company was not an agent of any of the CGL insurers. In fact, the defendant insurers were not directly notified of this claim until 1989, five years after Chemplex entered into the EPA consent decree.

HELD: The five-year delay did not constitute substantial compliance with any of the notice provisions in any of the CGL policies. Further, the insurers were prejudiced as a matter of law by the five-year delay in light of the fact the site had changed during that period, one key witness had died in the interim, and the insurers had been deprived of any opportunity to negotiate directly with the EPA. Accordingly, the Supreme Court remanded the case for entry of judgment in favor of the insurers.

Ide v. Farm Bureau Mut. Ins. Co., 545 N.W.2d 853 (Iowa 1996)

Coverage - Reasonable Expalbe Expectations

Miller Lamb Ltd., an Iowa family farm corporation, placed its sheep with two custom feeders, Griffith and Ide. Griffith, purchased a farm liability and umbrella policy from Farm Bureau which provided him with property damage coverage. Before Griffith received his policy and declaration page from Farm Bureau, the Miller Lamb Sheep entrusted to him died in an ice storm. Griffith filed a claim over the loss of the sheep but Farm Bureau denied coverage as the loss was considered an economic loss as opposed to a property loss.

Miller Lamb then brought suit against Griffith and Ide, obtained judgment against them and tried unsuccessfully to execute on the judgment. Relying upon the Iowa Direct Actions Statute, (Iowa Code Chapter 516), Miller Lamb then filed a declaratory judgment action against Farm Bureau seeking coverage under Griffith's policy. The district court ruled in favor of Miller Lamb.

HELD: Griffith had no reasonable expectation that the policy provided coverage for economic damages awarded Miller Lamb by virtue of the loss of his sheep. Although Griffith asked his insurance agent for comprehensive coverage, he clearly indicated he was only looking for coverage involving direct physical loss to property as opposed to liability coverage for economic damages. The district court's finding of coverage was reversed and the case was remanded with directions consistent with the Supreme Court's opinion.

Pierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1996)

Coverage—Replacement Cost Provision

Farm Bureau issued a homeowners policy to Larry L. and Jerri L. Pierce. A provision in the policy provided for dwelling replacement costs in the event their home was damaged or destroyed by fire, so long as the replacement cost claim was filed within 180 days of the loss.

The Pierces suffered a fire loss to their home and requested an extension of the 180-day period. Just before the deadline was due to expire, the Pierces entered into an executory real estate contract with family members. However, no money changed hands until after the deadline. Accordingly, Farm Bureau notified the Pierces that it was rejecting their claim for replacement costs benefits as they had failed to spend any amounts to repair or replace the damaged dwelling before the end of the extended deadline. As a result, the Pierces filed a breach of contract, fraudulent misrepresentation, negligent misrepresentation and bad faith action against Farm Bureau. A bench trial was held and the court entered judgment in favor of the Pierces for a portion of the replacement cost coverage. Farm Bureau appealed.

HELD: Even though no money exchanged hands, and the replacement costs clause required that money be actually spent on replacement, the clause was nonetheless satisfied when the insured filed an executed real estate contract for replacement of the dwelling before the end of the deadline. The Supreme Court noted the district court had properly found that the parties intended to be bound by the contract even though the insureds later failed to make the down payment on the date specified in the real estate contract.

First Nat. Bank v. Fidelity & Deposit, 545 N.W.2d 332 (Iowa Ct. App. 1996)

Duty to Defend

First National Bank brought suit against two of its comprehensive general liability insurers for their failure to defend the bank in a lawsuit brought by Kurtis Goembel.

Goembel's lawsuit against the bank alleged a breach of written contract and breach of an implied contract of good faith and fair dealing. The claims arose from the bank's refusal to extend credit to the Goembels up to a limit previously agreed to and for accelerating payment on the same line of credit. Goembel claimed that the bank's conduct in this matter was intentional. The bank immediately notified its insurance carriers of the suit and requested coverage. The Bank's CGL insurers reviewed the petition and denied coverage on the basis of the intentional act exclusion. The district court granted summary judgment in favor of the insurers on this issue.

HELD: An insurer has the duty to defend when there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case. Further, an insurer cannot await the outcome of the trial to furnish the defense if potential liability appears at an early stage.

HELD: In reviewing the pleadings and all other admissible and relevant facts, it was apparent that none of Goembel's allegations against the Bank could be considered "covered occurrences" under the policies issued by the defendants. Because Goembel alleged intentional conduct on the part of the Bank, the intentional act exclusion obviated the insurers obligation to defend the bank on the suit. Summary judgment affirmed.

Brown v. Danish Mut. Ins. Assoc., 550 N.W.2d 171 (Iowa Ct. App. 1996)

Examinations Under Oath

After Brown filed a theft-loss claim with his insurance carrier, Danish Mutual, a Danish claims representative took Brown's recorded statement and obtained his proof of loss inventory forms. Danish then exercised its right to take Brown's examination under oath. Brown not only refused to comply with the request but he also notified Danish that he did not intend to do so in the future. Danish notified Brown that if he continued to refuse the examination it would be considered a material breach of the terms of his policy, resulting in a denial of his claim. Brown continued to refuse to submit to the examination and his claim was denied for this reason.

Six months after the denial, Brown brought suit against Danish Mutual for breach of insurance contract and first-party bad faith. Danish filed a motion for summary judgment which was granted. On appeal, Brown contends that the recorded statement he provided was sufficient to comply with the examination under oath clause in the policy. Further, he argued that examination under oath clauses are intended to be used solely in connection with fire insurance claims.

HELD: The tape-recorded interview and documents previously submitted by Brown did not constitute substantial compliance with the examination under oath clause in the insurance policy. Accordingly, Danish Mutual had a "reasonable basis" to deny Brown's claim based solely on his failure to comply with the examination under oath clause. Summary judgment affirmed.

Frunzar v. Allied Prop. and Cas. Ins. Co., 548 N.W.2d 880 (Iowa 1996)

Family Member of Insured

Proof of Uninsured Status

Elizabeth Frunzar was a passenger in a car that was struck by a vehicle driven by Kilgore. She suffered severe injury and

sought uninsured (UM) motorist coverage from Allied under her father's automobile policy. As a condition of obtaining UM coverage under the policy, Frunzar was required to establish that she was a resident of her father's household on the date of the accident. Further, Frunzar was required to establish that Kilgore was uninsured at the time of the accident. After a bench trial in her suit for UM coverage, the court returned a verdict for Frunzar finding she was a resident of her father's household and that Kilgore was an uninsured motorist. Allied appealed the judgment.

HELD: The Iowa Supreme Court has previously addressed the issue of residency in named insured's household at time of accident in Amco Insurance Co. v. Rossman, 518 N.W.2d 333 (Iowa 1994). Rossman set forth seven factors to consider on this issue. The district court considered those factors and was correct in concluding Frunzar had presented substantial evidence showing that she was a resident of the named insured's household at time of her accident.

HELD: With respect to the issue of uninsured status of the tortfeaser, Frunzar was only able to present: (1) hearsay testimony that she was told by Kilgore that he had no insurance; and (2) a professional statement made by her attorney which indicated he had reviewed all possible sources of insurance and none could be found covering Kilgore's vehicle. Allied properly objected at trial to both statements and the court found Frunzar's hearsay was inadmissible but that her counsel's professional statement was admissible. However, because the district court apparently relied solely on Frunzar's hearsay statement, the case was reversed and remanded for new trial to determine whether Frunzar met her burden of proof as to Kilgore's status as an uninsured.

American Family Mut. Ins. Co. v. De Groot, 543 N.W.2d 870 (Iowa 1996)

Intentional Acts Exclusion

While baby-sitting a five-month-old child at her parents farm house, Paula De Groot became angry with the child and struck the child's head three times on the floor killing the child. After the child's parents brought suit against Paula and her parents, American Family, as carrier of the De Groot's farm liability policy, filed an answer on their behalf. Thereafter, American Family filed a declaratory judgment to determine whether it was obligated to defend or indemnify De Groot in light of her actions. The district court ruled in favor of American Family finding Paula had committed an intentional act excluding coverage.

HELD: The court properly inferred that Paula intended to inflict injury upon the child given the repetitious nature of striking the child's head on the floor three times. In the Supreme Court's opinion this was an intentional act which was not covered by the terms of the policy. Judgment affirmed.

Matter of Estate of Bickford, 549 N.W.2d 804 (Iowa 1996)

Life Insurance

Dwight Bickford, as part of his employment benefits plan, received insurance coverage under a life insurance policy issued by Metropolitan Life. When he first obtained coverage under the policy, Bickford was married to Sonja who he named as his sole beneficiary. Some years later he divorced Sonja but neglected to make a beneficiary change. After Bickford died, his administrator petitioned for declaratory judgment asking that the insurance proceeds be paid to the estate. The administrator contended that Sonja had terminated any interest she had in the life insurance policy upon her divorce from Bickford.

Sonja and Met Life moved for summary judgment contending that ERISA rather than state law governed the issue of entitlement to the insurance proceeds. It was Sonja and Met Life's position that the insurance policy was an employee benefit plan under ERISA which expressly supersedes any and all state laws relating to employee benefit plans covered under the Act. The district court denied the motion for summary judgment, but found that Sonja was entitled to the insurance proceeds.

HELD: In discussing without deciding whether ERISA preempted state law with respect to the insurance proceeds, the court found that even if ERISA is not preemptive, under Iowa state law a dissolution of marriage did not serve to terminate Sonja's right to the proceeds as a named beneficiary.

Farm and City Ins. Co. v. Gilmore, 539 N.W.2d 154 (Iowa 1995)

Permissive Operator Exclusion

Farm and City issued an auto policy to Gary Osweiller which provided coverage on his Ford Thunderbird. Osweiller's younger brother, Brian Osweiller, was permitted to drive the car with Gary's knowledge and consent. On one occasion Brian asked one of his passengers, Bradden Tuma, to drive the car. Tuma agreed to drive the car even though his school driving permit had previously been revoked for various moving violations. Tuma lost control of the car and struck a tree injuring the other passengers in the car.

After Osweiler made claim under his policy, Farm and City filed a petition for declaratory judgment contending the policy specifically excluded liability coverage for Tuma's negligent operation of the car because he had no "reasonable belief" that he was entitled to operate the car. In support Farm & City pointed out that although the insured, (Gary Osweiler), had given his brother, (Brian Osweiler), consent to drive the car, he had not given his consent to the operator, (Tuma). Nonetheless, the District Court found that Farm & City was obligated to provide coverage for the accident.

HELD: The policy provision excluding liability coverage for any person "using a vehicle without a reasonable belief that that person was entitled to do so" was found to be ambiguous by the Supreme Court. Accordingly, the provision was interpreted in favor of the insured. In this case, the District Court properly found that Tuma could have had a reasonable belief that he was entitled to use the car in light of the fact that the apparent owner, (Brian Osweiler), asked him to drive and particularly where the actual owner, (Gary Osweiler), had never instructed his brother not to allow others to drive the car.

Gentry vs. Wise, 537 N.W.2d 732 (Iowa 1995)

Set-Off

While operating his employers vehicle, Gentry was struck by an uninsured motorist. Gentry filed a workers compensation claim as a result of the accident and the claim was settled in the amount of $266,394. In the course of pursuing this claim, Gentry was also awarded Social Security disability payments for injuries related to the accident and for a secondary diagnosis which was unrelated to the accident. Thereafter, Gentry filed suit against the uninsured tort feasor and his employer's insurance carrier to recover uninsured motorists (UM) benefits.

In ruling on an application for adjudication of law point, the district court found the UM carrier was entitled to set-off all of Gentry's past and future Social Security disability payments as well as the workers compensation settlement Gentry received. The sole issue presented for appeal was whether the UM carrier should have received a credit for Gentry's past and future Social Security benefits.

HELD: Valid set off against UM benefits is allowed when the insured has previously obtained "insurance or other benefits" and the off set serves to "avoid duplication" of coverage. Although the Supreme Court found that Social Security disability payments are "insurance or other benefits" within meaning of the statute governing UM and UIM set off, (Iowa Code § 516A.2), it found the UM insurer was not entitled to set off that portion of Social Security payments which were for injuries unrelated to the

accident. Judgment affirmed with respect to set off of social security benefits directly related to the accident and reversed with respect to the payments not related to the accident.

Fort Madison Bank & Trust Company v. Farm Bureau Mut. Ins. Co., 543 N.W.2d 591 (Iowa 1996)

Set-Off

David and Berta Boyd were killed in a one-car accident. David was the driver of the vehicle and was intoxicated at the time of the accident. Farm Bureau had issued a policy on the vehicle to David and the policy contained uninsured (UM) motorist coverage limits of $100,000. Berta was an insured under the policy and it contained a set-off clause permitting Farm Bureau to recover payments from the proceeds of any settlement or judgment the injured person (Berta) obtained from any party liable for the injury (David).

David and Berta were survived by one minor son, Jazzber. Jazzber's conservator entered into a settlement of $50,000 with the "dram shop" which sold and served David alcoholic beverages just before the accident. This settlement arose out of Jazzber's claim for loss of parental consortium.

Thereafter, Jazzber's guardian, conservator, and the administrator of Berta's estate brought suit against David's estate and Farm Bureau on the claims of wrongful death, loss of parental consortium, and contract damages. Ultimately, the claims were reduced and the only remaining claim was Berta's estates claim for $100,000 in UM benefits from Farm Bureau. Farm Bureau stipulated that Berta's estate was entitled to UM benefits under the policy and that her estate had suffered $300,000 in damages. However, Farm Bureau continued to maintain recovery was subject to set-off. Further, before this issue was resolved, David's estate disbursed $49,000 in assets to Jazzber, through intestate secession. This left David's estate with approximately $1,250.00 at the time of trial.

The district court held that Farm Bureau could off set Jazzber's $50,000 dram shop settlement, the $49,000 distribution to Jazzber from David's estate, and the $1,250 remaining in David's estate. As the total amount of off set exceeded UM coverage limits, Berta's estate recovered nothing from Farm Bureau. The Court of Appeals reversed the district court finding Farm Bureau was not entitled to off set either Jazzber's dram shop settlement or Jazzber's distribution from David's estate. The case was heard on further review before the Iowa Supreme Court.

HELD: The $50,000 dram shop settlement received by Jazzber was not subject to being set off against Farm Bureau's UM

liability. The son was suing in his own separate legal entity apart from his mother, Berta's estate.

HELD: Farm Bureau was not entitled to set off the $49,000 distribution from David's estate to Jazzber. A probate disbursement of this kind under the laws of intestate secession is Jazzber's sole property as opposed to the property of his Berta's estate.

HELD: Farm Bureau was entitled to set off all other monies Berta's estate received from David's estate. Case remanded but with directions to the district court to enter judgment in favor of Berta's estate against Farm Bureau for $100,000 in UM coverage to be reduced by any other proceeds Berta's estate receives from David's estate in enforcement of the stipulated $300,000 judgment.

Matthess v. State Farm Mut. Auto. Ins. Co., 548 N.W.2d 562 (Iowa 1996)

Set-Off — Workers' Compensation Benefits

Matthess settled with the tortfeasor that struck his automobile. He also received workers compensation benefits as a result of the accident. State Farm sought to set off the settlement and the workers compensation benefits received from whatever Matthess was entitled to under his employer's underinsured (UIM) motorists coverage. The district court ruled that State Farm was entitled to set off the settlement and workers' compensation benefits. Matthess appealed the set-off of the workers' compensation.

HELD: "UIM policy provisions which provide that amounts payable will be reduced by all sums paid under workers compensation law is valid to the extent it provides for a reduction of insured's damages by amounts received pursuant to workers compensation claim."

Krapfl v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 877 (Iowa 1996)

Subrogation

Krapfl received $10,000 in medical payments under the med. pay provision of the policy issued to her by Farm Bureau. Farm Bureau then asserted a subrogation interest against the tortfeaser causing Krapfl's injuries to the extent of its med. pay payment. Farm Bureau then wrote Krapfl's attorneys notifying them that if suit was filed against the tortfeaser, Farm Bureau would intervene to protect its interests. Krapfl's attorneys responded by indicating that, if Farm Bureau intervened, it would

not insulate them from responsibility for a pro rata share of attorneys' fees and expenses.

Suit was filed against the tortfeaser and the case was settled prior to trial in the sum of $93,333.33. Krapfl's attorneys then looked to Farm Bureau to pay a pro rata share of their attorneys' fees. After a hearing on the dispute, the district court held that when an insurer employs its own attorneys and participates in discovery and settlement negotiations, it is not obligated to pay a pro rata share of the insured/plaintiff's attorneys fees and expenses. Krapfl appealed.

HELD: The statutory responsibility of the partially subrogated insurer to pay a pro rata share of its insured's attorneys' fees is not affected merely by the presence of the insurer's attorneys in the action whose participation is limited to protecting the insurer's subrogation interest. Such participation by the insurer's attorney did not lessen the role of the insured's attorneys in seeking recovery of the insured's entire claim. The district court opinion was reversed and remanded.

Freese v. Bituminous Cas. Corp., 549 N.W.2d 525 (Iowa 1996)

Uninsured Motorist Coverage—Commercial Umbrella Policy

While traveling in her employer's vehicle, Freese was injured in an automobile accident with an uninsured (UM) motorist. After obtaining damages against the uninsured motorist, Freese made claim and received UM benefits under her employer's policy with State Farm. Freese also made claim for UM benefits under a commercial umbrella policy issued to her employer by Bituminous. Bituminous rejected the claim contending it was obligated only to pay "the ultimate net loss" in excess of the retained limits in the underlying (i.e. State Farm) policy. The district court entered judgment for the insurer and Freese appealed.

HELD: A commercial umbrella insurance policy that covers "ultimate net loss" defined in terms of amounts for which the insured was "legally liable" constitutes a liability policy. As the Bituminous policy specifically did not provide excess coverage for UM claims, the court was correct in finding no coverage was available to Freese in this case. Judgment affirmed.

City of West Branch v. Miller, 546 N.W.2d 598 (Iowa 1996)

Waiver of Governmental Immunity

West Branch filed suit against the county assessor and auditor alleging they had failed to properly assess and collect taxes for the city. The assessor and auditor contended they were subject to the governmental immunity provisions of Iowa Code § 670.4(2) which serves to immunize officers and employees of a municipality acting within the scope of their employment duties. West Branch claimed the assessor and auditor had waived their governmental immunity when the county purchased a public officials errors and omissions insurance policy through a local government risk pool. The district court disagreed with West Branch and granted the auditor and assessor's motion for summary judgment.

HELD: Although the county's mere participation in a local government risk pool did not constitute a waiver of governmental immunity for the auditor and the assessor, the county's additional purchase of an errors and omissions policy in that risk pool did serve to waive governmental immunity

HELD: Even though the errors and omissions policy did not specifically refer to the assessment or collection of taxes, such alleged failures fell within the definition of "wrongful acts" within the policy and were therefore subject to coverage. Case reversed and remanded for further proceeding.

JUDGMENT
Rex Staub

Walters vs. U.S. Gypsum Co., 537 N.W.2d 708 (Iowa 1995)

Summary Judgment - Retaliatory Discharge

Eighteen days after Walters filed a civil rights complaint against her employer, she was terminated for poor job performance, excessive absenteeism, disruption of operations and abusive treatment of other employees. As a result, Walters filed suit against her employer alleging she had been discharged in retaliation for having filed the civil rights complaint.

Aside from the timing of the termination, Walters presented no evidence which was contrary to the employers stated reasons for termination. Consequently, the employer filed a motion for summary judgment contending it was uncontroverted that Walters was terminated for legitimate nondiscrimatory reasons. The District Court granted the motion believing that Walters' claims were based solely on her bare assertion that the termination was due to the civil rights complaint.

HELD: Because the Plaintiff indicated in her resistance that she was never disciplined for any of the reasons upon which the termination was based, the Supreme Court found there was a genuine issue of material fact not subject to a summary judgment motion. The case was reversed and remanded.

Allendorf vs. Langman Construction, Inc., 539 N.W.2d 370 (Iowa 1995)

Dismissal - Failure to Exhaust Administrative Remedies

A worker brought an action against his employer, Langman, and the State of Iowa alleging he was injured as a result of their negligent acts and omissions. The injuries in question occurred while the worker was working on an Iowa DOT bridge project. Before reaching the merits of the case, the District Court dismissed the worker's claim against the State of Iowa on the basis that his notice of claim filed with the State Appeal Board was fatally defective. The District Court concluded the workers failure to demand a sum certain in the claim constituted a failure to exhaust administrative remedies.

HELD: No particular form or manner for giving notice is required to file a claim against the state with the Appeal Board, so long as the Board is somehow informed of the facts underlying the claim and amount sought within the period prescribed.

HELD: In this case, the worker did not fail to exhaust his administrative remedies merely because he indicated the amount of his claim was "unknown" on the state administrative claim form. It was clear from the record that the Appeal Board denied the claim based on the liability issues as opposed to the worker's failure to demand a sum certain in the claim form. Further, the denial occurred two months after the claim had been presented thereby leaving the worker with a lack of motive and opportunity to supplement the claim with a sum certain.

Kabes Restaurant Limited v. Kintner, 538 N.W.2d 281 (Iowa 1995)

Judgment Notwithstanding the Verdict

Kabes Restaurant sued its former employee, Kintner, for breach of fiduciary duty conversion and fraud. Kintner responded with a counter-claim for breach of permanent employment contract. The jury returned a verdict in favor of Kintner and the district court ruled in favor of Kintner in denying Kabes' posttrial motion for JNOV.

HELD: In reviewing motions for JNOV, the evidence is considered in the light most favorable to the nonmoving party, together with every legitimate inference that may reasonably

deduced from the evidence. Given the facts of this case, the District Court was correct in finding that, as a matter of law, Kabe's was not entitled to JNOV.

In Re Marriage of Farr, 542 N.W.2d 828 (Iowa 1996)

Satisfaction of Judgment

HELD: A payment in the amount of judgment by a judgment debtor and the filing of a satisfaction of judgment by the creditor will release the debtor from liability upon the judgment. However, if satisfaction is challenged, it is the judgment debtor's burden to prove satisfaction was accomplished, whether or not the satisfaction was filed by the judgment creditor.

Burke v. Iowa District Court for Boone County, 546 N.W.2d 582 (Iowa 1996)

Foreign Judgment

HELD: A properly authenticated foreign judgment filed in an Iowa district court which would have venue if the original action had been commenced in this state, shall be treated in the same manner as a judgment of the district court of this state. Accordingly, the judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying the judgment in this state.

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996)

Summary Judgment–Defamation Claims

Carr, a trustee for the Iowa Trust, was sued for mismanagement of the trust after the Trust's investment advisor, Steve Weimer, misappropriated over $65 million in trust assets. Carr and the other individual trustees then brought a defamation and negligence action against the trust custodian, Bankers Trust, and the special counsel for the trust. The lawsuit arose from an article published in the Des Moines Register wherein certain officers of Bankers Trust claimed that Carr and the other trustees had limited their ability to effectively administer the trust.

The court granted Bankers Trust's motion for summary judgment finding that, as a matter of law, the trustees had failed to establish any malice. Carr and the other trustees appealed.

HELD: Because of the court's "solicitude for first amendment rights, the role of summary judgment in defamation cases is rather unique; the court must examine evidence to determine if a rational fact finding could conclude that malice had been established by clear and convincing evidence". This case stands for the proposition that clear and convincing evidence of falsity and malice is required and that courts are more inclined to grant summary judgment motions in defamation actions. District court judgment affirmed.

City of Iowa City v. Hagen Electronics, Inc., 545 N.W.2d 530 (Iowa 1996)

Motion to Dismiss--Denial as Res Judicata

HELD: A court's ruling on a motion to dismiss does not conclusively determine the merits of the issues presented in the petition for purposes of res judicata. Consequently, the court's decision to overrule the motion to dismiss cannot be considered an adjudication for purposes of applying res judicata to preclude further litigation on the merits of the case.

Wieseler v. Sister of Mercy Health Care Corp., 540 N.W.2d 445 (Iowa 1995)

Motion for Judgment notwithstanding the Verdict

Weiseler was injured when he slipped and fell in the parking lot of the Marion Health Center in Sioux City. Weiseler filed a premises liability suit against Marion Health Center and its parent corporation Sisters of Mercy Health Corporation as a result of the fall. The case was tried to a jury and at the close of plaintiff's case, Sisters of Mercy filed a motion for directed verdict contending Wieseler had failed to present any evidence showing Sisters of Mercy could reasonably anticipate an unreasonable risk of harm to Weiseler from an open and obvious defect. Sisters of Mercy also contended that Weiseler had failed to present any evidence that would indicate the defendant knew or should have known of the existence of frost on the parking lot prior to Weiseler's fall.

A motion for directed verdict was overruled and at close of evidence Sisters of Mercy renewed its earlier motion for directed verdict which was again overruled. The jury returned a verdict finding of Weiseler and Sisters of Mercy equally at fault. As a result, Sisters of Mercy's motion for JNOV was granted by the court. On appeal the Court of Appeals affirmed and Weiseler applied for further review before the Supreme Court.

HELD: In reviewing motions for JNOV, the Supreme Court views the evidence in accordance with the same principles

required by the district court. The court will view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly or reasonably be made. Further, the motion for JNOV must stand on the grounds raised in the motion for directed verdict. In this case, the court found Weiseler had presented substantial evidence in support of each element of his claims and therefore JNOV was improperly granted. The case was reversed and remanded to the district court.

Hughes v. Burlington Northern Railroad Company, 545 N.W.2d 318 (Iowa 1996)

Offer to Confess Judgment

Hughes brought a negligence action against Burlington Northern arising from her collision with a Burlington Northern train. Prior to trial, Burlington Northern offered to confess judgment in the amount of $50,000, Hughes accepted the offer and a hearing was held to determine interest and costs. The district court denied any pre-judgment interest, awarded Hughes deposition costs which had been filed at time of judgment, but refused to award Hughes any deposition costs filed after the judgment.

HELD: This case is a comparative fault action under Iowa Code Chapter 668. Accordingly, the Court's entry of judgment on the offer to confess judgment was a product of voluntary agreement as opposed to judicial determination. That being the case, the parties were free to agree to a specified pre-judgment interest rate. The offer of confession in this case was absolutely silent on this issue. Accordingly, the court acted properly in refusing to impose a term of interest and in denying Hughes' request for pre-judgment interest.

Bittner v. Ottumwa Community School Dist., 549 N.W.2d 295 (Iowa 1996)

Summary Judgment--Continuance to Resist

Bittner brought a defamation suit against various defendants concerning alleged defamatory statements contained in an audit and which were made in the course of a criminal investigation and resulting criminal prosecution. After all the defendants filed motions for summary judgment, Bittner requested an extension of time to resist so that he could conduct further discovery which was resisted by one of the defendants. The court granted the defendants' motions for summary judgment finding that Bittner did not timely resist the motions. Bittner then filed a motion for enlargement of the courts findings which was overruled.

HELD: Iowa R. Civ. P. 237(f) governs requests for additional time to resist a motion for summary judgment. Under this rule, the party requesting additional time must set forth, (by affidavit), the reasons why he/she cannot proffer evidentiary affidavits and additional factual information needed to resist the motion. Additionally, failure to file a Rule 237(f) affidavit is sufficient grounds to reject any claim that opportunity for discovery was inadequate. Aside from the fact that extensive discovery had taken place before the defendants filed their motions for summary judgment, Bittner had failed to file an affidavit and substantially comply with Rule 237(f). Accordingly, the district court did not abuse its discretion in denying Bittner's request for additional time. Judgment affirmed.

JURISDICTION

Rex Staub

Hoth v. Sexton, 539 N.W.2d 137 (Iowa 1995)

Forum Non Conveniens

Bobby Hoth was killed when his vehicle was struck head-on by an automobile driven by Mary Sexton and owned by her husband, Craig Sexton. Although, the accident occurred in Crawford County, Wisconsin, the Sextons and Hoth's wife and children were domiciliaries of Clayton County, Iowa. Further, Hoth's estate was administered in Clayton County, Iowa.

In September 1991, Hoth's representative filed suit in Clayton County, Iowa District Court for underinsured (UIM) motorist's benefits from U.S.F. & G. In February 1993, Hoth's representative, wife and children then filed a wrongful death suit in Clayton County against the Sextons. Shortly thereafter, the Sextons moved for conditional dismissal of the wrongful death suit on the basis of forum non conveniens arguing that, because the accident had occurred in Wisconsin and the material witnesses resided there, the case properly belonged in Crawford County, Wisconsin. The Iowa court denied the motion and consolidated the UIM and wrongful death suits for trial on April 1994.

Before the case went to trial, Hoth's passenger in the car filed her own personal injury suit against the Sextons in Wisconsin. Consequently, the Sextons renewed their motion for conditional dismissal based on forum non conveniens. This time, the Iowa court granted the motion and ordered the plaintiffs to refile their suit in Wisconsin within 60 days. Plaintiffs' interlocutory appeal of this ruling was granted by the Iowa Supreme Court.

HELD: The Iowa Supreme Court noted that promotion of judicial economy is not the standard by which motions based on forum non conveniens are judged. Rather, the movant must be able to show that "the relative inconveniences are so unbalanced" that jurisdiction should be declined for equitable reasons.

HELD: In this case the following factors weighed against granting the motion: (1) the defendants and plaintiffs were domiciled in Iowa; (2) the defendants claim that they would be unable to secure the attendance of witnesses in Iowa was unsubstantiated; and (3) choice of law rules governing the case would not be difficult to apply. Accordingly, the Sextons failed to present sufficient evidence showing they would be unduly burdened by having to defend the law suits in Iowa.

Dept. of Trans. v. District Ct. for Polk County, 539 N.W.2d 191 (Iowa 1995)

Writ of Certiorari

Pursuant to an agreement between the county attorney and a motor vehicle driver, the district court reduced the driver's period of suspension which had previously been imposed by the Department of Transportation. The DOT filed a petition for writ of cert challenging the legality of the district court's order.

HELD: Cert lies when a district court has exceeded its jurisdiction or has acted illegally. Unless otherwise provided by statute, the judgment on the cert is limited to sustaining the proceedings below or annulling them wholly or in part, to the extent that they are illegal or in excess of jurisdiction.

HELD: In this case, the district court lacked authority to reduce the suspension imposed by the DOT for habitual offenders because there is no legislation which would allow for early restoration of driving privileges.

In re Marriage of Van Veen, 545 N.W.2d 263 (Iowa 1996)

Preclusion - Issue

After the child support recovery unit (CSRU) retained an income withholding order against Diane Van Veen's ex-husband, Diane filed an application for modification of child support. The court granted her application finding there had been a material and substantial change in circumstances warranting modification. Mr. Van Veen appealed contending the issue had already been litigated in the mandatory income withholding action filed by the CSRU. The Court of Appeals held that Diane Van Veen was precluded from relitigating back child support occurring

before the income withholding order. The case was heard on further review by the Supreme Court.

HELD: The four prerequisites of issue preclusion are: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in a prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issues in the prior action must have been necessary and essential to the resulting judgment. In this case, the court's grant of mandatory income withholding did not fully dispose of the issue of child support arrearages. Issue preclusion did not apply in this case, Court of Appeals decision vacated, District Court judgment affirmed.

Supreme Court Bd. of Ethics v. D.J.I., 545 N.W.2d 866 (Iowa 1996)

Preclusion – Issue (Administrative Disciplinary Proceedings)

In January 1991, the district court returned a sizable malpractice verdict against D.J.I. concluding he had committed fraud, legal malpractice, constructive fraud and conspiracy to defraud in violation of several disciplinary regulations of the Iowa Code of Professional Responsibility. D.J.I. did not appeal the district court judgment.

In July 1995, four and one-half years after the 1991 civil judgment was rendered against D.J.I., the Iowa Supreme Court Board of Professional Ethics ("Board") filed a complaint with the grievance commission ("Commission"). The 1991 civil judgment was attached to the complaint and incorporated by reference. Although D.J.I. did not challenge the authenticity of the judgment in his answer to the complaint, he argued that issue preclusion did not apply because Supreme Court Rule 118.7 (which provided for the use of issue preclusion in lawyer discipline cases), did not become effective until after the 1991 civil judgment was entered. The Commission concluded that Rule 118.7 provided for retroactive application of issue preclusion. D.J.I. filed interlocutory appeal on this issue.

HELD: It is a general rule that a statute is presumed to be prospective in its operation unless expressly made retroactive or retrospective. This same general rule is applied to rules of court. However, the Supreme Court found that rules governing proceedings before the grievance commission specifically state those rules may be applied retroactively in certain situations. Although this was not specifically stated in Rule 118.7, the court nonetheless found that the issue preclusion amendment applied retroactively to D.J.I.'s pending disciplinary case.

Bahr v. Council Bluffs Civil Service Comm'n, 542 N.W.2d 255 (Iowa 1996)

Subject Matter Jurisdiction

Bahr was offered a job with the Council Bluffs Police Department conditioned upon a satisfactory medical and psychological evaluation as required by the Civil Service Commission. Bahr's psychological evaluation indicated he was not suited to police work resulting in a revocation of the job offer. Bahr filed an appeal of the revocation with the Civil Service Commission which ruled in favor of the Council Bluffs Police Department.

Bahr appealed the Civil Service decision to district court. The district court reversed the Commission's decision and directed that Bahr be hired as a permanent police officer. On appeal to the Iowa Supreme Court, the Commission argued the district court had no subject matter jurisdiction to render its decision because, under the Iowa Code, the most that Bahr could expect to receive was probationary status and probationary employees may be removed without right of appeal to the Commission.

HELD: Because the Civil Service Commission had no legislative authority to order that Bahr be hired as a permanent police officer, the district court likewise could not direct that he be hired as a permanent officer. District court judgment reversed.

Riley v. Boxa, 542 N.W.2d 519 (Iowa 1996)

Exhaustion of Administrative Remedies

A property owner filed a petition for declaratory judgment claiming she was wrongfully denied an application for a building permit. Her petition was filed before she exhausted her administrative remedy of appealing the denial to the Board of Adjustment. The district court denied the petition for failure to exhaust administrative remedies.

HELD: Although a litigant must exhaust her administrative remedies before seeking judicial review of an administrative decision, the doctrine is subject to an exception. That exception permits early judicial review when the administrative remedy sought would be inadequate or where its further pursuit would be fruitless. In this case, the evidence did not support the exception. Judgment affirmed.

State ex rel. Vega v. Medina, 549 N.W.2d 507 (Iowa 1996)

Subject Matter Jurisdiction

The Iowa Department of Human Services filed a paternity suit against Medina to establish current child support and to obtain reimbursement of AFDC benefits. Medina challenged the district court's subject matter jurisdiction contending that at the time of the child's conception, he was only visiting Iowa. Shortly thereafter, he returned to his residence on the Santee-Sioux reservation in Nebraska where he was a member of that tribe. In overruling Medina's motion to dismiss, the district court determined it had jurisdiction over the matter as Medina had resided in Sioux City at the time of the child's conception.

HELD: In absence of express federal law stating otherwise, Indians venturing beyond boundaries of the reservations are generally subject to nondiscriminatory state laws applicable to all citizens of the state of Iowa. Because the state's interests in connection to this case are so great, and the exercise of jurisdiction would not interfere with any rights or interests of the reservation, subject matter jurisdiction was properly accepted by the Iowa District Court. Judgment affirmed.

In Re Marriage of Crew, 549 N.W.2d 527 (Iowa 1996)

Personal Jurisdiction

Crew's ex-wife, Katherine Lowe, petitioned for modification of a divorce decree entered in California. Crew resided in Washington and has never been to Iowa although he maintained telephonic contact with his children and provided them with insurance coverage and other benefits. As a result, Crew filed a motion to dismiss contending the court lacked personal jurisdiction over him. The district court ruled in Crew's favor dismissing the action.

HELD: Crew's contact with his children, including correspondence, telephone calls, providing health insurance, paying for orthodontics, and furnishing airline tickets, did not constitute sufficient minimum contacts with Iowa for purposes of asserting personal jurisdiction over him.

HELD: When determining whether personal jurisdiction may be asserted over a nonresident defendant, the focus is on the defendant's connection with litigation in the forum state as opposed to the defendant's connection with residents in this state.

Shumaker v. Iowa Dept. of Transp., 541 N.W.2d 850 (Iowa 1995)

Preclusion - Claim

Shumaker filed suit in federal district court against her employer, the DOT and her immediate supervisors alleging employment discrimination and sexual harassment. Her complaint included a federal Title VII claim and an Iowa Civil Rights claim. Although the federal court ruled in favor of Shumaker on her Title VII claim, it did not rule on her Iowa Civil Rights claim and instead noted "in her proposed order, Shumaker concedes that an action under Iowa Code Chapter 601A is not permitted under the facts of this case and the 11th amendment, the court will consider this as withdrawal of the claim arising under the Iowa Civil Rights Act".

The federal court did not specifically find that it lacked jurisdiction to hear Shumaker's Iowa Civil Rights claim and Shumaker did not request a clarification of the order nor did she request the court consider her state law claim under the federal court's pendent jurisdiction. No appeals were taken on the federal court's ruling.

Thereafter, Shumaker filed a petition in Iowa District against the same defendants asserting the same claims previously raised in federal court. The district court granted the DOT's motion for summary judgment finding that, in light of the federal district court opinion, Shumaker's Iowa civil rights claim was precluded. Shumaker raised the following points on appeal: (1) that her state law claim was not finally adjudicated by the federal court; and (2) even if she had requested the court consider her state law claim, the 11th amendment served to deprive the federal district court of subject matter jurisdiction over the state law claim.

HELD: The federal court in this case could have considered the state law claim in the exercise of its pendent jurisdiction based on considerations of judicial economy, convenience and fairness to litigants. However, Shumaker either abandoned her state law claim in federal court or she failed to seek an adjudication of it under the court's pendent jurisdiction. Accordingly, district court properly dismissed the case on grounds of claim preclusion. Dismissal affirmed.

Matsui v. King, 547 N.W.2d 228 (Iowa Ct. App. 1996)

Preclusion—Issue

One of Matsui's judgment creditors, King, filed a writ of execution against Matsui's property in Iowa district court. Matsui responded with a petition for declaratory judgment claiming the sale was improper because, among other things, the original default judgment obtained in federal district court in

California was void. Matsui appealed the district court's dismissal of his petition for declaratory judgment.

HELD: In the California federal district court, Matsui contested the validity of the default judgment in the action to set it aside and a full and complete hearing was held on the issue. Consequently, substantial rights of the parties were involved and those rights were either fully litigated or the parties were afforded the opportunity to litigate those rights. In addition, the California federal district court decision to deny the motion to set aside was a final ruling. Matsui had the right to appeal that decision but declined to do so. As a result, Matsui's attempt to once again set aside the foreign default judgment is precluded under the doctrine of res judicata. Judgment affirmed.

Dorsey v. Dorsey, 545 N.W.2d 328 (Iowa Ct. App. 1996)

Preclusion - Issue

Tenant, Lynn Dorsey, brought an action for breach of oral lease of agricultural land against the original landowner, Darlene Dorsey, after she sold the land. Lynn Dorsey claimed that his right to possession had previously been resolved in an earlier forcible entry and detainer action against the new owner. The district court ruled in favor of the original land owner, Darlene Dorsey, finding issue preclusion did not apply.

HELD: One of the prerequisites of issue preclusion is that the defendant be a party to the underlying prior action. In this case, Darlene Dorsey was not a party to the underlying forcible entry and detainer action as it was against the new landowner. Therefore, the court proceeded to consider whether issue preclusion could be applied to nonmutual parties.

HELD: As to whether issue preclusion could be applied to Darlene Dorsey as a non-mutual party, the court found: (1) the issues raised in the prior proceeding were not identical; (2) Darlene Dorsey was not given a full and fair opportunity to litigate the underlying forcible entry and detainer action; (3) and, the forcible entry and detainer action was tried on stipulated facts. Considering these factors, the trial court was correct in concluding that issue preclusion did not apply to the nonmutual parties in this case.

Schuver v. E. I. Du Pont De Nemours and Co., 546 N.W.2d 610 (Iowa 1996)

Preemption

O'Brien, a soybean farmer, sued the seller and manufacturer (DuPont) of a soybean herbicide which allegedly caused damaged to his crops.

DuPont moved for summary judgment contending Schuver's claims were preempted by federal legislation that regulated the manufacture and labeling of the soybean herbicide – the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The district court found Schuver's claims were preempted by FIFRA in granting DuPont's motion for summary judgment.

HELD: Preemption may be found where Congress's intent to preempt the field is either expressly stated or implicit in Congressional policy. FIFRA expresses such an intent. Schuver's claims for negligence and strict liability amounted to claims that the warnings given on the herbicide labels were inadequate. Accordingly, these claims fell within the auspices of FIFRA and were preempted. Summary judgment affirmed.

Rater v. District Ct. for Polk County, 548 N.W.2d 588 (Iowa Ct. App. 1996)

Writ of Certiorari - Timeliness

Mrs. Rater applied for a contempt order based on her ex-husband's failure to pay support. The district court found Mr. Rater in contempt and later sentenced him to 30 days in Polk County Jail. Within 30 days of sentencing Mr. Rater filed a petition for writ of cert. Mrs. Rater resisted on the basis Court of Appeals lacked jurisdiction to hear Mr. Rater's petition for writ as it was not filed within 30 days of the Court's finding of contempt.

HELD: In accordance with the Iowa R. Civ. P. 319, a writ of cert must be brought within 30 days from the time the tribunal, board, or officer exceeded its jurisdiction or otherwise acted illegally. As a matter of first impression, the Iowa Supreme Court found the date of final action in this case was the date of sentencing as opposed to the date the contempt order was issued. Accordingly, the Iowa Court of Appeals had subject matter jurisdiction to consider the writ.

LIMITATIONS OF ACTION

Rex Staub

Sahu v. Iowa Board of Medical Examiners, 537 N.W.2d 674 (Iowa 1995)

Administrative Proceedings - Doctrine of Laches

The Iowa Board of Medical Examiners ("Board") commenced a disciplinary proceeding against Dr. Sahu seven years after auditors concluded he had submitted inaccurate Medicaid claims and one year and five months after Dr. Sahu was acquitted of federal charges stemming from the audit. Because there is no statute of limitations for administrative proceedings of this kind, Dr. Sahu argued the general statute of limitations (Iowa Code Section 614.1) applied and served to bar the Board's complaint. On judicial review, the District Court affirmed the Board's decision to suspend, fine and place Dr. Sahu on probation.

HELD: Although courts usually apply general statutes of limitations to administrative proceedings when no statute of limitations is specified, when it is in the public interest, such as disciplinary proceedings against a medical professional, the courts will not apply the general statute of limitations.

HELD: Even though the disciplinary complaint against Dr. Sahu was filed seven years after his alleged act of misconduct, the complaint was not barred by the doctrine of laches because: (1) the Board had good reason to delay filing of the complaint during the pendency of Dr. Sahu's criminal charges; (2) the Board acted within a reasonable time after the conclusion of Dr. Sahu's criminal trial; and (3) there was no evidence presented which would indicate Dr. Sahu was prejudiced by the delay.

Borchard v. Anderson, 542 N.W.2d 247 (Iowa 1996)

Intentional Torts

Borchard and Anderson were married from 1966 until 1981. During this marriage, Borchard claimed that she was subjected to numerous acts of severe domestic abuse. Twelve years after their divorce, on July 19, 1993, Borchard was diagnosed as suffering from post-traumatic stress disorder ("PTSD") as a result of the domestic abuse she suffered during the marriage. On December 1, 1993, Borchard filed suit against Anderson for damages to compensate her for the PTSD.

Anderson moved for summary judgment contending the two-year statute of limitations for intentional torts, (Iowa Code § 614.1(2)), applied and barred recovery. The district court granted summary judgment in favor of Anderson finding Borchard's PTSD was simply a late manifestation of the injuries she had received during her marriage twelve years before. On appeal, Borchard contended that she was subject to an exception to the two-year statute of limitations rule. Specifically, in accordance with Iowa Code § 614.8 she was a mentally ill person and therefore was entitled to file the action one year after the

disability terminated. She also argued the common law discovery rule served to toll the statute.

HELD: The evidence in this case indicated Borchard was able to raise her children, hold jobs and even became remarried after the divorce. This evidence indicated that Borchard was not disabled to such an extent that she was unable to file a lawsuit within twelve year period following her divorce from Anderson. Section 614.8 does not serve as an exception in this case.

HELD: Borchard was aware she was being abused, that it was inappropriate during the marriage and that it caused her harm, even if she did not know medically why or how the abuse effected her. Accordingly, she understood the causal connection between the domestic abuse and the emotional problems later diagnosed as PTSD long before that diagnosis. Consequently, the discovery rule does not apply to this case. Summary judgment affirmed.

Van Overbeke v. Youberg, 540 N.W.2d 273 (Iowa 1995)

Professional Malpractice — Iowa Code Section 614.1

Van Overbeke brought a medical malpractice claim against her attending physician, Dr. Youberg. The suit stems from Van Overbeke's cesarean delivery of her first child in March of 1981. During this delivery, Dr. Youberg failed to inject Van Overbeke with a drug to prevent blood sensitization.

Iowa Code § 614.1 specifies that the statute of limitations for all malpractice cases is two years after discovery of the injury and, in no event, more than six years after the act or omission causing the injury. Although suit was brought more than six years after the cesarean delivery, Von Overbeke contended at trial that Dr. Youberg had fraudulently concealed information so as to avoid the six year bar.

At trial, the jury returned a verdict of negligence against Youberg but found that he had not fraudulently concealed information so as to toll the six year statute. In light of this verdict, the court entered judgment in favor of Youberg and the other defendants.

HELD: Although it is not specifically stated in Iowa Code § 614.1, fraudulent concealment can serve as an exception to the statutory six year statute of limitations. However, to assert this exception, the plaintiff must be able to establish the defendant did some affirmative act to conceal the cause of action and that the plaintiff made a diligent effort to discover the cause of action. In this case, the attending physician, nurses, and hospital employees all testified that information was not concealed from Van Overbeke. Accordingly, Van Overbeke failed to

submit sufficient evidence which would entitle her to the fraudulent concealment exception.

Frideres v. Schiltz, 540 N.W.2d 261 (Iowa 1995)

Sex Abuse

Plaintiff sued her parents and brothers for alleged sexual abuse committed against her while she was a child. The evidence showed that Plaintiff had always remembered some of the alleged acts of sexual abuse and had "repressed" other alleged acts. Plaintiff's claims would normally have been barred by the applicable statute of limitations on July 1, 1973. Plaintiff filed suit in September of 1991.

Following motions for summary judgment by defendants, the United States District Court for the Northern District of Iowa certified various questions to the Iowa Supreme Court. Questions of note are discussed.

HELD: The first certified question was whether the enactment of Iowa Code § 614.8A in 1990 retroactively revived Plaintiff's claims of childhood sexual abuse. Section 614.8A provides:

> An action for damages for injury suffered as a result of sexual abuse which occurred while the injured person was a child, but not discovered until after the injured person is of the age of majority, shall brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse.

The Supreme Court held that the Iowa Legislature had not clearly and expressly stated in enacting Iowa Code § 614.8A that it retroactively revived claims for which the limitations period had previously run. The Court did include a caveat that such claims could still be subject to the common law discovery rule.

The fourth certified question asked whether the phrase "an action for damages or injuries suffered as a result of sexual abuse" in Iowa Code § 614.8A included "indirect" claims such as intentional infliction of emotional distress, intentional and negligent failure to protect, and premises liability. The Court held that this phrase applies to "claims causally connected to sexual abuse" as "sexual abuse" is defined in section 709.1 - the criminal code definition of sexual abuse.

The sixth certified question asked whether or not the common law discovery rule set forth in Chrischiles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967), and subsequent cases, is available to

a plaintiff who has always remembered some of the alleged acts of sexual abuse. The Court held:

> The common law discovery rule requires that the plaintiff know or in the exercise of reasonable care should have known both the fact of the injury and its cause. Consequently, a person who has always remembered some specific act or acts of sexual abuse may rely on the discovery rule in those instances where the nexus between those specific acts and the claimed injuries is not discovered until a time less than two years prior to commencement of the action.

Woodroffe v. Hasenclever, 540 N.W.2d 45 (Iowa 1995)

Sex Abuse

In 1992, Woodroffe filed suit against her uncle, Hasenclever, for sexual abuse, assault, and intentional infliction of emotional distress. At time of filing Woodroffe was over 40 years old and she claimed the acts complained of occurred when she was between the age of 1 and 1-1/2 years old and five years old.

The allegations first came to light when Woodroffe was being treated by a psychologist on March 20, 1985. At a later interview with the same psychologist in 1989, she finally described in detail her refreshed recollections of the sexual abuse allegedly committed by Hasenclever. Therefore, Woodroffe's claims were brought more than two years after the 1985 interview but within two years of the 1989 subsequently refreshed recollections of sexual abuse.

HELD: As a matter of law, in 1985 Woodroffe had notice of her injury and its cause. Consequently, the 1985 interview commenced the running of the two-year common law discovery rule.

HELD: Woodroffe's alleged refreshed recollection in 1989 does not serve to cause the limitations period to commence yet again. The district court's order of summary judgment in favor of Hasenclever on the basis of limitations of action is affirmed.

NEGLIGENCE

Webb L. Wassmer

Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996)

A

Causation - Cause in Fact

The Gersts sued the Marshalls after discovering petroleum contamination on land that the Gersts had purchased from the Marshalls. The Gersts alleged causes of action for negligence, strict liability, res ipsa loquitur, fraudulent misrepresentation, and a claim under Iowa Code § 455B.111. Section 455B.111 permits citizens' actions to enforce the requirements of chapter 455B.

The District Court granted summary judgment in favor of the Marshalls. The Supreme Court affirmed.

HELD: Causation is an element of all of the tort theories alleged by Plaintiffs. Additionally, after applying various principles of statutory construction, the Court held that Iowa Code § 455B.111 also contains a causation requirement.

Justice Ternus' opinion contains a lengthy discussion of the history of the definition of "causation" under Iowa law. Justice Ternus notes that the Iowa case law has not been consistent. However, under any definition of causation, two components are required: (1) the defendant's conduct must have in fact caused the plaintiff's damages; and (2) the policy of the law must make the defendant legally responsible for the injury. The first inquiry is a factual question for the jury. The second question is a legal issue for the court.

Early Iowa cases utilized a "but-for" test for causation, except in cases of concurrent causes where either cause, operating alone, would have been sufficient to cause the identical result. As the case law developed, the "substantial factor" test was created to impose liability when the but-for test would have relieved two or more tortfeasors from liability.

Commencing in 1960, the Supreme Court began citing to the Restatement's definition of causation. The Restatement (Second) of Torts defines "legal cause" as requiring proof that the defendant's conduct "is a substantial factor in bringing about the harm" and that there is no rule of law which relieves the defendant from liability. However, the Court has not consistently adhered to the Restatement's definition.

Recent cases have defined causation solely as being "a substantial factor in producing damage and when the damage would not have happened except for the conduct." See Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 858 (Iowa 1994). However, the majority of the Court's decisions have required a plaintiff to show both the "but-for" test, with the concurrent cause exception, and the Restatement's "substantial factor" test.

Justice Ternus suggests that it might "be prudent to eliminate the substantial factor test as a requirement in all

cases in order to clearly separate the jury's factual inquiry into causal relationship from the policy question of responsibility," but finds that it is not necessary to do so in this case. The Court has always required a plaintiff to meet the traditional "but-for" test. "But-for" is the absolute minimum test for causation because any attempt to impose liability without it would connect the defendant with an injury that the defendant had nothing to do with.

Turning to the specific facts of the case, the Court found insufficient evidence that any conduct by the Marshalls had in fact produced the petroleum contamination found on the property. All of the experts agreed that the contamination had come from the fuel delivery system, but none of the experts could state how or when the release occurred. "Without testimony to establish *when* the contamination occurred, testimony identifying possible sources of contamination still leaves the jury to speculate on whether those sources - the fuel delivery system components - were the responsibility of the Gersts or the Marshalls and Reif Oil *at the time of the contamination*.

Diemer v. Hansen, 545 N.W.2d 573 (Iowa Ct. App. 1996)

Causation - Need for Expert Testimony

Purchasers of hog raising facility sued real estate agent and real estate company for fraudulent and negligent misrepresentation that: (1) prior owners had never experienced any hog diseases; and (2) it had been five or six years since prior owners had had hogs on premises. Both representations were false. Following plaintiffs' purchase of property, he acquired hogs who subsequently developed various diseases. Trial court granted summary judgment in favor of Defendants. Court of Appeals affirmed.

HELD: Proof of causation in fact under the facts of this case required expert testimony that the diseases developed by Plaintiffs' hogs was caused by either an earlier disease on the premises or the fact that hogs had been on the premises more recently than represented. That connection, if any, is an issue beyond common knowledge and experience and requires expert testimony. Plaintiffs' own experts stated that the hogs were probably infected with the diseases when acquired by Plaintiffs and it was unlikely that the diseases were caused by hogs previously on the premises, particularly since Plaintiffs had disinfected the premises before placing any hogs there. Summary judgment in favor of Defendants was properly granted.

Heine v. Allen Memorial Hospital Corp., 549 N.W.2d 821 (Iowa 1996)

Contribution

Heine fell down steps and was treated at Allen Memorial Hospital. He sustained injuries to his neck, back, and upper shoulders. Subsequently, Heine was involved in an automobile accident with Wedemeier and sustained neck injuries. Wedemeier confessed judgment for $100,000. Heine subsequently sued Allen for negligence in diagnosis and treatment.

Wedemeier filed a petition for contribution against Allen, alleging that the failure to diagnosis and treat Heine's previous neck injury contributed to the damages that she was required to pay. Allen raised Iowa Code § 147.136 as an affirmative defense to Wedemeier's contribution claim. Generally, § 147.136 provides that in an action against a physician for personal injury, economic losses that have been reimbursed by insurance or from some other source are not recoverable. The District Court held that § 147.136 barred Wedemeier's contribution claim. The Supreme Court reversed.

HELD: Iowa Code § 147.136 applies only to actions for damages for personal injury against a physician. Wedemeier's contribution claim does not fall within that definition and is not an action for personal injury. Her action for contribution is an equitable action designed to require joint tortfeasors to share the burden of the injured party's damages.

Perry v. Tendal, 538 N.W.2d 296 (Iowa 1995).

Imputed Negligence

Daniel Perry borrowed a vehicle owned by his mother Louise. He hitched a trailer to it and then asked Stultz to use the vehicle and trailer to conduct several errands for Daniel. While on the errands, Stultz had an accident with a vehicle operated by Tendal. Louise Perry sued for the damage done to her vehicle. At trial, district court instructed over Louise's objection that Stultz' negligence was imputed to her, as owner.

HELD: Tendal produced no evidence to support a finding that Stultz and Louise had any special relationship or that he was serving as her agent or servant. Accordingly, his fault as a mere permissive user is not attributable to the owner under Stuart v. Pilgrim.

Schoborg v. Anderson, 548 N.W.2d 180 (Iowa Ct. App. 1996)

Municipal Immunity

Following automobile accident, plaintiff sued Coralville and Iowa City for failure to properly maintain a road, which was a

boundary line between the two cities. The District Court granted the cities' motions for summary judgment on the basis that the cities were immune pursuant to Iowa Code § 668.10(2). The Supreme Court affirmed.

HELD: Iowa Code § 668.10(2) provides that a municipality may not be assigned a percentage of fault for the failure to remove snow or ice, or to place sand, salt or other substances on the road, if the city establishes that it complied with its policy or level of service for doing so.

Although Coralville's policy was that sufficient sand and salt should be applied so that curves "can be safely negotiated," that statement is a goal and does not create a standard of care. As there was no evidence that Coralville and Iowa City did not follow their own policies, summary judgment was properly granted.

Brewster v. United States, 542 N.W.2d 524 (Iowa 1996)

Res Ipsa Loquitur

Plaintiff was injured when she entered the automatic doors at the Veterans Administration Medical Center (VAMC) in Des Moines. The doors closed on her and when she subsequently forced them open, she fell, breaking her hip. Plaintiff sued VAMC under the Federal Tort Claims Act, submitting claims of specific and general ("res ipsa") negligence. The federal court granted summary judgment for VAMC on the specific negligence claim and certified the following question to the Supreme Court of Iowa:

> Where an appliance on land causes injury to an invitee to those premises and the owner of the land has exclusive control over the premises, but the evidence is limited to only the occurrence of the accident and the plaintiff's injuries, under Iowa law does the doctrine of res ipsa loquitur preclude the granting of summary judgment?

HELD: The Supreme Court answered the question in the affirmative. Summary judgment should be denied. The Court first engaged in an extensive discussion of the history of res ipsa and the contours of the doctrine. The Court restated its traditional formulation that res ipsa is applicable when: (1) "the injury is caused by an instrumentality under the exclusive control of the defendant," and (2) "the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used." Res ipsa permits, but does not require, the jury to infer that the defendant was negligent. Further, the burden of persuasion rests at all times with the plaintiff.

After reviewing cases from several other jurisdictions on the specific issue of automatic doors, the Court concluded that a malfunction of automatic doors meets the second part of the test, i.e. automatic doors do not malfunction in the absence of negligence. "In other words, reasonable people could conclude that it is more likely than not that there is negligence associated with the automatic door's malfunction."

Frideres v. Schiltz, 540 N.W.2d 261 (1995)

Negligent Failure to Protect

Plaintiff sued parents and brothers for alleged sexual abuse committed against Plaintiff by father and brothers occurring while Plaintiff was a child. The evidence was that Plaintiff had always remembered some of the alleged acts of sexual abuse and had "repressed" other alleged acts. One of the claims against her parents was for negligent failure to protect.

Following motions for summary judgment by defendants, the United States District Court for the Northern District of Iowa certified various questions to the Supreme Court of Iowa. Question 7 asked "Does Iowa law recognize a cause of action against a parent for negligent failure to protect?"

HELD: The Court held that Iowa does not recognize a distinct cause of action for "negligent failure to protect." However, an allegation of a parental failure to protect a child from sexual abuse could be asserted based on "ordinary tort principles." The Court did not specify what it meant by "ordinary tort principles."

Bigalk v. Bigalk, 540 N.W.2d 247 (Iowa 1995)

Specifications of Negligence

Plaintiff sued defendant for injuries suffered when she fell into a stairwell. The trial court overruled plaintiff's objection that the marshaling instruction did not set forth her four claimed specifications of negligence. The jury held in favor of defendant.

HELD: Reversed and remanded for a new trial. In a negligence case not involving *res ipsa loquitur* the trial court must instruct on the specific allegations of negligence. This case is unusual in that it was the plaintiff, not the defendant, making the objection. The Supreme Court rejected the defendant's argument that the plaintiff was not prejudiced because the plaintiff could have argued any specification to the jury that she wanted given the general nature of the instruction. The Court held that failing to instruct on the specific allegations

of negligence meant that the jury was not required by the instructions to focus on each specification of negligence and, thus, did not sufficiently advise the jury of the plaintiff's theory of the case.

TORTS

Webb L. Wassmer

Brown v. Danish Mutual Ins. Ass'n, 550 N.W.2d 171 (Iowa Ct. App. 1996)

Bad Faith - First Party

Brown made claim for theft loss to Danish Mutual. Pursuant to the policy, Danish Mutual requested that Brown submit to an examination under oath and specifically warned Brown that coverage would be denied if he refused. Brown refused. As a consequence, Danish Mutual denied coverage for failure to comply with the policy. Brown sued for breach of contract and bad faith. The District Court granted summary judgment for Danish Mutual and the Court of Appeals affirmed.

HELD: Brown failed to substantially comply with the terms of the policy. Danish Mutual had a reasonable basis to deny coverage.

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

Civil Rights - ADEA

Plaintiff was employed by Must, Inc. (a Burger King franchisee) as an assistant manager and then a manager from 1983 to 1989. In 1989 he was terminated for poor performance. He was then employed by another Burger King franchisee for four months and terminated for poor performance. He was then rehired by Must, Inc., in 1989, at age 48 to manage a Burger King. Plaintiff was terminated eighteen months later at age 49. Plaintiff alleged that he was terminated due to his age. Defendant argued that he was terminated due to poor performance and the fact that his store ranked 108th out of 110 stores in the region. The jury found for Plaintiff and Defendant appealed. Affirmed.

HELD: An ADEA claim may be established by one of two methods: the McDonnell Douglas method or the Price Waterhouse method.

To use the McDonnell Douglas method, the plaintiff must establish a prima facie case of discrimination: (1) that he is a member of a protected class; (2) he was performing his work satisfactorily; and (3) he had adverse action taken against him. The defendant must then articulate a legitimate nondiscriminatory

reason for the adverse employment action, although the defendant need not establish the nondiscriminatory reason by a preponderance of the evidence. The plaintiff must then prove that the asserted reason is a pretext and that the discriminatory motive played a substantial part in the adverse action.

To use the Price Waterhouse method, the plaintiff must present credible evidence of conduct or statements of supervisors sufficient to infer that discrimination was a motivating factor in the adverse employment action. If the plaintiff meets that burden, the defendant must establish by a preponderance of the evidence that it would have made the same decision even in the absence of the improper motive.

The Supreme Court held that Plaintiff had presented sufficient evidence to submit the case to the jury under either method. Accordingly, the trial court properly denied Defendant's motions for DV and JNOV.

The Court rejected Defendant's argument that if a member of a protected class is hired and then fired shortly thereafter, there is no discrimination as a matter of law. The Court stated "[t]o apply such a wooden rule in an area where each case is factually distinct would effectively grant every employer a grace period at the beginning of each employee's tenure during which the employer could freely discriminate with no fear of sanctions. This we choose not to do."

Courtney v. American National Can Co., 537 N.W.2d 681 (Iowa 1995)

Civil Rights - Disability

After Plaintiff Courtney, who was a forklift driver for Defendant American National Can Co. ("ANC"), had three accidents, ANC's company physician determined that Courtney had become legally blind in one eye. The physician recommended that Courtney should not be allowed to drive a forklift as he posed a safety hazard to himself and other employees. ANC reassigned Courtney to a lower paying position. Courtney sued for disability discrimination pursuant to Iowa Code Chapter 216. The District Court, after a bench trial, held in favor of ANC. The Supreme Court affirmed.

HELD: Courtney failed to prove the element of his claim that he was qualified for the forklift driver job. A blanket exclusion of a particular class of disabled persons from a position is not permissible unless the disability necessarily renders all members of the class incapable of performing the essential functions of the job. An individualized inquiry is required.

Here, ANC made the required individualized inquiry. The company physician was familiar with how forklifts were used at ANC. The company physician reasonably concluded that Courtney could not perform the essential functions of the forklift driver's job, particularly since Courtney had been involved in three accidents in a short period of time. Accordingly, ANC did not rely on any stereotypical judgment that full vision in both eyes was required to operate a forklift.

The Court also rejected Courtney's argument that ANC had not reasonably accommodated Courtney's disability. Since Courtney's job had involved operating a forklift ninety-eight percent of the time, eliminating that duty from his job would alter the essential nature of the job and result in more than a de minimis expense.

Ramirez v. Iowa Department of Transportation, 546 N.W.2d 629 (Iowa Ct. App. 1996)

Civil Rights - National Origin

Plaintiff, of Hispanic descent, alleged that the Iowa Department of Transportation had failed to promote him due to his national origin. Ramirez and two Caucasian co-workers were finalists for two positions. The positions were filled with the co-workers. The District Court, following a bench trial, held in favor of the DOT. Affirmed.

HELD: The correct analytical framework is the "shifting burden" analysis of McDonnell Douglas. Plaintiff successfully demonstrated a prima facie case of discrimination. The DOT offered a legitimate, non-discriminatory reason for the promotion of the two co-workers in that they had significantly more experience than Plaintiff in "inspection" which was necessary for the positions.

The Court rejected Plaintiff's arguments that the non-discriminatory reason offered by the DOT were pretextual. First, despite Plaintiff's arguments, the DOT's affirmative action plan did not require that Plaintiff be given preferential treatment because his old position and the position he was applying for are considered "equal" positions under the plan. Second, there was insufficient evidence that Plaintiff had been subjected to a hostile work environment or that any inappropriate conduct by his other co-workers had affected the promotion decision. Third, the District Court was in the best position to weigh the credibility of the testimony of the person making the promotion decision that he had promoted those who he believed were best qualified.

Lee v. Halford, 540 N.W.2d 426 (Iowa 1995)

A

Civil Rights - Property and Liberty Interests in Employment

Lee was employed as the Deputy Director of the Iowa Department of Corrections. Halford was hired as Director of the Department. Two days after commencing service, Halford terminated Lee's employment, citing differences in management styles. Lee sued for breach of contract and for deprivation of liberty and property interests pursuant to 42 U.S.C. § 1983. The District Court granted summary judgment for Defendants. The Supreme Court affirmed.

HELD: Iowa Code Chapter 19A establishes various protections for state employees. However, Iowa Code § 19A.3 exempts "division heads" from the protections of Chapter 19A. Lee was a "division head." The purpose of this exception is to give agency heads, such as Halford, flexibility in appointing key policy making employees. Accordingly, under the statute, Lee served at the pleasure of the Director. Accordingly, Lee possessed no property or liberty interest which could have been violated.

Davis v. City of Waterloo, No. 78/94-1516 (Iowa Sup. Ct. July 24, 1996)

Civil Rights - Racial Discrimination

Following an injury to one of the city's street department foremen, the position was declared vacant. Davis (a white male), Thompson (an African-American male), and another white male, were the top three finishers in a civil service examination. The street department supervisor, Grimm, recommended Davis for the position. Grimm testified that, in addition to placing first on the civil service exam, Davis' qualifications for the position greatly exceeded Thompson's due to Davis' experience and ability. The city's affirmative action officer, Turner, recommended that Thompson be appointed because the city had no African-Americans in any of its nine foreman positions. Based on Turner's recommendation, Meyer, the public works director, and Rodemeyer, the personnel director, recommended to the city council that Thompson be promoted. Meyer testified that but for the recommendation from Turner, he would have recommended that Davis be promoted. Rodemeyer testified that the sole reason he recommended that Thompson be promoted was the fact that there was no member of a minority group employed by the city as a foreman. The city council appointed Thompson. The evidence demonstrated that the city council traditionally appointed whomever the department head (in this case Meyer) recommended.

Davis sued for a violation of his civil rights under both state and federal law. The District Court found in favor of Davis. The Supreme Court affirmed.

HELD: The law protects white persons, as well as minorities, from discrimination. The evidence is "vividly clear" that the promotion decision was based on race.

The Court also rejected the City's defense that it had relied on its affirmative action plan in promoting Thompson. An affirmative action plan is not a license to favor minority employees over white employees. Such a plan must be narrowly tailored to remedy past discrimination by the particular public employer and not discrimination in society in general. A mere imbalance between one identifiable racial group and another in an employer's labor force or in a particular position does not justify preferences in the hiring or promotion of a member of the underrepresented group.

Further, the city's affirmative action plan was directed solely at eliminating any barriers to minority race applicants. The plan did not give minority groups any preferences and, in fact, specifically stated that personnel decisions would be made without regard to race.

Reiss v. ICI Seeds, Inc., 548 N.W.2d 170 (Iowa Ct. App. 1996)

Civil Rights - Sex Discrimination and Retaliatory Discharge

Plaintiff Reiss sued ICI for sex discrimination and retaliatory discharge. Reiss had been employed as a district sales manager for ICI. Reiss was discharged when ICI purchased another company, consolidated the two sales forces, and eliminated four positions, including Reiss' position. Reiss filed a complaint with the Iowa Civil Rights Commission asserting that she had been discharged in retaliation for an earlier sexual harassment charge she had filed against ICI's marketing manager, Robert McClelland. The District Court found in favor of ICI. Affirmed.

HELD:

1. With respect to the retaliatory discharge claim, Plaintiff failed to prove that there was any causal connection between her earlier sexual harassment charge and her termination. The only evidence offered by Reiss was that other employees had been sexually harassed by McClelland. There was no evidence that Reiss was discharged because of her prior complaint.

2. Even though Reiss had failed to specifically make a sex discrimination complaint to the Iowa Civil Rights Commission, her sex discrimination claim was fairly included in the retaliatory discharge claim.

3. Although the trial court erred in finding that Reiss had not made out a prima facie case of employment discrimination in accordance with McDonnell Douglas, there was no evidence that Reiss' termination was influenced by a discriminatory motive. The evidence was that Reiss was terminated as part of a reduction in force. Although ICI produced no objective reasons for Reiss' termination, the testimony of ICI's manager Steve Mohr that he had terminated Reiss and the other three employees based on his subjective opinion that the sales managers he kept would work best with him and do the best job for the company was sufficient to provide sufficient evidence for the fact finder to conclude that Reiss' termination was not motivated by sex discrimination.

Kulish v. West Side Unlimited Corp., 545 N.W.2d 860 (Iowa 1996)

Consortium

Matthew Kulish, an adult, was killed in an accident with a truck owned by West Side Unlimited. Plaintiffs, Kulish's parents, brought claims against West Side Unlimited and its driver for wrongful death and for loss of consortium. The trial court dismissed the loss of consortium claim. Affirmed.

HELD: The Court has consistently refused to recognize a common law parental right to consortium for the injury to or death of an adult child. Plaintiffs argued that allowing an adult child to recover for the loss of consortium of a parent while not permitting parents to recover for the loss of consortium of an adult child violates equal protection. The right of an adult child to recover for the loss of consortium of a parent is created by Iowa Code § 613.15. The Court disagreed with Plaintiffs' equal protection argument on the basis that the common law recognized no rights of consortium between an adult child and parent in either direction. The Court carefully noted that Plaintiffs were not asserting that either Iowa Code § 613.15 or Rule of Civil Procedure 8, which permits a parent's consortium claim for injury to or the death of a minor child violated equal protection. The Court expressed no opinion on that issue.

Willey v. Riley, 541 N.W.2d 521 (Iowa 1995)

Conversion

Riley hired Willey as an associate in his law firm. Willey subsequently resigned. Willey sued Riley for, inter alia, conversion of a settlement check.

Willey represented the Estate of Jamie Harder in a wrongful death claim. The parties subsequently settled the litigation. Willey requested that the check be made payable to "John Harder, Executor of the Estate of Jamie Harder and Tom Riley Law Firm, P.C." The check was actually made payable to the Harders and "Wythe Willey, their attorney." When the check was received, Riley or one of his employees endorsed the check and deposited into the Tom Riley Trust Account. Riley also transferred two-thirds of the settlement proceeds to a certificate of deposit in the name of the Harders. Riley also transferred a portion of the funds into a certificate of deposit in the law firm's name and a portion into the law firm's general account. All of these transfers were made before the probate court approved the law firm's fees and expenses.

The District Court granted Riley's motion for summary judgment. Affirmed.

HELD: The District Court correctly granted summary judgment. First, by requesting that the check be made payable to the "Tom Riley Law Firm," Willey gave implied authority to Riley to endorse the check with Willey's name. Second, before the probate court approved the requested fees and expenses, Willey had no right to control any of the proceeds from the settlement. Thus, there could be no conversion by Riley of property owned by Willey.

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996)

Defamation - Malice

Trustees of Iowa Trust sued custodian of trust, Bankers Trust Company, and law firm for Trust, the Davis firm, for negligence and defamation.

The defamation claim arose from an article in the Des Moines Register relating statements by officers of Bankers Trust that Bankers Trust's contract with the Iowa Trust did not require Bankers Trust to perform various services that a custodian normally does, such as ensure that collateral was received before transferring securities in a reverse repurchase agreement and suggesting that the Trustees did not want those services because they were more expensive. The District Court granted summary judgment in favor of Bankers Trust on the defamation claim. Affirmed.

HELD: While there would arguably be a genuine issue of disputed material fact under normal summary judgment rules, a more stringent standard to avoid summary judgment applies in a defamation case. Because of the First Amendment implications, summary judgment is warranted in a defamation case (where malice is required to be shown) unless a rational fact finder could

conclude that malice had been established by clear-and-convincing evidence. In this case, there is no clear and convincing evidence of malice and summary judgment was properly granted.

Bitner v. Ottumwa Community School District, 549 N.W.2d 295 (Iowa 1996)

Defamation - Privilege

Bitner, a former elementary school principal, sued the school district, school officials, a bank, and accountants for defamation relating to statements contained in an audit and statements made in the course of a criminal investigation and resulting charges.

After Bitner's resignation to accept another position, the school conducted an investigation regarding shortages in the school's activity fund, which had been under Bitner's control. The school obtained a statement from the bank and one of its tellers that Bitner had presented checks payable to the school and received payment in cash. The school also hired an auditing firm to provide a written report to the school district. The report was subsequently provided by the auditor to the state auditor who made it public pursuant to Iowa Code § 11.19. As a result of the audit, Bitner was charged with theft. He was subsequently acquitted.

The trial court granted summary judgment in favor of the defendants. The Supreme Court affirmed.

HELD: All of the defendants are entitled to absolute or qualified privileges. Further, Bitner is a public figure and thus, was required to show that the Defendants acted with actual malice. There was no evidence of actual malice.

Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996)

Defamation - Public Concern/Malice

Jury foreman sued criminal defense attorneys and Des Moines Register for defamation for publishing information regarding attorneys' motion for new trial on basis that foreman was a racist and had given the clerk of court a false social security number (which later turned out to be his juror number). The trial court granted the Register's motion for summary judgment. After trial, a jury found in favor of the attorneys. Affirmed.

HELD: In order to establish a prima facie case of defamation against a media defendant, the plaintiff must show: (1) publication (2) of a defamatory statement (3) concerning the plaintiff (4) in negligent breach of the professional standard of

care (5) that results in demonstrable injury. Further, if the matter is of public concern, the plaintiff must prove actual malice to recover punitive damages.

Public concern "encompasses those controversies raising issues that might reasonably be expected to have an impact beyond the parties directly enmeshed in the particular controversy." The allegations against the juror and the resulting public perception of the criminal justice system are certainly of public concern, particularly the allegation that racism may have played a role in the conviction of the African-American criminal defendant.

Plaintiff failed to produce any evidence of actual malice. Although the Register article was based on an "advance" copy of the motion, rather than the motion as filed, "a motion to be filed as a court document by a member of the legal profession can be presumed to warrant a high degree of trustworthiness." Plaintiff also failed to produce any evidence of actual damages. Accordingly, summary judgment was properly granted in favor of the Register.

The Court also found no error in the trial against the attorneys.

Suntken v. Den Ouden, 548 N.W.2d 164 (Iowa Ct. App. 1996)

Defamation - Publication

Ex-wife sued ex-husband and his office manager for libel and intentional infliction of emotional distress for notations made by office manager on ex-husband's child support and alimony checks. Those notations included such comments as "$2250 unemployment ex-wife," "$2250 breast implants," and "$2250 psycho." The District Court found in favor of the ex-wife and against the office manager on the libel claim. The Supreme Court reversed.

HELD: The words on the checks are not libelous per se. Accordingly, the plaintiff had to prove "publication," i.e., that the words had been communicated to someone other than the plaintiff. Although the office manager had sent the checks to the Friend of the Court, who forwarded them to Plaintiff, there was no evidence that anyone at Friend of the Court had read the statements. Plaintiff's showing of the checks to friends was not "publication" because plaintiff cannot create publication by recommunicating the statements. Plaintiff deleted the statements before she cashed the checks.

Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996)

A

Defamation - Publication

IBP operates a hog processing plant in Storm Lake. IBP has a comprehensive alcohol and drug policy which prohibits, inter alia, the possession of "look-alike drugs." Ephedrine, a stimulant, is a prohibited drug under the policy. The policy also provides for daily searches of employees selected at random upon entering the plant. It was undisputed that Huegerich had never been informed of the "look-alike drug" policy or received a copy of the policy.

Huegerich was selected for random search. He was found in possession of an over-the-counter asthma medication called Maxalert, which contains ephedrine and which is identical in appearance to an illegal amphetamine called "white cross" or "speed." IBP's head of security, Jack Hunnel, tested the pills in the presence of Huegerich and Tom Henrich, the head of the quality control department. The pills tested positive for ephedrine. Hunnel accused Huegerich of possessing "white cross." Huegerich was terminated for violation of the "look-alike drug" policy. Subsequent lab tests demonstrated that the pills were Maxalert, a legal substance, rather than "white cross." Subsequent to his termination, other IBP employees told Huegerich that they had heard that he had been terminated for possession of "speed."

Huegerich sued IBP for negligent discharge and defamation, as well as other claims. The trial court entered judgment in favor of Huegerich on the negligent discharge and defamation claims. The Supreme Court reversed as to both claims.

HELD: An essential element of a defamation claim is publication. A defamatory communication is not "published" unless it is heard and understood by a third person to be defamatory. Defamatory statements made only to the person defamed are not "published." Huegerich alleged two acts of defamation by IBP.

First, Huegerich alleged that Hunnel had defamed him when Hunnel accused him of possessing "white cross." It was undisputed that the only three people in the room at the time were Huegerich, Hunnel, and Henrich. However, there was no evidence in the record that Henrich heard Hunnel make that comment. Accordingly, Hunnel's accusation was not published.

Second, Huegerich based a claim on statements by two IBP employees to him that they had heard that Huegerich had been fired for possession of "speed." However, there was no evidence in the record as to how, when, or from whom, these individuals had heard that Huegerich had been fired for possession of "speed." Huegerich argued that either some employee had seen Hunnel conduct the test through the security office window or that Hunnel, Henrich, or some other IBP management employee had

communicated to the IBP employees that Huegerich had been fired for the possession of "speed." The Court found that these arguments were merely speculative and that the employees could have merely drawn a conclusion from their observations of Huegerich's termination. Accordingly, there was not substantial evidence that IBP management had published any defamatory statement regarding the reason for Huegerich's termination.

Taggart v. Drake University, 549 N.W.2d 796 (Iowa 1996)

Defamation - Publication

Taggart was employed on a series of one year contracts, beginning in 1986-87, as an art professor at Drake University. Her area of specialization was graphic design. Normally, a professor was considered for tenure during the sixth year.

The art department chair, Tom Worthen, believed that Taggart was not submitting a sufficient amount of work for peer review. Taggart contended that graphic artists normally work for private clients and do not generally exhibit art works in an academic or professional setting. Worthen recommended to Dean Myron Marty that Taggart be given a "terminal appointment" for the 1991-92 academic year.

Taggart sued Drake for breach of contract, Dean Marty for intentional infliction of emotional distress, and Worthen for defamation. The trial court granted summary judgment in favor of the Defendants on all three claims. Affirmed.

HELD: The claim for defamation against Worthen related to Worthen's statements to Dean Marty and the faculty committee. The trial court held that intra-university communications between administrators and faculty members are not "published" for the purposes of defamation law.

The Court noted that there is a split of authority regarding whether intra-corporate communications can be defamatory. One line of cases holds that intra-corporate communications are merely the corporation talking to itself and, thus, there is no publication of the statements. Another line of cases holds that such communications are published, but are subject to a qualified privilege. The Court held that it need not resolve this issue because Taggart loses under either theory. Under the first theory, there is no defamation because the statements were not published. Under the second theory, the test for qualified privilege is met because all of the statements by Worthen were made as part of his duties to perform an annual evaluation of Taggart, which included making judgments as to Taggart's performance. Although Taggart disagreed with Worthen's evaluation, there was no evidence that Worthen harbored any specific intent to inflict harm upon Taggart through falsehood.

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Campbell v. Quad City Times, 547 N.W.2d 608 (Iowa Ct. App. 1996)

Defamation - Substantial Truth

Quad City Times published newspaper articles regarding couples' arrest and citation for contempt for failing to produce income tax records. Couple sued for defamation. Trial court granted summary judgment on basis that article was substantially true. Court of Appeals affirmed.

HELD: The defense of substantial truth requires proof that the "sting" or "gist" of the publication is substantially true. The "sting" or "gist" is determined by looking to the heart of the matter, and not to details of secondary importance. A review of the court records relating to the contempt action revealed that the article was substantially true, even though the article indicated that Plaintiffs had been fined, as well as imprisoned, when the Plaintiffs had actually only been imprisoned. However, this error did not alter the "gist" of the article that Plaintiffs had been found in contempt for failing to obey an IRS summons and a court order enforcing the summons and punished for that contempt.

Snyder v. Fish, 539 N.W.2d 197 (Iowa Ct. App. 1995)

Dramshop

While his parents were away, Shad Fish (age 19) hosted a party at his parents' house. Some of his friends brought a keg. Two of his guests were McFarland, also under the legal age, and Plaintiff Snyder. McFarland drank at the party. On the ride home, McFarland, who was driving, overturned the vehicle, injuring Snyder. There was contradictory evidence as to whether the parents arrived home after the party was over or while it was still going on or whether they knew about the party. Snyder sued the parents for a common law action based on Iowa Code § 123.47 for providing intoxicants to minors. The District Court granted summary judgment for Defendants. Affirmed.

HELD: To state a common law claim based on a violation of Iowa Code § 123.47, Plaintiff must prove that defendants' affirmatively provided alcohol to McFarland. Merely permitting or allowing beer to be consumed in their home is not sufficient. Even though there is a disputed fact issue as to whether the parents were aware of the party or tacitly permitted it to continue after they arrived home, those facts are not material. There is no evidence that Shad's parents provided the beer or hosted the party. Summary judgment was properly granted.

Hoth v. Meisner, 548 N.W.2d 152 (Iowa 1996)

Dramshop

Minor sued defendant for common law claim based on defendant furnishing liquor to minor.

HELD: Plaintiff's common law claim against Defendant licensee are preempted by dramshop statute, Iowa Code § 123.92. Despite Plaintiff's arguments that she was furnished alcohol as a social guest rather than as part of the Defendant's liquor business, she produced no evidence to rebut Defendant's affidavit that he had sold Plaintiff alcohol as part of his liquor business. Grant of summary judgment affirmed.

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996)

Duty

Trustees of Iowa Trust sued custodian of trust, Bankers Trust Company, and law firm for Trust, the Davis firm, for negligence and defamation.

The negligence claim alleged that Bankers Trust failed to comply with Iowa law, the trust's investment policy, and the custodial agreement and that the Davis firm failed to adequately specify Bankers Trust's duties in the agreement. The Trustees alleged that they had suffered damages financially and to their reputation as a result. The District Court granted summary judgment in favor of Bankers Trust and the Davis firm. Affirmed.

HELD: Assuming that Bankers Trust and the Davis firm were negligent and violated their duties to the Trust, they did not owe any duty to the Trustees individually. Bankers Trust and the Davis firm could not reasonably have foreseen that the Trustees were relying on their services for the protection of the Trustees' personal finances and reputations. Summary judgment was properly granted.

Deppe v. Poweshiek County, 542 N.W.2d 6 (Iowa Ct. App. 1995)

Duty

Deputies stopped Deppe for speeding. One of the deputies instructed Deppe to walk around the car and get into the back passenger seat. When Deppe attempted to do so, he was required to walk through waist high weeds in the dark. Deppe fell into an open culvert and was injured. The jury found the County sixty-five percent at fault. The Court of Appeals affirmed.

HELD: Section 314A(4) of the Restatement (Second) of Torts states that:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Under the unique facts of this case, when the deputy directed Deppe to get into the car, the deputy curtailed Deppe's normal opportunities for self-protection. The deputy expected Deppe to follow his instructions and would have taken "further action" if Deppe had not. Accordingly, the deputy owed a duty of care to Deppe.

Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699 (Iowa 1995)

Duty - Possessor of Land

Wal-Mart contracted with Laubscher to remove snow from Wal-Mart's parking lot. Laubscher sub-contracted with Lobaugh. After snow storm, Lobaugh attempted to remove the snow, but succeeding in only created a one to two inch thick surface of packed snow and ice. Two days later, Kragel fell in lot. Kragel sued Wal-mart, who filed a cross-petition against Laubscher for contribution, who filed a cross-petition against Lobaugh for contribution. At trial, district court instructed on Kragel's premises--liability claim against Wal-Mart in substantially the form provided by Iowa Civil Jury Instruction 900.1, which is based on sections 343 and 343A of the Restatement. Court refused, however, to instruct as requested by Kragel that Wal-Mart had a nondelegable duty to Kragel. Court also refused to instruct as requested by Kragel that Laubscher and Lobaugh's fault was attributable to Wal-Mart.

Jury found Wal-Mart not to be at fault. The Supreme Court reversed and remanded for a new trial.

HELD: The duty of a possessor of land to maintain the premises in a reasonably safe condition for invitees is a nondelegable duty. The Court adopted Section 425 of the Restatement (Second) of Torts, which provides:

> One who employs an independent contractor to maintain in a safe condition land which he holds open to the entry of the public as his place of business, . . . is subject to the same liability for physical harm caused by the contractor's negligent failure to maintain the land . . . in reasonably safe condition, as though he had retained its maintenance in his own hands.

Wieseler v. Sisters of Mercy, 540 N.W.2d 445 (Iowa 1995)

Duty - Possessor of Land

Alvin Wieseler parked in visitor lot and walked into hospital to pick up his wife, who was being released. Lot was fenced and had a single entrance and exit. There were no steps or safety railings, and the walkway was sloped. As he walked towards the hospital, Alvin slipped and noticed frost on the pavement. He realized he had to be careful and acted accordingly. On his return from his wife's room to his car, Alvin was carrying miscellaneous items in his arms. He slipped and fell.

The Wieselers sued the hospital. At trial, an architect criticized the parking lot design and the absence of safety devices. After jury found Alvin and hospital equally at fault, the District Court sustained hospital's motion for JNOV. Reversed.

HELD: The exception language in section 343 and section 343A of the Restatement apply and create a jury question which precludes entry of JNOV. Section 343A precludes liability for injuries caused by known or obvious dangers, "unless the possessor should anticipate the harm despite such knowledge or obviousness." Jury had sufficient evidence on which to find that hospital was negligent in failing to prevent Alvin's accident.

> [I]t would be reasonable for a jury to conclude that the hospital should have realized the hidden danger presented to persons venturing into the lot where slippery conditions could be present. Moreover, . . . even though Alvin knew of the potential danger presented by the slippery conditions, the hospital should have realized he might fail to protect himself . . . [because] there is only one common entrance/exit. . . . [T]he jury could reasonably conclude that Alvin knew the parking lot driveway was frosty but did not realize how slippery it was when going downhill with his arms full of hospital-stay related items.

Carr v. San-Tan, Inc., 543 N.W.2d 303 (Iowa Ct. App. 1995)

Duty - Possessor of Land

Injured swimmer brought suit against private beach owners for failing to warn him not to dive into water and for failing to have water depth markers. Swimmer (with blood alcohol level of

.230) was injured when he ran towards the water, dove in head first, and struck head on rock, causing quadriplegia.

HELD: Beach owners had no duty to warn plaintiff. The risk of harm of diving into shallow water is readily ascertainable by a reasonable person exercising ordinary perception, intelligence, and judgment and, therefore, is a known and obvious risk. It is unreasonable, as a matter of law, to dive head first into shallow water while running from a beach. The Court noted that "the legal responsibility to warn should serve to protect the visitor from harm, not expose possessors to liability for injuries from dangers which the visitor is capable of guarding against."

Allison by Fox v. Page, 545 N.W.2d 281 (Iowa 1996)

Duty - Possessor of Land

Mother of child bitten by dog belonging to tenant sued landlords.

HELD: Landlords owed no duty to child to protect her from the dog as landlords had no right to control the tenant's dog, even though there was evidence that the landlords knew that the dog had previously bitten someone else. A landlord is generally not liable for a dangerous condition existing on the land arising after the tenant takes possession. The Court also declined to apply section 379A of the Restatement (Second) of Torts, regarding a lessor's liability for known dangerous activities undertaken by a tenant, to this case.

Butcher v. White's Iowa Institute, 541 N.W.2d 262 (Iowa Ct. App. 1995)

Duty - Restraint of Animal

Plaintiff automobile driver was injured when he struck horse owned by defendant. The horse had escaped when an unattended truck (also owned by defendant) rolled down a hill and broke the fence. Following a jury verdict for the plaintiff, the trial court granted JNOV. Affirmed.

HELD: There was no substantial evidence of record that the defendant was negligent. Although proof that an animal is roaming at large is prima facie negligence, the presumption is rebuttable. There was no inference of negligence regarding the truck. Further, the fact that the trial court denied the defendant's motion for a directed verdict at the close of the evidence, did not preclude the trial court from granting JNOV.

Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459 (Iowa Ct. App. 1995)

Fear of Future Injury

Plaintiffs sued their employer and owner of building that they had participated in demolishing. Plaintiffs alleged that they had been exposed to asbestos during the demolition. Plaintiffs produced no evidence that they had suffered any actual physical injury. The District Court granted summary judgment for Defendants. Affirmed.

HELD: Plaintiffs' claim for fear of future injury must fail. Plaintiffs have not produced any evidence showing any statistical likelihood that they will develop any disease in the future. Further, Plaintiffs have failed to establish that they have suffered severe emotional distress. Plaintiffs merely testified to vague fears of developing cancer in the future.

Estate of Crabtree, 550 N.W.2d 168 (Iowa 1996)

Fiduciary Duty

Crabtree owned several certificates of deposit. One of the certificates was payable on his death to his daughter, Mary Ann Crabtree. In October of 1991, Crabtree suffered a stroke and was placed in a nursing home. In November of 1991, Crabtree executed a plenary power of attorney, appointing Sherry Wurzer, Crabtree's other daughter, as his attorney-in-fact. After consulting with Crabtree, Sherry cashed the certificate at issue in March of 1992 and used part of the money to pay Crabtree's nursing home expenses and to purchase a burial contract and monument that Crabtree desired. The certificate in which Mary Ann had an interest was chosen because it was the only certificate that could be cashed without a penalty for early withdrawal. Crabtree subsequently died in December of 1992. Mary Ann and Sherry were 50/50 beneficiaries in his estate.

Mary Ann filed a claim in probate asserting that Sherry had improperly made a gift to herself and had breached her fiduciary duties to Crabtree. The District Court dismissed Mary Ann's claim. The Supreme Court affirmed.

HELD: Although the power of attorney did not permit Sherry to make a gift to herself and the use of the certificate at issue instead of other assets had the eventual effect of increasing the amount of Crabtree's assets distributed to Sherry and decreasing the assets distributed to Crabtree, Sherry did not breach her fiduciary duty to Crabtree. Sherry did not benefit from the transaction at the time it occurred and any eventual benefit to her was fortuitous. Sherry had a duty to use Crabtree's assets for his benefit and the certificate was cashed to provide needed

support for Crabtree and to effectuate his desires regarding his burial. Further, it would not have been in Crabtree's financial best interest to cash a different certificate as the other certificates carried an early withdrawal penalty.

Clark v. McDaniel, 546 N.W.2d 590 (Iowa 1996)

Fraud

The Clarks purchased a Ford Taurus station wagon from the Pierces. The Pierces represented that the car was a 1989 model. The Clarks subsequently determined that the car had been "clipped" in that the rear half of a 1986 Taurus had been welded to the front half of a 1989 Taurus.

The Pierces were not aware that the car had been clipped. The Pierces had purchased the car from McDaniel, a used car dealer, who knew that the car had been clipped but did not specifically inform the Pierces of this fact.

After a bench trial, the trial court awarded the Clarks judgment against McDaniel. The trial court also dismissed the Clarks' claim against the Pierces, finding that the Pierces had only relayed the information given to them by McDaniel. The Supreme Court affirmed.

HELD: McDaniel had a duty to disclose the material fact that the car had been clipped to the Pierces as he was a person with superior knowledge dealing with persons who relied upon him. The evidence demonstrated that McDaniel did not clearly tell the Pierces that the car had been clipped, although some of McDaniels' statements to the Pierces may have suggested that fact. Further, the purchase agreement did not disclose that half the car was not a 1989 model.

The Court further held that the Clarks justifiably relied on McDaniel's failure to disclose to the Pierces that the car had been clipped. The Court adopted Section 533 of the Restatement (Second) of Torts which provides:

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

The Court found that McDaniel could reasonably expect that the Pierces would pass along information regarding clipping and the model year to a subsequent purchaser.

Benson v. Richardson, 537 N.W.2d 748 (1995)

Fraudulent Conveyance

United States District Court awarded judgment in favor of Plaintiffs and against Defendant Gary Richardson for over $1,000,000. The federal court did not award any judgment against Gary's wife, Phyllis. The judgment was subsequently declared non-dischargeable in a bankruptcy proceeding

Prior to the entry of the federal court judgment, Gary and Phyllis had a joint bank account. Three days after the judgment was entered, Phyllis transferred the balance of that account to an account solely in her name. Following the judgment, Gary deposited his earnings directly into Phyllis' account, over which he had no signature authority.

Also shortly after the judgment was entered, Gary unilaterally granted First Security Bank, which held the mortgage on the Richardson's residence, a security interest in his year end bonus. The residence was titled solely in Phyllis' name. The bonus was subsequently used to pay off the remaining mortgage.

Finally, after the judgment was issued, Gary, a physician, formed a professional corporation, Richardson P.C. Gary was issued one share of stock in the corporation and Phyllis was issued ninety-nine shares. Gary then substituted the P.C. in the employment agreements formerly between Gary and his employers. After a small salary paid to Gary, the earnings of Richardson P.C. were distributed ninety-nine percent to Phyllis or retained by the P.C.

Plaintiff judgment creditors brought an action contending that the bank account transfers, the house payment, and the professional corporation were all fraudulent transfers to Phyllis to avoid payment of the judgment and should be set aside. The District Court held that the transfers were fraudulent and entered judgment against Phyllis. The Supreme Court affirmed with modifications.

HELD:

1. The bank account transfers and Gary's deposits of his earnings into Phyllis' bank account were fraudulent conveyances. The Richardsons asserted that 75% of Gary's earnings were not subject to satisfaction of the judgment pursuant to the Federal Consumer Credit

Protection Act. The Court held that "when an individual places exempt earnings in the bank account of another, but retains full enjoyment of those earnings as if he or she held the earnings in his or her own account, those earnings only retain their exempt character for ninety days following their receipt." The Court noted that an exception to this rule exists if it can be shown that the parties had a longstanding practice of depositing money in a single party account, but here it was clear that the bank transfers were intended to avoid paying the judgment.

2. The Court held that the transactions regarding the house were not a legitimate preference of a creditor but rather constituted a fraudulent conveyance to Phyllis. The Court held that the trial court had properly imposed a constructive trust on the house in favor of the creditors. The Court modified the judgment to reduce the amount of the trust to reflect the extent of the proven non-exempt funds which were traceable to the house.

3. The Court found that Richardson P.C. was fraudulently established and that the P.C. was purely Gary's alter ego. "Fraudulent concealment of earnings is not a valid purpose for a corporation." Accordingly, the Court directed entry of judgment against Richardson P.C. for the entire federal court judgment. The Court also held that the dividends payed by the P.C. to Phyllis were fraudulent conveyances and that those dividends had thus lost any exempt character that they might have had as Gary's earnings.

INNK Land and Cattle Co. v. Kenkel, 546 N.W.2d 585 (Iowa 1996)

Fraudulent Conveyance

INNK obtained a judgment against Raymond and Evelyn Kenkel in Colorado. A bankruptcy court determined that the judgment was not dischargeable because it was based on fraud. INNK sued the Kenkels and other Defendants to recover assets that the Kenkels and corporations controlled by the Kenkels had transferred to others. The District Court found in favor of INNK. Affirmed.

HELD: In addition to a statute of limitations issue, the primary issue was whether INNK was an existing creditor of the Kenkels at the time the transfers were made. The Court affirmed the findings of the trial court that INNK was an existing creditor and that the transfers were fraudulent. The Court also rejected arguments by the Defendants that INNK had not been prejudiced.

Textron Financial Corp. v. Kruger, 545 N.W.2d 880 (Iowa Ct. App. 1996)

Fraudulent Conveyance

Kruger ran a store that sold pianos. Textron provided the floor plan financing for the business. Olson also provided financing to Kruger and placed pianos with Kruger for sale on consignment. Kruger executed a $100,000 promissory note in favor of Olsen. Kruger subsequently, in the face of financial problems, closed the business. At the time, Kruger owned Olson over $117,000.

In November of 1991, Textron filed suit against Kruger for $116,000 owed to it. A default judgment was entered in favor of Textron on December 27, 1991. On December 11, 1991, Kruger signed a quit claim deed to Olson transferring Kruger's remainder interest in 62.5 acres of farmland, in which Kruger's mother had a life estate, in exchange for a $35,000 credit against Kruger's debt to Olson. Kruger's mother died in May 1992 and Olson became the owner of the land pursuant to the quit claim deed.

Textron sued Kruger and Olson to set aside the deed as a fraudulent conveyance. The District Court ruled in favor of Kruger and Olson. The Court of Appeals reversed, finding that the conveyance was fraudulent based on the clear and convincing evidence.

HELD: Although a debtor may generally prefer one creditor over another, Kruger's deed to Olson bears numerous indicia of a fraudulent conveyance including:

1. Kruger was insolvent at the time the deed was signed;

2. Kruger deeded the property shortly after Textron filed its application for a default judgment;

3. Kruger and Olson had been close business associates for many years;

4. although Olson was a sophisticated buyer and seller of real estate, he never inspected the property, never made any attempt to determine the property's market value, never had the title examined, never asked how many acres were in the property, and never sought other information that a buyer would normally seek;

5. although the property was subject to a life estate, Kruger and Olson never discussed the health or life expectancy of Kruger's mother, which is an issue a bona-fide buyer would have been highly interested in; and

6. Kruger never took any steps to determine the market value of the land, further, despite months of negotiations with Olson for a $75,000 credit against the debt in exchange for the deed, Kruger abruptly dropped his demand to a $35,000 credit.

There is clear and convincing evidence that Kruger intended to defraud Textron and that Olson actively participated in the fraud. The conveyance should be set aside.

City of McGregor v. Janett, 546 N.W.2d 616 (Iowa 1996)

Fraudulent Misrepresentation

Plaintiff landowners sued the City of McGregor on theory that members of city council had fraudulently misrepresented to them that they would return condemned land to Plaintiffs if the Plaintiffs did not appeal the decision of the compensation commission. Plaintiffs waived their appeal. City subsequently proceeded to evict Plaintiffs from the property pursuant to the decision of the compensation commission. The trial court held in favor of the Plaintiffs. Reversed with directions to enter judgment for the City.

HELD: Plaintiffs could not justifiably rely on statements by city council members as a city council can only officially act pursuant to the passage of a motion, resolution, amendment, or ordinance. Plaintiffs claimed reliance merely rests on informal, nonbinding predictions of the city council's future actions. Accordingly, persons relying on statements by city officials do so at their peril. "Were courts to impose liability on municipalities for the speculation advanced at city council meetings, or the assurances routinely given constituents by elected representatives, the potential for litigation would be staggering and the harm to legislative processes irreparable. Council members must be free to discuss the pros and cons of disputed issues without fear their inclinations will be misinterpreted."

Whalen v. Connelly, 545 N.W.2d 284 (Iowa 1996)

Fraudulent Misrepresentation

Whalen entered into an agreement with Connelly to operate a gambling riverboat in Davenport. Whalen and Connelly formed TCG, a limited partnership. Whalen became a five-percent limited partner. St. Louis River Cruise Lines, Inc., a corporation controlled by Connelly, became the other limited partner. Della III, Inc., another corporation controlled by

Connelly became the general partner. Whalen and Connelly also entered into a letter agreement defining what assets Whalen's five percent interest attached to.

Because additional capital was needed, a second partnership agreement was signed amending the first agreement. Under the second agreement, Iowa River boat Corporation became the second general partner and the corporations controlled by Connelly contributed additional capital. Whalen retained his five percent share. Whalen and Connelly also entered into a second letter agreement redefining the assets Whalen's five percent interest attached to.

Among other claims, Whalen sued Connelly, TCG, Della, Inc., and Connelly's attorney, Ellers, for fraudulent misrepresentation and alleged that he had been fraudulently induced to enter into the first partnership agreement and first letter agreement by representations relating to the extent of his five-percent interest. The Supreme Court affirmed the District Court's dismissal of this claim.

HELD: All of the representations asserted by Whalen were specifically addressed in the integrated written partnership agreements and letter agreements. Allowing Whalen to proceed would violated the parol evidence rule.

Second, Whalen waived any claim of fraudulent inducement by entering into the second partnership agreement and the second letter agreement. Before executing those documents, Whalen recognized that he might have a fraud claim.

Teague v. Mosley, No. 207/95-611 (Iowa Sup. Ct. July 24, 1996)

Immunity - County Board of Supervisors

Teague sued County Board of Supervisors pursuant to 42 U.S.C. § 1983 for violation of his civil rights resulting from being assaulted while an inmate at the Black Hawk County jail. Teague asserted that the supervisors had violated their duties in failing to provide a safe environment at the jail. The District Court granted summary judgment in favor of the supervisors. Affirmed.

HELD: County supervisors are entitled to absolute immunity for actions taken in connection with their official duties, if acting in a legislative capacity. To determine whether supervisors are acting in a legislative capacity, the Court will look to the nature of the function and the effect that exposure to liability would have on the official's performance of that function. The supervisors in this case were acting in a legislative capacity and are thus absolutely immune from liability.

Dickerson v. Mertz, 547 N.W.2d 208 (Iowa 1996)

Immunity - Iowa Tort Claims Act

Hunter brought action against two Department of Natural Resources employees, Mertz and Batterson, for abuse of process, malicious prosecution, intentional infliction of emotional distress, and violation of his due process rights pursuant to 42 U.S.C. § 1983. The District Court granted summary judgment in favor of the Defendants. The Supreme Court affirmed.

HELD: Under the Iowa Tort Claims Act, Iowa Code Chapter 669, Mertz and Batterson are statutorily immune from suit for abuse of process and malicious prosecution. Although Iowa Code § 669.4 waives the state's sovereign immunity, § 669.14 specifically excepts claims for "malicious prosecution" and "abuse of process."

Intentional infliction of emotional distress is not included in the exceptions enumerated in § 669.14. Accordingly, Mertz and Batterson are not statutorily immune with respect to the emotional distress claim.

With regard to the federal civil rights claim, Mertz and Batterson are entitled to qualified immunity. The actions of Mertz and Batterson were not unreasonable and there was no evidence that Mertz and Batterson knew or should have known that they were violating any of Dickerson's constitutional rights.

Hunt v. State, 538 N.W.2d 659 (Iowa Ct. App. 1996)

Immunity - State

On September 25, 1991, the Iowa Department of Transportation decided to install four-way stop traffic control signals at the intersection of Highway 13 and County Home Road. Prior to this decision, traffic on County Home Road was required to stop. Traffic on Highway 13 was not. The DOT placed signs at the intersection stating "4-Way Stop To Be Installed On Nov. 20, 1991."

On October 24, 1991, Hunt was killed while attempting to cross Highway 13 after coming to a stop on County Home Road. Her administrator sued the State, alleging that the State was negligent in failing to timely install four-way stop signs after the State had determined that such signing was necessary.

The trial court granted the State's motion to dismiss. Affirmed.

HELD: Iowa Code § 668.10(1) provides that the State shall not be assigned a percentage of fault for "the failure to place, erect, or install a stop sign," but once the "device has been placed, created or installed" the State may be assessed a

percentage of fault for "failure to maintain the device." Hunt argued that the September 25, 1991, decision "created" a stop sign and that the State had failed to maintain the sign by timely installing it.

The Court rejected this construction and held that the State's decision as to when to install a sign falls within the State's discretion whether to install a sign at all. Accordingly, the State is entitled to immunity under § 668.10(1).

Dickerson v. Mertz, 547 N.W.2d 208 (Iowa 1996)

Intentional Infliction of Emotional Distress

Hunter brought action against two Department of Natural Resources employees, Mertz and Batterson, for abuse of process, malicious prosecution, intentional infliction of emotional distress, and violation of his due process rights. The claims were based on the following incidents:

1. Mertz stopped Dickerson to check his hunting license. Mertz' license failed to display a hunter safety certificate number as required by law. Dickerson told Mertz that he had taken the hunter safety course. Mertz later confirmed that Dickerson had not completed the course and issued a citation to Dickerson for hunting without a valid license and confiscated the license. Dickerson was acquitted of the charge, but Mertz refused to return the license. Dickerson obtained a new license.

2. Based on an eyewitness statement, Batterson charged Dickerson with "taking deer by auto" and confiscated the deer. Dickerson was subsequently acquitted of the charge.

3. Batterson checked Dickerson's license on eight to ten occasions in a "rude manner."

HELD: The actions of Mertz and Batterson were not "outrageous" as a matter of law. All of the actions taken by Mertz and Batterson were within their authority as conservation officers.

Suntken v. Den Ouden, 548 N.W.2d 164 (Iowa Ct. App. 1996)

Intentional Infliction of Emotional Distress

Ex-wife sued ex-husband and his office manager for libel and intentional infliction of emotional distress for notations made by office manager on ex-husband's child support and alimony

checks. One of those notations was "$2250 M.S." The District Court found in favor of the ex-wife and against the office manager on the intentional infliction claim. The Supreme Court reversed.

HELD: The primary factual issue was whether "M.S." meant multiple sclerosis, a condition which afflicted Plaintiff, or was Plaintiff Marlene Suntken's initials. The Supreme Court held that it was bound by the trial court's finding that it meant multiple sclerosis. The Court held, however, that the conduct was not sufficiently "outrageous" to support a claim of intentional infliction of emotional distress.

Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459 (Iowa Ct. App. 1995)

Intentional Infliction of Emotional Distress

Plaintiffs sued their employer and owner of building that they had participated in demolishing. Plaintiffs alleged that they had been exposed to asbestos during the demolition. Plaintiffs produced no evidence that they had suffered any actual physical injury. The District Court granted summary judgment for Defendants. Affirmed.

HELD: Plaintiffs' claim for intentional infliction of emotional distress must fail. The facts do not demonstrate any outrageous conduct.

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Intentional Infliction of Emotional Distress

Van Baale was employed by the Des Moines Police Department. He was terminated for misconduct. He brought suit against the City of Des Moines and various officials for breach of oral contract, promissory estoppel, negligence, denial of equal protection, and intentional infliction of emotional distress. The District Court granted Defendants' motion to dismiss. The Supreme Court affirmed.

HELD: All claims except the intentional infliction of emotional distress were properly dismissed as Iowa Code Chapter 400 is the exclusive remedy for claims alleging that a civil service employee was improperly terminated.

The intentional infliction claim apparently related to a promise by Police Chief William Moulder that Van Baale would not be dismissed if he pled guilty to the criminal charges relating to the misconduct so that the City could avoid a trial with the accompanying negative publicity. Van Baale asserted that Moulder

then yielded to media pressure and fired Van Baale. The Court held that, viewing the evidence in the light most favorable to Van Baale, Moulder's conduct was not sufficiently outrageous to state a claim.

Taggart v. Drake University, 549 N.W.2d 796 (Iowa 1996)

Intentional Infliction of Emotional Distress

Taggart was employed on a series of one year contracts, beginning in 1986-87, as an art professor at Drake University. Her area of specialization was graphic design. Normally, a professor was considered for tenure during the sixth year.

The art department chair, Tom Worthen, believed that Taggart was not submitting a sufficient amount of work for peer review. Taggart contended that graphic artists normally work for private clients and do not generally exhibit art works in an academic or professional setting. Worthen recommended to Dean Myron Marty that Taggart be given a "terminal appointment" for the 1991-92 academic year.

Taggart sued Drake for breach of contract, Dean Marty for intentional infliction of emotional distress, and Worthen for defamation. The trial court granted summary judgment in favor of Defendants on all three claims. Affirmed.

HELD: Taggart's claim against Dean Marty was that during a meeting between Dean Marty and Taggart, Dean Marty yelled at her in a sexist and condescending way, called her "young woman," accused her of causing trouble, stated that she was making his life miserable, and leaned over the table and glared at her in a threatening manner. The Court held that this conduct was not sufficiently outrageous to state a claim for intentional infliction of emotional distress.

Lamb v. Newton-Livingston, Inc., No. 6-120/94-1613 (Iowa Ct. App. May 31, 1996)

Intentional Infliction of Emotional Distress

Plaintiff sued nursing home for intentional infliction of emotional distress, and other claims, related to her mother's suicide while in care of home. The trial court directed a verdict for Defendants on Plaintiff's intentional infliction claim. Affirmed.

The claimed emotional distress resulted from two statements by a nursing home employee to Plaintiff. The first was a claim by the employee that the mother's vomiting was self-inflicted and that the mother's behavior might be modified if Plaintiff

restricted her visits. Plaintiff believed her mother's vomiting to be involuntary but restricted her visits in accordance with the employee's advice. The mother committed suicide shortly thereafter. The second statement was to the effect that the employee could not understand why the mother had committed suicide to hurt Plaintiff, when Plaintiff had been so good to her mother.

HELD: Neither of these statements rises to the level of outrageous conduct. Whether or not the advice to Plaintiff to restrict her visits was good or bad advice is not relevant. The second comment was merely a poor attempt at sympathy.

Kabe's Restaurant, Ltd. v. Kintner, 538 N.W.2d 281 (Iowa 1995).

Interference with Contract

Kintner and others formed Kabe's, a restaurant and motel. Kintner was the moving force behind the formation of the business venture. He was an original member of the board of directors, the major shareholder, and the manager of the restaurant and motel. Original members of the board of directors intended that Kintner be granted the opportunity to work for the business for as long as he wished or until reaching retirement age. Several years after the business commenced, Kintner developed conflicts with board member Hall over how to run the business. At Hall's instigation, the board terminated Kintner. Kintner sued for breach of his permanent employment contract. Kintner also sued Hall for tortious interference with contract.

Following jury verdict for Kintner, the District Court granted Hall's JNOV motion on interference claim.

HELD: Notwithstanding Kintner's evidence of Hall's animus and his instigation of board decision to terminate Kintner, Hall's status as a board member and part owner creates a qualified privilege. Kintner did not produce any evidence that Hall acted in excess of the parameters protected by the qualified privilege.

Willey v. Riley, 541 N.W.2d 521 (Iowa 1995)

Interference with Contract

Riley hired Willey as an associate in his law firm. Willey subsequently resigned and sued Riley for unpaid wages. Riley counterclaimed for, inter alia, recovery of fees that Willey earned as a lobbyist for Reese Communications Companies, Inc., and Philip Morris, U.S.A. Willey subsequently amended to add a claim for interference with Willey's contracts with Reese and Philip Morris.

Willey had been hired by Reese to perform lobbying services for Philip Morris. In January of 1990, Willey entered into a one-year contract for lobbying services with Phillip Morris directly. Willey resigned on March 30, 1990. On April 2, 1990, a fax from Patricia Wilson of Philip Morris to Willey came to Riley's attention. Riley called Wilson and began asking her questions about Willey's relationship with Philip Morris. Wilson refused to answer Riley's questions and terminated the call. Riley called Wilson again two weeks to a month later and again asked her questions regarding Willey's relationship with Philip Morris. Wilson refused to answer and terminated the call. Wilson reported the calls from Riley to her superiors, who instructed her to sever all contacts with Willey. Wilson testified that but for the calls from Riley she would have continued to work with Willey and would have renewed the contract with Willey at the end of 1990.

Following a jury verdict for Willey on the intentional interference claim, the District Court declined to grant Riley's JNOV motion. The Supreme Court reversed, holding that the JNOV motion should have been granted.

HELD: Willey did not present substantial evidence that Riley's two calls to Wilson were made with the predominant purpose of financially injuring or destroying Willey. The evidence demonstrated that Riley made the calls for a legitimate purpose, to inquire into the nature and extent of an employment relationship between Philip Morris and Willey, one of Riley's employees. There was no evidence that Riley made any comments derogatory of Willey during those calls. Philip Morris' decision to terminate Willey's contract was merely incidental to Riley's legitimate inquiries.

Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597 (Iowa 1996)

Interference with Contract

Cas' Feed Store traditionally allowed its customers, at the end of the year, to prepay future crop expenses so that the customers could utilize the tax deduction. Cas then deposited the prepayments with Farmers State Bank and Trust. Cas defaulted on its loan with the bank and the bank set-off Cas' accounts against the loans, including the customer prepayments. Cas' agreement with the bank allowed the right of set-off. Although the bank was aware that some of the money in Cas' accounts constituted pre-payments, those amounts were not segregated in a separate account or otherwise identified. Several customers sued the bank for intentional interference with contract. The District Court entered judgment in favor of the customers and against the bank. The Supreme Court reversed and held that a directed verdict should have been directed in favor of the bank on the intentional interference claim. The Court

remanded for consideration of a constructive trust claim, which the District Court had not ruled on.

HELD: The bank had no duty to investigate the source of the funds before exercising its right of set-off. A party does not improperly interfere with a contract by exercising its own legal rights to protect its own financial interests. Even though the bank acted intentionally to seize the assets, there was no evidence that the bank set-off the funds with the predominant purpose of injuring Cas' customers.

RTL Distributing, Inc. v. Double S. Batteries, Inc., 545 N.W.2d 587 (Iowa Ct. App. 1996)

Interference with Contract

Van Schroeder and Marie Schulte incorporated Double S for the purpose of operating a battery wholesale business. Schroeder and Schulte purchased the rights to service several customers from their prior employer, Gary Doerrfeld, and entered into a non-compete agreement with Doerrfeld. Doerrfeld subsequently incorporated RTL Distributing. Benjamin Chair provided the capital for RTL and became its sole shareholder. Subsequently, Doerrfeld left RTL to work for Double S. RTL sued Double S for interference with a contractual arrangement and interference with a prospective business advantage. Judgment was entered for RTL. The Court of Appeals reversed and directed that judgment should be entered in favor of Double S.

HELD: The substance of RTL's claim was that Double S interfered with the employment contract between Doerrfeld and RTL. However, Doerrfeld was an employee-at-will. As RTL had no legal right to Doerrfeld's services, but only a future expectancy of his continued employment, the claim was for interference with a prospective contractual relationship, not a claim for interference with an existing contract. Accordingly, RTL was required to prove that Double S acted with the predominate purpose of financially injuring or damaging RTL's business. Although there was evidence that Double S violated "accepted business practices" and various provisions of the agreement between Double S and Doerrfeld, there was no substantial evidence that Double S acted with any improper purpose.

Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995).

Interference with Contract

Zumaris became a key employee at Economy, a commercial roofing repair business that was owned by his stepfather. When the stepfather died, Zumaris became president of Economy. Zumaris

repeatedly attempted to buy Economy from his stepfather's natural children, who were not involved in the business. When other prospective purchasers appeared and began inquiries and negotiations, Zumaris left to start another business, Roofing Technologies, Inc. (RTI). Before resigning from Economy, however, he obtained reimbursement for accrued vacation pursuant to a policy never adopted by the board of directors. Evidence suggested that Zumaris accessed Economy's bid computer, which contained information on customers, cost information, and price information, and copied the information to printer or disk and deleted the information from the computer. Zumaris also caused Economy's mechanic to perform substantial maintenance on roofing equipment that Zumaris had purchased. RTI competed directly with Economy, to Economy's financial detriment.

Economy also had a contract with one of its primary customers, Alcoa. The contract required Economy to perform work as requested by Alcoa. The Court interpreted the contract to impose no contractual requirement on Alcoa to place all of its work with Economy or to not use any other contractor, although Alcoa had, in fact, placed all of its work with Economy prior to RTI's formation.

With new ownership, Economy sued Zumaris and RTI for interference with existing contract and prospective business advantage. After trial, the district court directed a verdict on the interference claims.

HELD: The District Court properly directed a verdict on Economy's claim for interference with an existing contract, because Economy's contract with Alcoa was strictly executory. Assuming without deciding that only valid and enforceable contracts can support an action for intentional interference with a contract (an assumption made by the parties), Economy's contract with Alcoa is unenforceable by virtue of an absence of mutuality of obligation. Alcoa had no obligation to use Economy for its work, and Economy had no right to receive work from Alcoa unless Alcoa requested in writing that services be performed.

On the other hand, the history of transactions between Economy and Alcoa served as a valid basis for Economy's claim for interference with prospective business advantage. Economy adduced substantial evidence of anticipate prospective business with Alcoa, Zumaris' interference with that relationship by contacting Alcoa before Zumaris left the employ of Economy to solicit Alcoa's business for RTI, and other factors, such as Zumaris using Economy's staff and supplies to perform maintenance on equipment Zumaris intended to use in RTI's business. Zumaris also solicited other customers and other Economy employees for RTI before he left his employment with Economy. Economy also produced substantial evidence of Zumaris' animus toward the owners of Economy, to satisfy the requirement in prospective business advantage cases of proving an intent or purpose to

injure or destroy. Further, Zumaris copied computer files with customer information that he used for RTI and deleted that information from Economy's computer so that Economy no longer had the information. The District Court erred in granting Zumaris' motion for directed verdict on Economy's claim for interference with prospective business advantage.

Wemett v. Schueller, 545 N.W.2d 1 (Iowa Ct. App. 1995)

Joint Tortious Conduct

Plaintiff was injured in automobile accident. Plaintiff sued passengers in other vehicle on the theories that they had: (1) furnished alcohol to the driver; (2) were aiding and abetting the driver's criminal conduct; and (3) they were engaged in joint tortious conduct. The District Court granted summary judgment for Defendants. Affirmed.

HELD: There was no evidence that the passengers had furnished alcohol to the driver or had aided and abetted the driver's violation of the rules of the road (failure to stop at stop sign).

There was also no substantial evidence that the passengers were engaged in joint tortious conduct with the driver.

Anderson Plasterers v. Meinecke, 543 N.W.2d 612 (Iowa 1996)

Loss of Employee's Services

Employer sued third-party tortfeasor for loss of injured employees' services, the expense of hiring replacement workers, and increased workers' compensation premiums. Summary judgment was granted for third-party tortfeasor. Affirmed.

HELD: Supreme Court refused to recognize cause of action by employer against third-party tortfeasor for injury to employees. Even though such an action was allowed under English common law, that action was based on idea that employees are "property" of the employer. Such a claim has no basis in modern society. The Court adopted section 766C of the Restatement (Second) of Torts on this point.

The Court did leave open the possibility that such a claim may lie if the injury to the employee was intentionally, rather than negligently, caused.

Ruden v. Jenk, 543 N.W.2d 605 (Iowa 1996)

Malpractice (Legal) - Proximate Cause

Gertrude Ruden and Rosella Jasper filed suit against attorney Tom Jenk alleging malpractice in handling the estate of Ruden and Jasper's brother, Frank Ruden. Ruden and Jasper were administrator's of Frank's estate. The trial court granted summary judgment for Jenk. The Supreme Court affirmed.

Frank had purchased a tavern from the Jaegers in 1979. Max Jenk, Tom Jenk's father, prepared the real estate contract. In 1980, Frank executed an assignment of his interest in the contract to Ruden and Jasper. The assignment stated that "in case of my death for value received I hereby sell, assign and transfer . . . my right, title and interest" in the contract. The assignment was never delivered to Ruden and Jasper and they were unaware of the assignment until after Frank's death.

After Frank's death, Tom Jenk found the assignment, which he recorded. He advised Ruden and Jasper of the assignment. He also requested that the Jaegers make the remaining payments on the contract directly to Ruden and Jasper. Two other heirs of Frank's estate challenged the assignment on the basis that it was an attempted testamentary transfer that did not meet the requirements of a will. Jenk researched the validity of the assignment and concluded that it was invalid. Accordingly, Jenk instructed the Jaegers to make payments to the estate and requested Ruden and Jasper to turn over the payments to the estate which they had received, which they did. The probate court subsequently determined that the assignment was ineffective.

Ruden and Jasper sued Jenk for malpractice alleging that: (1) he incorrectly advised them that the assignment was valid; and (2) he failed to advise them of their potential cause of action against Max Jenk for improperly preparing the assignment before the statute of limitations expired. The trial court granted summary judgment for Jenk. The Supreme Court affirmed.

HELD: The first question is whether any attorney-client relationship existed between Jenk and Ruden and Jasper. Although an attorney for an estate is hired by the executor or administrator, his fiduciary duties extend to overseeing the estate and all of the distributees. Jenk did have a duty to advise Ruden and Jasper, as administrators of the estate, as to the legal validity of the assignment. Factual issues exist as to whether an attorney-client relationship existed between Jenk and Ruden and Jasper, as individuals. Further, there are factual questions as to whether Jenk breached any duty.

However, Plaintiffs failed to demonstrate that any breach of duty by Jenk proximately caused them damage. With regard to the first allegation, if Jenk had originally advised Ruden and Jasper

that the assignment was valid, that advice would not have changed the eventual outcome of the probate court finding the assignment invalid. Jenk merely gave Ruden and Jasper "false hope."

With regard to the second allegation, prior to the running of the statute of limitations, Ruden and Jasper consulted another attorney, Bitter, who advised them that Max Jenk had committed malpractice in his drafting of the assignment and in failing to deliver the assignment. Bitter declined to pursue the claim. Tom Jenk's failure to advise Ruden and Jasper of their claim against Max Jenk did not proximately cause their damage as they were aware of that claim from Bitter's advice.

Kubik v. Burt, 540 N.W.2d 60 (Iowa Ct. App. 1995)

Malpractice (Legal) - Need for Expert Testimony

Kubik sued former attorney Burk for legal malpractice relating to Burk's representation of Kubik in criminal proceedings. Kubik represented himself pro se in malpractice action. Burk filed a motion for summary judgment on the basis that Kubik had failed to designate any experts as required by Iowa Code § 668.11. The trial court granted the motion and the Court of Appeals affirmed.

HELD: A pro se litigant is required to conform to Section 668.11 just as an attorney is required to do so. Kubik failed to show good cause for failing to comply with Section 668.11.

Expert testimony that an attorney's conduct is negligent is required, unless the proof is so clear that the trial court can rule that the attorney was negligent as a matter of law or negligence can be clearly recognized or inferred by a person who is not an attorney. The allegations of negligence raised by Kubik are beyond the common knowledge of laypersons and, accordingly, expert testimony was required. Having no expert testimony, Kubik's claims were properly dismissed.

Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996)

Negligent Discharge

IBP operates a hog processing plant in Storm Lake. IBP has a comprehensive alcohol and drug policy which prohibits, inter alia, the possession of "look-alike drugs." Ephedrine, a stimulant, is a prohibited drug under the policy. The policy also provides for daily searches of employees selected at random upon entering the plant. It was undisputed that Huegerich had never been informed of the "look-alike drug" policy or received a copy of the policy.

Huegerich was selected for random search. He was found in possession of an over-the-counter asthma medication called Maxalert, which contains ephedrine and which is identical in appearance to an illegal amphetamine called "white cross" or "speed." IBP's head of security, Jack Hunnel, tested the pills in the presence of Huegerich and Tom Henrich, the head of the quality control department. The pills tested positive for ephedrine. Hunnel accused Huegerich of possessing "white cross." Huegerich was terminated for violation of the "look-alike drug" policy. Subsequent lab tests demonstrated that the pills were Maxalert, a legal substance, rather than "white cross."

Huegerich sued IBP for negligent discharge and defamation, as well as other claims. The trial court entered judgment in favor of Huegerich on the negligent discharge and defamation claims. The Supreme Court reversed as to both claims.

HELD: The trial court held that IBP had negligently discharged Huegerich because Huegerich had never been made aware of IBP's policy prohibiting the possession of "look-alike drugs" and had never been advised that he could be terminated for possessing "look-alike drugs." The Court began by noting that Huegerich was an employee-at-will and that the general rule is that an employer may discharge an employee-at-will at any time, for any reason, or for no reason. The only exceptions to the at-will rule are violation of public policy or when a contract is created by an employer's handbook or policy manual.

The Court noted that a minority of jurisdictions have recognized a cause of action for negligent discharge, but most jurisdictions have refused to do so. The Court held that recognizing this tort would impose a duty of care on an employer when discharging an employee, which would radically alter the at-will rule. Accordingly, the Court declined to recognize a cause of action for negligent discharge.

Lamb v. Newton-Livingston, Inc., No. 6-120/94-1613 (Iowa Ct. App. May 31, 1996)

Negligent Infliction of Emotional Distress

Plaintiff sued nursing home for negligent infliction of emotional distress, and other claims, related to her mother's suicide while in care of home. The trial court directed a verdict for Defendants on Plaintiff's negligent infliction claim. Affirmed.

The claimed emotional distress resulted from two statements by a nursing home employee to Plaintiff. The first was a claim by the employee that the mother's vomiting was self-inflicted and that the mother's behavior might be modified if Plaintiff restricted her visits. Plaintiff believed her mother's vomiting

to be involuntary but restricted her visits in accordance with the employee's advice. The mother committed suicide shortly thereafter. The second statement was to the effect that the employee could not understand why the mother had committed suicide to hurt Plaintiff, when Plaintiff had been so good to her mother.

HELD: As Plaintiff sustained no physical injury, she would normally be denied any recovery in a negligence action for emotional distress. The only exception is if the relationship between the parties is such that there is a duty to exercise ordinary care to avoid causing emotional harm. No such relationship exists in this case.

Frideres v. Schiltz, 540 N.W.2d 261 (1995)

Parental Immunity

Plaintiff sued parents and brothers for alleged sexual abuse committed against Plaintiff by father and brothers occurring while Plaintiff was a child. The evidence was that Plaintiff had always remembered some of the alleged acts of sexual abuse and had "repressed" other alleged acts. Two of the claims against her parents were for negligent failure to protect and premises liability.

Following motions for summary judgment by defendants, the United States District Court for the Northern District of Iowa certified various questions to the Supreme Court of Iowa. Questions 8 and 9 asked whether the parents would be entitled to parental immunity with respect to the negligent failure to protect and premises liability claims.

HELD: "Clearly, there is no parental immunity from a negligence claim of a child when the parent knows of and allows sexual abuse of the child."

Schuver v. E.I. Du Pont De Nemours & Co., 546 N.W.2d 610 (Iowa 1996)

Preemption - Federal Insecticide, Fungicide, and Rodenticide Act

Raymond Schuver applied herbicide Preview to his soybean crops in 1988, 1989, and 1990. Preview is manufactured by Du Pont. Raymond rotated his soybean and corn fields on an annual basis. In 1989 and 1990, Raymond noticed damage to his corn crop. An agronomist told Raymond that the damage was caused by residual carryover effects from the Preview. Raymond retired in 1991 and his son, Steven, operated the farm thereafter. Steven

did not use Preview, but noticed damage to the corn crops in 1991 through 1994.

The Schuvers alleged that Du Pont was negligent in the manufacture and sale of Preview and that Du Pont was strictly liable as Preview was defective and unreasonably dangerous. The District Court granted summary judgment in favor of Du Pont. The Supreme Court affirmed.

HELD: The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts claims based on the adequacy of warnings and instructions on the labels of EPA registered pesticides. All of Plaintiffs' claims are preempted as they are all based on an underlying allegation that the label should have warned that Preview should not be used in O'Brien County as the pH levels in O'Brien County tend to be higher than 6.8. The label did warn that Preview should not be used on soils with a pH greater than 6.8.

Marcus v. Young, 538 N.W.2d 285 (Iowa 1995).

Private Right of Action

Marcus previously had been dismissed by University of Iowa Medical School for poor academic performance. Some years later, he sued University officials and State for producing his academic records in response to subpoena duces tecum served in litigation in which he was serving as an expert witness. Apparently as a result of the documents produced by the medical school, the hiring party terminated Marcus' services as an expert and refused to pay his fee. District court dismissed his action after concluding that neither chapter 22 nor rule 681 IAC 17.13(22) creates a private remedy for a violation of section 22.7, which provides:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information: (1) personal information in records regarding a student, perspective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records.

HELD: Chapter 22 gives no explicit or implicit indication of an intent to create a private remedy. Chapter 22 creates a number of remedies, and so it would be illogical to assume that the legislature intended to create a private right of action without mentioning it. Moreover, creation of a private right of action for negligent dissemination of confidential information

would be contrary to the general purpose of chapter 22: disclosure rather than concealment.

Teague v. Mosley, No. 207/95-611 (Iowa Sup. Ct. July 24, 1996)

Private Right of Action

Teague sued County Board of Supervisors pursuant to 42 U.S.C. § 1983 for violation of his civil rights resulting from being assaulted while an inmate at the Black Hawk County jail. Teague asserted that the supervisors had violated their duties in failing to provide a safe environment at the jail. The District Court granted summary judgment in favor of the supervisors and the Supreme Court affirmed.

HELD: Iowa Code § 331.322(10) states that the County Board of Supervisors shall "inspect the jails." The Court held that the Legislature did not intend to create a private cause of action for the violation of this statutory duty of inspection. The statute contains no express provision for a private cause of action for a Board of Supervisors' violation of any statutory duty. Further, the Legislature in Iowa Code § 356.43 imposed a duty of inspection of jails on the Iowa Department of Corrections and, in § 356.36 provided that the violation of the Department's duty of inspection does not permit any civil action to recover damages.

Schuver v. E.I. Du Pont De Nemours & Co., 546 N.W.2d 610 (Iowa 1996)

Products Liability - Defective or Unreasonably Dangerous

Raymond Schuver applied herbicide Preview to his soybean crops in 1988, 1989, and 1990. Preview is manufactured by Du Pont. Raymond rotated his soybean and corn fields on an annual basis. In 1989 and 1990, Raymond noticed damage to his corn crop. An agronomist told Raymond that the damage was caused by residual carryover effects from the Preview. Raymond retired in 1991 and his son, Steven, operated the farm thereafter. Steven did not use Preview, but noticed damage to the corn crops in 1991 through 1994.

The Schuvers alleged that Du Pont was negligent in the manufacture and sale of Preview and that Du Pont was strictly liable as Preview was defective and unreasonably dangerous. The District Court granted summary judgment in favor of Du Pont. The Supreme Court affirmed.

HELD: In addition to finding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts Plaintiffs' strict liability claim as the claim was based on an underlying

allegation that the label should have warned that Preview should not be used in O'Brien County as the pH levels in O'Brien County tend to be higher than 6.8, the Court found that there was no evidence that Preview is defective or unreasonably dangerous. The label clearly warned that Preview should not be used if the pH level is greater than 6.8 and recommended that pH be determined by laboratory analysis. Using Preview in soil with a pH greater than 6.8 or using Preview without determining pH would be a misuse of the product. There was no evidence that Preview was unreasonably dangerous when used as intended in soils with a pH of less than 6.8.

Bredberg v. Pepsico, Inc., No. 199/94-1046 (Iowa Sup. Ct. July 24, 1996)

Products Liability - Defective or Unreasonably Dangerous

Bredberg sued Pepsico, Inc., Pepsi Cola General Bottlers, Inc., and the store selling Bredberg a bottle of Diet Mountain Dew for strict liability. Plaintiff testified that the bottle exploded in his hand. Plaintiff also provided expert testimony that the breaking of the bottle was caused by a spontaneous explosion.

Defendants argued that Bredberg had dropped the bottle. Defendants produced expert testimony that the evidence was consistent with an impact fracture, rather than an explosion.

The jury found in favor of Plaintiff. The District Court denied Pepsico and Pepsi Cola's motions for directed verdict and JNOV. The Supreme Court affirmed.

HELD: Based on the testimony of the plaintiff and his expert there was sufficient evidence from which the jury could have determined that the bottle exploded. There was no evidence that the condition of the bottle or its contents changed after it left the control of Pepsico and Pepsi Cola. Assuming that the bottle exploded, either the bottle or the pressurized product inside must have been in a defective condition. Further, an exploding bottle of Diet Mountain Dew is unreasonably dangerous as the user would not expect the bottle to explode in its normal and intended use.

Crow v. Manitex, Inc., 550 N.W.2d 175 (Iowa Ct. App. 1996)

Products Liability - Defective Design

Crow, an employee of L.E. Myers Construction Company, was injured while using a crane manufactured by Manitex. The accident resulted from the failure of two other Myers employees to properly pin the extension of the crane known as the

"stinger." Crow was being raised on a basket attachment to the crane. Because of the improper pinning, the stinger suddenly retracted, causing Crow to fall to the ground. Crow sued for negligent failure to warn and strict products liability based on defective design. The jury found in favor of Crow.

HELD: There was sufficient evidence in the record to generate a jury question on the issue of defective design. Manitex had experienced a previous similar accident and had failed to correct the problem, even though Manitex had redesigned other parts of the crane. Further, there was evidence of alternative safer designs used by Manitex' competitors. There was also evidence from which it could be concluded that Manitex could foresee that the stinger would be improperly pinned. The Court remanded for a new trial, however, because the District Court had improperly submitted the negligent failure to warn claim to the jury and the jury had returned a general verdict on both claims.

Crow v. Manitex, Inc., 550 N.W.2d 175 (Iowa Ct. App. 1996)

Products Liability - Failure to Warn

Crow, an employee of L.E. Myers Construction Company, was injured while using a crane manufactured by Manitex. The accident resulted from the failure of two other Myers employees to properly pin the extension of the crane known as the "stinger." Crow was being raised on a basket attachment to the crane. Because of the improper pinning, the stinger suddenly retracted, causing Crow to fall to the ground. Crow sued for negligent failure to warn and strict products liability based on defective design. The jury found in favor of Crow.

HELD: Manitex discharged its duty to warn. The Myers employees testified that they knew that if the stinger was improperly pinned, the stinger could retract and injure the person in the basket. Further, there was a warning in the cab of the crane stating that no one should operate the crane unless they had been trained in the safe operation of the crane and unless they knew and followed the safety and operating instructions in the manual. The manual contained specific instructions and warnings related to the stinger. Further, there was a sticker on the crane specifically stating "Pull jib stinger until it is fully extended and lock in place with pin. Failure to do so will allow jib stinger to retract suddenly when boom is raised." The Myers employees also testified that they had read the warning decals and had consulted the instruction manual on how to pin the stinger. There was no other warning that Manitex could have given which would have prevented the accident. Accordingly, judgment should have been entered in favor of Manitex on the failure to warn claim.

Economy Roofing and Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995).

Trade Secrets

Zumaris became a key employee at Economy, a commercial roofing repair business that was owned by his stepfather. When the stepfather died, Zumaris became president of Economy. Zumaris repeatedly attempted to buy Economy from his stepfather's natural children, who were not involved in the business. When other prospective purchasers appeared and began inquiries and negotiations, Zumaris left Economy to start another business, Roofing Technologies, Inc. (RTI). Evidence suggested that Zumaris accessed Economy's bid computer, which contained information on customers, cost information, and price information, and copied the information to printer or disk, and then deleted the information from Economy's computer. RTI competed directly with Economy, to Economy's financial detriment.

With new ownership, Economy sued Zumaris and RTI for interference, usurpation of corporate opportunity, breach of fiduciary duty, and for usurpation of trade secrets. District court declined Economy's request for temporary injunctive relief. Although the record is unclear, the parties agreed that the court should direct a verdict against Economy on the trade secret claims before the commencement of trial.

HELD: The computer information could have been found by the jury to constitute a trade secret. A jury also could have found that Zumaris had a fiduciary duty to maintain its secrecy. Although Zumaris had the right to take with him his general knowledge as acquired over the entire scope of his employment, Economy was entitled to prove that Zumaris had obtained the customer, price, and cost information surreptitiously and had provided it to RTI. Finally, the trial court's ruling on the motion for temporary injunction was not dispositive of the trade secrets claim. Economy should have been permitted to submit that claim to the jury.

Smuck v. National Management Corp., 540 N.W.2d 669 (Iowa Ct. App. 1995)

Wrongful Termination - Public Policy Exception

Smuck managed a low-income apartment complex for National Management Corporation (NMC). The apartments were subsidized by the Farmers Home Administration. Payments by FmHA to NMC were based on the tenants' ability to pay, which included consideration of the tenants' income and expenses. NMC received no money unless it was shown that the tenant resided in an apartment for the required period of time. NMC terminated Smuck's employment on the basis of alleged tenant complaints

regarding Smuck. Smuck contended that he was terminated because he refused to participate in NMC's scheme to misrepresent the number of days that tenants resided in the apartments and tenant expenses. Smuck sued for breach of contract and wrongful termination. The District Court granted summary judgment in favor of NMC on both counts.

HELD: After determining that NMC's employment manual did not create a contract and that Smuck was an employee-at-will, the Court turned to the question of whether Smuck had shown a public policy exception to the at-will doctrine. The Court held that federal law can serve as a source of state law policy. Accordingly, it is contrary to public policy to terminate an employee for refusing to break any law, whether state or federal. Accordingly, the Court affirmed the District Court's grant of summary judgment on the breach of contract claim and reversed and remanded the wrongful termination claim for trial.

Walters v. United States Gypsum Co., 537 N.W.2d 708 (Iowa 1995).

Wrongful Termination - Retaliatory Discharge

Employer placed Walters on involuntary unpaid medical leave after she witnessed a murder. She eventually obtained a release from a doctor, and the employer allowed her to return to work. She filed a civil rights complaint against the employer for forcing her to take involuntary leave. The employer then fired her for poor performance, excessive absenteeism, disruption of work, and abusive treatment of other employees. Walters sued for retaliatory discharge. In her deposition, she admitted working under the influence of beer and marijuana, which was a violation of written company policy and gave the employer the discretion to terminate her employment. Employer moved for summary judgment on the "after acquired evidence" doctrine. District court sustained the motion. Reversed.

HELD: McKennon v. Nashville Banner Publishing Co., 513 U.S. ____ 115 S. Ct. 879, 130 L. Ed.2d 852 (1995), "strikes the correct balance in furthering the policies underlying retaliatory discharge recoveries and at the same time yielding to practical reality." After acquired evidence does not bar a claim for wrongful termination, but it can restrict damages. Employer must establish that the newly discovered wrongdoing would have resulted in termination, had employer known about it at the time of firing. If so, employee still can recover for retaliatory discharge, but only back pay from date of unlawful discharge to date of discovery of after-acquired evidence.

Yockey v. State, 540 N.W. 2d 418 (Iowa 1995)

Wrongful Termination - Retaliatory Discharge

Five-month probationary employee who already had been warned about the consequences of continuing to demonstrate poor attendance suffered a work-related injury and missed another seven days of work before returning with restrictions. Employee filed a claim for workers' compensation benefits. Employer discharged employee for failing to improve upon the deficiencies in her performance. Employee sued for retaliatory discharge. At trial, she testified that she believed she was terminated for continued absenteeism, not for filing the workers' compensation claim. After jury was unable to reach verdict, district court sustained employer's motion for directed verdict. Affirmed.

HELD: Employee's testimony is a binding admission that is fatal to her claim. Employee attempted to avoid consequence of her admission by arguing that employer cannot terminate in retaliation for absence related to work injury. The Court rejected this claim because it was not plead or tried. The Court also discussed but declined to consider employee's argument that the burden-shifting analysis set forth in Hulme v. Barret, 449 N.W.2d 629 (Iowa, 1989), should apply in all retaliatory discharge cases.

TRIAL

Rex Staub

Kragel vs. Wal-Mart Stores, Inc., 537 N.W.2d 699 (Iowa 1995)

Jury Instructions — Premises Liability

Kragel, brought suit against Wal-Mart after she slipped and fell on snow and ice in Wal-Mart's parking lot. Wal-Mart cross-petitioned for contribution against the independent contractor it had hired to clear snow from the parking lot. The independent contractor then cross-petitioned against the subcontractor he had hired to do the snow plowing. Wal-Mart then cross-petitioned against the same subcontractor for contribution.

At trial, the district court refused to instruct the jury that the owner, Wal-Mart, had a nondelegable duty to Kragel to maintain the parking lot in a reasonably safe condition. The district court also rejected the plaintiff's proposed jury instruction that would have permitted the jury to the find the contractor and subcontractor at fault and then attribute their fault, if any, to Wal-Mart. The district court rejected this instruction because the Kragels' suit was solely against Wal-Mart.

HELD: The Iowa Supreme Court reviews a challenge to a jury instruction for legal error.

HELD: The district court committed reversible error in refusing to instruct the jury that the owner (Wal-Mart) was liable for a physical harm caused by the negligent failure of its independent contractor to maintain the premises in a safe condition. Under the Restatement approach, the duty of an owner of land to maintain his/her property in a reasonably safe condition for invitees is a nondelegable duty.

HELD: The district court also committed reversible error in failing to instruct the jury that it could find either independent contractor or subcontractor at fault, and then attribute that fault to the owner. Wal-Mart's own cross-petition put into issue the contractor and subcontractor's fault towards Kragel.

In re S. J. M., 539 N.W.2d 496 (Iowa Ct. App. 1995)

Objections

During a child in need of assistance (CINA) proceeding in juvenile court, the state offered a letter written by a clinical social worker concerning the social worker's therapy sessions with the child. The father objected, contending the letter contained inadmissible hearsay, opinions beyond the expertise of the witness and for which "no proper foundation" had been laid, and that it "invaded the province of the jury". The court reserved its ruling and stated that a written ruling would be made a part of the final written decision on the case. When the court issued its final written decision, it failed to make a specific ruling on the offer of the letter and the father did not respond with a post-trial motion requesting a ruling.

HELD: Objections to admission of evidence must generally "be specific enough to alert the trial court to a legal question or problem raised" as to allow opposing counsel to take corrective action. In this case, the Supreme Court found the father's objection was sufficiently definite.

HELD: In a footnote, however, the Court noted that, ordinarily, a general objection on the grounds the question calls for an "opinion and conclusion" or that it "invades the province of the jury" lacks specificity and has no force or effect. More specific reasons for exclusion must be pointed out when objections of these kinds are made.

HELD: Nonetheless, the father should have but failed to file a Rule 179(b) motion requesting a specific ruling on the objection. His failure to do so constitutes a waiver of the objection for purposes of appeal.

Perry v. Tendal, 538 N.W.2d 296 (Iowa 1995)

Jury Instructions – Imputed Negligence

Louise Perry loaned her van to her son, Daniel Perry, who then loaned the van to a family friend, Lawrence Stoltze. While using the van to run errands for Daniel Perry, Stoltze collided with a vehicle owned and operated by Debby Tendal. As a result, Louise Perry sued Tendal for damage to her van alleging she was at fault. Tendal cross-petitioned against Stoltze.

At the jury trial of this case, over Louise Perry's objection, the court submitted an imputed negligence instruction that allowed the jury to impute the negligence of Stoltze (the driver) to Louise Perry (the owner).

HELD: At the time of the collision, Stoltze was not acting as an "agent" or "servant" of Louise Perry. There was no evidence presented to show that Louise Perry knew that Stoltze was driving the automobile at her son's request. In addition, Stoltze was performing errands for the sole benefit of her son. Submission of the imputed negligence in this scenario constituted reversible error.

Rosenberger Enterprises, Inc. v. ISCI, 541 N.W.2d 904 (Iowa Ct. App. 1995)

Misconduct of Counsel - Closing Arguments

Rosenberger sued its insurance agent, Mike O'Dean, and his employer, Insurance Services of Iowa (ISCI) for negligently placing Rosenberger's insurance policy with an unlicensed foreign insurance company. Before trial, O'Dean filed a motion in limine which sought to exclude any evidence of error or omissions insurance coverage. Although Rosenberger's counsel agreed to the motion, he proceeded to use an overhead projector exhibit which made reference to the errors and ommissions policy. In addition, during his impassioned closing argument, the same counsel also suggested the jury consider O'Dean's ability to pay damages in comparison with the foreign insurance company's inability to pay the damages and further stated:

> I'm here to tell you that Mike O'Dean is not 1% at fault. He's not 50% at fault. He's 100%. One whole big banana. Absolutely and unequivocally and the most truthful way that I can ever say anything, as God is my judge.....

After the jury returned a verdict in favor of Rosenberger, O'Dean moved for mistrial on the grounds of attorney misconduct during closing arguments. O'Dean also filed a motion for new trial or in the alternative JNOV on the same grounds. The district court denied the motions but remitted the total damage award to some degree.

HELD: The Court of Appeals found, "counsel attempted to play at the passions of the jury through religious imagery and interjection of his personal opinion as to the merits of the case. Counsel has no right to create evidence by his or her arguments nor may counsel interject personal belief into argument". Given the cumulative effect of the closing argument presented by Rosenberger's counsel, and the jury's exposure to the errors and omissions insurance coverage specifically excluded by a motion in limine, it was an abuse of the court's discretion to deny the motion for new trial.

Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996)

Ex Parte Communications

Johnson was a jury foreman in a highly publicized criminal trial which resulted in the conviction of an African-American defendant accused of raping and murdering a Caucasian woman. After the conviction, it was discovered that Johnson had solicited others to join an alleged white supremacist group and that he had made derogatory comments about blacks and Jews. This information ultimately made its way to the newspapers resulting in Johnson's suit against the criminal defendant's attorneys and the Des Moines Register for libel and slander.

The Register was ultimately dismissed from the case and the defendant's attorneys, (Nickerson and Rosenberg), obtained a verdict in their favor. On appeal, among other things, Johnson claims he was prejudiced by an ex parte communication between the trial judge and the defense counsel.

HELD: The communication complained of dealt only with courtroom security. The merits of the case were not discussed. Accordingly, judgment in favor of the defendants was affirmed.

State v. Adamson, 542 N.W.2d 12 (Iowa Ct. App. 1995)

Misconduct of Counsel

Adamson was convicted of sexually abusing his teenage stepdaughter. After his conviction, one of the jurors testified that during defense witness testimony, the prosecuting attorney had rolled her eyes in disbelief and that this was noticed by the other jurors.

HELD: Although this case was decided on a number of other appealable issues, raised by the criminal defendant, the court made it a point to state that such conduct on the part of a prosecuting attorney hinders the defendant's chances for a fair trial, stating "we trust it will not occur again on retrial of this case".

State v. Kellog, 542 N.W.2d 514 (Iowa 1996)

Jury Instructions

During Kellog's criminal trial, the defendant's counsel requested a jury instruction defining what appeared to be a basic term. The court refused the instruction and Kellog wa convicted. On appeal, one of the issues raised by Kellog was that the court improperly refused to submit the requested jury instruction.

HELD: As long as the requested jury instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. Although the court must also present an instruction explaining technical terms or legal terms of art, it is not required to define "generally understood words of ordinary usage". In this case the definition of an ordinary word was being sought and the defendant was not prejudiced by the court's refusal to submit the requested instruction.

Dudley v. GMT Corp., 541 N.W.2d 259 (Iowa Ct. App. 1995)

Jury Verdict

Dudley filed a personal injury suit against GMT, the manufacturer of the machine she injured her hand in. The jury returned a verdict of 55% fault to Dudley and 45% fault to GMT. In her motion for new trial and motion for JNOV, Dudley claimed the jury misunderstood, misapplied and/or failed to follow the court's instructions with respect to the verdict form and that one of the submitted instructions contained an incorrect statement of law. In support, Dudley submitted the affidavits and testimony of several jurors which, tended to show the verdict reflected an apportionment of damages Dudley was entitled to rather than an apportionment of fault. Dudley appealed the district court's denial of her motion for new trial on this basis.

HELD: Iowa Rule of Evidence 606(b) governs the admissibility of a juror's evidence regarding the validity of a verdict. Under Rule 606(b), juror evidence is only admissible in situations in which it is claimed the jury returned an incomplete verdict as opposed to an erroneous one. Because Dudley claims the verdict was erroneous, jury testimony regarding any misunderstandings of the instructions is inadmissible.

HELD: With respect to Dudley's claim that the jury had confused percentage of fault with percentage of recovery, the court pointed out that jury dissatisfaction with the result is not a basis for setting aside the verdict.

HELD: With respect to Dudley's claim that one of the jury instructions contained an incorrect statement of the law, the court found that trial courts have discretion to modify or rephrase uniform jury instructions to meet the demands of each case so long as the instructions fully and fairly embody the issues and applicable law. The instruction in this case, albeit not identical to the uniform civil jury instructions, was supported by the pleadings and substantial evidence in the case. District court judgment affirmed.

State v. Arnold, 543 N.W.2d 600 (Iowa 1996)

Jury Misconduct

Arnold appealed this conviction of child endangerment contending the jury committed misconduct in two respects. First, one of the jurors sought advice from her mother with respect to a legal issue in the case and then disclosed that answer to the other jurors. Second, one of the jurors looked up the word "risk" in the dictionary and shared that definition with the other jurors.

HELD: To impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts concerning what actually occurred in or out of the jury room with respect to the misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to and with reasonable probability did, influence the verdict. In this case, the Supreme Court found the misconduct complained of did not appear to have "probably" influenced the verdict. Conviction affirmed.

Crow v. Manitex, Inc., 550 N.W.2d 175 (Iowa Ct. App. 1996)

Jury Instructions – Multiple Theories of Recovery

Crow was injured in an accident involving a truck mounted hydraulic crane manufactured by Manitex, Inc., a wholly-owned subsidiary of the Manitowoc Company, Inc. Before trial, Crow settled with all other defendants except Manitex and Manitowoc. The jury returned a verdict in Crow's favor awarding him $740,000 on the claims of strict liability and negligent failure to warn. Manitex filed a motion for judgment notwithstanding the verdict and for new trial which was denied. Manitex appealed.

HELD: The district court properly submitted jury instructions on the issue of strict liability due to defective design but erred in submitting the negligence claim as Manitex's warnings were adequate. Where a general verdict of liability results from a submission of two or more theories, one of which

contains error, and it cannot be determined whether the verdict resulted from the invalid instruction, the case must be reversed and remanded for a new trial. The case was reversed and remanded.

State v. Henning, 545 N.W.2d 322 (Iowa 1996)

Jury Misconduct

Henning was tried on the charge of vehicular homicide. At trial, during a break in deliberations, one of the jurors advised the court attendant that he had heard from sources outside of trial that Henning had been convicted of OWI on three prior occasions. The court attendant immediately reported this to the judge who gave the jury a general admonition. The jury then returned a verdict of guilty and Henning filed a motion for new trial primarily on the basis of juror misconduct. The Court of Appeals affirmed the conviction and the Supreme Court granted review.

HELD: Although the court is "loath" to grant a new trial on the grounds the jurors have learned discovered, (from sources outside the trial), that the accused has previously been found guilty of criminal acts, the Supreme Court was convinced the nature of the inadmissible information was prejudicial. In this case, the extraneous information provided to the jury indicated Henning was a habitual operator of a motor vehicle while under the influence of intoxicants, and Henning's state of intoxication at the time of the accident leading to his charge was a paramount issue in the case. Accordingly, it is very likely the evidence sufficiently prejudiced the jury and influenced their verdict. Court of Appeals decision vacated. Judgment reversed and remanded.

State v. Jefferson, 545 N.W.2d 248 (Iowa 1996)

Motion for New Trial

Motion to Reopen Evidence

Jefferson was charged with first-degree robbery. At trial, Jefferson' alleged accomplice, Rizer, testified that Jefferson was not involved in the robbery. Rather, Rizer stated that "Che" (whose last name and address were unknown), was his accomplice. Jefferson also took the stand and denied his participation in the robbery but stated he too knew a "Che". A sheriff's deputy overheard the testimony regarding Che and, recalled having dealt with an individual by the name of Che Moore who lived close to the crime scene. By the time the deputy discovered the information the jury was already deliberating but the information was relayed to Jefferson's attorney. Jefferson's attorney did

not raise the issue at that time by moving to reopen the evidence and instead raised the issue in a motion for new trial after Jefferson was convicted. Jefferson appealed the court's denial of new trial.

HELD: To prevail on a motion for new trial based on newly discovered evidence, the movant must be able to show: (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative; and (4) the evidence probably would have changed the result of the trial. In this case the evidence was discovered before the verdict. Therefore, Jefferson's attorney should have moved the court to reopen the evidence. This would have avoided the necessity of a new trial and could have immediately corrected any deficiency in the record.

HELD: Although this is a case of first impression with respect to reopening the record after the jury commences its deliberation, the Supreme Court specifically found that a district court has the power to reopen the record after the jury commences deliberations if the remaining prongs of the newly-discovered evidence test are met.

Foster v. Pyner, 545 N.W.2d 584 (Iowa 1996)

New Trial—Inadequacy of Jury Award

Foster obtained a judgment against the owner of a dog that bit her minor child. However, the jury's award was limited to damages for the child's past pain and suffering. Foster then requested the court increase the amount of the verdict by virtue of the jury's failure to award future damages. The district court granted Foster's request and issued an additur of $10,000 to the verdict with the proviso that if Pyners rejected the additur, a new trial would result. Pyners rejected the additur and the court ordered a new trial. Pyners appealed contending the court abused its discretion in granting Foster a new trial.

HELD: The evidence was sufficient to lead the district court to the conclusion the verdict was inadequate and required remand for a new trial. Further, the retrial is not limited to any single issue of damages (e.g. future damages) because the "jury determinations of various elements of damages are apt to be influenced by the recovery allowed for other elements of damages". The district court opinion was affirmed and remanded for trial on all damages.

State v. Holtz, 548 N.W.2d 162 (Iowa Ct. App. 1996)

Jury Instructions—Witness Credibility

In Holtz's criminal trial on the charges of indecent exposure and attempted enticement of a child, the court gave its own modified instruction with regard to witness credibility. This instruction did not contain the various factors which may be considered in judging a witness's credibility as stated in the Iowa Uniform Jury Instructions. Holtz appealed contending the district court erred in failing to give the uniform instruction on the credibility of witnesses.

HELD: Although trial courts are not bound by the uniform jury instructions, the Court of Appeals certainly prefers they be used at trial. Nonetheless, the modified instruction given by the court in this case was not an abuse of discretion as there was nothing that would have prohibited the defense counsel from arguing the uniform jury instructions factors in his closing argument.

Weatherwax v. Koontz, 545 N.W.2d 522 (Iowa 1996)

Inconsistent Verdict

Donald Weatherwax brought a medical malpractice action against two physicians for the wrongful death of his wife. Weatherwax settled with one of the physicians and the case against the other, Dr. Koontz, proceeded to trial. The jury returned a verdict finding the physician 10% at fault and that Weatherwax's damages amounted to $96,000 for present value of patient's lost chance of survival. The jury was discharged on Friday afternoon and over the weekend, without knowledge of the court or opposing counsel, Weatherwax's counsel questioned the jurors about the verdict. Based on his discussions, he fashioned an affidavit and presented it to each juror to sign and notarize. The affidavit stated, among other things, that the jury found plaintiff's total damages to be $961,340 and it was their intention to award Weatherwax's $96,134 based on Koontz's 10% comparative fault. Using these affidavits, Weatherwax filed a motion to reform the verdict to comply with the intent of the jury.

At the evidentiary hearing on the motion, the trial judge questioned the jurors about the $96,134 damage award and found their testimony inconsistent on this issue. Accordingly, the court denied Weatherwax's motion to reform the verdict and motion for new trial. The Court of Appeals ruled in favor of Weatherwax and further review was held by the Iowa Supreme Court.

HELD: The Iowa Supreme Court found it was not necessary to decide on the admissibility of the affidavits or juror statements at the post-trial hearing because the hearing revealed the jurors had different views concerning the total amount they intended to award. Because the record did not establish that the jury necessarily intended a larger amount as its verdict, the district

court was correct in overruling Weatherwax's motion for new trial and motion to reform the verdict.

WORKERS' COMPENSATION

Rex Staub**

Second Injury Fund v. Klebs, 539 N.W.2d 178 (Iowa 1995).

Appellate Procedure - Preservation of Issues

Klebs sustained a work-related to his knee in 1986 while employed by Ace Van Lines. Klebs began working for Johnsrud Transport in 1989. During his third week with Johnsrud, Klebs sustained a work-related injury to his right shoulder. Klebs settled his claim against Johnsrud and brought a claim against the Second Injury Fund. At hearing, the deputy industrial commissioner determined that Klebs was entitled to an additional 186 weeks of benefits at a rate of $425.94 per week, based on the rate stipulated by Klebs and Johnsrud in their settlement. The Fund argued that the appropriate rate was actually $130.64, and that the rate stipulated in the settlement was not binding on the Fund. The deputy determined that the burden of proof as to the appropriate rate was on the Fund, and absent any other evidence, the settlement rate was binding on the Fund. The Fund appealed to the Industrial Commissioner who affirmed. The Fund then sought judicial review, asserting only that the commissioner's decision was not supported by substantial evidence in the record. The district court reversed the commissioner's decision, and Klebs appealed, arguing in part that the Fund did not properly raise the issue on appeal.

HELD: Reversed. The commissioner's allocation of the burden of proof as to the appropriate rate was a matter of law. Consequently, the Fund's appeal should have raised the issue of correction of errors of law, rather than whether the decision was supported by substantial evidence. The supreme court held that Iowa Code § 17A.19 requires a petition for judicial review of an agency decision to include the specific grounds upon which relief is sought; notice pleading is insufficient.

Winnebago Indus. v. Smith, 548 N.W.2d 582 (Iowa 1996).

Appellate Procedure - Scope of Commissioner's Review on Remand

Smith sustained work-related cumulative injuries to her arms. Winnebago voluntarily paid some workers' compensation benefits, but denied benefits for a cubital tunnel syndrome injury on the basis that it was related to work for a subsequent employer. The Industrial Commissioner awarded Smith additional medical and healing period benefits, but determined she was not

entitled to additional permanent disability benefits beyond those already paid by Winnebago. Smith sought judicial review of the commissioner's decision regarding permanent disability benefits; Winnebago did not raise any issues on appeal. The district court found for Smith and remanded to the commissioner for additional findings on the issue of permanent disability benefits. On remand, the commissioner reversed the original ruling and awarded Smith additional permanent disability benefits. However, the commissioner also reversed the prior award of healing period and medical benefits. The commissioner's decision on remand was affirmed on judicial review, and Smith appealed.

HELD: Reversed and remanded. When a decision is remanded for a stated further proceeding, the authority of the court or agency is limited on remand to the issues specified by the appellate court.

Celotex Corp. v. Auten, 541 N.W.2d 252 (Iowa 1995).

Apportionment of Prior Injuries - Full Responsibility Rule

Auten began working for Celotex in 1959. In 1977, Auten sustained a work-related injury to his neck. Auten later settled his claim for workers' compensation benefits by agreeing to accept payment of 25% permanent partial disability to the body as a whole (about $17,000). In 1982, Auten injured his right arm at work and was given permanent partial impairment ratings. Auten later settled that claim for $10,000. Finally, in 1988, Auten injured his right shoulder at work. Because his physician imposed significant restrictions, Auten was unable to find other employment when he was subsequently terminated by Celotex. The Industrial Commissioner eventually awarded Auten permanent total disability benefits.

Celotex sought judicial review of the commissioner's decision, asserting in part that Auten's disability must be apportioned between the 1988 injury in dispute and the two prior work injuries for which Celotex had already compensated Auten. The district court found that Auten's disability should not be apportioned, and was affirmed on appeal to the Iowa Court of Appeals. Celotex sought further review by the supreme court.

HELD: Affirmed. The supreme court held that apportionment is only permitted when the prior injury was unrelated to employment and independently produces an ascertainable portion of the ultimate industrial disability. Here, the prior injuries were work-related, so no apportionment was permitted. Further, the legislature has provided apportionment credits in several instances, but not in the present factual situation. Absent any statutory credit for prior benefit payments, there cannot be any apportionment.

A

Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995).

Apportionment of Prior Injuries - Full Responsibility Rule

Industrial Disability - Use of Age as Factor in Determining Disability

Odd-Lot Doctrine - Burden of Proof

Second Injury Fund - Requirements for Triggering Liability

In 1949, Nelson began work in a rock quarry owned by Basic Materials. In 1963, he sustained a serious injury to his left knee, resulting in permanent impairment. Nelson subsequently developed severe arthritis in both knees. In 1988, Nelson fell at work, severely injuring his left shoulder. Nelson underwent surgery for his shoulder, resulting in significant permanent impairment. Nelson's physician felt that Nelson's knee arthritis prevented him from returning to work and recommended that he retire. Nelson did retire, and subsequently brought claims against Basic Materials and the Second Injury Fund, alleging his 1988 shoulder injury caused him to be permanently and totally disabled under the odd-lot doctrine. Basic argued that they were not responsible for any preexisting disability not caused or aggravated by the 1988 fall. The Fund argued that the shoulder injury was to the body as a whole and consequently did not trigger Fund liability.

The Industrial Commissioner, in an appeal decision, determined that Nelson had sustained industrial disability from his shoulder injury, but determined that most of his disability was related to his knee conditions. The commissioner held that Basic was only liable for the industrial disability resulting from the 1988 shoulder injury; and apportioned out all disability related to Nelson's prior knee injury and preexisting arthritis. In determining the extent of Nelson's disability, the commissioner noted that Nelson was an older employee who would not earn as much money over the remainder of his working life. Further, the commissioner determined that Nelson could not prove he was totally disabled under the odd-lot doctrine because he had not attempted to find employment. Finally, the commissioner determined that an injury to the shoulder was an injury to the arm, thereby triggering Fund liability. On judicial review, the district court affirmed the decision with respect to Basic, but reversed with respect to the Fund, holding that a shoulder injury was to the body as a whole, and consequently did not trigger Fund liability. Nelson appealed to the supreme court.

HELD: Affirmed in part, reversed in part, and remanded. The supreme court specifically adopted the "full-responsibility rule" holding that an employer is responsible for the entire industrial disability sustained by an injured employee, even if part of the disability is related to a prior injury. The court stated that

an employer may only apportion a prior injury if that injury was not work-related, if it produced disability independently, and if the amount of disability could be ascertained. Thus, because Nelson's prior knee injury was work-related Basic was responsible for the combined industrial disability related to Nelson's preexisting knee injury and knee arthritis as well as his subsequent shoulder injury.

HELD: The court determined that the commissioner had improperly used age in reducing the extent of Nelson's industrial disability. The supreme court held that age could be used as a factor in determining an employee's loss of earning capacity, but not his loss of earnings. The mere fact that an injured worker will have fewer years of lower earnings is irrelevant in determining industrial disability.

HELD: To prove he is totally disabled under the odd-lot doctrine, an injured employee must first make a prima facie showing by substantial evidence that the worker is not employable in the competitive labor market. The supreme court held that, although an employee must usually demonstrate a reasonable effort to secure work, this is not an absolute necessity if there is other substantial evidence that the worker is not employable. The supreme court noted that a good faith effort to find employment would be important in typical odd-lot cases, but other factors to be considered included physical impairment, intelligence, education, training, age, and ability to be retrained. Once the employee establishes the prima facie case, the burden of evidence shifts to the employer to show that work is available. In all cases, however, the ultimate burden of persuasion remains with the employee.

HELD: Shoulder injuries are not injuries to the arm, and hip injuries are not injuries to the leg. Thus, shoulder and hip injuries are not scheduled member injuries, but rather are body as a whole injuries which do not trigger Second Injury Fund liability.

Johnson v. Farmer, 537 N.W.2d 770 (Iowa 1995).

Arising in the Course of Employment - Going and Coming Rule

Gross Negligence by Coemployee

Exclusive Remedy Provision - Loss of Consortium Claims

Johnson was employed as an adjunct instructor by Des Moines Area Community College (DMACC). On the morning of December 7, 1991, Johnson drove to DMACC's Ankeny campus where she met her supervisor, Farmer. Johnson and Farmer then left in a DMACC vehicle to drive to DMACC's Carroll campus to conduct testing evaluations. During this drive, Farmer lost control of the

vehicle, causing the car to slide off the road into a power pole. Johnson sustained bodily injuries as a result of the crash. DMACC determined that Johnson was eligible for workers' compensation benefits, which she accepted.

Johnson later filed a personal injury suit in district court against DMACC and Farmer; Johnson's husband and children joined the suit asserting claims for loss of consortium. After an evidentiary hearing under Iowa Rule of Civil Procedure 103, the district court dismissed the claims against DMACC, determining that Johnson's injuries arose in the course of her employment and thus her suit was barred by the exclusive remedy provision of Iowa Code § 85.20. The district court later dismissed Johnson's claims against Farmer by granting a motion for summary judgment. The district court determined there was no evidence of conduct by Farmer that rose to the level of gross negligence as required by Iowa Code § 85.20. Finally, the district court also dismissed the loss of consortium claims as being barred by the exclusive remedy provisions of Iowa Code § 85.20. Johnson appealed all three decisions.

HELD: Affirmed. Off-premises injuries, including injuries sustained while going to and from work, usually do not arise in the course of employment. However, there are exceptions to this rule when the employer exercises some degree of control over the area or situation where the injury occurs. Here, Johnson was being driven from one job site to another job site, and her supervisor directed the route and operation of the vehicle. Consequently, Johnson's injuries arose in the course of her employment, and her district court suit was barred by the exclusive remedy provisions of Iowa Code § 85.20.

HELD: In a gross negligence action against a coemployee, the injured employee must demonstrate that the coemployee had an actual realization of imminent danger coupled with a reckless disregard or lack of concern for the probable consequences of the act. There was no evidence that Farmer realized that there was any danger in driving that day, nor was there any evidence of reckless lack of concern by Farmer. At most, Farmer may have acted negligently by driving 55 mph on icy roads rather than "a more prudent" 40 mph. Summary judgment was appropriate.

HELD: Loss of consortium claims arising out of an injury covered by workers' compensation are barred by the exclusive remedy provisions of Iowa Code § 85.20.

Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459 (Iowa Ct. App. 1995).

Exclusive Remedy Provision - Asbestos Exposure

Exclusive Remedy Provision - Mental Injuries

Plaintiffs were employed by Abell-Howe Co. to demolish a building owned by Archer-Daniels-Midland Co. (ADM). Plaintiffs alleged they were exposed to asbestos during the demolition work and brought suit against both Abell-Howe and ADM for personal injuries, including mental distress. Abell-Howe filed a motion for summary judgment, asserting that the claims were barred by the exclusive remedy provision of Iowa Code § 85.20. Plaintiffs resisted, asserting that their claims for mental injuries were not compensable under workers' compensation law. The district court granted summary judgment and plaintiffs appealed.

HELD: Affirmed. Purely mental injuries are compensable under Iowa workers' compensation law, even if the employee has not sustained any physical injury. Consequently, the exclusive remedy provision limits employees' recovery against their employer for mental injuries to workers' compensation benefits and any other action is barred.

Ahlers v. EMCASCO Ins. Co., 548 N.W.2d 892 (Iowa 1996).

Indemnity and Third-Party Claims - Attorneys' Fees

Ahlers was injured while driving a school bus in the course of her employment. She received approximately $35,000 in workers' compensation benefits from EMCASCO. Ahlers subsequently brought suit against the driver of the other vehicle, and EMCASCO intervened to protect its indemnification and lien interests. Ahlers eventually settled for the policy limits, an amount less than the amount of EMCASCO's lien, and her attorney asserted a claim to one-third of the proceeds as his contingent fee. EMCASCO objected to the fee as unreasonable, arguing that they had begun negotiations with the third-party's insurance carrier prior to Ahlers' filing suit, and that the third-party insurance carrier had decided to offer the policy limits prior to any contact by Ahlers' attorney. The district court held a hearing on the apportionment of attorneys' fees and found the one-third fee to be reasonable. EMCASCO appealed.

HELD: Affirmed. EMCASCO, as an indemnitor, was only entitled to the proceeds of the settlement remaining after attorneys' fees were deducted, up to the amount of its lien. The one-third fee was reasonable in that, prior to filing suit, Ahlers reasonably believed she would recover more than the amount of the lien. Finally, because EMCASCO received all of the proceeds, it was fair that they should pay all of the attorneys' fees.

Allen v. Allen Water & Wastewater Eng'g, Inc., 549 N.W.2d 516 (Iowa 1996).

Indemnity and Third-Party Claims - Determination of Amount of Lien

Thomas Allen, an employee of Allen Water, was killed in an automobile accident. Thomas's wife, Sandra, brought a third-party wrongful death action against the driver of the other vehicle, resulting in a $70,000 settlement. Sandra also brought a claim for workers' compensation death benefits. Allen Water and its insurance carrier, Kemper Insurance, asserted a right of indemnification of about $49,000 from the third-party claim settlement. Sandra agreed that there was an indemnification interest, but asserted that the amount was only about $25,000. The Industrial Commissioner, however, determined that there was no indemnification interest. Upon judicial review, the district court reversed the commissioner, held that there was a right to indemnification, and remanded to the commissioner for a determination of the amount of the indemnity interest. Allen appealed the district court decision, arguing that only the district court had authority to decide the amount of the indemnity interest. The Iowa Court of Appeals affirmed the district court's decision to remand to the commissioner, and Allen sought further review before the supreme court.

HELD: Affirmed. Because the claim originated before the Industrial Commissioner, only the commissioner has authority to make findings of fact. The district court's jurisdiction was limited to judicial review of the commissioner's findings. Here, no findings of fact as to the amount of the indemnity interest had been made by the commissioner. Thus, the district court properly remanded the case to the commissioner to make such findings. This situation is to be distinguished from cases where a party files an independent action in district court seeking to enforce or defend against claimed indemnity rights. In such a case, the district court serves as the trial court and decides questions of law and fact.

Haynes v. Second Injury Fund, 547 N.W.2d 11 (Iowa Ct. App. 1996).

Permanent Disability - Proof of Impairment

Administrative Procedure - Preservation of Error

Haynes sustained a work-related injury to her left knee in 1989, and subsequently developed work-related bilateral carpal tunnel syndrome. Haynes settled her claims with her employer based on 26% permanent impairment to her knee and 6% impairment to each arm. Haynes then filed a claim against the Second Injury Fund seeking additional permanent disability benefits. At hearing, Haynes did not present any medical evidence of a permanent impairment rating to either arm. The deputy commissioner noted that this lack of evidence was a "problem". Haynes's attorney stated he "would be happy to leave the record

open" but that he did not feel this would be accepted by the deputy. The Fund did present an opinion letter from a physician stating that Haynes had no permanent impairment based on the carpal tunnel syndrome. The deputy subsequently entered a ruling denying Haynes any further benefits on the grounds that there was no evidence of any permanent impairment to either arm. Haynes appealed to the Industrial Commissioner, and also requested permission to submit additional evidence consisting of an impairment rating obtained after the hearing. The commissioner denied the request to offer additional evidence and affirmed the deputy's decision. On judicial review, the district court also denied a request to present additional evidence and affirmed the commissioner's decision. Haynes appealed to the supreme court.

HELD: Affirmed. Although carpal tunnel syndrome is an injury to a scheduled member which can trigger Second Injury Fund liability, the injury must also be permanent before Fund liability is triggered. Expert medical evidence is generally required to establish permanency. However, a formal impairment rating is not always necessary, and permanency can also be inferred from the nature of the injury itself. In this case, however, the commissioner's decision was supported by substantial evidence in that Haynes offered no evidence of permanent impairment, and the Fund offered evidence that there was no permanent impairment.

HELD: A mere statement at hearing that counsel would be willing to leave the record open is insufficient to preserve error on the deputy's decision to close the record. Further, the deputy's decision was not an abuse of discretion in that Haynes knew prior to hearing that she did not have medical evidence of permanency but that the Fund intended to offer evidence showing Haynes had no permanency.

Stumpff v. Second Injury Fund, 543 N.W.2d 904 (Iowa 1996).

Second Injury Fund - Requirements for Triggering Liability

In 1976, Stumpff sustained a work-related injury to his right index finger, resulting in permanent impairment. In 1989, Stumpff fell at work and fractured both wrists. Stumpff subsequently filed a claim against the Second Injury Fund. The deputy industrial commissioner found that Claimant's 1976 injury was limited to the finger, and consequently did not trigger the Fund's liability. The deputy's decision was affirmed on appeals to the Industrial Commissioner and district court. Stumpff appealed to the supreme court.

HELD: Affirmed. Iowa Code § 85.64 specifically requires the prior loss of a hand, foot, leg, or eye to trigger Fund liability. Iowa Code § 85.34 distinguishes between hands and fingers for purposes of determining permanent disability

benefits. Consequently, an injury limited to a finger is not an injury to the hand and does not trigger Fund liability.

Garien v. Schneider, 546 N.W.2d 606 (Iowa 1996).

Self-Insured Employer - Statutory Requirements

Election of Remedies - Uninsured Employer

Exclusive Remedy Provision - Loss of Consortium Claims

Exclusive Remedy Provision - Negligence Claims Against Coemployees

Garien sustained serious work-related injuries while employed by Dahlen Transport. Dahlen was not insured for workers' compensation claims in Iowa, but did contract with an independent third-party workers' compensation administrator to administer its workers' compensation claims in several states. Through this arrangement, Dahlen paid Garien nearly $16,000 in temporary disability benefits as well as over $119,000 in medical expenses. Garien subsequently brought an action at law against Dahlen, as well as a negligence action against a coemployee. Garien's wife and children also brought consortium claims against each defendant. After motions for summary judgment were filed, the district court ruled that Dahlen was not self-insured as required by Iowa law, and therefore, Garien could elect to bring an action at law pursuant to Iowa Code § 87.21. The district court also ruled that Garien's acceptance of workers' compensation benefits from Dahlen was not an election of an inconsistent remedy. Dahlen appealed.

HELD: Affirmed in part, reversed in part, and remanded. The supreme court held that to be a self-insured employer, the employer must follow all statutory requirements, including filing proof of financial ability and furnishing a bond to the Industrial Commissioner. Dahlen's failure to properly qualify as a self-insured employer permitted Garien to elect a remedy under Iowa Code § 87.21.

HELD: Acceptance of workers' compensation benefits may constitute an irreversible election of remedy. Such an election may be complete even if all benefits have not yet been paid. However, an employee's election must be knowing. Thus, an election may be avoided if it is the result of ignorance of the law or mistake. In such a case, double recovery is avoided by giving the employer credit for any benefits paid under the rejected remedy.

HELD: Loss of consortium claims are barred by the exclusive remedy provision only if the employee elects against an action at law.

HELD: An action at law against a coemployee is subject to the gross negligence standard of the exclusive remedy provision only if the employee elects against an action at law against the employer.

Henriksen v. Younglove Constr., 540 N.W.2d 254 (Iowa 1995).

Subject Matter Jurisdiction - Injuries Occurring Outside of Iowa

Younglove Construction builds grain storage facilities throughout the United States. Its headquarters and only business office is in Sioux City, Iowa. In January 1989, Henriksen was hired by Younglove to work on a project in South Sioux City, Nebraska. Henriksen was domiciled in Iowa, but only worked for Younglove in Nebraska. In November 1989, Henriksen sustained work-related neck and back injuries, and eventually filed a claim for workers' compensation benefits. Younglove asserted that the Iowa Industrial Commissioner did not have subject matter jurisdiction over a work-related injury occurring in Nebraska. The deputy commissioner dismissed the claim, and was affirmed on appeals to the industrial commissioner and district court. Henriksen appealed to the supreme court.

HELD: Reversed and remanded. Iowa Code § 85.71 governs jurisdiction over injuries occurring outside of Iowa. The supreme court determined that the plain language of section 85.71 conferred subject matter jurisdiction to the Industrial Commissioner for injuries occurring outside of Iowa provided the employee was domiciled in Iowa at the time of the injury. The supreme court noted that personal jurisdiction over the employer was also required. The supreme court specifically overruled two prior contrary decisions, Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981), and George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983).

**My thanks to Michael Mock for assisting me with this portion of the Appellate Update.

1996 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 25

9:00 a.m.	Registration
11:00 a.m.	Board of Directors Meeting
1:00 p.m.	Introduction & Report of Association
1:15 - 2:00	Annual Appellate Update, Part I • Steven L. Serck Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C. Des Moines, IA
2:00 - 2:30	Annual Legislative Review • Robert M. Kreamer Des Moines, IA
2:30 - 3:00	An Updated Look at Premises Liability Law in Iowa • Michael W. Ellwanger Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser Sioux City, IA
3:00 - 3:15	BREAK
3:15 - 3:45	Effective Mediation—Meeting the Insurance Carrier Expectations • Susan M. Brown Litigation Manager, Farmland Insurance Company, Des Moines, IA
3:45 - 5:15	Defending the Traumatic Brain Injury Claim • Steven B. Bisbing, Psy.D., J.D. 7406 Aspen Avenue Takoma Park, MD
5:15 - 8:00	COCKTAILS–Des Moines River Amphitheater West side of Embassy Suites Hotel Entertainment - Kuhlmann Sisters Dinner on your own in Des Moines

THURSDAY, SEPTEMBER 26

8:30 - 9:30	* Brain and Psychological Injury Case Clinic • Steven B. Bisbing, Psy.D., J.D. 7406 Aspen Avenue Takoma Park, MD
9:30 - 10:00	Recent Developments in Administrative Law • David L. Brown Hansen, McClintock & Riley Des Moines, IA
10:00 - 10:15	BREAK
10:15 - 11:00	Workers Compensation Update • Honorable Iris Post Iowa Industrial Commissioner
11:00 - 11:30	The Voodoo of Claim Reserves • D. Samuel Waters, Claims Attorney Continental Western Insurance Company Des Moines, IA
11:30 - 12:00	Navigating the Rapids in Communicating with the Insurance Carrier • Neal Sharmer, Claims Attorney United Fire & Casualty Cedar Rapids, IA
12:00 - 12:45	LUNCH — Embassy Suites Hotel
12:45 - 1:15	Supreme Court Report • Honorable James H. Andreasen Justice, Iowa Supreme Court
1:15 - 2:00	Civil Conspiracy, RICO, & the Common Law • David L. Phipps Whitfield & Eddy, P.L.C. Des Moines, IA
2:00 - 2:45	Ethics Update: The Prosecutor's View • Charles L. Harrington Ethics Counsel to Iowa Supreme Court Board of Professional Ethics & Conduct
2:45 - 3:00	BREAK
3:00 - 3:45	Product Liability: Status of Restatement and Punitive Damages • Gregory M. Lederer Simmons, Perrine, Albright & Ellwood Cedar Rapids, IA
3:45 - 4:30	Annual Appellate Update, Part II • Rex B. Staub Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, IA
4:30 - 5:00	Election of Officers and Directors and Annual Meeting of IDCA
6:30 - 9:00	Reception and Banquet GLEN OAKS COUNTRY CLUB 6:30 - Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 27

7:30 - 8:30	Board of Directors Meeting
8:30 - 9:00	The A.D.A. & Civil Tort Liability • Gene R. Krekel Hirsch, Adams, Krekel, Putnam, Cahill, & Miller Burlington, IA
9:00 - 10:00	Allocation of Fault & Mitigation of Damages • Philip J. Willson Willson & Pechacek, P.L.C. Council Bluffs, IA
10:00-10:15	BREAK
10:15 - 11:00	Pretrial Media Statements: Where are the Ethical Safe Harbors • Honorable Robert D. Wilson Judge, 5th Judicial District • Sharon K. Malheiro Davis, Hockenberg, Wine, Brown, Koehn, & Shors, P.C. Des Moines, IA
11:00 - 11:45	Intentions & $4 Will Get You a Microbrew, But It Won't Get You Understood: Perception is the Key to Communication in Litigation, Part 1 • Mary E. Ryan Speech Communication Specialists Denver, CO
11:45 - 12:30	LUNCH
12:30 - 1:00	Federal Court Report • Honorable Charles R. Wolle, Chief Judge, Southern District of Iowa
1:00 - 1:30	Communication in Litigation, Part 2 • Mary E. Ryan Speech Communication Specialists Denver, CO
1:30 - 2:15	What Does the Grievance Commission Do and What Do Lawyers Do – Some Surprising Cases • R. Bruce Haupert Chair, Iowa Supreme Court Grievance Commission
2:15 - 3:00	Annual Appellate Update, Part III • Webb L. Wassmer Simmons, Perrine, Albright & Ellwood Cedar Rapids, IA

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. Alibee 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 (Honorary) 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
Gregory M Lederer 1994-1995

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 - Robert A. Engberg

* Deceased

OFFICERS AND DIRECTORS
1995 - 1996

PRESIDENT

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

PRESIDENT-ELECT

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

SECRETARY

Jaki K. Samuelson - 1996
1300 First Interstate Bank Bldg
Des Moines, IA , 50309

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
Des Moines, IA , 50309

DISTRICT VI

Robert D Houghton - 1997
P O. Box 2107
Cedar Rapids, IA , 52406-2107

DISTRICT VII

Carol A. H Freeman - 1996
600 Davenport Bank Bldg
Davenport, IA , 52801

DISTRICT VIII

Wendy N. Munyon - 1998
P O Box 790
Grinnell, IA , 50112

AT LARGE

J. Michael Weston - 1996
2720 First Avenue
Cedar Rapids, IA , 52406

Michael W Ellwanger - 1998
Suite 300, Toy National Bank Bldg
Sioux City, IA , 51101

Mark L. Tripp - 1997
Suite 3700, 801 Grand Ave.
Des Moines, IA , 50309-2727

David L Brown - 1996
803 Fleming Bldg.
Des Moines, IA , 50309

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

1996 ANNUAL MEETING
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1996 LEGISLATIVE REPORT

Robert M. Kreamer
Whitfield & Eddy
Des Moines, Iowa

B

1996 LEGISLATIVE REPORT
By
ROBERT M. KREAMER

The 1996 Iowa legislature adjourned May 1st after spending one-hundred fifteen days in session. While Iowa legislators successfully dealt with several important issues, the 1996 legislative session continued to experience a partisan and philosophical gridlock on most substantive issues because of the divided control of the Iowa House of Representatives and the Iowa Senate. While Republicans controlled the House by a 63-37 margin, the Democrats narrowly controlled the Senate by a 27-23 margin. Because of this control split, much of the session was spent posturing by both parties to win control of the Senate in the 1996 general election. Never was the gridlock and political posturing more apparent than on several issues of interest and importance to the Iowa Defense Counsel Association. This legislation of interest in 1996 included the following bills:

House File 345 - This legislation would have eliminated the statutory 10% interest provision found in Iowa Code Section 535.3 and provided that this interest would be at the same rate found in Iowa Code Section 668.13 in comparative fault actions. This legislation passed the Iowa House of Representatives in 1995 by a vote of 92-4 and was then approved this year by the Senate Judiciary Committee on a 10-5 vote. Despite successfully clearing this Senate committee and being placed on the Senate Debate Calendar, House File 345 was not allowed floor time for debate by the Senate leadership.

House File 362 - This legislation provided that the statute of limitations for a products liability action would be ten years from

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the date the product is first purchased. It 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 in 1995 by a vote of 63-33 but was never given any consideration by the Iowa Senate this year.

House File 394 - This legislation provided that an action for medical malpractice allegedly committed on a minor under age six (6) must be commenced prior to the minor's eighth (8th) birthday. This legislation passed the Iowa House of Representatives in 1995 by a vote of 71-24 but was never given any consideration by the Iowa Senate this year.

House File 300 (Companion bill SSB 266) - This legislation would eliminate joint and several liability in comparative fault actions. No action was taken by either the House Judiciary Committee or the Senate Judiciary Committee.

House File 250 (Companion bill SSB 263) - This legislation provided 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). No action was taken by either the House Judiciary Committee or the Senate Judiciary Committee.

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House Study Bill 605 - This legislation provided a provision capping non-economic damages at $250,000.00 and also allowed an award of future damages to be reduced to present value. No action was taken on this legislation by the House Committee on Economic Development.

Senate File 2404 - This legislation rewrites the Iowa Administrative Procedure Act found in Iowa Code Chapter 17A. This legislation was approved by the Senate Judiciary Committee and was then taken off the Senate Debate Calendar and referred to the Senate State Government Committee.

House File 130 - This legislation allowed 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 in 1995 but received no further consideration in 1996.

Senate File 257 - This so-called "Sunshine in Litigation Act" created a presumption that all court records in civil actions are open to the public unless access is restricted by law and was approved by the Senate Judiciary Committee in 1995. 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. No further consideration was given this legislation in 1996.

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While 1996 was a very busy and often frustrating year because of the gridlock that existed between the Iowa House and Iowa Senate, I am pleased to report that there was no legislation of an adverse nature to the Iowa Defense Counsel Association that won legislative approval. I am also pleased to report that I continue to be looked to for leadership by legislators, lobbyists and other interest groups sharing our legislative perspective on the above pieces of legislation and other related issues.

In closing, I would like to thank all of the members of the Iowa Defense Counsel Association for the opportunity to have represented you this past year. Additionally, I would like to give a special thank-you to the Board of Directors, the Legislative Committee and especially its chairperson, Mark Tripp, for all of the support and assistance that has been given me this past year. I look forward to working with you in the days ahead to continue to promote a strong defense attitude in the Iowa legislature. THANK YOU!

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MAR 10 1995

Place On Calendar

HOUSE FILE 345

BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO HSB 239)

Passed House, Date 4-5-95 Passed Senate, Date _____

Vote: Ayes 92 Nays 4 Vote: Ayes _____ Nays _____

Approved _____

A BILL FOR

An Act relating to the rate of interest charged on judgments and decrees.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 345

TLSB 2123HV 76

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Section 1. Section 535.3, Code 1995, is amended to read as follows:

535.3 INTEREST ON JUDGMENTS AND DECREES.

Interest shall be allowed on all money due on judgments and decrees of courts ~~at the rate of ten percent per year, unless~~ a as follows:

1. At a rate equal to the coupon issue yield equivalent, as determined by the United States secretary of the treasury, of the average accepted auction price for the last auction of fifty-two-week United States treasury bills settled immediately prior to the date of the judgment.

2. A different rate which is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree.

3. The state court administrator shall distribute notice monthly of the rate set under subsection 1 and any changes to that rate to all district courts.

4. The interest shall accrue from the date of the commencement of the action.

~~This section does not apply to the award of interest for judgments and decrees subject to section 668.13.~~

EXPLANATION

This bill provides that the rate of interest on judgments and decrees set in section 535.3 is to be equal to the coupon issue rate of 52-week United States treasury bills unless a different rate is set in the judgment or decree. The bill also eliminates language in that section made redundant by the bill providing that the section does not apply to comparative fault actions.

LSB 2123HV 76
mk/jw/5

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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

An Act relating to the statute of limitations for products liability actions and providing immunity from products liability under certain circumstances and providing for the Act's applicability.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

House Amendments _____

HF 362
mk/pk/25

B S.F. _____ H.F. 362

Section 1. Section 614.1, Code 1995, is amended by adding the following new subsection:

NEW SUBSECTION. 2A. WITH RESPECT TO PRODUCTS. Those founded on the death of the person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than ten years after the product was first purchased, leased, bailed, or installed for use or consumption. This subsection shall not affect the time during which a person found liable may seek and obtain contribution or indemnity from another person whose actual fault caused a product to be defective.

This subsection does not apply to a manufacturer, assembler, designer, supplier of specifications, seller, or distributor of a product who is subject to a federal consent decree, order, or agreement recalling the product or prohibiting the sale or further manufacture of the product. The ten-year statute of repose shall not apply in cases of fraud or intentional misrepresentation by a manufacturer.

Sec. 2. NEW SECTION. 668.3A IMMUNITY DUE TO MISUSE, FAILURE TO MAINTAIN, OR ALTERATION.

Notwithstanding any other provisions of the Code, in an action seeking recovery of damages for personal injury, death, or property damage alleged to have been caused by a product, no fault shall be allocated to a manufacturer, assembler, designer, supplier of specifications, seller, or distributor, where the proximate cause of the injury was a misuse of the product by the plaintiff or some third person or was a failure by the plaintiff or some third person to properly maintain, service, or repair the product or was due to an alteration,

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modification, or change in the product which was made by a person other than, and without the direction or consent of, the manufacturer, assembler, designer, supplier of specifications, seller, or distributor from whom recovery of damages is being sought.

This section does not apply to a manufacturer, assembler, designer, supplier of specifications, seller, or distributor of a product who is subject to a federal consent decree, order, or agreement recalling the product or prohibiting the sale or further manufacture of the product.

Sec. 3. APPLICABILITY. This Act applies only to causes of action accruing on or after July 1, 1995.

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MAR 1 3 1995

Place On Calendar

HOUSE FILE 394
BY COMMITTEE ON ECONOMIC DEVELOPMENT

(SUCCESSOR TO HSB 17)

Passed House, Date 3/27/95 Passed Senate, Date _____
Vote: Ayes 71 Nays 24 Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the statute of limitations for medical malpractice actions regarding minors under six years of age.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 1567HV 76

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Section 1. FINDINGS. The general assembly finds that the exception to the general statute of limitations provided minors in section 614.8, Code 1995, impedes efforts of the state to make maternal and child health care widely available in order to provide for the health and welfare of children and pregnant women of this state. Because providers of health care rendering services to children and pregnant women remain liable to claims made by the children involved for as long as nineteen years after the service is rendered, or even longer if the child claims the injury was prenatal, a disincentive results for the provision of these services. The long period of limitation influences medical students to not pursue obstetrical and pediatric practices and physicians practicing in those areas to cease practice many years in advance of normal retirement in order to avoid defending claims during their advanced years. Evidence of both tendencies exists and is especially obvious in the less populated areas of the state where these medical services are in dangerously short supply. Because of the extended period of limitation provided minors, a significant number of primary care physicians have stopped providing obstetrical services. These trends also have an adverse impact upon the state's efforts to provide for the economic development of less populated areas of the state. The shortage of physicians providing obstetrical care in those areas is a significant impediment to attracting new economic activity. Available data show that more than 97 percent of all such claims are brought within eight years of occurrence. Claims brought after such a passage of time would logically be very difficult to prove or defend successfully. Fading of memories, the absence of records, and changes in the standard of care make litigating claims after such a period prohibitively expensive and difficult. Public policy should encourage claimants to bring claims within a more reasonable period of time when there is greater likelihood of success. Providers of health care, to the extent that a reasonable

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period of limitation can provide protection, should be relieved of concern that they or their estates could be placed in the position of having to defend actions based upon events that occurred many years in the past. The general assembly recognizes the potentially conflicting public interests between access to the courts and access to health care and finds that the state has a compelling interest in access to health care which must be paramount in furtherance of the government's obligation to provide for the general health and welfare of its citizens.

Sec. 2. Section 614.8, Code 1995, is amended to read as follows:

614.8 MINORS AND MENTALLY ILL PERSONS.

~~The~~ Other than an action by a minor brought for medical malpractice, the times limited for actions ~~herein~~, except those brought for penalties and forfeitures, ~~shall be~~ are extended in favor of ~~minors and mentally ill persons~~ a minor or a mentally ill person, so that ~~they shall have~~ the minor or the mentally ill person has one year from and after the termination of such disability within which to commence ~~said~~ an action. The time limited for an action brought for medical malpractice is extended in favor of a minor less than six years of age so that the minor has until the minor's eighth birthday to commence an action. As used in this section, "medical malpractice" means an action founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatrist, optometrist, pharmacist, chiropractor, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care.

EXPLANATION

This bill makes legislative findings regarding the need for a shortened statute of limitations for medical malpractice actions involving minors who are injured under the age of six. The bill provides that an action for medical malpractice

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allegedly committed on a minor under age six must be commenced prior to the minor's eighth birthday.

MAR 5 [illegible]
JUDICIARY

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HOUSE FILE 300
BY GRUBBS

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act eliminating joint and several liability in comparative fault actions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 300

TLSB 1894HH 76

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Section 1. Section 668.4, Code 1995, is amended to read as follows:

668.4 JOINT AND SEVERAL LIABILITY.

In actions brought under this chapter, the rule of joint and several liability shall not apply ~~to defendants who are found to bear less than fifty percent of the total fault assigned to all parties.~~

EXPLANATION

This bill eliminates joint and several liability in comparative fault actions. Currently, joint and several liability exists only in the event that a defendant is found to bear at least 50 percent of the total fault assigned to all parties.

LSB 1894HH 76
mk/cf/24

MAR 2 1995
JUDICIARY

HOUSE FILE 250
BY GRUBBS

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Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to consortium claims under comparable fault.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 250

TLSB 1892HH 76
mk/jw/5

B

Section 1. Section 668.3, subsection 1, Code 1995, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. Contributory fault shall not bar recovery in an action by a claimant to recover damages for loss of services, companionship, society, or consortium, unless the fault attributable to the person whose injury or death provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants, third-party defendants, and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person whose injury or death provided the basis for the damages.

Sec. 2. Section 668.3, subsection 2, paragraph b, Code 1995, is amended to read as follows:

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, ~~and~~ person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society. For this purpose the court may determine that two or more persons are to be treated as a single party.

EXPLANATION

This bill 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. The bill overrules Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988).

LSB 1892HH 76
mk/jw/5

SSB 605

ECONOMIC DEVELOPMENT

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Bradley, Chair
Boggess
McCoy

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON ECONOMIC DEVELOPMENT BILL BY CHAIRPERSON LARSON)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to damages in tort actions.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

B

S.F. _____ H.F. _____

Section 1. Section 668.3, Code 1995, is amended by adding the following new subsection:

NEW SUBSECTION. 1A. In an action brought under this chapter, a plaintiff shall not receive an award for noneconomic damages of more than two hundred fifty thousand dollars.

Sec. 2. Section 668.3, subsection 2, paragraph a, Code 1995, is amended to read as follows:

a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded. In making the findings required by this paragraph, a claimant shall not be entitled to receive noneconomic damages of more than two hundred fifty thousand dollars.

Sec. 3. Section 668.3, subsection 8, Code 1995, is amended to read as follows:

8. In an action brought pursuant to this chapter the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past damages and that portion of the judgment or decree awarded for future damages. All future damages shall be reduced to present value prior to entry of judgment or award.

EXPLANATION

This bill establishes a limit of $250,000 on noneconomic damages which may be awarded a party in a tort action. The bill also requires all future damages to be reduced to present value prior to being awarded to the claimant.

LSB 4218HC 76

FILED MAR 4 1996

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SENATE FILE 2404
BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO SSB 2280)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the Iowa administrative procedure Act.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 3885SV 76

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ARTICLE 1

GENERAL PROVISIONS

Section 1. NEW SECTION. 17A.1101 CITATION, STATEMENT OF PURPOSE, AND CONSTRUCTION.

1. This chapter may be cited as the "Iowa Administrative Procedure Act".

2. The purposes of this chapter are the following:

a. To provide legislative and gubernatorial oversight of powers and duties delegated to administrative agencies.

b. To increase the public accountability of administrative agencies.

c. To simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions.

d. To increase public access to information about agency law and policy.

e. To increase public participation in the formulation of administrative rules and the efficacy and acceptability of those rules.

f. To increase the fairness and efficiency of agencies in their conduct of adjudicatory proceedings.

g. To simplify the process of judicial review of agency action as well as to increase its availability and effectiveness.

3. In accomplishing its objectives, the intention of this chapter is to strike a fair balance between the need for adequate protection of private rights and political control of agency processes and the need for efficient, economical, and effective government administration.

4. The coverage and requirements of this chapter shall be construed broadly to effectuate the purposes of this chapter and any exemptions from its requirements contained in this chapter or elsewhere shall be narrowly construed.

Sec. 2. NEW SECTION. 17A.1102 DEFINITIONS.

As used in this chapter, unless the context otherwise

requires:

1. "Adjudicative proceeding" means the process for formulating and issuing an order.

2. "Agency" means a board, commission, department, officer, or other administrative unit of this state, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. "Agency" does not mean the general assembly or any of its components, the judicial department or any of its components, the governor, or a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the state or any of their administrative units. To the extent it purports to exercise authority subject to any provision of this chapter, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the administrative unit is located within or subordinate to another agency.

3. "Agency action" means any one of the following:

a. The whole or a part of a rule or an order.

b. The failure to adopt a rule or issue an order.

c. An agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

4. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency, with respect to the matter at issue, is vested by any provision of law.

5. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

6. "Order" means an agency action of particular applicability that determines the legal rights, duties,

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privileges, immunities, or other legal interests of one or more specific persons. The term does not include an "executive order" issued by the governor pursuant to section 17A.1104 or 17A.3202.

7. "Party to agency proceedings" or "party" in context so indicating, means any of the following:

a. A person to whom the agency action is specifically directed.

b. A person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding.

8. "Party to judicial review or civil enforcement proceeding" or "party" in context so indicating, means any of the following:

a. A person who files a petition for judicial review or civil enforcement.

b. A person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

9. "Person" means an individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

10. "Presiding officer" means an individual who presides at any stage in an adjudicatory proceeding.

11. "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state statute, court rule, executive order, or rule of an agency.

12. "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedures, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule. Notwithstanding any other provision of law, "rule" includes an executive order or directive of the governor which

creates an agency or establishes a program or which transfers a program between agencies established by statute or rule.

13. "Rulemaking" means the process for formulating and adopting a rule.

Sec. 3. NEW SECTION. 17A.1103 APPLICABILITY AND RELATION TO OTHER LAW.

1. This chapter applies to all agencies and all proceedings not expressly exempted, mentioning this chapter by name or number.

2. This chapter creates only procedural rights and imposes only procedural duties. The procedural rights and duties are in addition to those created and imposed by other statutes. To the extent that any other statute would diminish a right created or duty imposed by this chapter, the other statute is superseded by this chapter, unless the other statute expressly provides otherwise, mentioning this chapter by name or number.

3. An agency may grant procedural rights to persons in addition to those conferred by this chapter as long as rights conferred upon other persons by any provision of law are not substantially prejudiced.

Sec. 4. NEW SECTION. 17A.1104 SUSPENSION OF CHAPTER'S PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS OR SERVICES.

1. To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the governor by executive order may suspend, in whole or in part, one or more provisions of this chapter. The governor by executive order shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

2. An executive order issued under subsection 1 is subject to the requirements applicable to the adoption and effectiveness of a rule.

3. If any provision of this chapter is suspended pursuant

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to this section, the governor shall promptly report the suspension to the general assembly. The report must include recommendations concerning any desirable legislation that may be necessary to conform this chapter to federal law.

Sec. 5. NEW SECTION. 17A.1105 WAIVER.

Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this chapter.

Sec. 6. NEW SECTION. 17A.1106 INFORMAL SETTLEMENTS.

Except to the extent precluded by another provision of law, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is encouraged. Agencies shall establish by rule specific procedures to facilitate informal settlement of matters. This section does not require any party or other person to settle a matter pursuant to informal procedures.

Sec. 7. NEW SECTION. 17A.1107 CONVERSION OF PROCEEDINGS.

1. At any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding may convert the proceeding to another type of agency proceeding provided for by this chapter if the conversion is appropriate under the particular circumstances, is in the public interest, and does not prejudice the substantial rights of any party. If required by any provision of law, the presiding officer or other agency official responsible for the proceeding shall convert the proceeding to another type of agency proceeding provided by this chapter.

2. A conversion of a proceeding of one type to a proceeding of another type may be effected only upon notice to all parties to the original proceeding and an opportunity to present argument on that issue. An order converting one type of proceeding to another type of proceeding is a final order.

3. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be

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converted, that officer or official, in accordance with agency rules, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

4. To the extent feasible and consistent with the rights of parties and the requirements of this chapter pertaining to the new proceeding, the record of the original agency proceeding must be used in the new agency proceeding.

5. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

a. Give such additional notice to parties or other persons as is necessary to satisfy the requirements of this chapter pertaining to the new proceeding.

b. Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of this chapter pertaining to the new proceeding.

c. Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of this chapter pertaining to the new proceeding.

6. Each agency shall adopt rules to govern the conversion of one type of proceeding to another. The rules must include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Sec. 8. NEW SECTION. 17A.1108 EFFECTIVE DATE.

This chapter takes effect on July 1, 1997, and does not govern proceedings pending on that date. This chapter governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. This chapter also governs agency proceedings conducted on a remand from a court or another agency after the effective date of this chapter.

ARTICLE 2

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PUBLIC ACCESS TO AGENCY LAW AND POLICY

Sec. 9. NEW SECTION. 17A.2101 PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULES.

1. The administrative rules editor shall cause the "Iowa Administrative Bulletin" to be published in pamphlet or electronic form at least every other week containing all of the following:

a. Notices of proposed rule adoption prepared in such a manner so that the text of a proposed or adopted rule shows the text of any existing rule being changed and the change being made.

b. Newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule being changed and the change being made.

c. All proclamations and executive orders of the governor which are general and permanent in nature.

d. Resolutions nullifying administrative rules passed by the general assembly pursuant to article III, section 40 of the Constitution of the State of Iowa.

e. Other materials deemed appropriate for such publication by the administrative rules review committee or the administrative rules coordinator.

2. Subject to the direction of the administrative rules coordinator, the administrative rules editor shall cause the "Iowa Administrative Code" to be compiled, indexed, and published in loose-leaf or electronic form containing all effective rules of each agency. The administrative rules editor shall also cause loose-leaf or electronic supplements to the Iowa administrative code to be published on a schedule determined by the administrative rules coordinator and the administrative rules review committee. Any such loose-leaf supplements shall be in a form suitable for insertion in the appropriate places in the permanent compilation, and any such electronic supplements shall be wholly integrated into the text of the permanent compilation. The administrative rules

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coordinator shall devise a uniform numbering system for rules and may renumber rules before publication to conform with the system.

3. a. The administrative rules editor may omit from the Iowa administrative bulletin or code any proposed or filed adopted rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if all of the following apply:

(1) The administrative rules editor and the administrative rules coordinator determine that knowledge of the rule is likely to be important to only a small class of persons.

(2) On application to the adopting agency, the proposed or adopted rule in printed or electronic form is made available at no more than its cost of reproduction.

(3) The administrative bulletin or code contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

b. The administrative rules editor shall omit from the Iowa administrative code any rule or portion of a rule nullified by the general assembly pursuant to article III, section 40 of the Constitution of the State of Iowa, any rule or portion of a rule rescinded by the governor pursuant to section 17A.3202, and any other rule that is no longer effective.

4. The Iowa administrative bulletin and the Iowa administrative code and its supplements shall be made available upon request to all persons who subscribe to any of them through the state printing division of the department of general services. Copies of this code so made available shall be kept current by the division.

Each agency shall also make available for public inspection and copying in its principal office those portions of the Iowa administrative bulletin and code containing all rules adopted or used by the agency in the discharge of its functions, and

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the index to those rules. An agency may satisfy the requirements of this paragraph by making available for public inspection and copying in its principal office a complete and up-to-date set of the administrative bulletin and code

5. All expenses incurred by the administrative rules editor under this section shall be defrayed under section 2B.22.

6. a. The Iowa administrative code shall be cited as (agency identification number) IAC, (chapter, rule, subrule, lettered paragraph, or numbered subparagraph).

b. The Iowa administrative bulletin shall be cited as IAB (volume), (number), (publication date), (page number), (ARC number). "ARC number" means the identification number assigned by the administrative rules coordinator to each rulemaking document.

7. Except as otherwise required by law, subsections 1 and 2 do not apply to rules governed by section 17A.3116, and the following provisions apply instead:

a. Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing, to the extent feasible and practicable, all of its rules within the scope of section 17A.3116. Each addition to, change in, or deletion from this official compilation must also be dated, indexed, and a record thereof kept. All portions of the compilation must be made available for public inspection and copying at no more than the cost of reproduction; however, an agency need not make available for public inspection and copying those portions containing rules governed by section 17A.3116, subsection 2, except to the extent that such inspection and copying is required by constitution or statute or in discovery under the Iowa rules of civil or criminal procedure. Certified copies of the full compilation must also be furnished to the administrative rules coordinator and members of the administrative rules review committee, and be kept current by the agency at least every thirty days.

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b. A rule subject to the requirements of this subsection shall not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of paragraph "a" are satisfied. The burden of proving that knowledge or that the failure to include a rule subject to this subsection in the required compilation was justified because it was not feasible or practicable to do so, is on the agency. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

Sec. 10. NEW SECTION. 17A.2102 PUBLIC INSPECTION AND INDEXING OF AGENCY ORDERS.

1. In addition to other requirements imposed by any provision of law, each agency shall make all written final orders, including settlement orders, available for public inspection and copying at no more than the cost of reproduction and index them by name and subject. When the agency makes them available for public inspection and copying, the agency shall delete from those orders identifying details to the extent required by any provision of law or necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets. In each case the justification for the deletion must be explained in writing and attached to the order.

2. A written final order shall not be relied on as precedent by an agency and shall not be invoked by an agency for any purpose, to the detriment of any person, until it has been made available for public inspection and indexed in the manner described in subsection 1. This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

Sec. 11. NEW SECTION. 17A.2103 DECLARATORY ORDERS.

1. Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a

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statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2. However, an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

2. Each agency shall adopt rules that provide for the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions. The rules must describe the classes of circumstances in which the agency will not issue a declaratory order and must be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agency issuance of reliable advice.

3. Within fifteen days after receipt of a petition for a declaratory order, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons.

4. Persons who qualify under any applicable provision of law as an intervenor and who file timely petitions for intervention according to agency rules may intervene in proceedings for declaratory orders. Other provisions of article 4 of this chapter apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

5. Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

a. Issue an order declaring the applicability of the statute, rule, or order in question to the specified

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circumstances.

b. Set the matter for specified proceedings.

c. Agree to issue a declaratory order by a specified time.

d. Decline to issue a declaratory order, stating the reasons for its action.

6. A copy of all orders issued in response to a petition for a declaratory order must be mailed promptly to the petitioner and any other parties.

7. A declaratory order has the same status and binding effect as any other order issued in an agency adjudicative proceeding. A declaratory order must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

8. If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, the petition is deemed to have been denied.

Sec. 12. NEW SECTION. 17A.2104 REQUIRED RULEMAKING.

In addition to other rulemaking requirements imposed by law, each agency shall do all of the following:

1. Adopt as a rule a description of the organization of the agency which states the course and method of its operations, the administrative subdivisions of the agency and the programs implemented by each of them, a statement of the mission of the agency and the methods by which and location where the public may obtain information or make submissions or requests.

2. Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency.

3. As soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and

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procedural safeguards that the agency will apply to the law it administers.

ARTICLE 3

RULEMAKING

PART 1

ADOPTION AND EFFECTIVENESS OF RULES

Sec. 13. NEW SECTION. 17A.3101 ADVICE ON POSSIBLE RULES BEFORE NOTICE OF PROPOSED RULE ADOPTION.

1. In addition to seeking information by other methods, an agency, before publication of a notice of proposed rule adoption under section 17A.3103, may solicit comments from the public on a subject matter of possible rulemaking under active consideration within the agency by causing notice to be published in the administrative bulletin of the subject matter and indicating where, when, and how persons may comment.

2. Each agency head may also appoint formal committees, as determined by the agency head, to comment, before publication of a notice of proposed rule adoption under section 17A.3103, on the subject matter of a possible rulemaking under active consideration within the agency. The membership of those committees must be published at least annually in the administrative bulletin.

Sec. 14. NEW SECTION. 17A.3102 PUBLIC RULEMAKING DOCKET.

1. Each agency shall maintain a current, public rulemaking docket.

2. The rulemaking docket must contain a listing of the precise subject matter of each possible rule currently under active consideration within the agency for proposal under section 17A.3103, the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule. For the purposes of this subsection, each agency shall define by rule the point at which a "possible rule" is "currently under active consideration within the agency for proposal under section 17A.3103." Failure to

include in the docket a possible rule currently under active consideration shall not be grounds for the invalidation of that rule after it is adopted if the agency can demonstrate that its omission was in good faith.

3. The rulemaking docket must list each pending rulemaking proceeding. A rulemaking proceeding is pending from the time it is commenced, by publication of a notice of proposed rule adoption, to the time it is terminated, by publication of a notice of termination or the rule becoming effective. For each rulemaking proceeding, the docket must indicate all of the following:

a. The subject matter of the proposed rule.

b. A citation to all published notices relating to the proceeding.

c. Where written submissions on the proposed rule may be inspected.

d. The time during which written submissions may be made.

e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made.

f. Whether a written request for the issuance of a regulatory analysis of the proposed rule has been filed, whether that analysis has been issued, and where the written request and analysis may be inspected.

g. The current status of the proposed rule and any agency determinations with respect thereto.

h. Any known timetable for agency decisions or other action in the proceeding.

i. The date of the rule's adoption.

j. The date or dates the rule is to be or was considered by the Administrative Rules Review Committee and an indication of any action taken by that committee on the rule.

k. The date of the rule's filing, indexing, and publication.

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1. When the rule will become effective.

Sec. 15. NEW SECTION. 17A.3103 NOTICE OF PROPOSED RULE ADOPTION.

1. At least thirty-five days before the adoption of a rule, an agency shall cause notice of its contemplated action to be published in the administrative bulletin by submitting five copies of the proposed rule to the administrative rules coordinator, who shall assign an ARC number to each rulemaking document and forward three copies to the administrative rules editor for publication in the administrative bulletin. The notice of proposed rule adoption must include all of the following:

a. A short explanation of the purpose of the proposed rule.

b. The specific legal authority authorizing the proposed rule.

c. Subject to section 17A.2101, subsection 3, the text of the proposed rule.

d. Where, when, and how persons may present their views on the proposed rule.

e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

2. Within three days after its publication in the administrative bulletin, the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies. Failure to provide copies as provided in this subsection shall not be grounds for invalidation of a rule, unless that failure was deliberate on the part of the agency or a result of gross negligence.

3. An agency may publish a notice of proposed rule adoption and hold a rulemaking proceeding on the notice after the enactment and before the effective date of a statute

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authorizing it to adopt such a rule as long as any rule adopted on the basis of that proceeding states that it will not become effective until a specified date on or after the effective date of the authorizing statute.

Sec. 16. NEW SECTION. 17A.3104 PUBLIC PARTICIPATION.

1. For at least twenty days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

2. a. An agency shall schedule an oral proceeding on a proposed rule if, within twenty days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by the administrative rules review committee, the administrative rules coordinator, a political subdivision, an agency, or twenty-five persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

b. An oral proceeding on a proposed rule, if required, may not be held earlier than twenty days after notice of its location and time is published in the administrative bulletin.

c. The agency head, a member of the agency head, or another person designated by the agency, shall preside at a required oral proceeding on a proposed rule. The person presiding must have knowledge of the purpose and subject matter of the proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

d. Each agency shall adopt rules for the conduct of oral rulemaking proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

Sec. 17. NEW SECTION. 17A.3105 REGULATORY ANALYSIS.

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1. An agency shall issue a regulatory analysis of a proposed rule that complies with requirements of subsection 2, paragraphs "a" and "b", if, within thirty-five days after the published notice of proposed rule adoption, a written request for the analysis is submitted to the agency by the administrative rules review committee or the administrative rules coordinator. An agency shall also issue a regulatory analysis of a proposed rule that complies with subsection 2, paragraphs "a" and "b", if that rule would have a substantial impact on small business and if such a request is submitted to the agency within the specified time period by at least twenty-five persons signing that request who each qualify as a small business or by an organization representing at least twenty-five such persons. If a rule has been adopted without prior notice and an opportunity for public participation in reliance upon section 17A.3108, the written request for the analysis may be made within seventy days of publication of that rule.

2. a. Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain all of the following:

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

(2) A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, including a description of the nature and amount of all of the different kinds of costs that would be incurred in complying with the proposed rule.

(3) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

(4) A comparison of the probable costs and benefits of the

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proposed rule to the probable costs and benefits of inaction.

(5) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

(6) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

b. In the case of a rule that would have a substantial impact on small business, the regulatory analysis must also contain a discussion of whether it would be feasible and practicable to do any of the following to reduce the impact of the rule on small business:

(1) Establish less stringent compliance or reporting requirements in the rule for small business.

(2) Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.

(3) Consolidate or simplify the rule's compliance or reporting requirements for small business.

(4) Establish performance standards to replace design or operational standards in the rule for small business.

(5) Exempt small business from any or all requirements of the rule.

c. The agency shall reduce the impact of the proposed rule on small business by using a method discussed in paragraph "b" if it finds that the method is legal and feasible in meeting the statutory objectives which are the basis of the proposed rule.

3. Each regulatory analysis must include quantifications of the data to the extent practicable and must take account of both short-term and long-term consequences.

4. Notwithstanding any other time period specified in this chapter, a concise summary of the regulatory analysis must be published in the administrative bulletin at least ten days

before the earliest of the following:

a. The end of the period during which persons may make written submissions on the proposed rule.

b. The end of the period during which an oral proceeding may be requested.

c. The date of any required oral proceeding on the proposed rule.

In the case of a rule adopted without prior notice and an opportunity for public participation in reliance upon section 17A.3108, the summary must be published within seventy days of the request.

5. The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

6. If the agency has made a good faith effort to comply with the requirements of subsections 1 through 3, the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

7. For the purpose of this section, "small business" means any entity including but not limited to an individual, partnership, corporation, joint venture, association, or cooperative, to which all of the following apply:

a. It is not an affiliate or subsidiary of an entity dominant in its field of operation.

b. It has either twenty or fewer full-time equivalent positions or less than one million dollars in annual gross revenues in the preceding fiscal year.

For purposes of this definition, "dominant in its field of operation" means having more than twenty full-time equivalent positions and more than one million dollars in annual gross revenues, and "affiliate or subsidiary of an entity dominant in its field of operation" means an entity which is at least twenty percent owned by an entity dominant in its field of

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operation, or by partners, officers, directors, majority stockholders, or their equivalent, of an entity dominant in that field of operation.

Sec. 18. NEW SECTION. 17A.3106 TIME AND MANNER OF RULE ADOPTION.

1. An agency shall not adopt a rule until the period for making written submissions and oral presentations has expired.

2. Within one hundred eighty days after the later of the publication of the notice of proposed rule adoption, or the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the administrative bulletin.

3. Before the adoption of a rule, an agency shall consider the written submissions, oral submissions or any memorandum summarizing oral submissions, and any regulatory analysis, provided for by this part.

4. Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge, and judgment, in the adoption of a rule.

Sec. 19. NEW SECTION. 17A.3107 VARIANCE BETWEEN ADOPTED RULE AND NOTICE OF PROPOSED RULE ADOPTION.

1. The agency shall not adopt a rule that differs from the rule proposed in the notice of proposed rule adoption on which the rule is based unless all of the following apply:

a. The differences are within the scope of the matter announced in the notice of proposed rule adoption and are in character with the issues raised in that notice.

b. The differences are a logical outgrowth of the contents of that notice of proposed rule adoption and the comments submitted in response thereto.

c. The notice of proposed rule adoption provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

2. In determining whether the notice of proposed rule

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adoption provided fair warning that the outcome of that rule-making proceeding could be the rule in question the agency shall consider all of the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests.

b. The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of proposed rule adoption.

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of proposed rule adoption.

Sec. 20. NEW SECTION. 17A.3108 GENERAL EXEMPTION FROM PUBLIC RULEMAKING PROCEDURES.

1. To the extent an agency for good cause finds that any requirements of sections 17A.3103 through 17A.3107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection. An agency shall not rely upon this subsection on the ground that it has insufficient time to follow usual procedures to adopt a rule, because adoption of the rule is required by a statute that became effective only very recently, unless that statute also requires the agency to adopt the rule by a specified date and it would be impracticable to follow usual procedures for adoption of the rule during the period between the date of the enactment of the statute and the specified date by which the agency must adopt the rule.

2. In an action contesting a rule adopted under subsection 1, the burden is upon the agency to demonstrate that any omitted requirements of sections 17A.3103 through 17A.3107 were impracticable, unnecessary, or contrary to the public

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interest in the particular circumstances involved.

3. Within two years after the effective date of a rule adopted under subsection 1, the administrative rules review committee or the governor may request the agency to hold a rulemaking proceeding thereon according to the requirements of sections 17A.3103 through 17A.3107. The request must be in writing, filed in the office of the administrative rules coordinator, and sent to the agency. The administrative rules coordinator shall immediately forward to the administrative rules editor a certified copy of the request. Notice of the filing of the request must be published in the next issue of the administrative bulletin. The rule in question ceases to be effective one hundred eighty days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rulemaking proceeding conducted pursuant to the requirements of sections 17A.3103 through 17A.3107.

Sec. 21. NEW SECTION. 17A.3109 EXEMPTION FOR CERTAIN RULES.

1. An agency need not follow the provisions of sections 17A.3103 through 17A.3108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. A rule adopted under this subsection must include a statement that it was adopted under this subsection when it is published in the administrative bulletin, and there must be an indication to that effect in a footnote to the rule when it is published in the administrative code.

2. A reviewing court shall determine wholly de novo the validity of a rule within the scope of subsection 1 that is adopted without complying with the provisions of sections 17A.3103 through 17A.3108.

Sec. 22. NEW SECTION. 17A.3110 CONCISE EXPLANATORY STATEMENT.

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1. At the time it adopts a rule, an agency shall issue a concise explanatory statement containing all of the following:

a. A summary of the principal reasons urged for and against the rule.

b. The agency's reasons for adopting the rule, including the agency's reasons for overruling the considerations urged against its adoption.

c. An indication of any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted, with the reasons for any change.

2. Only the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

Sec. 23. NEW SECTION. 17A.3111 CONTENTS, STYLE, AND FORM OF RULE.

1. Each rule adopted by an agency must contain the text of the rule and all of the following:

a. The date the agency adopted the rule.

b. A concise statement of the purpose of the rule.

c. A reference to all rules repealed, amended, or suspended by the rule.

d. A reference to the specific statutory or other authority authorizing adoption of the rule.

e. Any findings required by any provisions of law as a prerequisite to adoption or effectiveness of the rule.

f. The effective date of the rule if other than that specified in section 17A.3115, subsection 1.

2. To the extent feasible, each rule should be written in clear and concise language understandable to persons who may be affected by it.

3. An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has

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been adopted by an agency of the United States or of this state, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, and must state that the rule does not include any later amendments or editions of the incorporated matter. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing that matter. An agency which adopts standards by reference to another publication shall purchase and provide a copy of the publication containing the standards to the administrative rules coordinator who shall deposit the copy in the state law library where it shall be made available for inspection and reference. In those cases where the purchase of an additional copy would be an unreasonable expense, the administrative rules coordinator may waive this requirement if the publication can be temporarily and promptly obtained for review by the state law library upon request.

Sec. 24. NEW SECTION. 17A.3112 AGENCY RULEMAKING RECORD.

1. An agency shall maintain for a period of five years an official rulemaking record for each rule it adopts. The record and materials incorporated by reference must be available for public inspection.

2. The agency rulemaking record must contain all of the following:

a. Copies of all publications in the administrative bulletin with respect to the rule or the proceeding upon which

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the rule is based.

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based.

c. All written petitions, requests, submissions, and comments received by the agency and all other written materials that are unprivileged and that are not required by statute to be kept confidential that were considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based.

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations.

e. A copy of any regulatory analysis prepared for the proceeding upon which the rule is based.

f. A copy of the rule and explanatory statement filed in the office of the administrative rules coordinator.

g. All petitions for exceptions to, amendments of, or repeal or suspension of, the rule.

h. A copy of any request filed pursuant to section 17A.3108, subsection 3.

i. A copy of any objection to the rule filed by the administrative rules review committee pursuant to section 17A.3204, subsection 4, and the agency's response.

j. A copy of any filed executive order with respect to the rule.

3. Upon judicial review, the record required by this section constitutes the official agency rulemaking record with respect to a rule. Except as provided in section 17A.3110, subsection 2, or otherwise required by a provision of law, the agency rulemaking record need not constitute the exclusive

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basis for agency action on that rule or for judicial review thereof.

Sec. 25. NEW SECTION. 17A.3113 INVALIDITY OF RULES NOT ADOPTED ACCORDING TO CHAPTER -- TIME LIMITATIONS.

1. A rule adopted after the effective date of this Act is invalid unless adopted in substantial compliance with the provisions of sections 17A.3102 through 17A.3108 and sections 17A.3110 through 17A.3112.

2. An action to contest the validity of a rule on the grounds of its noncompliance with any provision of sections 17A.3102 through 17A.3108 or sections 17A.3110 through 17A.3112 must be commenced within two years after the effective date of the rule.

Sec. 26. NEW SECTION. 17A.3114 FILING OF RULES.

1. An agency shall file in the office of the administrative rules coordinator three certified copies of each rule it adopts and all existing rules that have not previously been filed. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each adopted rule must have attached to it the explanatory statement required by section 17A.3110. The administrative rules coordinator shall assign an ARC number to each rule and shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the administrative rules coordinator.

2. The administrative rules coordinator shall transmit to the administrative rules editor, two certified copies of each filed rule as soon after its filing as is practicable.

Sec. 27. NEW SECTION. 17A.3115 EFFECTIVE DATE OF RULES.

1. Except to the extent subsection 2 provides otherwise, each adopted rule becomes effective thirty-five days after the later of its filing in the office of the administrative rules

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coordinator or its publication and indexing in the administrative bulletin.

2. a. A rule becomes effective on a date later than that established by subsection 1 if a later date is required by another statute or specified in the rule.

b. A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection 1 if the agency establishes such an effective date and finds that one or more of the following applies:

(1) The earlier effective date is required by constitution, statute, or court order.

(2) The rule only confers a benefit or removes a restriction on the public or some segment thereof.

(3) The rule only delays the effective date of another rule that is not yet effective.

(4) The earlier effective date is necessary to avoid immediate danger to the public health, safety, or welfare.

(5) The rule is wholly ministerial and does not alter the existing legal rights of any person.

c. The finding and a brief statement of the reasons therefor required by paragraph "b" must be made a part of the rule. In any action contesting the effective date of a rule made effective under paragraph "b", the burden is on the agency to justify its finding.

d. Each agency shall make a reasonable effort to make known to persons who may be affected by it a rule made effective before publication and indexing under this subsection.

3. This section does not relieve an agency from compliance with any provision of law requiring that some or all of its rules be approved by other designated officials or bodies before they become effective.

Sec. 28. NEW SECTION. 17A.3116 SPECIAL PROVISION FOR CERTAIN CLASSES OF RULES.

Except to the extent otherwise provided by any provision of

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law, sections 17A.3102 through 17A.3115 are inapplicable to all of the following:

1. A rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public.

2. A rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

a. Enable law violators to avoid detection.

b. Facilitate disregard of requirements imposed by law.

c. Give a clearly improper advantage to persons who are in an adverse position to the state.

3. A rule that only establishes specific prices to be charged for particular goods or services sold by an agency.

4. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.

5. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its political subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

6. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

7. A form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form.

8. An agency budget.

9. An opinion of the attorney general.

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10. The terms of a collective bargaining agreement.

Sec. 29. NEW SECTION. 17A.3117 PETITION FOR ADOPTION OF RULE.

1. Any person may petition an agency requesting the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons therefor, initiate rulemaking proceedings in accordance with this chapter or if otherwise lawful, adopt a rule.

2. If a person petitions an agency requesting the adoption of a rule superseding specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, the agency shall initiate rulemaking proceedings in accordance with this chapter and adopt such a rule unless the agency finds, and incorporates in that finding the reasons therefor, that the adoption of such a rule at this time is infeasible or that such a rule is impracticable, and provides a copy of that finding to the petitioner.

PART 2

REVIEW OF AGENCY RULES

Sec. 30. NEW SECTION. 17A.3201 REVIEW BY AGENCY.

Within each five-year period an agency shall review each of its rules to determine whether each such rule should be repealed or amended, or a new rule adopted instead. In conducting that review, the agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include, for each such rule, a concise statement of all of the following:

1. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.

2. Criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of

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the rule tendered to the agency or granted by the agency.

3. Alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes.

A copy of the report must be sent to the administrative rules review committee and the administrative rules coordinator and be available for public inspection.

Sec. 31. NEW SECTION. 17A.3202 REVIEW BY GOVERNOR -- ADMINISTRATIVE RULES COORDINATOR.

1. To the extent the agency itself would have such authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order. If the rule in question has been effective for more than one hundred eighty days, that executive order shall be subject to the provisions of sections 17A.3103, 17A.3104, and 17A.3106 through 17A.3116 applicable to the adoption and effectiveness of a rule.

2. The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating in the order the reasons for the action. The executive order must be filed in the office of the administrative rules coordinator, which shall promptly forward a certified copy to the agency and the administrative rules editor. An executive order terminating a rulemaking proceeding becomes effective on the date it is filed and must be published in the next issue of the administrative bulletin.

3. There is created, within the office of the governor, an administrative rules coordinator to advise the governor in the execution of the authority vested under this article. The governor shall appoint the administrative rules coordinator who shall serve at the pleasure of the governor.

Sec. 32. NEW SECTION. 17A.3203 ADMINISTRATIVE RULES REVIEW COMMITTEE.

1. There is created an administrative rules review

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committee. The committee shall be bipartisan and shall be composed of the following members:

a. Five senators appointed by the majority leader of the senate.

b. Five representatives appointed by the speaker of the house.

2. Committee members shall be appointed prior to the adjournment of a regular session convened in an odd-numbered year. Member's terms of office shall be for four years beginning May 1 of the year of appointment. However, a member shall serve until a successor is appointed. A vacancy on the committee shall be filled by the original appointing authority for the remainder of the term. A vacancy shall exist whenever a committee member ceases to be a member of the house from which the member was appointed.

3. A committee member shall be paid the per diem specified in section 2.10, subsection 6, for each day in attendance and shall be reimbursed for actual and necessary expenses. There is appropriated from money in the general fund not otherwise appropriated an amount sufficient to pay costs incurred under this section.

4. The committee shall choose a chairperson from its membership and prescribe its rules of procedure. The committee may employ a secretary or may appoint the administrative rules editor or a designee to act as secretary.

5. A regular committee meeting shall be held at the seat of government on the second Tuesday of each month. Unless impracticable in advance of each such meeting the subject matter to be considered shall be published in the Iowa administrative bulletin. A special committee meeting may be called by the chairperson at any place in the state and at any time. Unless impracticable, in advance of each special meeting notice of the time and place of such meeting and the subject matter to be considered shall be published in the Iowa administrative bulletin.

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6. Notwithstanding section 13.7, the committee may employ necessary legal and technical staff.

Sec. 33 NEW SECTION. 17A.3204 REVIEW BY ADMINISTRATIVE RULES REVIEW COMMITTEE.

1. The administrative rules review committee shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

2. Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the administrative bulletin.

3. The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The speaker of the house and the president of the senate shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the general assembly from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

4. a. If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of

the administrative rules coordinator. The filed objection must contain a concise statement of the committee's reasons for its action.

b. The administrative rules coordinator shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question and the administrative rules editor. The administrative rules coordinator shall also maintain a permanent register open to public inspection of all objections by the committee.

c. The administrative rules editor shall publish and index an objection filed pursuant to this subsection in the next issue of the administrative bulletin and indicate its existence in a footnote to the rule in question when that rule is published in the administrative code. In case of a filed objection by the committee to a rule that is subject to the requirements of section 17A.2101, subsection 7, the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

d. Within thirty days after the filing of an objection by the committee to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

e. After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency. A court holding a rule in such a proceeding to be invalid because it is outside the authority delegated to the agency shall render judgment against the agency for court costs. Court costs include a reasonable attorney's fee and are payable by the treasurer of state from

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the support appropriations of the agency that adopted the rule.

f. The failure of the administrative rules review committee to object to a rule is not an implied legislative authorization of its procedural or substantive validity.

5. The committee may recommend to an agency that it adopt a rule. The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of sections 17A.3103 and 17A.3104. An agency is not required to adopt the proposed rule.

6. The committee may, by a two-thirds vote of the committee members, delay the effective date of an adopted rule that is not yet effective for any period designated by the committee that would end no later than the next adjournment of a regular session of the general assembly. When the committee takes such action the committee shall state the reasons therefor. If the general assembly has not disapproved the rule by a joint resolution prior to the end of the period during which its effectiveness has been delayed by the action of the committee, the rule shall become effective. If the rule is disapproved by the general assembly during that period, the rule shall not become effective and the agency shall summarily withdraw the rule.

7. The committee shall file an annual report with the presiding officer of each house and the governor.

ARTICLE 4

ADJUDICATIVE PROCEEDINGS

PART 1

AVAILABILITY OF ADJUDICATIVE PROCEEDINGS -- APPLICATIONS -- LICENSES -- WAIVER OF RULE

Sec. 34. NEW SECTION. 17A.4101 ADJUDICATIVE PROCEEDINGS -- WHEN REQUIRED -- EXCEPTIONS.

1. An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order. However, an

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agency need not conduct an adjudicative proceeding if the order is a decision to do any of the following:

a. To issue or not to issue a complaint, summons, or similar accustation.

b. To initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court.

c. Under section 17A.4103, not to conduct an adjudicative proceeding.

This subsection does not preclude an agency from establishing, subject to sections 17A.5107 and 17A.5112, procedures that must be followed prior to the commencement of an adjudicative proceeding, or from issuing an order prior to conducting an adjudicative proceeding if any of the following apply:

(1) The person subject to that order may, within a time period specified by rule or in the order, file an application for an adjudicatory proceeding, that application will automatically dissolve the order from the time of its issuance, and the substantial rights of the person subject to that order are not prejudiced by the order in the interim period prior to its automatic dissolution resulting from the filing of an application for an adjudicatory proceeding.

(2) The order was properly issued in accordance with section 17A.4501.

(3) The agency was expressly authorized by statute to issue that order prior to conducting an adjudicatory proceeding, in which case, the agency must proceed as quickly as feasible after its issuance to complete any proceeding that would be required if the statute had not authorized such action in advance of any adjudicative proceeding.

2. This article applies to rulemaking proceedings only to the extent that another statute expressly so requires.

Sec. 35. NEW SECTION. 17A.4102 ADJUDICATIVE PROCEEDINGS -- COMMENCEMENT.

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1. Subject to the requirements of other provisions of law, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

2. An agency shall commence an adjudicative proceeding upon the application of any person, unless any of the following apply:

a. The agency lacks jurisdiction of the subject matter.

b. Resolution of the matter requires the agency to exercise discretion within the scope of section 17A.4101, subsection 1.

c. A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter and, in the exercise of that discretion, the agency has determined not to conduct an adjudicative proceeding.

d. Resolution of the matter does not require the agency to issue an order that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

e. The matter was not timely submitted to the agency according to any applicable provision of law.

f. The matter was not submitted in a form substantially complying with any applicable provision of law.

3. Subject to other provisions of law, each agency may, by rule, establish specified time limits for commencing various classes of adjudicative proceedings that are within the agency's jurisdiction.

4. An application for an agency to issue an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

5. An adjudicative proceeding commences when the agency or a presiding officer does any of the following:

a. Notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

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b. Begins to take action on a matter that appropriately may be determined by an adjudicative proceeding, unless this action is one of the following:

(1) An investigation for the purpose of determining whether an adjudicative proceeding should be conducted.

(2) A decision which, under section 17A.4101, subsection 1, the agency may make without conducting an adjudicative proceeding.

Sec. 36. NEW SECTION. 17A.4103 DECISION NOT TO CONDUCT ADJUDICATIVE PROCEEDING.

An agency that decides, pursuant to section 17A.4102, subsection 2, not to conduct an adjudicative proceeding in response to an application, shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

Sec. 37. NEW SECTION. 17A.4104 AGENCY ACTION ON APPLICATIONS.

1. Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute for any stage of the proceedings, an agency shall process an application for an order, other than a declaratory order, as follows:

a. Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of any agency member or employee who may be contacted regarding the application.

b. Except in situations governed by paragraph "c", within ninety days after receipt of the application or of the response to a timely request made by the agency pursuant to paragraph "a", the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part, on the basis of emergency or summary adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter.

(2) Commence a formal adjudicative hearing or a conference adjudicative hearing in accordance with this chapter.

(3) Dispose of the application in accordance with section 17A.4103.

c. If the application pertains to subject matter that is not available when the application is filed but may be available in the future, including an application for housing or employment at a time no vacancy exists, the agency may proceed to make a determination of eligibility within the time provided in paragraph "b". If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible applicants as provided by law and, upon request, shall notify the applicant of the status of the application.

2. If a timely application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the agency has taken final action upon the application for renewal or, if the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court or agency.

Sec. 38. NEW SECTION. 17A.4105 AGENCY ACTION AGAINST LICENSEES.

An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute. This section does not preclude an agency from taking immediate action to protect the public interest in accordance with section 17A.4501 or adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees,

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including rules affecting the existing licenses of a class of licensees.

Sec. 39. NEW SECTION. 17A.4106 PETITION FOR WAIVER OF RULE.

1. A person may file a petition with an agency requesting a waiver, in whole or in part, of a rule of that agency on the ground that the application of the rule to the particular circumstances of that person would qualify for a waiver under subsection 5. A petition filed under this provision must specify the rule in question, the precise scope of the waiver requested, the specific facts that would justify a waiver for petitioner, and the reasons why the particular application of the rule to petitioner for which the waiver is requested would qualify for a waiver under subsection 5.

2. Each agency shall issue rules consistent with this section concerning all of the following:

a. Governing the form, contents, and filing of petitions for the waivers of rules.

b. Specifying the procedural rights of persons in relation to such petitions.

c. Providing for the disposition of those petitions.

3. Within fifteen days after receipt of a petition for waiver of a rule, the agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons. Persons who qualify under any applicable provision of law as an intervenor and file timely petitions for intervention according to agency rules may intervene in proceedings for waivers of a rule. Other provisions of this article apply to agency proceedings for waivers of a rule only to the extent an agency so provides by rule or order.

4. An order granting or denying such a petition shall be in writing and shall contain a statement of the relevant facts and reasons supporting that action. An agency shall grant or deny such a petition within ninety days of its receipt.

Failure of an agency to grant or deny such a petition within ninety days of its receipt shall be deemed a denial of that petition by the agency.

5. An agency shall issue an order granting a petition for a waiver of a rule, in whole or in part, if application of the rule to the petitioner on the basis of the particular facts specified in the petition would not serve any of the purposes of the rule. An agency may issue an order granting a petition for waiver of a rule, in whole or in part, if application of the rule to the petitioner would result in undue hardship, waiver of the rule on the basis of the facts specified in the petition would be consistent with the public interest, and waiver of the rule as to petitioner would not prejudice the substantial rights of any other person. An order granting such a petition shall constitute a defense in any subsequent proceeding where the applicability of that rule to petitioner is at issue if petitioner proves in that subsequent proceeding all of the relevant facts pertaining to petitioner upon which that waiver order was based and that the particular application of the rule at issue was within the scope of the waiver order in question.

6. In an agency proceeding to enforce a rule of that agency, a person resisting the enforcement of the rule may defend successfully upon a demonstration that application of the rule to the person would not serve any of the purposes of the rule.

7. An agency may, on its own motion, waive the application of one or more of its rules, in whole or in part, to a specified person on the ground that the relevant facts pertaining to that person would qualify that person for a waiver under the provisions of subsection 5, by rendering an order containing the facts and reasons justifying that waiver.

8. Any order issued under this section shall be transmitted to petitioner or to the person as to whom the waiver order pertains within seven days of its rendition.

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9. An agency shall maintain a file for each of its rules for which a waiver order has been issued containing all orders waiving the application to any person of that rule.

PART 2

FORMAL ADJUDICATIVE HEARING

Sec. 40. NEW SECTION. 17A.4201 APPLICABILITY.

An adjudicative proceeding is governed by this part, except as otherwise provided by any of the following:

1. A statute other than this chapter.

2. A rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this chapter for those proceedings.

3. Section 17A.4501 pertaining to emergency adjudicative proceedings.

4. Section 17A.2103 pertaining to declaratory proceedings.

5. Section 17A.4106 pertaining to petitions for waiver of rules.

Sec. 41. NEW SECTION. 17A.4202 PRESIDING OFFICER, DISQUALIFICATION, SUBSTITUTION.

1. a. If the agency or an officer of the agency under whose authority the adjudicative proceeding is to take place is a named party to that proceeding or a real party in interest to that proceeding, in the discretion of the agency head, the presiding officer may be either the agency head, one or more members of the agency head, or one or more administrative law judges assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301. However, the agency head shall designate as the presiding officer an administrative law judge assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301 if any person to whom the agency action is specifically directed timely requests an administrative law judge to preside at the proceeding.

b. If the agency or an officer of the agency under whose

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authority the adjudicative proceeding is to take place is not a named party to that proceeding or a real party in interest to that proceeding, in the discretion of the agency head, the presiding officer may be either the agency head, one or more members of the agency head, an administrative law judge assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301, or any other person designated as a presiding officer by the agency head. Any other person designated as a presiding officer by the agency head may be employed by and officed in the agency for which that person acts as a presiding officer, but such a person shall not perform duties inconsistent with that person's duties and responsibilities as a presiding officer and shall be governed by the merit system provisions of chapter 19A.

2. Any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is or may be disqualified.

3. Any party may timely request the disqualification of a person after receipt of notice indicating that the person will preside or upon discovering facts establishing grounds for disqualification, whichever is later.

4. A person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination.

5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by either of the following:

a. The governor, if the disqualified or unavailable person is an elected official.

b. The appointing authority, if the disqualified or unavailable person is an appointed official.

6. Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken

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by the latter.

Sec. 42. NEW SECTION. 17A.4203 REPRESENTATION.

1. Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

2. Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by any provision of law, other representative.

3. Any party may designate in writing with an agency an authorized representative to act on behalf of that party in a particular proceeding. An attorney licensed to practice in this state who files an appearance or a pleading with an agency on behalf of a party shall be deemed to be the designated authorized representative of the party in that proceeding. If an authorized representative has been designated, notice to a party required under this article must be satisfied by providing the notice to that representative.

Sec. 43. NEW SECTION. 17A.4204 PREHEARING CONFERENCE -- AVAILABILITY -- NOTICE.

The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted the following apply:

1. The presiding officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. If the presiding officer decides that another presiding officer should conduct that conference, the agency shall assign or request the office of administrative hearings to assign a presiding officer for the prehearing conference, exercising the same discretion as is provided by section 17A.4202 concerning the selection of a presiding officer for a hearing.

2. The presiding officer for the prehearing conference shall set the time and place of the conference and give

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reasonable and timely written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall also give such notice to other persons entitled to notice under any provision of law.

3. The notice must include all of the following:

a. The names of all parties, and the mailing addresses of all parties or the names and mailing addresses of their designated representatives, and the names and mailing addresses of all other persons to whom notice is being given by the presiding officer.

b. The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency.

c. The official file or other reference number, the name of the proceeding, and a general description of the subject matter.

d. A statement of the time, place, and nature of the prehearing conference.

e. A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held.

f. The name, official title, mailing address and telephone number of the presiding officer for the prehearing conference.

g. A statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing or a summary adjudicative proceeding for disposition of the matter as provided by this chapter.

h. A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding may be held in default under this chapter.

4. The notice may include a statement that each party must bring to the prehearing conference specified listed materials or information, as determined by the presiding officer, and

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that a failure to do so, without good cause, will preclude that party from subsequently introducing those materials or that information in the proceeding. The notice may also include any other matters that the presiding officer considers desirable to expedite the proceedings.

Sec. 44. NEW SECTION. 17A.4205 PREHEARING CONFERENCE -- PROCEDURE AND PREHEARING ORDER.

1. The presiding officer may conduct all or part of the prehearing conference by telephone, videoconference, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

2. The presiding officer shall conduct the prehearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type of proceeding, exploration of settlement possibilities, waivers of any rights conferred upon a party by this chapter that are relevant to the proceeding, preparation of stipulations on any relevant matter, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which evidence will be presented in written form, and the extent to which telephone, videoconference, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference and may deviate from that order at the hearing only with the consent of all parties or for good cause.

3. If a prehearing conference is not held, the presiding officer for the hearing may issue a prehearing order, based on

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the pleadings, to regulate the conduct of the proceedings.

Sec. 45. NEW SECTION. 17A.4206 NOTICE OF HEARING.

1. The presiding officer for the hearing, or another person authorized to do so by rule of the agency, shall set the time and place of the hearing and give reasonable and timely written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

2. The notice must include a copy of any prehearing order rendered in the matter unless the parties and persons who have filed written petitions to intervene have already been furnished with a copy of such an order.

3. To the extent not included in a prehearing order accompanying it, the notice must include all of the following:

a. The names of all parties, and the mailing addresses of all parties or the names and mailing addresses of their designated representatives, and the names and mailing addresses of all other persons to whom notice is being given.

b. The name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the agency.

c. The official file or other reference number, the name of the proceeding, and a general description of the subject matter.

d. A statement of the time, place, and nature of the hearing.

e. A statement of the legal authority and jurisdiction under which the hearing is to be held.

f. The name, official title, mailing address, and telephone number of the presiding officer.

g. To the extent known to the person giving notice, a statement of the issues involved and of the matters asserted by the parties.

h. A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding may be held in default

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under this chapter.

4. The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

5. The agency shall give notice to persons entitled to notice under any provision of law who have not been given notice by the presiding officer. Notice under this subsection may include all types of information provided in subsections 1 through 4 or may consist of a brief statement indicating the subject matter, parties, time, place, and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

Sec. 46. NEW SECTION. 17A.4207 PLEADINGS, BRIEFS, MOTIONS, SERVICE.

1. The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, and objections.

2. The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

3. A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.

Sec. 47. NEW SECTION. 17A.4208 DEFAULT.

1. If a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding, the presiding officer may serve by certified mail all parties written notice of a proposed default order, including a statement of the grounds.

2. Within fifteen days or such longer period specified by rule after the mailing by certified mail of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. A proposed default order may be vacated for any reason specified in the rules of civil

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procedure or for any other reason specified by agency rule. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

3. The presiding officer shall either issue or vacate the default order promptly after expiration of the time within which the party may file a written motion under subsection 2.

4. After issuing a default order, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party.

Sec. 48. NEW SECTION. 17A.4209 INTERVENTION.

1. The presiding officer shall grant a petition for intervention if all of the following apply:

a. The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least twenty days before the hearing.

b. The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law.

c. The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

2. The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

3. If a petitioner qualifies for intervention, the

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presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include any or all of the following:

a. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.

b. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

c. Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

4. The presiding officer shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Sec. 49. NEW SECTION. 17A.4210 SUBPOENAS, DISCOVERY, AND PROTECTIVE ORDERS.

1. Discovery procedures applicable to civil actions are available to all parties in accordance with the rules of civil procedure. Upon notice to all parties, the presiding officer at the request of any party shall, and upon the presiding officer's own motion may, administer oaths and issue subpoenas, discovery orders, and protective orders, in accordance with the rules of civil procedure.

2. Any party or person to whom the subpoena or similar process is directed may object to the issuance of the subpoena or process. The presiding officer and any reviewing district court shall sustain the subpoena or similar process only to the extent that it is found to be in accordance with the law

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applicable to the issuance of subpoenas or discovery in civil actions.

3. Subpoenas and orders issued under this section may be enforced pursuant to article 5, part 2, of this chapter on civil enforcement of agency action.

4. An agency that relies on a witness in an adjudicative proceeding, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of the witness' testimony, shall, on request, make such statements or reports available prior to hearing to parties for use on cross-examination, unless those statements or reports are otherwise expressly exempt from disclosure by constitution or statute. Identifiable agency records that are relevant to disputed material facts involved in an adjudicative proceeding, shall, upon request, promptly be made available to a party unless the requested records are expressly exempt from disclosure by constitution or statute.

5. Unless provided otherwise by any applicable provision of law, an agency authorized to issue an investigatory subpoena for the purpose of determining whether to commence an adjudicatory proceeding may do so only after giving notice of the proposed issuance of the subpoena and an opportunity to contest its issuance to the persons who are the subject of the agency investigation. However, an agency may omit such notice and opportunity if it obtains an order from a district court approving that omission because of any of the following:

a. The whereabouts of the persons who are the subject of the agency investigation are unknown and could not be ascertained with reasonable efforts.

b. Such notice to the persons who are the subject of the agency investigation would seriously interfere with the agency's ability to obtain the evidence necessary to perform its law enforcement responsibilities.

c. Such notice would result in imminent peril to the health, safety, or welfare of any person or persons.

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Sec. 50. NEW SECTION. 17A.4211 PROCEDURE AT HEARING.

At a hearing, all of the following apply:

1. The presiding officer shall regulate the course of the proceedings in conformity with any prehearing order.

2. To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

3. The presiding officer may conduct all or part of the hearing by telephone, videoconference, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

4. The presiding officer shall cause the hearing to be recorded at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption. The recording or stenographic notes of oral proceedings or the transcription thereof shall be filed with and maintained by the agency for at least five years from the date of the final decision in that case.

5. The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, videoconference, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity to observe and hear that communication at the location of any one of the participants,

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as designated by the presiding officer, or if that is not feasible, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

Sec. 51. NEW SECTION. 17A.4212 EVIDENCE -- OFFICIAL NOTICE.

1. Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence after notifying the parties of an intention to do so and providing the parties with an opportunity to object to that exclusion. Evidence shall not be excluded solely because it is hearsay.

2. All testimony of parties and witnesses must be made under oath or affirmation.

3. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

4. Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

5. Official notice may be taken of any fact that could be judicially noticed in the courts of this state, the record of other proceedings before the agency, technical or scientific matters within the agency's specialized knowledge, and codes or standards that have been adopted by an agency of the United States, of this state, or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest

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and rebut the facts or material so noticed. However, if the required notification of the parties is infeasible or impracticable prior to the issuance of such an initial or final order, the notification may first occur in that order itself, as long as the parties are afforded, through the granting of a motion for reconsideration timely filed with the presiding officer, an opportunity, after the order is rendered, to contest and rebut the facts or material so noticed before that order becomes final.

Sec. 52. NEW SECTION. 17A.4213 EX PARTE COMMUNICATIONS.

1. Except as provided in subsection 2, or unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding shall not communicate, directly or indirectly, regarding any issue in the proceeding other than inquiries about scheduling, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

2. A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not receive ex parte communications of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

3. Unless required for the disposition of ex parte matters specifically authorized by statute, a party to an adjudicative proceeding, and a person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, shall not communicate, directly or indirectly, in connection with any issue in that proceeding other than inquiries about scheduling, while the proceeding is

as designated by the presiding officer, or if that is not feasible, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

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1. Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence after notifying the parties of an intention to do so and providing the parties with an opportunity to object to that exclusion. Evidence shall not be excluded solely because it is hearsay.

2. All testimony of parties and witnesses must be made under oath or affirmation.

3. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

4. Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

5. Official notice may be taken of any fact that could be judicially noticed in the courts of this state, the record of other proceedings before the agency, technical or scientific matters within the agency's specialized knowledge, and codes or standards that have been adopted by an agency of the United States, of this state, or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest

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and rebut the facts or material so noticed. However, if the required notification of the parties is infeasible or impracticable prior to the issuance of such an initial or final order, the notification may first occur in that order itself, as long as the parties are afforded, through the granting of a motion for reconsideration timely filed with the presiding officer, an opportunity, after the order is rendered, to contest and rebut the facts or material so noticed before that order becomes final.

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2. A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not receive ex parte communications of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

3. Unless required for the disposition of ex parte matters specifically authorized by statute, a party to an adjudicative proceeding, and a person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, shall not communicate, directly or indirectly, in connection with any issue in that proceeding other than inquiries about scheduling, while the proceeding is

pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.

4. If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection 5.

5. A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral and other communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within ten days after notice of the communication.

6. When necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

7. The agency and any party may report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, suspending or revoking a privilege to practice before the agency, and for censuring, suspending, or dismissing agency personnel, for any violations of this section

8. In a proceeding for judicial review, the burden shall be on the party seeking to uphold the validity of an order to

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demonstrate that any violation of subsections 1 through 5 relating to the issuance of that order did not prejudice the substantial rights of the party seeking its invalidation.

Sec. 53. NEW SECTION. 17A.4214 SEPARATION OF FUNCTIONS.

1. A person who has served personally as an investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

2. A person who is subject to the authority, direction, or discretion of one who has served personally as an investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

3. A person who has participated in a determination of probable cause or other equivalent preliminary determination as to the sufficiency of the evidence to support the facts alleged by any party in an adjudicative proceeding shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

4. A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with this section or section 17A.4202.

5. In a proceeding for judicial review, the burden shall be on the party seeking to uphold the validity of an order to demonstrate that any violation of this section relating to the issuance of that order did not prejudice the substantial rights of the party seeking its invalidation.

Sec. 54. NEW SECTION. 17A.4215 FINAL ORDER -- INITIAL ORDER.

1. If the presiding officer is the agency head, the presiding officer shall render a final order.

2. If the presiding officer is not the agency head, the

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presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with section 17A.4216.

3. A final order and an initial order must include the date of its rendition and, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. The order must include an explanation of why the evidence in the record supports each finding of fact and why the evidence in the record that is contrary to a finding does not preclude it. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must also be accompanied by a concise and explicit statement of each of the underlying facts in the record that support those findings. Each conclusion of law must be supported by cited authority or by a reasoned explanation. If a party has submitted proposed findings of fact, conclusions of law, or policy reasons, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief from that final or initial order. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

4. Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge

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may be utilized in evaluating evidence, but only in accordance with section 17A.4212, subsection 5. Unless provided otherwise by another provision of law, findings of fact shall be based upon a preponderance of the evidence and the burden of proof shall be on the proponent of the agency action requested.

5. If a person serving or designated to serve as presiding officer becomes unavailable, for any reason, before rendition of the final order or initial order, a substitute presiding officer must be appointed as provided in section 17A.4202. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice; but if demeanor of witnesses is a substantial factor and the original presiding officer is unavailable the portions of the hearing involving demeanor heard by the original presiding officer shall be heard again by the new presiding officer.

6. The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

7. A final order or initial order must be rendered in writing within ninety days after conclusion of the hearing or after submission of proposed findings in accordance with subsection 6 unless this period is waived, extended with the written consent of all parties, or extended for good cause shown.

8. The presiding officer shall cause copies of the final order or initial order to be mailed or otherwise delivered to each party within two working days from the time the order is rendered.

Sec. 55. NEW SECTION. 17A.4216 REVIEW OF INITIAL ORDER -- EXCEPTIONS TO REVIEWABILITY.

1. The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that any of the following apply:

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a. A provision of law precludes or limits agency review of the initial order.

b. The agency head, in the exercise of discretion conferred by a provision of law, does any of the following:

(1) Determines to review some but not all issues, or not to exercise any review.

(2) Delegates its authority to review the initial order to one or more persons.

(3) Authorizes one or more persons to review the initial order, subject to further review by the agency head.

2. A petition for appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within twenty days after rendition of the initial order or within such longer time period, not to exceed thirty days, as established by rule of the agency. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within twenty days after its rendition. The time period for a party to file a petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to section 17A.4218, and a new time period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

3. The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

4. The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

5. The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

6. Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

7. The presiding officer may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the presiding officer may order such temporary relief as is authorized and appropriate.

8. A final order or an order remanding the matter for further proceedings must be rendered in writing within sixty days after receipt of briefs and oral argument unless that period is waived, extended with the written consent of all parties, extended for good cause shown, or extended by rule for that class of cases for an additional period of not longer than thirty days.

9. A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and must include, or incorporate by express reference to the initial order, all the matters required by section 17A.4215, subsection 3.

10. The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to

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be mailed or otherwise delivered to each party within two working days from the time the order is rendered.

Sec. 56. NEW SECTION. 17A.4217 STAY.

A party may submit to the presiding officer a petition for stay of effectiveness of an initial or final order within twenty days after its rendition unless otherwise provided by statute or stated in the initial or final order. The presiding officer may take action on the petition for stay, either before or after the effective date of the initial or final order. A petition for a stay is deemed to have been denied if the presiding officer does not dispose of it within ten days after the filing of the petition.

Sec. 57. NEW SECTION. 17A.4218 RECONSIDERATION.

Unless otherwise provided by statute or rule the following apply:

1. Any party, within twenty days after rendition of an initial or final order, may file a petition for reconsideration of that order, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review. A copy of the application for reconsideration shall be timely mailed by the presiding officer to all parties of record not joining in the application.

2. The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

3. The presiding officer shall render a written order denying the petition, or granting the petition and dissolving or modifying the initial or final order, or setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within twenty days after the filing of the

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petition.

Sec. 58. NEW SECTION. 17A.4219 REVIEW BY SUPERIOR AGENCY.

If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as an initial order and the second agency functions as though it were reviewing an initial order in accordance with section 17A.4216.

Sec. 59. NEW SECTION. 17A.4220 EFFECTIVENESS OF ORDERS.

1. Unless a later date is stated in a final order or a stay is granted, a final order is effective twenty days after rendition, except for any of the following:

a. A party shall not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order.

b. A final order shall not be invoked for any purpose against any person unless the agency has made the final order available for public inspection and copying or the person has actual knowledge of the final order.

c. A final order may become effective on a specified date stated in the order that is earlier than twenty days after its rendition if any of the following exist:

(1) Another statute authorizes the agency to set an earlier effective date for that order.

(2) The order only confers a benefit or relieves a restriction on the parties other than the agency issuing the order.

(3) The earlier effective date is necessary to avoid an immediate danger to the public health, safety, or welfare.

2. Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with section 17A.4215 is determined as follows:

a. When the initial order is rendered, if administrative

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review is unavailable.

b. When the agency head renders an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect.

c. Twenty days after rendition of the initial order, if no party has filed a petition for appeal and the agency head has not given written notice of its intention to exercise review.

3. Unless a later date is stated in an initial order or a stay is granted, an initial order that becomes a final order in accordance with subsection 2 and section 17A.4215 is effective twenty days after becoming a final order, except for any of the following:

a. A party shall not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised.

b. An initial order shall not be invoked for any purpose against any person unless the agency has made the initial order available for public inspection and copying or the person has actual knowledge of the initial order or of an order stating that review will not be exercised.

c. An initial order that becomes a final order may become effective on a specified date stated in the order that is earlier than twenty days after it becomes a final order if it satisfies the requirements of subsection 1, paragraph "a", "b", or "c".

4. This section does not preclude an agency from taking immediate action to protect the public interest in accordance with section 17A.4501.

Sec. 60. NEW SECTION. 17A.4221 AGENCY RECORD.

1. An agency shall maintain an official record of each adjudicative proceeding under this part.

2. The agency record consists only of all of the following:

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a. Notices of all proceedings.

b. Any prehearing order.

c. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.

d. Evidence received or considered.

e. A statement of matters officially noticed.

f. Proffers of proof and objections and rulings thereon.

g. Proposed findings, requested orders, and exceptions.

h. The record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.

i. Any final order, initial order, or order on reconsideration.

j. Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with section 17A.4213, subsection 2.

k. Matters placed on the record after an ex parte communication.

3. Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this part and for judicial review thereof.

PART 3

OFFICE OF ADMINISTRATIVE HEARINGS

Sec. 61. NEW SECTION. 17A.4301 OFFICE OF ADMINISTRATIVE HEARINGS -- CREATION, POWERS, DUTIES.

1. An independent office of administrative hearings is created to be headed by a director appointed by the governor and confirmed by the senate. The director serves at the pleasure of the governor.

2. The office shall employ administrative law judges as necessary to conduct proceedings required by this chapter or any other provision of law. Administrative law judges employed by the office shall not perform duties inconsistent with their duties and responsibilities as administrative law

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judges and shall not be located in offices within the agencies for which they act as presiding officers. Administrative law judges shall be covered by the merit system provisions of chapter 19A. Subject to the approval of the department of personnel, the office shall, insofar as practicable, provide for different classes of administrative law judges with different salary scales. The office shall also facilitate, insofar as practicable, specialization by its administrative law judges so that particular judges may become expert in presiding over cases in particular agencies.

3. If the office cannot furnish one of its administrative law judges in response to an agency request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

4. The director may furnish administrative law judges on a contract basis to any governmental entity to conduct any proceeding not subject to this chapter.

5. After the effective date of this Act, a person shall not be newly employed by the office as an administrative law judge to preside over formal adjudicative hearings unless that person has a license to practice law in this state.

6. The office shall adopt rules pursuant to this chapter to do all of the following:

a. To establish qualifications for administrative law judges employed by the office, and, subject to the approval of the department of personnel, procedures by which candidates for a position as an administrative law judge in the office will be considered for employment and the manner in which public notice of vacancies for positions as administrative law judges in the office will be given.

b. To establish procedures for agencies to request and for

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the director to assign administrative law judges employed by the office; however, an agency shall not select or reject any individual administrative law judge for any proceeding except in accordance with this chapter.

c. To establish procedures and adopt forms, consistent with this chapter and other provisions of law, to govern administrative law judges employed by the office, but any rules adopted under this paragraph shall be applicable to a particular adjudicatory proceeding only to the extent that they are not inconsistent with the rules of the agency under whose authority that proceeding is conducted.

d. To establish standards and procedures for the evaluation, training, promotion, and discipline by the office of administrative law judges employed by the office.

e. To establish, consistent with the provisions of this chapter, a code of administrative judicial conduct that is similar in function and substantially equivalent to the Iowa code of judicial conduct, to govern the actions of all persons who act as presiding officers under the authority of section 17A.4202, subsection 1.

f. To facilitate the performance of the responsibilities conferred upon the office by this chapter.

7. The director may do all of the following:

a. Maintain a staff of reporters and other personnel.

b. Administer the provisions of this section and rules adopted under its authority.

8. The office may charge agencies for services rendered and the payment received shall be considered repayment receipts as defined in section 8.2.

PART 4

CONFERENCE ADJUDICATIVE HEARING

Sec. 62. NEW SECTION. 17A.4401 CONFERENCE ADJUDICATIVE HEARING -- APPLICABILITY.

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and

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the matter is entirely within one or more categories for which the agency by rule has adopted this part. However, those categories may include only the following:

1. A matter in which there is no disputed issue of material fact.

2. A matter in which there is a disputed issue of material fact, if the matter involves one or more of the following:

a. A monetary amount of not more than one thousand dollars. In determining whether a matter involves only a monetary amount of one thousand dollars or less, a presumption arises that, if a claimant prevails on the merits, the claimant will subsequently be qualified for and entitled to the amount of any periodic payments claimed for the maximum period allowed by law and that claimant may aggregate the amount of those subsequent payments for purposes of determining the monetary amount involved in the matter at issue.

b. A disciplinary sanction against an inmate.

c. A disciplinary sanction against a student which does not involve expulsion or suspension for more than ten days from an educational institution.

d. A disciplinary sanction against a public employee which does not involve discharge or suspension for more than ten days from employment.

e. A disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license, or a reprimand or warning against an occupational or professional licensee which may reasonably be deemed to affect the economic or professional status or reputation of that licensee.

Sec. 63. NEW SECTION. 17A.4402 CONFERENCE ADJUDICATIVE HEARING -- PROCEDURES.

The procedures of this chapter pertaining to formal adjudicative hearings apply to a conference adjudicative hearing, except to the following extent:

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1. If a matter is initiated as a conference adjudicative hearing, a prehearing conference shall not be held.

2. The provisions of section 17A.4210 do not apply to conference adjudicative hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference adjudicative hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

3. Section 17A.4211, subsections 1 and 2, do not apply except for the following:

a. The presiding officer shall regulate the course of the proceedings.

b. Only the parties may testify and present written exhibits.

c. The parties may offer comments on the issues and cross examine each other with respect to any factual disputes.

4. The provisions of section 17A.4215, subsection 4, requiring findings of fact to be based exclusively on the evidence of record and on matters officially noticed, and section 17A.4221 do not apply; instead, the provisions of section 17A.4506 apply.

Sec. 64. NEW SECTION. 17A.4403 CONFERENCE ADJUDICATIVE HEARING -- PROPOSED PROOF.

1. If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing, but if disclosure of any fact, allegation, or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

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2. If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain those facts if the proceeding were converted to a formal adjudicative hearing.

PART 5

EMERGENCY AND SUMMARY ADJUDICATIVE PROCEEDINGS

Sec. 65. NEW SECTION. 17A.4501 EMERGENCY ADJUDICATIVE PROCEEDINGS.

1. An agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

2. The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

3. The agency shall render an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

4. The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered.

5. After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

6. The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

7. Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for

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agency action in emergency adjudicative proceedings or for judicial review thereof.

Sec. 66. NEW SECTION. 17A.4502 SUMMARY ADJUDICATIVE PROCEEDINGS -- APPLICABILITY.

An agency may use summary adjudicative proceedings if all of the following apply:

1. The use of those proceedings in the circumstances does not violate any provision of law.

2. The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties.

3. The matter is entirely within one or more categories for which the agency by rule has adopted this section and sections 17A.4503 to 17A.4506; however, those categories may include only the following:

a. A monetary amount of not more than one hundred dollars.

b. A reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against an inmate, student, or public employee.

c. The denial of an application after the applicant has abandoned the application.

d. The denial of an application for admission to an educational institution or for employment by an agency.

e. The denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with section 17A.4504.

f. A matter that is resolved on the sole basis of inspections, examinations, or tests.

g. The acquisition, leasing, or disposal of property or the procurement of goods or services by contract.

Sec. 67. NEW SECTION. 17A.4503 SUMMARY ADJUDICATIVE PROCEEDINGS -- PROCEDURES.

1. The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with section

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17A.4301, or, unless prohibited by law, one or more other persons designated by the agency head in the discretion of the agency head, may be the presiding officer. Unless prohibited by law, a person exercising authority over the matter is the presiding officer.

2. If the proceeding involves a monetary matter or a reprimand, warning, disciplinary report, or other sanction, all of the following apply:

a. The presiding officer, before taking action, shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter.

b. The presiding officer, at the time any unfavorable action is taken, shall give each party a brief statement of the reasons for the action.

3. An order rendered in a proceeding that involves a monetary matter must be in writing. An order in any other summary adjudicative proceeding may be oral or written.

4. The agency, by reasonable means, shall furnish to each party notification of the order in a summary adjudicative proceeding. Notification must at least include a statement of the agency's action.

Sec. 68. NEW SECTION. 17A.4504 ADMINISTRATIVE REVIEW OF SUMMARY ADJUDICATIVE PROCEEDINGS -- APPLICABILITY.

Except to the extent prohibited by any provision of law, an agency, on its own motion, may conduct an administrative review of an order resulting from summary adjudicative proceedings, and shall conduct this review upon the written or oral request of a party if the agency receives the request within ten days after furnishing notification under section 17A.4503, subsection 4.

Sec. 69. NEW SECTION. 17A.4505 ADMINISTRATIVE REVIEW OF SUMMARY ADJUDICATIVE PROCEEDINGS -- PROCEDURES.

Unless otherwise provided by statute:

1. An agency need not furnish notification of the pendency of administrative review to any person who did not request the

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review, but the agency shall not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

2. The reviewing officer, in the discretion of the agency head, may be any person who could have presided at the summary adjudicative proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

3. The reviewing officer shall give each party an opportunity to explain the party's view of the matter unless the party's view is apparent from the written materials in the file submitted to the reviewing officer. The reviewing officer shall make any inquiries necessary to ascertain whether the proceeding must be converted to a conference adjudicative hearing or a formal adjudicative hearing.

4. The reviewing officer may render an order disposing of the proceeding in any manner that was available to the presiding officer at the summary adjudicative proceeding or the reviewing officer may remand the matter for further proceedings, with or without conversion to a conference adjudicative hearing or a formal adjudicative hearing.

5. If the order under review is or should have been in writing, the order on review must be in writing, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order, and a notice of any further available administrative review.

6. A request for administrative review is deemed to have been denied if the reviewing officer does not dispose of the matter or remand it for further proceedings within twenty days after the request is submitted.

PART 6

CONFERENCE AND SUMMARY ADJUDICATIVE PROCEEDING RECORDS

Sec. 70. NEW SECTION. 17A.4601 AGENCY RECORD OF CONFERENCE AND SUMMARY ADJUDICATIVE PROCEEDINGS AND

ADMINISTRATIVE REVIEW.

1. The agency record consists of any documents regarding the matter that were submitted by a party to, or were considered or prepared by the presiding officer for, that conference or summary adjudicative proceeding or by the presiding or reviewing officer for any subsequent agency review. The agency shall maintain these documents as its official record.

2. Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in conference or summary adjudicative proceedings or for judicial review thereof.

ARTICLE 5

JUDICIAL REVIEW AND CIVIL ENFORCEMENT

PART 1

JUDICIAL REVIEW

Sec. 71. NEW SECTION. 17A.5101 EXCLUSIVITY OF JUDICIAL REVIEW PROVISIONS -- RELATIONSHIP BETWEEN JUDICIAL REVIEW PROVISIONS OF THIS CHAPTER AND ANCILLARY PROCEDURAL REQUIREMENTS OF OTHER LAW AND SUPERIOR JUDICIAL REMEDIES.

Except as expressly provided otherwise by another statute referring to this chapter by name or number, this chapter establishes the exclusive means of judicial review of agency action, except for any of the following:

1. The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

2. Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by other applicable law.

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3. If the relief available under other sections of this chapter is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this chapter to the extent necessary for their effectuation. The applicable provisions of this chapter and other law must be combined to govern a single proceeding or, if the court orders, two or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

Sec. 72. NEW SECTION. 17A.5102 FINAL AGENCY ACTION REVIEWABLE.

1. A person who qualifies under this chapter regarding standing in section 17A.5106, exhaustion of administrative remedies in section 17A.5107, and time for filing the petition for review in section 17A.5108, and other applicable provisions of law regarding bond, compliance, and other preconditions is entitled to judicial review of final agency action, whether or not the person has sought judicial review of any related nonfinal agency action.

2. For purposes of this section and section 17A.5103:

a. "Final agency action" means the whole or a part of any agency action other than nonfinal agency action.

b. "Nonfinal agency action" means the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

Sec. 73. NEW SECTION. 17A.5103 NONFINAL AGENCY ACTION REVIEWABLE.

A person is entitled to judicial review of nonfinal agency action only if all of the following apply:

1. It appears likely that the person will qualify under

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section 17A.5102 for judicial review of the related final agency action.

2. Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Sec. 74. NEW SECTION. 17A.5104 JURISDICTION -- VENUE.

1. The district court shall conduct judicial review.

2. Venue shall be in the Polk county district court or the district court for the county in which the petitioner resides or has its principal place of business. When a proceeding for judicial review has been commenced, a court may, in the interest of justice, transfer the proceeding to the district court for another county.

Sec. 75. NEW SECTION. 17A.5105 FORM OF ACTION -- SERVICE -- CONTENTS OF PETITION.

Judicial review is initiated by filing a petition for review in the appropriate district court. A petition may seek any type of relief available under section 17A.5101, subsection 3, and section 17A.5117.

Sec. 76. NEW SECTION. 17A.5106 STANDING.

1. The following persons have standing to obtain judicial review of final or nonfinal agency action:

a. A person to whom the agency action is specifically directed.

b. A person who was a party to the agency proceedings that led to the agency action.

c. If the challenged agency action is a rule, a person subject to that rule.

d. A person eligible for standing under another provision of law.

e. A person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, a person does not have standing as one otherwise aggrieved or adversely affected unless all of the following apply:

(1) The agency action has prejudiced or is likely to

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prejudice that person.

(2) That person's asserted interests are among those that the agency was required by law to consider when it engaged in the agency action challenged.

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

2. The administrative rules review committee of the general assembly, which is required to exercise general and continuing oversight over administrative rules, may petition for judicial review of any rule.

Sec. 77. NEW SECTION. 17A.5107 EXHAUSTION OF ADMINISTRATIVE REMEDIES.

A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, except for any of the following:

1. A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based, or have petitioned for its amendment or repeal.

2. A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required.

3. The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Sec. 78. NEW SECTION. 17A.5108 TIME FOR FILING PETITION FOR REVIEW.

Subject to other requirements of this chapter or of another statute:

1. A petition for judicial review of a rule may be filed

at any time, except as limited by section 17A.3113, subsection 2.

2. A petition for judicial review of an order is not timely unless filed within thirty days after rendition of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.

3. A petition for judicial review of agency action other than a rule or order is not timely unless filed within thirty days after the agency action, but the time is extended if any of the following apply:

a. During the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.

b. During any period that the petitioner did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

Sec. 79. NEW SECTION. 17A.5109 PETITION FOR REVIEW -- FILING AND CONTENTS.

1. A petition for review must be filed with the clerk of the district court and must name the agency as respondent.

2. A petition for review must set forth all of the following:

a. The name and mailing address of the petitioner.

b. The name and mailing address of the agency whose action is at issue.

c. Identification of the specific agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.

d. Identification of persons who were parties in any adjudicative proceedings that led to the agency action.

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e Facts to demonstrate that the petitioner is entitled to obtain judicial review.

f. Facts on which venue is based.

g. The specific grounds on which relief is sought and the petitioner's reasons for believing that relief should be granted.

h. A request for relief, specifying the type and extent of relief requested.

A petition for review that is in substantial compliance with the requirements of this subsection shall not be dismissed solely for failure to satisfy its requirements.

Sec. 80. NEW SECTION. 17A.5110 PETITION FOR REVIEW -- SERVICE AND NOTIFICATION -- NOTICE OF INTERVENTION.

1. Within ten days after the filing of a petition for judicial review of agency action, the petitioner shall serve a file stamped copy of the petition upon the agency in the manner provided by the rules of civil procedure for the personal service of an original notice or shall mail a file stamped copy of the petition to the agency by restricted certified mail.

2. Within ten days after the filing of a petition for judicial review of agency action in an adjudicative proceeding, the petitioner shall also give notice of the petition for review to each other party of record in that adjudicative proceeding either by serving a file stamped copy of the petition upon that party in the manner provided by the rules of civil procedure for the personal service of an original notice or by restricted certified mail.

3. The personal service or mailing required by this section shall be jurisdictional and may be made on the party or the party's attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorneys of record at their last known mailing address. Proof of mailing shall be by the return receipt from the restricted certified mail.

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4. Any party of record in an adjudicative proceeding before an agency who wishes to intervene and participate in the judicial review proceeding must file an appearance in the court indicating that intention within forty-five days from the date the petition is filed.

Sec. 81. NEW SECTION. 17A.5111 STAY AND OTHER TEMPORARY REMEDIES PENDING FINAL DISPOSITION.

1. Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

2. A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

3. If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may grant relief only upon a finding that all of the following apply:

a. The applicant is likely to prevail when the court finally disposes of the matter.

b. Without relief the applicant will suffer irreparable injury.

c. The grant of relief to the applicant will not substantially harm other parties to the proceedings.

d. The type of threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

4. If subsection 3 does not apply, the court shall grant relief if it finds that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

5. If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the

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agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.

Sec. 82. NEW SECTION. 17A.5112 LIMITATION ON NEW ISSUES.

A person may obtain judicial review of an issue that was not raised before the agency, only to the extent of any of the following:

1. The agency did not have authority to grant an adequate remedy based on a determination of the issue involved because the issue or remedy was not within the jurisdiction of the agency.

2. The person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue.

3. The agency action subject to judicial review is a rule and the person is challenging only the validity of that rule and has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue.

4. The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in compliance with any provision of law or was notified but was not permitted to participate in that adjudicative proceeding.

5. The interests of justice would be served by judicial resolution of an issue arising from any of the following:

a. A change in controlling law occurring after the agency action.

b. Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

Sec. 83. NEW SECTION. 17A.5113 JUDICIAL REVIEW OF FACTS CONFINED TO RECORD FOR JUDICIAL REVIEW AND ADDITIONAL EVIDENCE TAKEN PURSUANT TO THIS CHAPTER.

Judicial review of disputed issues of fact must be confined

to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to this chapter.

Sec. 84. NEW SECTION. 17A.5114 NEW EVIDENCE TAKEN BY COURT OR AGENCY BEFORE FINAL DISPOSITION.

1. The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding any of the following:

a. Improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action.

b. Unlawfulness of procedure or of decision-making process.

c. Any material fact that was not required by provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review.

2. The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if any of the following apply:

a. The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record.

b. The court finds that all of the following apply:

(1) New evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action.

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(2) The interests of justice would be served by remand to the agency.

c. The agency improperly excluded or omitted evidence from the record.

d. A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Sec. 85. NEW SECTION. 17A.5115 AGENCY RECORD FOR JUDICIAL REVIEW -- CONTENTS, PREPARATION, TRANSMITTAL, COST.

1. Within thirty days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

2. If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection 4.

3. The agency may charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court. A failure by the petitioner to pay any of this cost to the agency does not relieve the agency from the responsibility for timely preparation of the record and transmittal to the court.

4. By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

5. The court may tax the cost of preparing transcripts and

copies for the record in accordance with any of the following:

a. Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record.

b. As provided by section 17A.5117.

c. In accordance with any other provision of law.

6. Additions to the record pursuant to section 17A.5114 must be made as ordered by the court.

7. The court may require or permit subsequent corrections or additions to the record.

Sec. 86. NEW SECTION. 17A.5116 SCOPE OF REVIEW -- GROUNDS FOR INVALIDITY.

1. Except to the extent that this chapter provides otherwise, in suits for judicial review of agency action all of the following apply:

a. The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.

b. The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time that action was taken.

2. The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

3. The court shall grant relief from agency action if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.

b. Beyond the authority conferred upon the agency by any provision of law or in violation of any provision of law.

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been delegated to the discretion of the agency.

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d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.

e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.

f. Based upon a determination of fact clearly delegated to the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph the following terms have the following meanings:

(1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

(2) "Record before the court" means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) "When that record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record that detracts from that finding as well as all of the relevant evidence that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the evidence in the record supports its finding of fact and why the evidence in the record that is contrary to its finding does not preclude that finding.

g. Action other than a rule that is inconsistent with a rule of the agency.

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so illogical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been delegated to the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been delegated to the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

In making the determinations required by this subsection, the court is not required to give any deference to the view of the agency with respect to whether particular matters have been delegated to the discretion of the agency and with respect to the validity of agency action relating to matters that have not been delegated to the discretion of the agency. However, the court must give appropriate deference to the view of the agency with respect to the validity of agency action

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relating to matters that have been delegated to the discretion of the agency.

Sec. 87. NEW SECTION. 17A.5117 TYPE OF RELIEF.

1. The court may award damages or compensation only to the extent expressly authorized by another provision of law.

2. The court may grant other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

3. The court may also grant necessary ancillary relief to redress the effects of agency action wrongfully taken or withheld, including the taxation of costs, but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.

4. If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

Sec. 88. NEW SECTION. 17A.5118 REVIEW BY HIGHER COURT.

Final decisions of the district court on petitions for review of agency action are reviewable by appeal to the supreme court as in other civil cases although the appeal may be taken regardless of the amount involved. On appeal, the supreme court, or court of appeals if the case is referred by the supreme court to the court of appeals, shall reverse, modify, or vacate the decision of the district court only if the reviewing court determines that the district court applied an incorrect legal standard or unreasonably applied a correct legal standard.

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PART 2

CIVIL ENFORCEMENT

Sec. 89. NEW SECTION. 17A.5201 PETITION BY AGENCY FOR CIVIL ENFORCEMENT OF RULE OR ORDER.

1. In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the district court.

2. The petition must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

3. Venue shall be in the district court for the county in which the defendant resides or has its principal place of business, or with the consent of the defendant, in the Polk County district court. When a proceeding for enforcement has been commenced, the court may, in the interest of justice, transfer the proceeding to a district court for another county.

4. A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, any other civil remedy provided by law, or any combination of the foregoing.

Sec. 90. NEW SECTION. 17A.5202 PETITION BY QUALIFIED PERSON FOR CIVIL ENFORCEMENT OF AGENCY'S ORDER.

1. Any person who would qualify under this chapter as having standing to obtain judicial review of an agency's failure to enforce its order may file a petition for civil enforcement of that order, but the action shall not be commenced until or under any of the following circumstances:

a. Until at least sixty days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to the agency head concerned, to the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement.

b. If the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the

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same defendant.

c. If a petition for review of the same order has been filed and is pending in court.

2. The petition must name, as defendants, the agency whose order is sought to be enforced and each alleged violator against whom the petitioner seeks civil enforcement.

3. The agency whose order is sought to be enforced may move to dismiss on the grounds that the petition fails to qualify under this section or that enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss unless the petitioner demonstrates that the petition qualifies under this section and the agency's failure to enforce its order is based on an exercise of discretion that is improper on one or more of the grounds provided in section 17A.5116, subsection 3, paragraph "h".

4. Except to the extent expressly authorized by any provision of law, a petition for civil enforcement filed under this section shall not request, and the court shall not grant, any monetary payment apart from taxable costs.

Sec. 91. NEW SECTION. 17A.5203 DEFENSES -- LIMITATION ON NEW ISSUES AND NEW EVIDENCE.

A defendant may assert, in a proceeding for civil enforcement any of the following:

1. That the rule or order sought to be enforced is invalid on any of the grounds stated in section 17A.5116. If that defense is raised, the court may consider issues and receive evidence only within the limitations provided by sections 17A.5112, 17A.5113, and 17A.5114.

2. Any of the following defenses on which the court, to the extent necessary for the determination of the matter, may consider new issues or take new evidence:

a. The rule or order does not apply to the party.

b. The party has not violated the rule or order.

c. The party has violated the rule or order but has subsequently complied, but a party who establishes this

defense is not necessarily relieved from any sanction provided by law for past violations.

d. Any other defense allowed by law.

Sec. 92. NEW SECTION. 17A.5204 INCORPORATION OF CERTAIN PROVISIONS ON JUDICIAL REVIEW.

Proceedings for civil enforcement are governed by section 17A.5101, subsection 2, and section 17A.5115 concerning judicial review, as modified where necessary to adapt them to those proceedings.

Sec. 93. NEW SECTION. 17A.5205 REVIEW BY HIGHER COURT.

Final decisions of the district court on petitions for civil enforcement of agency action are reviewable by appeal to the supreme court as in other civil cases, although the appeal may be taken regardless of the amount involved. On appeal, the supreme court, or court of appeals if the case is referred by the supreme court to the court of appeals, shall reverse, modify, or vacate the decision of the district court only if the reviewing court determines that the district court applied an incorrect legal standard or unreasonably applied a correct legal standard.

Sec. 94. Section 2B.17, subsection 4, Code 1995, is amended to read as follows:

4. The Iowa administrative code and the Iowa administrative bulletin shall be cited as provided in section ~~17A.6~~ 17A.2101.

Sec. 95. Section 2C.9, subsection 1, Code 1995, is amended to read as follows:

1. Investigate, on complaint or on the citizens' aide's own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that the citizens' aide shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency. A communication or receipt of information made pursuant to the powers prescribed in this chapter shall not be considered an ex parte

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communication as described in the provisions of section ~~17A.17~~ 17A.4213.

Sec. 96. Section 10A.601, subsection 7, Code 1995, is amended to read as follows:

7. An application for ~~rehearing~~ reconsideration before the appeal board shall be filed pursuant to section ~~17A.16~~ 17A.4218, unless otherwise provided in chapter 19A, 80, 88, 89A, 91C, 96, or 97B. A petition for judicial review of a decision of the appeal board shall be filed pursuant to ~~section 17A.19~~ the provisions for judicial review in chapter 17A, article 5. The appeal board may be represented in any such judicial review by an attorney who is a regular salaried employee of the appeal board or who has been designated by the appeal board for that purpose, or at the appeal board's request, by the attorney general. Notwithstanding the petitioner's residency requirement in section ~~17A.19~~, ~~subsection 2~~ 17A.5104, a petition for judicial review may be filed in the district court of the county in which the petitioner was last employed or resides, provided that if the petitioner does not reside in this state, the action shall be brought in the district court of Polk county, Iowa, and any other party to the proceeding before the appeal board shall be named in the petition. Notwithstanding the thirty-day requirement in section ~~17A.19, subsection 6~~ 17A.5115, the appeal board shall, within sixty days after filing of the petition for judicial review or within a longer period of time allowed by the court, transmit to the reviewing court the original or a certified copy of the entire records of a contested case. The appeal board may also certify to the court, questions of law involved in any decision by the appeal board. Petitions for judicial review and the questions so certified shall be given precedence over all other civil cases except cases arising under the workers' compensation law of this state. No bond shall be required for entering an appeal from any final order, judgment, or decree of the district

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court to the supreme court.

Sec. 97. Section 21.6, subsection 1, Code 1995, is amended to read as follows:

1. The remedies provided by this section against state governmental bodies shall be in addition to those provided by section ~~17A.19~~ 17A.5117. Any aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney, may seek judicial enforcement of the requirements of this chapter. Suits to enforce this chapter shall be brought in the district court for the county in which the governmental body has its principal place of business.

Sec. 98. Section 22.7, subsection 15, Code Supplement 1995, is amended to read as follows:

15. Information concerning the procedures to be used to control disturbances at adult correctional institutions. Such information shall also be exempt from public inspection under ~~section 17A.3~~ sections 17A.2101 and 17A.2102. As used in this subsection disturbance means a riot or a condition that can reasonably be expected to cause a riot.

Sec. 99. Section 22.8, subsection 4, paragraph f, Code 1995, is amended to read as follows:

f. The rights and remedies provided by this section are in addition to any rights and remedies provided by ~~section 17A.19~~ chapter 17A, article 5.

Sec. 100. Section 22.9, unnumbered paragraph 2, Code 1995, is amended to read as follows:

An agency within the meaning of section ~~17A.2, subsection 1~~ 17A.1102 shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.

Sec. 101. Section 22.10, subsection 1, Code 1995, is amended to read as follows:

1. The rights and remedies provided by this section are in

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addition to any rights and remedies provided by ~~section 17A.19~~ chapter 17A, article 5. Any aggrieved person, any taxpayer to or citizen of the state of Iowa, or the attorney general or any county attorney, may seek judicial enforcement of the requirements of this chapter in an action brought against the lawful custodian and any other persons who would be appropriate defendants under the circumstances. Suits to enforce this chapter shall be brought in the district court for the county in which the lawful custodian has its principal place of business.

Sec. 102. Section 68B.2, subsection 13, paragraph b, subparagraph (8), Code 1995, is amended to read as follows:

(8) Persons whose activities are limited to submitting data, views, or arguments in writing, or requesting an opportunity to make an oral presentation under section ~~17A.4, subsection 1~~ 17A.3104.

Sec. 103. Section 68B.31, subsection 8, Code 1995, is amended to read as follows:

8. If a hearing on the complaint is ordered the ethics committee shall receive all admissible evidence, determine any factual or legal issues presented during the hearing, and make findings of fact based upon evidence received. Hearings shall be conducted in the manner prescribed for adjudicative proceedings in ~~section 17A.12~~ chapter 17A, article 4. The rules of evidence applicable under section ~~17A.14~~ 17A.4212 shall also apply in hearings before the ethics committee. Clear and convincing evidence shall be required to support a finding that the member of the general assembly or lobbyist before the general assembly has committed a violation of this chapter. Parties to a complaint may, subject to the approval of the ethics committee, negotiate for settlement of disputes that are before the ethics committee. Terms of any negotiated settlements shall be publicly recorded. If a complaint is filed or initiated less than ninety days before the election for a state office, for which the person named in the

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complaint is the incumbent officeholder, the ethics committee shall, if possible, set the hearing at the earliest available date so as to allow the issue to be resolved before the election. An extension of time for a hearing may be granted when both parties mutually agree on an alternate date for the hearing. The ethics committee shall make every effort to hear all ethics complaints within three months of the date that the complaints are filed. However, after three months from the date of the filing of the complaint, extensions of time for purposes of preparing for hearing may only be granted by the ethics committee when the party charged in the complaint with the ethics violation consents to an extension. If the party charged does not consent to an extension, the ethics committee shall not grant any extensions of time for preparation prior to hearing. All complaints alleging a violation of this chapter or the code of ethics shall be heard within nine months of the filing of the complaint. Final dispositions of violations, which the ethics committee has found to have been established by clear and convincing evidence, shall be made within thirty days of the conclusion of the hearing on the complaint.

Sec. 104. Section 68B.34, Code 1995, is amended to read as follows:

68B.34 INVESTIGATION BY INDEPENDENT SPECIAL COUNSEL -- PROBABLE CAUSE.

The purpose of an investigation by the independent special counsel is to determine whether there is probable cause to proceed with an adjudicatory hearing on the matter. In conducting investigations and holding hearings, the independent special counsel may require by subpoena the attendance and testimony of witnesses and may subpoena books, papers, records, and any other real evidence relating to the matter before the independent special counsel. The independent special counsel shall have the additional authority provided in section ~~17A.13~~ 17A.4210. If the

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independent special counsel determines at any stage in the proceedings that take place prior to hearing that the complaint is without merit, the independent special counsel shall report that determination to the appropriate ethics committee and the complaint shall be dismissed and the complainant and the party charged shall be notified. If, after investigation, the independent special counsel determines evidence exists which, if proven, would support a finding of a violation of this chapter, a finding of probable cause shall be made and reported to the ethics committee, and a hearing shall be ordered by the ethics committee as provided in section 68B.31. Independent special counsel investigations are not meetings of a governmental body within the meaning of chapter 21, and records and information obtained by independent special counsel during investigations are confidential until disclosed to a legislative ethics committee under section 68B.31.

Sec. 105. Section 80A.17, subsection 1, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

Pursuant to section ~~17A.19, subsection 6~~ 17A.5115, the department, upon an appeal by the licensee of the decision by the department shall transmit the entire record of the contested case to the reviewing court.

Notwithstanding section ~~17A.19, subsection 6~~ 17A.5115, if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.

Sec. 106. Section 86.17, subsection 1, Code 1995, is amended to read as follows:

1. A deputy industrial commissioner may preside over any ~~contested case~~ adjudicative proceeding brought under this chapter, or chapter 85 or 85A in the manner provided by chapter 17A. The deputy commissioner or the commissioner may make such inquiries and investigation in ~~contested case~~

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adjudicative proceedings as shall be deemed necessary, consistent with the provisions of section ~~17A.17~~ 17A.4213.

Sec. 107. Section 86.19, subsection 2, Code 1995, is amended to read as follows:

2. Notwithstanding the requirements of section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4, a certified shorthand reporter, appointed by the presiding officer in ~~a contested case~~ an adjudicative proceeding or by the industrial commissioner in an appeal proceeding, may maintain and thus have the responsibility for the recording or stenographic notes for the period required by section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4.

Sec. 108. Section 86.24, subsections 2 and 3, Code 1995, are amended to read as follows:

2. In addition to the provisions of ~~section 17A.15~~ sections 17A.4215 and 17A.4216, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or the commissioner may remand the decision to the deputy commissioner for further proceedings.

3. In addition to the provisions of ~~section 17A.15~~ sections 17A.4215 and 17A.4216, the industrial commissioner, on appeal, may limit the presentation of evidence as provided by rule.

Sec. 109. Section 86.42, Code 1995, is amended to read as follows:

86.42 JUDGMENT BY DISTRICT COURT ON AWARD.

Any party in interest may present a certified copy of an order or decision of the commissioner, from which a timely petition for judicial review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section ~~17A.19, subsection 5~~ 17A.5111, or an order or decision of a deputy commissioner from which a timely appeal has not been taken within the agency and which has become final by the passage of time as provided by rule and section ~~17A.15~~ 17A.4220, or an agreement for settlement approved by the commissioner, and all papers in

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connection therewith, to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the industrial commissioner, or in the absence of an act of any party which prevents a decision of a deputy industrial commissioner from becoming final, has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.

Sec. 110. Section 99A.6, unnumbered paragraph 2, Code 1995, is amended to read as follows:

Judicial review of actions of the issuing authorities may be sought in accordance with the terms of the Iowa administrative procedure Act. Municipalities acting as issuing authorities shall be deemed state agencies solely for the purposes of bringing their actions under this chapter within the terms ~~of section 17A.19~~ for judicial review in chapter 17A, article 5. If the licensee has not filed a petition for judicial review in district court, revocation shall date from the thirty-first day following the date of the order of the issuing authority. If the licensee has filed a petition for judicial review, revocation shall date from the thirty-first day following entry of the order of the district court, if action by the district court is adverse to the licensee.

Sec. 111. Section 123.37, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The administrator may compromise and settle doubtful and disputed claims for taxes imposed under this chapter or for taxes of doubtful collectibility, notwithstanding section 7D.9. The administrator may enter into informal settlements as permitted pursuant to section ~~17A.10~~ 17A.1106, to

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compromise and settle doubtful and disputed claims for taxes imposed under this chapter. The administrator may make a claim under a licensee's or permittee's penal bond for taxes of doubtful collectibility. Whenever a compromise or settlement is made, the administrator shall make a complete record of the case showing the tax assessed, reports and audits, if any, the licensee's or permittee's grounds for dispute or contest, together with all evidence of the dispute or contest, and the amounts, conditions, and settlement or compromise of the dispute or contest.

Sec. 112. Section 135.70, Code 1995, is amended to read as follows:

135.70 APPEAL OF CERTIFICATE OF NEED DECISIONS.

The council's decision on an application for certificate of need, when announced pursuant to section 135.69, is a final decision. Any dissatisfied party who is an affected person with respect to the application, and who participated or sought unsuccessfully to participate in the formal review procedure prescribed by section 135.66, may request a ~~rehearing~~ reconsideration in accordance with ~~chapter 17A~~ section 17A.4218 and rules of the department. If a ~~rehearing~~ reconsideration is not requested or an affected party remains dissatisfied after the request for ~~rehearing~~ reconsideration, an appeal may be taken in the manner provided by chapter 17A. Notwithstanding the Iowa administrative procedure Act, chapter 17A, a request for ~~rehearing~~ reconsideration is not required, prior to ~~appeal under section 17A.19~~ the filing of a petition for judicial review as provided in chapter 17A, article 5.

Sec. 113. Section 135C.2, subsection 3, paragraph d, Code Supplement 1995, is amended to read as follows:

d. Notwithstanding the limitations set out in this subsection regarding rules for intermediate care facilities for the mentally retarded, the department shall consider the federal interpretive guidelines issued by the federal health care financing administration when interpreting the

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department's rules for intermediate care facilities for the mentally retarded. This use of the guidelines is not subject to the rulemaking provisions of sections ~~17A.4 and 17A.5~~ chapter 17A, article 3, but the guidelines shall be published in the Iowa administrative bulletin and the Iowa administrative code.

Sec. 114. Section 139C.2, subsection 3, Code 1995, is amended to read as follows:

3. The department shall establish an expert review panel to determine on a case-by-case basis under what circumstances, if any, a health care provider determined to be infected with HIV or HBV practicing outside the hospital setting or referred to the panel by a hospital, may perform exposure-prone procedures. If a health care provider determined to be infected with HIV or HBV does not comply with the determination of the expert review panel, the panel shall report the noncompliance to the examining board with jurisdiction over the health care provider. A determination of an expert review panel pursuant to this section is a final agency action ~~appealable~~ subject to judicial review pursuant to ~~section 17A.19~~ chapter 17A, article 5.

Sec. 115. Section 147A.5, subsection 3, Code Supplement 1995, is amended to read as follows:

3. The department may deny an application for authorization, or may place on probation, suspend, or revoke existing authorization if the department finds reason to believe the program has not been or will not be operated in compliance with this subchapter and the rules adopted pursuant to this subchapter, or that there is insufficient assurance of adequate protection for the public. The denial or period of probation, suspension, or revocation shall be effected and judicial review may be ~~appealed~~ sought as provided ~~by section 17A.12~~ for adjudicative proceedings under chapter 17A, article 5.

Sec. 116. Section 147A.7, subsection 2, Code Supplement

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1995, is amended to read as follows:

2. If clinical issues are involved, the matter shall be referred to the board for completion of the investigation and the conduct of any disciplinary proceeding pursuant to chapter 17A. The findings of the board shall be the final decision for purposes of section ~~17A.15~~ 17A.4215 and shall be enforced by the department.

Sec. 117. Section 148C.6A, Code 1995, is amended to read as follows:

148C.6A APPEAL TO BOARD OF MEDICAL EXAMINERS IN CONTESTED CASES INVOLVING DISCIPLINE.

Pursuant to section ~~17A.15~~ 17A.4219, a decision of the board in ~~a contested case~~ an adjudicative proceeding involving discipline of a person licensed as a physician assistant may be appealed to the board of medical examiners.

Sec. 118. Section 161A.4, subsection 1, unnumbered paragraph 1, Code 1995, is amended to read as follows:

The soil conservation division is established within the department to perform the functions conferred upon it in chapters 161A through 161C, 207, 208, 467B, and 467C. The division shall be administered in accordance with the policies of the state soil conservation committee, which shall advise the division and which shall approve administrative rules proposed by the division for the administration of chapters 161A through 161C, 161E, 161F, 207, and 208 before the rules are adopted pursuant to section ~~17A.5~~ 17A.3115. If a difference exists between the committee and secretary regarding the content of a proposed rule, the secretary shall notify the chairperson of the committee of the difference within thirty days from the committee's action on the rule. The secretary and the committee shall meet to resolve the difference within thirty days after the secretary provides the committee with notice of the difference.

Sec. 119. Section 163.30, subsection 3, unnumbered paragraph 3, Code 1995, is amended to read as follows:

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A permittee shall not represent more than one dealer. Failure of a licensee or permittee to comply with this chapter or a rule made pursuant to this chapter is cause for revocation by the secretary of the permit or license after notice to the alleged offender and the holding of a hearing by the secretary. Rules shall be made in accordance with chapter 17A. A rule, the violation of which is made the basis for revocation, except temporary emergency rules, shall first have been approved after public hearing as provided in section ~~17A.4~~ 17A.3104 after giving twenty days' notice of the hearing as follows:

Sec. 120. Section 169.5, subsection 9, paragraph e, Code 1995, is amended to read as follows:

e. Hold hearings on all matters properly brought before the board and administer oaths, receive evidence, make the necessary determinations, and enter orders consistent with the findings. The board may require by subpoena the attendance and testimony of witnesses and the production of papers, records, or other documentary evidence and commission depositions. An administrative law judge may be appointed pursuant to ~~section 17A.11, subsection 3~~ chapter 17A, article 4, to perform those functions which properly repose in an administrative law judge.

Sec. 121. Section 169.5, subsection 9, paragraph i, Code 1995, is amended to read as follows:

i. Adopt, amend, or repeal rules relating to the standards of conduct for, testing of, and revocation or suspension of certificates issued to veterinary assistants. However, a certificate shall not be suspended or revoked by less than a two-thirds vote of the entire board in a proceeding conducted in compliance with ~~section 17A.12~~ chapter 17A, article 4.

Sec. 122. Section 169.15, Code 1995, is amended to read as follows:

169.15 APPEAL.

Any party aggrieved by a decision of the board may ~~appeal~~

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~~the-matter-to-the-district-court~~ petition for judicial review as provided in ~~section-17A.19~~ chapter 17A, article 5.

Sec. 123. Section 172D.1, subsection 14, Code Supplement 1995, is amended to read as follows:

14. "Rule of the department" means a rule as defined in section ~~17A.2~~ 17A.1102 which materially affects the operation of a feedlot and which has been adopted by the department. The term includes a rule which was in effect prior to July 1, 1975. Except as specifically provided in section 172D.3, subsection 2, paragraph "b", subparagraph (5) and paragraph "c", subparagraph (5) nothing in this chapter shall be deemed to empower the department to make any rule.

Sec. 124. Section 200.3, subsection 20, Code 1995, is amended to read as follows:

20. "Rule" means a rule as defined in section ~~17A.2~~ 17A.1102 which materially affects the operation of an anhydrous ammonia plant. The term includes a rule which was in effect prior to July 1, 1984.

Sec. 125. Section 203C.10, unnumbered paragraph 2, Code 1995, is amended to read as follows:

If upon the filing of the information or complaint the department finds that the licensee has failed to meet the warehouse operator's obligation or otherwise has violated or failed to comply with the provisions of this chapter or any rule ~~promulgated~~ adopted under this chapter, and if the department finds that the public health, safety or welfare imperatively requires emergency action, then the department without hearing may order a summary suspension of the license in the manner provided in section ~~17A.18~~ 17A.4105. When so ordered, a copy of the order of suspension shall be served upon the licensee at the time the information or complaint is served as provided in this section.

Sec. 126. Section 207.14, subsection 2, unnumbered paragraph 2, Code 1995, is amended to read as follows:

If upon expiration of the time as fixed the administrator

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finds in writing that the violation has not been abated, the administrator, notwithstanding ~~section 17A.18~~ sections 17A.4105 and 17A.4501, shall immediately order a cessation of coal mining and reclamation operations relating to the violation until the order is modified, vacated, or terminated by the administrator pursuant to procedures outlined in this section. In the order of cessation issued by the administrator under this subsection, the administrator shall include the steps necessary to abate the violation in the most expeditious manner possible.

Sec. 127. Section 207.15, subsection 5, unnumbered paragraph 2, Code 1995, is amended to read as follows:

Notwithstanding section ~~17A.20~~ 17A.5118, an appeal bond shall be required for an appeal of a judgment assessing a civil penalty.

Sec. 128. Section 216.15, subsection 3, paragraph b, Code Supplement 1995, is amended to read as follows:

b. For purposes of this chapter, an administrative law judge issuing a determination of probable cause or no probable cause under this section is exempt from ~~section 17A.17~~ sections 17A.4213 and 17A.4214.

Sec. 129. Section 216.17, subsection 1, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

For purposes of the time limit for filing a petition for judicial review under the Iowa administrative procedure Act, specified by section ~~17A.19~~ 17A.5108, the issuance of a final decision of the commission under this chapter occurs on the date notice of the decision is mailed by certified mail, to the parties.

Notwithstanding the time limit provided in section ~~17A.19, subsection 3~~ 17A.5108, a petition for judicial review of no-probable-cause decisions and other final agency actions which are not of general applicability must be filed within thirty days of the issuance of the final agency action.

Sec. 130. Section 216.17, subsection 6, Code 1995, is

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amended to read as follows:

6. In the enforcement proceeding the court shall determine its order on the same basis as it would in a proceeding reviewing commission action under section ~~17A.19, subsection 8~~ 17A.5117.

Sec. 131. Section 217.30, subsection 8, Code 1995, is amended to read as follows:

8. The provisions of this section shall take precedence over section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4.

Sec. 132. Section 225C.29, Code 1995, is amended to read as follows:

225C.29 COMPLIANCE.

Except for a violation of section 225C.28B, subsection 2, the sole remedy for violation of a rule adopted by the commission to implement sections 225C.25 through 225C.28B shall be by a proceeding for compliance initiated by request to the division pursuant to chapter 17A. Any decision of the division shall be in accordance with due process of law and is subject to ~~appeal to the Iowa district court~~ judicial review pursuant to ~~sections 17A.19 and 17A.20~~ chapter 17A, article 5, and appeal pursuant to section 17A.5118 by any aggrieved party. Either the division or a party in interest may apply to the Iowa district court for an order to enforce the decision of the division. Any rules adopted by the commission to implement sections 225C.25 through 225C.28B do not create any right, entitlement, property or liberty right or interest, or private cause of action for damages against the state or a political subdivision of the state or for which the state or a political subdivision of the state would be responsible. Any violation of section 225C.28B, subsection 2, shall solely be subject to the enforcement by the commissioner of insurance and penalties granted by chapter 507B for a violation of section 507B.4, subsection 7.

Sec. 133. Section 229.23, subsection 3, Code 1995, is amended to read as follows:

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3. In addition to protection of the person's constitutional rights, enjoyment of other legal, medical, religious, social, political, personal and working rights and privileges which the person would enjoy if the person were not so hospitalized or detained, so far as is possible consistent with effective treatment of that person and of the other patients of the hospital. If the patient's rights are restricted, the physician's direction to that effect shall be noted on the patient's record. The department of human services shall, in accordance with chapter 17A establish rules setting forth the specific rights and privileges to which persons so hospitalized or detained are entitled under this section~~,-and-the-exceptions-provided-by-section-17A.2,-subsection-10,-paragraphs-"a"-and-"k",-shall-not-be-applicable-to-the-rules-so-established~~. The patient or the patient's next of kin or friend shall be advised of these rules and be provided a written copy upon the patient's admission to or arrival at the hospital.

Sec. 134. Section 249A.3, subsection 11, paragraph b, Code Supplement 1995, is amended to read as follows:

b. The department shall exercise the option provided in 42 U.S.C. § 1396p(c) to provide a period of ineligibility for medical assistance due to a transfer of assets by a noninstitutionalized individual or the spouse of a noninstitutionalized individual. For noninstitutionalized individuals, the number of months of ineligibility shall be equal to the total, cumulative uncompensated value of all assets transferred by the individual or the individual's spouse on or after the look-back date specified in 42 U.S.C. § 1396p(c)(1)(B)(i), divided by the average monthly cost to a private patient for nursing facility services in Iowa at the time of application. The services for which noninstitutionalized individuals shall be made ineligible shall include any long-term care services for which medical assistance is otherwise available. Notwithstanding ~~section~~

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~~17A.4~~ sections 17A.3103 through 17A.3107, the department may adopt rules providing a period of ineligibility for medical assistance due to a transfer of assets by a noninstitutionalized individual or the spouse of a noninstitutionalized individual without notice of opportunity for public comment, to be effective immediately upon filing under section ~~17A.5~~ 17A.3115, subsection 2, paragraph "b", subparagraph (1).

Sec. 135. Section 252.27, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The board shall record its proceedings relating to the provision of assistance to specific persons under this chapter. A person who is aggrieved by a decision of the board may ~~appeal~~ seek judicial review of the decision as if it were ~~a contested case~~ an adjudicative proceeding before an agency and as if the person had exhausted administrative remedies in accordance with the procedures and standards ~~in section 17A.19, subsections 2 to 8 except paragraphs "b" and "c" of subsection 8, and section 17A.20~~ for judicial review in chapter 17A, article 5, except for section 17A.5116, subsection 3, paragraphs "b" and "g", and for appeal in section 17A.5118.

Sec. 136. Section 252J.8, subsection 4, paragraph d, Code Supplement 1995, is amended to read as follows:

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~~ 17A.4105, 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.

Sec. 137. Section 256B.6, unnumbered paragraph 3, Code 1995, is amended to read as follows:

Notwithstanding ~~section 17A.11~~ chapter 17A, article 4, the

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state board of education shall adopt rules for the appointment of an impartial administrative law judge for special education appeals. The rules shall comply with federal statutes and regulations.

Sec. 138. Section 261B.3, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The secretary may request additional information as necessary to enable the secretary to determine the accuracy and completeness of the information contained in the registration application. If the secretary believes that false, misleading, or incomplete information has been submitted in connection with an application for registration, the secretary may deny registration. The secretary shall conduct a hearing on the denial if a hearing is requested by a school. The secretary may withhold a certificate of registration pending the outcome of the hearing. Upon a finding after the hearing that information contained in the registration application is false, misleading, or incomplete, the secretary shall deny a certificate of registration to the school. The decision of the secretary is subject to judicial review in accordance with ~~section 17A.19~~ chapter 17A, article 5.

Sec. 139. Section 262.69, unnumbered paragraph 3, Code 1995, is amended to read as follows:

Notwithstanding the provisions of chapter 17A, a proceeding conducted by the state board of regents or an institution governed by the state board of regents to determine the validity of an assessment of a violation of traffic control and parking rules is not ~~a contested case~~ an adjudicative proceeding as defined in section ~~17A.2, subsection 5~~ 17A.1102.

Sec. 140. Section 267.6, Code 1995, is amended to read as follows:

267.6 IOWA ADMINISTRATIVE PROCEDURE ACT.

The provisions of chapter 17A shall not apply to the council or any actions taken by it, except that any

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recommendations adopted by the council pursuant to section 267.5, subsection 3, and any rules adopted by the council shall be adopted, amended, or repealed only after compliance with the provisions of ~~sections 17A.4, 17A.5, and 17A.6~~ chapter 17A, article 3.

Sec. 141. Section 272C.6, subsection 4, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

Pursuant to the provisions of section ~~17A.19, subsection 6~~ 17A.5115, a licensing board upon ~~an appeal~~ seeking of judicial review by the licensee of the decision by the licensing board, shall transmit the entire record of the ~~contested case~~ adjudicative proceeding to the reviewing court.

Notwithstanding the provisions of section ~~17A.19, subsection 6~~ 17A.5115, if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.

Sec. 142. Section 316.9, subsection 4, Code 1995, is amended to read as follows:

4. A person aggrieved by a determination as to eligibility for assistance or a payment authorized by this chapter, or the amount of a payment, upon application may have the matter reviewed. Rules governing reviews shall provide for a prompt one-step uncomplicated fact-finding process. Such a review is an appeal of an agency action as defined in section ~~17A.2, subsection 2~~ 17A.1102, and is not ~~a contested case~~ an adjudicative proceeding. The decision rendered shall be the displacing agency's final agency action.

Sec. 143. Section 321.52, subsection 3, unnumbered paragraph 2, Code Supplement 1995, is amended to read as follows:

However, upon application the department upon a showing of good cause may issue a certificate of title after the fourteen-day period for a junked vehicle for which a junking certificate has been issued. For purposes of this subsection,

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"good cause" means that the junking certificate was obtained by mistake or inadvertence. If a person's application to the department is denied, the person may make application for a certificate of title under the bonding procedure as provided in section 321.24, if the vehicle qualifies as an antique vehicle under section 321.115, subsection 1, or the person may seek judicial review as provided under ~~sections 17A.19 and 17A.20~~ chapter 17A, article 5, and appellate review under section 17A.5118.

Sec. 144. Section 321.253A, subsection 1, Code 1995, is amended to read as follows:

1. The department shall place and maintain directional signs upon primary highways which provide information about historic sites which are located on land owned or managed by an agency as defined in section ~~17A.2~~ 17A.1102. The signs shall conform to the manual of uniform traffic devices. However, the directional signs are not subject to requirements applicable to tourist-oriented directional signs.

Sec. 145. Section 321.556, subsections 1 and 2, Code Supplement 1995, are amended to read as follows:

1. If, upon review of the record of convictions of any person, the department determines that the person appears to be a habitual offender, the department shall immediately notify the person in writing and afford the licensee an opportunity for a hearing. The notice shall direct the person named in the notice to appear for hearing and show cause why the person should not be barred from operating a motor vehicle on the highways of this state. The notice shall meet the requirements of section ~~17A.12~~ 17A.4206 and shall be served in the manner provided in that section. Service of notice on any nonresident of this state may be made in the same manner as provided in sections 321.498 through 321.506. A peace officer stopping a person for whom a notice to appear for hearing has been issued under the provisions of this section may personally serve the notice upon forms approved by the

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department to satisfy the notice requirements of this section. A peace officer may confiscate the motor vehicle license of a person if the license has been revoked or has been suspended subsequent to a hearing and the person has not forwarded the motor vehicle license to the department as required.

2. The hearing shall be conducted as provided ~~in section 17A.12~~ for an adjudicative proceeding in chapter 17A, article 4, before the department in the county where the alleged events occurred, unless the director and the person agree that the hearing may be held in some other county, or the hearing may be held by telephone conference at the discretion of the agency conducting the hearing. The hearing shall be recorded and its scope shall be limited to the issue of whether the person notified is a habitual offender.

Sec. 146. Section 321.560, Code Supplement 1995, is amended to read as follows:

321.560 PERIOD OF REVOCATION.

A license to operate a motor vehicle in this state shall not be issued to any person declared to be a habitual offender under section 321.555, subsection 1, for a period of not less than two years nor more than six years from the date of the final decision of the department under section ~~17A.19~~ 17A.4215 or the date on which the district court upholds the final decision of the department, whichever occurs later. However, a temporary restricted license may be issued to a person declared to be a habitual offender under section 321.555, subsection 1, paragraph "c", pursuant to section 321.215, subsection 2. A license to operate a motor vehicle in this state shall not be issued to any person declared to be a habitual offender under section 321.555, subsection 2, for a period of one year from the date of the final decision of the department under section ~~17A.19~~ 17A.4215 or the date on which the district court upholds the final decision of the department, whichever occurs later. The department shall adopt rules under chapter 17A which establish a point system

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which shall be used to determine the period for which a person who is declared to be a habitual offender under section 321.555, subsection 1, shall not be issued a license.

Sec. 147. Section 368.22, unnumbered paragraph 4, and subsections 1, 2, and 3, Code 1995, are amended to read as follows:

The judicial review provisions of this section and chapter 17A, article 5, shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of that agency action. The court's review on appeal of a decision is limited to questions relating to jurisdiction, regularity of proceedings, and whether the decision appealed from is arbitrary, unreasonable, or without substantial supporting evidence. The court may reverse and remand a decision of the board or a committee, with appropriate directions. The following ~~portions of section 17A.19~~ provisions of chapter 17A are not applicable to this chapter:

1. ~~The part of subsection 2 which relates to where proceedings for judicial review shall be instituted.~~ Section 17A.5104, subsection 2.

2. ~~Subsection 5.~~ Section 17A.5111.

3. ~~Subsection 8.~~ Section 17A.5116.

4. Section 17A.5117.

Sec. 148. Section 421.17, subsection 20, unnumbered paragraph 2, Code Supplement 1995, is amended to read as follows:

The provisions of ~~sections 17A.10 to 17A.18~~ chapter 17A, article 4, relating to ~~contested cases~~ adjudicative proceedings shall not apply to any matters involving the equalization of valuations of classes of property as authorized by this chapter and chapter 441. This exemption shall not apply to a hearing before the state board of tax review.

Sec. 149. Section 422.21, unnumbered paragraph 5, Code

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1995, is amended to read as follows:

The director shall determine for the 1989 and each subsequent calendar year the annual and cumulative inflation factors for each calendar year to be applied to tax years beginning on or after January 1 of that calendar year. The director shall compute the new dollar amounts as specified to be adjusted in section 422.5 by the latest cumulative inflation factor and round off the result to the nearest one dollar. The annual and cumulative inflation factors determined by the director are not rules as defined in section ~~17A.2, subsection 10~~ 17A.1102. The director shall determine for the 1990 calendar year and each subsequent calendar year the annual and cumulative standard deduction factors to be applied to tax years beginning on or after January 1 of that calendar year. The director shall compute the new dollar amounts of the standard deductions specified in section 422.9, subsection 1, by the latest cumulative standard deduction factor and round off the result to the nearest ten dollars. The annual and cumulative standard deduction factors determined by the director are not rules as defined in section ~~17A.2, subsection 10~~ 17A.1102.

Sec. 150. Section 422.53, subsection 5, Code Supplement 1995, is amended to read as follows:

5. If the holder of a permit fails to comply with any of the provisions of this division or any order or rule of the department adopted under this division or is substantially delinquent in the payment of a tax administered by the department or the interest or penalty on the tax, or if the person is a corporation and if any officer having a substantial legal or equitable interest in the ownership of the corporation owes any delinquent tax of the permit-holding corporation, or interest or penalty on the tax, administered by the department, the director may revoke the permit. The director shall send notice by mail to a permit holder informing that person of the director's intent to revoke the

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permit and of the permit holder's right to a hearing on the matter. If the permit holder petitions the director for a hearing on the proposed revocation, after giving ten days' notice of the time and place of the hearing in accordance with section ~~17A.18, subsection 3~~ 17A.4105, the matter may be heard and a decision rendered. The director may restore permits after revocation. The director shall adopt rules setting forth the period of time a retailer must wait before a permit may be restored or a new permit may be issued. The waiting period shall not exceed ninety days from the date of the revocation of the permit.

Sec. 151. Section 424.5, subsection 6, Code 1995, is amended to read as follows:

6. To revoke a permit the director shall serve notice as required by section ~~17A.18~~ 17A.4105 to the permit holder informing that person of the director's intent to revoke the permit and of the permit holder's right to a hearing on the matter. If the permit holder petitions the director for a hearing on the proposed revocation, after giving ten days' notice of the time and place of the hearing in accordance with section ~~17A.18, subsection 3~~ 17A.4105, the matter may be heard and a decision rendered. The director may restore permits after revocation. The director shall adopt rules setting forth the period of time a depositor must wait before a permit may be restored or a new permit may be issued. The waiting period shall not exceed ninety days from the date of the revocation of the permit.

Sec. 152. Section 441.21, subsection 11, Code Supplement 1995, is amended to read as follows:

11. The percentage of actual value computed by the director for agricultural property, residential property, commercial property, industrial property and property valued by the department of revenue and finance pursuant to chapters 428, 433, 434, 436, 437, and 438 and used to determine assessed values of those classes of property does not

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constitute a rule as defined in section ~~17A.2, subsection 10~~ 17A.1102.

Sec. 153. Section 441.49, unnumbered paragraph 7, Code 1995, is amended to read as follows:

Tentative and final equalization orders issued by the director of revenue and finance are not rules as defined in section ~~17A.2, subsection 7~~ 17A.1102.

Sec. 154. Section 455B.105, subsection 9, Code 1995, is amended to read as follows:

9. Upon request of at least four members of the commission before adopting or modifying a rule, the director shall prepare and publish with the notice required under section ~~17A.4~~ 17A.3103, subsection 1, ~~paragraph "a",~~ a comprehensive estimate of the economic impact of the proposed rule or modification.

Sec. 155. Section 455B.446, subsection 4, Code 1995, is amended to read as follows:

4. Notice of the hearing in the form provided in section ~~17A.12, subsection 2,~~ 17A.4206 shall be published in a newspaper of general circulation in each city and county in which the proposed site is located once a week for two consecutive weeks with the second publication being at least twenty days prior to the date of the hearing.

Sec. 156. Section 455G.4, subsection 3, paragraph b, Code 1995, is amended by striking the paragraph.

Sec. 157. Section 476.6, subsection 19, paragraph a, Code 1995, is amended to read as follows:

a. The board shall conduct ~~contested case~~ adjudicative proceedings for review of energy efficiency plans and budgets filed by rate-regulated gas or electric utilities. The board may approve, reject, or modify the plans and budgets. Notwithstanding the provisions of section ~~17A.19, subsection 5~~ 17A.5111, in an application for judicial review of the board's decision concerning a utility's energy efficiency plan or budget, the reviewing court shall not order a stay. Whenever

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a request to modify an approved plan or budget is filed subsequently by the office of consumer advocate or a rate-regulated gas or electric public utility, the board shall promptly initiate a formal proceeding if the board determines that any reasonable ground exists for investigating the request. The formal proceeding may be initiated at any time by the board on its own motion. Implementation of board approved plans or budgets shall be considered continuous in nature and shall be subject to investigation at any time by the board or the office of the consumer advocate.

Sec. 158. Section 476A.1, subsection 1, Code 1995, is amended to read as follows:

1. "Agency" means an agency as defined in section ~~17A.2, subsection 1~~ 17A.1102.

Sec. 159. Section 476A.4, subsection 3, Code 1995, is amended to read as follows:

3. Notice of the proceeding in the form provided in section ~~17A.12, subsection 2,~~ 17A.4206 shall be published in a newspaper of general circulation in each county in which the proposed site is located once a week for two consecutive weeks with the second publication being at least twenty days prior to the date of the hearing. The board shall be responsible for publication and delivery of notices required by this section.

Sec. 160. Section 479.29, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board shall, pursuant to chapter 17A, adopt rules establishing standards for the protection of underground improvements during the construction of pipelines, to protect soil conservation and drainage structures from being permanently damaged by pipeline construction and for the restoration of agricultural lands after pipeline construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking, and, in addition to the

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requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. Any county board of supervisors may, under the provisions of chapter 17A, and subsequent to the rulemaking proceedings, petition under those provisions for additional rulemaking to establish standards to protect soil conservation practices, structures and drainage structures within that county. Upon the request of the petitioning county the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section shall not apply within the boundaries of a city, unless the land is used for agricultural purposes.

Sec. 161. Section 479A.14, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board shall adopt rules establishing standards to protect underground improvements during the construction of pipelines, to protect soil conservation and drainage structures from being permanently damaged by pipeline construction, and for the restoration of agricultural lands after pipeline construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking and, in addition to the requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. A county board of supervisors may, under chapter 17A and subsequent to the rulemaking proceedings, petition for additional rulemaking to establish standards to protect soil conservation practices, structures, and drainage structures within that county. Upon the request of the petitioning county, the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section do not apply within the

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boundaries of a city, unless the land is used for agricultural purposes.

Sec. 162. Section 479B.20, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board, pursuant to chapter 17A, shall adopt rules establishing standards for the protection of underground improvements during the construction of pipelines or underground storage facilities, to protect soil conservation and drainage structures from being permanently damaged by construction of the pipeline or underground storage facility, and for the restoration of agricultural lands after pipeline or underground storage facility construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking, and, in addition to the requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. Any county board of supervisors may, under the provisions of chapter 17A, and subsequent to the rulemaking proceedings, petition under those provisions for additional rulemaking to establish standards to protect soil conservation practices, structures, and drainage structures within that county. Upon the request of the petitioning county, the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section shall not apply within the boundaries of a city unless the land is used for agricultural purposes.

Sec. 163. Section 514B.4A, subsection 2, Code 1995, is amended to read as follows:

2. Rules proposed by the commissioner for adoption for the direct provision of health care services by a health maintenance organization, shall be forwarded by the commissioner to the director of public health for review,

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comment, and recommendation, prior to submission to the administrative rules coordinator pursuant to section ~~17A.4~~ 17A.3103.

Sec. 164. Section 519A.4, subsection 1, Code 1995, is amended to read as follows:

1. The association shall submit a plan of operation to the commissioner, together with any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the association consistent with sections 519A.2 to 519A.13. The plan of operation and any amendments thereto shall become effective only after ~~promulgation~~ adoption of the plan or amendment by the commissioner as a rule pursuant to ~~section 17A.4~~ chapter 17A, article 3: Provided that the initial plan may in the discretion of the commissioner become effective immediately upon filing with the secretary of state pursuant to section ~~17A.5~~ 17A.3115, subsection 2, paragraph "b", subparagraph (1).

Sec. 165. Section 524.228, subsection 4, Code 1995, is amended to read as follows:

4. A hearing provided for in this section shall be presided over by an administrative law judge appointed in accordance with ~~section 17A.11~~ chapter 17A, article 4. The hearing shall be private, unless the superintendent determines after full consideration of the views of the party afforded the hearing, that a public hearing is necessary to protect the public interest. After the hearing, and within thirty days after the case has been submitted for decision, the superintendent shall review the proposed order of the administrative law judge and render a final decision, including findings of fact upon which the decision is predicated, and issue and serve upon each party to the proceeding an order consistent with this section.

Sec. 166. Section 533.6A, subsection 4, Code 1995, is amended to read as follows:

4. A hearing provided for in this section shall be

presided over by an administrative law judge appointed in accordance with ~~section 17A.11~~ chapter 17A, article 4. The hearing shall be private, unless the superintendent determines after full consideration of the views of the party afforded the hearing, that a public hearing is necessary to protect the public interest. After the hearing, and within thirty days after the case has been submitted for decision, the superintendent shall review the proposed order of the administrative law judge and render a final decision, including findings of fact upon which the decision is predicated, and issue and serve upon each party to the proceeding an order consistent with this section.

Sec. 167. Section 534.405, unnumbered paragraph 7, Code 1995, is amended to read as follows:

Actions taken by the superintendent under this section are not subject to section ~~17A.18, subsection 3~~ 17A.4105.

Sec. 168. Section 535B.7, subsection 2, unnumbered paragraph 1, Code 1995, is amended to read as follows:

The administrator may order an emergency suspension of a licensee's license pursuant to section ~~17A.18, subsection 3~~ 17A.4501. A written order containing the facts or conduct which warrants the emergency action shall be timely sent to the licensee by restricted certified mail. Upon issuance of the suspension order, the licensee must also be notified of the right to an evidentiary hearing. A suspension proceeding shall be promptly instituted and determined.

Sec. 169. Section 904.602, subsection 9, unnumbered paragraph 2, Code 1995, is amended to read as follows:

These records are exempt from the public inspection requirements in ~~section 17A.3~~ sections 17A.2101, 17A.2102, and ~~section~~ 22.2.

Sec. 170. Section 906.3, Code 1995, is amended to read as follows:

906.3 DUTIES OF PAROLE BOARD.

The board of parole shall adopt rules regarding a system of

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paroles from correctional institutions, and shall direct, control, and supervise the administration of the system of paroles. The board of parole shall consult with the director of the department of corrections on rules regarding a system of work release and shall assist in the direction, control, and supervision of the work release system. The board shall determine which of those persons who have been committed to the custody of the director of the Iowa department of corrections, by reason of their conviction of a public offense, shall be released on parole or work release. The grant or denial of parole or work release is not ~~a contested case~~ an adjudicative proceeding as defined in section ~~17A.2~~ 17A.1102.

Sec. 171. REPEAL.

1. Sections 17A.1 through 17A.5, 17A.7, and 17A.9 through 17A.33, Code 1995, are repealed.

2. Sections 17A.6 and 17A.8, Code Supplement 1995, are repealed.

EXPLANATION

This bill repeals the current Iowa Administrative Procedure Act under chapter 17A and replaces it with a new Iowa Administrative Procedure Act. The new Act is based in part on the 1981 Model State Administrative Procedures Act of the national conference of commissioners on uniform state laws. Like the current chapter 17A, the proposed new Act applies to all state agencies and covers four main subjects: 1) public access to agency law and policy; 2) agency rulemaking procedure and the review of agency rules; 3) agency adjudication; and 4) the judicial review of agency action.

The bill makes several changes from current law.

First, the bill imposes several new or additional requirements concerning public access to agency law. New section 17A.2101 requires each agency to compile, index, and make available to the public, with some minor exceptions, all agency policies of general applicability that are not required

to be published.

The bill also makes several changes concerning the adoption and effectiveness of rules. The bill requires all agencies, as soon as feasible and to the extent practicable, to make their law through rules adopted after public rulemaking proceedings in which all interested persons may participate and which are subject to legislative and gubernatorial review. The bill also requires each agency to maintain an up-to-date public rulemaking docket containing all rules proposed by that agency and in process and all rules currently under active consideration within that agency for future proposal. New section 17A.3105 requires an agency to prepare, in specified circumstances, a detailed, structured, regulatory (cost-benefit) analysis for a proposed rule that is available to the general public. New section 17A.3107 specifies when a variance between the text of a proposed rule and the text of the adopted rule based on that proposed rule is sufficiently substantial so that the agency must hold additional public proceedings before it can adopt the rule. New section 17A.3109 authorizes agencies to omit usual rulemaking procedures for wholly interpretive rules only if the rules issued in reliance on that exemption are subject to de novo judicial review for their correctness. Section 17A.3110 requires an explanatory statement for each adopted rule and makes the reasons contained in that statement the sole basis on which the agency may defend the legality of that rule. Section 17A.3111 specifies the required contents, style, and form for all adopted rules. Section 17A.3112 requires the creation of a detailed public agency rulemaking record for each adopted rule. Section 17A.3117 requires agencies, after a petition therefor, to adopt, as soon as feasible and to the extent practicable, a rule subject to public rulemaking procedures superseding specified principles of law or policy lawfully declared in individual cases.

Section 17A.3201 requires each agency to engage in a

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formal, systematic, and periodic review of its rules to facilitate the elimination or amendment of its unnecessary rules. Sections 17A.3202 through 17A.3204 provide for the powers of the governor and the administrative rules review committee of the general assembly in reviewing agency rules.

Section 17A.4106 requires the waiver in individual cases of a particular rule that is overbroad because its application in those cases would not in actual practice serve any of the purposes of the rule and authorizes the waiver of a particular rule in individual cases where its application would cause undue hardship, its waiver is consistent with the public interest, and would not prejudice the rights of any other person.

The bill also provides for the adjudicative process to be applied in various situations. The bill replaces the current reference to contested case proceedings with adjudicative proceedings. The bill provides that the product of agency adjudication (an "order") that is subject to the provisions of the Act includes all agency action of particular applicability defining the legal rights, duties, or privileges, of specified persons. The bill requires agencies, with only few exceptions, to conduct adjudicatory proceedings before issuing an "order" and that agencies shall conduct a "formal adjudicative hearing" as the process for issuing an order, unless another statutory provision or a rule authorized by this Act provides otherwise, and specifies all of the elements of such a proceeding. Sections 17A.4204 and 17A.4205 provide for and regulate prehearing conferences in formal adjudicative hearings. Sections 17A.4206 through 17A.4208 provide for the specificity of the notice, pleadings, and default requirements applicable to formal adjudicative hearings. Section 17A.4209 provides for and regulates intervention in formal adjudicative hearings. Section 17A.4210 requires notice to persons who are the subject of an agency investigation of any subpoenas related to that investigation that are directed at third

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persons. Section 17A.4213 also imposes ex parte communications prohibitions in formal adjudicative hearings and additional remedies for their violation. Section 17A.4214 provides for separation of functions requirements and remedies for their violation in formal adjudicative hearings, including entirely new prohibitions on the combination of investigative and subsequent decision-making functions and probable cause finding and subsequent decision-making functions. Section 17A.4215 provides for the required contents of agency orders and the burden of proof in formal adjudicative hearings. Section 17A.4220 establishes an effective date for adjudicatory orders in formal adjudicative hearings.

Section 17A.4301 establishes a wholly separate and independent office of administrative hearings to house and provide rules governing administrative law judges (ALJ) including rules imposing on all persons who act as presiding officers a code of administrative judicial conduct that is similar to the Iowa code of judicial conduct; that section also requires all newly hired ALJs who preside over formal adjudicative hearings to be admitted to the bar of this state.

Sections 17A.4401 to 17A.4403 create and regulate a conference adjudicative hearing of less formality, complexity, and cost, than a formal adjudicative hearing, and establish guidelines prescribing the precise and limited circumstances in which agencies may use a conference adjudicative hearing.

The bill also creates and regulates very informal, summary, low-cost adjudicative proceedings, called emergency and summary adjudicative proceedings, and prescribes the limited circumstances in which agencies may use those proceedings.

The bill also makes provision for the judicial review of agency action. Section 17A.5102 statutorily defines the distinction between "final" and "nonfinal" agency actions which are subject to different requirements for judicial review. Section 17A.5103 increases the grounds upon which nonfinal agency action is reviewable. Section 17A.5106

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confers standing to seek judicial review on specified classes of persons and also lists three elements that must be satisfied to qualify for standing under the "aggrieved and adversely affected" standard. Section 17A.5107 increases the grounds justifying a failure to exhaust administrative remedies prior to filing a suit for judicial review of agency action. Section 17A.5108 specifies in detail the time requirements for review of various types of agency action. Section 17A.5111 specifies a standard for the issuance by the reviewing court of a stay of agency action pending judicial review and clarifies the right of an agency to grant a stay after a judicial review proceeding has commenced. Section 17A.5112 indicates the circumstances in which judicial review may be obtained of issues that were not previously raised before the agency. Section 17A.5114 specifies the circumstances in which new evidence may be taken by the court reviewing the agency action and in which that court may remand the matter to the agency for the taking of additional evidence. Section 17A.5116 greatly elaborates and increases the specificity of the standards for judicial review, expressly indicates when a reviewing court may and when it may not substitute its judgment de novo for that of the agency, and expressly prescribes the burden of persuasion with respect to those standards. Section 17A.5117 provides for the various types of relief available in proceedings for judicial review. Section 17A.5118 codifies the appropriate standard for Iowa supreme court review of a district court decision reviewing agency action.

Additional conforming amendments to the Code may be necessary to fully implement this bill.

LSB 3885SV 76
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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

(COMPANION TO LSB 1642SS BY BARTZ)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to jury instructions.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 130

TLSB 1642HH 76

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Section 1. NEW SECTION. 624.13A JURY INSTRUCTION -- RIGHT TO JUDGE LAW.

1. A defendant's right to trial by jury, in all instances where the state or a political subdivision of the state is the plaintiff, includes the right to inform the jury of the jury's prerogative to judge the law as well as all the evidence, and to render a verdict dictated by conscientious consideration. This right shall not be limited by the rules of civil or criminal procedure, juror's oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the impanelment of jurors willing to exercise this power.

2. Once the jury has been informed in accordance with subsection 1, a party to the action shall not be prohibited from presenting arguments to the jury which may pertain to issues of law and conscience, including the following:

a. The merit, intent, constitutionality, or applicability of the law to the defendant's case.

b. The motive, moral perspective, or circumstances of the defendant.

c. The degree and direction of guilt or actual harm done.

d. The sanctions which may be applied to the losing party.

3. Failure to allow the defendant to so inform the jury shall be grounds for a mistrial and another trial by jury.

EXPLANATION

This bill provides that in any jury trial where the state or one of its political subdivisions is the plaintiff, the defendant has 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 right to inform the jury shall not be limited by the rules of criminal or civil procedure, court procedure or practice, or methods of jury selection which might preclude or limit the selection of jurors who are willing to judge the law as it applies to the case. The bill

also provides that any party to the trial shall not be prohibited from presenting arguments to the jury pertaining to issues of law and conscience. Finally, the bill provides that failure to allow the defendant to inform the jury of its right to judge the law as it applies to the case is grounds for a mistrial and a new jury trial.

LSB 1642HH 76
mk/sc/14

FILED MAR 7 1995

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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

An Act relating to public access to court records and providing for the Act's applicability.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

S.F. 257

TLSB 2226SV 76
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S.F. 257 H.F. _____

Section 1. NEW SECTION. 624B.1 TITLE -- DEFINITION.

1. This chapter shall be known as the "Sunshine in Litigation Act."

2. For the purposes of this chapter, unless the context otherwise requires, "court records" means any of the following:

a. All documents of any nature filed in connection with any matter before any civil court, except any of the following:

(1) Documents filed with a court in camera, only for the purpose of obtaining a ruling on the discoverability of such documents.

(2) Documents in court files to which access is otherwise restricted by law.

b. Settlement agreements, not filed of record, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, the administration of public office, or the operation of government.

c. Discovery, not filed of record, concerning matters that have a probable adverse effect upon the general health or safety, the administration of public office, or the operation of government, except discovery not filed of record in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

Sec. 2. NEW SECTION. 624B.2 SEALING RECORDS.

A court order or opinion issued in the adjudication of a case shall not be sealed. Other court records are presumed to be open to the general public but may be sealed only upon a showing pursuant to the procedures of this chapter and all of the following:

1. A specific, serious, and substantial interest which clearly outweighs the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety.

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2. No less restrictive means than sealing the records will adequately and effectively protect the specific interest asserted.

Sec. 3. NEW SECTION. 624B.3 COERCION.

A person shall not offer an inducement to a party to a civil action designed to influence that party in regard to the sealing of any court record. Violation of this section is punishable as a contempt of court.

Sec. 4. NEW SECTION. 624B.4 NOTICE.

Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice in the manner that notices for meetings of county governmental bodies are required to be posted. The notice shall contain the content of the motion, identify the case in which the motion has been filed, and state that a hearing will be held in open court on the motion and that any person may intervene and be heard concerning the motion. The notice shall also contain the date and time of the hearing and a brief but specific description of the nature of the case, the court records sought to be sealed, and the identity of the movant. A verified copy of the notice shall be filed by the movant with the clerk of the supreme court.

Sec. 5. NEW SECTION. 624B.5 HEARING.

A hearing shall be held in open court on a motion to seal court records as soon as practicable but not less than fourteen days after notice is posted pursuant to section 624B.4 Nonparties may intervene as a matter of right for the limited purpose of participating in the proceedings which will determine whether court records are sealed. The court may inspect records in camera.

Sec. 6. NEW SECTION. 624B.6 TEMPORARY SEALING ORDER.

A temporary sealing order may issue upon motion and notice to any parties who have answered in the case, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury

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will result to a specific interest of the movant before notice can be posted and a hearing held. A temporary sealing order shall set forth the time for the hearing required by section 624B.5 and shall direct the movant to give the notice required by section 624B.4. The court may modify or withdraw any temporary order upon motion by any party or intervenor, following notice to all parties and a hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce the burden of proof of the party seeking to seal court records.

Sec. 7. NEW SECTION. 624B.7 ORDER ON MOTION TO SEAL COURT RECORDS.

A motion relating to sealing or opening court records shall be decided by written order, open to public inspection, which shall state the style and number of the case, the specific reasons for finding and concluding whether the showing required by section 624B.2 has been made, the specific court records or portions of court records which are to be sealed, and the period of time the records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case. However, failure to comply with this requirement shall not affect the appealability of the order.

Sec. 8. NEW SECTION. 624B.8 CONTINUING JURISDICTION.

Any person may intervene as a matter of right at any time before or after judgment to seal or open court records. A court that issues an order sealing court records retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or opening court records shall be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. The circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by section 624B.2 shall be on

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the party seeking to seal records.

Sec. 9. NEW SECTION. 624B.9 APPEAL.

An order or a portion of an order, relating to sealing or opening court records, shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, to hold further hearings, or to make additional findings.

Sec. 10. NEW SECTION. 624B.10 APPLICABILITY DATE.

Access to documents in court files not defined as court records by this chapter remains governed by existing law. This chapter does not apply to any court records sealed in an action in which a final judgment has been entered before July 1, 1996. This chapter applies to cases pending on July 1, 1996, only with regard to court records filed or exchanged on or after July 1, 1996, and any motion filed on or after July 1, 1996, to alter or vacate an order restricting access to court records issued before July 1, 1996.

EXPLANATION

This bill provides a presumption that all court records in civil actions are open to the public unless access is restricted by operation of other law. The bill also provides a mechanism for hearings on motions to seal court records and for appeal of orders relating to the sealing of court records. The bill applies to cases pending on and after July 1, 1996.

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UPDATE ON SELECTED PREMISES LIABILITY ISSUES

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TABLE OF CONTENTS

I. STANDARD OF CARE

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The duty of care which a possessor of land owes to an entrant upon that land continues to be based upon the entrant's status as either as trespasser, licensee or invitee. Morgan v. Perlowski, 508 N.W.2d 724, 727 (Iowa 1993).

The threshold question in premises liability cases is the status of the entrant upon the land. An invitee is a person who enters or remains on land open to the public by invitation or permission, and is owed the highest standard of care. Morgan, 508 N.W.2d at _____. The Restatement of Torts, Second, §333, would define such an invitee as a "public invitee." The Restatement also refers to a second type of invitee--a "business visitor." This is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent. Morgan, supra, 508 N.W.2d at 727. See also 330 Restatement of Torts, Second. Reasoner v. Chicago, Rock Island and Pacific Railroad Co., 101 N.W.2d 739, 741 (Iowa 1960).

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. Restatement of Torts, Second, §329.

The Iowa Supreme Court has generally allowed the determination of the entrant's status to go to the jury. Lattner v. Immaculate Conception Church, 121 N.W.2d 639 (Iowa 1963); Otto v. Stork, 159 N.W.2d 528 (Iowa 1968).

The elements for recovery are different for each of the above entrants. Iowa Civil Jury Instruction 900.1 lists the essentials for recovery by an invitee; 900.2 sets for the essentials for recovery to a licensee; and 900.4 sets forth the essentials for recovery by a trespasser. The Jury Instructions are attached hereto.

As noted in the comment to Jury Instruction 900.1, although the Supreme Court has occasionally suggested that basing a land possessor's duty of care on the status of the injured party is being abandoned, the cases still consistently adhere to this approach.

II. THE OPEN AND OBVIOUS DEFENSE

It has long been assumed that if the defendant could prove that the dangerous condition on the premises was "open and obvious," this would constitute a complete defense. A series of recent cases have shown this not to be the case.

A. In Konicek v. Loomis Brothers, Inc., 457 N.W.2d 614 (Iowa 1990), the plaintiff was working on the roof of a college facility when he fell through a hole cut in the roof for a skylight. There was a material that was spread over the skylight hole. The plaintiff testified that he had a general idea of where this hole was at. Nevertheless, he fell through. In affirming a plaintiff's verdict, the court noted that "it was apparent from [plaintiff's] testimony that he too recognized and understood the probability and gravity of the danger and comprehended the attendant risks." Id. at page 619. However, the court stated the following in affirming the verdict:

> The jury, however, could also find from the evidence that despite this obvious danger, [defendant] should have anticipated that the uncovered skylights could

> cause injury to the [subcontractor's] roofers. As we said, the dangerous condition posed by the uncovered skylights was just as obvious and known to [defendant] as it was to [plaintiff].
>
> . . . Certainly [defendant] could anticipate that the [subcontractor] roofers would probably proceed in the face of obvious danger, knowing that if they failed to do so, they could lose their jobs.
>
> Under all these circumstances the jury could find that any warning would have been inadequate, leaving [defendant] only one alternative: Covering the skylights.

Id. at page 619.

B. In Schnoor v. Deitchler, 482 N.W.2d 913 (Iowa 1992), the plaintiff was an experienced farmer and grain hauler. He was hired by the defendant to haul beans from the defendant's farm. Defendant loaded the beans into the plaintiff's truck with his auger. The plaintiff walked near the loading end of the auger and slipped on beans that were on the ground. His foot went in to the unguarded auger causing severe injuries to his leg. There was a jury verdict for the plaintiff. The defendant appealed, arguing that a business invitee cannot recover from the occupier of land, if the condition causing the injury is open or obvious, or if the business invitee has actual knowledge of the danger. The court pointed out that the plaintiff was experienced and familiar with the auger. He knew that the open auger was dangerous. His duty was to position the truck under the auger, uncover the canvas and wait for the truck to be filled. He knew the ground was covered with beans and also that the beans were slippery. He was aware of the dangers of being close enough to touch the auger. The court stated at page 917: "We conclude that when Bernard voluntarily walked in the vicinity of the open auger, he assumed the risk of harm. Under these circumstances,

Deitchler owed no duty of care to Bernard." The court also discussed whether the defendant should have anticipated that the dangerous condition would cause physical harm to the plaintiff, notwithstanding the plaintiff's knowledge. The court noted that liability may be imposed upon a possessor of land in those instances in which the possessor may have reason to expect that the invitee's attention may be distracted, or that the invitee will proceed to encounter the known and obvious danger because the advantage of doing so would outweigh the apparent risk to a reasonable man in the invitee's position. Id. at page 917. However, this case does not fall within the exception. There was no evidence of a distraction. There is no evidence that the plaintiff could anticipate that the plaintiff would leave the truck and walk approximately 60 feet to the area of the open auger. His work duties did not require him to be there. "The facts here do not fall within one of the exceptions but rather falls squarely within the general rule that a possessor of land is not liable for obvious or known dangers." Id. at page 918.

C. One way in which a plaintiff may attempt to avoid the open and obvious defense is the "distraction doctrine." In Coleman v. Monson, 522 N.W.2d 91 (Iowa App. 1994), the plaintiff was a store employee who was working after hours. The floors were being cleaned by a cleaning service. The court held that because the cleaning service was acting in behalf of the possessor, they were held to the same duty of care as a possessor. Id. at page 93. The plaintiff was considered an invitee. The plaintiff testified that she knew that cleaning was going on and that the floors were wet. However, she attempted to find

an aisle that was dry. She guessed wrong, she walked down a wet aisle and fell. The defendant filed a Motion for Directed Verdict based upon the contention that the wet floor was open and obvious and that the plaintiff had actual knowledge of the danger. The court held that the plaintiff's evidence was sufficient to permit an inference that the water in the aisle where she fell would not have been obvious to one exercising ordinary care, and that a jury could find that the defendant had superior knowledge of where the floor was wet. The plaintiff proposed and the court gave a jury instruction which advised the jury that although the defendant was not required to warn of known or obvious condition, such a duty did exist if the person on the premises may be distracted so that he or she will not discover what was obvious. The plaintiff contended that the shiny floor was a distraction. The court noted that the distraction rule is an exception to the general rule that a possessor is not liable if the danger is known or obvious. The court stated that under the facts of the case, the shiny floor was not a distraction, and the instruction was erroneous.

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D. In Wieseler v. Sisters of Mercy Health Corp., 540 N.W.2d 445 (Iowa 1995), the plaintiff walked across a slippery parking lot to a hospital. He noted at the time that the parking lot and its egress point were quite slippery and frosty. Upon returning to his vehicle the plaintiff slipped and fell. The jury returned a verdict for the plaintiff. However, the district court granted a motion for judgment notwithstanding the verdict on the grounds that the dangerous condition was open and obvious to the plaintiff. The Court of Appeals affirmed. The Supreme Court reversed. The court engaged in an extensive analysis

of §343 and §343A of the Restatement of Torts. Section 343 creates liability on the part of the landowner if the landowner knows or by the exercise of reasonable care would discover that there is a condition on his land which presents an unreasonable risk of harm to invitees, and if the landowner should expect that the invitee would not discover or realize the danger. Section 343A, however, contains an exception to the owner liability of §343. The owner of land is not liable if the condition is known or obvious to the injured party "unless the possessor should anticipate the harm despite such knowledge or obviousness." The Supreme Court held that the plaintiff's evidence was sufficient to generate jury questions on all of the issues raised by Restatement §§343 and 343A. The court held that there was a jury question as to whether the condition of the pavement created "an unreasonable risk of harm from which the hospital should have expected Alvin would fail to protect himself." The court stated that the fact that the danger "was known or obvious to Alvin is not conclusive in determining the hospital's duty or in determining whether the hospital acted reasonably in not taking precautions to prevent the type of accident that occurred here." The court emphasized the fact that Alvin was age 60 at the time of trial (?) and that he exited the hospital with arms full of items possessed by his wife during her stay at the hospital. The court stated at page 452:

> Moreover, we believe that even though Alvin knew of the potential danger presented by the slippery conditions, the hospital should have realized he might fail to protect himself from the condition due to the fact there is only one common entrance/exit to the parking lot. We believe the evidence was such that the jury could reasonably conclude that Alvin knew the parking lot driveway was frosty but did not realize how slippery it was when going down

hill with his arms full of hospital-stay related items.

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E. The most recent case on this issue is Carr v. San-Tan, Inc., 543 N.W.2d 303 (Iowa App. 1995). In this case a swimmer took a running dive into shallow water at a beach. He sustained serious head and neck injuries. The plaintiff claimed that the beach owners were negligent in failing to warn customers not to dive or to have water depth markers. The jury concluded that the plaintiff and the defendants were each 50% at fault. The defendant filed a motion for judgment notwithstanding the verdict. This motion was granted. The trial court found that the danger posed by shallow water was open and obvious, and that the defendants did not owe a duty to post signs warning of shallow water or the risks of diving into shallow water. The Court of Appeals affirmed. The plaintiff argued on appeal that the trial court misapplied the open and obvious rule by failing to consider whether the defendant should have anticipated the harm even though the harmful condition may have been open and obvious. The court noted that where the risks of harm are known or obvious, there is normally no duty to warn and the possessor is not liable for any injuries sustained by an invitee. The court noted that the rationale for this "no duty rule" is that actual knowledge of a danger is equivalent and perhaps even superior to a warning. The court acknowledged that even where a danger is known or obvious, a possessor's duty of care may still be triggered if the possessor should anticipate the harm despite such knowledge or obviousness. Id. at page 306. The court noted that "the fighting question, we believe, is whether the possessor nevertheless should

anticipate the circumstances or conditions will cause harm." The court stated that it was reluctant to impose a duty on a possessor of land to warn of risks based upon an activity which is "obviously unreasonable."

> The special circumstances which give rise to liability even when a dangerous condition or activity is known or obvious deal with conduct of an invitee which is reasonable under the circumstances. As a matter of law, we conclude it is unreasonable to perform a head-first dive into water while running from a beach. San-Tan did not have a duty to warn Carr under the circumstances.

It would appear that the above cases stand for several propositions. First, a defendant is generally not liable for failure to warn or repair, if the condition is open and obvious to the plaintiff.

Second, a defendant can nevertheless be held liable for injuries caused by open and obvious conditions, if the defendant can anticipate that the plaintiff will nevertheless encounter the open and obvious condition.

Third, the issue of whether or not a defendant can reasonably anticipate that a plaintiff will encounter the open and obvious condition will almost always be a jury question. Therefore the first point, that generally defendants will not be held liable for open and obvious conditions, is not a defense that can ordinarily be established as a matter of law.

Fourth, the only time that a defendant can successfully rely upon the "open and obvious" defense, as a matter of law, is where the plaintiff obviously acts unreasonable in encountering the open, obvious and dangerous condition.

III. GENERAL CONTRACTOR LIABILITY

C

In Konicek v. Loomis Brothers, Inc., 457 N.W.2d 614 (Iowa 1990), the court dealt with the circumstances under which a general contractor could be held liable to the employees of a subcontractor. In this case the defendant, Loomis Brothers, contracted with Cornell College in Mount Vernon to build a "sports learning center." Loomis subcontracted with Abild to roof the center. The plaintiff was an employee of Abild. The roof had numerous skylights. Abild was working on the roof when he stepped through a skylight and was seriously injured. The jury returned a substantial verdict for the plaintiff as well as the plaintiff's wife and children. The Supreme Court addressed the issue of when a general contractor might become liable to the employees of a subcontractor. The court discussed §384 of the Restatements of Torts, Second, at some length. That section provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

The court held that the plaintiff was a business invitee--"one who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of land." Employees of independent contractors are included within the business invitee classification. The possessor of land is under a duty to use ordinary care to keep the premises in a reasonably safe condition for business invitees. It requires the possessor to use reasonable care to

ascertain the actual condition of the premises. The duty also requires the possessor to make the area reasonably safe or to give warning of the actual condition and risk involved. Id. at page 618.

The court held that the general contractor was a "possessor" and that the plaintiff was a "invitee." The plaintiffs' recovery was affirmed.

IV. LIABILITY OF FRANCHISOR

In Hofnagel v. McDonald's Corporation, 522 N.W.2d 808 (Iowa 1994), the Supreme Court dealt with the issue of when a franchisor could be held liable for injuries on the premises of franchisees. In this particular case the plaintiff was injured when she was assaulted by third parties on the restaurant premises. Summary judgment was granted. The Supreme Court affirmed. Whether the franchisor owed a duty depended upon the degree of franchisor's retailed control over the property and daily operation of the business. In this case, the court held that the franchisor did not retail sufficient control over the operations of the restaurant to impose upon it a duty. The franchisor was not a "possessor" of land for the purpose of imposing a duty to discover and protect against physical harm.

V. LIABILITY OF LANDLORD TO TENANT

What if your tenant sustains a personal injury on the landlord's property? In Parmeter v. Walsted, Woodbury County No. 107395, the tenant fell down the stairs into the basement. He alleged that the stairs were slippery and overly steep. He also alleged that there were improper handrails, in violation of local ordinance. A

Motion for Summary Judgment was filed on the grounds that the premises had been turned over to the tenant for his exclusive use, and that the landlord could not be held liable because he did not have retained control.

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The Supreme Court of Iowa has consistently taken the position that a tenant cannot recover for personal injuries against his owner/landlord, based upon a defective condition in the premises, unless the owner/landlord retains control over the premises where the injury occurs. Sulhoff v. Everett, 16 N.W.2d 737, 738 (Iowa 1944); Primus v. Bellevue Apts., 44 N.W.2d 347, 350 (Iowa 1950); Stupka v. Scheidel, 56 N.W.2d 874, 877 (Iowa 1953); Montgomery v. Engel, 179 N.W.2d 478, 480 (Iowa 1970); Coleman v. Hall, 161 N.W.2d 329, 332 (Iowa 1968); Shill v. Careage, Corp., 353 N.W.2d 416, 419 (Iowa 1984).

The rule, which has been cited in many subsequent cases, was set forth in Stupka, 56 N.W.2d at 877:

> As a general rule an owner who has leased a building to another without any agreement to repair is not liable to the tenant, or to one who has entered the premises on the tenant's invitation, for personal injuries sustained by reason of their unsafe condition. However, this rule does not apply where the owner retains control, or the owner and tenant have joint control, over the premises or the part thereof where the injury occurs.
>
> This exception to the rule is frequently invoked where an injury is caused by the condition of a hall, passageway, stairway or elevator over which the owner, alone or jointly with the tenant, has control. Such an owner is liable to one who has been so injured after coming upon the premises by invitation from the tenant. There are other exceptions to the general rule which need not be considered here. Burner v. Higman & Skinner Co., 103 N.W.2d 802; Casey v. Valley Savings Bank, 300

N.W.2d 733, 735; Barrett v. Stoneburg, 29 N.W.2d 420, 423.

On the issue of what constitutes "control," Stupka cited with approval the following language from Hull v. Bishop-Stoddard Cafeteria, 26 N.W.2d 429, 445 (Iowa 1946):

> A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

It is clear from the above cited cases that the "retained control" must be more than the normal rights of a landlord to enter onto property that he owns and is leasing to a third party. Rather, the landlord must retain actual possessory rights of a certain portion of the leasehold, and the lessee has the right to use that portion as "appurtenant to the part leased to him." As noted in Stupka, this rule frequently applies to common areas such as halls, passageways or elevators.

The Iowa cases frequently cite the Restatement of Torts, Second. Section 356 provides as follows:

> Except as stated in §§357-362, a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

The legal basis for the general rule set forth in §356 is discussed in comment (a). Under traditional rules of real property, a seller of land would not be liable to the buyer if there was a dangerous condition on the premises. Rather, the rule of caveat emptor would apply. The comment states:

> Therefore, as in the case of the vendor under §352, it is the general rule that the lessor is not liable to the lessee, or to others on the land, for injuries occurring after the lessee has taken possession, even though such injuries result from a dangerous condition existing at the time of the transfer.

In Montgomery v. Engel, 179 N.W.2d 478 (Iowa 1970), the plaintiff fell down an inside stairway. The facts of that case are somewhat similar to the instant case. The plaintiff fell down an inside stairway which led both to the apartment and to the attic above it. Both the landlord and the tenant used the stairs in question, and the attic, but the landlord's use was infrequent. The plaintiff alleged that the stairway was "wore, smooth and slippery." The plaintiff also alleged that the defendants had failed to equipment the stairway with at least one handrail in violation of the municipal ordinances. The trial court held that there was sufficient evidence to show the owner and tenant had joint control, but held that there was insufficient evidence on the question of negligence. On appeal, the court agreed that there was insufficient evidence of negligence with reference to the "slippery step" claim. However, with reference to the claim that the defendant was negligent for failing to equip the stairway with a handrail, the court held that the "allegation charging negligence in failing to comply with the ordinance requiring a handrail should have been submitted to

the jury." Id. at page 483. However, the important part of the case was the court's reaffirmance that there must be a preliminary showing of joint control. Id. at page 480.

In response to the above law, the plaintiff in this case alleged that the defendant could still be held liable. The plaintiff specifically pointed to the Uniform Residential Landlord and Tenant Act, Chapter 562A, Iowa Code. Chapter 562A.15 specifically requires that the landlord comply with all requirements of applicable building and housing codes, and also do whatever is necessary to keep the premises in a fit and habitable condition. Based upon this law, the Motion for Summary Judgment was overruled. A copy of the court's ruling is attached hereto.

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CHAPTER 900

PREMISES LIABILITY

IOWA CIVIL JURY INSTRUCTIONS

C

900.1 Essentials For Recovery - Condition Of Premises - Duty To Invitees. The plaintiff must prove all of the following propositions:

1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.

2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff or one that the defendant should have expected the plaintiff would fail to protect [himself] [herself] from.

3. The defendant was negligent in (set forth the particulars of the claim of negligence in failing to protect the plaintiff).

4. The negligence was a proximate cause of the plaintiff's damage.

5. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No _____.]

Authority

Konicek v. Loomis Bros. Inc., 457 N.W.2d 614 (Iowa 1990)

Stover v. Lakeland Squareowners Ass'n, 434 N.W.2d 866 (Iowa 1989)

Hanson v. Town & Country Shopping Center, 259 Iowa 542, 144 N.W.2d 870 (1966)

Restatement of Torts (Second), sections 343 and 343A

Comment

Caveat: The Iowa Supreme Court has noted that it has 'backed away from conclusively basing a land possessor's duty of care on the status of the injured parties." Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984). Thus far however, the court has not abolished the distinction among duties to invitees, licensees and trespassers.

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IOWA CIVIL JURY INSTRUCTIONS

900.2 Essentials For Recovery - Condition Of Premises - Duty To Licensees. The Plaintiff must prove all of the following propositions:

1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.

2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff

3. The plaintiff did not know or have reason to know of the condition and the risk involved.

4. The defendant was negligent in failing to [make the condition safe] [or] [warn the plaintiff of the condition and the risk involved].

5. The negligence was a proximate cause of the plaintiff's damage.

6. The nature and extent of damage

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No _____.]

Authority

Sullivan v. First Presbyterian Church, 260 Iowa 1373, 152 N.W.2d 628 (1967)

Restatement (Second) of Torts, sections 341 and 342

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900.3 Essentials For Recovery - Condition Of Premises - Duty To Trespassers - Negligence. The plaintiff must prove all of the following propositions:

1. The defendant knew or had reason to know of the presence of the plaintiff on the premises

2. The defendant afterward was negligent by failing to exercise reasonable care for the plaintiff's safety by [set forth the particulars of the claimed negligence.]

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3. The activities were the proximate cause of the plaintiff's damage.

4. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Champlin v. Walker, 249 N.W.2d 839 (Iowa 1977)

Restatement of Torts (Second), sections 333 and 336

Comment

Note The Iowa Supreme Court has noted but not addressed adoption of Restatement of Torts (Second), sections 334 and 370. See Champlin v. Walker supra.

900.4 Essentials For Recovery - Condition Of Premises - Duty To Trespassers - Willful Or Wanton. The plaintiff must prove all of the following propositions:

1. The Defendant's actions in [set forth the action or conditions complained of] were willful or wanton. Actions are willful if intentionally done to cause harm.

2. The activities were the proximate cause of the plaintiff's damage.

3. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Champlin v. Walker 249 N.W.2d 839 (Iowa 1977)

Restatement of Torts (Second), sections 333 and 336

Comment

Note The Iowa Supreme Court has noted but not addressed adoption of Restatement of Torts (Second) sections 334 and 370. See Champlin v. Walker supra

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IOWA CIVIL JURY INSTRUCTIONS

900.5 Condition Of The Premises - Knowledge Or Notice Of The Condition. The [owner] [occupant] of premises is presumed to know all conditions on the premises that are caused or created by the [owner] [occupant] or the [owner's] [occupant's] [agent] [employee]. The [owner] [occupant] of premises is not responsible for an injury suffered by a person on the premises which resulted from a condition of which the [owner] [occupant] had no knowledge, unless the condition existed for a long enough time that in the exercise of reasonable care the [owner] [occupant] should have known about it.

Authority

Ling v. Hosts, Inc., 164 N.W.2d 123 (Iowa 1969)

Weidenhaft v. Shoppers Fair, 165 N.W.2d 756 (Iowa 1969)

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IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

GUY PARMETER, Plaintiff, vs. CONNIE WALSTED, Defendant.	LAW NO. 107395C RULING RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed February 15, 1996)

Defendant Connie Walsted's Motion for Summary Judgment came on for hearing on March 14, 1996. Defendant was represented by attorney Michael W. Ellwanger. Plaintiff was represented by attorney Al Sturgeon. The Court heard the arguments of the parties and took the matter under advisement. Now, after reviewing the record and applicable law, the Court rules as follows:

RULING

Summary Judgment Standards

Summary judgment is proper if the entire record before the court shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405, 408 (Iowa 1993). In ruling on a motion for summary judgment, the court must examine the record in the light most favorable to the party opposing the motion. Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 258 (Iowa 1991). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the party resisting the motion for summary judgment, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 195 (Iowa 1985). If, however, the conflict consists only of the legal consequences flowing from undisputed facts or from facts viewed most

favorably toward the resisting party, summary judgment is proper. Paul v. Ron Moore Oil Co., 487 N.W.2d 337, 337-38 (Iowa 1992).

C

The moving party has the burden of showing that no genuine issue of material fact exists, and that they are entitled to judgment as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985). The party resisting summary judgment, however, must set forth specific material facts in dispute and show that there is a genuine issue for trial. Bradshaw v. Wakonda Club, 476 N.W.2d 743, 745 (Iowa Ct. App. 1991). Summary judgment may be granted only if the court determines that no such issue is present, and that the movant is entitled to judgment as a matter of law. Bates, 467 N.W.2d at 258.

Landlord Liability

Plaintiff Guy Parmeter, hereafter the "tenant," rented a house from Defendant Connie Walsted, hereafter the "landlord." In the present action, the tenant is suing for injuries he allegedly sustained from a fall on a stairway located in the basement of the house. The tenant contends that the stairs were dangerous and defective, in violation of city code requirements, and that he and his co-tenants notified the landlord about the condition of the stairs on several occasions. The landlord moves for summary judgment on the grounds that she surrendered possession and control of the house and stairs to the tenants. In the absence of evidence that she exercised or retained some control over the stairs, the landlord argues that she owed no duty to the tenant on which liability for personal injuries could be based.

The landlord relies on several Iowa cases which state that an owner is generally not liable for injuries to a tenant occurring on premises where the owner has retained no control. See, e.g., Wright v. Peterson, 146 N.W.2d 617, 620 (Iowa 1967). The reason for this is that once the

landlord has surrendered both possession and control of the rented property, the landlord has no duty to look after the premises or keep them in repair. See Byers v. Evans, 436 N.W.2d 654, 655 (Iowa Ct. App. 1988) (quoting Prosser on Torts). As the landlord notes in her brief, the rule of caveat emptor applied under the "general rule."

There was considerable dissatisfaction with this general rule, however. In 1972, the Iowa Supreme Court criticized the "antiquated concept of caveat emptor" and recognized an implied warranty of habitability in residential leases. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972). The supreme court held that

> "[a] landlord impliedly warrants at the outset of the lease that there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty . . . is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein."

Id. at 796. The supreme court has not determined whether a landlord's breach of this warranty gives rise to a cause of action for personal injuries, Poyzer v. McGraw, 360 N.W.2d 748, 751 (Iowa 1985), but the court has found that incidental and consequential damages are recoverable. Roeder v. Nolan, 321 N.W.2d 1, 5 (Iowa 1982).

As it applies to residential leases, the "general rule" was further modified by Iowa's adoption of the Uniform Residential Landlord and Tenant Act. See Iowa Code § 562A.2(2) (1995). The Act requires, among other things, that a landlord must "comply with the requirements of applicable building and housing codes materially affecting health and safety," and "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable

condition." Iowa Code § 562A 15(1)(a), (b) (1995). In imposing these duties, the Act makes no distinction between areas "controlled" by the tenant and areas "controlled" by the landlord. Compare with Iowa Code § 562A.15(1)(c) (1995). Thus, the landlord's duties to repair and maintain would extend to the stairs in question, regardless of whose control they were under.

C

The court is unaware of any Iowa appellate decisions which explicitly indicate that a tenant has a cause of action for personal injuries arising from a landlord's breach of duties imposed by chapter 562A. The supreme court has been confronted with this theory of liability, however, on at least one occasion. In Poyzer v. McGraw, 360 N.W.2d 748 (Iowa 1985), a tenant's personal injury suit was grounded in part on the landlord tenant act. The supreme court rejected the claim because it held that there was no rental agreement, thus the Act did not apply. But the supreme court did not indicate that a personal injury claim based on the statute is improper.

Research of the law in other states with similar landlord tenant statutes reveals that many jurisdictions recognize a personal injury cause of action for a landlord's breach of duties imposed by statute. See, e.g., Shroades v. Rental Homes, Inc., 427 N.E.2d 774 (Ohio 1981); Humbert v. Sellars, 708 P.2d 344 (Or. 1985); Watson v. Sellers, 385 S.E.2d 369 (S.C. Ct. App. 1989). In Watson v. Sellars, a tenant was injured after falling on defective stairs leading to the door of her trailer. As here, the landlord argued that the common law imposed no legal duty on the part of the landlord to keep in repair leased residential premises under the control of the tenant, and contended that a cause of action could not be based on the landlord tenant act. After analyzing statutory provisions virtually identical to those adopted in Iowa, the South Carolina Court of Appeals held that the Act did provide a basis for a cause of action in tort in favor of a tenant of

residential property against a landlord who failed, after notice, to make necessary repairs. The Watson court also made the following observation:

> "As a matter of fact, the vast majority of states now reject the thesis that a landlord is immune from tort liability for injuries sustained on rented premises; an abrogation of this immunity has been advocated by most legal commentators and it has been abolished either in whole or in part in the majority of the states of this nation."

Id. at 374.

At least one jurisdiction has allowed a personal injury cause of action by finding that the requirements imposed under the landlord tenant act satisfy section 357 of the Restatement (Second) of Torts. Jackson v. Wood, 726 P 2d 796 (Kan Ct. App. 1986). Section 357 establishes that a landlord can be liable for injuries caused by a defective condition on the rental property if the landlord has contracted to keep the property in repair. Restatement (Second) of Torts § 357 (1965). The Jackson court held that since duties imposed on a landlord by the landlord tenant act were a part of every residential lease, there was a contract to repair within the meaning of the Restatement (Second). Id. at 800. Similar to Kansas, Iowa law provides that a landlord may be liable in tort for injuries resulting from conditions of disrepair where the landlord has contracted to keep the property in repair. Long v. Jensen, 522 N.W.2d 621, 623 (Iowa 1994). Similar to the statute in Jackson, Iowa Code chapter 562A requires landlords to make repairs to residential property. Under the reasoning of Jackson, the exception to the "general rule" of nonliability where a landlord has surrendered control, but has agreed to keep the property in repair, see Byers v. Evans, 436 N.W 2d 654, 655 (Iowa Ct. App. 1988), would apply to the present case. Thus, even if the tenant's cause of action could not be based on the landlord tenant act, it could be grounded on section 357 of the Restatement (Second) of Torts.

The Restatement (Second) of Property likewise takes the position that a landlord may be subject to liability under the circumstances involved here:

> "Landlord Under Legal Duty to Repair Dangerous Condition
>
> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is a violation of:
>
> (1) an implied warranty of habitability; or
>
> (2) a duty created by statute or administrative regulation."

Restatement (Second) of Property § 17 6 (1977) Assuming that the tenant is able to prove the landlord violated duties imposed by chapter 562A or a local housing code--an issue which appears to be genuinely disputed in the present case and is not raised in the landlord's motion--the Restatement (Second) would allow recovery for personal injuries caused by the breach.

Iowa law mirrors the Restatement (Second) in the case of housing codes, and provides a cause of action for personal injuries attributed to a landlord's violation of a local housing ordinance. Montgomery v. Engel, 179 N W 2d 478 (Iowa 1970). In Montgomery, as here, a tenant sued for injuries he sustained from a fall on stairs which he contended were in violation of standards imposed by municipal ordinance. Although the ordinance specifically provided for criminal sanctions, the supreme court determined that the duties imposed by the ordinance on the landlord could be the basis for a personal injury suit, and the remedies provided by the ordinance did not preclude such a suit. Although the stairs in Montgomery may have been under the landlord's partial control, this possible distinction from the present case is not relevant. Chapter 562A makes a residential landlord responsible for compliance with code requirements throughout the property, regardless of control.

The Court concludes from the forgoing that summary judgment is inappropriate in the present case. Montgomery provides authority for the tenant's claims which are based on city code violations The Court also believes that chapter 562A provides the tenant with a cause of action for personal injuries for a landlord's breach of duties imposed by the statute. Alternatively, since chapter 562A imposes on landlords a duty to repair and maintain property, the "agreement to repair" exception to the general rule recognized in Iowa, see Byers v. Evans, 436 N W 2d 654, 655 (Iowa Ct. App 1988), would apply in this case.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that Defendant Connie Walsted's Motion for Summary Judgment is overruled.

IT IS SO ORDERED.

Signed this 17th day of April, 1996

Michael S. Walsh
Judge, Third Judicial District of Iowa

Copy A. Sturgeon
W. Rawlings
4-18-96

D

EFFECTIVE MEDIATION
Meeting The Insurance Carrier's Expectations

Susan M. Brown
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Des Moines, Iowa

EFFECTIVE MEDIATION - MEETING THE INSURANCE CARRIER'S EXPECTATIONS

D

I. Mediation, defined in the context of this discussion, is two parties in dispute (pre or post suit) who agree to attempt settlement through a mutually agreeable neutral party (mediator).

A. The mediator may suggest settlement amounts but has no authority or power to bind the parties.

B. The mediator is not a decision-maker, only a facilitator.

II. Why the big Mediation push from the insurance industry?

A. Litigation cost management is a major objective of every insurance company.

1. Litigation costs may or may not be part of the liability coverage limit. In serious cases, costs run as high, or higher, than the loss. This leaves the policyholder uninsured, if part of the limit. If costs are in addition to the limit, they are an expense and have a substantial impact on the insurance company's financial bottom line.

2. Premium, an insurance companies' income, is rated on the amount of insurance sold and anticipated expenses. Competitive Pricing, to accommodate unprecedented increases in legal costs, is a major challenge.

B. Mediation is an effective legal cost containment tool, if a case is managed properly.

1. Early, focused discovery and evaluation provides early settlement opportunity.

2. Determine early on whether the case should be resolved (i.e. questionable liability or damages) or denied and defended through trial.

3. The majority of cases involve disputes where settlement is desired, therefore, prepare the case for settlement, not trial. Trial preparation can always be done if settlement efforts fail.

a. Obtain written discovery through Interrogatories.

b. Depose crucial parties (Plaintiff, Key Witnesses).

c. Retain key experts and obtain a short conclusory opinion if needed, to evaluate liability or damages (i.e. Economist; IME; Reconstructionist; Cause & Origin;

d. Obtain authorizations (if not already in the claim file) and request medical and wage information. Secure treating physicians clinical reports.

3. Evaluate the case based on early discovery and investigation.

4. Initiate settlement discussions. Defense will usually be at an advantage because they are ahead of plaintiff. Unless you are sure to settle, do not go to your top dollar in negotiations, leaving room to mediate.

5. Mediate if initial negotiations fail. Attorney's are positional in order to do their jobs effectively. Mediation allows parties to maintain their position while working toward a settlement through the mediator.

III. Skepticism from Defense Counsel.

A. There are no procedural rules in mediation, this is uncomfortable for some attorneys.

B. Negative response because of failed attempts. You don't win every case; and can't expect to settle every mediated case. Settlement may not take place until weeks after the mediation. If settled later, efforts are still a worthwhile process, as they facilitate movement and settlement.

C. Mediation is merely a fact finding process for the plaintiff. Only reveal what you want the other side to know. May find out something you don't know or that you know and they don't - reciprocal fact finding.

D. Parties are too far apart, never agree. Difference between demand and offer is never a reason to not try mediation. Mediation is designed to assist parties in realistic evaluation of their case.

E. If settle every case, never get trial practice. Many cases settle at the courthouse steps. You will best serve the insurance client's interests by getting to early evaluation and settlement before all the costs of trial preparation incurred and then making a settlement recommendation.

IV. Keys to Successful Mediation.

A. Know opposing counsel and how they operate [1] (Pattern of negotiation, how often try cases, reasonable/hardball, cash flow problems, control over client, reputation in community, usually settle or not, success/failure in recent trials, other cases demanding attention.)

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[1] Tammy J Meyer, Learning The Art of Negotiation, Jan 1996 Def 20; Charles B. Burr II, Common Sense Settlement Negotiations: The Art of Winning Without a Trial, Feb. 1990 Def 8

B. Know your case and be ready with case citations or statutes to support your position on either or both liability or damages. [2]

C. Know the venue, judge and potential jury pool; are they liberal or conservative, willing to give high verdicts or not? [3]

D

D. Evaluate Your Case Objectively.

1. Know the hard damages - out of pocket costs, medicals, lost wages, future lost income, property damage.

2. Know jury verdicts/settlements in similar cases.

a. Cautiously use national jury verdict reporters, they may include extraordinary amounts which skew average verdict results.

Sources for verdict reporters are National Jury Verdict Review and Analysis (201-624-1665); Verdict-Trak (201-624-1665); Lexis; Westlaw. [4]

b. Talk with other attorneys/adjusters who may have tried or settled similar cases.

3. Know the strengths and weaknesses of your case.

a. Recognize the weaknesses in your case and acknowledge them if brought out by the opponent, to preserve your credibility with the opponent and mediator. [5]

b. Counter any stated weakness with strength, from your case. [6]
Ex: Slip and fall from lettuce leaf on grocery floor. Point out area last inspected within 10 mins.; leaf in clear view; leaf not brown or crushed (evidence there a short while; no actual or constructive notice to store personnel who acted reasonably; contributing negligence by plaintiff.)

E. Negotiate with realistic offers.

1. Rarely reveal your top dollar to the mediator, as they will work from your top and plaintiff's low, to bring the parties together.

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2 Meyer, supra note 1, at 20.

3 Burr, supra note 1, at 8.

4 Meyer, supra note 1, at 21

5 Id.

6 Id.

2. Don't be discouraged by minimal movement by the opposing side. Continue the process, adjust responding offers accordingly; or refuse to make further offers until demand is at or below a set number (be ready to leave the table if this condition is not met).

3. If the demand is an outrageous number, start at a realistic number but send the message your expectation is major movement by the other side in response to a good faith offer.

4. Go to mediation with a settlement range and authority. Be prepared to change your position based on what you learn at mediation. Flexibility is key to successful mediation.

5. Never make a "drop dead" final offer unless it is. You lose credibility if you continue to negotiate after extending your "top dollar". [7]

F. Choose a good mediator.

1. Many companies have begun keeping a list of effective and ineffective mediators. Check with other attorneys who have used the mediator.

2. A mediator should be able to find out plaintiff's motivation. [8] This leads to many possibilities for settlement. Find out plaintiff's interest, i.e. want bills paid; mortgage paid off; concern future income (use structured settlement); new car; a house; an apology; revenge (a problem).

3. A good mediator discusses the case, the law, the issues with both sides, pointing out strengths and weaknesses. A poor mediator merely carries numbers back and forth and encourages "splitting the difference".

4. Do not discount mediators from plaintiff's bar. They usually have good evaluation skills and plaintiff counsel will be less alienated and likely to listen to the mediators comments/perspective.

G. All parties must be present at mediation.

1. Mediation creates a mind set of finalization. Plaintiff is going to a predetermined place with their counsel and the opposition to try to settle - like a day in court.

2. Mediation may be the first time the plaintiff hears the negatives of his/her case. If plaintiff's counsel has a client control problem, the process may facilitate settlement possibility.

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7 Burr, supra note 1, at 9

8 Meyer, supra note 1, at 24

V. Avoid Pitfalls.

A. Liens.

1. If the lien is a large amount, require a representative to be present at mediation for negotiation on the lien amount. Many times a workers' compensation lien is an obstacle to settlement, but can be compromised.

2. Upon settlement, at the mediation session, make it clear who will pay liens, how and when.

3. If liens are an unanswered question, add an indemnity agreement to the release (be sure you have a solvent plaintiff) or ask for counsel's personal indemnification. [9]

B. Confirm whether the settlement includes any advanced payments or if it is over and above paid amounts. [10]

C. If a minor is involved, determine who is responsible for filing court approval. [11]

D. If there is a Confidentiality Agreement, be certain all parties are aware and agree. [12]

E. If there are coverage issues, either non-covered allegations or policy limits problem, do not get involved. Evaluate the case as if there were no coverage issues. Your client is the insured, not the insurance company. [13]

F. When negotiating, watch for offers that are not really offers, they may backfire. Ex: "If you go to $100,000, I will recommend it to my client". If you agree, you have offered $100,000. Plaintiff usually comes back with a higher number demand. Solution: "I will offer $100,000 if your client will accept it". If not accepted, $100,000 is not on the negotiating table.

VI. Defense counsels can best serve the insurance carrier and policyholder clients by conducting early, focused discovery that will allow counsel and the company to efficiently evaluate liability and damages. Since most litigated cases settle before trial, negotiations may then be initiated early in litigation, if appropriate. Utilization of mediation as a negotiation/settlement tool, enhances settlement opportunities, preventing unnecessary legal expense and providing efficient, effective litigation case management by the company and counsel.

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9 Id. at 27.

10 Id.

11 Id

12 Id

13 Id. at 26.

E

DEFENDING THE TRAUMATIC BRAIN INJURY CLAIM: CLINICAL & LITIGATION CONSIDERATIONS

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ANNUAL MEETING
SEPTEMBER 25, 1996
DES MOINES, IOWA

DEFENDING THE TRAUMATIC BRAIN INJURY CLAIM:
Clinical & Litigation Considerations

E

I. Introduction - Clinical Overview

A. Prevalence, significance, and common causes

E

Introduction

> Every year in the United States, two million people sustain a traumatic brain injury, one every fifteen seconds.... Of these two million, over 100,000 will die. Traumatic brain injury is, in fact, the leading killer and disabler of this country's children and young adults. Motor vehicle crashes, child abuse, and violence are the major causes. The statistics are staggering, yet this nation as a whole remains unaware of traumatic brain injury.....[1]

A head injury is basically an injury serious enough to damage the brain to some degree. These traumas, especially mild or minor head injuries, have been referred to as the "silent epidemic" not only because of their prevalence but because they often represent frightening consequences and permanent changes in the lives of sufferers and those to whom they are close to. Not surprisingly, because of the relative prevalence of traumatic brain injuries each year - especially the "mild closed head injury" - it also is a significant source of personal injury litigation.

Epidemiology

As noted above as many as two million people a year suffer some degree of head trauma making these injuries one of the nations most devastating in terms of loss of function, death, family disruption and work productivity. Consider the following:

- Head injury is a serious public health problem in all industrialized nations, and is a significant factor in approximately half of all deaths related to trauma.
- The incidence and prevalence of traumatic head injuries is estimated as 200/100,000 and 400/100,000, respectively.[2]
- The most frequently injured are males between the ages of 15-24 years of age with an estimated annual incidence of 600/100,000![3]
- Approximately five hundred thousand of all head injury cases result in hospitalization.

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1 National Head Injury Foundation, *Every Fifteen Seconds* (brochure) (no date).

2 Cope, *Incidence, prevalence and economic aspects of traumatic head injury*, 11 Santa Clara Valley Medical Center: Head Injury Rehabilitation Project 1 (1982)

3 H. Levin, A. Benton, & R. Grossman, *NeuroBehavioral Consequences of Closed Head Injury* (1982)

- o Deaths from head injury result in 75,000-100,000 cases annually; and 30-50% of head injuries are associated with moderate to severe permanent impairment. For example, of those surviving a significant head injury, up to 90,000 annually will have a debilitating loss of function, 5,000 will develop seizures, and 2,000 will remain in a persistent vegetative state.[4]

- o Five to ten percent of persons suffering a *mild brain injury* will nonetheless suffer long-term residual neuropsychiatric sequelae.

Common Causes

A head injury may result from a variety traumatic events including motor vehicle accidents, falls, industrial accidents, assaults and acts of violence, and sports and recreational activities. It is estimated that at least 40% of all mild head injuries are motor vehicle related.[5] In MVA traumas one of two types of head injuries occur. Most commonly, the head will strike a solid object such as the door panel, steering wheel, or dash board. If the head is not struck, a head injury can still occur if the brain is significantly jostled. For example, in the case of severe "whiplash" resulting from a rear-end motor vehicle accident, a brain injury can occur because of the sudden rotation and front to back linear motion of the brain stiking the inside of the skull.

B. Neurophysiology and classes of TBI

Neurophysiology of the traumatic brain injury[6]

There are essentially two major classes of traumatic brain injury - "*closed head injury*" (CHI) and "*open head injury*" (OHI). Attorneys, insurance claims managers and most clinicians are more likely to be confronted with the former than the latter. A closed head injury is usually produced by either a blow to the head or a rapid acceleration and deceleration of the head during which the brain is bounced back and forth inside the skull.[7] The tension produced by either action can pull apart microscopic nerve fibers and cause damage to the activated system of neuro-fibers which send out signals or commands to all parts of the body.

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[4] Dept. of Health & Human Services, Interagency Head Injury Task Force Report, 7 (1989)

[5] Kraus & Nourjah, *The epidemiology of mild, uncomplicated brain injury*, 28 J. Trauma 1637 (1988)

[6] *See generally* Arthur C. Roberts, *Litigating Head Trauma Cases* §2.1 (1994) (excellent overview of the biomechanics of brain trauma due to traumatic head injury)

[7] It is important to understand that the brain can sustain a significant injury without the head striking any external object.

A frequent source of this type of injury are motor vehicle collisions. Commonly, in addition to stretching and tearing of nerve fibers, extreme stress is also put on the brain stem. The brain stem connects the ventral areas of the brain to the spinal cord. In the brain stem many functions are tightly located including control of breathing, heart rate, eye movements, swallowing, control of consciousness and facial movements. Basically, all sensations going to the brain, as well as signals from the brain to the rest of the body, are mediated by the brain stem. A closed head injury can either produce "diffuse" or "focal" damage to brain function depending upon the extent of the movement of the brain (e.g., where does it strike the skull, how often).

If the injury is diffuse it means there has been a stretching and tearing of nerve fibers in different areas of the brain (i.e., widely scattered but not random). Diffuse brain injuries are not specific to a particular domain of functioning therefore the resulting consequence will be a general disruption in the overall speed, efficiency, execution and integration of mental processes. However, if trauma to the brain is centralized in one particular area, it is said to be localized or "focal" and resulting in specific neurological damage (e.g., problems primarily with speech, memory, or vision).

The second type of brain insult or trauma is commonly referred to as an "open head injury" (OHI). This is represented by an observable injury to the head such as a gun-shot wound or penetration by a sharp object. Unlike a closed head injury, an OHI is usually located at a specific or focal point in the brain. Consequently, very specific problems will result. For instance, an OHI victim may demonstrate difficulties with word finding but have no problem with actual memory of what he wants to say.

It is important to note that while most injuries to the brain result from a blow or insult to the head, brain trauma can occur is several other ways. For example, a near drowning victim may suffer damage to brain cells because of anoxia or lack of oxygen to the brain. Similarly, when someone suffers a stroke because a blood vessel ruptures or becomes clogged, the blood supply - carrying oxygen and nutrients - is interrupted and injury to brain tissue occurs. Also, the build up of blood from a ruptured artery underneath the skull can compress brain tissue and lead to damage and loss of function. Finally, infections such as meningitis, brain tumors, certain diseases, and medication overdoses can also produce an injury or trauma to the brain.

Classification

Head injuries are often classified as "mild", "moderate", or "severe" (or catastrophic) depending upon the extent of damage to the brain and resulting disruption in overall functioning. *Mild* or minor head trauma, as indicated in the introduction, is by far the most common form of traumatic brain injury. While there are no universally accepted medical indicators or decision rules for classifying head trauma, a designation of "minor" or "mild" is usually attached when the following factors occur: the head is struck, or moved violently which results in a transient alteration of consciousness; the patient is hospitalized for a relatively brief period (sometimes not at all, but, possibly a few days); and is discharged to home without a prescription for formal follow-up treatment or rehabilitation.

It is notable that the alteration of consciousness usually, but not always, involves some brief loss of consciousness. In comparison, there is a rough correlation between length of coma and severity of head injury (as measured by outcome). However, with mild head injury, when the loss of consciousness is less than an hour, there is no demonstratable connection between the length of consciousness and severity of problems. This is not to say that a mild head injury should be taken lightly. Significant functional impairment can occur even when there is only a transient loss of consciousness. For example, many patients will have "awakened" by the time they arrive at the emergency room following a mild head trauma, although they might not recall the events before or during the accident, despite being awake and communicative.

Moderate and *severe* brain injury, at least in part, is defined according to the length of time a person is in a coma and the scope and duration of the resulting disabilities. Coma refers to a prolonged state of unconsciousness. When a period of consciousness lasts an hour or more, the term "coma" is usually applied. Accordingly, persons are thought to suffer at least a "moderate" head or brain injury if they are in a coma for up to six hours and they experience residual cognitive problems for more than a year. A "severe" injury by contrast is typified by a coma exceeding six hours and resulting disabilities. The disabilities generally affect several areas of functioning with a poor prognosis for recovery to the person's pre-trauma state.

C. Common sequelae

Regardless of the class of head trauma, it is reasonable to expect that the injured person will experience *some* change, however brief in duration, in his/her behavior, ability to function, and/or personality. As previously mentioned, symptoms can vary greatly depending upon the extent and location of the brain injury. What is particularly frustrating to closed head injury sufferers and those around them, especially if the trauma is seemingly mild, is that the injured person can display a variety of problems despite no observable physical injury.

Closed head injuries, where the damage to the brain is not localized or focused, may singularly or collectively produce a variety of emotional, physical, social, vocational, intellectual and physical problems for the injured person. Moreover, these problems may affect both the present and future life functioning. Common sequelae or changes in functioning associated with head trauma *in general* can be grouped into three classes: cognitive (thinking and reasoning) impairment; physical impairment; and psycho-social-behavioral impairment.[8]

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[8] *See generally Neuropsychiatry of Traumatic Brain Injury* 87-788 (B. Silver, R. Hales & S. Yodofsky eds. 1994)(summarizing projected "relative frequency" of neurobehavioral symptoms associated with mild and severe brain injury)

Cognitive Impairment Areas

- attention
- communication
- concentration
- judgment
- memory (immediate, short and long-term)
- perception
- planning skills
- reading skills
- writing

Physical Impairment Areas

- auditory
- coordination
- headaches
- paralysis (one side or both)
- seizures
- speech
- vision

Psycho-Social-Behavioral

- affect (inappropriate)
- agitation
- anhedonia (loss of interest)
- anxiety
- denial
- depression
- emotional dyscontrol
- fatigue
- mood swings
- personality changes
- sexual dysfunction
- self-esteem (lowered)

When damage to the brain is focal or localized, discernable syndromes or recognizable collections of behavior and symptoms emerge. This is because no part of the brain operates independently and an injury to one area often affects many functions simultaneously. One consequence, for example, that is probably familiar to many lay people is temporal lobe epilepsy. Damage to the temporal lobe often produces unprovoked aggression, poor memory, decreased sexuality, visual-perceptual problems, and difficulty discriminating sounds. *Appendix A* outlines some of the areas of the cerebral cortex and their major functions.

D. Assessment procedures

Neurodiagnostic Techniques

Today there is a variety of tests and procedures available to determine the nature and extent of a suspected injury to the brain.[9] Tests or techniques capable of providing objective evidence of organic dysfunction are sometimes referred to as neuroradiological or neurodiagnostic procedures. Some of the many procedures currently available for use with patients with brain injuries for research or clinical purposes are the following:

Skull and Neck X-rays

Skull x-rays are routinely used whenever there is evidence of trauma to the head or neck. X rays can identify the presence and extent of a fracture or break in a bone.

EEG/BEAM/qEEG

Electroencephalography (EEG), brain electrical activity mapping (BEAM), and quantitative electroencephalography (qEEG) are procedures that display areas of varying electrical activity in the brain. These procedures are useful in diagnosing seizure or abnormal brain wave activity due to head trauma.

CT or CAT scans

CT or computerized axial tomography is a sophisticated form of x-ray that is used in conjunction with a computer to identify "slices" or discreet sections of the brain that demonstrate swelling, fluid collection, hemorrhage, or a tumor. The CT scan is particularly useful at examining the bony structures of the brain.

MRI or NMRI

Similar to the CT scan, MRI's or magnetic resonance imaging[10] uses magnetic fields (instead of X rays) to produce a picture of brain tissues. More definitive than the CT scan, MRI's can detect slight changes in the brain that cannot be seen on a regular X ray or CT scan. The MRI is superior to the CT scan for its ability to delineate gray and white matter, detect demyelinating lesions, and image lesions in the certain areas of the brain such as the brain stem and temporal lobe. Moreover, the MRI can assist in detecting structural abnormalities associated with stroke and transient ischemic attacks (TIAs), tumors, cerebral edema, hydrocephalus, and cysts.

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9 *See generally Comprehensive Textbook of Psychiatry/VI* (H. Kaplan, B. Sadock 1995); Grossman, *Neuroradiology: The Requisites* (1994); Samuels, *Manual of Neurology: Diagnosis & Therapeutics* (1994)

10 NMRI simply refers to Nuclear Magnetic Resonance Imaging

PET

PET or positron emission tomography allows for the assessment of cortical and subcortical brain *function*. In other words, PET scanning is able to image deep brain functions. This information is useful in determining cerebral dysfunction due to head trauma, stroke syndrome, TIAs and some mental illnesses.

SPECT

Similar to PET, SPECT or single photon emission tomography utilizes radioactive substances to visualize functional aspects of both cortical and subcortical areas. Because of the longer half-lives of the isotopes used, SPECT is able to image the brain over a longer period of time than PET.

Regional Cerebral Blood Flow

The amount of blood flowing to a region of the cortex is positively correlated to the metabolic activity of that region. Accordingly, regional CBF imaging or rCBF measures blood flow to the cerebral cortex (but not deep brain structures) which can be useful in detecting disrupted or damaged areas of the brain. Like the SPECT, rCBF is primarily a research procedure at this time.

Neuropsychiatric & Neuropsychological Procedures

In addition to various objective medical investigatory procedures, careful behavioral observation, clinical interviewing, and paper and pencil testing by experienced, qualified professionals can also yield significant neurodiagnostic information. In cases in which a brain injury is suspected, the neuropsychiatrist and neuropsychologist may prove invaluable, if not essential, to the accurate diagnosis of a patient's complaints of cognitive impairment.

Neuropsychiatric examination

The study of psychiatric symptoms associated with classical neurological conditions (e.g., depression associated with damage to the dominant frontal lobe) and the study of neurological symptoms associated with classical psychiatric conditions (e.g., abnormal visual tracking associated with schizophrenia) are two primary areas in the field of neuropsychiatry. The trained neuropsychiatrist combines a knowledge of neurology and clinical psychiatry in order to diagnose neurological conditions that may initially present with psychiatric symptoms alone. An understanding of the interface between psychiatry and neurology helps clarify the process by which discrete disorders of the brain can result into the complex symptoms seen in many psychiatric disorders.

To accurately differentiate psychiatric symptoms that are the result of brain dysfunction and their probable cerebral etiology from classic functional or non-organic disorders, the neuropsychiatrist often times conducts an evaluation that develops specific information directly from the patient and combines it with data derived from other

diagnostic sources (e.g., neuroradiological test results; medical records; neuropsychological testing).

The examination of a head trauma patient by a neuropsychiatrist, especially if conducted in conjunction with a legal case, will generally require a fairly comprehensive mental status examination because of the number of functioning areas that typically must be assessed (*see* Appendix B). In some respects the neuropsychiatric mental status examination (NPMSE) is to psychiatry what the physical examination is to internal medicine because of its scope and attention to detail

Neuropsychology

Clinical neuropsychology is specialty within psychology that integrates specific educational, scientific and professional contributions of the discipline of clinical psychology with relevant developments in the neurosciences, This integration addresses the description, diagnosis, and remediation of neuropsychological deficits resulting from disorders that affect the neuroanatomical and pathophysiological sub-states of behavior and the promotion and maintenance of neuropsychological functioning. It is principally concerned with the development and integration of behavioral and neurological sciences for the understanding of brain-behavior relationships.

Like the neuropsychiatrist, clinical neuropsychologists requires an additional level of knowledge and training that is customary provided in traditional clinical psychology graduate education. At a minimum, the competent neuropsychologist possesses a knowledge of the central nervous system and dysfunction and the relationship between central (structural and functional) processes and the psychological processes that are affected by the pathophysiological changes in the central nervous system. While it has been argued that the only way for consumers (e.g., attorneys, patient advocates) to be assured that a psychologist claiming to be a "neuropsychologist" is indeed properly trained would be for board certification in neuropsychology[11], this is clearly not the norm for a significant number of professionals who offer neuropsychological services[12].

Applying principles of experimental and clinical psychology to the analysis of cognitive and behavioral disturbance associated with injury, disease, or abnormal development of the brain, neuropsychological testing may be viewed as a refinement and extension of certain aspects of the traditional neurological exam. For example, the same behavioral and mental capacities that are subject of the neurological evaluation are also assessed in a more precise and objective manner by neuropsychological testing. Basically, neuropsychological tests are standardized procedures that produce quantifiable and reproducible results that compare scores of normal persons of the age and demographic

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11 There are presently two recognized boards that certify diplomates in neuropsychology - the American Board of Clinical Neuropsychology (ABCN) and the American Board of Professional Psychology (ABPP - neuropsychology)

12 *See e.g.*, McCaffrey, *Educational backgrounds of clinical neuropsychologists in APA-approved internship sites*, 16 Pro. Psychol: Res. & Prac. 773 (1985)

background of the person being tested with scores that have been empirically determined to represent brain impairment. As such, clinical neuropsychologist assess current behavioral disturbance that are likely associated with central nervous system dysfunction. In conjunction with a variety of history and diagnostic data[13], the neuropsychological examiner with his/her array of test procedures (*see* Appendix C), is often capable of addressing a variety diagnostic decisions essential to the injury and causation analysis process. For example, the comprehensive neuropsychological assessment may provide a baseline of cognitive functioning by the patient/litigant which can then be used for a variety of diagnostic, prognostic, and treatment decisions. Some of the decisions include:

1. Differential diagnosis between psychological and organic syndromes and disorders (e.g., depression v. dementia).

2. Differential diagnosis between two or more suspected etiologies of cerebral dysfunction (e.g., tumor v. cerebral vascular trauma).

3. Comparison of pre- and post-neuropsychological functioning following surgical, pharmacological, or behavioral interventions for purposes of assessing treatment efficacy and recovery potential.

4. Establishment of baseline measures to monitor progressive cerebral disease or recovery processes (e.g., neoplasms, demyelinating disease, head trauma).

5. Assessment of cognitive and affective status for the formulation of rehabilitation strategies and the design of remedial interventions.

Sometimes neuropsychological testing is the only procedure capable of detecting, identifying, and quantifying specific cerebral impairment and its likely area of damage. This is especially true in cases involving mild brain injury. All neurological and neuroradiological testing (e.g., CT, MRI, EEG) will be "normal" yet the patient will complain of a number of cognitive deficits. Neuropsychological testing, and to a lesser extent, the neuropsychiatric mental status examination, is then employed to fully identify the nature and extent of the patient's problems.

E. Outcome assessment

It is usually difficult to predict the outcome or recovery rate of head trauma during the first hours, days, or even weeks. In fact, with or without intervention the outcome may remain unknown for many months or years. The unpredictableness of the effects and recovery from traumatic head injury is in large part due to the individual and specific circumstances of the injury. There is considerable research and controversy regarding what factors tend to indicate good recovery prognosis.

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[13] *E.g.,* essential background data (e.g., academic, developmental, medical, mental, and vocational histories); psychological, neurological, and/or neuropsychiatric examinations; neuroradiological test results, and general laboratory tests

Generally, pre-trauma factors thought to effect prognosis and the speed of recovery, especially in mild head injury cases, are:

- o patient's age
- o pre-existing personality disorders
- o previous head injury experiences
- o alcohol use, especially chronic and/or at the time of trauma
- o significant emotional or social pressure, following the trauma
- o pre-existing medical history
- o physical exercise

In terms of the nature of the trauma itself, the correlation between length of amnesia[14] and prognosis, especially in patients over 30 is frequently thought to be a useful clinical indicator.

Degree of Trauma Severity (possible)	Duration of Post Trauma Amnesia
Slight impairment/residual symptoms (if any)	0 - 15 minutes
Mild impairment/residual symptoms	15 - 60 minutes
Moderate impairment/residual symptoms	1 - 24 hours
Severe impairment/residual symptoms	1 - 7 days
Very Severe impairment/residual symptoms	> 7 days

[14] Post Traumatic Amnesia or PTA

Lastly, factors thought to be indicators of prognosis and positive recovery in *moderate to severe brain injuries* are:

	Poorer	Better
(1) Age	Old Age	Youth
(2) Glasgow Coma Scale	<7	>7
(3) Pupillary Light Reflex	Pupils Remain Dilated *(Brainstem injured)	Pupil Contracts
(4) Dolls Eyes	Impaird *(Brainstem injured)	Intact
(5) Caloric Testing With Ice Water	Eyes Do Not Deviate *(Brainstem injured)	Eyes Deviate To Irrigated Side
(6) P.T.A. Length	Long P.T.A.	Short P.T.A.
(7) CT Scan	Large Blood Clot	Normal
(8) Evoked Potentials	Deficient	Normal

At no time is any of this information lost on the neuropsychiatric or neuropsychological examiner. Even in cases of moderate to severe head injury, this data will be essential to these examiners in terms of determining the nature and extent of any assessment they conduct as well as recommendations they might later make in terms of rehabilitation and family counseling.

II. Defense of Damages Strategy - A suggested protocol for attorneys

A. Step One: Identify the Injuries: "Establish the Clinical Picture"

1. Classify the case according to injury

Early in the life of a case, especially if on its face it is reported to be relatively serious,[15] attorneys and claims professionals should begin at least a preliminary assessment or screening of the case. For the attorney, early screening will alert him or her to the necessity of retaining specialists to assist with identifying appropriate discovery and interpreting available records. Early screening assists the insurance representative by enabling him or her to set appropriate reserves, identify whether legal counsel especially familiar with head trauma cases requires retaining, and mustering other resources that will be beneficial to the defense of what might amount to a significant damages case.

Legal counsel and claims professionals do not need to be specially trained in medicine or psychology to at least *screen* the case. All that is necessary is common sense, the general experience that is developed over time analyzing and litigating general trauma claims and an idea of what questions need to be answered. The following is a thumbnail sketch of a suggested screening process.

Factors to Consider

Initially, screening should address two primary issues: likely liability and probable damages. Liability will be dictated by a variety of legal and insurance policy related factors and is left to the capable analysis of legal counsel and the claims professional handling the file. Even in cases in which liability *appears* to favor the defense, it behooves both counsel and claims to at least analyze the **damages claims** in the event that later considerations prompt resolution via settlement.

Injury

Damages analysis primarily addresses two components: injury and causation. Accordingly, any preliminary screening should be done with an eye toward both of these considerations, though the injury component is usually the only area that is prone to quick assessment. Once a sufficient understanding of the cause of action is developed, legal counsel and claims personnel should be asking two questions in preliminarily gauging the seriousness of the potential damages.

- Claim of Injury v. Cause of Action

  How do the claims of injury (e.g., physical, psychological, cognitive) and damages (e.g., work loss) compare with the cause of action (e.g., MVA, fall in hole, assault)?

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[15] *E.g.*, Demand letter from claimant's attorney or notice of injury to insurer.

This question simply requires a common-sense analysis of the available information about the injury claims or potential claims. In other words, do the currently reported complaints "make sense" when compared to the mechanism of injury and its relative seriousness (e.g., "minor fender bender" MVA, head on collision, rape assault).

o Claims Made v. Claims Possible

How do the claims of injury compare with the nature of injuries documented in the available records?

This preliminary assessment, again, does not require a sophisticated knowledge of medicine, science, etc. A cursory knowledge of neurophysiology and common sequelae associated with traumatic brain injury, coupled with the comprehensible language contained in the records, and the attorney's own background knowledge is sufficient to make this comparison at a general level. Understandably, some preliminary discovery or records procurement will generally be necessary before this question can be answered. However, complete or comprehensive discovery is often not required, though it will be necessary later to clarify any preliminary analysis.

It should be noted that this assessment is only looking at the currently reported complaints and can not address the full panorama of possible damages/injury complaints that may later develop or be claimed (e.g., worsening of injuries, late emerging emotional problems, loss of work, disability, etc.). Moreover, this analysis is not intended to evaluate the reliability or competency of the information provided. Notwithstanding these conditions, the early "visceral" and/or common-sense assessment of an injury claim should be an important first step in preparing the defense of damages in a personal injury file. Recall, that its purpose is to simply give the attorney and/or claims professional a general idea of the potential magnitude of the damages in order to reasonably and timely allocate appropriate resource for its full analysis[16] and defense.

Causation

Screening for causation is generally not a viable option - at least not during the initial stages of opening a file - because of the need to evaluate the claimant's history as well as the many nuances of the cause of action. However, if preliminary documentation such as neurodiagnostic reports reveals evidence of old injuries or mentions past hospitalizations or treatment (medical, psychological) then interest regarding causation should be piqued.

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[16] This analysis will later involve a reliable understanding of the nature of the trauma, scope of complaints, losses, and foreseeably compensable damages, and the available evidence (medical, psychological, economic) that is purported to support the plaintiff's claims of damages.

2. Muster needed resources

Following a preliminary screening of the plaintiff's damages claims, the attorney should promptly implement an aggressive course of information *discovery*. Part of this action plan should be the determination of whether additional expertise is needed. The timely use of a *consultant* throughout the life of a case should be considered at this point. Notwithstanding the additional financial expense that the retaining of any professional represents, the value of consultant to the efficient management and strategy development of a case should not be overlooked.[17] *This is especially true in the traumatic brain injury case because of the unfamiliarity of many attorneys with these types of injury claims, their potential for requiring considerable discovery, and the various litigation considerations that are unique to these cases.*[18]

The damages consultant, who is generally a non-discoverable, should be retained as early into the life of a case as possible. This can include in the aforementioned "preliminary damages screening" stage if the plaintiff's damages or their probable cause is especially perplexing[19]. By retaining the consultant in the early stages of a case counsel can benefit from this added expertise during all phases of case preparation (e.g., save time and valuable resources).

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17 *See* Appendix F (The Forensic Consultant: Uses and Considerations)

18 *See e.g.*, Appendix E (Summary of Commonly Misunderstood Facts About Brain Injuries)

19 For example, if the claimant suffered multiple traumas - including a possible traumatic brain injury - as a result of the cause of action and there is a demand for payment for highly specialized in-patient rehabilitation. Questions may arise regarding the timing and/or efficacy of this proposed intervention (generally or specific to the identified rehabilitation facility or program). Similarly, in cases involving what appears to be a mild head injury, plaintiffs with significant pre-existing medical, psychological, or lifestyle problems should be very carefully evaluated due to, among other factors, causation considerations.

B. Step Two: Determine the Possible Compensable Damages

1. Discovery Considerations

From a damages perspective, the objective of discovery should involve obtaining information regarding three essential areas: (1) the plaintiff's pre-trauma history[20] and functioning[21]; (2) the nature of the cause of action; and (3) the plaintiff's post-trauma history and functioning.

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Lawyers have a variety of discovery procedures that they can use to obtain information about a person's history, functioning, and the cause of action. For nearly all of the standard discovery procedures - interrogatories, production of document requests, depositions - a two step process is suggested: (1) careful drafting of comprehensive requests; (2) reviewing materials received in response with those requests in order to assess the claimant's full compliance and identify additional information for further discovery.

Interrogatories

Since interrogatories are usually the first discovery procedure used by either party in most personal injury cases, their general objective should be to gain as much information as possible early in litigation. Accordingly, unless limited by applicable rules of evidence, questions should be both expansive in coverage and detailed in nature.

Topics commonly addressed in interrogatories in general, and in head trauma cases in particular include, but are not limited to:

- Historical background of the claimant such as demographics, medical history including medications, mental health history, legal history, history of violence, drug history, employment history
- Information regarding the cause of action such as descriptions of conditions, witnesses, any police investigation, claimant's condition just prior to the trauma including the ingestion of drugs, medication, alcohol, etc.

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[20] From a forensic damages assessment context, *history* refers to the events and circumstances that comprise and describe the patient or plaintiff's life. This information is static and quantitative. In other words, it refers to a factual description of the events which make of an individual's life. Common areas of history experience include: childhood, adolescence, education, employment, medical, mental health, substance abuse, legal (e.g., civil, criminal, workers compensation), social/interpersonal relationship (e.g., marital), sexual, recreation/interests, and traumas/stressors.

[21] From a forensic damages assessment context, *functioning* refers to the "manner" and "extent" to which an individual engages in the events or circumstances associated with his or her history. It is dynamic and reflects the qualitative aspect of a person's life.

- o Post-trauma intervention: evaluation, treatment (e.g., medical, mental health, rehabilitation)
- o Case related facts (e.g., names and involvement of experts, consultants)
- o Documents or assistance received in completing interrogatory answers[22]

Production of Document Requests

Requests for production of documents (POD), like interrogatories, should be as expansive in scope and detail as possible in terms of identifying specific documents. Unless there is a reason to limit the frequency of these requests, they should be filed as often as is reasonably necessary to obtain the information being sought. Moreover, every time information is received in response to a POD request, it should be scrutinized for compliance and additional discovery identification. The use of a consultant can be particularly useful in identifying needed records, evaluating compliance with previous POD requests, and identifying additional materials and information for further discovery requests.

Appendix G[23] provides a general list of documents or information that should be considered for POD requests in any personal injury case. The reason for such a comprehensive list is simple, one of the objectives in evaluating the damages in any personal injury case is the reconstruction of the claimant's history and functioning - before and following the cause of action. Accordingly, the paper trail that tends to accumulate in any person's life is often-times an invaluable means of facilitating such a reconstruction.[24]

Almost without exception, the use of a consultant or damages expert during this phase of the case development, is invaluable, if not essential. For example, in the mild to moderate head injury case, the claim for damages can be significant. Fortunately, the potential for damages mitigation tends to be fairly good **if** competent and timely discovery and analysis of the claimant's background and the cause of action is conducted.

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[22] This information may be significant in a traumatic brain injury case since the use or absence of assistance (e.g., use of documents, third-party help) to the claimant may help corroborate or contradict a claim of proximally caused cognitive impairment (e.g., memory impairment).

[23] Appendix G (Suggested Production of Documents Request: Damages)

[24] It is generally unlikely, however, that a complete reconstruction of an individual's pre and post trauma life can be accomplished solely through production of document requestions - no matter how successful the discovery process is. This is especially true when evaluating the issue of functioning.

Depositions

Once interrogatories have been received and reviewed and sufficient information about the cause of action and the plaintiff's history and claims of injury is established, deposing the claimant, his or her experts, and other third-parties should be *considered*. The purpose of deposing any of these witnesses is primarily two fold: (1) to gather additional information - either clarification of details revealed in the interrogatories and other documents or new areas of inquiry - and (2) to evaluate the person (e.g., claimant, expert) as a witness in terms of presentation and credibility. This latter objective is especially important with the head-injured claimant. For example, deposing this patient allows for his or her sympathy potential to be assessed as well as whether evidence of the types of injuries being complained of are presented (e.g., cognitive difficulties).

Questioning Considerations: Litigant

Litigants who report brain impairment require special consideration when opposing counseling is preparing and conducting his or her deposition. For one, these individuals will commonly complain of (among other complaints) memory and concentration problems, fatigue, and headaches. If these complaints are accurate, their ability to participate fully in the deposition may be compromised. Moreover, opposing counsel should always take care to note of any other factors that might skew or limit this litigant's "best" performance as a reliable historian, such as room lighting and outside distractions. In an effort to compensate for these possible concerns, as well as general complaint exaggeration which is not uncommon in any litigation, the deposing counsel should endeavor to shape the deposition environment and his/her questions accordingly.

To reduce the possibility that environmental factors might adversely influence the performance of the litigant reporting brain impairment it behooves the deposing attorney to be sensitive to several factors: the lighting in the room should not be too bright, the room temperature should be slightly cooler than normal[25], water should be readily available, outside distractions should be minimized[26], and seating of all participants would be such where the deponent's visual field is least encumbered by those around him.

In order to facilitate the litigant's accurate comprehension of the deposition questions the following format should be considered:

1. Ask short, clear questions and avoid compound questions. Even the mildly head impaired patient can become confused if questions are too "cumbersome."

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[25] This is especially true if a litigant is taking certain medications (e.g., psychotropics) that affect internal perceptions of body temperature. Moreover, many medications produce a cotton mouth feeling in the mouth.

[26] This includes visual distractions (e.g., too many people in the room, people outside the deposition who are observable to the deponent, people interrupting the deposition, a room that is cluttered with materials, wall hangings, etc.) and auditory distractions (e.g., noises from outside the deposition room, telephone ringing, etc.).

2. Make sure the claimant gives you a relevant and complete answers. For instance, when inquiring about his/her complaints, ask him/her to elaborate **descriptively**: example

   a. Describe the complaint (e.g., give examples)?

   b. How does it affect your daily routine? (ask for examples)

   c. Has (complaint) always affected you this way or in other ways (describe, examples)?

   d. When did you first experience this complaint?

   e. How long have you experienced this complaint?

   f. How frequently do you experience this complaint?

3. Be aware of any evidence of fatigue or confusion. Be prepared to take breaks and, if necessary, take a break yourself so to give the claimant a "rest."

4. When asking historical questions, it may be useful as a follow-up question to cite significant events that might assist the claimant in remembering general and specific dates.

   Example:

   Q: Tell me what happened in January 1990 that has lead to this lawsuit?
   A: I'm not sure (or I do not remember)?

   Q: What can you tell me about the *day after your birthday when you were in accident while driving the company pick-up truck*?[27]

5. All general questions should usually be followed up with specific questions that describe or illustrate the (typically) ambiguous response by the witness. example:

   Q: How are you feeling today?
   A: Fine.

   Q: Describe your mood right now?

   Q: How often do you feel this way during the seven days of the week?

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[27] NOTE: Limit giving any contextual information (e.g., day after birthday, driving truck) if you can. In doing so, a more reliable indication of overall memory function can be obtained.

Q: Do you experience any aches or pains at this moment? etc. (describe each one)

Content of the Claimant's Deposition

The content or scope of inquiry will frequently be dictated by how much is known about the witness at the time of the deposition. Accordingly, counsel - while generally wanting to be as thorough as necessary - should tailor his or her questions so that they globally address outstanding history and functioning information[28] as well as any other information relevant to the defense.[29] It behooves counsel to consider conferring with an experienced forensic expert or consultant prior to the deposition of the claimant, any critical third-party damages witnesses, and the opposition's damages experts. In addition to obtaining insights into what subject areas should be delved into, a knowledgeable expert or consultant may be able to provide specific questions to ask which are both on point but considerate of the claimant's reported impairment status.[30]

2. Proof of Damages Analysis: Experts

Determining the Need

Evaluations conducted, other than for treatment, during litigation can be an invaluable, if not, essential part of the discovery process. Sometimes generically referred to as independent examination, independent medical examination (IME), or simply forensic examination, its general purpose is to obtain reliable information about some aspect of the claimant's life and/or functioning. However, the decision to have such examination(s) conducted is not automatic, nor under all circumstances is one even legally permitted. The following factors, among others that counsel and the claims adjuster or manager deem appropriate, should be considered:

- What is the objective or purpose of the exam, and can it be met by other non-intrusive means?
- Expense

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[28] Counsel can use the sub-topics summarized previously regarding an individual's life history as an outline for questions the deponent about his or her history. These question, of course, are largely relevant to damages.

[29] *E.g.*, questions associated with liability; facts that may be relevant to applicable legal defenses

[30] The more involved an expert or consultant is in assisting counsel in the deposition process the more effective it (deposition) can serve as a supplemental interview to any IME previously conducted or contemplated in the future. In other words, an experienced expert or consultant can contribute specific questions and insights that are analogous to those he or she might normally provide him or herself if an IME were being conducted.

- o Availability of competent examiner(s) and/or resources to conduct the examination (e.g., sophisticated neuroimaging equipment)

- o Rules of evidence/legal considerations

- o What is the likelihood that it will produce information that is advantageous to the opposition or add confusion to the discovery process?[31] If better than 50%, does this likelihood outweigh the intended benefit to the defense?

- o What is the likelihood that the examination process will produce adverse effects (e.g., or significantly exacerbate current complaints)? For example, with the TBI patient who manifests significant emotionality (e.g., frontal lobe dysfunction) this should be a grave concern.

- o What is the likelihood that over time the plaintiff's proximally caused condition will change from what it appears to be now - deteriorate or become complicated[32] or improve.[33]

- o Are there currently reasons to delay or not conduct an IME?[34]

It should be noted that *even if* a number of these and/or other factors are evident or reasonably likely, an IME should not be ruled out. It does mean, however, at the very least that these concerns must be specifically addressed and/or guarded against by the examiner.

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[31] NOTE: This is an important consideration if the claimant is suspected of symptom exaggeration or, in the case of a brain impairment claimant, if his/her complaints are relatively mild and there is likely a number of other (non-cause of action related) factors responsible for these complaints. When this is the case the potential for **false-positive** findings of "brain damage" should be of concern.

[32] NOTE: This is a threshold concern in pediatric head injury cases since a delay in manifest and residual symptomatology and impairment commonly occurs. Moreover, seizures in child and adults, can also be a late developing complication.

[33] For example, a wide range of "spontaneous recovery" will occur following almost any level of brain injury for up to and even after 18 months post-trauma.

[34] When to delay or not schedule an IPE - General Considerations:

(1) There is insufficient information regarding the claimant &/or cause of action;
(2) Your expert may arrive at the same conclusion as plaintiffs' expert (e.g., claimant suffers from proximally caused moderate brain damage);
(3) High potential for false-positive or exaggerated results (e.g., acute head injury claims);
(4) Plaintiff's expert is weak - defense may decide to simply rebut plaintiff's proof of damages

Timing of an examination

When to conduct the IME can be just as important as why, what, type, and by whom. Typically, no IME should be conducted until sufficient document and other discovery has been conducted so that the potential examiner - if he or she chooses[35] - can become familiar with the background of the case and the claimant. If nothing else, attorneys or claims professionals will need this information themselves in order to decide if an IME is needed, and if so, what type.

Notwithstanding issues concerning litigation strategy - such as delaying an IME as late as is legally allowed in order to limit the opposition's scope of questioning of the defense expert during deposition - one medical reason to consider delaying any decision to schedule the IME of plaintiff claiming brain injury is the fact that a certain amount of "spontaneous recovery" will naturally occur.[36] Accordingly, if an examination (e.g., neurological, neuropsychological) is conducted too soon after the trauma, it will almost always produce inflated results of deficits and dysfunction far worse than the patient's eventual condition. From a defense of damages perspective, this development can be quite troublesome, if not disastrous, since counsel may have to withdraw, limit, or rebut his or her own expert! Similarly, if the claimant is involved in or will be involved in aggressive treatment and rehabilitation, it behooves counsel to delay any consideration of an independent examination until the benefits of the treatment have been significantly realized.

Assuming it is legally permitted, *re-examining* the claimant at a later time - such as following a reasonable period of rehabilitation, should also be considered. Sometimes, in order to avoid possible false-positive results, a much narrower or focused examination from the first one should be conducted. Re-evaluations, like choosing to have an evaluation conducted in the first place, should not be decided on casually or automatically. Consultation with the examiner who conducted the first evaluation will generally produce some valuable insights into whether a second testing is warranted. If a second examination is done it should usually be conducted as close in time to any scheduled adjudicatory hearing as possible (e.g., arbitration, trial, settlement conference) in order that your expert can provide you with the most recent assessment (e.g. valid) of the claimant. Moreover, the content and procedures used in the second examination should closely follow what was conducted in the first one so reasonably valid comparisons of results (e.g., progress, deterioration) may be made.

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35 Some examiners, especially regarding psychological injury claims, choose to have no pre-existing knowledge of the claimant and only a cursory familiarity with the cause of action before conducting an examination. A primary reason for this approach is to avoid being biased by historical and other data. Whether to review data (e.g, patient records) before or after an examination is solely a matter of personal preference by the individual examiner. There are equally valid and reasonable reasons to have some pre-existing introduction to the claimant's background as there is to the converse.

36 *See e.g.*, Swann v. City-Parish, 492 So.2d 1225 (La. App. Ct. 1st Cir., 1986)(rebuffing lower court's criticism of plaintiff's neuropsychological evaluation for occurring a little over two years after precipitating trauma, citing in part the expert's testimony that the best time to conduct testing was approximately two years post trauma since "there are certain transitory phenomena associated with the post-concussive syndrome," which should "pass before one administers a neuropsychological evaluation.")

Content/Objectives of an examination

The objective of an independent clinical or forensic examination is commonly called the *referral question(s)* and is an often a neglected and poorly applied part of the forensic assessment process by attorneys. Since it is the referral question that dictates the nature and scope of the information to be investigated by the examiner, it behooves the referral source to be as accurate, clear, and broad as necessary to address the questions germane to the litigation. Too often, referral sources (e.g., attorneys) "order an IME" and just assume that the examiner will "know what to do." This is a risky and often-times wasteful approach that will usually result in only a partial determination of what was needed - if that.[37] To avoid this problem in litigation, attorneys can do two things. They can solicit the assistance of the proposed examining expert in identifying what information will be needed. Or, if there is concern that involving the examining expert might contaminate or bias him or her, counsel can confer with a consultant who is not a named witness in the case can be done.

Appendix J provides an overview of a general forensic evaluation (contents and suggested procedures) in a case involving the complaint of traumatic brain injury. Obviously, each case will present its own set of unique information needs and evaluation considerations, thereby requiring a much more specific assessment protocol or set of protocols.

Examiner Considerations

Generally, the referral question associated with an evaluation of claims of possible significant injury, damages, or losses - such as a brain damage claim[38] - will primarily focus on developing the plaintiff's history and pre-trauma functioning and evaluating his current functioning.[39] This information, in order for it to be complete and reasonably reliable (especially for trial litigation purposes), *may* require an evaluation from more than one examiner (e.g., radiologist, neurologist, psychiatrist). In cases in which the claimant's possible proximally caused damages are extensive, it is highly likely that several experts will be needed to evaluate the claims of injury, their prognosis, and any treatment recommendations for mitigation purposes.[40] However, in the case of the more common "mild closed head injury" claim, counsel will frequently require one, possibly two, experts to address damages. In cases of suspected mild brain trauma, there is generally no

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37 *See e.g.*, Appendix L (A Sample of Common Errors & Omissions in the Assessment of Damages in Brain Injury Litigation)

38 *See e.g.*, Appendix H (Potential Damages & Losses in Head Trauma Cases)

39 *See* Appendix J (Injury Evaluation of the Brain Damaged Litigant: Suggested Subject Areas)

40 *See e.g.*, Appendix I (Potential Experts Useful to the Litigation of a Head Trauma Case

objective medical evidence of damage (e.g., CT, MRI, electrodiagnostic) therefore the need to involve a neuroradiologist, neurosurgeon, and possibly a neurologist is obviated. Due to the relative subtlety of symptoms reported by many mild head trauma patient, neuropsychological and neuropsychiatric experts are frequent examiners of choice. If there are also complaints of significant psychological problems, in addition to cognitive impairment, a second, separate expert psychological examiner (e.g., clinical psychologist or psychiatrist) may be appropriate.[41]

Claimant's Treating Professional v. Forensic Expert

There are times when the defense can effectively rely on the findings of the claimant's treating professional(s) to present expert evidence in support of its damages position. This determination is obviously made after a careful analysis of the treating professional's opinions on the threshold issue of "proximally caused injury"[42] and his or her credibility and reliability as a potential testifying witness.[43] In these situations, the retaining of an independent forensic expert may be unnecessary.

Whether to conduct an IME or multiple examinations, by what type of specialists, when and for what purpose are usually difficult decisions that require a careful weighing of many factors - medical, legal, financial, and case strategy related. The use of a consulting expert can be very helpful in sorting out and weighing these considerations.

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41 *See generally* Appendix K (Assessing Psychological & Neuropsychological Damages: Types of Examiners)

42 Reliance solely or primarily on the opinions of treating professionals should not be made exclusively on the basis of whether they support or coincide with the defense's theory of the damages. These opinions must also be superior to (e.g., more reliable or competent) than alternative theories of injury or challenges potentially raised by the plaintiff. In other words, the opinions of the treater must be sufficiently supported that they not only competently explain the claimant's proximally cause injuries but also address other theories of injury potentially raised by the plaintiff.

43 The witness must not only arrive at clinically reliable opinions but be capable of effectively communicating them in a legal forum - something a non-forensic professional may not be effective in doing due to inexperience.

C. Step Three: Identify Mitigating or Rebutting Theories

1. Injury related

A key to the effective rebuttal or mitigation of the plaintiff's damages claim, especially in high profile cases such as brain damages litigation, is the identification of alternative theories or reasons that account for the plaintiff's claims of injury and their likely cause. This is clearly a case specific task that fundamentally requires a careful and detailed analysis of the claimant's proof of damages all of the information that is or will be available about the claimant (e.g., history and pre and post trauma functioning) in general. Only after this information is developed and analyzed can supportable defense theories regarding injury and causation be produced. Appendix M outlines a number of defense of damages theories (rebuttal or mitigating) that can generally apply to many brain injury claims.

Whether there is evidence which completely rebuts or mitigates some or all of the plaintiff's damages claims will depend upon the claimant's pre-trauma status (e.g., physical and emotional health), the nature of the cause of action, and post-trauma events. However, in the great majority of cases - even those involving relatively severe impairment, there is often evidence that will allow the defense to at least argue at least one or more mitigating theories. This aspect of the defense's litigation preparation, like the critiquing of the opposition's proof of damages, will often benefit from the insights of a damages consultant - in addition to the capable expertise of defense counsel.

2. Causation based

The competent clinician, when assessing the nature and etiology of a patient's complaints, will always consider alternative causes that might either be producing, contributing to, or compounding them. This is *especially* true in cases involving a suspected "mild brain injury" because of the plethora of non-cerebral factors that can produce or mimic cognitive sequelae. To assume that all cognitive, psycho-social, and behavioral complaints are the result of trauma to the head is not only clinically naive but forensically disastrous should the clinician testify about causation. The importance of differential diagnosis in personal injury cases is well illustrated by the case *Chambers v. United States*, 656 F.Supp. 1447 (SD Tex. 1987). In *Chambers*, the defense proved to the satisfaction of the trial court that the minor plaintiff's learning disabilities were "developmental", and not the result of the closed head injury that he sustained in the cause of action. Consequently, no damages were awarded for the learning disability.

3. Assessment Procedures/Proof of Damages Factors

The analysis of the claimant's proof of damages should be conducted with at least two objectives in mind: assessing the validity and reliability of the evidence purported to support the plaintiff's claims of injury and identifying alternative theories of injury and causation for rebuttal purposes.

The evaluation of the claimant's proof of damages in many personal injury cases, such as brain injury litigation, ultimately comes down to critiquing the work-product and opinions of his or her experts. Trial counsel can often identify, via various discovery (e.g., deposition) and independent investigatory methods,[44] potentially useful information about an expert. However, it would be unreasonable to expect even the most experienced attorney to be sufficiently knowledgeable about any of the many clinical specialties likely to be involved in a significant brain damage case and/or to be fully capable in evaluating their methods, interpretations, and conclusions. Accordingly, it is encouraged that the defense retain an expert for the purposes of assisting with the critiquing the findings and opinions of the opposition's experts. *It is rule, rather than the exception, regardless of the credentials of the expert that errors and omissions in standard assessment procedures will be made.*[45] Therefore, the question that the defense should be raising is not "whether" the plaintiff's experts have committed an error(s) or omission(s) but "what" are they and how do they affect the validity and reliability of his or her proof of damages. It should be emphasized that the expert that the defense retains for this purpose should be considered a consultant and not named for testimony purposes. Moreover, this individual must not only be forensically experienced as well as thorough, but sufficiently familiar with the litigation process (in general) and the defense's objectives (in particular).

Not only can an analysis of the work-product of the opposition's expert be invaluable for deposition and cross-examination, there is the possibility that a plaintiff's expert may be restricted in his/her testimony or excluded altogether! Recent developments in the case law have re-focused attention on the role of expert testimony and what evidence should be admitted for jury consideration. For example, the United States Supreme Court in the matter *Daubert v. Merrell Dow Pharmaceutical, Inc.*[46], ruled that federal judges were obligated to "ensure that any and all scientific evidence admitted is not only relevant but reliable." Further, the court held that judges, in applying the Federal Rules of Evidence, must personally assess whether the underlying reasoning and methods of an expert's proposed testimony is scientifically valid. While the court failed to define or provide specific guidelines that judges must apply when making these determinations, many commentators feel that judges will nonetheless apply far more careful scrutiny to expert opinion before allowing it to be heard by a jury.[47] *Daubert* could have an important impact in profile litigation such as brain damage cases. For example, unproven theories regarding the use of neuropsychological testing to support a findings of diffuse axonal injuries and

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[44] *See e.g.*, Preuss, *Finding an Achilles Heel: Discovery Techniques for Adverse Experts*, DEF. COUNSEL J. 351 (July 1992)

[45] *See generally* Appendix L (A Sample of Common Errors & Omissions in the Assessment of Damages In Brain Injury Litigation)

[46] *See* 113 S.Ct. 2786 (1993)

[47] *See e.g., Daubert v. Merrell Dow*: Who Won? (article); "Torts" (article); *also see* Sherman, *'Junk Science' Rule Used Broadly*, 16 Nat'l. L. J. 3, 28 (10/04/93)("They [judges] are going to have to give a more reasoned statement about why they are letting in evidence....They can't do it on a rubber-stamp basis the way some of them did it in the past.")

computer generated evidence (e.g., car crash[48] and closed head injury re-creation) could be successfully challenged on *Daubert* grounds.[49] It is further believed that while *Daubert* applies to the federal judiciary, it is being headed by state courts as well.[50]

4. Post Trauma Functioning

In general, the issue of damages in personal injury cases is not determined, evidenced by, or even adequately explained by a medical or psychiatric diagnosis - a fact that frequently elude many forensic experts and attorneys no matter how experienced. Instead, it is the claimant's **functioning** which in large part defines the nature and quality (severity) of any damages. Accordingly, counsel should strive to have the claimant's functioning since the cause of action accurately and thoroughly examined. It is not uncommon for the claimant's actual daily functioning to contradict some of his or her complaints of impairment.[51] Moreover, functional data can be a powerful rebuttal or neutralizing factor to inflated, marginally supported conclusions by questionable expert testimony.

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[48] *Id.* 28 (Recent conference for federal judges regarding the application of the *Daubert* decision discussed several topics including "[P]roblems that arise from the use of computer-generated evidence....).

[49] *See e.g., New Test for PTSD Awaits Court Challenge*, Trial 108-109 (July 1993); Pitman, Orr, *Psychophysiologic testing for post-traumatic stress disorder: Forensic psychiatric application*, 21 Bull. Am. Acad. Psychiat. & L. 37 (1993)

[50] 16 Nat'l. L. J. 28 (10/04/93)("Even state judges feel a need to get up to speed on the *Daubert* requirements. *Daubert* is not controlling in their courts. But...Everybody has a sense it is the direction we might be going in.")

[51] For example, a claimant who is capable of successfully driving independently - especially long distances or to unfamiliar areas - will likely have a difficult time convincing a reasonable jury that he or she suffers from proximally caused impairments in short-term memory, attention, visual-spatial relations, and higher cognitive processing.

III. Conclusion

Brain impairment due to head trauma tends represents some of the most complex litigation that an attorney can undertake. The need for some specialized medical knowledge, coupled with an appreciation of the unique considerations associated with evaluating persons with brain impairment generally and over time makes these cases especially challenging.

It behooves the attorney faced with a claim of traumatic brain injury to develop a long-range strategy for purposes of understanding the potential damages and their likely cause(s). The damages in these cases can be successfully defended (e.g., rebutted or mitigated) if counsel takes the time to thoroughly assess the claimant's pre and post trauma history, functioning, and all complaints, as well as the mechanics of the precipitating trauma. Frequently, for a defense of damages strategy to be effective and efficient, it requires the involvement of outside expertise during the formulative stages of the case and throughout its life. Moreover, counsel must be willing to commit the necessary resources to obtain needed evidentiary results from appropriate examining experts, as well as sufficient deposition testimony from the claimant and any relevant collateral witnesses (for possible rebuttal purposes). Once all applicable data is gathered and carefully analyzed by the defense's expert(s) and/or damages consultant, it is not uncommon for various defense of damages theories to emerge. Moreover, even when there appears to be sufficient evidence to support some meritorious claim of proximally caused cognitive impairment, the defense may still be successful in mitigating those claims by effectively critiquing the plaintiff's proof of damages. This typically involves a careful analysis of the credibility, methods, and findings of the claimant's damages experts. It is not uncommon that errors and omissions in fundamental clinical assessment and reporting practices have been committed.

Finally, counsel should also give careful consideration to manner in which resolution of the case is effectuated. Binding and non-binding meditation and arbitration - especially in cases with high exposure and possible significant damages such as the moderate to severe traumatic brain injury claim - should always be investigated in lieu of trial, and in addition to traditional settlement negotiations between attorneys.

IV. Appendices

Appendix A: Cerebral Lobes & Associated Function Damage[52]

E

I. FRONTAL LOBE

The following are lists of syndromes and signs seen with frontal lobe lesions:

Either Frontal Lobe

1. Contralateral paresis in upper or lower limbs
2. Contralateral oculomotor neglect of voluntary gaze
3. Hemi-inattention
4. Perseveration
5. Cognitive changes: associative learning, estimation and judgment, sequencing, recency judgment, decreased fluency
6. Emotional changes: aspontaneity, lack of initiative, flatness of affect, lability, diminished anxiety

Nondominant (Right) Frontal Lobe

1. Impersistence
2. Failure to appreciate humor in speech or perception
3. Poor design fluency

Dominant (Left) Frontal Lobe

1. Nonfluent aphasia
2. Oral apraxia, manual apraxia
3. Impaired verbal, gestural fluency
4. Depression

Both Frontal Lobes

1. Akinetic mutism
2. Aspontaneity
3. Impaired utilization behavior
4. Gait apraxia
5. Incontinence
6. Perseveration
7. Cognitive changes: lack of judgment, foresight
8. Emotional changes: lability

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[52] J. McGlone, B. Young, *Cerebral localization* in CLINICAL NEUROLOGY 1-74 (Baker A., Joynt R. eds. 1986) [Philadelphia, Harper and Row]

II. TEMPORAL LOBE

The following are lists of syndromes and signs seen with temporal lobe lesions.

Either Temporal Lobe

1. Contralateral lower face paresis in spontaneous smiling
2. Visual field defect, especially homonymous, noncongruous, upper quadratic
3. Increased flicker fusion threshold to photic stimulation
4. Increased auditory threshold for high-frequency sounds and auditory inattention to the contralateral side
5. Decreased sexuality

Nondominant (Right) Temporal Lobe

1. Impaired nonverbal memory functions
2. Reduced discrimination of nonverbal sounds, pitch, and tonal quality; impaired discrimination of emotional vocalizations
3. Impaired discrimination of olfactory stimuli
4. Visual perceptual deficits

Dominant (Left) Temporal Lobe

1. Impaired verbal memory
2. Impaired phoneme identification, especially from right ear
3. Dysnomia

Both Temporal Lobes

1. Global amnesia (both hippocampi)
2. Kluver-Bucy Syndrome: apathy, placidity; psychic blindness; increased sexual activity; "sham rage"; increased oral behavior; increased touching
3. Visual agnosia
4. Cortical deafness
5. Auditory agnosia

III. PARIETAL LOBE

The following is a summary of neurologic and psychological deficits seen with lesions of the parietal lobes.

Either Parietal Lobe

1. Contralateral and hemi-sensory loss
2. Hemisensory neglect
3. Contralateral limb size and motility changes, including loss of muscle bulk and reduced growth in children
4. Pseudothalamic syndrome
5. Defective ocular pursuit movements and optokinetic nystagmus
6. Metamorphopsia
7. Constructional apraxia

Nondominant (Right) Parietal Lobe

1. Constructional apraxia (visuoperceptual component)
2. Spatial disorientation
3. Impaired recognition of speech intonation
4. Affective changes

Dominant (Left) Parietal Lobe

1. Aphasia
2. Dyslexia
3. Agraphia
4. Manual apraxias
5. Constructional apraxia (motor component)

Both Parietal Lobes

1. Visual agnosia
2. Severe visual spatial disorientation
3. Severe constructional apraxia
4. Impaired revisualization or irreminiscence

IV. OCCIPITAL LOBE

The following list of deficits noted with destructive lesions is an approximation. The exact anatomy of some of the phenomena listed is imprecise. Extension into the parietal or temporal regions, or into both, probable accounts for many of the phenomena other than isolated visual field defects.

Either Occipital Lobe

1. Contralateral homonymous visual field defect: scotoma, quadrantanopia, hemianopia
2. Unilateral optic ataxia

Nondominant (Right) Occipital Lobe

1. Color agnosia
2. Oculomotor gaze defect
3. Impaired visual orientation
4. Impaired topograhic memory

Dominant (Left) Occipital Lobe

1. Color anomia
2. Alexia without agraphia (if lesion interrupts posterior corpus callosum)
3. Object agnosia

Both Occipital Lobes

1. Bilateral scotomas
2. Cortical blindness
3. Anton's syndrome
4. Simultagnosia
5. Visual agnosias: colors, objects, faces
6. Balint's syndrome

Appendix B: The Neuropsychiatric/Neuropsychological Assessment

The neuropsychiatric and neuropsychological assessment provides measurable and/or observable data regarding the strengths and weaknesses of the patient in a variety of cognitive, behavioral, and psychological areas.

I. Common Objective(s)

A. Determine the nature of the patient's dysfunction (pre and post trauma functioning)

B. How does the patient's current impairment affect functioning?

C. What is the prognosis for recovery?

II. Common Areas of Assessment

A. General verbal ability

B. Visual-spatial problem solving

C. Abstract reasoning

D. Concept formation

E. New and rapid problems solving ability

F. Judgment

G. Mental flexibility

H. Cognitive efficiency

I. Sensory and motor functioning

J. Attention and concentration

K. Verbal fluency

L. Memory (immediate recall, short-term, and long-term)

M. Psychologic/emotional intactness

III. General Neuropsychiatric/Neuropsychological Report Contents

A. Pre-trauma history (psycho-social-medical)

B. Patient's condition at the time of examination

C. Description of the relationship between the patient's injuries/complaints and present condition

D. Statement regarding the genuiness of the complaints

E. Diagnosis or nature of the disability or both

F. The extent of the disability

G. The prognosis or duration of the disability or both

H. Recommendations for treatment

Appendix C: Selected Psychological and Neuropsychological Test Instruments[53]

Achievement Measures

Basic Achievement Skills Individual Screener
Peabody Individual Achievement Test (PIAT)
Wide Range Achievement Test - Revised (WRAT-R)

Affective Status

Beck Depression Inventory
Multiple Affect Adjective Check List

Attention, Concentration & Conceptual Tracking

Paced Auditory Serial Addition Test (PASAT)
Seashore Rhythm Test
Trail-making Test (parts A & B)
Wechsler Adult Intelligence Scale-Revised (subtests: arithmetic, digit symbol)

Comprehensive Neuropsychological Test Batteries

Halstead-Reitan Neuropsychological Test Battery (adult and child versions)
Luria-Nebraska Neuropsychological Test Battery (adult and child versions)

Hand Dominance

Harris Test of Lateral Dominance

Intellectual Functioning

Wechsler Adult Intelligence Scale-Revised (adults)
Wechsler Intelligence Scale for Children-III (WISC-III)

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[53] *See generally* D. Keyser, R. Sweetland, *Test Critiques I-VI* (1995) (comprehensive critical analysis of several hundred of the most common psychological, educational, occupational, and apptitude tests used in the US)

Language

Aphasia Screening Test
Boston Diagnostic Aphasia Exam
Multilingual Aphasia Examination
Speech Sounds Perception Test
Wechsler Adult Intelligence Scale-Revised [WAIS-R] (subtests: information, comprehension, similarities, vocabulary)
Wepman Aphasia Battery

Memory and Learning

Benton Visual Retention Test
California Verbal Learning Test
Rey Auditory Verbal Learning Test (RAVLT)
Rey-Osterieth Complex Design Test (recall mode)
Tactual Performance Test (memory and localization)
Wechsler Adult Intelligence Scale-Revised (subtests: digit span)
Wechsler Memory Scale-Revised

Motor Skills

Finger-Tapping Test
Grip Strength
Grooved Pegboard Test

Personality

Millon Clinical Multiaxial Inventory-II (MCMI-2)
Minnesota Multiphasic Personality Inventory-II (MMPI-2)
Rorschach Inkblot Test
Sixteen Personality Factor Questionnaire (16 PF)

Reasoning & Problem Solving

Categories Test
Wisconsin Card Sort Test

Visual-Spatial & Constructional Ability

Bender Gestalt Visual Motor Test
Benton Facial Recognition Test
Benton Visual Form Discrimination Test
Rey-Osterrieth Complex Figure Test (copy mode)
Tactual Performance Test
WAIS-R (subtests: block design, object assembly, picture arrangement, picture completion)

Appendix D: Differential Diagnoses Associated with Head Trauma

Some of the many alternative causes of complaints that appear to suggest central nervous system dysfunction from head trauma include:

- Childhood injuries pre-existing the most recent head injury (e.g., sports, bicycle riding, skateboarding, physical abuse)
- Pre-trauma mental disorders
- Personality Disorders
- Occupational hazards (e.g., pre-existing injuries; toxic exposure)
- Dementias (Alzeimers, Picks Disease, Huntington Disease)
- Previous or subsequent head injuries (e.g., MVA whiplash)
- Cerebrovascular disease
- Epilepsy and epileptic seizures
- Headaches and facial pain
- Degenerative diseases
- Metabolic diseases
- Endocrine disorders
- Infectious and inflammatory diseases
- Neoplastic or developmental disorders
- Alcohol (effects)
- Substance abuse (effects)
- Psychotropic medication (side effects)
- Malingering[54]

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[54] Malingering is not a mental illness but an intentional production of false or exaggerated symptoms in order to achieve some external incentive (e.g., compensation or to avoid some responsibility). Persons involved in litigation should always be closely assessed for malingering potential due to the obvious

Appendix E: Summary of Commonly Misunderstood Facts About Brain Injuries

Incidence

- Over 2 million persons in the United States suffer traumatic brain injuries annually.
- Tens of thousands of persons suffering a traumatic brain injury are not accurately diagnosed or diagnosed at all.

Injury

- A person does not need to be rendered unconscious in order to sustain a cognizable traumatic brain injury.
- A brain injury that is diagnosed as "mild" or "minor" does not necessarily mean that it has had no appreciable impact on the patient's functioning or that the affect on the patient's quality of life is correspondingly "minor" or inconsequential
- It is not necessary for a person to strike his head in order to sustain a traumatic brain injury.

Diagnosis & Treatment

- *Normal or negative* neuroradiological test results such as x-rays, CT, and MRI, do not necessarily rule out the presence of traumatic brain injury with significant cognitive impairments.
- Neuropsychological testing, in conjunction with other clinical evidence, is frequently needed to rule in or rule out the relative damages to the brain when objective indications of brain damage are negative.
- Approximately only 1 in 20 traumatic brain injury victims receive adequate rehabilitation.
- The best and only cure for traumatic brain injury is prevention.

Effects/Recovery

- Headaches, personality change, variable emotions, sleep disturbance, forgetfulness, difficulty getting organized, depression, and sensitivity to noise are just some of the many complaints commonly associated with traumatic brain injury. These effects can, however, relate to non-TBI causes.
- Children with even "mild" cognitive impairment may have special educational needs.
- The brain is capable of varying degrees of "spontaneous recovery" within the first 12-24 months after the traumatic injury with or without treatment.

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opportunity to exploit the civil process for their own financial gain. Because of the high financial stakes that are frequently involved in lawsuits involving brain-damaged claimants the opportunity for symptom exaggeration, manipulation, and out right fabrication must always be considered. This is especially true since neuropsychological and neuropsychiatric assessments of brain impairment are easy to fake and the professionals who administer them do not necessarily possess special expertise in detecting fraud and deception.

Appendix F: The Forensic Consultant: Uses and Considerations

I. General Description

A.	Status	:	non-examining or non-testifying
B.	Role	:	analyze data; form opinions; advise counsel
C.	Legal Status	:	non-discoverable
D.	Client	:	counsel
E.	Timing	:	engage as soon as possible and throughout the life of the case

II. Services

A. Analysis of Records[55]

B. Discovery Identification[56]

C. Critique of Opposition's Expert (work-product, opinions)[57]

D. Disposition planning[58]

E. Education[59]

III. Advantages

A. Non-discoverable therefore opinions can be frank and objective without concern for disclosure

B. Broad understanding of forensic issues, strategy

C. Able to be objective; sounding board for counsel's ideas, theories

D. Capable of providing array of assistance throughout the life of litigation

IV. Retention Considerations

A. Cannot testify

B. Cannot personally gather evidence (e.g., IME) without compromising non-discovery status

C. Added litigation expense

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[55] This includes, but is not limited to: injury assessment; causation assessment; identification and critical analysis of likely theories of the opposition

[56] This includes, but is not limited to: identification of documents for discovery; critique of defense requests for document discovery; and deposition assistance (providing questions; analyzing the deposition of all relevant lay and expert witnesses

[57] *E.g.*, methods and findings.

[58] *E.g.*, settlement, trial (cross-exam questions for expert)

[59] *E.g.*, neuropsychological issues; medical literature, etc.

Appendix G: Suggested Production of Documents Request: Damages[60]

___ **Credit Check**

___ **Education Records** (transcripts, disciplinary reports, health records, etc)

___ **Employment Records** (applications, performance evaluations, health records, worker compensation claims, etc.)

___ **Driving Records** (all jurisdictions: current and former names)

___ **Income Tax Returns** (at least the last five years)

___ **Insurance Claim Index**

___ **Insurance Records** (applications, all policies, claims)

___ **Legal Records** (civil, criminal, workers' compensation claims, accident, police and investigator reports)

___ **Marital Records** (divorce papers, custody agreement and records)

___ **Medical Records** (**all** records of in-patient and out-patient intervention and tests, prescription records, billing statements, CVs of primary care physicians)

___ **Military Records** (active & reserve: performance reviews, disciplinary reports, medical and mental health records, discharge papers, etc.)

___ **Previous Litigation** (sue/sued: all transcripts, pleadings, records)

___ **Psychological Records** (all records of in-patient and out-patient counseling, testing reports and protocols, alcohol/drug treatment, billing statements, CVs of examiners and therapists)

___ **Vital Statistics Files** (e.g., any records under maiden or changed name)

___ **Miscellaneous** (e.g., pain, complaint, and/or activities diary by plaintiff, day-in-life video)

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[60] This is a general list of possible records applicable to evaluating a claim of damages. Not all of these records will require discovering in all cases.

Appendix H: Potential Damages & Losses in Head Trauma Cases

I. **PAIN & SUFFERING**

- A. Physical injury
- B. Medical/surgical procedures
- C. Medications
- D. Loss of Functioning, disfigurement, deformity
- E. Chronic pain

II. **PSYCHO-SOCIAL LOSS**

- A. Cognitive damage
- B. Personality & behavioral change
- C. Psychological pain and suffering
- D. Loss of society
  1. consortium: spouse, children
  2. loss of pleasure/hedonic

III. **INCREASED RISK & TREATMENT**

- A. Future risk of illness or conditions
- B. Medical surveillance
- C. Future Treatment & Rehabilitation

IV. **DIRECT ECONOMIC LOSS**

- A. Loss of current and future income
- B. Special damages (medical expenses, lost income)

Appendix I: Potential Experts Useful to the Litigation of a Head Trauma Case

PHYSICAL INJURY

Neurologist:	Evaluation of neurological status, identification of dysfunctional nervous system, and identification of treatment needs including medications, annual evaluations, blood monitoring, neurodiagnostic procedures and neurologic surveillance (e.g., seizure potential).
Neurosurgeon	Assessment and treatment of structural damage and lesions in the brain and spine primarily using nuclear imaging and surgical procedures.
Orthopedist	Assessment and treatment of bones, joints and muscles (e.g., spine and related complications following significant head trauma). Determines need for surgery, orthotic devices, follow-up visits and recommendations for related services.
Ophthalmologist or Neuro-ophthalmologist	Examination or surgical intervention when required. Identifies visual deficiency influencing normal development. Prescribes treatment, optical or surgical remediation and artificial eyes, and surveillance of treatment recovery.

COGNITIVE COMPLAINTS

Neurologist/ Neuropsychologist	Assessment of variety of brain-behavior functioning using observation, interviewing and standardized test procedures. Identifies need for cognitively related services and intervention. Treatment includes cognitive and memory rehabilitation (e.g., compensatory strategies), coping with disability, and education.
Neuropsychiatrist	Identifies cognitive mental status and evidence of organically oriented psychopathology using observation, interviewing, and review of neuroimaging evidence. The neuropsychiatrist can also make recommendations regarding the need for psychotherapy, medication, cognitive rehabilitation, hospitalization, residential placement.

PSYCHOLOGICAL COMPLAINTS

Psychologist, Clinical	Assessment of personality, psychological functioning, and history of children or adults using interviewing and standardized test procedures. Identifies need for mental health treatment and/or placement.
Psychiatrist	Identifies general mental status and evidence of psychopathology (functional or organic) using observation and interviewing procedures. Can make recommendations regarding the need for psychotherapy, medication, hospitalization, residential placement as well as family treatment.

E

PEDIATRIC DAMAGES

Pediatric Neurologist/ Developmental Pediatrician/ Psychologist

Evaluation of general developmental status of infant or child. Determination of development delays and projected future difficulties. Assesses full range of medical needs and services.

Special Education Teacher

Develops educational plan for disabled children to assist in cognitive, affective and psychomotor skills development. Monitors educational progress. Identifies needed instructional materials. Assesses educational program being provided and consults with parents, school and other sources of service.

REHABILITATION

Physiatrist/Physical Medicine & Rehabilitation

Assessment of general/anatomical function involving joints, skin, bladder and motor performance. Designs treatment plan for therapies and outlines prognosis for future mobility.

Occupational Therapist

Assessment of daily living skills, gross visual-motor-perceptual functioning, feeding and eating skills, oral-motor reflexes and spatial awareness. Treatment involves re-development, re-learning of lost or partially forgotten daily living skills.

Physical Therapist:

Assessment of muscle tone, range of motion, sensation, balance, biomechanical alignment, adaptability, muscle strength, sensory organization, degree of spasticity and synergistic organization. Treatment involves re-development, re-learning, strengthening of lost or partially forgotten or wasted muscle/motor abilities.

Psychologist, Rehabilitation:

Multimodal assessment of children from birth through school age to determine general development, intellectual, emotional, academic and neurobehavioral status. Evaluates family constellation and determines needs and services required to compensate and treat identified deficits. Makes recommendations regarding needed rehabilitation services; provides counseling of patient and family regarding psycho-social factors associated with recovery and adjustment to deficits.

Rehabilitation Counselor

Identification of functional capacities of patient from several perspectives including strength, flexibility, tolerance and self-care. Also, assists in identifying rehabilitation services required as part of total rehabilitation plan for the life of child or adult.

Speech & Language Therapist

Assessment and treatment of sensory and motor mechanisms of speech. Identification of deficits, speech fluency, productions, volume and general communication skills. Recommends, designs and implements remedial treatment.

VOCATIONAL

Vocational Counselor/Therapist

In conjunction with functioning information from other sources, determines work potential; identification of current and potential work skills/abilities, and range of jobs or positions suitable for patient. Assesses overall employment potential and economic loss (set-off) resulting from disability.

E

ECONOMIC

Economist

Projection of current and future economic costs for recommended service and determination of lost income (past, current, future) as a result of disability.

Annuitist

Development of a commercial annuity arrangement which permits the payment of present day premium (e.g., by the defendant) for a guarantee that payments of a specific amount will be made to the annuitant (e.g., claimant) at some date or dates in the future.

*Partially adapted from: R. Minsky, Expert Witnesses Services Useful in Damages Assessment (unpublished)

Appendix J: Injury Evaluation of the Brain Damaged Litigant: Suggested Subject Areas

I. Physical Functioning

A. Physical evaluations (e.g., medical systems, orthopedic)

B. Radiological, diagnostic, and lab testing

II. Cognitive Functioning

A. Neurological examination & testing

B. Neuropsychological testing

C. Review of past history records

III. Emotional Functioning

A. Psychological or psychiatric evaluation

B. Psychological testing (if needed)

C. Review of past history records

IV. Psycho-Social-Vocational Functioning

A. Comprehensive history interview - patient

1. pre-trauma functioning & personality

2. current functioning & personality
   - a. intellectual functioning
   - b. personality
   - c. previous trauma
   - d. medical history (differential diagnosis)
   - e. psychiatric history
   - f. developmental history
   - g. family history
   - h. sexual history
   - i. social/interpersonal history
   - j. recreational history
   - k. employment history (e.g., rule out toxic exposure, pre-trauma)
   - l. substance abuse/use

B. Interview of reliable third parties for history and complaint corroboration

Appendix K: Assessing Psychological & Neuropsychological Damages: Types of Examiners

E

I. Psychiatrist/Neuropsychiatrist

A. Definition - *physician* specializing in the study & treatment of mental disorders from an *organic or biological* perspective

B. Education & Training

1. 4 yrs. of medical school (general medicine)
2. one year internship
3. three years of psychiatric residency; neurology residency (neuropsychiatrist)

C. Procedures

1. physical exam
2. gross neurological exam
3. mental status exam
4. clinical history
5. review of neuroradiologic data (neuropsychiatrist) and relevant medical records

D. Strengths

1. doctors of medicine - added credibility
2. better qualified if the mental condition is biologically oriented
3. medical training makes them generally more suitable for cases with a lot of medication treatment and other organic injuries
4. working knowledge of neurology

C. Weaknesses

1. limited diagnostic procedures
2. psychiatric interview, in and of itself, has poor reliability, subjective

3. trained to be brief, less comprehensive in complaint investigation

4. limited training in psychological and personality theory

5. treatment focus is more on biological (medication); therefore, not generally the best judge of psychotherapy needed by a claimant

E

II. Psychologist (clinical)

A. Definition - person trained to study and measure mental processes, and to diagnose and treat mental disorders of a psychological nature

B. Education & Training

1. 3-4 years of graduate school including supervised clinical experiences in diagnosis, treatment and testing

2. 1 year of clinical internship

3. dissertation: research

C. Procedures

1. mental status exam

2. clinical history

3. testing (psychological, personality, intellectual, cognitive, etc.)

4. review of relevant records

D. Strengths

1. considerable training and education in psychopathology, personality theory and psychological processes

2. many psychological tests possess acceptable levels of validity and reliability

3. testing adds an objective dimension to examination

4. broad sub-areas of specialization in psychology

5. some training in empirical research methods and interpretation is typical

E. Weaknesses

1. non-physician - therefore unlikely to address organic factors without specialized post-doctoral training

2. not competent to address medication matters

3. sometimes perceived as less competent or credible by juries

4. testing tends to be more time consuming and expensive than psychiatric interview

5. few valid and reliable tests for cross-cultural litigants

6. tests having internal bias toward white males is common

III. Neuropsychologist

A. Definition - person who studies and assesses the relationship between the brain and specific behavioral correlates and functions.

B. Education & Training

1. There is no professional or legal restriction regarding who can claim to be a neuropsychologist[61]

2. Generally: doctoral level, licensed psychology provider with demonstrated competency in neuropsychology and neuroscience

3. Two or more years of supervised neuropsychology training

C. Procedures

1. neuropsychological mental status exam

2. neuropsychological & intellectual testing (e.g., Halstead Reitan Neuropsychological Test Battery; Luria-Nebraska Neuropsychological Test Battery)

3. review of relevant records

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61 *But see* Definition of a Clinical Neuropsychologist, 3 *The Clin. Neuropsychologist* 22 (1989)

D. Strengths

1. tests are more sensitive to brain impairment than neuroradiological techniques for some lesions

2. wide variety of tests capable of assessing a broad scope of cognitive abilities and function

3. most neuropsychologists are initially trained as clinical psychologists and therefore are competent to administer both

E. Weaknesses

1. require special competence to appropriately administer, score, and interpret neuropsychological procedures and results

2. easily and commonly misused and misinterpreted (over-interpretation)

3. tend to be more time consuming and expensive than psychological testing or psychiatric evaluation

4. some neuropsychological tests are too sensitive and examiners fail to discriminate non-organic causes for test responses

Appendix L: A Sample of Common Errors & Omissions in the Assessment of Damages In Brain Injury Litigation

E

I. Procedure Related

A. Inadequate history (pre & post trauma)

B. Inadequate inquiry into complaints (e.g., conjecture, "clinical guessing")

C. Failure to review medical records, psychological testing

D. Insufficient or unreliable procedures to render conclusions (e.g., disability determinations)

E. Reliance on inadequate, exaggerated and/or unreliable sources - No corroboration (e.g., economic projections, life care plans)

F. Psychological/neuropsychological testing

1. scoring/computational errors

2. interpretation errors (under or over interpret)

3. misapplication of norms

G. Medical Testing (e.g., lab, neuroradiological)

1. equipment error (e.g., contaminated samples, miscalibration of equipment)

2. interpretation errors (under or over interpret)

II. Examiner Related

A. Inadequate qualifications

B. Breach of professional ethics or standards - credibility

C. Bias effect (e.g., double agentry; fee slave)

D. Iatrogenic factors (e.g., over-testing, premature medical conclusions, negligent diagnosis/treatment)

III. Injury Assessment

A. Injury conclusions are inconsistent with case facts, expected medical results, or accepted diagnostic criteria

B. Symptoms are wrongly assessed clinical significance

C. Failure to assess all of the compensable damages

IV. Causation

A. Causation is not addressed

B. Failure to consider/rule out alternative causal factors for complaints made

1. medication effects (see PDR)

2. malingering, symptom exaggeration

3. stress (pre and post trauma)

4. pre-existing physical, psychological, medical conditions

5. intervening factors

6. personality factors

C. Cause of action is but one of many "causes" of the plaintiff's complaints (e.g., no apportionment or mitigation consideration)

D. Failure to consider/rule patient produced mitigating effects

1. failure to seek timely, competent treatment and/or rehabilitation

2. failure to timely pursue and responsibly participate in prescribed treatment and/or rehabilitation

3. patient committed acts that jeopardies his/her health and/or recovery

Appendix M: Common Mitigating & Rebuttal Theories in Brain Trauma Litigation: A Sample

E

I. Injury

A. Claims of injury are not reliably supported by the available evidence (e.g., neuroradiological, neuropsychological, etc.).

B. Claims of injury are not as serious as what has been reported, claimed, or the plaintiff's injuries might suggest.

C. The injuries claimed are inconsistent with the area of the brain that has been documented to have been produced by the cause of injury.

D. Claims of injury are exaggerated.

E. Claims of an organically based disability are not supported by the evidence and/or been appropriately evaluated (e.g., GEPI standards).

F. The injury claimed is not legally recognized in the controlling jurisdiction (e.g., "hedonic damages").

II. Causation

G. There is insufficient evidence to support a causation conclusion.

H. There is evidence of pre-existing head trauma or brain related lesion (e.g., tumor, history of infection) that is more likely than not responsible for the plaintiff's current complaints.

I. At worst, the cause of action only exacerbated these pre-existing injuries.

J. Psychogenic factors are creating, maintaining, and/or exacerbating the plaintiff's purported neurological complaints.

1. Factitious disorder, somatoform disorder

2. Major Depression; traumatic neurosis

K. The claimant is malingering.

L. The plaintiff's complaints are due to pre-existing factors or causes such as, but not limited to: chronic substance abuse, personality disorder, previous medical condition, medication effects, other traumas, etc.

M. The plaintiff's complaints are due to post-cause of action factors such as, but not limited to: subsequent trauma, iatrogenic factors (e.g., malpractice by treating/examining professionals), medication effects, substance abuse, etc.)

III. Assessment Procedures/Proof of Damages Factors

N. Insufficient procedures (number, type, adequately reliable) were used to arrive at the conclusion of brain injury based impairments.

O. Failure to consider and rule out differential diagnosis factors or alternative causes.

P. Errors and omissions committed by the examining professionals render their findings unreliable, invalid.

1. *Daubert* Challenge

Q. The claimant's life care plan is inadequately supported and/or inflated.

1. There are less costly but appropriate alternatives to the claimant's proposed life care plan.

IV. Post Trauma Functioning

R. The claimant's actual functioning is:

1. better than what it is reported.

2. inconsistent with the injuries that are being claimed.

S. Maladaptive coping/life patterns are maintaining, exacerbating the plaintiff's purported neurological complaints and interfering with recovery.

T. The claimant has failed to mitigate his/her damages by becoming involved in appropriate treatment, thereby impeding recovery as well as raising questions about the severity of the injuries and the plaintiff's veracity.

ppendix N: Suggested Bibliography

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PROBLEMS IN ADMINISTRATIVE LAW AND A PROPOSED LEGISLATIVE SOLUTION

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PROBLEMS IN ADMINISTRATIVE LAW - REPRESENTING THE PROFESSIONAL BEFORE ADMINISTRATIVE AGENCIES

I. INTRODUCTION

In recent years there has been a virtual explosion of litigation in Iowa before administrative agencies. Numerous professional boards have existed for some time. However, in recent years, all boards have become increasingly aggressive in the processing of initial complaints and the filing of formal complaints against licensed professionals in the State of Iowa.

Whether you have practiced in the administrative law area to date, if the present trend continues, I would predict each of you at some time in your practice will be faced with the very important task of representing your professional client before his or her licensure board. Because of the procedural peculiarities specific to administrative practice, I have attempted to outline some of the problem areas you should be aware of in order to effectively represent your professional clients.

II. WHAT ARE THE NATURE OF THE CHARGES?

A. The rules and regulations governing specific licensure boards as set forth in the Iowa Administrative Code, are given broad latitude and deference by the Iowa Supreme Court. For example, the specific phrase "practices harmful or detrimental to the public" has been upheld against a constitutional challenge based on vagueness. See, Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236 (Iowa 1991) ("we believe the language of the statutes Eaves challenges gives sufficient notice to doctors that they must perform in a minimally competent manner. The enforcement mechanism is in essence a statutorily prescribed peer review. The Board has the authority under the challenged provisions to impose discipline for 'harmful practice' based on findings of fact of a failure to meet the minimal standards of acceptable medical practice.")

B. Similarly, the Iowa Board of Dental Examiners has a rule imposing possible discipline for "dishonorable or unprofessional conduct in the practice of dentistry". (Husband dentist was reprimanded by the Board of Dental Examiners for sending a letter to patients of his wife who was also a dentist, characterizing the Board's procedures in the disciplinary action which had been filed against his wife). The Supreme Court in upholding the discipline for writing the letters, stated "we are not convinced that the prohibition of his "dishonorable conduct" presents a realistic danger that the protected free speech rights of third parties not before this Court will be chilled. Also, the potential for chilling of protective speech is very small in relation to the statute's legitimate sweep in regulating professional conduct of licensed dentists." Wettach v. Iowa Board of Dental Examiners, 524 N.W.2d 168, 171, 172 (Iowa 1994) (Statute upheld against vagueness and overbreadth constitutional challenges).

C. To preserve a challenge to possibly vague or overbroad charges, a constitutional challenge should be lodged at the earliest opportunity, otherwise it will be deemed waived by the Courts.

D. Discovery, including use of interrogatories and requests for production, should be specifically directed to attempting to flush out the nature of the charges, specific facts supporting the statement of charges and why the agency believes there is a basis for discipline.

III. HAVE THERE BEEN ADMINISTRATIVE SUBPOENAS SERVED BY THE STATE AGENCY? HOW DOES ONE CHALLENGE THE ADMINISTRATIVE SUBPOENA?

A. Statutory authorization - Chapter 17A.13, The Code, the Iowa Administrative Code specific to given agencies, Chapter 272(c), the Code, generally provide for issuance of administrative subpoenas.

B. The Iowa Supreme Court has been extremely deferential in permitting broad use of subpoena powers by agencies to the potential prejudice of the professional licensee. In McMaster v. Board of Psychology Examiners, 509 N.W.2d 754 (Iowa 1993), the Iowa Board of Psychology Examiners subpoenaed the records of a patient from a psychologist who was not under investigation. The patient had previously been a patient of a psychologist whom the Board was investigating. Neither the patient nor the psychologist not under investigation, acquiesced in

the subpoenas but rather challenged same before the agency and the district court. The Court at 761 of the decision stated:

> "Because the record is wholly inadequate to justify an intrusion into [patient's] right of privacy, we must reverse the district court's order enforcing the subpoena. However, we remand to allow the Board an opportunity to make the kind of showing this opinion deems necessary to support the Board's request for enforcement of its subpoena. If the Board elects to proceed to make such a showing, the District Court must then determine in accordance with this decision whether the showing is sufficient to justify the intrusion."

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The Court sets forth a five part test providing:

1. The Board should make a minimal showing that the complaint reasonably justifies the issuance of a subpoena in furtherance of the investigation.

2. The Board should establish that the records are necessary as evidence in connection with the disciplinary proceeding.

3. The Board should establish it notified the patient and attempted to obtain an authorization from the patient for release of records before issuing the subpoena.

4. The Board should establish that there are adequate safeguards to prevent unauthorized disclosure.

5. The Board should establish whether there is an express statutory mandate, articulated public policy or other recognizable public interest militating toward access.

While this case was remanded for further review by the district court in light of this duly set forth test, clearly the decision gives broad powers to agencies seeking many otherwise protected records.

C. The subpoenas are normally served by investigators who often will demand immediate response.

D. Often investigators will present, with no prior notice, and expect the professional to drop every commitment to meet with the investigator.

E. Often administrative subpoenas may attempt to reach matters of confidential nature, including possible protected information. See Chapter 22.7, the Code, Examination of Public Records/Confidential Records.

IV. WHAT IS THE ROLE OF THE ATTORNEY GENERAL?

A. The Office of Attorney General regularly advises state agencies, assists in drafting rules and participates in board meetings. Indeed, the Attorney General assigned to administrative agencies participates in the oversight of investigations, as well as the drafting of formal charges by the board.

B. Prosecution of claims is generally handled by the Attorney General's Office. Actions are brought on behalf of the board through the Attorney General's Office.

C. The nature of the adversarial process and identification of who are the parties may change after the contested case has been prosecuted and a decision rendered by the board. In Fisher v. Iowa Board of Optometry Examiners, 476 N.W.2d 48 (Iowa 1991), the Supreme Court held that the assistant attorney general prosecuting the case did so on behalf of the licensure board. The board, however, served as fact-finder and was advised on legal issues by the administrative law judge. However, after the board rendered its decision, through the IALJ, then the assistant who presented the case before the board, may through pleadings filed and petitions for rehearing, confer party status on the State of Iowa seeking to amend the agency's ruling. The fact one assistant attorney general can change status in the same case by merely filing a petition of rehearing, while at the same time, another assistant attorney general representing another State agency files other pleadings in the case representing another state licensing board, has apparently been sanctioned by the Supreme Court.

V. CAN ONE CHALLENGE BIAS ON BEHALF OF THE AGENCY?

A. Generally, by the time a complaint has been filed charging the professional licensee, members of the licensure board have met or at least sub-committees of the board have met, to discuss whether charges should be filed in the first place. Additionally, the

director of an agency will have met with board members during the investigative stage. Furthermore, the investigator has met with the Board and the executive director as well as with representatives from the Attorney General's Office on occasion prior to any contested case proceeding. These meetings have been held often times without the professional being in attendance and certainly without you, as counsel for the professional, being in attendance. What challenge can be made to this process?

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B. The Supreme Court has rejected claims made against agency findings based on bias. The Court has referenced Iowa Code Section 17A.17(4), the Code, which specifically provides:

> "A party to a contested case proceeding may file a timely and sufficient affidavit asserting personal bias of an individual participating in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceedings of the case."

Query: Does this provision provide for challenges to the composition of the entire board, to actions of the executive director and the interaction between the board, the executive director and the Attorney General's Office?

C. Recent cases underscore the difficulty in successfully making a challenge to board composition based on bias. In Kholeif v. Board of Medical Examiners, 497 N.W.2d 804 (Iowa 1993), the Supreme Court rejected a challenge seeking to compel a state licensure board to deliver for in-camera judicial review a transcript of the board's closed session deliberations. In this particular case, the Board had filed a formal complaint against the physician and issued a summary suspension to cease practice pending hearing. At the hearing, when the physician sought to challenge the board prior to presenting evidence based on bias, these claims were rejected. The board stated prior to the hearing that it would be willing to consider both sides of the controversy without any bias. After hearing, the board revoked the physician's license and imposed a fine. The Supreme Court rejected a claim

that the Board had been pre-disposed prior to the evidentiary hearing providing a narrow interpretation of 17A.17(4). The Court stated at 807:

> "Absent objective facts, however, litigants must not be permitted to engage in fishing expeditions into closed session transcripts".

Previously, the Court had similarly provided narrow interpretation of the affidavit requirement. See, Council Bluffs Committee School District v. City of Council Bluffs, 412 N.W.2d 171 (Iowa 1987); Fisher v. Iowa Board of Optometry Examiners, 478 N.W.2d 609, 611 (Iowa 1991). In Fisher, the board's first decision exonerated the licensee. Subsequently an amended decision sanctioned the licensee. When a challenge was made on the basis of outside influences on the board, this claim was rejected as the board had not been permitted to respond to challenges of the bias at the administrative level before the matter was appealed to district court. In this regard, also see Geringer v. Iowa Department of Human Services, 521 N.W.2d 730 (Iowa 1994). The Court ruled on appeal that the director of the department was not disqualified for partiality even though there was evidence of an inter-office memo that urged the director to review a proposed decision by the ALJ in part because the issues before the agency in the contested case "directly affected the mission and operation of the agency". The Supreme Court held the general rules requiring disqualification based on bias were not the same as would perhaps require disqualification under the judicial conduct canons. Also see Board of Dental Examiners v. Hufford, 461 N.W.2d 194 (Iowa 1990) (the licensee through counsel was not permitted to question board members concerning a motion made at the hearing to disqualify any board member from hearing the case who had participated in a decision to file charges. The board's position was affirmed on appeal.)

E. Discovery should be directed at the bias issue to provide foundation for statutory and constitutional challenge. Inquiry should be made on the entire background of investigation; board meetings, interaction with investigators and Attorney General's Office. Generally, you should consider scheduling the investigator's deposition at an early stage of your representation.

VI. HAS THE BOARD IMPROPERLY COMBINED THE FUNCTIONS OF INVESTIGATOR, PROSECUTOR AND ADJUDICATOR IN VIOLATION OF DUE PROCESS?

A. The United States Supreme Court in the case of Withrow v. Larkin, 421 U.S. 35, 4795 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723-24 (1975) set forth the guiding principal governing constitutional challenges based on "combination of functions":

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented".

B. The Iowa Supreme Court has rejected several challenges to agency action based on this claim. See, Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981) (constitutionality of school board hearing to discharge superintendent upheld); Hartwig v. Board of Nursing, 448 N.W.2d 321, 323-324 (Iowa 1989)(the Supreme Court rejected claims that preliminary action of board in summarily suspending license caused it to make preliminary determination of facts prior to hearing any evidence). Eaves v. Board of Medical Examiners, 467 N.W.2d 234 (Iowa 1991)(the Supreme Court rejected claim that the executive director of the board impermissibly combined functions as prosecutor by filing original complaint and acted as adjudicator in later overruling motion to dismiss. The Court stated there had been no prejudging of case and that the filing of the complaint and ruling on preliminary motions was merely "ministerial, not prosecutorial conduct"). Also see, Fairfield Community School District v. Justmann, 476 N.W.2d 335, 338-340 (Iowa 1991)(the fact superintendent investigates and recommends termination of teacher and then presents case before the board and in this case utilized a non-voting board member as a witness in the case, was not violative of due process. Appellant unable to overcome presumption of honesty, integrity, and fairness of the process). Also see, Fisher v.

Iowa Board of Optometry Examiners, 510 N.W.2d 873, 876-877 (Iowa 1994)(the fact second hearing was held in closed session with no additional evidence taken and without appearance by licensee or counsel, not violation of due process. Petitioner has not met his burden to demonstrate unfairness under these facts).

C. Constitutional challenge should be considered on this basis in every case. The Supreme Court has granted the issue is available it is just difficult to demonstrate factually. However, see Keith v. Community School District of Wilton, etc., 262 N.W.2d 249, 261-262 (Iowa 1978)("teacher was entitled under §279.13, the Code, to a hearing before an impartial board or tribunal. Keith did not have such a hearing. This requires reversal").

VII. MAY ONE OBTAIN REVIEW OF AGENCY ACTION BEFORE FINAL JUDGMENT?

A. Assuming, as counsel for the professional, you have challenged charges as unconstitutional, sought relief from administrative subpoenas, challenged the potential bias of the forum and have raised the due process issues of combination of functions to no avail before the agency, may you obtain district court intervention before final judgment?

B. The Supreme Court has been very clear that interlocutory review of agency actions is highly unlikely. See, Salisbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830 (Iowa 1979)(the Court held that while litigants may claim irreparable harm from administrative action and may proceed to Court without exhausting administrative remedies, this is a very rarely permitted procedure.) However, see Glowacki v. Board of Medical Examiners, 501 N.W.2d 539 (Iowa 1993)(licensee successfully challenged Code Section which as applied to him would prohibit seeking stay of summary suspension during administrative proceedings).

C. While interlocutory appeals and stays of administrative agencies are very rare, the Glowacki case does provide a limited basis for early judicial review.

VIII. AFTER PRESENTATION AT THE LICENSURE HEARING, MUST ONE FILE PETITION FOR REHEARING TO PRESERVE ISSUES FOR REVIEW?

A. See Fisher v. Iowa Board of Optometry Examiners, 478 N.W.2d 609 (Iowa 1991)(decision filed exonerating

professional). Upon petition for rehearing filed by prosecution, amended order entered. Petition for Judicial Review then filed in district court challenging illegal procedures by board. Iowa Supreme Court held certain issues not preserved for review "although Fisher may not have perceived a constitutional defect until after the board issued its amended decision, he still had the opportunity to present that issue to the board in another request for rehearing". Under the logic of this decision, we now know there exists a possibility of multiple petitions for rehearing in one given case.

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IX. WHAT REMEDIES ARE AVAILABLE TO JUDICIALLY REVIEW ADMINISTRATIVE ACTION?

A. Chapter 17A.19, The Code, provides for judicial review of administrative actions. Normally, a petition must be filed within 30 days of the agency's final decision. Most petitions are filed in Polk County District Court or in the district court for the county in which the petitioner resides or has his principal place of business.

B. Numerous Iowa Supreme Court opinions have defined a limited scope of review applied to review agency action. 17A.19(8), The Code, provides the District Court may reverse, modify or grant other appropriate relief only if agency action is affected by errors of law unsupported by substantial evidence in the record or characterized by abuse of discretion. The Code specifically provides at 17A.19(8):

> "8. The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:
>
> a. In violation of constitutional or statutory provisions;
>
> b. In excess of the statutory authority of the agency;
>
> c. In violation of an agency rule;
>
> d. Made upon unlawful procedure;
>
> e. Affected by other error of law;

f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or

g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

C. As review is not de novo, the Court reviews to determine whether or not there is evidence supporting the board's decision. The Courts have been generally deferential based by presumably greater expertise by an agency over matters within its purview. See, Fairfield Community School District v. Justmann, 476 N.W.2d 335 (Iowa 1991). Also see, Burns v. Board of Nursing, 495 N.W.2d 698 (Iowa 1993). In reversing the district court reversal of agency action, placing nurse on probation the Supreme Court held at 699:

> "The administrative process presupposes that judgment calls are to be left to the agency. Nearly all disputes are won or lost there...
>
> In stating that we look to all of the evidence, including that offered in opposition to the agency's finding, we do not compromise the limitation on our scope of review. The rule merely means that support for the agency finding can be gathered from any part of the evidence. Because review is not de novo, the Court must now reassess the weight to be accorded various items of evidence. The weight of evidence remains within the agency's exclusive domain. Under the circumstances, great care must be taken by the reviewing Court to avoid moving from the prescribed limited review into one that is de novo."

Also see, Iowans for WOI TV v. Board of Regents, 508 N.W.2d 679, 687 (Iowa 1993). The Supreme Court in reversing the district court's holding that the Board of Regents had acted illegally, held:

> "With respect to the district court's conclusion that President Jischke was coerced, we believe that the coercion the court perceived flowed entirely from the realities of the institutional setting in which President Jischke found himself. He stood in a subordinate position to the board

on this policy matter. Although he perhaps had the power to block the proposed sale, the board had the power to decide who would be the president of Iowa State University. The type of coercion which that relationship produces is a fact of life and does not serve to invalidate an election to accede to the will of a superior authority."

D. Recently the Iowa Supreme Court, reversed a district court holding and remanded the matter for the agency holding that the Board of Medical Examiner's decision imposing sanctions was not supported by substantial evidence. See Glowacki v. Iowa Board of Medical Examiners, 516 N.W.2d 881 (Iowa 1994). Complaint against physician stemmed from what the board felt was dishonest billing practices. Both sides presented expert witnesses in this regard. The board found violation and suspended license for 90 days. The Supreme Court reversed relying primarily reversal on the expert witnesses called by respondent. Justice Harris dissented, stating at 887:

> "The majority thwarts the medical board's proper and commendable attempts to protect the public from dishonest billing practices in the medical profession... Judicial second guessing of agency wisdom will destroy the fabric of administrative law."

(This is one of the very few cases that will assist you in challenging an administrative fact-finding on judicial review. For that reason I suggest you read and then re-read it before commencing any representation of the professional before the agency).

X. PRACTICE POINTERS

One basic rule governs the defense of professionals before administrative agencies. It is fair to say cases are won or lost at this level because of the Courts' general deference to the administrative agencies.

So long as this is the case, my advice to each and every one of you is the following:

1. Explore in each and every case the possibility of an informal settlement which may alleviate the need to go through the lengthy, difficult process.

2. Obtain the full set of investigative materials from the agency and review these in detail before commencing formal discovery.

3. If an informal settlement is not possible with the particular board of which you are charged, raise each and every procedural challenge at each stage of the proceedings to preserve your record in the event of a needed appeal.

4. Secure competent expert witnesses supportive of your professional. Agency boards, as participants in a form of "peer review" are amenable to persuasive presentations by qualified expert witnesses.

5. Present necessary character witnesses before the board to defuse any claims your professional is anything other than a person of the highest integrity in the community in which he or she practices.

6. Consider an independent medical examination of those persons challenging your licensee.

Hopefully, you and your professional clients will never face the reality of a license complaint. However, if you do, I believe this outline will be of some assistance to you.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW - A PROPOSED LEGISLATIVE SOLUTION

I. INTRODUCTION

A. Since the Spring of 1994, the Iowa State Bar Association has been thoroughly reviewing Chapter 17A, the Code of Iowa (Iowa Administrative Procedure Act). This process had its impetus when then President, Keith McKinley, and the Board of Governors adopted the following Resolution:

> "BE IT RESOLVED that an Ad Hoc Committee of the Association to be known as the Task Force on Administrative Law be created by the Board of Governors to examine the administrative procedures of the State of Iowa with regard to procedural due process, the independence of the administrative judicial officers and the promulgation of substantive law through rule

making and to propose such amendments to the Iowa Administrative Procedures Act as may be necessary to safeguard the rights of the citizens of the State of Iowa and protect their access to the Courts.

BE IT FURTHER RESOLVED that the President be and he is hereby authorized and directed to appoint this Task Force of not to exceed twelve (12) members to serve for fifteen (15) months and report its findings and recommendations to the Board of Governors no later than the annual meeting of the Association in June of 1995."

B. Since that time, the Task Force has met for full day meetings on May 13, 1994; June 10, 1994; August 19, 1994; October 21, 1994; November 10, 1994; January 13, 1995; February 10, 1995; March 31, 1995; April 28, 1995; June 16, 1995; July 14, 1995; September 1, 1995; September 22, 1995; October 20, 1995 and December 8, 1995. Additionally, the Administrative Law Section of the Iowa State Bar Association has met to review the act and has made suggestions in the process, many of which have been adopted as the Task Force has been completing its task.

II. HIGHLIGHTS OF THE NEW PROPOSED ACT

A. Rulemaking

1. The act will make agency rulemaking more accountable to the public through more notice, earlier notice, and additional procedures to ensure the agency seriously considers public input and provides adequate opportunity for that input.

2. The act ensures broader public input for agency lawmaking, wider and easier availability of agency made law and assures that agency law is prospective only rather than retrospective and is subject to review by the legislature and the Governor. The new statute requires agencies to prefer lawmaking by rules rather than by retrospective ad hoc adjudicatory orders.

B. Agency Adjudication

1. Separation of functions. The proposed provisions of the PNIAPA, is broader than the current provision under the IAPA, and still broader than

the MSAPA. The differences among the proposed provision and the current IAPA are as follows:

a. The proposed provision explicitly bars any person who investigates a case personally from sitting as presiding officer or assisting the presiding officer, while the current IAP does not prohibit such a combination of functions.

b. The proposed provision explicitly bars any person who personally investigates a case from being the administrative superior of the presiding officer in that case, which is not prohibited under the current IAPA.

c. The proposed provision expressly bars a person who personally evaluates the evidence in a case to determine whether there is a probable cause to proceed in that case from sitting as the presiding officer in that case. The current IAPA does not explicitly bar this combination of functions.

The provision also provides that if one member of a multi-member agency is the presiding officer at a hearing, he or she will not automatically be prohibited from participating in the agency final decision if there is an appeal to the entire agency absent a demonstration by a party that the person should be disqualified in accordance with this provision or with the terms of the provision relating to disqualification of presiding officers.

2. Expanded grounds to challenge ex-parte communication and possible bias in proceedings.

3. Three Different levels of hearings with descending order of formality with very strict rules when less formal hearings could be used.

a. Formal adjudicative hearings.

b. Conference adjudicative hearings.

c. Emergency and Summary Adjudicative Proceedings.

C. Judicial Review

1. Scope of review; grounds for invalidity. The act is intended to tighten up existing standards of review and elaborate these standards further to assure in practice the reviewing courts take a hard look at agency action as was intended by the original statute.

III. SUMMARY OF PROPOSED LEGISLATION

A. The Task Force report was unanimously approved by the Board of Governors of the Iowa State Bar Association on January 5, 1996.

B. The Bar Association bill was introduced as a legislative bill in this year's legislative session. A copy of the entire Senate bill is attached as an appendix to this outline.

C. By Senate Joint Resolution, an interim study committee has been created to review the proposed bill and hold two days of hearings between the end of this legislative session and the commencement of the next legislative session. A copy of the Senate Joint Resolution is attached.

D. The Interim Study Committee has been appointed by legislative leadership. Members of the Interim Study Committee who will hear testimony of the proposed legislation include Senator Tom Vilsack, Democrat - Mt. Pleasant; Senator Mary Neuhauser, Democrat - Iowa City; and Senator Gene Maddox, Republican - Clive. Other legislators will be identified shortly.

E. Meetings with numerous interested parties are scheduled throughout the fall leading up to the legislative session. Among these interested parties are: Iowa Utilities Association, Association of Business and Industry, Iowa Attorney General, Iowa League of Cities, Iowa Medical Society, Iowa Department of Employment Services, Farm Bureau, Polk County Republicans, Iowa Advisory Commission on Intergovernmental Relations and the Board of Regents/State Universities.

IV. NEED FOR ACTIVE SUPPORT FROM THE IOWA DEFENSE COUNSEL

Vilsack
Giannetto
Neuhauser
Redfern
McKean

SSB 2280
Judiciary

BAH Adkins
PRD Banfield
Dave Brown
Linda Weidman

SENATE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON GIANNETTO)

F

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the Iowa administrative procedure Act.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

ARTICLE 1

GENERAL PROVISIONS

Section 1. NEW SECTION. 17A.1101 CITATION, STATEMENT OF PURPOSE, AND CONSTRUCTION.

1. This chapter may be cited as the "Iowa Administrative Procedure Act".

2. The purposes of this chapter are the following:

a. To provide legislative and gubernatorial oversight of powers and duties delegated to administrative agencies.

b. To increase the public accountability of administrative agencies.

c. To simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions.

d. To increase public access to information about agency law and policy.

e. To increase public participation in the formulation of administrative rules and the efficacy and acceptability of those rules.

f. To increase the fairness and efficiency of agencies in their conduct of adjudicatory proceedings.

g. To simplify the process of judicial review of agency action as well as to increase its availability and effectiveness.

3. In accomplishing its objectives, the intention of this chapter is to strike a fair balance between the need for adequate protection of private rights and political control of agency processes and the need for efficient, economical, and effective government administration.

4. The coverage and requirements of this chapter shall be construed broadly to effectuate the purposes of this chapter and any exemptions from its requirements contained in this chapter or elsewhere shall be narrowly construed.

Sec. 2. NEW SECTION. 17A.1102 DEFINITIONS.

As used in this chapter, unless the context otherwise

requires:

1. "Adjudicative proceeding" means the process for formulating and issuing an order.

2. "Agency" means a board, commission, department, officer, or other administrative unit of this state, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. "Agency" does not mean the general assembly or any of its components, the judicial department or any of its components, the governor, or a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the state or any of their administrative units. To the extent it purports to exercise authority subject to any provision of this chapter, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the administrative unit is located within or subordinate to another agency.

3. "Agency action" means any one of the following:

a. The whole or a part of a rule or an order.

b. The failure to adopt a rule or issue an order.

c. An agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

4. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency, with respect to the matter at issue, is vested by any provision of law.

5. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

6. "Order" means an agency action of particular applicability that determines the legal rights, duties,

privileges, immunities, or other legal interests of one or more specific persons. The term does not include an "executive order" issued by the governor pursuant to section 17A.1104 or 17A.3202.

7. "Party to agency proceedings" or "party" in context so indicating, means any of the following:

a. A person to whom the agency action is specifically directed.

b. A person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding.

8. "Party to judicial review or civil enforcement proceeding" or "party" in context so indicating, means any of the following:

a. A person who files a petition for judicial review or civil enforcement.

b. A person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

9. "Person" means an individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

10. "Presiding officer" means an individual who presides at any stage in an adjudicatory proceeding.

11. "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state statute, court rule, executive order, or rule of an agency.

12. "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedures, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule. Notwithstanding any other provision of law, "rule" includes an executive order or directive of the governor which

creates an agency or establishes a program or which transfers a program between agencies established by statute or rule.

13. "Rulemaking" means the process for formulating and adopting a rule.

Sec. 3. NEW SECTION. 17A.1103 APPLICABILITY AND RELATION TO OTHER LAW.

1. This chapter applies to all agencies and all proceedings not expressly exempted, mentioning this chapter by name or number.

2. This chapter creates only procedural rights and imposes only procedural duties. The procedural rights and duties are in addition to those created and imposed by other statutes. To the extent that any other statute would diminish a right created or duty imposed by this chapter, the other statute is superseded by this chapter, unless the other statute expressly provides otherwise, mentioning this chapter by name or number.

3. An agency may grant procedural rights to persons in addition to those conferred by this chapter as long as rights conferred upon other persons by any provision of law are not substantially prejudiced.

Sec. 4. NEW SECTION. 17A.1104 SUSPENSION OF CHAPTER'S PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS OR SERVICES.

1. To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the governor by executive order may suspend, in whole or in part, one or more provisions of this chapter. The governor by executive order shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

2. An executive order issued under subsection 1 is subject to the requirements applicable to the adoption and effectiveness of a rule.

3. If any provision of this chapter is suspended pursuant

to this section, the governor shall promptly report the suspension to the general assembly. The report must include recommendations concerning any desirable legislation that may be necessary to conform this chapter to federal law.

Sec. 5. NEW SECTION. 17A.1105 WAIVER.

Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this chapter.

Sec. 6. NEW SECTION. 17A.1106 INFORMAL SETTLEMENTS.

Except to the extent precluded by another provision of law, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is encouraged. Agencies shall establish by rule specific procedures to facilitate informal settlement of matters. This section does not require any party or other person to settle a matter pursuant to informal procedures.

Sec. 7. NEW SECTION. 17A.1107 CONVERSION OF PROCEEDINGS.

1. At any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding may convert the proceeding to another type of agency proceeding provided for by this chapter if the conversion is appropriate under the particular circumstances, is in the public interest, and does not prejudice the substantial rights of any party. If required by any provision of law, the presiding officer or other agency official responsible for the proceeding shall convert the proceeding to another type of agency proceeding provided by this chapter.

2. A conversion of a proceeding of one type to a proceeding of another type may be effected only upon notice to all parties to the original proceeding and an opportunity to present argument on that issue. An order converting one type of proceeding to another type of proceeding is a final order.

3. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be

converted, that officer or official, in accordance with agency rules, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

4. To the extent feasible and consistent with the rights of parties and the requirements of this chapter pertaining to the new proceeding, the record of the original agency proceeding must be used in the new agency proceeding.

5. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

a. Give such additional notice to parties or other persons as is necessary to satisfy the requirements of this chapter pertaining to the new proceeding.

b. Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of this chapter pertaining to the new proceeding.

c. Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of this chapter pertaining to the new proceeding.

6. Each agency shall adopt rules to govern the conversion of one type of proceeding to another. The rules must include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Sec. 8. NEW SECTION. 17A.1108 EFFECTIVE DATE.

This chapter takes effect on July 1, 1997, and does not govern proceedings pending on that date. This chapter governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. This chapter also governs agency proceedings conducted on a remand from a court or another agency after the effective date of this chapter.

ARTICLE 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

Sec. 9. NEW SECTION. 17A.2101 PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULES.

1. The administrative rules editor shall cause the "Iowa Administrative Bulletin" to be published in pamphlet or electronic form at least every other week containing all of the following:

a. Notices of proposed rule adoption prepared in such a manner so that the text of a proposed or adopted rule shows the text of any existing rule being changed and the change being made.

b. Newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule being changed and the change being made.

c. All proclamations and executive orders of the governor which are general and permanent in nature.

d. Resolutions nullifying administrative rules passed by the general assembly pursuant to article III, section 40 of the Constitution of the State of Iowa.

e. Other materials deemed appropriate for such publication by the administrative rules review committee or the administrative rules coordinator.

2. Subject to the direction of the administrative rules coordinator, the administrative rules editor shall cause the "Iowa Administrative Code" to be compiled, indexed, and published in loose-leaf or electronic form containing all effective rules of each agency. The administrative rules editor shall also cause loose-leaf or electronic supplements to the Iowa administrative code to be published on a schedule determined by the administrative rules coordinator and the administrative rules review committee. Any such loose-leaf supplements shall be in a form suitable for insertion in the appropriate places in the permanent compilation, and any such electronic supplements shall be wholly integrated into the text of the permanent compilation. The administrative rules

coordinator shall devise a uniform numbering system for rules and may renumber rules before publication to conform with the system.

3. a. The administrative rules editor may omit from the Iowa administrative bulletin or code any proposed or filed adopted rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if all of the following apply:

(1) The administrative rules editor and the administrative rules coordinator determine that knowledge of the rule is likely to be important to only a small class of persons.

(2) On application to the adopting agency, the proposed or adopted rule in printed or electronic form is made available at no more than its cost of reproduction.

(3) The administrative bulletin or code contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

b. The administrative rules editor shall omit from the Iowa administrative code any rule or portion of a rule nullified by the general assembly pursuant to article III, section 40 of the Constitution of the State of Iowa, any rule or portion of a rule rescinded by the governor pursuant to section 17A.3202, and any other rule that is no longer effective.

4. The Iowa administrative bulletin and the Iowa administrative code and its supplements shall be made available upon request to all persons who subscribe to any of them through the state printing division of the department of general services. Copies of this code so made available shall be kept current by the division.

Each agency shall also make available for public inspection and copying in its principal office those portions of the Iowa administrative bulletin and code containing all rules adopted or used by the agency in the discharge of its functions, and

the index to those rules. An agency may satisfy the requirements of this paragraph by making available for public inspection and copying in its principal office a complete and up-to-date set of the administrative bulletin and code.

5. All expenses incurred by the administrative rules editor under this section shall be defrayed under section 2B.22.

6. a. The Iowa administrative code shall be cited as (agency identification number) IAC, (chapter, rule, subrule, lettered paragraph, or numbered subparagraph).

b. The Iowa administrative bulletin shall be cited as IAB (volume), (number), (publication date), (page number), (ARC number). "ARC number" means the identification number assigned by the administrative rules coordinator to each rulemaking document.

7. Except as otherwise required by law, subsections 1 and 2 do not apply to rules governed by section 17A.3116, and the following provisions apply instead:

a. Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing, to the extent feasible and practicable, all of its rules within the scope of section 17A.3116. Each addition to, change in, or deletion from this official compilation must also be dated, indexed, and a record thereof kept. All portions of the compilation must be made available for public inspection and copying at no more than the cost of reproduction; however, an agency need not make available for public inspection and copying those portions containing rules governed by section 17A.3116, subsection 2, except to the extent that such inspection and copying is required by constitution or statute or in discovery under the Iowa rules of civil or criminal procedure. Certified copies of the full compilation must also be furnished to the administrative rules coordinator and members of the administrative rules review committee, and be kept current by the agency at least every thirty days.

b. A rule subject to the requirements of this subsection shall not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of paragraph "a" are satisfied. The burden of proving that knowledge or that the failure to include a rule subject to this subsection in the required compilation was justified because it was not feasible or practicable to do so, is on the agency. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

Sec. 10. NEW SECTION. 17A.2102 PUBLIC INSPECTION AND INDEXING OF AGENCY ORDERS.

1. In addition to other requirements imposed by any provision of law, each agency shall make all written final orders, including settlement orders, available for public inspection and copying at no more than the cost of reproduction and index them by name and subject. When the agency makes them available for public inspection and copying, the agency shall delete from those orders identifying details to the extent required by any provision of law or necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets. In each case the justification for the deletion must be explained in writing and attached to the order.

2. A written final order shall not be relied on as precedent by an agency and shall not be invoked by an agency for any purpose, to the detriment of any person, until it has been made available for public inspection and indexed in the manner described in subsection 1. This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

Sec. 11. NEW SECTION. 17A.2103 DECLARATORY ORDERS.

1. Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a

statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2. However, an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

2. Each agency shall adopt rules that provide for the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions. The rules must describe the classes of circumstances in which the agency will not issue a declaratory order and must be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agency issuance of reliable advice.

3. Within fifteen days after receipt of a petition for a declaratory order, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons.

4. Persons who qualify under any applicable provision of law as an intervenor and who file timely petitions for intervention according to agency rules may intervene in proceedings for declaratory orders. Other provisions of article 4 of this chapter apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

5. Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

a. Issue an order declaring the applicability of the statute, rule, or order in question to the specified

circumstances.

b. Set the matter for specified proceedings.

c. Agree to issue a declaratory order by a specified time.

d. Decline to issue a declaratory order, stating the reasons for its action.

6. A copy of all orders issued in response to a petition for a declaratory order must be mailed promptly to the petitioner and any other parties.

7. A declaratory order has the same status and binding effect as any other order issued in an agency adjudicative proceeding. A declaratory order must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

8. If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, the petition is deemed to have been denied.

Sec. 12. NEW SECTION. 17A.2104 REQUIRED RULEMAKING.

In addition to other rulemaking requirements imposed by law, each agency shall do all of the following:

1. Adopt as a rule a description of the organization of the agency which states the course and method of its operations, the administrative subdivisions of the agency and the programs implemented by each of them, a statement of the mission of the agency and the methods by which and location where the public may obtain information or make submissions or requests.

2. Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency.

3. As soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and

procedural safeguards that the agency will apply to the law it administers.

ARTICLE 3

RULEMAKING

PART 1

ADOPTION AND EFFECTIVENESS OF RULES

Sec. 13. NEW SECTION. 17A.3101 ADVICE ON POSSIBLE RULES BEFORE NOTICE OF PROPOSED RULE ADOPTION.

1. In addition to seeking information by other methods, an agency, before publication of a notice of proposed rule adoption under section 17A.3103, may solicit comments from the public on a subject matter of possible rulemaking under active consideration within the agency by causing notice to be published in the administrative bulletin of the subject matter and indicating where, when, and how persons may comment.

2. Each agency head may also appoint formal committees, as determined by the agency head, to comment, before publication of a notice of proposed rule adoption under section 17A.3103, on the subject matter of a possible rulemaking under active consideration within the agency. The membership of those committees must be published at least annually in the administrative bulletin.

Sec. 14. NEW SECTION. 17A.3102 PUBLIC RULEMAKING DOCKET.

1. Each agency shall maintain a current, public rulemaking docket.

2. The rulemaking docket must contain a listing of the precise subject matter of each possible rule currently under active consideration within the agency for proposal under section 17A.3103, the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule. For the purposes of this subsection, each agency shall define by rule the point at which a "possible rule" is "currently under active consideration within the agency for proposal under section 17A.3103." Failure to

include in the docket a possible rule currently under active consideration shall not be grounds for the invalidation of that rule after it is adopted if the agency can demonstrate that its omission was in good faith.

3. The rulemaking docket must list each pending rulemaking proceeding. A rulemaking proceeding is pending from the time it is commenced, by publication of a notice of proposed rule adoption, to the time it is terminated, by publication of a notice of termination or the rule becoming effective. For each rulemaking proceeding, the docket must indicate all of the following:

a. The subject matter of the proposed rule.

b. A citation to all published notices relating to the proceeding.

c. Where written submissions on the proposed rule may be inspected.

d. The time during which written submissions may be made.

e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made.

f. Whether a written request for the issuance of a regulatory analysis of the proposed rule has been filed, whether that analysis has been issued, and where the written request and analysis may be inspected.

g. The current status of the proposed rule and any agency determinations with respect thereto.

h. Any known timetable for agency decisions or other action in the proceeding.

i. The date of the rule's adoption.

j. The date or dates the rule is to be or was considered by the Administrative Rules Review Committee and an indication of any action taken by that committee on the rule.

k. The date of the rule's filing, indexing, and publication.

1. When the rule will become effective.

Sec. 15. NEW SECTION. 17A.3103 NOTICE OF PROPOSED RULE ADOPTION.

1. At least thirty-five days before the adoption of a rule, an agency shall cause notice of its contemplated action to be published in the administrative bulletin by submitting five copies of the proposed rule to the administrative rules coordinator, who shall assign an ARC number to each rulemaking document and forward three copies to the administrative rules editor for publication in the administrative bulletin. The notice of proposed rule adoption must include all of the following:

a. A short explanation of the purpose of the proposed rule.

b. The specific legal authority authorizing the proposed rule.

c. Subject to section 17A.2101, subsection 3, the text of the proposed rule.

d. Where, when, and how persons may present their views on the proposed rule.

e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

2. Within three days after its publication in the administrative bulletin, the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies. Failure to provide copies as provided in this subsection shall not be grounds for invalidation of a rule, unless that failure was deliberate on the part of the agency or a result of gross negligence.

3. An agency may publish a notice of proposed rule adoption and hold a rulemaking proceeding on the notice after the enactment and before the effective date of a statute

authorizing it to adopt such a rule as long as any rule adopted on the basis of that proceeding states that it will not become effective until a specified date on or after the effective date of the authorizing statute.

Sec. 16. NEW SECTION. 17A.3104 PUBLIC PARTICIPATION.

1. For at least twenty days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

2. a. An agency shall schedule an oral proceeding on a proposed rule if, within twenty days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by the administrative rules review committee, the administrative rules coordinator, a political subdivision, an agency, or twenty-five persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

b. An oral proceeding on a proposed rule, if required, may not be held earlier than twenty days after notice of its location and time is published in the administrative bulletin.

c. The agency head, a member of the agency head, or another person designated by the agency, shall preside at a required oral proceeding on a proposed rule. The person presiding must have knowledge of the purpose and subject matter of the proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

d. Each agency shall adopt rules for the conduct of oral rulemaking proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

Sec. 17. NEW SECTION. 17A.3105 REGULATORY ANALYSIS.

1. An agency shall issue a regulatory analysis of a proposed rule that complies with requirements of subsection 2, paragraphs "a" and "b", if, within thirty-five days after the published notice of proposed rule adoption, a written request for the analysis is submitted to the agency by the administrative rules review committee or the administrative rules coordinator. An agency shall also issue a regulatory analysis of a proposed rule that complies with subsection 2, paragraphs "a" and "b", if that rule would have a substantial impact on small business and if such a request is submitted to the agency within the specified time period by at least twenty-five persons signing that request who each qualify as a small business or by an organization representing at least twenty-five such persons. If a rule has been adopted without prior notice and an opportunity for public participation in reliance upon section 17A.3108, the written request for the analysis may be made within seventy days of publication of that rule.

2. a. Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain all of the following:

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

(2) A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, including a description of the nature and amount of all of the different kinds of costs that would be incurred in complying with the proposed rule.

(3) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

(4) A comparison of the probable costs and benefits of the

proposed rule to the probable costs and benefits of inaction.

(5) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

(6) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

b. In the case of a rule that would have a substantial impact on small business, the regulatory analysis must also contain a discussion of whether it would be feasible and practicable to do any of the following to reduce the impact of the rule on small business:

(1) Establish less stringent compliance or reporting requirements in the rule for small business.

(2) Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.

(3) Consolidate or simplify the rule's compliance or reporting requirements for small business.

(4) Establish performance standards to replace design or operational standards in the rule for small business.

(5) Exempt small business from any or all requirements of the rule.

c. The agency shall reduce the impact of the proposed rule on small business by using a method discussed in paragraph "b" if it finds that the method is legal and feasible in meeting the statutory objectives which are the basis of the proposed rule.

3. Each regulatory analysis must include quantifications of the data to the extent practicable and must take account of both short-term and long-term consequences.

4. Notwithstanding any other time period specified in this chapter, a concise summary of the regulatory analysis must be published in the administrative bulletin at least ten days

before the earliest of the following:

a. The end of the period during which persons may make written submissions on the proposed rule.

b. The end of the period during which an oral proceeding may be requested.

c. The date of any required oral proceeding on the proposed rule.

In the case of a rule adopted without prior notice and an opportunity for public participation in reliance upon section 17A.3108, the summary must be published within seventy days of the request.

5. The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

6. If the agency has made a good faith effort to comply with the requirements of subsections 1 through 3, the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

7. For the purpose of this section, "small business" means any entity including but not limited to an individual, partnership, corporation, joint venture, association, or cooperative, to which all of the following apply:

a. It is not an affiliate or subsidiary of an entity dominant in its field of operation.

b. It has either twenty or fewer full-time equivalent positions or less than one million dollars in annual gross revenues in the preceding fiscal year.

For purposes of this definition, "dominant in its field of operation" means having more than twenty full-time equivalent positions and more than one million dollars in annual gross revenues, and "affiliate or subsidiary of an entity dominant in its field of operation" means an entity which is at least twenty percent owned by an entity dominant in its field of

operation, or by partners, officers, directors, majority stockholders, or their equivalent, of an entity dominant in that field of operation.

Sec. 18. NEW SECTION. 17A.3106 TIME AND MANNER OF RULE ADOPTION.

1. An agency shall not adopt a rule until the period for making written submissions and oral presentations has expired.

2. Within one hundred eighty days after the later of the publication of the notice of proposed rule adoption, or the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the administrative bulletin.

3. Before the adoption of a rule, an agency shall consider the written submissions, oral submissions or any memorandum summarizing oral submissions, and any regulatory analysis, provided for by this part.

4. Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge, and judgment, in the adoption of a rule.

Sec. 19. NEW SECTION. 17A.3107 VARIANCE BETWEEN ADOPTED RULE AND NOTICE OF PROPOSED RULE ADOPTION.

1. The agency shall not adopt a rule that differs from the rule proposed in the notice of proposed rule adoption on which the rule is based unless all of the following apply:

a. The differences are within the scope of the matter announced in the notice of proposed rule adoption and are in character with the issues raised in that notice.

b. The differences are a logical outgrowth of the contents of that notice of proposed rule adoption and the comments submitted in response thereto.

c. The notice of proposed rule adoption provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

2. In determining whether the notice of proposed rule

adoption provided fair warning that the outcome of that rule-making proceeding could be the rule in question the agency shall consider all of the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests.

b. The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of proposed rule adoption.

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of proposed rule adoption.

Sec. 20. NEW SECTION. 17A.3108 GENERAL EXEMPTION FROM PUBLIC RULEMAKING PROCEDURES.

1. To the extent an agency for good cause finds that any requirements of sections 17A.3103 through 17A.3107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection. An agency shall not rely upon this subsection on the ground that it has insufficient time to follow usual procedures to adopt a rule, because adoption of the rule is required by a statute that became effective only very recently, unless that statute also requires the agency to adopt the rule by a specified date and it would be impracticable to follow usual procedures for adoption of the rule during the period between the date of the enactment of the statute and the specified date by which the agency must adopt the rule.

2. In an action contesting a rule adopted under subsection 1, the burden is upon the agency to demonstrate that any omitted requirements of sections 17A.3103 through 17A.3107 were impracticable, unnecessary, or contrary to the public

interest in the particular circumstances involved.

3. Within two years after the effective date of a rule adopted under subsection 1, the administrative rules review committee or the governor may request the agency to hold a rulemaking proceeding thereon according to the requirements of sections 17A.3103 through 17A.3107. The request must be in writing, filed in the office of the administrative rules coordinator, and sent to the agency. The administrative rules coordinator shall immediately forward to the administrative rules editor a certified copy of the request. Notice of the filing of the request must be published in the next issue of the administrative bulletin. The rule in question ceases to be effective one hundred eighty days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rulemaking proceeding conducted pursuant to the requirements of sections 17A.3103 through 17A.3107.

Sec. 21. NEW SECTION. 17A.3109 EXEMPTION FOR CERTAIN RULES.

1. An agency need not follow the provisions of sections 17A.3103 through 17A.3108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. A rule adopted under this subsection must include a statement that it was adopted under this subsection when it is published in the administrative bulletin, and there must be an indication to that effect in a footnote to the rule when it is published in the administrative code.

2. A reviewing court shall determine wholly de novo the validity of a rule within the scope of subsection 1 that is adopted without complying with the provisions of sections 17A.3103 through 17A.3108.

Sec. 22. NEW SECTION. 17A.3110 CONCISE EXPLANATORY STATEMENT.

1. At the time it adopts a rule, an agency shall issue a concise explanatory statement containing all of the following:

a. A summary of the principal reasons urged for and against the rule.

b. The agency's reasons for adopting the rule, including the agency's reasons for overruling the considerations urged against its adoption.

c. An indication of any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted, with the reasons for any change.

2. Only the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

Sec. 23. NEW SECTION. 17A.3111 CONTENTS, STYLE, AND FORM OF RULE.

1. Each rule adopted by an agency must contain the text of the rule and all of the following:

a. The date the agency adopted the rule.

b. A concise statement of the purpose of the rule.

c. A reference to all rules repealed, amended, or suspended by the rule.

d. A reference to the specific statutory or other authority authorizing adoption of the rule.

e. Any findings required by any provisions of law as a prerequisite to adoption or effectiveness of the rule.

f. The effective date of the rule if other than that specified in section 17A.3115, subsection 1.

2. To the extent feasible, each rule should be written in clear and concise language understandable to persons who may be affected by it.

3. An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has

basis for agency action on that rule or for judicial review thereof.

Sec. 25. NEW SECTION. 17A.3113 INVALIDITY OF RULES NOT ADOPTED ACCORDING TO CHAPTER -- TIME LIMITATIONS.

1. A rule adopted after the effective date of this Act is invalid unless adopted in substantial compliance with the provisions of sections 17A.3102 through 17A.3108 and sections 17A.3110 through 17A.3112.

2. An action to contest the validity of a rule on the grounds of its noncompliance with any provision of sections 17A.3102 through 17A.3108 or sections 17A.3110 through 17A.3112 must be commenced within two years after the effective date of the rule.

Sec. 26. NEW SECTION. 17A.3114 FILING OF RULES.

1. An agency shall file in the office of the administrative rules coordinator three certified copies of each rule it adopts and all existing rules that have not previously been filed. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each adopted rule must have attached to it the explanatory statement required by section 17A.3110. The administrative rules coordinator shall assign an ARC number to each rule and shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the administrative rules coordinator.

2. The administrative rules coordinator shall transmit to the administrative rules editor, two certified copies of each filed rule as soon after its filing as is practicable.

Sec. 27. NEW SECTION. 17A.3115 EFFECTIVE DATE OF RULES.

1. Except to the extent subsection 2 provides otherwise, each adopted rule becomes effective thirty-five days after the later of its filing in the office of the administrative rules

the rule is based.

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based.

c. All written petitions, requests, submissions, and comments received by the agency and all other written materials that are unprivileged and that are not required by statute to be kept confidential that were considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based.

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations.

e. A copy of any regulatory analysis prepared for the proceeding upon which the rule is based.

f. A copy of the rule and explanatory statement filed in the office of the administrative rules coordinator.

g. All petitions for exceptions to, amendments of, or repeal or suspension of, the rule.

h. A copy of any request filed pursuant to section 17A.3108, subsection 3.

i. A copy of any objection to the rule filed by the administrative rules review committee pursuant to section 17A.3204, subsection 4, and the agency's response.

j. A copy of any filed executive order with respect to the rule.

3. Upon judicial review, the record required by this section constitutes the official agency rulemaking record with respect to a rule. Except as provided in section 17A.3110, subsection 2, or otherwise required by a provision of law, the agency rulemaking record need not constitute the exclusive

law, sections 17A.3102 through 17A.3115 are inapplicable to all of the following:

1. A rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public.

2. A rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

a. Enable law violators to avoid detection.

b. Facilitate disregard of requirements imposed by law.

c. Give a clearly improper advantage to persons who are in an adverse position to the state.

3. A rule that only establishes specific prices to be charged for particular goods or services sold by an agency.

4. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.

5. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its political subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

6. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

7. A form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form.

8. An agency budget.

9. An opinion of the attorney general.

coordinator or its publication and indexing in the administrative bulletin.

2. a. A rule becomes effective on a date later than that established by subsection 1 if a later date is required by another statute or specified in the rule.

b. A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection 1 if the agency establishes such an effective date and finds that one or more of the following applies:

(1) The earlier effective date is required by constitution, statute, or court order.

(2) The rule only confers a benefit or removes a restriction on the public or some segment thereof.

(3) The rule only delays the effective date of another rule that is not yet effective.

(4) The earlier effective date is necessary to avoid immediate danger to the public health, safety, or welfare.

(5) The rule is wholly ministerial and does not alter the existing legal rights of any person.

c. The finding and a brief statement of the reasons therefor required by paragraph "b" must be made a part of the rule. In any action contesting the effective date of a rule made effective under paragraph "b", the burden is on the agency to justify its finding.

d. Each agency shall make a reasonable effort to make known to persons who may be affected by it a rule made effective before publication and indexing under this subsection.

3. This section does not relieve an agency from compliance with any provision of law requiring that some or all of its rules be approved by other designated officials or bodies before they become effective.

Sec. 28. NEW SECTION. 17A.3116 SPECIAL PROVISION FOR CERTAIN CLASSES OF RULES.

Except to the extent otherwise provided by any provision of

been adopted by an agency of the United States or of this state, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, and must state that the rule does not include any later amendments or editions of the incorporated matter. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing that matter. An agency which adopts standards by reference to another publication shall purchase and provide a copy of the publication containing the standards to the administrative rules coordinator who shall deposit the copy in the state law library where it shall be made available for inspection and reference. In those cases where the purchase of an additional copy would be an unreasonable expense, the administrative rules coordinator may waive this requirement if the publication can be temporarily and promptly obtained for review by the state law library upon request.

Sec. 24. NEW SECTION. 17A.3112 AGENCY RULEMAKING RECORD.

1. An agency shall maintain for a period of five years an official rulemaking record for each rule it adopts. The record and materials incorporated by reference must be available for public inspection.

2. The agency rulemaking record must contain all of the following:

a. Copies of all publications in the administrative bulletin with respect to the rule or the proceeding upon which

10. The terms of a collective bargaining agreement.

Sec. 29. NEW SECTION. 17A.3117 PETITION FOR ADOPTION OF RULE.

1. Any person may petition an agency requesting the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons therefor, initiate rulemaking proceedings in accordance with this chapter or if otherwise lawful, adopt a rule.

2. If a person petitions an agency requesting the adoption of a rule superseding specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, the agency shall initiate rulemaking proceedings in accordance with this chapter and adopt such a rule unless the agency finds, and incorporates in that finding the reasons therefor, that the adoption of such a rule at this time is infeasible or that such a rule is impracticable, and provides a copy of that finding to the petitioner.

PART 2

REVIEW OF AGENCY RULES

Sec. 30. NEW SECTION. 17A.3201 REVIEW BY AGENCY.

Within each five-year period an agency shall review each of its rules to determine whether each such rule should be repealed or amended, or a new rule adopted instead. In conducting that review, the agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include, for each such rule, a concise statement of all of the following:

1. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.

2. Criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of

the rule tendered to the agency or granted by the agency.

3. Alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes.

A copy of the report must be sent to the administrative rules review committee and the administrative rules coordinator and be available for public inspection.

Sec. 31. NEW SECTION. 17A.3202 REVIEW BY GOVERNOR -- ADMINISTRATIVE RULES COORDINATOR.

1. To the extent the agency itself would have such authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order. If the rule in question has been effective for more than one hundred eighty days, that executive order shall be subject to the provisions of sections 17A.3103, 17A.3104, and 17A.3106 through 17A.3116 applicable to the adoption and effectiveness of a rule.

2. The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating in the order the reasons for the action. The executive order must be filed in the office of the administrative rules coordinator, which shall promptly forward a certified copy to the agency and the administrative rules editor. An executive order terminating a rulemaking proceeding becomes effective on the date it is filed and must be published in the next issue of the administrative bulletin.

3. There is created, within the office of the governor, an administrative rules coordinator to advise the governor in the execution of the authority vested under this article. The governor shall appoint the administrative rules coordinator who shall serve at the pleasure of the governor.

Sec. 32. NEW SECTION. 17A.3203 ADMINISTRATIVE RULES REVIEW COMMITTEE.

1. There is created an administrative rules review

committee. The committee shall be bipartisan and shall be composed of the following members:

a. Five senators appointed by the majority leader of the senate.

b. Five representatives appointed by the speaker of the house.

2. Committee members shall be appointed prior to the adjournment of a regular session convened in an odd-numbered year. Member's terms of office shall be for four years beginning May 1 of the year of appointment. However, a member shall serve until a successor is appointed. A vacancy on the committee shall be filled by the original appointing authority for the remainder of the term. A vacancy shall exist whenever a committee member ceases to be a member of the house from which the member was appointed.

3. A committee member shall be paid the per diem specified in section 2.10, subsection 6, for each day in attendance and shall be reimbursed for actual and necessary expenses. There is appropriated from money in the general fund not otherwise appropriated an amount sufficient to pay costs incurred under this section.

4. The committee shall choose a chairperson from its membership and prescribe its rules of procedure. The committee may employ a secretary or may appoint the administrative rules editor or a designee to act as secretary.

5. A regular committee meeting shall be held at the seat of government on the second Tuesday of each month. Unless impracticable in advance of each such meeting the subject matter to be considered shall be published in the Iowa administrative bulletin. A special committee meeting may be called by the chairperson at any place in the state and at any time. Unless impracticable, in advance of each special meeting notice of the time and place of such meeting and the subject matter to be considered shall be published in the Iowa administrative bulletin.

6. Notwithstanding section 13.7, the committee may employ necessary legal and technical staff.

Sec. 33. NEW SECTION. 17A.3204 REVIEW BY ADMINISTRATIVE RULES REVIEW COMMITTEE.

1. The administrative rules review committee shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

2. Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the administrative bulletin.

3. The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The speaker of the house and the president of the senate shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the general assembly from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

4. a. If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of

the administrative rules coordinator. The filed objection must contain a concise statement of the committee's reasons for its action.

b. The administrative rules coordinator shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question and the administrative rules editor. The administrative rules coordinator shall also maintain a permanent register open to public inspection of all objections by the committee.

c. The administrative rules editor shall publish and index an objection filed pursuant to this subsection in the next issue of the administrative bulletin and indicate its existence in a footnote to the rule in question when that rule is published in the administrative code. In case of a filed objection by the committee to a rule that is subject to the requirements of section 17A.2101, subsection 7, the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

d. Within thirty days after the filing of an objection by the committee to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

e. After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency. A court holding a rule in such a proceeding to be invalid because it is outside the authority delegated to the agency shall render judgment against the agency for court costs. Court costs include a reasonable attorney's fee and are payable by the treasurer of state from

the support appropriations of the agency that adopted the rule.

f. The failure of the administrative rules review committee to object to a rule is not an implied legislative authorization of its procedural or substantive validity.

5. The committee may recommend to an agency that it adopt a rule. The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of sections 17A.3103 and 17A.3104. An agency is not required to adopt the proposed rule.

6. The committee may, by a two-thirds vote of the committee members, delay the effective date of an adopted rule that is not yet effective for any period designated by the committee that would end no later than the next adjournment of a regular session of the general assembly. When the committee takes such action the committee shall state the reasons therefor. If the general assembly has not disapproved the rule by a joint resolution prior to the end of the period during which its effectiveness has been delayed by the action of the committee, the rule shall become effective. If the rule is disapproved by the general assembly during that period, the rule shall not become effective and the agency shall summarily withdraw the rule.

7. The committee shall file an annual report with the presiding officer of each house and the governor.

ARTICLE 4

ADJUDICATIVE PROCEEDINGS

PART 1

AVAILABILITY OF ADJUDICATIVE PROCEEDINGS -- APPLICATIONS -- LICENSES -- WAIVER OF RULE

Sec. 34. NEW SECTION. 17A.4101 ADJUDICATIVE PROCEEDINGS -- WHEN REQUIRED -- EXCEPTIONS.

1. An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order. However, an

agency need not conduct an adjudicative proceeding if the order is a decision to do any of the following:

a. To issue or not to issue a complaint, summons, or similar accustation.

b. To initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court.

c. Under section 17A.4103, not to conduct an adjudicative proceeding.

This subsection does not preclude an agency from establishing, subject to sections 17A.5107 and 17A.5112, procedures that must be followed prior to the commencement of an adjudicative proceeding, or from issuing an order prior to conducting an adjudicative proceeding if any of the following apply:

(1) The person subject to that order may, within a time period specified by rule or in the order, file an application for an adjudicatory proceeding, that application will automatically dissolve the order from the time of its issuance, and the substantial rights of the person subject to that order are not prejudiced by the order in the interim period prior to its automatic dissolution resulting from the filing of an application for an adjudicatory proceeding.

(2) The order was properly issued in accordance with section 17A.4501.

(3) The agency was expressly authorized by statute to issue that order prior to conducting an adjudicatory proceeding, in which case, the agency must proceed as quickly as feasible after its issuance to complete any proceeding that would be required if the statute had not authorized such action in advance of any adjudicative proceeding.

2. This article applies to rulemaking proceedings only to the extent that another statute expressly so requires.

Sec. 35. NEW SECTION. 17A.4102 ADJUDICATIVE PROCEEDINGS -- COMMENCEMENT.

1. Subject to the requirements of other provisions of law, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

2. An agency shall commence an adjudicative proceeding upon the application of any person, unless any of the following apply:

a. The agency lacks jurisdiction of the subject matter.

b. Resolution of the matter requires the agency to exercise discretion within the scope of section 17A.4101, subsection 1.

c. A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter and, in the exercise of that discretion, the agency has determined not to conduct an adjudicative proceeding.

d. Resolution of the matter does not require the agency to issue an order that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

e. The matter was not timely submitted to the agency according to any applicable provision of law.

f. The matter was not submitted in a form substantially complying with any applicable provision of law.

3. Subject to other provisions of law, each agency may, by rule, establish specified time limits for commencing various classes of adjudicative proceedings that are within the agency's jurisdiction.

4. An application for an agency to issue an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

5. An adjudicative proceeding commences when the agency or a presiding officer does any of the following:

a. Notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

b. Begins to take action on a matter that appropriately may be determined by an adjudicative proceeding, unless this action is one of the following:

(1) An investigation for the purpose of determining whether an adjudicative proceeding should be conducted.

(2) A decision which, under section 17A.4101, subsection 1, the agency may make without conducting an adjudicative proceeding.

Sec. 36. NEW SECTION. 17A.4103 DECISION NOT TO CONDUCT ADJUDICATIVE PROCEEDING.

An agency that decides, pursuant to section 17A.4102, subsection 2, not to conduct an adjudicative proceeding in response to an application, shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

Sec. 37. NEW SECTION. 17A.4104 AGENCY ACTION ON APPLICATIONS.

1. Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute for any stage of the proceedings, an agency shall process an application for an order, other than a declaratory order, as follows:

a. Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of any agency member or employee who may be contacted regarding the application.

b. Except in situations governed by paragraph "c", within ninety days after receipt of the application or of the response to a timely request made by the agency pursuant to paragraph "a", the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part, on the basis of emergency or summary adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter.

(2) Commence a formal adjudicative hearing or a conference adjudicative hearing in accordance with this chapter.

(3) Dispose of the application in accordance with section 17A.4103.

c. If the application pertains to subject matter that is not available when the application is filed but may be available in the future, including an application for housing or employment at a time no vacancy exists, the agency may proceed to make a determination of eligibility within the time provided in paragraph "b". If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible applicants as provided by law and, upon request, shall notify the applicant of the status of the application.

2. If a timely application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the agency has taken final action upon the application for renewal or, if the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court or agency.

Sec. 38. NEW SECTION. 17A.4105 AGENCY ACTION AGAINST LICENSEES.

An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute. This section does not preclude an agency from taking immediate action to protect the public interest in accordance with section 17A.4501 or adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees,

including rules affecting the existing licenses of a class of licensees.

Sec. 39. NEW SECTION. 17A.4106 PETITION FOR WAIVER OF RULE.

1. A person may file a petition with an agency requesting a waiver, in whole or in part, of a rule of that agency on the ground that the application of the rule to the particular circumstances of that person would qualify for a waiver under subsection 5. A petition filed under this provision must specify the rule in question, the precise scope of the waiver requested, the specific facts that would justify a waiver for petitioner, and the reasons why the particular application of the rule to petitioner for which the waiver is requested would qualify for a waiver under subsection 5.

2. Each agency shall issue rules consistent with this section concerning all of the following:

a. Governing the form, contents, and filing of petitions for the waivers of rules.

b. Specifying the procedural rights of persons in relation to such petitions.

c. Providing for the disposition of those petitions.

3. Within fifteen days after receipt of a petition for waiver of a rule, the agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons. Persons who qualify under any applicable provision of law as an intervenor and file timely petitions for intervention according to agency rules may intervene in proceedings for waivers of a rule. Other provisions of this article apply to agency proceedings for waivers of a rule only to the extent an agency so provides by rule or order.

4. An order granting or denying such a petition shall be in writing and shall contain a statement of the relevant facts and reasons supporting that action. An agency shall grant or deny such a petition within ninety days of its receipt.

Failure of an agency to grant or deny such a petition within ninety days of its receipt shall be deemed a denial of that petition by the agency.

5. An agency shall issue an order granting a petition for a waiver of a rule, in whole or in part, if application of the rule to the petitioner on the basis of the particular facts specified in the petition would not serve any of the purposes of the rule. An agency may issue an order granting a petition for waiver of a rule, in whole or in part, if application of the rule to the petitioner would result in undue hardship, waiver of the rule on the basis of the facts specified in the petition would be consistent with the public interest, and waiver of the rule as to petitioner would not prejudice the substantial rights of any other person. An order granting such a petition shall constitute a defense in any subsequent proceeding where the applicability of that rule to petitioner is at issue if petitioner proves in that subsequent proceeding all of the relevant facts pertaining to petitioner upon which that waiver order was based and that the particular application of the rule at issue was within the scope of the waiver order in question.

6. In an agency proceeding to enforce a rule of that agency, a person resisting the enforcement of the rule may defend successfully upon a demonstration that application of the rule to the person would not serve any of the purposes of the rule.

7. An agency may, on its own motion, waive the application of one or more of its rules, in whole or in part, to a specified person on the ground that the relevant facts pertaining to that person would qualify that person for a waiver under the provisions of subsection 5, by rendering an order containing the facts and reasons justifying that waiver.

8. Any order issued under this section shall be transmitted to petitioner or to the person as to whom the waiver order pertains within seven days of its rendition.

9. An agency shall maintain a file for each of its rules for which a waiver order has been issued containing all orders waiving the application to any person of that rule.

PART 2

FORMAL ADJUDICATIVE HEARING

Sec. 40. NEW SECTION. 17A.4201 APPLICABILITY.

An adjudicative proceeding is governed by this part, except as otherwise provided by any of the following:

1. A statute other than this chapter.

2. A rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this chapter for those proceedings.

3. Section 17A.4501 pertaining to emergency adjudicative proceedings.

4. Section 17A.2103 pertaining to declaratory proceedings.

5. Section 17A.4106 pertaining to petitions for waiver of rules.

Sec. 41. NEW SECTION. 17A.4202 PRESIDING OFFICER, DISQUALIFICATION, SUBSTITUTION.

1. a. If the agency or an officer of the agency under whose authority the adjudicative proceeding is to take place is a named party to that proceeding or a real party in interest to that proceeding, in the discretion of the agency head, the presiding officer may be either the agency head, one or more members of the agency head, or one or more administrative law judges assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301. However, the agency head shall designate as the presiding officer an administrative law judge assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301 if any person to whom the agency action is specifically directed timely requests an administrative law judge to preside at the proceeding.

b. If the agency or an officer of the agency under whose

authority the adjudicative proceeding is to take place is not a named party to that proceeding or a real party in interest to that proceeding, in the discretion of the agency head, the presiding officer may be either the agency head, one or more members of the agency head, an administrative law judge assigned by the office of administrative hearings in accordance with the provisions of section 17A.4301, or any other person designated as a presiding officer by the agency head. Any other person designated as a presiding officer by the agency head may be employed by and officed in the agency for which that person acts as a presiding officer, but such a person shall not perform duties inconsistent with that person's duties and responsibilities as a presiding officer and shall be governed by the merit system provisions of chapter 19A.

2. Any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is or may be disqualified.

3. Any party may timely request the disqualification of a person after receipt of notice indicating that the person will preside or upon discovering facts establishing grounds for disqualification, whichever is later.

4. A person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination.

5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by either of the following:

a. The governor, if the disqualified or unavailable person is an elected official.

b. The appointing authority, if the disqualified or unavailable person is an appointed official.

6. Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken

by the latter.

Sec. 42. NEW SECTION. 17A.4203 REPRESENTATION.

1. Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

2. Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by any provision of law, other representative.

3. Any party may designate in writing with an agency an authorized representative to act on behalf of that party in a particular proceeding. An attorney licensed to practice in this state who files an appearance or a pleading with an agency on behalf of a party shall be deemed to be the designated authorized representative of the party in that proceeding. If an authorized representative has been designated, notice to a party required under this article must be satisfied by providing the notice to that representative.

Sec. 43. NEW SECTION. 17A.4204 PREHEARING CONFERENCE -- AVAILABILITY -- NOTICE.

The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted the following apply:

1. The presiding officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. If the presiding officer decides that another presiding officer should conduct that conference, the agency shall assign or request the office of administrative hearings to assign a presiding officer for the prehearing conference, exercising the same discretion as is provided by section 17A.4202 concerning the selection of a presiding officer for a hearing.

2. The presiding officer for the prehearing conference shall set the time and place of the conference and give

reasonable and timely written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall also give such notice to other persons entitled to notice under any provision of law.

3. The notice must include all of the following:

a. The names of all parties, and the mailing addresses of all parties or the names and mailing addresses of their designated representatives, and the names and mailing addresses of all other persons to whom notice is being given by the presiding officer.

b. The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency.

c. The official file or other reference number, the name of the proceeding, and a general description of the subject matter.

d. A statement of the time, place, and nature of the prehearing conference.

e. A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held.

f. The name, official title, mailing address and telephone number of the presiding officer for the prehearing conference.

g. A statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing or a summary adjudicative proceeding for disposition of the matter as provided by this chapter.

h. A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding may be held in default under this chapter.

4. The notice may include a statement that each party must bring to the prehearing conference specified listed materials or information, as determined by the presiding officer, and

that a failure to do so, without good cause, will preclude that party from subsequently introducing those materials or that information in the proceeding. The notice may also include any other matters that the presiding officer considers desirable to expedite the proceedings.

Sec. 44. NEW SECTION. 17A.4205 PREHEARING CONFERENCE -- PROCEDURE AND PREHEARING ORDER.

1. The presiding officer may conduct all or part of the prehearing conference by telephone, videoconference, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

2. The presiding officer shall conduct the prehearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type of proceeding, exploration of settlement possibilities, waivers of any rights conferred upon a party by this chapter that are relevant to the proceeding, preparation of stipulations on any relevant matter, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which evidence will be presented in written form, and the extent to which telephone, videoconference, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference and may deviate from that order at the hearing only with the consent of all parties or for good cause.

3. If a prehearing conference is not held, the presiding officer for the hearing may issue a prehearing order, based on

the pleadings, to regulate the conduct of the proceedings.

Sec. 45. NEW SECTION. 17A.4206 NOTICE OF HEARING.

1. The presiding officer for the hearing, or another person authorized to do so by rule of the agency, shall set the time and place of the hearing and give reasonable and timely written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

2. The notice must include a copy of any prehearing order rendered in the matter unless the parties and persons who have filed written petitions to intervene have already been furnished with a copy of such an order.

3. To the extent not included in a prehearing order accompanying it, the notice must include all of the following:

a. The names of all parties, and the mailing addresses of all parties or the names and mailing addresses of their designated representatives, and the names and mailing addresses of all other persons to whom notice is being given.

b. The name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the agency.

c. The official file or other reference number, the name of the proceeding, and a general description of the subject matter.

d. A statement of the time, place, and nature of the hearing.

e. A statement of the legal authority and jurisdiction under which the hearing is to be held.

f. The name, official title, mailing address, and telephone number of the presiding officer.

g. To the extent known to the person giving notice, a statement of the issues involved and of the matters asserted by the parties.

h. A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding may be held in default

under this chapter.

4. The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

5. The agency shall give notice to persons entitled to notice under any provision of law who have not been given notice by the presiding officer. Notice under this subsection may include all types of information provided in subsections 1 through 4 or may consist of a brief statement indicating the subject matter, parties, time, place, and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

Sec. 46. NEW SECTION. 17A.4207 PLEADINGS, BRIEFS, MOTIONS, SERVICE.

1. The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, and objections.

2. The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

3. A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.

Sec. 47. NEW SECTION. 17A.4208 DEFAULT.

1. If a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding, the presiding officer may serve by certified mail all parties written notice of a proposed default order, including a statement of the grounds.

2. Within fifteen days or such longer period specified by rule after the mailing by certified mail of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. A proposed default order may be vacated for any reason specified in the rules of civil

procedure or for any other reason specified by agency rule. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

3. The presiding officer shall either issue or vacate the default order promptly after expiration of the time within which the party may file a written motion under subsection 2.

4. After issuing a default order, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party.

Sec. 48. NEW SECTION. 17A.4209 INTERVENTION.

1. The presiding officer shall grant a petition for intervention if all of the following apply:

a. The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least twenty days before the hearing.

b. The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law.

c. The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

2. The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

3. If a petitioner qualifies for intervention, the

presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include any or all of the following:

a. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.

b. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

c. Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

4. The presiding officer shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Sec. 49. NEW SECTION. 17A.4210 SUBPOENAS, DISCOVERY, AND PROTECTIVE ORDERS.

1. Discovery procedures applicable to civil actions are available to all parties in accordance with the rules of civil procedure. Upon notice to all parties, the presiding officer at the request of any party shall, and upon the presiding officer's own motion may, administer oaths and issue subpoenas, discovery orders, and protective orders, in accordance with the rules of civil procedure.

2. Any party or person to whom the subpoena or similar process is directed may object to the issuance of the subpoena or process. The presiding officer and any reviewing district court shall sustain the subpoena or similar process only to the extent that it is found to be in accordance with the law

applicable to the issuance of subpoenas or discovery in civil actions.

3. Subpoenas and orders issued under this section may be enforced pursuant to article 5, part 2, of this chapter on civil enforcement of agency action.

4. An agency that relies on a witness in an adjudicative proceeding, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of the witness' testimony, shall, on request, make such statements or reports available prior to hearing to parties for use on cross-examination, unless those statements or reports are otherwise expressly exempt from disclosure by constitution or statute. Identifiable agency records that are relevant to disputed material facts involved in an adjudicative proceeding, shall, upon request, promptly be made available to a party unless the requested records are expressly exempt from disclosure by constitution or statute.

5. Unless provided otherwise by any applicable provision of law, an agency authorized to issue an investigatory subpoena for the purpose of determining whether to commence an adjudicatory proceeding may do so only after giving notice of the proposed issuance of the subpoena and an opportunity to contest its issuance to the persons who are the subject of the agency investigation. However, an agency may omit such notice and opportunity if it obtains an order from a district court approving that omission because of any of the following:

a. The whereabouts of the persons who are the subject of the agency investigation are unknown and could not be ascertained with reasonable efforts.

b. Such notice to the persons who are the subject of the agency investigation would seriously interfere with the agency's ability to obtain the evidence necessary to perform its law enforcement responsibilities.

c. Such notice would result in imminent peril to the health, safety, or welfare of any person or persons.

Sec. 50. NEW SECTION. 17A.4211 PROCEDURE AT HEARING.

At a hearing, all of the following apply:

1. The presiding officer shall regulate the course of the proceedings in conformity with any prehearing order.

2. To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

3. The presiding officer may conduct all or part of the hearing by telephone, videoconference, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

4. The presiding officer shall cause the hearing to be recorded at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption. The recording or stenographic notes of oral proceedings or the transcription thereof shall be filed with and maintained by the agency for at least five years from the date of the final decision in that case.

5. The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, video-conference, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity to observe and hear that communication at the location of any one of the participants,

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as designated by the presiding officer, or if that is not feasible, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

Sec. 51. NEW SECTION. 17A.4212 EVIDENCE -- OFFICIAL NOTICE.

1. Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence after notifying the parties of an intention to do so and providing the parties with an opportunity to object to that exclusion. Evidence shall not be excluded solely because it is hearsay.

2. All testimony of parties and witnesses must be made under oath or affirmation.

3. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

4. Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

5. Official notice may be taken of any fact that could be judicially noticed in the courts of this state, the record of other proceedings before the agency, technical or scientific matters within the agency's specialized knowledge, and codes or standards that have been adopted by an agency of the United States, of this state, or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest

and rebut the facts or material so noticed. However, if the required notification of the parties is infeasible or impracticable prior to the issuance of such an initial or final order, the notification may first occur in that order itself, as long as the parties are afforded, through the granting of a motion for reconsideration timely filed with the presiding officer, an opportunity, after the order is rendered, to contest and rebut the facts or material so noticed before that order becomes final.

Sec. 52. NEW SECTION. 17A.4213 EX PARTE COMMUNICATIONS.

1. Except as provided in subsection 2, or unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding shall not communicate, directly or indirectly, regarding any issue in the proceeding other than inquiries about scheduling, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

2. A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not receive ex parte communications of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

3. Unless required for the disposition of ex parte matters specifically authorized by statute, a party to an adjudicative proceeding, and a person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, shall not communicate, directly or indirectly, in connection with any issue in that proceeding other than inquiries about scheduling, while the proceeding is

pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.

4. If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection 5.

5. A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral and other communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within ten days after notice of the communication.

6. When necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

7. The agency and any party may report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, suspending or revoking a privilege to practice before the agency, and for censuring, suspending, or dismissing agency personnel, for any violations of this section.

8. In a proceeding for judicial review, the burden shall be on the party seeking to uphold the validity of an order to

demonstrate that any violation of subsections 1 through 5 relating to the issuance of that order did not prejudice the substantial rights of the party seeking its invalidation.

Sec. 53. NEW SECTION. 17A.4214 SEPARATION OF FUNCTIONS.

1. A person who has served personally as an investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

2. A person who is subject to the authority, direction, or discretion of one who has served personally as an investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

3. A person who has participated in a determination of probable cause or other equivalent preliminary determination as to the sufficiency of the evidence to support the facts alleged by any party in an adjudicative proceeding shall not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

4. A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with this section or section 17A.4202.

5. In a proceeding for judicial review, the burden shall be on the party seeking to uphold the validity of an order to demonstrate that any violation of this section relating to the issuance of that order did not prejudice the substantial rights of the party seeking its invalidation.

Sec. 54. NEW SECTION. 17A.4215 FINAL ORDER -- INITIAL ORDER.

1. If the presiding officer is the agency head, the presiding officer shall render a final order.

2. If the presiding officer is not the agency head, the

presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with section 17A.4216.

3. A final order and an initial order must include the date of its rendition and, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. The order must include an explanation of why the evidence in the record supports each finding of fact and why the evidence in the record that is contrary to a finding does not preclude it. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must also be accompanied by a concise and explicit statement of each of the underlying facts in the record that support those findings. Each conclusion of law must be supported by cited authority or by a reasoned explanation. If a party has submitted proposed findings of fact, conclusions of law, or policy reasons, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief from that final or initial order. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

4. Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge

may be utilized in evaluating evidence, but only in accordance with section 17A.4212, subsection 5. Unless provided otherwise by another provision of law, findings of fact shall be based upon a preponderance of the evidence and the burden of proof shall be on the proponent of the agency action requested.

5. If a person serving or designated to serve as presiding officer becomes unavailable, for any reason, before rendition of the final order or initial order, a substitute presiding officer must be appointed as provided in section 17A.4202. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice; but if demeanor of witnesses is a substantial factor and the original presiding officer is unavailable the portions of the hearing involving demeanor heard by the original presiding officer shall be heard again by the new presiding officer.

6. The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

7. A final order or initial order must be rendered in writing within ninety days after conclusion of the hearing or after submission of proposed findings in accordance with subsection 6 unless this period is waived, extended with the written consent of all parties, or extended for good cause shown.

8. The presiding officer shall cause copies of the final order or initial order to be mailed or otherwise delivered to each party within two working days from the time the order is rendered.

Sec. 55. NEW SECTION. 17A.4216 REVIEW OF INITIAL ORDER -- EXCEPTIONS TO REVIEWABILITY.

1. The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that any of the following apply:

a. A provision of law precludes or limits agency review of the initial order.

b. The agency head, in the exercise of discretion conferred by a provision of law, does any of the following:

(1) Determines to review some but not all issues, or not to exercise any review.

(2) Delegates its authority to review the initial order to one or more persons.

(3) Authorizes one or more persons to review the initial order, subject to further review by the agency head.

2. A petition for appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within twenty days after rendition of the initial order or within such longer time period, not to exceed thirty days, as established by rule of the agency. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within twenty days after its rendition. The time period for a party to file a petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to section 17A.4218, and a new time period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

3. The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

4. The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

5. The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

6. Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

7. The presiding officer may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the presiding officer may order such temporary relief as is authorized and appropriate.

8. A final order or an order remanding the matter for further proceedings must be rendered in writing within sixty days after receipt of briefs and oral argument unless that period is waived, extended with the written consent of all parties, extended for good cause shown, or extended by rule for that class of cases for an additional period of not longer than thirty days.

9. A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and must include, or incorporate by express reference to the initial order, all the matters required by section 17A.4215, subsection 3.

10. The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to

be mailed or otherwise delivered to each party within two working days from the time the order is rendered.

Sec. 56. NEW SECTION. 17A.4217 STAY.

A party may submit to the presiding officer a petition for stay of effectiveness of an initial or final order within twenty days after its rendition unless otherwise provided by statute or stated in the initial or final order. The presiding officer may take action on the petition for stay, either before or after the effective date of the initial or final order. A petition for a stay is deemed to have been denied if the presiding officer does not dispose of it within ten days after the filing of the petition.

Sec. 57. NEW SECTION. 17A.4218 RECONSIDERATION.

Unless otherwise provided by statute or rule the following apply:

1. Any party, within twenty days after rendition of an initial or final order, may file a petition for reconsideration of that order, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review. A copy of the application for reconsideration shall be timely mailed by the presiding officer to all parties of record not joining in the application.

2. The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

3. The presiding officer shall render a written order denying the petition, or granting the petition and dissolving or modifying the initial or final order, or setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within twenty days after the filing of the

petition.

Sec. 58. NEW SECTION. 17A.4219 REVIEW BY SUPERIOR AGENCY.

If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as an initial order and the second agency functions as though it were reviewing an initial order in accordance with section 17A.4216.

Sec. 59. NEW SECTION. 17A.4220 EFFECTIVENESS OF ORDERS.

1. Unless a later date is stated in a final order or a stay is granted, a final order is effective twenty days after rendition, except for any of the following:

a. A party shall not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order.

b. A final order shall not be invoked for any purpose against any person unless the agency has made the final order available for public inspection and copying or the person has actual knowledge of the final order.

c. A final order may become effective on a specified date stated in the order that is earlier than twenty days after its rendition if any of the following exist:

(1) Another statute authorizes the agency to set an earlier effective date for that order.

(2) The order only confers a benefit or relieves a restriction on the parties other than the agency issuing the order.

(3) The earlier effective date is necessary to avoid an immediate danger to the public health, safety, or welfare.

2. Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with section 17A.4215 is determined as follows:

a. When the initial order is rendered, if administrative

review is unavailable.

b. When the agency head renders an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect.

c. Twenty days after rendition of the initial order, if no party has filed a petition for appeal and the agency head has not given written notice of its intention to exercise review.

3. Unless a later date is stated in an initial order or a stay is granted, an initial order that becomes a final order in accordance with subsection 2 and section 17A.4215 is effective twenty days after becoming a final order, except for any of the following:

a. A party shall not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised.

b. An initial order shall not be invoked for any purpose against any person unless the agency has made the initial order available for public inspection and copying or the person has actual knowledge of the initial order or of an order stating that review will not be exercised.

c. An initial order that becomes a final order may become effective on a specified date stated in the order that is earlier than twenty days after it becomes a final order if it satisfies the requirements of subsection 1, paragraph "a", "b", or "c".

4. This section does not preclude an agency from taking immediate action to protect the public interest in accordance with section 17A.4501.

Sec. 60. NEW SECTION. 17A.4221 AGENCY RECORD.

1. An agency shall maintain an official record of each adjudicative proceeding under this part.

2. The agency record consists only of all of the following:

a. Notices of all proceedings.

b. Any prehearing order.

c. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.

d. Evidence received or considered.

e. A statement of matters officially noticed.

f. Proffers of proof and objections and rulings thereon.

g. Proposed findings, requested orders, and exceptions.

h. The record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.

i. Any final order, initial order, or order on reconsideration.

j. Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with section 17A.4213, subsection 2.

k. Matters placed on the record after an ex parte communication.

3. Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this part and for judicial review thereof.

PART 3

OFFICE OF ADMINISTRATIVE HEARINGS

Sec. 61. NEW SECTION. 17A.4301 OFFICE OF ADMINISTRATIVE HEARINGS -- CREATION, POWERS, DUTIES.

1. An independent office of administrative hearings is created to be headed by a director appointed by the governor and confirmed by the senate. The director serves at the pleasure of the governor.

2. The office shall employ administrative law judges as necessary to conduct proceedings required by this chapter or any other provision of law. Administrative law judges employed by the office shall not perform duties inconsistent with their duties and responsibilities as administrative law

judges and shall not be located in offices within the agencies for which they act as presiding officers. Administrative law judges shall be covered by the merit system provisions of chapter 19A. Subject to the approval of the department of personnel, the office shall, insofar as practicable, provide for different classes of administrative law judges with different salary scales. The office shall also facilitate, insofar as practicable, specialization by its administrative law judges so that particular judges may become expert in presiding over cases in particular agencies.

3. If the office cannot furnish one of its administrative law judges in response to an agency request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

4. The director may furnish administrative law judges on a contract basis to any governmental entity to conduct any proceeding not subject to this chapter.

5. After the effective date of this Act, a person shall not be newly employed by the office as an administrative law judge to preside over formal adjudicative hearings unless that person has a license to practice law in this state.

6. The office shall adopt rules pursuant to this chapter to do all of the following:

a. To establish qualifications for administrative law judges employed by the office, and, subject to the approval of the department of personnel, procedures by which candidates for a position as an administrative law judge in the office will be considered for employment and the manner in which public notice of vacancies for positions as administrative laws judges in the office will be given.

b. To establish procedures for agencies to request and for

the director to assign administrative law judges employed by the office; however, an agency shall not select or reject any individual administrative law judge for any proceeding except in accordance with this chapter.

c. To establish procedures and adopt forms, consistent with this chapter and other provisions of law, to govern administrative law judges employed by the office, but any rules adopted under this paragraph shall be applicable to a particular adjudicatory proceeding only to the extent that they are not inconsistent with the rules of the agency under whose authority that proceeding is conducted.

d. To establish standards and procedures for the evaluation, training, promotion, and discipline by the office of administrative law judges employed by the office.

e. To establish, consistent with the provisions of this chapter, a code of administrative judicial conduct that is similar in function and substantially equivalent to the Iowa code of judicial conduct, to govern the actions of all persons who act as presiding officers under the authority of section 17A.4202, subsection 1.

f. To facilitate the performance of the responsibilities conferred upon the office by this chapter.

7. The director may do all of the following:

a. Maintain a staff of reporters and other personnel.

b. Administer the provisions of this section and rules adopted under its authority.

8. The office may charge agencies for services rendered and the payment received shall be considered repayment receipts as defined in section 8.2.

PART 4

CONFERENCE ADJUDICATIVE HEARING

Sec. 62. NEW SECTION. 17A.4401 CONFERENCE ADJUDICATIVE HEARING -- APPLICABILITY.

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and

the matter is entirely within one or more categories for which the agency by rule has adopted this part. However, those categories may include only the following:

1. A matter in which there is no disputed issue of material fact.

2. A matter in which there is a disputed issue of material fact, if the matter involves one or more of the following:

a. A monetary amount of not more than one thousand dollars. In determining whether a matter involves only a monetary amount of one thousand dollars or less, a presumption arises that, if a claimant prevails on the merits, the claimant will subsequently be qualified for and entitled to the amount of any periodic payments claimed for the maximum period allowed by law and that claimant may aggregate the amount of those subsequent payments for purposes of determining the monetary amount involved in the matter at issue.

b. A disciplinary sanction against an inmate.

c. A disciplinary sanction against a student which does not involve expulsion or suspension for more than ten days from an educational institution.

d. A disciplinary sanction against a public employee which does not involve discharge or suspension for more than ten days from employment.

e. A disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license, or a reprimand or warning against an occupational or professional licensee which may reasonably be deemed to affect the economic or professional status or reputation of that licensee.

Sec. 63. NEW SECTION. 17A.4402 CONFERENCE ADJUDICATIVE HEARING -- PROCEDURES.

The procedures of this chapter pertaining to formal adjudicative hearings apply to a conference adjudicative hearing, except to the following extent:

1. If a matter is initiated as a conference adjudicative hearing, a prehearing conference shall not be held.

2. The provisions of section 17A.4210 do not apply to conference adjudicative hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference adjudicative hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

3. Section 17A.4211, subsections 1 and 2, do not apply except for the following:

a. The presiding officer shall regulate the course of the proceedings.

b. Only the parties may testify and present written exhibits.

c. The parties may offer comments on the issues and cross examine each other with respect to any factual disputes.

4. The provisions of section 17A.4215, subsection 4, requiring findings of fact to be based exclusively on the evidence of record and on matters officially noticed, and section 17A.4221 do not apply; instead, the provisions of section 17A.4506 apply.

Sec. 64. NEW SECTION. 17A.4403 CONFERENCE ADJUDICATIVE HEARING -- PROPOSED PROOF.

1. If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing, but if disclosure of any fact, allegation, or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

2. If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain those facts if the proceeding were converted to a formal adjudicative hearing.

PART 5

EMERGENCY AND SUMMARY ADJUDICATIVE PROCEEDINGS

Sec. 65. NEW SECTION. 17A.4501 EMERGENCY ADJUDICATIVE PROCEEDINGS.

1. An agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

2. The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

3. The agency shall render an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

4. The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered.

5. After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

6. The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

7. Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for

agency action in emergency adjudicative proceedings or for judicial review thereof.

Sec. 66. NEW SECTION. 17A.4502 SUMMARY ADJUDICATIVE PROCEEDINGS -- APPLICABILITY.

An agency may use summary adjudicative proceedings if all of the following apply:

1. The use of those proceedings in the circumstances does not violate any provision of law.

2. The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties.

3. The matter is entirely within one or more categories for which the agency by rule has adopted this section and sections 17A.4503 to 17A.4506; however, those categories may include only the following:

a. A monetary amount of not more than one hundred dollars.

b. A reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against an inmate, student, or public employee.

c. The denial of an application after the applicant has abandoned the application.

d. The denial of an application for admission to an educational institution or for employment by an agency.

e. The denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with section 17A.4504.

f. A matter that is resolved on the sole basis of inspections, examinations, or tests.

g. The acquisition, leasing, or disposal of property or the procurement of goods or services by contract.

Sec. 67. NEW SECTION. 17A.4503 SUMMARY ADJUDICATIVE PROCEEDINGS -- PROCEDURES.

1. The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with section

17A.4301, or, unless prohibited by law, one or more other persons designated by the agency head in the discretion of the agency head, may be the presiding officer. Unless prohibited by law, a person exercising authority over the matter is the presiding officer.

2. If the proceeding involves a monetary matter or a reprimand, warning, disciplinary report, or other sanction, all of the following apply:

a. The presiding officer, before taking action, shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter.

b. The presiding officer, at the time any unfavorable action is taken, shall give each party a brief statement of the reasons for the action.

3. An order rendered in a proceeding that involves a monetary matter must be in writing. An order in any other summary adjudicative proceeding may be oral or written.

4. The agency, by reasonable means, shall furnish to each party notification of the order in a summary adjudicative proceeding. Notification must at least include a statement of the agency's action.

Sec. 68. NEW SECTION. 17A.4504 ADMINISTRATIVE REVIEW OF SUMMARY ADJUDICATIVE PROCEEDINGS -- APPLICABILITY.

Except to the extent prohibited by any provision of law, an agency, on its own motion, may conduct an administrative review of an order resulting from summary adjudicative proceedings, and shall conduct this review upon the written or oral request of a party if the agency receives the request within ten days after furnishing notification under section 17A.4503, subsection 4.

Sec. 69. NEW SECTION. 17A.4505 ADMINISTRATIVE REVIEW OF SUMMARY ADJUDICATIVE PROCEEDINGS -- PROCEDURES.

Unless otherwise provided by statute:

1. An agency need not furnish notification of the pendency of administrative review to any person who did not request the

review, but the agency shall not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

2. The reviewing officer, in the discretion of the agency head, may be any person who could have presided at the summary adjudicative proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

3. The reviewing officer shall give each party an opportunity to explain the party's view of the matter unless the party's view is apparent from the written materials in the file submitted to the reviewing officer. The reviewing officer shall make any inquiries necessary to ascertain whether the proceeding must be converted to a conference adjudicative hearing or a formal adjudicative hearing.

4. The reviewing officer may render an order disposing of the proceeding in any manner that was available to the presiding officer at the summary adjudicative proceeding or the reviewing officer may remand the matter for further proceedings, with or without conversion to a conference adjudicative hearing or a formal adjudicative hearing.

5. If the order under review is or should have been in writing, the order on review must be in writing, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order, and a notice of any further available administrative review.

6. A request for administrative review is deemed to have been denied if the reviewing officer does not dispose of the matter or remand it for further proceedings within twenty days after the request is submitted.

PART 6

CONFERENCE AND SUMMARY ADJUDICATIVE PROCEEDING RECORDS

Sec. 70. NEW SECTION. 17A.4601 AGENCY RECORD OF CONFERENCE AND SUMMARY ADJUDICATIVE PROCEEDINGS AND

ADMINISTRATIVE REVIEW.

1. The agency record consists of any documents regarding the matter that were submitted by a party to, or were considered or prepared by the presiding officer for, that conference or summary adjudicative proceeding or by the presiding or reviewing officer for any subsequent agency review. The agency shall maintain these documents as its official record.

2. Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in conference or summary adjudicative proceedings or for judicial review thereof.

ARTICLE 5

JUDICIAL REVIEW AND CIVIL ENFORCEMENT

PART 1

JUDICIAL REVIEW

Sec. 71. NEW SECTION. 17A.5101 EXCLUSIVITY OF JUDICIAL REVIEW PROVISIONS -- RELATIONSHIP BETWEEN JUDICIAL REVIEW PROVISIONS OF THIS CHAPTER AND ANCILLARY PROCEDURAL REQUIREMENTS OF OTHER LAW AND SUPERIOR JUDICIAL REMEDIES.

Except as expressly provided otherwise by another statute referring to this chapter by name or number, this chapter establishes the exclusive means of judicial review of agency action, except for any of the following:

1. The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

2. Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by other applicable law.

3. If the relief available under other sections of this chapter is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this chapter to the extent necessary for their effectuation. The applicable provisions of this chapter and other law must be combined to govern a single proceeding or, if the court orders, two or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

Sec. 72. NEW SECTION. 17A.5102 FINAL AGENCY ACTION REVIEWABLE.

1. A person who qualifies under this chapter regarding standing in section 17A.5106, exhaustion of administrative remedies in section 17A.5107, and time for filing the petition for review in section 17A.5108, and other applicable provisions of law regarding bond, compliance, and other preconditions is entitled to judicial review of final agency action, whether or not the person has sought judicial review of any related nonfinal agency action.

2. For purposes of this section and section 17A.5103:

a. "Final agency action" means the whole or a part of any agency action other than nonfinal agency action.

b. "Nonfinal agency action" means the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

Sec. 73. NEW SECTION. 17A.5103 NONFINAL AGENCY ACTION REVIEWABLE.

A person is entitled to judicial review of nonfinal agency action only if all of the following apply:

1. It appears likely that the person will qualify under

section 17A.5102 for judicial review of the related final agency action.

2. Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Sec. 74. NEW SECTION. 17A.5104 JURISDICTION -- VENUE.

1. The district court shall conduct judicial review.

2. Venue shall be in the Polk county district court or the district court for the county in which the petitioner resides or has its principal place of business. When a proceeding for judicial review has been commenced, a court may, in the interest of justice, transfer the proceeding to the district court for another county.

Sec. 75. NEW SECTION. 17A.5105 FORM OF ACTION -- SERVICE -- CONTENTS OF PETITION.

Judicial review is initiated by filing a petition for review in the appropriate district court. A petition may seek any type of relief available under section 17A.5101, subsection 3, and section 17A.5117.

Sec. 76. NEW SECTION. 17A.5106 STANDING.

1. The following persons have standing to obtain judicial review of final or nonfinal agency action:

a. A person to whom the agency action is specifically directed.

b. A person who was a party to the agency proceedings that led to the agency action.

c. If the challenged agency action is a rule, a person subject to that rule.

d. A person eligible for standing under another provision of law.

e. A person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, a person does not have standing as one otherwise aggrieved or adversely affected unless all of the following apply:

(1) The agency action has prejudiced or is likely to

prejudice that person.

(2) That person's asserted interests are among those that the agency was required by law to consider when it engaged in the agency action challenged.

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

2. The administrative rules review committee of the general assembly, which is required to exercise general and continuing oversight over administrative rules, may petition for judicial review of any rule.

Sec. 77. NEW SECTION. 17A.5107 EXHAUSTION OF ADMINISTRATIVE REMEDIES.

A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, except for any of the following:

1. A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based, or have petitioned for its amendment or repeal.

2. A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required.

3. The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Sec. 78. NEW SECTION. 17A.5108 TIME FOR FILING PETITION FOR REVIEW.

Subject to other requirements of this chapter or of another statute:

1. A petition for judicial review of a rule may be filed

at any time, except as limited by section 17A.3113, subsection 2.

2. A petition for judicial review of an order is not timely unless filed within thirty days after rendition of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.

3. A petition for judicial review of agency action other than a rule or order is not timely unless filed within thirty days after the agency action, but the time is extended if any of the following apply:

a. During the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.

b. During any period that the petitioner did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

Sec. 79. NEW SECTION. 17A.5109 PETITION FOR REVIEW -- FILING AND CONTENTS.

1. A petition for review must be filed with the clerk of the district court and must name the agency as respondent.

2. A petition for review must set forth all of the following:

a. The name and mailing address of the petitioner.

b. The name and mailing address of the agency whose action is at issue.

c. Identification of the specific agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.

d. Identification of persons who were parties in any adjudicative proceedings that led to the agency action.

e. Facts to demonstrate that the petitioner is entitled to obtain judicial review.

f. Facts on which venue is based.

g. The specific grounds on which relief is sought and the petitioner's reasons for believing that relief should be granted.

h. A request for relief, specifying the type and extent of relief requested.

A petition for review that is in substantial compliance with the requirements of this subsection shall not be dismissed solely for failure to satisfy its requirements.

Sec. 80. NEW SECTION. 17A.5110 PETITION FOR REVIEW -- SERVICE AND NOTIFICATION -- NOTICE OF INTERVENTION.

1. Within ten days after the filing of a petition for judicial review of agency action, the petitioner shall serve a file stamped copy of the petition upon the agency in the manner provided by the rules of civil procedure for the personal service of an original notice or shall mail a file stamped copy of the petition to the agency by restricted certified mail.

2. Within ten days after the filing of a petition for judicial review of agency action in an adjudicative proceeding, the petitioner shall also give notice of the petition for review to each other party of record in that adjudicative proceeding either by serving a file stamped copy of the petition upon that party in the manner provided by the rules of civil procedure for the personal service of an original notice or by restricted certified mail.

3. The personal service or mailing required by this section shall be jurisdictional and may be made on the party or the party's attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorneys of record at their last known mailing address. Proof of mailing shall be by the return receipt from the restricted certified mail.

4. Any party of record in an adjudicative proceeding before an agency who wishes to intervene and participate in the judicial review proceeding must file an appearance in the court indicating that intention within forty-five days from the date the petition is filed.

Sec. 81. NEW SECTION. 17A.5111 STAY AND OTHER TEMPORARY REMEDIES PENDING FINAL DISPOSITION.

1. Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

2. A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

3. If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may grant relief only upon a finding that all of the following apply:

a. The applicant is likely to prevail when the court finally disposes of the matter.

b. Without relief the applicant will suffer irreparable injury.

c. The grant of relief to the applicant will not substantially harm other parties to the proceedings.

d. The type of threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

4. If subsection 3 does not apply, the court shall grant relief if it finds that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

5. If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the

agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.

Sec. 82. NEW SECTION. 17A.5112 LIMITATION ON NEW ISSUES.

A person may obtain judicial review of an issue that was not raised before the agency, only to the extent of any of the following:

1. The agency did not have authority to grant an adequate remedy based on a determination of the issue involved because the issue or remedy was not within the jurisdiction of the agency.

2. The person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue.

3. The agency action subject to judicial review is a rule and the person is challenging only the validity of that rule and has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue.

4. The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in compliance with any provision of law or was notified but was not permitted to participate in that adjudicative proceeding.

5. The interests of justice would be served by judicial resolution of an issue arising from any of the following:

a. A change in controlling law occurring after the agency action.

b. Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

Sec. 83. NEW SECTION. 17A.5113 JUDICIAL REVIEW OF FACTS CONFINED TO RECORD FOR JUDICIAL REVIEW AND ADDITIONAL EVIDENCE TAKEN PURSUANT TO THIS CHAPTER.

Judicial review of disputed issues of fact must be confined

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so illogical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been delegated to the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been delegated to the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

In making the determinations required by this subsection, the court is not required to give any deference to the view of the agency with respect to whether particular matters have been delegated to the discretion of the agency and with respect to the validity of agency action relating to matters that have not been delegated to the discretion of the agency. However, the court must give appropriate deference to the view of the agency with respect to the validity of agency action

(2) The interests of justice would be served by remand to the agency.

c. The agency improperly excluded or omitted evidence from the record.

d. A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Sec. 85. NEW SECTION. 17A.5115 AGENCY RECORD FOR JUDICIAL REVIEW -- CONTENTS, PREPARATION, TRANSMITTAL, COST.

1. Within thirty days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

2. If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection 4.

3. The agency may charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court. A failure by the petitioner to pay any of this cost to the agency does not relieve the agency from the responsibility for timely preparation of the record and transmittal to the court.

4. By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

5. The court may tax the cost of preparing transcripts and

copies for the record in accordance with any of the following:

a. Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record.

b. As provided by section 17A.5117.

c. In accordance with any other provision of law.

6. Additions to the record pursuant to section 17A.5114 must be made as ordered by the court.

7. The court may require or permit subsequent corrections or additions to the record.

Sec. 86. NEW SECTION. 17A.5116 SCOPE OF REVIEW -- GROUNDS FOR INVALIDITY.

1. Except to the extent that this chapter provides otherwise, in suits for judicial review of agency action all of the following apply:

a. The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.

b. The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time that action was taken.

2. The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

3. The court shall grant relief from agency action if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.

b. Beyond the authority conferred upon the agency by any provision of law or in violation of any provision of law.

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been delegated to the discretion of the agency.

d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.

e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.

f. Based upon a determination of fact clearly delegated to the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph the following terms have the following meanings:

(1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

(2) "Record before the court" means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) "When that record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record that detracts from that finding as well as all of the relevant evidence that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the evidence in the record supports its finding of fact and why the evidence in the record that is contrary to its finding does not preclude that finding.

g. Action other than a rule that is inconsistent with a rule of the agency.

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h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so illogical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been delegated to the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been delegated to the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

In making the determinations required by this subsection, the court is not required to give any deference to the view of the agency with respect to whether particular matters have been delegated to the discretion of the agency and with respect to the validity of agency action relating to matters that have not been delegated to the discretion of the agency. However, the court must give appropriate deference to the view of the agency with respect to the validity of agency action

relating to matters that have been delegated to the discretion of the agency.

Sec. 87. NEW SECTION. 17A.5117 TYPE OF RELIEF.

1. The court may award damages or compensation only to the extent expressly authorized by another provision of law.

2. The court may grant other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

3. The court may also grant necessary ancillary relief to redress the effects of agency action wrongfully taken or withheld, including the taxation of costs, but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.

4. If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

Sec. 88. NEW SECTION. 17A.5118 REVIEW BY HIGHER COURT.

Final decisions of the district court on petitions for review of agency action are reviewable by appeal to the supreme court as in other civil cases although the appeal may be taken regardless of the amount involved. On appeal, the supreme court, or court of appeals if the case is referred by the supreme court to the court of appeals, shall reverse, modify, or vacate the decision of the district court only if the reviewing court determines that the district court applied an incorrect legal standard or unreasonably applied a correct legal standard.

PART 2

CIVIL ENFORCEMENT

Sec. 89. NEW SECTION. 17A.5201 PETITION BY AGENCY FOR CIVIL ENFORCEMENT OF RULE OR ORDER.

1. In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the district court.

2. The petition must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

3. Venue shall be in the district court for the county in which defendant resides or has its principal place of business, or with the consent of the defendant, in the Polk County district court. When a proceeding for enforcement has been commenced, the court may, in the interest of justice, transfer the proceeding to a district court for another county.

4. A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, any other civil remedy provided by law, or any combination of the foregoing.

Sec. 90. NEW SECTION. 17A.5202 PETITION BY QUALIFIED PERSON FOR CIVIL ENFORCEMENT OF AGENCY'S ORDER.

1. Any person who would qualify under this chapter as having standing to obtain judicial review of an agency's failure to enforce its order may file a petition for civil enforcement of that order, but the action shall not be commenced until or under any of the following circumstances:

a. Until at least sixty days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to the agency head concerned, to the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement.

b. If the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the

same defendant.

c. If a petition for review of the same order has been filed and is pending in court.

2. The petition must name, as defendants, the agency whose order is sought to be enforced and each alleged violator against whom the petitioner seeks civil enforcement.

3. The agency whose order is sought to be enforced may move to dismiss on the grounds that the petition fails to qualify under this section or that enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss unless the petitioner demonstrates that the petition qualifies under this section and the agency's failure to enforce its order is based on an exercise of discretion that is improper on one or more of the grounds provided in section 17A.5116, subsection 3, paragraph "h".

4. Except to the extent expressly authorized by any provision of law, a petition for civil enforcement filed under this section shall not request, and the court shall not grant, any monetary payment apart from taxable costs.

Sec. 91. NEW SECTION. 17A.5203 DEFENSES -- LIMITATION ON NEW ISSUES AND NEW EVIDENCE.

A defendant may assert, in a proceeding for civil enforcement any of the following:

1. That the rule or order sought to be enforced is invalid on any of the grounds stated in section 17A.5116. If that defense is raised, the court may consider issues and receive evidence only within the limitations provided by sections 17A.5112, 17A.5113, and 17A.5114.

2. Any of the following defenses on which the court, to the extent necessary for the determination of the matter, may consider new issues or take new evidence:

a. The rule or order does not apply to the party.

b. The party has not violated the rule or order.

c. The party has violated the rule or order but has subsequently complied, but a party who establishes this

defense is not necessarily relieved from any sanction provided by law for past violations.

d. Any other defense allowed by law.

Sec. 92. NEW SECTION. 17A.5204 INCORPORATION OF CERTAIN PROVISIONS ON JUDICIAL REVIEW.

Proceedings for civil enforcement are governed by section 17A.5101, subsection 2, and section 17A.5115 concerning judicial review, as modified where necessary to adapt them to those proceedings.

Sec. 93. NEW SECTION. 17A.5205 REVIEW BY HIGHER COURT.

Final decisions of the district court on petitions for civil enforcement of agency action are reviewable by appeal to the supreme court as in other civil cases, although the appeal may be taken regardless of the amount involved. On appeal, the supreme court, or court of appeals if the case is referred by the supreme court to the court of appeals, shall reverse, modify, or vacate the decision of the district court only if the reviewing court determines that the district court applied an incorrect legal standard or unreasonably applied a correct legal standard.

Sec. 94. Section 2B.17, subsection 4, Code 1995, is amended to read as follows:

4. The Iowa administrative code and the Iowa administrative bulletin shall be cited as provided in section ~~17A.6~~ 17A.2101.

Sec. 95. Section 2C.9, subsection 1, Code 1995, is amended to read as follows:

1. Investigate, on complaint or on the citizens' aide's own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that the citizens' aide shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency. A communication or receipt of information made pursuant to the powers prescribed in this chapter shall not be considered an ex parte

communication as described in the provisions of section ~~17A.17~~ 17A.4213.

Sec. 96. Section 10A.601, subsection 7, Code 1995, is amended to read as follows:

7. An application for ~~rehearing~~ reconsideration before the appeal board shall be filed pursuant to section ~~17A.16~~ 17A.4218, unless otherwise provided in chapter 19A, 80, 88, 89A, 91C, 96, or 97B. A petition for judicial review of a decision of the appeal board shall be filed pursuant to ~~section 17A.19~~ the provisions for judicial review in chapter 17A, article 5. The appeal board may be represented in any such judicial review by an attorney who is a regular salaried employee of the appeal board or who has been designated by the appeal board for that purpose, or at the appeal board's request, by the attorney general. Notwithstanding the petitioner's residency requirement in section ~~17A.19,~~ ~~subsection 2~~ 17A.5104, a petition for judicial review may be filed in the district court of the county in which the petitioner was last employed or resides, provided that if the petitioner does not reside in this state, the action shall be brought in the district court of Polk county, Iowa, and any other party to the proceeding before the appeal board shall be named in the petition. Notwithstanding the thirty-day requirement in section ~~17A.19, subsection 6~~ 17A.5115, the appeal board shall, within sixty days after filing of the petition for judicial review or within a longer period of time allowed by the court, transmit to the reviewing court the original or a certified copy of the entire records of a contested case. The appeal board may also certify to the court, questions of law involved in any decision by the appeal board. Petitions for judicial review and the questions so certified shall be given precedence over all other civil cases except cases arising under the workers' compensation law of this state. No bond shall be required for entering an appeal from any final order, judgment, or decree of the district

court to the supreme court.

Sec. 97. Section 21.6, subsection 1, Code 1995, is amended to read as follows:

1. The remedies provided by this section against state governmental bodies shall be in addition to those provided by section ~~17A.19~~ 17A.5117. Any aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney, may seek judicial enforcement of the requirements of this chapter. Suits to enforce this chapter shall be brought in the district court for the county in which the governmental body has its principal place of business.

Sec. 98. Section 22.7, subsection 15, Code Supplement 1995, is amended to read as follows:

15. Information concerning the procedures to be used to control disturbances at adult correctional institutions. Such information shall also be exempt from public inspection under ~~section 17A.3~~ sections 17A.2101 and 17A.2102. As used in this subsection disturbance means a riot or a condition that can reasonably be expected to cause a riot.

Sec. 99. Section 22.8, subsection 4, paragraph f, Code 1995, is amended to read as follows:

f. The rights and remedies provided by this section are in addition to any rights and remedies provided by ~~section 17A.19~~ chapter 17A, article 5.

Sec. 100. Section 22.9, unnumbered paragraph 2, Code 1995, is amended to read as follows:

An agency within the meaning of section ~~17A.2, subsection 1~~ 17A.1102 shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.

Sec. 101. Section 22.10, subsection 1, Code 1995, is amended to read as follows:

1. The rights and remedies provided by this section are in

addition to any rights and remedies provided by ~~section 17A.19~~ chapter 17A, article 5. Any aggrieved person, any taxpayer to or citizen of the state of Iowa, or the attorney general or any county attorney, may seek judicial enforcement of the requirements of this chapter in an action brought against the lawful custodian and any other persons who would be appropriate defendants under the circumstances. Suits to enforce this chapter shall be brought in the district court for the county in which the lawful custodian has its principal place of business.

Sec. 102. Section 68B.2, subsection 13, paragraph b, subparagraph (8), Code 1995, is amended to read as follows:

(8) Persons whose activities are limited to submitting data, views, or arguments in writing, or requesting an opportunity to make an oral presentation under section ~~17A.4, subsection 1~~ 17A.3104.

Sec. 103. Section 68B.31, subsection 8, Code 1995, is amended to read as follows:

8. If a hearing on the complaint is ordered the ethics committee shall receive all admissible evidence, determine any factual or legal issues presented during the hearing, and make findings of fact based upon evidence received. Hearings shall be conducted in the manner prescribed for adjudicative proceedings in ~~section 17A.12~~ chapter 17A, article 4. The rules of evidence applicable under section ~~17A.14~~ 17A.4212 shall also apply in hearings before the ethics committee. Clear and convincing evidence shall be required to support a finding that the member of the general assembly or lobbyist before the general assembly has committed a violation of this chapter. parties to a complaint may, subject to the approval of the ethics committee, negotiate for settlement of disputes that are before the ethics committee. Terms of any negotiated settlements shall be publicly recorded. If a complaint is filed or initiated less than ninety days before the election for a state office, for which the person named in the

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complaint is the incumbent officeholder, the ethics committee shall, if possible, set the hearing at the earliest available date so as to allow the issue to be resolved before the election. An extension of time for a hearing may be granted when both parties mutually agree on an alternate date for the hearing. The ethics committee shall make every effort to hear all ethics complaints within three months of the date that the complaints are filed. However, after three months from the date of the filing of the complaint, extensions of time for purposes of preparing for hearing may only be granted by the ethics committee when the party charged in the complaint with the ethics violation consents to an extension. If the party charged does not consent to an extension, the ethics committee shall not grant any extensions of time for preparation prior to hearing. All complaints alleging a violation of this chapter or the code of ethics shall be heard within nine months of the filing of the complaint. Final dispositions of violations, which the ethics committee has found to have been established by clear and convincing evidence, shall be made within thirty days of the conclusion of the hearing on the complaint.

Sec. 104. Section 68B.34, Code 1995, is amended to read as follows:

68B.34 INVESTIGATION BY INDEPENDENT SPECIAL COUNSEL -- PROBABLE CAUSE.

The purpose of an investigation by the independent special counsel is to determine whether there is probable cause to proceed with an adjudicatory hearing on the matter. In conducting investigations and holding hearings, the independent special counsel may require by subpoena the attendance and testimony of witnesses and may subpoena books, papers, records, and any other real evidence relating to the matter before the independent special counsel. The independent special counsel shall have the additional authority provided in section ~~17A.13~~ 17A.4210. If the

independent special counsel determines at any stage in the proceedings that take place prior to hearing that the complaint is without merit, the independent special counsel shall report that determination to the appropriate ethics committee and the complaint shall be dismissed and the complainant and the party charged shall be notified. If, after investigation, the independent special counsel determines evidence exists which, if proven, would support a finding of a violation of this chapter, a finding of probable cause shall be made and reported to the ethics committee, and a hearing shall be ordered by the ethics committee as provided in section 68B.31. Independent special counsel investigations are not meetings of a governmental body within the meaning of chapter 21, and records and information obtained by independent special counsel during investigations are confidential until disclosed to a legislative ethics committee under section 68B.31.

Sec. 105. Section 80A.17, subsection 1, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

Pursuant to section ~~17A.19, subsection 6~~ 17A.5115, the department, upon an appeal by the licensee of the decision by the department shall transmit the entire record of the contested case to the reviewing court.

Notwithstanding section ~~17A.19, subsection 6~~ 17A.5115, if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.

Sec. 106. Section 86.17, subsection 1, Code 1995, is amended to read as follows:

1. A deputy industrial commissioner may preside over any ~~contested case~~ adjudicative proceeding brought under this chapter, or chapter 85 or 85A in the manner provided by chapter 17A. The deputy commissioner or the commissioner may make such inquiries and investigation in ~~contested case~~

adjudicative proceedings as shall be deemed necessary, consistent with the provisions of section ~~17A.17~~ 17A.4213.

Sec. 107. Section 86.19, subsection 2, Code 1995, is amended to read as follows:

2. Notwithstanding the requirements of section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4, a certified shorthand reporter, appointed by the presiding officer in ~~a contested case~~ an adjudicative proceeding or by the industrial commissioner in an appeal proceeding, may maintain and thus have the responsibility for the recording or stenographic notes for the period required by section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4.

Sec. 108. Section 86.24, subsections 2 and 3, Code 1995, are amended to read as follows:

2. In addition to the provisions of ~~section 17A.15~~ sections 17A.4215 and 17A.4216, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or the commissioner may remand the decision to the deputy commissioner for further proceedings.

3. In addition to the provisions of ~~section 17A.15~~ sections 17A.4215 and 17A.4216, the industrial commissioner, on appeal, may limit the presentation of evidence as provided by rule.

Sec. 109. Section 86.42, Code 1995, is amended to read as follows:

86.42 JUDGMENT BY DISTRICT COURT ON AWARD.

Any party in interest may present a certified copy of an order or decision of the commissioner, from which a timely petition for judicial review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section ~~17A.19, subsection 5~~ 17A.5111, or an order or decision of a deputy commissioner from which a timely appeal has not been taken within the agency and which has become final by the passage of time as provided by rule and section ~~17A.15~~ 17A.4220, or an agreement for settlement approved by the commissioner, and all papers in

connection therewith, to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the industrial commissioner, or in the absence of an act of any party which prevents a decision of a deputy industrial commissioner from becoming final, has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.

Sec. 110. Section 99A.6, unnumbered paragraph 2, Code 1995, is amended to read as follows:

Judicial review of actions of the issuing authorities may be sought in accordance with the terms of the Iowa administrative procedure Act. Municipalities acting as issuing authorities shall be deemed state agencies solely for the purposes of bringing their actions under this chapter within the terms ~~of section 17A.19~~ for judicial review in chapter 17A, article 5. If the licensee has not filed a petition for judicial review in district court, revocation shall date from the thirty-first day following the date of the order of the issuing authority. If the licensee has filed a petition for judicial review, revocation shall date from the thirty-first day following entry of the order of the district court, if action by the district court is adverse to the licensee.

Sec. 111. Section 123.37, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The administrator may compromise and settle doubtful and disputed claims for taxes imposed under this chapter or for taxes of doubtful collectibility, notwithstanding section 7D.9. The administrator may enter into informal settlements as permitted pursuant to section ~~17A.10~~ 17A.1106, to

compromise and settle doubtful and disputed claims for taxes imposed under this chapter. The administrator may make a claim under a licensee's or permittee's penal bond for taxes of doubtful collectibility. Whenever a compromise or settlement is made, the administrator shall make a complete record of the case showing the tax assessed, reports and audits, if any, the licensee's or permittee's grounds for dispute or contest, together with all evidence of the dispute or contest, and the amounts, conditions, and settlement or compromise of the dispute or contest.

Sec. 112. Section 135.70, Code 1995, is amended to read as follows:

135.70 APPEAL OF CERTIFICATE OF NEED DECISIONS.

The council's decision on an application for certificate of need, when announced pursuant to section 135.69, is a final decision. Any dissatisfied party who is an affected person with respect to the application, and who participated or sought unsuccessfully to participate in the formal review procedure prescribed by section 135.66, may request a ~~rehearing~~ reconsideration in accordance with ~~chapter 17A~~ section 17A.4218 and rules of the department. If a ~~rehearing~~ reconsideration is not requested or an affected party remains dissatisfied after the request for ~~rehearing~~ reconsideration, an appeal may be taken in the manner provided by chapter 17A. Notwithstanding the Iowa administrative procedure Act, chapter 17A, a request for ~~rehearing~~ reconsideration is not required, prior to ~~appeal under section 17A.19~~ the filing of a petition for judicial review as provided in chapter 17A, article 5.

Sec. 113. Section 135C.2, subsection 3, paragraph d, Code Supplement 1995, is amended to read as follows:

d. Notwithstanding the limitations set out in this subsection regarding rules for intermediate care facilities for the mentally retarded, the department shall consider the federal interpretive guidelines issued by the federal health care financing administration when interpreting the

department's rules for intermediate care facilities for the mentally retarded. This use of the guidelines is not subject to the rulemaking provisions of sections ~~17A.4 and 17A.5~~ chapter 17A, article 3, but the guidelines shall be published in the Iowa administrative bulletin and the Iowa administrative code.

Sec. 114. Section 139C.2, subsection 3, Code 1995, is amended to read as follows:

3. The department shall establish an expert review panel to determine on a case-by-case basis under what circumstances, if any, a health care provider determined to be infected with HIV or HBV practicing outside the hospital setting or referred to the panel by a hospital, may perform exposure-prone procedures. If a health care provider determined to be infected with HIV or HBV does not comply with the determination of the expert review panel, the panel shall report the noncompliance to the examining board with jurisdiction over the health care provider. A determination of an expert review panel pursuant to this section is a final agency action ~~appealable~~ subject to judicial review pursuant to ~~section 17A.19~~ chapter 17A, article 5.

Sec. 115. Section 147A.5, subsection 3, Code Supplement 1995, is amended to read as follows:

3. The department may deny an application for authorization, or may place on probation, suspend, or revoke existing authorization if the department finds reason to believe the program has not been or will not be operated in compliance with this subchapter and the rules adopted pursuant to this subchapter, or that there is insufficient assurance of adequate protection for the public. The denial or period of probation, suspension, or revocation shall be effected and judicial review may be ~~appealed~~ sought as provided ~~by section 17A.12~~ for adjudicative proceedings under chapter 17A, article 5.

Sec. 116. Section 147A.7, subsection 2, Code Supplement

1995, is amended to read as follows:

2. If clinical issues are involved, the matter shall be referred to the board for completion of the investigation and the conduct of any disciplinary proceeding pursuant to chapter 17A. The findings of the board shall be the final decision for purposes of section ~~17A.15~~ 17A.4215 and shall be enforced by the department.

Sec. 117. Section 148C.6A, Code 1995, is amended to read as follows:

148C.6A APPEAL TO BOARD OF MEDICAL EXAMINERS IN CONTESTED CASES INVOLVING DISCIPLINE.

Pursuant to section ~~17A.15~~ 17A.4219, a decision of the board in ~~a contested case~~ an adjudicative proceeding involving discipline of a person licensed as a physician assistant may be appealed to the board of medical examiners.

Sec. 118. Section 161A.4, subsection 1, unnumbered paragraph 1, Code 1995, is amended to read as follows:

The soil conservation division is established within the department to perform the functions conferred upon it in chapters 161A through 161C, 207, 208, 467B, and 467C. The division shall be administered in accordance with the policies of the state soil conservation committee, which shall advise the division and which shall approve administrative rules proposed by the division for the administration of chapters 161A through 161C, 161E, 161F, 207, and 208 before the rules are adopted pursuant to section ~~17A.5~~ 17A.3115. If a difference exists between the committee and secretary regarding the content of a proposed rule, the secretary shall notify the chairperson of the committee of the difference within thirty days from the committee's action on the rule. The secretary and the committee shall meet to resolve the difference within thirty days after the secretary provides the committee with notice of the difference.

Sec. 119. Section 163.30, subsection 3, unnumbered paragraph 3, Code 1995, is amended to read as follows:

A permittee shall not represent more than one dealer. Failure of a licensee or permittee to comply with this chapter or a rule made pursuant to this chapter is cause for revocation by the secretary of the permit or license after notice to the alleged offender and the holding of a hearing by the secretary. Rules shall be made in accordance with chapter 17A. A rule, the violation of which is made the basis for revocation, except temporary emergency rules, shall first have been approved after public hearing as provided in section ~~17A.4~~ 17A.3104 after giving twenty days' notice of the hearing as follows:

Sec. 120. Section 169.5, subsection 9, paragraph e, Code 1995, is amended to read as follows:

e. Hold hearings on all matters properly brought before the board and administer oaths, receive evidence, make the necessary determinations, and enter orders consistent with the findings. The board may require by subpoena the attendance and testimony of witnesses and the production of papers, records, or other documentary evidence and commission depositions. An administrative law judge may be appointed pursuant to ~~section 17A.11, subsection 3~~ chapter 17A, article 4, to perform those functions which properly repose in an administrative law judge.

Sec. 121. Section 169.5, subsection 9, paragraph i, Code 1995, is amended to read as follows:

i. Adopt, amend, or repeal rules relating to the standards of conduct for, testing of, and revocation or suspension of certificates issued to veterinary assistants. However, a certificate shall not be suspended or revoked by less than a two-thirds vote of the entire board in a proceeding conducted in compliance with ~~section 17A.12~~ chapter 17A, article 4.

Sec. 122. Section 169.15, Code 1995, is amended to read as follows:

169.15 APPEAL.

Any party aggrieved by a decision of the board may ~~appeal~~

~~the matter to the district court~~ petition for judicial review as provided in ~~section 17A.19~~ chapter 17A, article 5.

Sec. 123. Section 172D.1, subsection 14, Code Supplement 1995, is amended to read as follows:

14. "Rule of the department" means a rule as defined in section ~~17A.2~~ 17A.1102 which materially affects the operation of a feedlot and which has been adopted by the department. The term includes a rule which was in effect prior to July 1, 1975. Except as specifically provided in section 172D.3, subsection 2, paragraph "b", subparagraph (5) and paragraph "c", subparagraph (5) nothing in this chapter shall be deemed to empower the department to make any rule.

Sec. 124. Section 200.3, subsection 20, Code 1995, is amended to read as follows:

20. "Rule" means a rule as defined in section ~~17A.2~~ 17A.1102 which materially affects the operation of an anhydrous ammonia plant. The term includes a rule which was in effect prior to July 1, 1984.

Sec. 125. Section 203C.10, unnumbered paragraph 2, Code 1995, is amended to read as follows:

If upon the filing of the information or complaint the department finds that the licensee has failed to meet the warehouse operator's obligation or otherwise has violated or failed to comply with the provisions of this chapter or any rule ~~promulgated~~ adopted under this chapter, and if the department finds that the public health, safety or welfare imperatively requires emergency action, then the department without hearing may order a summary suspension of the license in the manner provided in section ~~17A.18~~ 17A.4105. When so ordered, a copy of the order of suspension shall be served upon the licensee at the time the information or complaint is served as provided in this section.

Sec. 126. Section 207.14, subsection 2, unnumbered paragraph 2, Code 1995, is amended to read as follows:

If upon expiration of the time as fixed the administrator

finds in writing that the violation has not been abated, the administrator, notwithstanding ~~section 17A.18~~ sections 17A.4105 and 17A.4501, shall immediately order a cessation of coal mining and reclamation operations relating to the violation until the order is modified, vacated, or terminated by the administrator pursuant to procedures outlined in this section. In the order of cessation issued by the administrator under this subsection, the administrator shall include the steps necessary to abate the violation in the most expeditious manner possible.

Sec. 127. Section 207.15, subsection 5, unnumbered paragraph 2, Code 1995, is amended to read as follows:

Notwithstanding section ~~17A.20~~ 17A.5118, an appeal bond shall be required for an appeal of a judgment assessing a civil penalty.

Sec. 128. Section 216.15, subsection 3, paragraph b, Code Supplement 1995, is amended to read as follows:

b. For purposes of this chapter, an administrative law judge issuing a determination of probable cause or no probable cause under this section is exempt from ~~section 17A.17~~ sections 17A.4213 and 17A.4214.

Sec. 129. Section 216.17, subsection 1, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

For purposes of the time limit for filing a petition for judicial review under the Iowa administrative procedure Act, specified by section ~~17A.19~~ 17A.5108, the issuance of a final decision of the commission under this chapter occurs on the date notice of the decision is mailed by certified mail, to the parties.

Notwithstanding the time limit provided in section ~~17A.19, subsection 3~~ 17A.5108, a petition for judicial review of no-probable-cause decisions and other final agency actions which are not of general applicability must be filed within thirty days of the issuance of the final agency action.

Sec. 130. Section 216.17, subsection 6, Code 1995, is

amended to read as follows:

6. In the enforcement proceeding the court shall determine its order on the same basis as it would in a proceeding reviewing commission action under section ~~17A.19,-subsection-8~~ 17A.5117.

Sec. 131. Section 217.30, subsection 8, Code 1995, is amended to read as follows:

8. The provisions of this section shall take precedence over section ~~17A.12~~ 17A.4211, subsection ~~7~~ 4.

Sec. 132. Section 225C.29, Code 1995, is amended to read as follows:

225C.29 COMPLIANCE.

Except for a violation of section 225C.28B, subsection 2, the sole remedy for violation of a rule adopted by the commission to implement sections 225C.25 through 225C.28B shall be by a proceeding for compliance initiated by request to the division pursuant to chapter 17A. Any decision of the division shall be in accordance with due process of law and is subject to ~~appeal-to-the-Iowa-district-court~~ judicial review pursuant to ~~sections-17A.19-and-17A.20~~ chapter 17A, article 5, and appeal pursuant to section 17A.5118 by any aggrieved party. Either the division or a party in interest may apply to the Iowa district court for an order to enforce the decision of the division. Any rules adopted by the commission to implement sections 225C.25 through 225C.28B do not create any right, entitlement, property or liberty right or interest, or private cause of action for damages against the state or a political subdivision of the state or for which the state or a political subdivision of the state would be responsible. Any violation of section 225C.28B, subsection 2, shall solely be subject to the enforcement by the commissioner of insurance and penalties granted by chapter 507B for a violation of section 507B.4, subsection 7.

Sec. 133. Section 229.23, subsection 3, Code 1995, is amended to read as follows:

3. In addition to protection of the person's constitutional rights, enjoyment of other legal, medical, religious, social, political, personal and working rights and privileges which the person would enjoy if the person were not so hospitalized or detained, so far as is possible consistent with effective treatment of that person and of the other patients of the hospital. If the patient's rights are restricted, the physician's direction to that effect shall be noted on the patient's record. The department of human services shall, in accordance with chapter 17A establish rules setting forth the specific rights and privileges to which persons so hospitalized or detained are entitled under this section~~,-and-the-exceptions-provided-by-section-17A.2,-subsection-10,-paragraphs-"a"-and-"k",-shall-not-be-applicable-to-the-rules-so-established~~. The patient or the patient's next of kin or friend shall be advised of these rules and be provided a written copy upon the patient's admission to or arrival at the hospital.

Sec. 134. Section 249A.3, subsection 11, paragraph b, Code Supplement 1995, is amended to read as follows:

b. The department shall exercise the option provided in 42 U.S.C. § 1396p(c) to provide a period of ineligibility for medical assistance due to a transfer of assets by a noninstitutionalized individual or the spouse of a noninstitutionalized individual. For noninstitutionalized individuals, the number of months of ineligibility shall be equal to the total, cumulative uncompensated value of all assets transferred by the individual or the individual's spouse on or after the look-back date specified in 42 U.S.C. § 1396p(c)(1)(B)(i), divided by the average monthly cost to a private patient for nursing facility services in Iowa at the time of application. The services for which noninstitutionalized individuals shall be made ineligible shall include any long-term care services for which medical assistance is otherwise available. Notwithstanding ~~section~~

~~17A.4~~ sections 17A.3103 through 17A.3107, the department may adopt rules providing a period of ineligibility for medical assistance due to a transfer of assets by a noninstitutionalized individual or the spouse of a noninstitutionalized individual without notice of opportunity for public comment, to be effective immediately upon filing under section ~~17A.5~~ 17A.3115, subsection 2, paragraph "b", subparagraph (1).

Sec. 135. Section 252.27, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The board shall record its proceedings relating to the provision of assistance to specific persons under this chapter. A person who is aggrieved by a decision of the board may ~~appeal~~ seek judicial review of the decision as if it were ~~a contested case~~ an adjudicative proceeding before an agency and as if the person had exhausted administrative remedies in accordance with the procedures and standards ~~in section 17A.19, subsections 2 to 8 except paragraphs "b" and "c" of subsection 8, and section 17A.20~~ for judicial review in chapter 17A, article 5, except for section 17A.5116, subsection 3, paragraphs "b" and "g", and for appeal in section 17A.5118.

Sec. 136. Section 252J.8, subsection 4, paragraph d, Code Supplement 1995, is amended to read as follows:

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~~ 17A.4105, 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.

Sec. 137. Section 256B.6, unnumbered paragraph 3, Code 1995, is amended to read as follows:

Notwithstanding ~~section 17A.11~~ chapter 17A, article 4, the

state board of education shall adopt rules for the appointment of an impartial administrative law judge for special education appeals. The rules shall comply with federal statutes and regulations.

Sec. 138. Section 261B.3, unnumbered paragraph 2, Code 1995, is amended to read as follows:

The secretary may request additional information as necessary to enable the secretary to determine the accuracy and completeness of the information contained in the registration application. If the secretary believes that false, misleading, or incomplete information has been submitted in connection with an application for registration, the secretary may deny registration. The secretary shall conduct a hearing on the denial if a hearing is requested by a school. The secretary may withhold a certificate of registration pending the outcome of the hearing. Upon a finding after the hearing that information contained in the registration application is false, misleading, or incomplete, the secretary shall deny a certificate of registration to the school. The decision of the secretary is subject to judicial review in accordance with ~~section 17A.19~~ chapter 17A, article 5.

Sec. 139. Section 262.69, unnumbered paragraph 3, Code 1995, is amended to read as follows:

Notwithstanding the provisions of chapter 17A, a proceeding conducted by the state board of regents or an institution governed by the state board of regents to determine the validity of an assessment of a violation of traffic control and parking rules is not ~~a contested case~~ an adjudicative proceeding as defined in section ~~17A.2, subsection 5~~ 17A.1102.

Sec. 140. Section 267.6, Code 1995, is amended to read as follows:

267.6 IOWA ADMINISTRATIVE PROCEDURE ACT.

The provisions of chapter 17A shall not apply to the council or any actions taken by it, except that any

recommendations adopted by the council pursuant to section 267.5, subsection 3, and any rules adopted by the council shall be adopted, amended, or repealed only after compliance with the provisions of ~~sections 17A.4, 17A.5, and 17A.6~~ chapter 17A, article 3.

Sec. 141. Section 272C.6, subsection 4, unnumbered paragraphs 2 and 3, Code 1995, are amended to read as follows:

Pursuant to the provisions of section ~~17A.19, subsection 6~~ 17A.5115, a licensing board upon ~~an appeal~~ seeking of judicial review by the licensee of the decision by the licensing board, shall transmit the entire record of the ~~contested case~~ adjudicative proceeding to the reviewing court.

Notwithstanding the provisions of section ~~17A.19, subsection 6~~ 17A.5115, if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.

Sec. 142. Section 316.9, subsection 4, Code 1995, is amended to read as follows:

4. A person aggrieved by a determination as to eligibility for assistance or a payment authorized by this chapter, or the amount of a payment, upon application may have the matter reviewed. Rules governing reviews shall provide for a prompt one-step uncomplicated fact-finding process. Such a review is an appeal of an agency action as defined in section ~~17A.2, subsection 2~~ 17A.1102, and is not ~~a contested case~~ an adjudicative proceeding. The decision rendered shall be the displacing agency's final agency action.

Sec. 143. Section 321.52, subsection 3, unnumbered paragraph 2, Code Supplement 1995, is amended to read as follows:

However, upon application the department upon a showing of good cause may issue a certificate of title after the fourteen-day period for a junked vehicle for which a junking certificate has been issued. For purposes of this subsection,

"good cause" means that the junking certificate was obtained by mistake or inadvertence. If a person's application to the department is denied, the person may make application for a certificate of title under the bonding procedure as provided in section 321.24, if the vehicle qualifies as an antique vehicle under section 321.115, subsection 1, or the person may seek judicial review as provided under ~~sections 17A.19 and 17A.20~~ chapter 17A, article 5, and appellate review under section 17A.5118.

Sec. 144. Section 321.253A, subsection 1, Code 1995, is amended to read as follows:

1. The department shall place and maintain directional signs upon primary highways which provide information about historic sites which are located on land owned or managed by an agency as defined in section ~~17A.2~~ 17A.1102. The signs shall conform to the manual of uniform traffic devices. However, the directional signs are not subject to requirements applicable to tourist-oriented directional signs.

Sec. 145. Section 321.556, subsections 1 and 2, Code Supplement 1995, are amended to read as follows:

1. If, upon review of the record of convictions of any person, the department determines that the person appears to be a habitual offender, the department shall immediately notify the person in writing and afford the licensee an opportunity for a hearing. The notice shall direct the person named in the notice to appear for hearing and show cause why the person should not be barred from operating a motor vehicle on the highways of this state. The notice shall meet the requirements of section ~~17A.12~~ 17A.4206 and shall be served in the manner provided in that section. Service of notice on any nonresident of this state may be made in the same manner as provided in sections 321.498 through 321.506. A peace officer stopping a person for whom a notice to appear for hearing has been issued under the provisions of this section may personally serve the notice upon forms approved by the

department to satisfy the notice requirements of this section. A peace officer may confiscate the motor vehicle license of a person if the license has been revoked or has been suspended subsequent to a hearing and the person has not forwarded the motor vehicle license to the department as required.

2. The hearing shall be conducted as provided ~~in section 17A.12~~ for an adjudicative proceeding in chapter 17A, article 4, before the department in the county where the alleged events occurred, unless the director and the person agree that the hearing may be held in some other county, or the hearing may be held by telephone conference at the discretion of the agency conducting the hearing. The hearing shall be recorded and its scope shall be limited to the issue of whether the person notified is a habitual offender.

Sec. 146. Section 321.560, Code Supplement 1995, is amended to read as follows:

321.560 PERIOD OF REVOCATION.

A license to operate a motor vehicle in this state shall not be issued to any person declared to be a habitual offender under section 321.555, subsection 1, for a period of not less than two years nor more than six years from the date of the final decision of the department under section ~~17A.19~~ 17A.4215 or the date on which the district court upholds the final decision of the department, whichever occurs later. However, a temporary restricted license may be issued to a person declared to be a habitual offender under section 321.555, subsection 1, paragraph "c", pursuant to section 321.215, subsection 2. A license to operate a motor vehicle in this state shall not be issued to any person declared to be a habitual offender under section 321.555, subsection 2, for a period of one year from the date of the final decision of the department under section ~~17A.19~~ 17A.4215 or the date on which the district court upholds the final decision of the department, whichever occurs later. The department shall adopt rules under chapter 17A which establish a point system

which shall be used to determine the period for which a person who is declared to be a habitual offender under section 321.555, subsection 1, shall not be issued a license.

Sec. 147. Section 368.22, unnumbered paragraph 4, and subsections 1, 2, and 3, Code 1995, are amended to read as follows:

The judicial review provisions of this section and chapter 17A, article 5, shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of that agency action. The court's review on appeal of a decision is limited to questions relating to jurisdiction, regularity of proceedings, and whether the decision appealed from is arbitrary, unreasonable, or without substantial supporting evidence. The court may reverse and remand a decision of the board or a committee, with appropriate directions. The following ~~portions of section 17A.19~~ provisions of chapter 17A are not applicable to this chapter:

1. ~~The part of subsection 2 which relates to where proceedings for judicial review shall be instituted.~~ Section 17A.5104, subsection 2.

2. ~~Subsection 5.~~ Section 17A.5111.

3. ~~Subsection 8.~~ Section 17A.5116.

4. Section 17A.5117.

Sec. 148. Section 421.17, subsection 20, unnumbered paragraph 2, Code Supplement 1995, is amended to read as follows:

The provisions of ~~sections 17A.10 to 17A.18~~ chapter 17A, article 4, relating to ~~contested cases~~ adjudicative proceedings shall not apply to any matters involving the equalization of valuations of classes of property as authorized by this chapter and chapter 441. This exemption shall not apply to a hearing before the state board of tax review.

Sec. 149. Section 422.21, unnumbered paragraph 5, Code

1995, is amended to read as follows:

The director shall determine for the 1989 and each subsequent calendar year the annual and cumulative inflation factors for each calendar year to be applied to tax years beginning on or after January 1 of that calendar year. The director shall compute the new dollar amounts as specified to be adjusted in section 422.5 by the latest cumulative inflation factor and round off the result to the nearest one dollar. The annual and cumulative inflation factors determined by the director are not rules as defined in section ~~17A.2, subsection 10~~ 17A.1102. The director shall determine for the 1990 calendar year and each subsequent calendar year the annual and cumulative standard deduction factors to be applied to tax years beginning on or after January 1 of that calendar year. The director shall compute the new dollar amounts of the standard deductions specified in section 422.9, subsection 1, by the latest cumulative standard deduction factor and round off the result to the nearest ten dollars. The annual and cumulative standard deduction factors determined by the director are not rules as defined in section ~~17A.2, subsection 10~~ 17A.1102.

Sec. 150. Section 422.53, subsection 5, Code Supplement 1995, is amended to read as follows:

5. If the holder of a permit fails to comply with any of the provisions of this division or any order or rule of the department adopted under this division or is substantially delinquent in the payment of a tax administered by the department or the interest or penalty on the tax, or if the person is a corporation and if any officer having a substantial legal or equitable interest in the ownership of the corporation owes any delinquent tax of the permit-holding corporation, or interest or penalty on the tax, administered by the department, the director may revoke the permit. The director shall send notice by mail to a permit holder informing that person of the director's intent to revoke the

permit and of the permit holder's right to a hearing on the matter. If the permit holder petitions the director for a hearing on the proposed revocation, after giving ten days' notice of the time and place of the hearing in accordance with section ~~17A.18, subsection 3~~ 17A.4105, the matter may be heard and a decision rendered. The director may restore permits after revocation. The director shall adopt rules setting forth the period of time a retailer must wait before a permit may be restored or a new permit may be issued. The waiting period shall not exceed ninety days from the date of the revocation of the permit.

Sec. 151. Section 424.5, subsection 6, Code 1995, is amended to read as follows:

6. To revoke a permit the director shall serve notice as required by section ~~17A.18~~ 17A.4105 to the permit holder informing that person of the director's intent to revoke the permit and of the permit holder's right to a hearing on the matter. If the permit holder petitions the director for a hearing on the proposed revocation, after giving ten days' notice of the time and place of the hearing in accordance with section ~~17A.18, subsection 3~~ 17A.4105, the matter may be heard and a decision rendered. The director may restore permits after revocation. The director shall adopt rules setting forth the period of time a depositor must wait before a permit may be restored or a new permit may be issued. The waiting period shall not exceed ninety days from the date of the revocation of the permit.

Sec. 152. Section 441.21, subsection 11, Code Supplement 1995, is amended to read as follows:

11. The percentage of actual value computed by the director for agricultural property, residential property, commercial property, industrial property and property valued by the department of revenue and finance pursuant to chapters 428, 433, 434, 436, 437, and 438 and used to determine assessed values of those classes of property does not

constitute a rule as defined in section ~~17A.2,-subsection-10~~ 17A.1102.

Sec. 153. Section 441.49, unnumbered paragraph 7, Code 1995, is amended to read as follows:

Tentative and final equalization orders issued by the director of revenue and finance are not rules as defined in section ~~17A.2,-subsection-7~~ 17A.1102.

Sec. 154. Section 455B.105, subsection 9, Code 1995, is amended to read as follows:

9. Upon request of at least four members of the commission before adopting or modifying a rule, the director shall prepare and publish with the notice required under section ~~17A.4~~ 17A.3103, subsection 1, ~~paragraph "a",~~ a comprehensive estimate of the economic impact of the proposed rule or modification.

Sec. 155. Section 455B.446, subsection 4, Code 1995, is amended to read as follows:

4. Notice of the hearing in the form provided in section ~~17A.12,-subsection-2,~~ 17A.4206 shall be published in a newspaper of general circulation in each city and county in which the proposed site is located once a week for two consecutive weeks with the second publication being at least twenty days prior to the date of the hearing.

Sec. 156. Section 455G.4, subsection 3, paragraph b, Code 1995, is amended by striking the paragraph.

Sec. 157. Section 476.6, subsection 19, paragraph a, Code 1995, is amended to read as follows:

a. The board shall conduct ~~contested-case~~ adjudicative proceedings for review of energy efficiency plans and budgets filed by rate-regulated gas or electric utilities. The board may approve, reject, or modify the plans and budgets. Notwithstanding the provisions of section ~~17A.19,-subsection-5~~ 17A.5111, in an application for judicial review of the board's decision concerning a utility's energy efficiency plan or budget, the reviewing court shall not order a stay. Whenever

a request to modify an approved plan or budget is filed subsequently by the office of consumer advocate or a rate-regulated gas or electric public utility, the board shall promptly initiate a formal proceeding if the board determines that any reasonable ground exists for investigating the request. The formal proceeding may be initiated at any time by the board on its own motion. Implementation of board approved plans or budgets shall be considered continuous in nature and shall be subject to investigation at any time by the board or the office of the consumer advocate.

Sec. 158. Section 476A.1, subsection 1, Code 1995, is amended to read as follows:

1. "Agency" means an agency as defined in section ~~17A.2, subsection 1~~ 17A.1102.

Sec. 159. Section 476A.4, subsection 3, Code 1995, is amended to read as follows:

3. Notice of the proceeding in the form provided in section ~~17A.12, subsection 2,~~ 17A.4206 shall be published in a newspaper of general circulation in each county in which the proposed site is located once a week for two consecutive weeks with the second publication being at least twenty days prior to the date of the hearing. The board shall be responsible for publication and delivery of notices required by this section.

Sec. 160. Section 479.29, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board shall, pursuant to chapter 17A, adopt rules establishing standards for the protection of underground improvements during the construction of pipelines, to protect soil conservation and drainage structures from being permanently damaged by pipeline construction and for the restoration of agricultural lands after pipeline construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking, and, in addition to the

requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. Any county board of supervisors may, under the provisions of chapter 17A, and subsequent to the rulemaking proceedings, petition under those provisions for additional rulemaking to establish standards to protect soil conservation practices, structures and drainage structures within that county. Upon the request of the petitioning county the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section shall not apply within the boundaries of a city, unless the land is used for agricultural purposes.

Sec. 161. Section 479A.14, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board shall adopt rules establishing standards to protect underground improvements during the construction of pipelines, to protect soil conservation and drainage structures from being permanently damaged by pipeline construction, and for the restoration of agricultural lands after pipeline construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking and, in addition to the requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. A county board of supervisors may, under chapter 17A and subsequent to the rulemaking proceedings, petition for additional rulemaking to establish standards to protect soil conservation practices, structures, and drainage structures within that county. Upon the request of the petitioning county, the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section do not apply within the

boundaries of a city, unless the land is used for agricultural purposes.

Sec. 162. Section 479B.20, subsection 1, Code Supplement 1995, is amended to read as follows:

1. The board, pursuant to chapter 17A, shall adopt rules establishing standards for the protection of underground improvements during the construction of pipelines or underground storage facilities, to protect soil conservation and drainage structures from being permanently damaged by construction of the pipeline or underground storage facility, and for the restoration of agricultural lands after pipeline or underground storage facility construction. To ensure that all interested persons are informed of this rulemaking procedure and are afforded a right to participate, the board shall schedule an opportunity for oral presentations on the proposed rulemaking, and, in addition to the requirements of ~~section 17A.4~~ sections 17A.3103 and 17A.3104, shall distribute copies of the notice of intended action and opportunity for oral presentations to each county board of supervisors. Any county board of supervisors may, under the provisions of chapter 17A, and subsequent to the rulemaking proceedings, petition under those provisions for additional rulemaking to establish standards to protect soil conservation practices, structures, and drainage structures within that county. Upon the request of the petitioning county, the board shall schedule a hearing to consider the merits of the petition. Rules adopted under this section shall not apply within the boundaries of a city unless the land is used for agricultural purposes.

Sec. 163. Section 514B.4A, subsection 2, Code 1995, is amended to read as follows:

2. Rules proposed by the commissioner for adoption for the direct provision of health care services by a health maintenance organization, shall be forwarded by the commissioner to the director of public health for review,

comment, and recommendation, prior to submission to the administrative rules coordinator pursuant to section ~~17A.4~~ 17A.3103.

Sec. 164. Section 519A.4, subsection 1, Code 1995, is amended to read as follows:

1. The association shall submit a plan of operation to the commissioner, together with any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the association consistent with sections 519A.2 to 519A.13. The plan of operation and any amendments thereto shall become effective only after ~~promulgation~~ adoption of the plan or amendment by the commissioner as a rule pursuant to ~~section 17A.4~~ chapter 17A, article 3: Provided that the initial plan may in the discretion of the commissioner become effective immediately upon filing with the secretary of state pursuant to section ~~17A.5~~ 17A.3115, subsection 2, paragraph "b", subparagraph (1).

Sec. 165. Section 524.228, subsection 4, Code 1995, is amended to read as follows:

4. A hearing provided for in this section shall be presided over by an administrative law judge appointed in accordance with ~~section 17A.11~~ chapter 17A, article 4. The hearing shall be private, unless the superintendent determines after full consideration of the views of the party afforded the hearing, that a public hearing is necessary to protect the public interest. After the hearing, and within thirty days after the case has been submitted for decision, the superintendent shall review the proposed order of the administrative law judge and render a final decision, including findings of fact upon which the decision is predicated, and issue and serve upon each party to the proceeding an order consistent with this section.

Sec. 166. Section 533.6A, subsection 4, Code 1995, is amended to read as follows:

4. A hearing provided for in this section shall be

presided over by an administrative law judge appointed in accordance with ~~section 17A.11~~ chapter 17A, article 4. The hearing shall be private, unless the superintendent determines after full consideration of the views of the party afforded the hearing, that a public hearing is necessary to protect the public interest. After the hearing, and within thirty days after the case has been submitted for decision, the superintendent shall review the proposed order of the administrative law judge and render a final decision, including findings of fact upon which the decision is predicated, and issue and serve upon each party to the proceeding an order consistent with this section.

Sec. 167. Section 534.405, unnumbered paragraph 7, Code 1995, is amended to read as follows:

Actions taken by the superintendent under this section are not subject to section ~~17A.18, subsection 3~~ 17A.4105.

Sec. 168. Section 535B.7, subsection 2, unnumbered paragraph 1, Code 1995, is amended to read as follows:

The administrator may order an emergency suspension of a licensee's license pursuant to section ~~17A.18, subsection 3~~ 17A.4501. A written order containing the facts or conduct which warrants the emergency action shall be timely sent to the licensee by restricted certified mail. Upon issuance of the suspension order, the licensee must also be notified of the right to an evidentiary hearing. A suspension proceeding shall be promptly instituted and determined.

Sec. 169. Section 904.602, subsection 9, unnumbered paragraph 2, Code 1995, is amended to read as follows:

These records are exempt from the public inspection requirements in ~~section 17A.3~~ sections 17A.2101, 17A.2102, and ~~section~~ 22.2.

Sec. 170. Section 906.3, Code 1995, is amended to read as follows:

906.3 DUTIES OF PAROLE BOARD.

The board of parole shall adopt rules regarding a system of

paroles from correctional institutions, and shall direct, control, and supervise the administration of the system of paroles. The board of parole shall consult with the director of the department of corrections on rules regarding a system of work release and shall assist in the direction, control, and supervision of the work release system. The board shall determine which of those persons who have been committed to the custody of the director of the Iowa department of corrections, by reason of their conviction of a public offense, shall be released on parole or work release. The grant or denial of parole or work release is not ~~a contested case~~ an adjudicative proceeding as defined in section ~~17A.2~~ 17A.1102.

Sec. 171. REPEAL.

1. Sections 17A.1 through 17A.5, 17A.7, and 17A.9 through 17A.33, Code 1995, are repealed.

2. Sections 17A.6 and 17A.8, Code Supplement 1995, are repealed.

EXPLANATION

This bill repeals the current Iowa Administrative Procedure Act under chapter 17A and replaces it with a new Iowa Administrative Procedure Act. The new Act is based in part on the 1981 Model State Administrative Procedures Act of the national conference of commissioners on uniform state laws. Like the current chapter 17A, the proposed new Act applies to all state agencies and covers four main subjects: 1) public access to agency law and policy; 2) agency rulemaking procedure and the review of agency rules; 3) agency adjudication; and 4) the judicial review of agency action.

The bill makes several changes from current law.

First, the bill imposes several new or additional requirements concerning public access to agency law. New section 17A.2101 requires each agency to compile, index, and make available to the public, with some minor exceptions, all agency policies of general applicability that are not required

to be published.

The bill also makes several changes concerning the adoption and effectiveness of rules. The bill requires all agencies, as soon as feasible and to the extent practicable, to make their law through rules adopted after public rulemaking proceedings in which all interested persons may participate and which are subject to legislative and gubernatorial review. The bill also requires each agency to maintain an up-to-date public rulemaking docket containing all rules proposed by that agency and in process and all rules currently under active consideration within that agency for future proposal. New section 17A.3105 requires an agency to prepare, in specified circumstances, a detailed, structured, regulatory (cost-benefit) analysis for a proposed rule that is available to the general public. New section 17A.3107 specifies when a variance between the text of a proposed rule and the text of the adopted rule based on that proposed rule is sufficiently substantial so that the agency must hold additional public proceedings before it can adopt the rule. New section 17A.3109 authorizes agencies to omit usual rulemaking procedures for wholly interpretive rules only if the rules issued in reliance on that exemption are subject to de novo judicial review for their correctness. Section 17A.3110 requires an explanatory statement for each adopted rule and makes the reasons contained in that statement the sole basis on which the agency may defend the legality of that rule. Section 17A.3111 specifies the required contents, style, and form for all adopted rules. Section 17A.3112 requires the creation of a detailed public agency rulemaking record for each adopted rule. Section 17A.3117 requires agencies, after a petition therefor, to adopt, as soon as feasible and to the extent practicable, a rule subject to public rulemaking procedures superseding specified principles of law or policy lawfully declared in individual cases.

Section 17A.3201 requires each agency to engage in a

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formal, systematic, and periodic review of its rules to facilitate the elimination or amendment of its unnecessary rules. Sections 17A.3202 through 17A.3204 provide for the powers of the governor and the administrative rules review committee of the general assembly in reviewing agency rules.

Section 17A.4106 requires the waiver in individual cases of a particular rule that is overbroad because its application in those cases would not in actual practice serve any of the purposes of the rule and authorizes the waiver of a particular rule in individual cases where its application would cause undue hardship, its waiver is consistent with the public interest, and would not prejudice the rights of any other person.

The bill also provides for the adjudicative process to be applied in various situations. The bill replaces the current reference to contested case proceedings with adjudicative proceedings. The bill provides that the product of agency adjudication (an "order") that is subject to the provisions of the Act includes all agency action of particular applicability defining the legal rights, duties, or privileges, of specified persons. The bill requires agencies, with only few exceptions, to conduct adjudicatory proceedings before issuing an "order" and that agencies shall conduct a "formal adjudicative hearing" as the process for issuing an order, unless another statutory provision or a rule authorized by this Act provides otherwise, and specifies all of the elements of such a proceeding. Sections 17A.4204 and 17A.4205 provide for and regulate prehearing conferences in formal adjudicative hearings. Sections 17A.4206 through 17A.4208 provide for the specificity of the notice, pleadings, and default requirements applicable to formal adjudicative hearings. Section 17A.4209 provides for and regulates intervention in formal adjudicative hearings. Section 17A.4210 requires notice to persons who are the subject of an agency investigation of any subpoenas related to that investigation that are directed at third

persons. Section 17A.4213 also imposes ex parte communications prohibitions in formal adjudicative hearings and additional remedies for their violation. Section 17A.4214 provides for separation of functions requirements and remedies for their violation in formal adjudicative hearings, including entirely new prohibitions on the combination of investigative and subsequent decision-making functions and probable cause finding and subsequent decision-making functions. Section 17A.4215 provides for the required contents of agency orders and the burden of proof in formal adjudicative hearings. Section 17A.4220 establishes an effective date for adjudicatory orders in formal adjudicative hearings.

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Section 17A.4301 establishes a wholly separate and independent office of administrative hearings to house and provide rules governing administrative law judges (ALJ) including rules imposing on all persons who act as presiding officers a code of administrative judicial conduct that is similar to the Iowa code of judicial conduct; that section also requires all newly hired ALJs who preside over formal adjudicative hearings to be admitted to the bar of this state.

Sections 17A.4401 to 17A.4403 create and regulate a conference adjudicative hearing of less formality, complexity, and cost, than a formal adjudicative hearing, and establish guidelines prescribing the precise and limited circumstances in which agencies may use a conference adjudicative hearing.

The bill also creates and regulates very informal, summary, low-cost adjudicative proceedings, called emergency and summary adjudicative proceedings, and prescribes the limited circumstances in which agencies may use those proceedings.

The bill also makes provision for the judicial review of agency action. Section 17A.5102 statutorily defines the distinction between "final" and "nonfinal" agency actions which are subject to different requirements for judicial review. Section 17A.5103 increases the grounds upon which nonfinal agency action is reviewable. Section 17A.5106

confers standing to seek judicial review on specified classes of persons and also lists three elements that must be satisfied to qualify for standing under the "aggrieved and adversely affected" standard. Section 17A.5107 increases the grounds justifying a failure to exhaust administrative remedies prior to filing a suit for judicial review of agency action. Section 17A.5108 specifies in detail the time requirements for review of various types of agency action. Section 17A.5111 specifies a standard for the issuance by the reviewing court of a stay of agency action pending judicial review and clarifies the right of an agency to grant a stay after a judicial review proceeding has commenced. Section 17A.5112 indicates the circumstances in which judicial review may be obtained of issues that were not previously raised before the agency. Section 17A.5114 specifies the circumstances in which new evidence may be taken by the court reviewing the agency action and in which that court may remand the matter to the agency for the taking of additional evidence. Section 17A.5116 greatly elaborates and increases the specificity of the standards for judicial review, expressly indicates when a reviewing court may and when it may not substitute its judgment de novo for that of the agency, and expressly prescribes the burden of persuasion with respect to those standards. Section 17A.5117 provides for the various types of relief available in proceedings for judicial review. Section 17A.5118 codifies the appropriate standard for Iowa supreme court review of a district court decision reviewing agency action.

Additional conforming amendments to the Code may be necessary to fully implement this bill.

LSB 3885SC 76

FOR YOUR INFORMATION

FILED APR 9 1996

SENATE CONCURRENT RESOLUTION NO. 119

BY GRONSTAL

A Concurrent Resolution relating to the establishment of an interim committee regarding the Iowa Administrative Procedure Act.

WHEREAS, current Iowa Code chapter 17A, the Iowa Administrative Procedure Act, was enacted and became effective in 1975; and

WHEREAS, in March 1994, the Iowa State Bar Association passed a resolution authorizing the appointment of a task force to examine the law and make a report to the Association; and

WHEREAS, in January 1996, the Iowa State Bar Association Board of Governors approved a proposed new Iowa Administrative Procedure Act, based in part on the Uniform Law Commissioners' Model State Administrative Procedure Act of 1981, and reflected in Senate File 2404, introduced, but not adopted, during the 1996 Regular Session of the General Assembly; and

WHEREAS, the Administrative Law Section of the Iowa State Bar Association has also recommended changes to the Iowa Administrative Procedure Act that differ from the recommendations approved by the Board of Governors of the Iowa State Bar Association; and

WHEREAS, the Iowa Administrative Procedure Act significantly impacts the citizens of this state in regulating the process of adopting administrative rules and in the process of resolving disputes relating to agency rules and agency action; and

WHEREAS, changes to the Iowa Administrative

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S.C.R. 119

S.C.R. 119

Procedure Act need careful consideration by the General Assembly in order to ensure that any changes to the Act adequately balance the rights of executive branch state agencies and citizens in the operation of administrative law in this state; NOW THEREFORE,

BE IT RESOLVED BY THE SENATE, THE HOUSE OF REPRESENTATIVES CONCURRING, That the Legislative Council is requested to establish and appoint members to an interim committee to conduct a study of the Iowa Administrative Procedure Act. The study shall include, but is not limited to, consideration of the proposed new Iowa Administrative Procedure Act reflected in Senate File 2404, and recommendations of state agencies and other interested parties. The Legislative Council is also requested to authorize five meeting days for the study.

BE IT FURTHER RESOLVED, That the interim committee develop recommendations to submit in a report to the Legislative Council and the members of the General Assembly which convenes in January 1997.

LSB 4452SS 76
ec/jj/8

WORKERS' COMPENSATION UPDATE

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Iris J. Post
Iowa Industrial Commissioner
Iowa Workforce Development
1000 E. Grand
Des Moines, Iowa 50319

I. Agency Update

A. Mediations

1. Mediation orders. (See Appendix D)

2. Three full-time deputies devoted to mediations; Helenjean Walleser, Walter McManus, and Steve Beasley.

3. Third deputy position (Steve Beasley) will be rotated every six months among the other hearing deputies.

4. Reviewing statistics/caseload to determine whether a fourth deputy should be added.

5. Mediating deputies may approve settlements at mediation. Contact claims analyst prior to mediation to ascertain whether your documents contain all correct and necessary information.

6. Mediations may be conducted via ICN.

7. Examination of other options for scheduling more mediations.

B. Settlements

1. New forms. (See Appendix A)

2. Not mandatory, but information on the forms is the minimum needed for approval of the settlement.

3. Average turn around time is ten (10) days for settlements.

C. Second Injury Fund (SIF)

1. 1996 Legislative solution. (See Appendix B)

2. SIF Task Force membership. (See Appendix C)

3. Report on progress of Task Force to date.

D. IAIABC Electronic Data Interchange Project

1. Iowa is one of 49 states participating in the project.

2. Project entails use of international standards for electronic reporting of first reports of injury, payment reports, medical and proof of insurance coverage reports.

3. Currently running first reports of injury with trading partners and will be able to add more in September 1996.

4. Benefits of EDI reporting.

a. Uniformity among forms and terms.

b. Reduction of administrative paperwork.

E. Hearings and Appeals.

1. Statistics.

2. Hearing assignment orders and back-up hearings. (See Appendix D)

F. Iowa Code section 86.13 and bad faith.

1. Iowa Supreme Court in Christensen v. Snap-on Tools Corp., ___ N.W.2d ___ (Iowa 1996), held that the "fairly debatable" standard for bad faith tort actions is also the appropriate standard pursuant to Iowa Code section 86.13.

2. Decisions by the agency on section 86.13 issues may be preclusive for tort actions.

II. Mission of the Division of Industrial Services (DIS) is to educate, to enforce, and to adjudicate the rights and duties of workers' and employers under the workers' compensation laws.

A. The Division's organizational placement within the Iowa Workforce Development Department. (See Appendix E for IWD's Organizational chart.)

B. Goals of DIS.

1. Reduce litigation through voluntary compliance and education.

2. Provide fair, timely and consistent information, and decisions and orders.

3. Anticipate customers' needs and wants.

4. Maximize internal human resources.

5. Maximize utilization and application of state of the art technology.

6. Provide professional, safe and efficient facilities.

7. Improve intra-agency relationships, communications and responsiveness.

Appendix

Appendix A	-	Settlement Forms
Appendix B	-	SIF 1996 Legislation with most current Polk County District Court Motion and Order
Appendix C	-	SIF Task Force Membership
Appendix D	-	Mediation Assignment Order Hearing Assignment Order
Appendix E	-	Iowa Workforce Development Organizational Chart

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CHECKLIST

FULL COMMUTATION

THIS FORM MUST ACCOMPANY THE SETTLEMENT DOCUMENTS

_____ All documents must be legible

_____ Originals and copies must be clearly marked
343 IAC 4.16

_____ 8 1/2 x 11 white paper (all documents)
343 IAC 8.7

_____ Self-addressed stamped envelope (adequate size with sufficient postage)
343 IAC 4.16

_____ First Report of Injury must be filed
343 IAC 6.2(2)

_____ Form 9 must be used (Division of Industrial Services' form)
343 IAC 6.4(2)

_____ Form 9 must be filled out in its entirety, and signed by all parties, including claimant
343 IAC 6.4(1)

_____ Final, updated claim activity report shall be filled out in its entirety and filed with settlement papers (calculations on the report should be identical to the calculations on the form 9)
343 IAC 6.2(2)

_____ Not more than 20 pages of medical reports shall be sent
343 IAC 6.2(9)

PREPARED BY:_____ DATE:_____, 199__
print or type

TELEPHONE NUMBER:_____

FORM 9 - 309-5019 (4-96) BEFORE THE IOWA INDUSTRIAL COMMISSIONER File No. _____

SS# _____

_____ VS. _____
Claimant (Injury Date)

_____
Employer

_____
Insurance Carrier

ORIGINAL NOTICE AND PETITION
AND ORDER
FOR COMMUTATION OF
ALL REMAINING BENEFITS
OF 10 WEEKS OR MORE 343 IAC 6.2(6)

To Employer and Insurance carrier: You are notified that an action for commutation of all remaining benefits has been commenced before the industrial commissioner seeking relief under the chapters of the Iowa Code relating to workers' compensation, occupational disease and occupational hearing loss (Chapter 85, 85A, 85B, 86 and 87). A hearing will be held in the judicial district wherein the injury occurred. When applicable, the parties will be notified by the industrial commissioner of the time and place of the prehearing conference and hearing. You are required to file an answer within 20 days of the receipt of this document or to otherwise move or respond as provided by Rule 343 IAC 4.[illegible] Failure to comply may result in the imposition of the sanctions of 343 IAC 4.36.

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Claim activity report (form 2 or 2A) shall match calculation below.

A. The undersigned makes Application for Full Commutation of all remaining benefits in the above entitled case and represents:

1. As a result of the compensable injury or death, claimant has suffered a permanent disability equal to _____ % of the _____

2. Total Entitlement ..... Temporary Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Rate _____ Rate _____ $ _____ Total

3. Paid to Date ..... Temporary Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Thru _____ Date Thru _____ Date $ _____ Total

4. Accrued-Not Paid ..... Temporary/Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Thru _____ Date Thru _____ Date $ _____ Total

5. Remainder ..... _____ Weeks @ $ _____ Total $ _____

6. Commuted Value ..... _____ Factor X _____ Weekly Rate = $ _____ Commuted Value

7. Other Terms _____

B. Attach pertinent, legible medical records not exceeding 20 pages indicating:
(1) The degree of disability
(2) The condition is not expected to deteriorate
(3) The condition is not expected to require future treatment (unless provision has been made for future treatment)

C. Statement of Need in dollars and cents. I will use the funds for the following:

1. _____ $ _____
2. _____ $ _____
3. _____ $ _____
4. _____ $ _____

Attorney fee disclosure:

$_____ = _____ % of settlement

D. I am the person entitled to workers' compensation benefits on account of the indicated injury or death. I have read the foregoing and all attachments. Upon receipt of the indicated sums and approval by the industrial commissioner, I release and discharge the named employer and insurance carrier from all liability under the Iowa Workers Compensation Law which is now in existence or may exist in the future on account of the indicated injury.

I consent to the degree of disability and the granting of the commutation. In the event the employer consents to the commutation, I waive any provision concerning contested cases as provided in Chapter 17A or otherwise

If I am not represented, I waive my right to an attorney

Claimant's Attorney Date

Claimant Date

State of Iowa

_____ } SS

On this _____ day of _____, 19 ____ before me personally appeared the above claimant to me known to be the identical person named in and who executed the foregoing instrument and acknowledged that the document has been read and executed as a voluntary act

G

Notary Public

E

EMPLOYER

1. The employer/insurance carrier consents to the degree of disability and the granting of the commutation and waives any provision concerning contested cases as provided in Chapter 17A or otherwise.

Employer/Insurance Carrier Date

2. The employer/insurance carrier resists the relief sought in the petition for commutation but acknowledges delivery of a copy of the original notice and petition.

(Check one) ☐ A hearing is waived ☐ A hearing is requested

Employer/Insurance Carrier Date

The foregoing Application for Commutation is approved and the relief sought is granted _____, 19 ____.

Iowa Industrial Commissioner

NOTICE TO APPLICANT

DELIVERY OF FORM

1. Delivery of this form is to be by personal service as in civil actions or by certified mail, return receipt requested. Rule 343 IAC 4.7.

2. A copy of this form with proof of delivery, must be filed with the Division of Industrial Services no later than 10 days after delivery upon the respondent. Rule 343 IAC 4.8.

3. The Commissioner will not deliver this form to the respondent for a petitioner.

DIVISION OF INDUSTRIAL SERVICES, 1000 EAST GRAND AVENUE, DES MOINES, IOWA 50319-0209 (515) 281-5934

The information provided will be open for public inspection under Iowa Code § 22.11

CHECKLIST

PARTIAL COMMUTATION

THIS FORM MUST ACCOMPANY THE SETTLEMENT DOCUMENTS

_____ All documents must be legible

_____ One set of papers submitted for each date of injury

_____ 8 1/2 x 11 white paper (all documents)
343 IAC 8.7

_____ Originals and copies clearly identified
343 IAC 4.16

_____ Self addressed stamped envelope (adequate size with sufficient postage)
343 IAC 4.16

_____ First Report of Injury must be filed
343 IAC 6.2(1)

_____ Form 9A (Division of Industrial Services form)
343 IAC 6.4(2)

_____ Form 9A must be filled out in its entirety and signed by all parties, including claimant
343 IAC 6.4(2)

_____ Updated claim activity report must be filled out in its entirety and filed with the settlement documents (all calculations should be identical to those on the form 9A)
343 IAC 6.2(2)
343 IAC 3.1(2)

_____ Not more than 20 pages of medical records shall be submitted with the settlement documents
343 IAC 6.2(9)

PREPARED BY:_____ DATE:_____, 199___
print or type

TELEPHONE NUMBER:_____

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FORM 9A - 309-5049 (4-96) BEFORE THE IOWA INDUSTRIAL COMMISSIONER File No _____

SS# _____

_____ VS _____
Claimant (Injury Date)

_____
Employer

ORIGINAL NOTICE AND PETITION
AND ORDER
FOR PARTIAL COMMUTATION

_____
Insurance Carrier

To Employer and Insurance carrier: You are notified that an action for partial commutation has been commenced before the industrial commissioner seeking relief under the chapters of the Iowa Code relating to workers' compensation, occupational disease and occupational hearing loss (Chapter 85, 85A, 85B, 86 and 87). A hearing will be held in the judicial district wherein the injury occurred. When applicable, the parties will be notified by the industrial commissioner of the time and place of the prehearing conference and hearing. **You are required to file an answer within 20 days of the receipt of this document** or to otherwise move or respond as provided by Rule 343 IAC 4.9. Failure to comply may result in the imposition of the sanctions of 343 IAC 4.36.
Claim activity report (form 2 or 2A) shall match calculation below.

G _____

The undersigned makes Application for Partial Commutation of all remaining benefits in the above entitled case and represents:

1. As a result of the compensable injury or death, claimant has suffered a permanent disability equal to _____ % of the _____

2. Total Entitlement ..... Temporary Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Rate _____ Rate _____ $ _____ Total

3. Paid to Date ..... Temporary Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Thru _____ Date Thru _____ Date $ _____ Total

4. Accrued-Not Paid ..... Temporary/Partial / Healing Period / Permanent/Death

Weeks _____ Weeks _____ Weeks _____

$ _____ $ _____

Amount Paid _____ Thru _____ Date Thru _____ Date $ _____ Total

5. Remainder ..... _____ Weeks @ $ _____ Total $ _____

6. Commutation of _____ Weeks for ☐ First part of remaining period ☐ Last part of remaining period

7. Commuted Value ..... _____ Factor X _____ Weekly Rate = $ _____ Commuted Value

8. Remainder After Commutation (if approved) _____ Weeks @ $ _____ = $ _____ Total

9. Other Terms _____

B Attach pertinent, legible medical records not exceeding 20 pages indicating:
(1) The degree of disability
(2) The condition is not expected to deteriorate
(3) The condition is not expected to require future treatment (unless provision has been made for future treatment)

C. Statement of Need in dollars and cents. I will use the funds for the following:

1 _____ $ _____

2 _____ $ _____

3 _____ $ _____

4 _____ $ _____

Attorney fee disclosure:

$_____ = ____ % of settlement

D. I am the person entitled to workers' compensation benefits on accou of the indicated injury or death. I have read the foregoing and all attachments. Upon receipt of the indicated sums and approval by the industrial commissioner, I release and discharge the named employer and insurance carrier from all liability under the Iowa Workers Compensation Law which is now in existence or may exist in the future on account of the indicated injury. I consent to the degree of disability and the granting of the commutation. In the event the employer consents to the commutation, I waive any provision concerning contested cases as provided in Chapter 17A or otherwise.

If I am not represented, I waive my right to an attorney.

Claimant's Attorney _____ Date _____ Claimant _____ Date _____

State of Iowa

_____ } SS

On this _____ day of _____ 19 ____ before me _____ personally appeared the above claimant to me known to be the identical person named in and who executed the foregoing instrument and acknowledged that the document has been read and executed as a voluntary act.

G

_____
Notary Public

E. EMPLOYER

1. The employer/insurance carrier consents to the degree of disability and the granting of the commutation and waives any provision concerning contested cases as provided in Chapter 17A or otherwise.

_____ _____
Employer/Insurance Carrier Date

2. The employer/insurance carrier resists the relief sought in the petition for commutation but acknowledges delivery of a copy of the original notice and petition.

(Check one) ☐ A hearing is waived ☐ A hearing is requested

_____ _____
Employer/Insurance Carrier Date

The foregoing Application for Commutation is approved and the relief sought is granted _____, 19 ____

_____
Iowa Industrial Commissioner

NOTICE TO APPLICANT

DELIVERY OF FORM

1. Delivery of this form is to be by personal service as in civil actions or by certified mail, return receipt requested. Rule 343 IAC 4.7.
2. A copy of this form with proof of delivery, must be filed with the Division of Industrial Services no later than 10 days after delivery upon the respondent. Rule 343 IAC 4.8.
3. The Commissioner will not deliver this form to the respondent for a petitioner.

DIVISION OF INDUSTRIAL SERVICES, 1000 EAST GRAND AVENUE, DES MOINES, IOWA 50319-0209 (515) 281-5934

The information provided will be open for public inspection under Iowa Code § 22.11

CHECKLIST

AGREEMENT FOR SETTLEMENT

THIS FORM MUST ACCOMPANY THE SETTLEMENT PAPERS

_____ All documents must be legible

_____ One set of papers is required for each date of injury

_____ 8 1/2 x 11 white paper (all documents)
343 IAC 8.7

_____ Originals and copies must be clearly identified
343 IAC 4.16

_____ Self-addressed stamped envelope (adequate size with sufficient postage)
343 IAC 4.16

_____ First Report of Injury must be filed for each date of injury
Iowa Code section 86.11
343 IAC 3.1(1)

_____ Current (updated) claim activity report for each date of injury must be filled out in its entirety and filed with the settlement
343 IAC 3.1(2) and (3)

_____ Not more than 20 pages medical records shall be attached to the settlement form
343 IAC 6.6

PREPARED BY:_____ DATE_____, 199__
print or type

TELEPHONE NUMBER:_____

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

_____ Claimant	:	File No.: _____
vs.	:	S.S. No.: _____
_____ Employer	:	Injury Date: _____
and	:	AGREEMENT FOR SETTLEMENT (Section 86.13, Iowa Code)
_____ Insurance Carrier	:	

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COME NOW claimant, employer and insurance carrier and submit this **AGREEMENT FOR SETTLEMENT** to the Industrial Commissioner pursuant to Iowa Code section 86.13. In support thereof, the parties state:

1. The parties agree that the claimant's accrued and paid entitlement to workers' compensation for the injury arising out of and in the course of his/her employment on _____ (date of injury) is set out in the claim activity report form 2 or 2A, dated _____ (date of form), attached hereto and incorporated as if set out in full.

2. The parties agree that claimant: (Choose one)

_____ is entitled to an additional _____ weeks of benefits totaling $_____ paid as they accrue.

_____ is not entitled to additional weekly benefits.

3. The parties agree that as a result of the injury claimant is entitled to permanent partial disability benefits equal to _____% of the _____ (scheduled member/baw). This disability is supported by the medical records attached hereto and submitted in support of this **Agreement for Settlement**.

4. The employer/insurance carrier shall file with the Industrial Commissioner and mail to the claimant a final report form 2A indicating the date of last payment. Rules 343 IAC 2.6 and 3.1.

5. The parties agree that the claimant's right to review-reopening will be available to the claimant for three years following the last date of payment of weekly disability benefits and that the claimant remains entitled to medical treatment for authorized care causally connected to the injury pursuant to Iowa Code section 85.27.

WHEREFORE, the parties respectfully request the Industrial Commissioner approve this **Agreement for Settlement.**

_____ _____

Claimant Date Employer/Insurance Carrier Date

APPROVED this _____ day of _____ 199____

_____

Iowa Industrial Commissioner

The information provided will be open for public inspection under Iowa Code § 22.11.

CHECKLIST

SPECIAL CASE SETTLEMENT (IOWA CODE SECTION 85.35)

THIS FORM MUST ACCOMPANY THE SETTLEMENT DOCUMENTS

_____ All documents must be legible

_____ One set of papers for each date of injury

_____ 8 1/2 x 11 white papers (all documents)
343 IAC 4.16

_____ Originals and copies clearly identified
343 IAC 4.16

_____ Self-addressed stamped envelope (adequate size with sufficient postage)
343 IAC 4.16

_____ First report of injury must be filed for each date of injury (if appropriate)
Iowa Code section 86.11
343 IAC 3.1(6)

_____ Final, updated claim activity report must be filled out in its entirety and filed with the settlement papers
343 IAC 3.1(2) and (3)

_____ Clearly identify, by highlighting, the evidence of a bona fide dispute in the records attached to the form

PREPARED BY:_____ DATE:_____, 199___
print or type

TELEPHONE NUMBER:_____

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

_____ Claimant vs. _____ Employer and _____ Insurance Carrier	File No(s): _____ S.S. No(s): _____ Injury Date(s): _____ CONTESTED CASE SETTLEMENT (Section 85.35, Iowa Code)

The undersigned parties make application for authorization and approval of a **CONTESTED CASE SETTLEMENT** pursuant to section 85.35, Iowa Code.

A. A Bona Fide Dispute exists under Iowa Code subsections 85.35(1), (2), (3), (4), (5), (6), (7), (8). (Circle applicable subsection(s).) Attach evidence of bona fide dispute.

B. Payment Terms: (Attach additional page if necessary)

C. Release: In consideration of this payment, claimant releases and discharges the above employer and insurance carrier from all liability under the Iowa Workers' Compensation Law for the above injury.

D. Statement of Awareness of Claimant: I have read the contested case settlement and attachments and am aware upon receipt of the payment and approval by the Industrial Commissioner I am barred from future claims or benefits under the Iowa Workers' Compensation Law for the injury(ies) and the payment shall not be construed as payment of weekly compensation. I understand I have the rights to 1) consult with an attorney of my own choosing and 2) to call the office of the Industrial Commissioner at (515) 281-5934 for a full explanation of the terms of this document and my rights under the Iowa Workers' Compensation Laws, and that I have either exercised the rights or wish not to do so.

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_____ _____

Claimant's Attorney Date Claimant Date

Subscribed and sworn to by claimant before me on this _____ day of

_____, 199___.

_____

Notary Public

E. Employer/Insurance Carrier: The employer/insurance carrier consents to the contested case settlement.

_____

Employer/Insurance Carrier Date

F. Approval: The contested case settlement is approved on this _____ day of _____, 199____.

_____

Iowa Industrial Commissioner

The information provided will be open for public inspection under Iowa Code §22.11.

Sec. 25. SURCHARGE FOR THE SECOND INJURY FUND -- TASK FORCE.

1. For the fiscal period commencing on the effective date of this section and ending June 30, 1997, the treasurer of state may assess a surcharge on workers' compensation weekly benefits paid in the state during the fiscal year commencing July 1, 1994. The surcharge is payable by all self-insured employers making weekly benefit payments and all insurers making weekly benefit payments on behalf of insured employers. The surcharge applies to all workers' compensation insurance policies and self-insurance coverages of employers approved for self-insurance by the commissioner of insurance pursuant to section 87.4 or 87.11, and to the state of Iowa, its departments, divisions, agencies, commissions, and boards, or any political subdivision coverages whether insured or self-insured. The surcharge shall not apply to any reinsurance or retrocessional transaction under section 520.4 or 520.9. The treasurer of state shall base the surcharge for each payor upon the payor's pro rata share of weekly benefits paid in the state during the fiscal year commencing July 1, 1994. The treasurer may use reports of weekly benefits paid derived from the last completed policy or reporting year, or other consistent allocation methodology. The surcharge is collectable by an insurer or from its policyholders if the insured employer fails to pay the insurer. An insurance carrier, its agent, or a third-party administrator shall not be entitled to any portion of the surcharge as a fee or commission for its collection. The surcharge is not subject to any taxes, licenses, or fees. The surcharge is not deemed to be an assessment or tax, but shall be deemed an additional benefit paid for injuries compensable under the second injury fund. However, the treasurer of state shall not collect over $870,000 in assessing the surcharge.

2. a. A second injury task force is created. The task force shall consist of representatives of business and labor appointed by the industrial commissioner who shall serve as chairperson of the task force. The task force shall study issues relating to the second injury fund including, but not limited to, the following:

(1) The role and purpose of the second injury fund within the workers compensation system.

(2) The source of funding for administrative expenses.

(3) The need for continuation of the second injury fund.

(4) The continuation of the surcharge imposed by this section.

b. The second injury task force shall complete its study and submit its recommendations to the chairpersons and ranking members of the standing committee on business and labor and the standing committee on labor and industrial relations of the general assembly by January 15, 1997.

c. The second injury task force is abolished upon submission of its report and recommendations to the general assembly as provided in this subsection.

3. The surcharges collected pursuant to this section shall be deposited in the second injury fund.

4. The administrative costs and expenses incurred by the treasurer of state, the attorney general, the second injury fund, or the department of revenue and finance, in connection with the second injury fund, may be paid from the fund to the extent authorized by 1995 Iowa Acts, chapter 219, section 25, and this section. However, the payment of administrative costs and expenses incurred by the treasurer of state, the attorney general, the second injury fund, and the department of revenue and finance, as authorized in this subsection, shall only be permitted for administrative costs and expenses incurred in the fiscal year commencing July 1, 1996, and ending June 30, 1997, and shall not exceed $170,000.

5. An insurer or self-insurer shall pay a surcharge imposed by this section no later than thirty days following the assessment.

6. a. If an insurer, policyholder, or self-insurer withdraws from doing business in this state before the surcharges authorized by this section become due, or fails or neglects to pay the surcharge imposed, the treasurer of state shall at once proceed to collect the surcharge, and may employ such legal process as may be necessary for that purpose, and when so collected shall deposit the surcharge into the second injury fund. The treasurer may bring the suit in any court of this state having jurisdiction, and reasonable attorney's fees may be taxed as costs in the suit.

b. If the surcharges imposed by this section are not paid or transferred when due, the insurer, policyholder, or self-insurer responsible for the failure shall be required to pay, as part of the surcharge, interest on the surcharge at the rate of one and one-half percent per month for each month or fraction of a month delinquent. If the treasurer of state prevails in any dispute concerning the assessment of a surcharge which has not been paid or transferred, interest shall be paid upon the amount found due to the state at the rate of one and one-half percent per month for each month or fraction of a month delinquent.

c. An insurer is not liable for a surcharge which is not paid to the insurer by the policyholder or employer provided the insurer has made good faith efforts to collect the surcharge from the policyholder or employer. An insurance carrier shall report to the treasurer of state a policyholder or employer who fails to pay a surcharge within thirty days of its due date.

d. In any action concerning the amount of a surcharge imposed by this section, any other surcharge shall continue to be made based upon the amount assessed by the treasurer of state. In the event of an overpayment, the excess amount paid may be credited against future payments otherwise due.

e. An employer who fails to pay the surcharges imposed under this section shall not be allowed to purchase workers' compensation insurance coverage or to renew a self-insurance authorization unless and until the surcharge has been paid.

7. For the purposes of this section, "insurer" includes a self-insurance group approved by the commissioner of insurance pursuant to section 87.4.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

'96 JUN 28 PM 12 57

IN RE: SECOND INJURY FUND SERVICES : No. CE 32807

RECEIVER'S APPLICATION TO MODIFY ORDER
RE: APPOINTMENT OF RECEIVER

MICHAEL L. FITZGERALD, Treasurer of the State of Iowa, and duly appointed and acting receiver for the Second Injury Fund, moves to modify the Order Re: Appointment of Receiver, and states to the Court:

1. On February 9, 1996, the Court, by Arthur E. Gamble, Judge, Fifth Judicial District, entered an Order appointing this receiver and staying all further administration, adjudication and payments from the Second Injury Fund, with exceptions, finding the Fund to then be insolvent.

2. On May 28, 1996, House File 2416 was signed by Governor Terry Branstad. Section 25 of the Act, a surcharge for the Second Injury Fund -- Task Force, being deemed of immediate importance, took effect on that date. See House File 2416, Section 34. This Act provides that the Treasurer of the State may assess and collect a surcharge, not to exceed $870,000.00, to be deposited in the Second Injury Fund.

3. The Treasurer has instigated procedures to assess this surcharge, which amounts are due on June 28, 1996. Upon the collection of this surcharge, the Second Injury Fund will have funds available for the payment of claims, awards and costs.

4. While this receivership should not be dissolved simply in anticipation of the collection of these additional funds for the Second Injury Fund, it is appropriate to modify the previously entered stay to allow for the gradual renewal of the administration, adjudication and payment of claims against the Second Injury Fund. In consultation with the Iowa Industrial Commissioner and the Office of the Attorney General, the receiver requests that paragraph D of the Order Re: Appointment of Receiver be stricken and replaced by the following:

G

1. Claims and original notice and petitions seeking benefits from the Second Injury Fund filed and served on or after July 1, 1996, will be administered and adjudicated according to the rules and procedure of the Iowa Industrial Commissioner, except as noted below.

2. All claims and original notice and petitions filed and served between February 9, 1996, and July 1, 1996, shall be responded to by the Fund under the rules of the Iowa Industrial Commissioner on or before August 2, 1996.

3. All claims and original notice and petitions seeking benefits from the Second Injury Fund, the adjudication of which have been stayed since February 9, 1996, shall resume the adjudicatory process on July 1, 1996, pursuant to the rules and regulations of the Iowa Industrial Commissioner, except as noted below.

4. In any contested case against the Second Injury Fund in which the time for appeal within the agency or for judicial review would have expired between February 9, 1996, and July 1, 1996, such time shall be extended to July 19, 1996.

5. Claims, settlements or awards against the Second Injury Fund, approved by the Iowa Industrial Commissioner, including administrative costs and expenses as allowed against the Fund, may be paid to the extent sufficient assets are available in the Second Injury Fund for their payment as well as payment of bi-weekly benefits as previously ordered by the Commissioner.

6. No original notice and petition seeking benefits from the Second Injury Fund may proceed to hearing before the Industrial Commissioner until October 1, 1996. However, district court or intra-agency appeals of cases previously heard may proceed. Further, no judgment, pursuant to Iowa Code section 86.42 may be entered or enforced against the Second Injury Fund before October 1, 1996.

WHEREFORE, the Treasurer of the State of Iowa respectfully requests modification of the Order Re: Appointment of Receiver entered February 9, 1996, as stated above.

By _____

CRAIG KELINSON
Special Assistant Attorney General
Dept. of Justice--Tort Claims
Hoover Office Building
Des Moines, Iowa 50319
(515) 281-5881
ATTORNEY FOR RECEIVER

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IN RE: SECOND INJURY FUND	:	No. CE 32807

ORDER RE: MODIFICATION OF APPOINTMENT OF RECEIVER

G

NOW on this 27 day of June, 1996, the Court having reviewed and considered the Receiver's Application to Modify Order Re: Appointment of Receiver, and being fully advised, orders:

1. The Order Re: Appointment of Receiver entered on February 9, 1996, is conditionally modified as requested by the receiver. This modification shall be deemed effective on the date of this Order.

2. All individuals currently receiving benefits from the Second Injury Fund or who have claims or contested cases seeking Fund benefits pending before the Iowa Industrial Commissioner or in the Courts of the State of Iowa on this date shall be notified of the receiver's application and this order by being mailed, by regular mail, to the address listed in the records of the Treasurer, a copy of these documents. The mailing of these documents to a claimant's attorney of record in any currently pending contested case or court proceeding shall be considered mailing to the individual. Upon the request of a person receiving this notice, the Court will conduct a hearing to review the application and reconsider the terms of the modification. If

a request for hearing is not received by the court on or before July 15, 1996, this order shall be considered final.

GENE L. NEEDLES, JUDGE OF THE
FIFTH JUDICIAL DISTRICT

Original filed
Copy to:

Craig Kelinson
Special Assistant Attorney General
Dept. of Justice--Tort Claims
Hoover Office Building
Des Moines, Iowa 50319
ATTORNEY FOR RECEIVER

APPENDIX C

Second Injury Fund Task Force Membership

Ms. Iris Post, Chair
Industrial Commissioner
1000 E. Grand Ave.
Des Moines, IA 50319

Mr. Clair Cramer
Div. of Industrial Services
1000 E. Grand Ave.
Des Moines, IA 50319

Mr. Craig Kelinson
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, IA 50319

Mr. Dave Neil
United Auto Workers
2525 E. Euclid, Ste 201
Des Moines, IA 50317

Mr. Art Hedberg
Attorney at Law
840 Fifth Ave.
Des Moines, IA 50309

Ms. Jan Laue
Iowa Federation of Labor
2000 Walker St., Ste A
Des Moines, IA 50317

Mr. Tom Gillespie
Plumbers & Steamfitters,
Local33
2501 Bell Ave.
Des Moines, IA 50321

Mr. Dave Brasher
Nat'l Federation of
Independent Bus.
319 E. 5th St., Ste 1
Des Moines, IA 50309

Mr. Tom Kunkle
The Dexter Company
2211 W. Grimes
Fairfield, IA 52556

Mr. Hugh Morrill
Deere & Company
John Deere Rd.
Moline, IL 61265

Mr. Vern Vogel
Hy-Vee Food Stores
5820 Westown Pkwy
West Des Moines, IA 50266

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

, Claimant, vs. , Employer, and , Insurance Carrier, Defendants.	File No(s). MEDIATION ASSIGNMENT ORDER

A review of the Industrial Commissioner's file reveals that the above captioned case is one in which the parties have requested dispute resolution pursuant to rule 343 IAC 4.40(2).

A determination has been made that it is in the best interests of the parties that attempts be made at prompt resolution of the disputed case.

IT IS THEREFORE ORDERED that the claimant and claim representative of the employer/insurance carrier duly authorized to settle the disputed issues shall appear with legal counsel before the assigned deputy industrial commissioner fully prepared to enter into meaningful discussions.

The mediation is scheduled for the _____ day of _____, 199__ at _____ ___M. at the county courthouse in:

_____Fort Dodge _____Sioux City ___Manchester

or at:

____Cedar Rapids (Cedar Rapids City Hall, 1st Avenue entrance)
____Davenport (U.S. District Court, 131 East 4th Street)
____Des Moines (Division of Industrial Services, 1000 East Grand Avenue).

If this mediation date is not acceptable, rescheduling may be requested only within 14 days of receipt of this order by placing a conference call with all

opposing parties to the hearing administrator, ph, 515-281-6621, between the hours of 9:00 A.M. and 10:30 A.M., Monday through Friday. Otherwise, a motion for continuance is required which will be granted only in case of emergency.

Counsel shall submit the Conference Report enclosed with this Order to the deputy by . Only one copy of the Report, with all appropriate signatures, shall be filed.

Failure to comply with this Order will result in the imposition of sanctions under rule 343 IAC 4.36.

G

Signed and filed this _____ day of April, 1996.

STEVEN C. BEASLEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

14-5170 (4/96)

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

Claimant,	File No(s).
vs.	HEARING ASSIGNMENT ORDER
Defendant Employer,	
Defendant Insurance Carrier.	

Be it remembered that more than 60 days have elapsed since all parties were ordered to jointly submit a prehearing conference report within 60 days. It was also ordered that the case would be assigned for a three-hour hearing as soon as practicable, if a properly completed report was not timely submitted.

Based upon the prehearing conference report or lack thereof, IT IS ORDERED AS FOLLOWS:

First Report of Injury. Defendant(s) is(are) ordered to file a First Report of Injury. Defendant(s) will be required to prove at the time of hearing that a First Report of Injury has been filed and, if unable to do so, they shall appear and show cause at the time of hearing why a civil penalty should not be assessed pursuant to section 86.12. Also, sanctions pursuant to rule 343 IAC 4.36 may be imposed for failure to file a First Report of Injury upon a showing of prejudice by the claimant.

Backup Assignment. This case is assigned as a backup for the 23TH day of September, 1996 at 1.00 P M. at the county courthouse in: Fort Dodge
This case will be heard at its backup assignment unless the case with the primary assignment for this same time proceeds to hearing. You are responsible for monitoring the status of that case by communicating with counsel. They are: _____.
If that primary case is canceled, the primary assignment for this case provided in paragraph 3 will be vacated and the time will be assigned to a different case. This agency will not notify you if a primary case is canceled.

Primary Assignment. Should this case not be heard at the backup time, the hearing is set for the 12TH day of UNKNOWN , 1996 at 1.00 P.M. at the same location as the backup hearing set forth in the paragraph above

Rescheduling and Continuances. If these hearing dates are not acceptable, rescheduling may be requested only within 14 days of receipt of this order by placing a conference call with all opposing parties to the hearing administrator, ph, 515 281-6621, only between the hours of 9:00 A.M. and 10:30 A.M., Monday thru Friday. Otherwise, a motion for continuance is required, which will be granted only in case of emergency. Should a case be rescheduled within 14 days, both a backup and primary assignment will be made. Should the parties wish only a single or primary assignment; a joint motion for continuance is required to be served within 14 days which will be granted only upon a showing of cause.

Case Preparation Completion Dates. Claimant shall complete case preparation, including discovery and responses, 60 days prior to the backup hearing date, or the primary hearing date if the case is not at the backup time. Defendant(s) shall complete case preparation, including discovery and responses, 30 days thereafter. These completion dates supersede Iowa Rule of Civil Procedure 125(c). When admissibility of evidence is disputed, the completion date for case preparation will be enforced under a prejudice standard. Any party, with timely notice to the other, may depose to the date of hearing any practitioner whose records or reports were timely served. The parties may agree in writing to modify these completion dates.

Witness and Exhibit Lists. Unless otherwise agreed in writing, a party shall serve a list of proposed witnesses and exhibits to be offered into evidence at hearing upon opposing parties on or before the serving party's case preparation completion date. Additional witnesses or exhibits may be allowed by the presiding deputy only if it is shown that a party is not unfairly surprised by their introduction into evidence.

Length of Hearing. The hearing is scheduled for a total of 3.50 hours. Claimant is allocated 1.5 (_____) hours. Defendant(s) are allocated the balance. Each party's allocation of time is to be used as each party sees fit. The allocation includes direct and cross-examination of all witnesses as well as any oral presentation of motions or argument.

Preparation of a Hearing Report. The parties are ordered to meet in advance of hearing to prepare the enclosed hearing report and required attachments for submission to the presiding deputy at the time of hearing which shall be signed by all parties or their counsel. The hearing will not commence until this report and attachments are submitted. Additional time to prepare this report will be taken from claimant's allocation unless it is shown that defendant(s) failed to cooperate in preparing the report.

G

Exhibit Requirements. All depositions, discovery materials and medical records or reports which are to be offered into evidence shall be marked before the hearing. A party may highlight written materials. All exhibits, including medical records and reports, shall be organized by author in chronological form. Exhibit pages shall be consecutively numbered.

The provisions of Iowa Code section 17A.14(1) require the exclusion if irrelevant, immaterial and unduly repetitious evidence. However, absent objection, a party's submission of 50 pages or less of written evidence will not be subject to detailed review at hearing for compliance with this Code section.

Hearing Issues. Unless otherwise agreed in writing, the issues to be heard are those identified in the prehearing conference report. Additional issues may be allowed by the presiding deputy only upon a showing that opposing parties are not unfairly surprised. The following issues have been bifurcated for hearing at a later date:

_____

Reporting of Proceedings. Defendant(s) shall arrange for the attendance of a certified shorthand reporter.

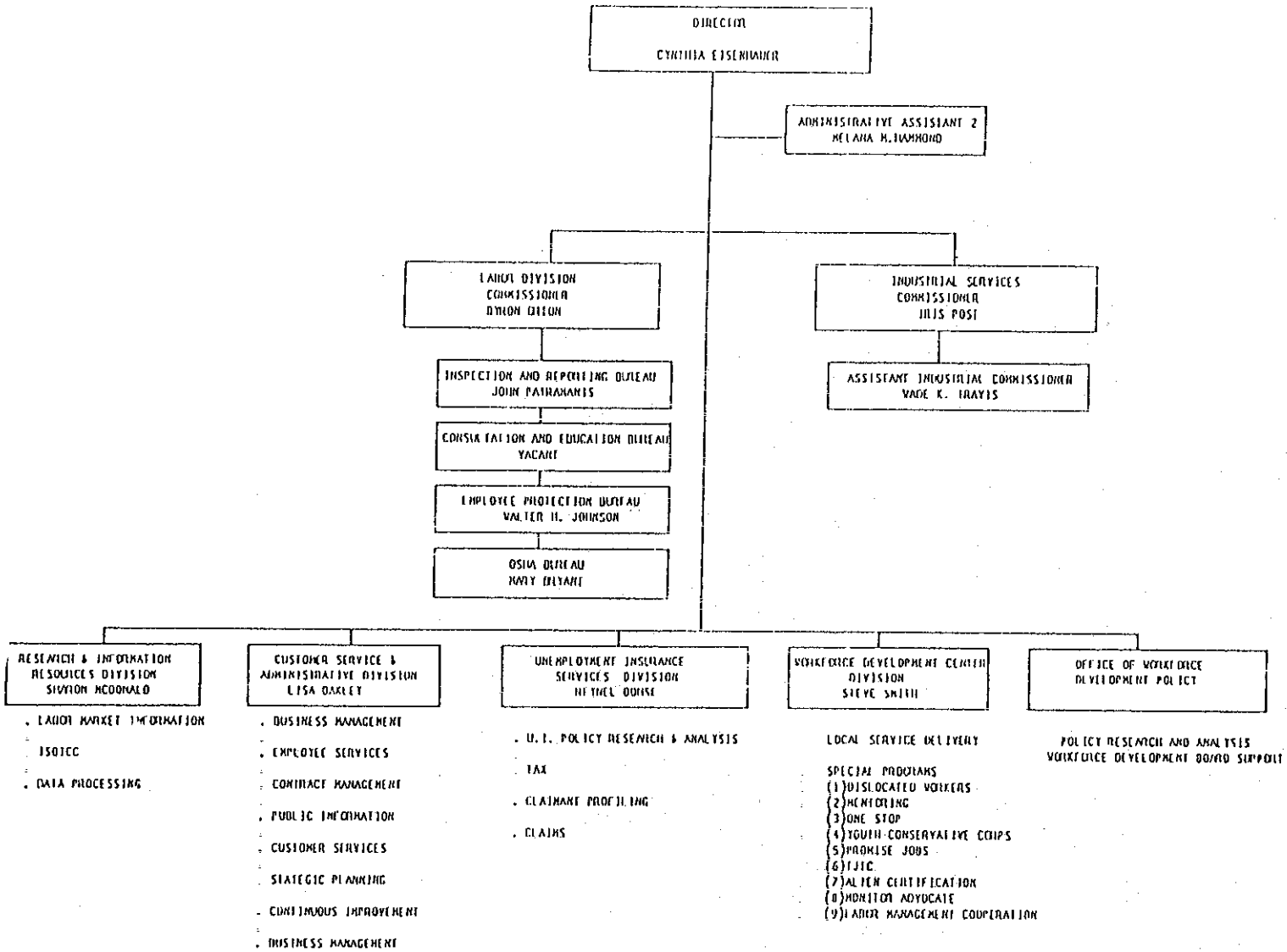
Interpreter. If an interpreter is required by Iowa Code chapters 622A or 622B for a party or witness who is unable to speak, understand or or hear the English language, defendant(s) shall provide the audio tape recorder and audio tapes for hearing as Iowa Code section 622A.8 requires. The parties shall work together to procure the services of an English language interpreter. The parties shall work together to procure the services of an interpreter as defined in section 622B.1.

Sanction. Failure to comply with this order may result in imposition of sanctions as provided in rule 343 IAC 4.36.

Signed and filed this day of , 1996.

COPIES TO:

Deputy Industrial Commissioner


DIRECTOR
CYNTHIA EISENHAUER
ADMINISTRATIVE ASSISTANT 2
MELANA M.HAMMOND
LABOR DIVISION
COMMISSIONER
DAMON DREON
INDUSTRIAL SERVICES
COMMISSIONER
JULIS POST
INSPECTION AND REPORTING BUREAU
JOHN FAIRMANIS
CONSULTATION AND EDUCATION BUREAU
VACANT
EMPLOYEE PROTECTION BUREAU
WALTER H. JOHNSON
OSHA BUREAU
MARY DELVAHL
ASSISTANT INDUSTRIAL COMMISSIONER
WADE K. TRAVIS
RESEARCH & INFORMATION
RESOURCES DIVISION
STEVEN MCDONALD
CUSTOMER SERVICE &
ADMINISTRATIVE DIVISION
LISA OAKLEY
UNEMPLOYMENT INSURANCE
SERVICES DIVISION
MICHEL DUNNE
WORKFORCE DEVELOPMENT CENTER
DIVISION
STEVE SMITH
OFFICE OF WORKFORCE
DEVELOPMENT POLICY
. LABOR MARKET INFORMATION
. ISOICC
. DATA PROCESSING
. BUSINESS MANAGEMENT
. EMPLOYEE SERVICES
. CONTRACT MANAGEMENT
. PUBLIC INFORMATION
. CUSTOMER SERVICES
. STATEGIC PLANNING
. CONTINUOUS IMPROVEMENT
. BUSINESS MANAGEMENT
. U. I. POLICY RESEARCH & ANALYSIS
. TAX
. CLAIMANT PROFILING
. CLAIMS
LOCAL SERVICE DELIVERY
SPECIAL PROGRAMS
(1)DISLOCATED WORKERS
(2)MENTORING
(3)ONE STOP
(4)YOUTH CONSERVATIVE CORPS
(5)PROMISE JOBS
(6)TJTC
(7)ALIEN CERTIFICATION
(8)MONITOR ADVOCATE
(9)LABOR MANAGEMENT COOPERATION
POLICY RESEARCH AND ANALYSIS
WORKFORCE DEVELOPMENT BOARD SUPPORT

THE VOODOO OF CLAIM RESERVES

H

D. Samuel Waters
Continental Western Insurance Company
Des Moines, Iowa

Case-Based Reserves

A. Philosophy

1. *Ultimate settlement cost as basis for reserve.*
2. *Developed settlement estimates through supplemental means.*

B. Reserving Objectives

1. *Reserve adequacy for each of several claims groups.*
2. *Reserve adequacy on an overall basis.*
3. *Reserve adequacy at current cost levels.*
4. *Reserve as a settlement target.*
5. *Reserve adequacy on a consistent level basis.*

C. Methodology for Setting a Case-Based Reserve Objectively

1. *Determining coverage.*
2. *Determining liability.*
3. *Determining damages.*

Bulk Reserves

A. Average Reserves
B. Deferred Reserves
C. Minimum Reserves
D. Fast Track Reserves

IBNR Reserves

A. Incurred But Not Reported
B. Incurred But Not Yet Processed
C. Incurred But Not Enough Reserved

Loss Development

A. Loss Development Triangles

H

ANNUAL STATEMENT FOR THE YEAR 1995
OF THE ABC COMPANY

LIABILITIES, SURPLUS AND OTHER FUNDS

		12-31-95	12-31-94
H	1. Losses (Part 3A, Line 32, Column 5)	4,403,000	4,613,000
	. . .		
	2. Loss Adjustment Expenses (Part 3A, Column 6, Line 32)	1,143,000	1,001,000
	. . .		
	9. Unearned Premiums (Part 2A, Line 34, Column 5)	3,317,000	3,647,000
	. . .		
	25. Surplus as regards policyholders Lines 22 to 24 C, less 24D) (Page 4, Line 32)	5,421,000	4,031,000
	. . .		

August 24, 1994

COMPLAINT

That on or about February 19, 1993, at approximately 2:34 p.m., plaintiff was operating her vehicle westbound on East Broadway. That at said time and place defendant was turning left from the eastbound turn lane on East Broadway. That as a direct and proximate result of defendant's negligence and carelessness, plaintiff was seriously injured.

August 31, 1994

PLAINTIFF'S CONTENTIONS

Plaintiff immediately experienced pain in her neck and low back and a tingling sensation radiating into both arms. After the accident, plaintiff's neck and low back pain did not subside at all. She also experienced severe frontal headaches with a confirmed diagnosis of acute cervical and lumbar sprain. Plaintiff underwent physical therapy from March 9, 1993 to March 26, 1993, and from May 24, 1993 to June 7, 1993. In October of 1993, she decreased her work week to four days a week.

Medical Bills	$3,349.26

Plaintiff missed forty (40) days of work for a total loss of $2,800. Additionally, plaintiff's lost wages from October 1, 1993 to the present are $1,400 (25 weeks x 8 hours x $7) for a total wage loss of $4,200.

FIRST PHILOSOPHY

Case-based reserves, in the aggregate, equal the ultimate settlement costs of the related claims.

SECOND PHILOSOPY

Case-based reserves are set recognizing that claim amounts, in the aggregate, will develop upward from the reserve established.

RESERVE ADEQUACY FOR EACH OF SEVERAL CLAIM GROUPS

Reserve adequacy should be reached within 3 to 6 months after the first date of report.

RESERVE ADEQUACY ON AN OVERALL BASIS

H

An insurer must set a reserve based on facts unknown at the time to achieve overall reserve adequacy. However, claims handlers should not make inferences beyond the documentation included in the claim file.

RESERVE ADEQUACY AT CURRENT COST LEVELS

The claim should have an equal probability of settling at an amount either greater or less than the reserve established. Prior to that time, a claim will be more likely to develop upward than downward.

RESERVES AS A SETTLEMENT TARGET

A company that considers case-based reserves as a settlement target has emphasized claims settlement and if established successfully, the reserves should develop upward in predictable patterns, resulting from initial examiner optimism, as well as the surfacing of new facts and inflation.

H

RESERVE ADEQUACY ON A CONSISTENT LEVEL BASIS

The main precept of consistency is letting the Claim Department go about their business. Consistency as a goal is fine as long as everything goes smoothly.

November 16, 1994

DEPOSITION

I deposed plaintiff this morning. Plaintiff is a young and appealing witness, and is highly credible. Her neck complaints have resolved, but she still complains of low back problems. She has missed significant work due to the accident, all of it apparently doctor ordered. However, she testified that the reason she changed jobs was that she moved to the north end of the city to be with her fiance.

H

February 24, 1995

PLAINTIFF'S DEMAND LETTER

An MRI taken in 1994 reveals that plaintiff had three bulging disks. It appears that at least two of those disks are impinging on the thecal sac.

H

Medical Bills Incurred to Date $3,949.26

Future Medical Expenses

It is likely that plaintiff's back condition will require surgery in the future; a laminectomy - our estimate of this expense would be $12,000.

Dr. Armstrong also felt that plaintiff's condition would require approximately two courses of physical therapy each year until she passes her childbearing years. Plaintiff would incur $1,200 in physical therapy expenses a year. Because she has 15 years of childbearing capacity (from age 25 to 40), the cost of future physical therapy would total $18,000.

It is reasonable to assume that plaintiff's chronic back condition will require periodic examinations and pain medications until she is age 70. We have allotted a conservative $200 per year and projecting that to age 70

results in a total of $9,000. By our calculations, past and future medical expenses total $42,849.26.

Plaintiff was forced to seek employment that did not require lifting and other physical stressors associated with her position as a certified nursing assistant. She found employment but, unfortunately, had to take a pay cut as a result. The difference between plaintiff's 1994 salary and her current job is $301.34 per month. She has, therefore, sustained a wage loss of $3,616.08 a year, which projected out over the course of her working life until age 65, results in a total future wage loss of $144,643.20.

H

PERMANENT DISABILITY - PAIN AND SUFFERING

While plaintiff is not currently undergoing medical treatment, her back remains symptomatic. For example, a few months ago, she tried to lift a one liter Coke bottle and found that she had to spend the next day in bed as a result of back pain.

Dr. Armstrong has also noted that plaintiff will have riskier pregnancies because of her back condition, that she will likely lose time from work as a result of her pregnancies, and that the stress of pregnancy could cause one of her disks to herniate or rupture. As you know, plaintiff is now pregnant.[1]

[1]Plaintiff is due on August 24, 1995.

METHODOLOGY FOR SETTING A CASE-BASED RESERVE

Coverage

% chance coverage exists _____

Liability

___ % chance insured will be 0% at fault _____
___ % chance insured will be 25% at fault _____
___ % chance insured will be 50% at fault _____
___ % chance insured will be 75% at fault _____
___ % chance insured will be 100% at fault _____

_____

Damages

Special Damages _____
General Damages _____
Total Damages $ _____

Coverage x Liability x Damages
_____ % _____ % $ _____ = $ _____
Reserve

October 12, 1995

REVIEW OF MEDICAL RECORDS

Dr. Dennis Armstrong states in that plaintiff will be at "increased risk" because while pregnant she may have more disk protrusion or may actually rupture her disk.

When 22 weeks pregnant, plaintiff had an orthopedic evaluation with Dr. Joseph Gimbel. Due to increased low back pain that was radiating in to the right buttock and down the right leg, Dr. Gimbel diagnosed sacroiliac strain because plaintiff had positive MRI findings (by history, he was not able to review the films). Plaintiff did not have any clinical symptoms of a herniated disk. The recommended treatment was trigger point injections after the pregnancy.

H

On July 24, 1995, a perinatology (specialized in fetus care) consult diagnosed oligohydramnios (an abnormally small amount of amniotic fluid). On July 26th, labor was induced because of the oligohydramnios and spontaneous decelerations (a decrease in fetal heart rate). An emergency Cesarean delivery under general anesthetic was performed on July 26th because of fetal intolerance to labor.

General anesthesia was selected because of the emergency nature of the Cesarean was the basis for the decision.

November 28, 1995

DEPOSITIONS

This summarizes the recent depositions of Dr. Armstrong and Dr. Tehranchi.

ARMSTRONG DEPOSITION

H

Dr. Armstrong agrees with Dr. Gimbel that plaintiff currently has no clinical findings of a herniated disk. He admits that plaintiff has no disk extrusions; she only has protrusions.

TEHRANCHI DEPOSITION

Dr. Tehranchi is the OB/GYN who delivered plaintiff's baby on July 26, 1995.

Dr. Tehranchi testified that plaintiff's low back pains were not a major concern during her hospitalization. From his perspective, the low back pain did not impair her delivery or recovery.

Plaintiff's low back pain and herniated disk had nothing to do with the C-section. The C-section was done because of low amniotic fluid and decreased fetal heart rate.

Plaintiff was healthy and recovered very well. The baby was healthy as well. While he knew she had low back problems, there were not a factor in his treatment of her.

BULK RESERVES

Certain lines of business give rise to claims that occur with great frequency. Consequently, establishing individual case-based reserves is not worth the effort.

AVERAGE RESERVES:

H

Used with any type of claim where a reserve may be calculated on an average severity basis.

DEFERRED RESERVES:

Attempts to address inadequacies in estimating case-based reserves before adequate facts have been obtained.

MINIMUM RESERVES:

Typically set arbitrarily - to be bolstered by a case-based reserve.

FASTTRACK RESERVES:

Permanently by-passes claim reserve records used when incurred to payment time lag is very short.

SCHEDULE P - PART 2A - HOMEOWNERS/FARMOWNERS

1 Years In Which Losses Were Incurred	INCURRED LOSSES AND ALLOCATED EXPENSES REPORTED AT YEAR END ($000 OMITTED)										12 One Year	13 Two Year
	2 1986	3 1987	4 1988	5 1989	6 1990	7 1991	8 1992	9 1993	10 1994	11 1995		
1. Prior	973	1,105	1,046	1,083	975	876	891	895	860	890	29	(6)
2. 1986	8,113	7,614	7,572	7,601	7,586	7,586	7,583	7,581	7,581	7,581		
3. 1987	xxx	6,716	6,472	6,401	6,276	6,253	6,253	6,212	6,213	6,212	(1)	
4. 1988	xxx	xxx	5,681	5,171	5,223	5,143	5,143	5,086	5,081	5,084	3	31
5. 1989	xxx	xxx	xxx	6,261	5,866	5,861	5,861	5,785	5,774	5,779	5	(6)
6. 1990	xxx	xxx	xxx	xxx	5,513	5,396	5,396	5,417	5,358	5,341	(17)	(76)
7. 1991	xxx	xxx	xxx	xxx	xxx	5,719	5,719	5,529	5,574	5,559	(15)	30
8. 1992	xxx	xxx	xxx	xxx	xxx	xxx	4,204	3,909	3,817	3,770	(47)	(139)
9. 1993	xxx	xxx	xxx	xxx	xxx	xxx	xxx	4,218	4,307	4,213	(94)	(5)
10. 1994	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	6,032	6,010	(22)	xxx
11. 1995	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	5,435	xxx	xxx
										12. Totals	(159)	(171)

SCHEDULE P - PART 3A - HOMEOWNERS/FARMOWNERS

1 Years In Which Losses Were Incurred	CUMULATIVE PAID LOSSES & ALLOCATED EXPENSES AT YEAR END ($000 OMITTED)										12 No. Claims Closed With Loss Payment	13 No. Claims Closed Without Loss Payment
	2 1986	3 1987	4 1988	5 1989	6 1990	7 1991	8 1992	9 1993	10 1994	11 1995		
1. Prior	000	315	521	676	763	829	831	841	851	870	32,431	4,061
2. 1986	6,141	7,212	7,355	7,434	7,521	7,576	7,579	7,579	7,579	7,579	8,901	1,131
3. 1987	xxx	4,526	5,881	6,021	6,113	6,160	6,160	6,160	6,160	6,160	7,248	921
4. 1988	xxx	xxx	3,783	4,800	4,866	4,992	5,009	5,086	5,083	5,086	5,400	561
5. 1989	xxx	xxx	xxx	3,976	5,281	5,463	5,641	5,690	5,773	5,779	5,541	483
6. 1990	xxx	xxx	xxx	xxx	4,036	5,041	5,091	5,283	5,284	5,231	6,797	618
7. 1991	xxx	xxx	xxx	xxx	xxx	4,189	4,186	5,091	5,256	5,412	5,496	500
8. 1992	xxx	xxx	xxx	xxx	xxx	xxx	3,286	3,345	3,681	3,651	4,054	375
9. 1993	xxx	xxx	xxx	xxx	xxx	xxx	xxx	3,978	4,001	4,051	3,838	391
10. 1994	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	5,396	5,417	3,736	408
11. 1995	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	3,337	3,086	366

NAVIGATING THE RAPIDS IN COMMUNICATIONS WITH INSURANCE CARRIERS

Neal Scharmer
United Fire & Casualty Company
Cedar Rapids, Iowa

Navigating the Rapids in Communications With Insurance Carriers

Neal Scharmer
Claims Attorney
United Fire & Casualty Company
Cedar Rapids, IA

Retained counsel is the front-line representative of the insured and insurer, and both parties have vital interests in being kept informed of the status of litigation. There are conflicting interests between the insured, counsel, and insurer and these have been the subject of numerous articles, treatises, and even a proposal from the American Law Institute. There are also conflicting interests amongst the three with respect to communications. At one extreme may be an insured who insists on what amounts to a "play-by-play" analysis of the claim in litigation. At another extreme is an attorney is all too eager (and without other demands on his time) to provide this type of analysis at an hourly rate. As a moderating influence on the amount of information conveyed, and the expense of doing so, is the insurance carrier, which is under constant pressure to keep claim expenses in line so as to protect policyholders, earn a return, and keep its products, and insurance in general, as a viable risk management technique.

No two lawsuits are identical, as are no two insureds. Complicating the scenario further are wide ranging preferences of insurance carriers for information and for taking an active role in litigated claims. Perhaps the overriding consideration for defense counsel should be common sense. How would counsel report to his client (the insured) if he had to justify every expense and personally deliver a bill to the client. From the insured's perspective, how much information would he deem important if he was paying the transmission costs. From the insurer's perspective, how can it complain about the amount and quality of information passed on if it does not make its preferences reasonably known. Attorneys are entitled to be fairly compensated for their efforts and insurers must appreciate that difficult claims and difficult insureds will present challenges to the "general rules" and "guideposts" an insurer may utilize in assessing its defense obligations. An insurer must also make counsel aware of what is expected and the role it is willing and/or expects to play in a claim in litigation.

The opinions expressed herein are solely those of the author and do not necessarily represent the position of United Fire & Casualty Company.

At the time of or prior to accepting an assignment, counsel should determine the preferences of the insurance carrier with respect to reporting. Carriers have frequently developed written guidelines which are sent along with a new case assignment. If counsel feels that the guidelines spell out requirements which are too onerous and otherwise inappropriate for the subject claim, counsel should communicate this concern to the carrier as soon as possible. The carrier will either grant an exception or obtain alternative counsel. If counsel feels that reporting requirements such as consultation with the insurance carrier prior to undertaking various forms of discovery place him in an ethical bind, the time to draw that to the carrier's attention is at the outset of the defense, and if not possible at the time, as soon as possible.

The goal of communications to an insurance carrier should be to enhance the carrier's knowledge of the claim in a manner that is manageable. Attention to insignificant detail (e.g. advising of a change in the time of depositions the carrier does not plan to attend or forwarding copies of all correspondence between counsel) may afflict the company representative with information overload. Conversely, insufficient communication ("By the way, discovery uncovered no new information and we're on for trial tomorrow") impairs the opportunity of the carrier to explore cost containment or settlement options. The goal of communication from an insurance company to counsel should be to provide, where appropriate, direction for further handling of the claim. While counsel may not learn what the insurer's representative is thinking, counsel should receive a timely response to his inquiry and an indication of how the carrier desires the litigation process to proceed. Sometimes this will be a request to obtain or provide more information on a specific issue. Other times it may be a directive to explore settlement or a conferring of settlement authority. At other times counsel will be informed that the company representative will assume an active role in settlement, assist in the location of potential expert testimony, or draw upon its claims investigation resources or a bank of information generated from prior similar claims.

The dialogue between counsel and carrier should be undertaken in such a way as to convey knowledge from one to the other as efficiently as possible. Some things are more easily (or more properly) reduced to writing. Telephone "tag" for advisement of a trial date, for instance, may be a poor utilization of each person's resources. Others lend themselves to oral discussion with its give and take. Counsel should determine the preferences of each carrier with which he deals.

To a great extent counsel is the eyes and ears of the insurer. The role is not unlike that of an investigative reporter. Communication with the company can be seen as occurring on two levels. On the one hand there are facts which deal directly with the occurrence giving rise to the claim. On the other hand there are issues which relate to the internal operations of the insurer. I have chosen to break down the communication along those lines.

Occurrence Specific

Who. In most instances the insurance company is already aware of the identity of the various persona involved in the claim. Therefore, it will frequently be unnecessary to give extensive biographic information concerning the involved people or firms. When persons "come out of the woodwork" during the course of the litigated claim, it may be necessary to report in greater detail. Rather than biographic information the carrier is more interested in demeanor, knowledge, reputation, credibility and the overall impression that each "player" in the claim will make. Those types of assessments (which may or may not confirm or contradict the company's assessment) are critical in an evaluation of virtually every aspect of the claim.

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What. The subject matter of a lawsuit will generally concern the extent of damages, actual or otherwise. The amount of detail will vary with the uniqueness of the injury. With an injury such as a torn rotator cuff counsel can probably leave its medical explanation at that, moving onto a description of the residual disability. With a consequential damage such as claimed income loss from a self-employed individual counsel may need to provide a more detailed explanation of how various "dominos" fell to justify the figure.

Where the carrier has already obtained the medical records and is knowledgeable in the course of treatment of a personal injury claim, except for the most recent developments, information overload can be avoided by confining reports to a highlight of past known developments and a concise synopsis of the claimant's present medical condition.

Counsel is frequently requested to quantify the damages, with or without regard to fault. The carrier is interested in "your best guess" at that time. Precision is not required. The opinion can change as the claim comes more into focus. The company wants confirmation to confirm or refute its internal evaluation.

As your opinion on damages changes counsel should notify the company, specifying the reasons for the change. That discovery is complete and the case must now be tried is rarely a satisfactory reason, by itself, to justify a material increase in counsel's quantification of damages.

What should be communicated to the carrier may vary with each company. However, as a general rule only those items which will have a material impact on how the company evaluates the exposure should be the subject of communication. Otherwise, short letters become longer and weekly letters become daily, and information overload becomes more and more probable.

When. This will frequently be that area of the facts that is least in dispute, and attention to it should be provided accordingly. However, there may be issues relating to the statute of limitations or availability of insurance coverage (with the company to which you are reporting or others.) While counsel is ethically bound to be an advocate for the insured, a straight forward analysis as to the time of the claim (without an analysis of whether it is within the coverage period) is a justifiable expectation of every carrier.

Why. This is generally the theory of liability. Sometimes there will be alternate versions of why there is or is not liability. Conflicting expert testimony is one reason. Alternative versions of the facts is another. Only infrequently will the carrier want an analysis of the liability theory. Generally, a recitation of the Restatement will be abhorred. Counsel should confine his communication to the relevant statutory and case law and how the fact specific issues of the subject claim fit within that framework. Liability is rarely a black and white issue. Counsel's absolute precision in fault percentages is not expected. Furthermore, there will be tolerance for an evolution of liability percentages as the litigation progresses. However, most carriers want counsel's assessment of fault to be meaningful, and to be meaningful some precision is required.

How. The evaluation of a claim and how the insured may be liable for the damages is a culmination of the previous factors. Conflicts in (1) versions of the facts, (2) liability theories, (3) expert opinions, (4) admissibility of evidence, and (5) application of the law must be reconciled. The carrier has chosen counsel for his skill in analysis of those factors and is entitled to a relatively firm opinion.

Perhaps there is no greater frustration on the part of the carrier than dealing with defense counsel who refuses to commit to an evaluation on the claim. Counsel must understand that this failure may lead to adverse inferences should subsequent litigation ensue. Weighing against counsel's reluctance to evaluate lest he be wrong is the carrier's need to be able to justify decisions it makes with respect to financing the defense.

The evaluation conveyed to the carrier should be that of defense counsel, not the elder statesman of the firm or a firm panel populated with plaintiff's attorneys who do not share your familiarity of the claim. Counsel was selected for his skill and interjection of opinions of others should be done only after consultation with the carrier.

When evaluating the "nuisance value" of a claim or "cost of defense", counsel should assume the carrier would hold him to that figure if the case were being defended on a flat fee basis.

Company Specific

Who. Some counsel have assumed the position that the insured is their client and all written communication to the company should be as the recipient of a photo-copy of a letter to the insured. I will not address that issue, but will instead confine my comments to whom at the carrier counsel should communicate.

The first consideration is the sophistication of the addressee. For instance, if you are writing to an attorney you will not need to write in-depth on the evidentiary standard for summary judgment. The company's representative will likely have demonstrated his grasp of the facts and legal issues, and the need for assistance in the analyzation of those, in the assignment letter.

Another consideration is whether there will be persons other than the immediate addressee who will review the letter. As a general rule claims involving greater potential for a significant financial recovery will be reviewed by the addressee's superiors. Reference to oral discussions about relevant considerations concerning evaluation, liability or damages may remove the need for follow-up requests from the superiors.

Another consideration is which attorney should be communicating with the company. As a general rule the carrier made its preference known at the time of assignment. That person was selected for their skill and expertise. To insure consistency and to allow the carrier to confidently rely on the reports, that designated attorney should be the author.

What. Perhaps as important as what counsel can and should relate to the insurance carrier is what he should not. The insured is the client. Facts which may adversely impact coverage should not be discussed, unless a specific request is made. It should be left to the carrier to employ methods, through separate counsel if necessary, to explore coverage implications. Counsel should be sensitive to the potential argument that references to matters which concern coverage but have no bearing on liability and damages leave the carrier open to criticism that it orchestrated a less than complete and vigorous defense.

With reference to the amount of information which counsel sends onto the carrier, the contents of the company file may be subject to discovery in subsequent litigation. Merely acting as a pass through (e.g. sending medical records in bulk, line by line analyses of depositions, and complete discovery responses without comment) may leave the company representative swimming in a sea of information and unable to differentiate the wheat from the chaff. Companies rarely, if ever, make a practice of disposing of correspondence. Presence of documents within the company file which make a reference to, however subtly or apparently insignificant, may leave the company representative who failed to glean that information vulnerable to adverse inferences on the subject of lack of due care.

Counsel can render assistance to the insurance company by commenting on what is present in the claim file that is not helpful or what needs to be developed further. This provides feedback to the carrier and gives the carrier an opportunity to use its resources to obtain the information or to supply what may be known but has not been included in the file. The carrier may also have encountered similar legal issues in prior claims and, upon identification of the issue by counsel, can save time and expense by making it available to you.

Counsel should also advise the carrier when his opinion on any significant aspect of the claim differs from the position assumed by the company. Carriers can be overly optimistic or pessimistic but have no opportunity to benefit from your (perhaps) more objective analysis if you feel it inappropriate or impolite to disagree.

When. As a general rule the insurer should be advised of any significant development as soon as possible. Of course, common sense dictates that more serious claims representing a larger exposure to the insurer should be the subject of more prompt reporting. Likewise, claims where the insured faces a realistic possibility of an excess exposure should be promptly reported. If your opinion as to exposure on the claim has not changed following a development upon which you must report, there is generally less urgency to the report.

Cases reported to the insurer immediately prior to or at the time litigation is commenced present special challenges to insurers. Insurers set internal time standards for appropriateness in file reserves. While the standards are of no immediate concern to counsel or the insured, they do have an impact on the insurer's need to know counsel's evaluation. Similarly, counsel's evaluation of the claim may impact the financial health of the company, so adverse developments in damages and liability should generally be reported prior to quarter or year-end so company financial decisions are made on the basis of full and complete information concerning company assets and liabilities.

The preferences of carriers for information immediately prior to and during trial vary. As counsel approaches trial he should be sure he knows how and when he will be expected to report. The carrier should advise counsel of efforts it may be undertaking on its own to resolve the claim so that counsel may be able to conserve his trial preparation efforts.

Why. There may be a perception among some counsel that company reporting requirements are burdensome and interfere with their duties of serving the client. So long as counsel delivers a "good" result for the insured and the carrier it may be felt that reporting to the company is an inappropriate use of his time and only invites intermeddling by the company representative.

Defense counsel are judged in many ways on their effectiveness. Results are certainly a measuring stick, and quite frankly carriers are unlikely to jettison counsel with a string of defense verdicts or favorable settlements. However, most carriers are far more understanding than may be perceived that results are sometimes influenced by factors beyond counsel's control. A fickle jury, poor jurisdiction, unexpected rulings from the court, an insured who makes a poor presentation, or simply an unfavorable factual situation will be present from time to time.

However, an often overlooked criteria on which counsel are judged is the comfort level they provide to the company personnel with whom they are communicating. Without communication the company cannot evaluate its alternatives or may even be unaware of the alternatives. Company personnel are judged by their ability to meet litigation management goals (e.g. early settlement, ADR, accurate evaluation of the value range, etc.) but without information about each of those factors your contact's manner of handling the claim file, and even the decision to retain counsel, will be brought into question. Counsel should endeavor to present the company representative, and the company in general, in the most favorable light as possible when it comes to consideration of all relevant information. By providing the company with all relevant information in a manageable form you can make the company representative's job easier and increase the company's level of comfort in its decision to engage your services.

How. The claims handling process functions more smoothly when a dialogue between counsel and carrier has been established. The objective is to maximize the exchange of relevant information from counsel to carrier and vice-verse. While some information may lend itself to oral communication, other information should be memorialized in writing.

Most carriers prefer written opinion letters and summaries of depositions, motions, and discovery documents. An opinion reduced to writing will not change over time. This opinion will also provide necessary information to the addressee's superiors or successors, who may not have had the benefit of oral communication with counsel. Written opinions will memorialize what the carrier knew and when. Because of possible evidentiary value in subsequent litigation, due consideration must be given to how counsel's communications could be taken out of context. Remember, the company claim file may be subject to discovery should there be untoward developments.

In an effort to consolidate relevant information and perhaps to prompt counsel to take a look at the big picture, carriers have developed forms for counsel to complete. This paperwork generally assumes a prominent place in the carrier's claim file. Development of these forms was intended to be of benefit for both the carrier and counsel. From the company's perspective a claim representative should be able to learn counsel's thoughts with respect to claim value and plan for defending the claim with out rifling through the entire file. The forms will also demonstrate to the representative's supervisors that the company is on top of the claim and that a plan to bring it to a resolution is in force. While reporting forms may be met with dislike on counsel's part, the age of increasing claims counts and stricter scrutiny over company operations appear to indicate that they are here to stay.

General Rules for Communicating With Insurance

1. Say what you mean and mean what you say.
2. Do not tell the company just what you think it wants to hear.
3. If you don't understand, speak up.
4. Promptly advise of material developments.
5. Provide justification for changes in your opinion.
6. Remember that persons other than the intended addressee may see your correspondence.
7. Do not try to impress the company with your brilliance.
8. Minimize surprises.

RICO CLAIMS AND CIVIL CONSPIRACY

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RICO Claims and Civil Conspiracy

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RICO CLAIMS

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CIVIL CONSPIRACY

SECTION I

Civil RICO

I. Introduction; Statutory Provisions

A. Overview.

1. Title IX of the Organized Crime Control Act (OCCA) was named "Racketeer Influenced and Corrupt Organizations" or "RICO." 18 U.S.C. §§ 1961-1968 (1988). RICO authorizes the government to initiate criminal prosecutions, civil proceedings, or both. Douglas E. Abrams, The Law of Civil RICO 2-3 (1991). The statute also authorizes a private cause of action, usually called "civil RICO." Id. at 3. "Criminal RICO" refers to the government's criminal remedy; "RICO" refers to the entire Title IX. Id.

2. The OCCA's 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) (quoted in Abrams, supra, at 4).

   a. RICO, however, has come to be "used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended targets of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 426 (1985) (Powell, J., dissenting).

   b. Plaintiffs have brought civil RICO actions against such nonracketeers as banks, lawyers or law firms, the Klu Klux Klan, the Church of Scientology, accounting firms, insurance companies, securities investment firms, abortion protestors, and not-for-profit health maintenance organizations. Abrams, supra at 8-9 (citations omitted); e.g., National Organization for Women, Inc., v. Scheidler, 510 U.S. ___, 127 L.Ed.2d 99, 114 S. Ct. ___(1994).

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3. The statute is to be read broadly and "liberally construed to effectuate its remedial purposes." Sedima, 473 U.S. at 497-98.

B. Statutory provisions.

1. RICO attacks "racketeering activity," defined as any act "chargeable" under certain state criminal laws, any act "indictable" under specified federal criminal provisions, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law. 18 U.S.C. § 1961(1).[1]

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[1] Under § 1961(1), 'racketeering activity' includes the following:

> (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) . . . (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

2. Prohibited activities under the statute include use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the maintenance or acquisition of an interest in an enterprise through a pattern of racketeering activity; the conducting or participation in the conduct of an enterprise through a pattern of racketeering activity; or the conspiring to violate any of these provisions. 18 U.S.C. § 1962.[2]

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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.

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18 U.S.C. § 1961(1).

[2] Section 1962 has four subsections:

(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 ... 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 ....

(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

a. Section 1962(a) makes it unlawful for a person "(1) to use or invest (2) income derived from a pattern (3) of racketeering activity (4) to establish, operate, or acquire an interest in (5) an enterprise." Nagle v. Merrill Lynch, Pierce, Fenner & Smith, 790 F.Supp 203, 207 (S.D.Iowa 1992).

b. Section 1962(b) makes it unlawful for a person "(1) through a pattern (2) of racketeering activity (3) to acquire or maintain an interest in or control of (4) an enterprise." Id. at 208.

c. The essential elements of a §1962(c) action are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Terry A. Lambert Plumbing v. Western Sec. Bank, 934 F.2d 976, 979 n.4 (8th Cir. 1991) (quoting Sedima, 473 U.S. at 496).

3. To state a civil cause of action under civil RICO, a plaintiff must allege it "suffered (1) injury in its business or property because the defendant, (2) while involved in one or more enumerated relationships with an enterprise, (3) engaged in a pattern of racketeering activity or collected an unlawful debt. Abrams, supra, at 17 (emphasis in original).

II. **Injury to Business or Property; Treble Damages, Attorneys Fees**

A. RICO's civil enforcement scheme includes the following provision for private suits:

> 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

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violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962.

a reasonable attorney's fee,[3] except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.[4]

18 U.S.C. § 1964(c).

1. Jurisdiction. This section provides federal courts with subject matter jurisdiction over any violation of 18 U.S.C. § 1962. The Honorable David B. Sentelle, Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 153 (1990); see Tafflin v. Levitt, 493 U.S. 455 (1990) (state courts have concurrent subject matter jurisdiction over claims arising under civil RICO); 18 U.S.C. § 1965 (venue provisions).

B. For standing, a complainant must allege an "injury" "fairly traceable to the defendant's allegedly unlawful conduct." National Organization for Women, 510 U.S. at ____, 127 L.Ed.2d at 107, 114 S. Ct. at ___ (stating standing is a jurisdictional requirement that remains

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[3] The statute also contains criminal penalties of imprisonment, fines, and forfeiture for violation of the provisions in § 1962. Sedima, 473 U.S. at 483.

[4] The remaining text of § 1964(c) after footnote 4 above, beginning with "except that no person may rely ....," is an amendment to civil RICO that became law on December 22, 1995, when the U.S. Senate overrode President Clinton's veto of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Abrams, The Law of Civil RICO (forthcoming Supp. 1996). The U.S. House of Representatives overrode the President's veto two days earlier. Id. Section 107 of the Act amended 18 U.S.C. § 1964(c). Id.

Section 108 of the Act states, "The amendments made by this title [including section 107] shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act." Id.

open to review at all stages of RICO litigation); Sedima, 473 U.S. at 496; Brennan, 973 F.2d at 648.

1. A defendant who violates § 1962 is not liable for treble damages to everyone he might have injured by conduct not constituting a RICO violation, nor liable to those not injured. Sedima, 473 U.S. at 496.

2. Competitive injury is not required for a civil RICO suit. Sedima, 473 U.S. at 359 n.15; Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982), adhered to on reh'g, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983).

3. No "racketeering injury"[5] separate from the harm from the predicate[6] acts is required. Sedima, 473 U.S. at 495.

C. RICO provides for compensation for a wide variety of proprietary injuries, including tangible and intangible injuries. Bieter Co. v. Blomquist, 987 F.2d 1319, 1325-27 (8th Cir.), cert. denied, ___ U.S. ___, 126 L.Ed.2d 50, 114 S. Ct. 81 (1993) (loss of opportunity to build commercial real estate development because competing developers had allegedly bribed city officials; holding that to establish injury by denial of rezoning, plaintiff developer was not required to allege it had renewed application after denial); Abrams, supra, at 123-24, 124 n.16.

D. Recovery for personal injury is precluded.

1. "Business or property" are words of limitation, and courts uniformly hold that § 1964(c) precludes recovery for personal injury, including mental or emotional distress, and wrongful death; injury to political interest; physical injury or pain; and the time and effort the plaintiff spent investigating the asserted racketeering activity.

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[5] A "racketeering injury" presumably requires organized crime involvement by the defendant. Abrams, supra, at 123.

[6] The U.S. Supreme Court defines "predicate acts" to mean those included as racketeering activities in the catalog of crimes listed in § 1961(1). Sedima, 473 U.S. at 495; see supra note 2.

Abrams, The Law of Civil RICO (forthcoming Supp. 1996) (citations omitted).[7]

2. A shareholder cannot maintain a RICO action for an injury to a corporation resulting in a decrease in value of shares "absent a showing of individual and direct injury to the shareholder." Brennan, 973 F.2d at 648 (holding pilots' complaint did not assert viable RICO claim based on shareholder status, where pilots made no allegation of direct and individual injury to their business or property resulting from shareholder status rather than status as employees; defendants were allegedly misappropriating corporate assets by diverting profits). An individual stockholder may, however, sue for fraud injuring him directly. Id. at 648 n.5 (citing Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986)).

E. Proximate cause: "By reason of."

1. Civil RICO authorizes recovery for persons who suffer proprietary injury "by reason of" a violation of § 1962. 18 U.S.C. § 1964(c).

2. To recover, a plaintiff must allege and prove that the RICO violation was the proximate cause of injury. Holmes v. Securities Investor Protection Corp. (SIPC), 503 U.S. 258, ___, 117 L.Ed.2d 532, 544-45, 112 S. Ct. ___, ___ (1992); see Bieter, 987 F.2d at 1325-27 (holding jury could reasonably find that real estate developer's alleged injuries arising from city council's rejection of proposed development were proximately caused by defendant developer's bribery of mayor and two city council members, even though their votes would have been insufficient to approve proposed development; major exerted strong role in proceedings and lobbied other city officials to oppose development).

F. Causation in "whistleblower" claims. As a matter of law, a plaintiff lacks standing to bring a "whistleblower" wrongful-discharge suit under 18 U.S.C. § 1964(c), when the underlying RICO violation is based on § 1962(a), (b), or (c). Bowman v. Western Auto

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[7] The author thanks Professor Douglas E. Abrams, University of Missouri-Columbia School of Law, and Little, Brown and Company for providing the manuscript of Professor Abrams' forthcoming 1996 supplement to his treatise.

Supply Co., 985 F.2d 388, 385-84 (8th Cir. 1993) (agreeing with the weight of the authority).

1. "The simple act of discharging an employee ... does not constitute racketeering as defined in RICO, and thus does not fall within the definition of what the Supreme Court has termed 'predicate acts,'" which are those included as racketeering activities in § 1961(1). Id.

G. Similarly, in the Eighth Circuit, standing to bring a civil suit under § 1964(c) based on an underlying conspiracy violation of § 1962(d) is limited to those who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO. Id. at 388 (recognizing split among circuits regarding standing to bring a civil RICO action based on a RICO conspiracy violation).

H. At the pleading stage, all that is required are general factual allegations of injury resulting from the defendant's conduct. National Organization for Women, 510 U.S. at ___, 127 L.Ed.2d at 107-08, 114 S. Ct. at __ (holding plaintiffs had standing to bring RICO action where they alleged conspiracy injured their business and/or property interests, and they alleged defendant threatened clinic administrator with reprisals if she refused to quit job).

III. **The RICO Enterprise**

A. An "enterprise" under RICO 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. 18 U.S.C. § 1961(4).

B. Enterprise must be distinct from "pattern of racketeering."

1. "By requiring proof of an 'enterprise,' RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering." Bennett, 685 F.2d at 1060. The enterprise is a separate element. Id. (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

2. An enterprise exists where separateness from the acts of racketeering can be found. Bennett, 685 F.2d at 1060; Nagle, 790 F.Supp. at 207 (holding affiliation of securities broker and others

employed by brokerage firm had no "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering").

a. Courts look for a "discrete economic association existing separately from the racketeering activity." Bennett, 685 F.2d at 1060.

b. An enterprise is likely to be distinct where the enterprise alleged is a legal entity rather than an "associational enterprise."[8] Bennett, 685 F.2d at 1060-61 (reversing district court conclusion that retirement village was not alleged to have existence apart from acts of racketeering and thus was not appropriately named as enterprise, where complaint portrayed retirement village as "pervasively fraudulent;" noting retirement village was legal entity).

C. Enterprise must be separate from culpable "person" under § 1962(c).

1. Section 1962(c) makes it unlawful for the "person" subject to the statute to act upon the "enterprise" in such a way that the enterprise's affairs are conducted through a pattern of racketeering activity. Bennett, 685 F.2d at 1061.

2. Under § 1962(c) an "enterprise" must be alleged apart from the "person" who "associated with" the enterprise for purposes of racketeering. Id. at 1061-62 (holding RICO action could not stand where equitable relief was sought from retirement village, thus placing village in role of "person" responsible for conducting affairs of enterprise through pattern of racketeering activity); Nagle, 790 F.Supp. at 207 (applying rule to § 1962(a) and (c) claims and holding branch office of securities brokerage firm was not separate from corporate defendant and therefore not a distinct enterprise;

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[8] RICO encompasses two kinds of enterprises: (1) legal entities and (2) associations in fact. Bennett, 685 F.2d at 1060 n.9 (citing Turkette, 452 U.S. at 581-82); United States v Anderson, 626 F.2d at 1358, 1365 & n.10 (8th Cir. 1980) (holding county would necessarily constitute "enterprise" apart from acts of racketeering, but association-in-fact of county judges with another was more problematic), cert. denied, 450 U.S. 912 (1981).

recognizing, however, authority outside Eighth Circuit to contrary regarding § 1962(a)).

D. A relationship between the defendant and an enterprise must exist; the defendant must have invested racketeering proceeds in, acquired control of, or associated with an enterprise. 18 U.S.C. § 1962(a), (b), (c); Bennett, 685 F.2d at 1063 n.16 (holding defendants were "associated with" an enterprise, where defendants were a mortgage lender and accountant to retirement village).

E. The enterprise must affect interstate commerce. See United States v. Robertson, ____ U.S. ____, ____, 115 S. Ct. 1732 (1995); Sedima, 473 U.S. at 496.

F. No economic motive required. Civil RICO does not require that either the enterprise or the predicate acts have an underlying economic motive. National Organization for Women, 510 U.S. at ___, 127 L.Ed.2d at 108-09, 114 S. Ct. at ___ (declining to affirm dismissal of RICO counts against protestors on basis profit-generating purpose must be alleged; stating enterprise referenced in § 1962(c) "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") (overruling United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir.) ("For purposes of RICO, an enterprise must be directed toward an economic goal."), cert. denied, 488 U.S. 974 (1988)).

G. Participate in the conduct.

1. Section 1962(c) makes it unlawful for a person to "conduct or participate ... in the conduct" of an enterprise's affairs, but the Act provides no definition of "participate in the conduct;" case law must be the source of a definition. Sentelle, supra, at 153.

2. A person must have participated in the operation or management of the enterprise itself to be subject to liability under § 1962(c). Reves v. Ernst & Young, 507 U.S. ___, 122 L.Ed.2d 525, 534-35, 113 S. Ct. ___ (1993) (holding accounting firm not liable under § 1962(c) pursuant to test limiting liability to participants in operation or management of enterprise itself, where firm reviewed series of completed transactions and certified farming cooperative's records as portraying financial status as of certain date);

Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, sub nom Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008 (1983).

a. "Operation or management" test requires only that to "participate, directly or indirectly, in the conduct of [an] enterprise's affairs," a defendant "must have some part in directing those affairs." Id. at 536-37(emphasis added) (adopting test and degree of management required by Bennett, 710 F.2d at 1364).

b. Liability is not limited to defendants with primary responsibility for the enterprise's affairs, or to those with a formal position in the enterprise. Reves, 507 U.S. at ___, 122 L.Ed.2d at 536 & n.4, 113 S. Ct. at ___ (disagreeing with view that § 1962(c) requires significant control over or within enterprise, as held in Yellow Bus Lines, Inc. v. Drivers, Chaufeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir.) (en banc), cert. denied, 501 U.S. ___ (1991)).

(1) Test does not limit liability to upper management. Reves, 507 U.S. at ___, 122 L.Ed.2d at 540, 113 S. Ct. at ___. "An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." Id. at ___, 122 L.Ed.2d 540 & n.9, 113 S. Ct. at ___ (declining to decide how far liability under § 1962(c) extended down the ladder of operation). Others associated with the enterprise who exert control over it, for example by bribery, might be found to operate or manage the enterprise. Id. at ___, 122 L.Ed.2d at 540, 113 S. Ct. at ___.

(2) The "operation or management test" does not limit the liability of "outsiders" who have no official position within an enterprise. Id. at ___, 122 L.Ed.2d at 540, 113 S. Ct. at ___.

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IV. Pattern of Racketeering Activity

A. Each of the four subsections of § 1962 requires proof that the defendant engaged in a "pattern of racketeering activity" or in the "collection of an unlawful debt." 18 U.S.C. § 1962.

B. The pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5); United States v. Flynn, 852 F.2d 1045, 1050 (8th Cir. 1988).

C. Racketeering activity.

1. Racketeering activity is defined in 18 U.S.C. § 1961(1). See supra note 1 and accompanying text.

2. Except in the case of private actions concerning fraud in the purchase or sale of securities[9], private civil RICO action for treble damages under § 1964(c) does not require that the action must proceed only against a defendant who has already been convicted of a crime. See Sedima, 473 U.S. at 488 (involving RICO claims for mail and wire fraud, and for conspiracy to violate § 1962(c)). "Racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be." Id.

3. Civil RICO does not require an alleged nexus with organized crime. Bennett, 685 F.2d at 1063.

D. A pattern must involve both relatedness and continuity. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989); Terry A. Lambert Plumbing v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991).

1. "Relatedness" involves "'criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission,

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[9] Absent a prior conviction, § 107 of the Private Securities Litigation Reform Act of 1995 removes from RICO private actions concerning fraud in the purchase or sale of securities, except where the defendant is convicted of such fraud. See supra note 5; telephone interview with Professor Douglas E. Abrams, University of Missouri-Columbia Law School (Feb. 5, 1996).

or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" Lambert Plumbing, 934 F.2d at 979-80 (quoting H.J., 492 U.S. at 240).

2. "Continuity" refers 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." Lambert Plumbing, 934 F.2d at 980.

3. A threat of continued racketeering activity exists in the following three situations, among others:

   a. The predicate acts involve a threat, either implicit of explicit, of long term racketeering activity, such as where a hoodlum sells "insurance" to storekeepers to cover them against broken windows, telling the storekeepers he will reappear each month to collect the "premium" that continues their "coverage." Id. at 980 & n.5.

   b. The predicate acts or offenses are part of an ongoing entity's regular way of doing business. Id. at 980.

   c. The predicate acts are a regular way of conducting an ongoing legitimate business, which does not exist for criminal purposes. Id.

4. To determine continuity, a court must "first look to the length of time during which the conduct occurred." Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 994 (8th Cir. 1989) (declining to decide what time period was needed to establish continuity, but holding conduct that lasted over three years was sufficient and was "not sporadic activity" or conduct occurring "over a few weeks or months").

E. A single scheme can constitute a RICO claim, but the scheme must meet the requirements of relatedness and continuity. Lambert Plumbing, 934 F.2d at 981 (holding case, which at most involved bank's plan to defraud single company in connection with single set of loan agreements, did not constitute pattern of racketeering; purpose of pattern requirement "is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim").

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F. Determination of a pattern of racketeering activity is a factual determination. Id. at 980.

G. Burden of proof. The occurrence of the predicate acts must be established by a preponderance of the evidence. Sedima, 473 U.S. at 491; see Utesch v. Dittmer, 947 F.2d 321, 329 (8th Cir. 1991) (holding where defendant did not make submissible case of fraud against defendant, there was insufficient evidence to send RICO count to jury), cert. denied, 503 U.S. 1006 (1992).

V. **Collection of Unlawful Debt**

A. "Unlawful debt" refers generally to activities involving usury and illegal gambling. Abrams, supra, at 261.

1. Specifically, § 1961(6) defines "unlawful debt" as 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.
>
> 18 U.S.C. § 1961(6).

B. Outside the illegal gambling context, the state or federal law allegedly violated must be related to usury. Abrams, supra, at 261; see United States v. Dennis, 458 F.Supp. 197, 198-99 (E.D.Mo. 1978), aff'd on other grounds, 625 F.2d 782 (8th Cir. 1980) (collection of unlawful debts by employee from co-employees on enterprise's premises does not constitute participation in enterprise's affairs through collection of unlawful debts).

VI. Practice Pointers

A. Pleadings.

1. Mail and wire fraud must be pleaded with the particularity required by Fed.R.Civ.P. 9(b).[10] Murr Plumbing, Inc. v. Scherer Brothers Financial Services Co., 48 F.3d 1066, 1069 (8th Cir. 1995); Bennett, 685 F.2d at 1062 (holding complaints lacked specificity required for pleading fraud under Rule 9(b), where complaints failed to allege "pattern of racketeering," although "multiple incidents" of mail and wire fraud were alleged).

   a. In cases of mail and wire fraud in which misrepresentations are made[11], "circumstances" include the time, place and contents of false representations, and the identity of the person making the misrepresentation and what was obtained or given up thereby. Murr, 48 F.3d at 1069 (quoting Bennett, 685 F.2d at 1062).

      (1) Allegations stating that the location of allegedly false statements was a "pamphlet" "promotional material," or "a typical life-care contract" were not sufficiently particular to satisfy Rule 9(b). Bennett, 685 F.2d at 1062.

      (2) Where complaints attributed certain false statements to "various other defendants" and did not identify defendants, the allegations failed to apprise defendants of claims against them and thus failed in particularity. Id.

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[10] Rule 9(b) requires: "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Murr Plumbing, Inc. v. Scherer Brothers Financial Services Co., 48 F.3d 1066, 1069 (8th Cir. 1995).

[11] Mail and wire fraud statutes, 18 U.S.C. § 1341 and 1343, respectively, involve two types of frauds: those in which misrepresentations were made, and those in which misrepresentations were not made. Murr, 48 F.3d at 1069 n.6 (citing United States Clausen, 792 F.2d 102, 104-05 (8th Cir.), cert. denied, 479 U.S. 858 (1986)).

b. In cases of mail and wire fraud in which misrepresentations are not made, "circumstances" consist of four elements: (1) a scheme to defraud, (2) intent to defraud, (3) reasonable foreseeability that the mails (or wires) will be used, and (4) use of the mails (or wires) in furtherance of the scheme. Murr, 48 F.3d at 1069 n.6 (citing 8th Cir. Model Criminal Jury Instruction 6.18.1341 (1994)).

2. A count is poorly pleaded if it states only that defendants are accused of "engag[ing] in 'a pattern of racketeering activity'" in violation of the RICO statute. Bennett, 685 F.2d at 1061 n.10. Such a statement accuses defendants only of engaging in the predicate crimes, which is not exactly what the statute proscribes. Id. "RICO forbids persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes." Id. (emphasis in original).

B. First Amendment.

1. A RICO defendant may raise the First Amendment in defense. National Organization for Women, 510 U.S. at ___, 127 L.Ed.2d at 112, 114 S. Ct. at ___ (Souter, J., concurring) (writing separately to "stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases;" stating conduct alleged to amount to Hobbs Act extortion [as in National Organization for Women] or another RICO predicate act might be protected First Amendment activity, entitling defendant to dismissal); see id. at ___ n.6, 127 L.Ed.2d at 111 n.6, 114 S. Ct. at ___ n.6 (declining to address First Amendment question because such claims were outside the question presented).

C. Discovery is broad.

1. Because under § 1961(5) the pattern of racketeering activity includes acts committed within a 10-year period, discovery may extend back beyond the beginning of the statutory period. Abrams, supra, at 354 (citations omitted).

2. Discovery concerning predicate acts relevant to proof of the pattern may have little or nothing to do with the plaintiff, because the plaintiff need

not allege injury resulted from all acts constituting the pattern. Id.

D. Labor preemption.

1. In the context of civil RICO labor preemption, issues arise concerning whether the federal labor scheme preempts RICO when the alleged pattern of racketeering activity consists of the following:

   a. Predicate acts indictable under 29 U.S.C. § 186 and § 501(c), which are the two labor statutes enumerated in § 1961(1) as indictable acts;

   b. Predicate acts indictable under the federal mail fraud or wire fraud statutes, or under another federal criminal statute enumerated in § 1961(1), which has no specific grounding in labor law; or

   c. Violent predicate acts chargeable under generically described state laws. Abrams (forthcoming Supp. 1996), supra.

2. Predicate acts indictable under 29 U.S.C. § 501(c) are not preempted, because RICO includes these violations within the definition of "racketeering activity." Brennan v. Chestnut, 973 F.2d 644, 646 (8th Cir. 1992).

3. Preemption may apply, however, where the predicate acts are indictable under the federal mail fraud or wire fraud statutes, or under another federal criminal statute enumerated in § 1961(1), if the court must look to the labor laws to define the predicate act. Id., 973 F.2d at 646 (finding pilots' RICO claim based on extortion statute, 18 U.S.C. § 1981, was preempted by NLRA; claims were clearly within NLRB's jurisdiction, where the determination in administrative action dealt with same claims).

E. Statute of limitations.

1. A four-year statute of limitations was made applicable to civil RICO cases by the U.S. Supreme Court in Agency Holding Corp. v. Malley-Duff Associates, Inc., 853 U.S. 143 (1987); Vesta State Bank v. Independent State Bank of Minnesota, 924 F.2d 155, 156 (8th Cir. 1991).

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2. The Eighth Circuit has adopted the following accrual rule for Civil RICO claims: "[W]ith respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." Granite Falls Bank v. Hendrikson, 924 F.2d 150, 154 (8th Cir. 1991); Vesta, 924 F.2d at 156 (vacating and remanding for consideration of statute of limitations question under Granite Falls standard where district court applied accrual rule based on discovery principals).

F. Sanctions.

1. Courts have imposed sanctions under Rule 11 of the Federal Rules of Civil Procedure for a frivolous civil RICO claim. See Lupo v. R. Rowland & Co., 857 F.2d 482, 486 (8th Cir. 1988), cert. denied, 490 U.S. 1081 (1989) (holding $50,000 sanction was reasonable, where, among other reasons, amended petition adding RICO count was signed in violation of Rule 11; claim was not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law").

2. Similarly, sanctions on appeals concerning civil RICO claims are supported under 28 U.S.C. § 1912 and Federal Rule of Appellate Procedure 38. Abrams, supra, at 381-85 (citations omitted).

G. Fifth Amendment privilege.

1. Availability of the Fifth Amendment privilege against compulsory self-incrimination is broad in civil RICO cases, because RICO statutes are basically criminal statutes whose enforcement mechanisms include a private civil remedies. Abrams, supra, at 385-86.

2. The Fifth Amendment privilege in civil RICO "extends to virtually any discovery request for noninnocuous information, as well as to virtually any noninnocuous question asked at the trial or other proceeding." Abrams, supra, at 391.

H. Adverse judicial reaction.

1. Judges generally express negative opinions about civil RICO. See Abrams, supra, at 11-14; The Honorable David B. Sentelle, Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 146-50 (1990) (describing the size of the "RICO monster;" noting U.S. Supreme Court justices and dozens of district court judges who have expressed negative opinions about civil RICO); The Honorable William H. Rehnquist, Get RICO Cases Out of My Courtroom, The Wall St. J., May 19, 1989, at A-14, col. 4.

2. "[J]udicial hatred of RICO arises not only from its amorphous mass, but also from the fact that this amorphous mass is a voracious monster," eroding basic concepts of American jurisprudence including federalism, separation of powers, First Amendment rights of free speech and association, labor law, and repose of actions. Sentelle, supra, at 161-68.

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SECTION II

CIVIL CONSPIRACY

I. **Overview**

A. Civil Conspiracy is a recognized claim under the substantive law of Iowa. Iowa ex rel. Turner v. First of Omaha Service Corp., 401 F.Supp. 439 (S.D. Iowa 1975).

B. "Conspiracy" itself (meaning the discussion of or agreement upon improper acts but without any act in furtherance of the plan) is not actionable. Lindaman v. Bode, 478 N.W.2d 312 (Iowa Ct. App. 1991); Cimijotti v. Paulsen, 219 F.Supp. 621, (N.D. Iowa 1963) appeal dismissed 323 F.2d 716 (8th Cir. 1963); Bixby v. Wilson & Co., 196 F.Supp 889 (N.D. Iowa 1961).

C. Some overt act is required for completion of the conspiracy and the overt act itself must be such as would give rise to a right of action with or without the conspiracy itself. Iowa ex rel. Turner v. First of Omaha Service Corp, supra; Shannon v. Gaar, 6 N.W.2d 304, 233 Iowa 38 (1942); Community Savings Bank v. Gaughen, 289 N.W. 727, 228 Iowa 18 (1940).

II. **Elements**

A. The Iowa Supreme Court has cited with approval the Restatement (2d) of Torts, Section 876 which reads as follows:

> Persons acting in concert.
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) Does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) Knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the others so to conduct himself, or
>
> (c) Gives substantial assistance to the other in

accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

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

B. Civil conspiracy in Iowa is defined as combination of two or more persons acting through concerted action to accomplish an unlawful end or to accomplish a lawful end by unlawful means. Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599, appeal after remand; Adam v. Mt. Pleasant Bank & Trust Co., 387 N.W.2d 771 (Iowa 1984); Basic Chemicals Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

C. The principle element of a conspiracy is the agreement or understanding between two or more persons to effect a wrong against another and involves some mutual action coupled with the intent to commit the act which results in an injury. Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731 (Iowa 1983).

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1. There are some cases which use language like the parties must "mentally act" in unison. While the language itself would suggest that perhaps the activity required as an element of "conspiracy" could be supplied by some mental transaction, the full text of the cases nevertheless makes it clear that some overt action is necessary as well. See, Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994).

D. Mere knowledge of the intent of some other party to commit a wrong or acquiescence in their intention to commit the wrong is not sufficient to hold another to the conspiracy. American Sec. Benev. Ass'n. v. District Court of Black Hawk County, 147 N.W.2d 55, 259 Iowa 983 (1966). The fact that one party supports another's position or agrees with their interest is not in itself sufficient to show a conspiracy. Hoefer v. Wisconsin Educ. Ass'n. Ins. Trust, 470 N.W.2d 336 (Iowa 1991).

E. Likewise, a subsequent adoption of the scheme after the injury is not sufficient to tie the second party to the conspiracy. Jolly v. Doolittle, 149 N.W. 890, 169 Iowa 658 (1914); Aughey v. Windrem, 114 N.W. 1047, 137 Iowa 315 (1908).

F. A party can be found guilty of conspiracy though their participation is properly characterized as "aiding" or "abetting." Tubbs v. United Cent. Bank, N.A., 451

N.W.2d 177 (Iowa 1990); Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994).

G. The conspiracy must be found against both of the defendants if there are two parties involved in the conspiracy. Hablichtel v. Yambert, 39 N.W. 877, 75 Iowa 539 (1888). However, if the conspiracy is alleged against more than two defendants, not all defendants need be found liable in order to prevail against the guilty parties. Faust v. Parker, 213 N.W. 794, 204 Iowa 297, Supplemental Opinion 215 N.W. 235 (1927).

III. **Procedural Issues**

A. Plaintiff has the burden of proof on conspiracy claims. Suspicion of the involvement of others is not sufficient. Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731 (Iowa 1983).

B. Likewise, conclusions of law as to the parties concerted actions are not sufficient to state a conspiracy claim. Adam v. Mt. Pleasant Bank & Trust Co., 387 N.W.2d 771 (Iowa 1986).

C. It has been recognized of course that conspiracy cases may be proved by circumstantial evidence, there seldom being direct proof of the conspiracy. Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599, appeal after remand Adam v. Mt. Pleasant Bank & Trust Co., 387 N.W.2d 771 (Iowa 1984); Stover v. Hindman, 159 N.W.2d 422 (Iowa 1968).

D. In the conspiracy context, the violation of a statute is evidence of fraud but not "fraud per se." Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984).

IV. **Damages**

A. Plaintiff bears the burden of proving the extent of damage. Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984); Community Savings Bank v. Gaughen, 289 N.W. 727, 228 Iowa 18 (1940).

B. Exemplary damages are allowable for conspiracy claims. Zamora v. Massey-Ferguson, Inc., 336 F.Supp 588 (S.D. Iowa 1972); Young v. Main 72 F.2d 640 (8th Cir. 1934).

C. Proof of damages is necessary to recover in an action for conspiracy. Roggensack v. Winona Monument Co., 233 N.W. 493, 211 Iowa 1307 (1930).

V. **Defenses**

A. In certain contexts, there may be questions as to the capacity of certain parties to conspire (in the anti-trust context, for example, there are cases recognizing an "intracorporate immunity doctrine meaning that officers or employees of the same firm do not have capacity to conspire with themselves in order to create a 'conspiracy.'" See for example, Islami v. Covenant Medical Ctr., 822 F.Supp 1361 (N.D. Iowa 1992) and Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

B. Likewise, it has been held that a person cannot conspire to violate their own contract. Harris v. Equitable Life Assurance Soc., 147 F.Supp 478 (D. Iowa 1957). In contrast, however, see Team Cent. Inc. v. Teamco, Inc. 271 N.W.2d 914 (Iowa 1978) where the Supreme Court of Iowa appears to be recognizing that a party can tortiously interfere with its own contract.

C. The plaintiff's conspiracy claim, of course, fails if it is found that the plaintiff has failed to state a claim upon which relief can be granted with respect to the underlying acts. In other words, one cannot be held liable for conspiring to commit acts which are not themselves actionable. Bickel v. Mackie, 447 F.Supp 1376, (N.D. Iowa 1978) aff'd 590 F.2d 341 (8th Cir. 1978); Roberts River Rides v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994).

D. Similarly, there can be no conspiracy to violate a contract which itself was not proven or which had already expired. Iowa Sec. Co. v. Schaefer, 126 N.W.2d 922, 256 Iowa 219 (1964); Shannon v. Gaar, 6 N.W.2d 304, 233 Iowa 38 (1942).

E. It has been held that it is not a defense to a conspiracy claim that the defendant's participation was not essential to the conspiracy or that the conspiracy would, in any event, have been consummated even without the defendant's complicity. Green v. Cochran, 43 Iowa 544 (1876).

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ETHICS UPDATE
THE PROSECUTOR'S VIEW

K

Charles L. Harrington, Ethics Counsel
Iowa Supreme Court Board
of Professional Ethics & Conduct

ETHICS UPDATE: THE PROSECUTOR'S VIEW

Recent Disciplinary Decisions of the Iowa Supreme Court

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Iowa Supreme Court Board of Professional Ethics & Conduct

I. Dishonesty, fraud, deceit, or misrepresentation.

Board of Professional Ethics and Conduct v. Clauss, 530 N.W.2d 453 (Iowa 1995). In a suit against a former client, Brenda Pollard, Clauss signed his wife's name to a return of service that stated she had served the original notice on Pollard. He then notarized the false signature. After judgment was entered against Pollard, she moved to set it aside. At a hearing on the motion, Clauss falsely testified under oath that he had witnessed his wife sign the return of service.

Clauss attempted to justify his conduct by noting that his wife really did serve Pollard. The court, however, found that this in no way excused the forged signature and the false notarization, which, along with the false testimony, were "in flagrant violation of DR 1-102A."

A separate count involved Clauss's representation of a collection agency. In several instances Clauss reached settlements with debtor-defendants but failed to report the settlements to the collection agency or to the court. Consequently,

default judgments were entered against those defendants. Rather than finding dishonesty in this conduct, the court concluded that Clauss had violated Canon 6 rules that a lawyer shall not handle matters beyond his competency or without adequate preparation and shall not neglect a client's legal matters.

Another allegation arose from a fee dispute between Clauss and the collection agency he represented. When their attorney-client relationship ended, Clauss withdrew a claimed attorney fee from funds of the collection agency that were on deposit in his trust account. The agency disputed the fee. The withdrawal violated DR 9-102(A)(2), which provides that if a lawyer and client dispute entitlement to trust account funds, the funds may not be withdrawn until the dispute is resolved.

Clauss's license was suspended with no possibility of reinstatement for three years.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Plumb, 546 N.W.2d 215 (Iowa 1996). Plumb allegedly had threatened to "set up" Mike Wells on a drug deal because he believed Wells was abusing Plumb's sister. At the time the alleged threat was made, Wells was represented by a lawyer who was also a part-time magistrate and alternate associate judge. To show that he had not made the threat, Plumb went to see the other lawyer at his chambers at the courthouse and surreptitiously tape-recorded their conversation.

The supreme court held that the tape-recording was deceitful conduct in violation of DR 1-102(A)(4). The court

found it "especially troubling that Plumb tape-recorded a conversation with a judge in chambers." In mitigation, the court noted Plumb's inexperience and the relative harmlessness of the recording (Plumb was trying to clear himself, not to incriminate the other lawyer). The court therefore chose to reprimand rather than suspend Plumb.

II. Criminal misconduct.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Marcucci, 543 N.W.2d 879 (Iowa 1996). This is the first case in which an Iowa lawyer's license has been suspended based on a criminal conviction for operating a motor vehicle while under the influence. Marcucci was convicted of third offense OWI, a felony. He is an alcoholic but the record showed that neither that condition nor his criminal law difficulties adversely affected his professional performance on behalf of clients. The court suspended his license to practice for at least six months.

In seeking leniency, Marcucci argued that OWI does not involve moral turpitude. The court found it unnecessary to address this argument directly. Rather than disciplining Marcucci under DR 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude), the court based its sanction on DR 1-102(A)(6) (a lawyer shall not engage in conduct reflecting adversely on lawyer's fitness to practice). Violation of the latter rule does not require moral turpitude.

The court emphasized that the term "fitness" in DR

1-102(A)(6) comprises more than legal competence. Any felony conviction, whether or not it involves moral turpitude, lessens public confidence in the legal profession and therefore warrants discipline under the rule.

III. Failure to respond to disciplinary authorities.

Committee on Professional Ethics and Conduct v. Horn, 526 N.W.2d 301 (Iowa 1995). In 1985 Horn achieved fame of sorts by being the respondent in the first Iowa disciplinary case to hold that a failure to respond to inquiries from disciplinary authorities is itself an ethical violation. See Committee on Professional Ethics and Conduct v. Horn, 379 N.W.2d 6 (Iowa 1985). He was again disciplined in 1992 for failure to respond to the ethics committee, as well as for other violations. See Committee on Professional Ethics and Conduct v. Horn, 480 N.W.2d 861 (Iowa 1992).

In this latest case, Horn once more was sanctioned for conduct that included failures to cooperate with the ethics committee. He ignored the committee's initial inquiries and in subsequent proceedings before the grievance commission he failed to answer the complaint, respond to requests for admissions, or attend the hearing.

Referring to Horn's previous disciplinary record, the court suspended his license with no possibility of reinstatement for twelve months.

IV. Fee violations.

Board of Professional Ethics and Conduct v. Evans, 537 N.W.2d 783 (Iowa 1995). This case involves ethical violations in the timing and amount of attorney fees collected in probate proceedings.

Iowa Code section 633.198 provides that a lawyer may not collect a fee in an estate without first obtaining an order from the court setting the amount of the fee. Under Iowa Rule of Probate Procedure 2(d) the first half of the amount set by the court "may be paid when the federal estate tax return, if required, and the Iowa Inheritance tax return, if required, are prepared," or, if no inheritance tax return is required, when the inheritance tax clearance is filed. The remaining fee may be paid upon preparation of the final report and payment of the court costs.

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In two separate estates, Respondent took fees several months before obtaining a fee order from the court and before satisfying the requirements of Probate Rule 2(d). He thereby violated DR 2-106(A) (lawyer shall not collect illegal fee) and DR 1-102(A)(5) (lawyer shall not engage in conduct prejudicial to administration of justice).

In one of the estates Respondent included property in his fee calculation that should have been excluded, namely "(1) the half of the joint tenancy property attributed to the decedent's surviving spouse, (2) real estate owned by the decedent outside of the State of Iowa, and (3) life insurance proceeds payable to

a named beneficiary." The result was a fee of about $7,300 more than he was entitled to and a further violation of DR 2-106(A).

Evans' license was suspended with no possibility of reinstatement for thirty days.

V. Conflict of interest: business transactions with client.

Board of Professional Ethics and Conduct v. Sikma, 533 N.W.2d 532 (Iowa 1995). In June 1991 Sikma became involved in a new telemarketing company formed by one Andrew Armstrong. Sikma did not initially invest any money in the company, but accepted the position of CEO on a part-time basis. He also continued his private law practice. One of his clients was Rashelle Katseres.

Shortly after Sikma became involved in the telemarketing company, he had a phone conversation with Katseres in which the company was discussed. Though he told her he should not be telling her about the company (because he recognized an ethical problem in approaching a client with a business deal) he did leave her with the incorrect impression that he had invested his own money in the business and that it was a good investment.

Following this conversation, Katseres invested $20,000 in the company. She did so without consulting any other professional advisor.

The Court held that Sikma violated DR 5-104(A), which provides that a lawyer should not enter into a business transaction with a client unless the client consents after full

disclosure. In so holding, the Court rejected two arguments made by Sikma.

The first argument was that the rule is violated only if the lawyer is formally retained to represent the client with respect to the business transaction at issue. The Court held that it is enough that the attorney has influence over the client because of a previous or current attorney-client relationship and the client looks to the lawyer to protect her interests. The lawyer need not be formally acting as counsel in the very transaction which is the subject of the alleged conflict of interest. When Sikma spoke to Katseres about the telemarketing company and she made her investment, he was representing her in a workers' compensation matter.

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The Court further rejected Sikma's claim that he made a "full disclosure" to Katseres. At most, he told her that "he should not approach her with a business proposal and she should seek other professional advice." But he did not tell her the effect that his own interest in the company could have on his professional judgment on her behalf and <u>why</u> it would be in her interest to have independent counsel.

The Court found that Sikma violated one other rule, DR 4-101(B)(3) (lawyer shall not knowingly use a confidence of a client for the advantage of the lawyer unless the client consents after full disclosure). Sikma knew, because he had prepared a will for Katseres in 1990, that she had about $120,000 in treasury bonds that could be available for investment. In telling her about the investment potential of

the telemarketing company, he was using her confidential information to his own advantage.

Because Sikma had no prior disciplinary record and because his misconduct was the result of poor judgment rather than deliberate, the Court imposed a license suspension of only three months.

VI. Conflict of interest: sexual relationship with client.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Hill, 540 N.W.2d 43 (Iowa 1995). In 1989 Hill's license was suspended for having sexual relations with a dissolution of marriage client in his law office. This time the violation occurred during visits with a female client who was being held in the Marshall County Jail. Instead of discussing the client's case, Hill would talk about sexual matters and would subject her to what she testified was offensive physical contact. The client's account of Hill's conduct was corroborated by photographs taken by law enforcement personnel.

Hill explained his conduct by noting that he is a clergyman as well as a lawyer and that he is a "hands-on" counselor. The court warned that any further demonstration of "amorous proclivities toward female clients" would require revocation of his license and that if he "is to be a member of the legal profession, it will be as a 'hands-off' counselor."

VII. Conflict of interest: drafting client's will naming self as beneficiary.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Winkel, 541 N.W.2d 862 (Iowa 1995). Winkel's long-time friend and client, Robert Bickert, "was said to be stubborn, strong-willed, obstreperous, domineering and opinionated." In 1992, shortly before Bickert died, he asked Winkel to prepare a new will for him. Bickert said that he wanted to leave $20,000 to Winkel. Twice Winkel prepared drafts of a will that omitted the $20,000 bequest, telling Bickert that such a bequest would be unethical. Bickert then proposed that Winkel's secretary, who had often done Bickert's personal typing, be allowed to retype the latest will draft with the addition of the $20,000 bequest. Winkel agreed to this suggestion.

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The court found Winkel to have violated DR 5-101(B) ("A lawyer or the lawyer's partners or associates shall not prepare an instrument in which a client desires to name the lawyer beneficially unless the lawyer is the spouse of, or is otheriwse related by consanguinity or affinity, within the third degree, to the client.").

In so holding, the court noted that it is not a defense that (1) the idea to make the bequest orginated with the client; (2) no undue influence was exercised; or (3) the client had a strong desire to make the bequest.

The grievance commission concluded that under the circumstances a private admonition would be appropriate. To the court, however, the question was whether Winkel should be suspended or reprimanded. The court chose "a severe public reprimand."

VIII. Neglect.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Scheetz, ___ N.W.2d ___ (Iowa 6-19-96). Upon the request of a resident of Oregon, Scheetz agreed to begin estate proceedings on two wills. He failed to probate either of them, however. When the Oregon resident requested that the wills be returned to him, Scheetz delayed doing so for many months.

In another probate matter Scheetz undertook to prepare and file the final report in an estate that was otherwise ready for closing. He entered an appearance, but failed to prepare the report.

The ethics board sent notices of complaint to Scheetz regarding these matters and requested his response. No response was provided. Meantime, Scheetz closed his private practice and accepted employment as an area prosecutor in drug cases. The evidence showed he was performing well in that position.

The court said that it was a close question whether to suspend or reprimand Scheetz. The court opted for a reprimand but imposed certain restrictions on his practice:

> Given Scheetz' voluntary remedial actions limiting his practice to areas of competence and his demonstrated ability to practice law in a more structured setting, we conclude the most appropriate sanction to impose on these facts is a public reprimand. Should Scheetz ever return to private practice, we (1) prohibit him from accepting any probate or estate matters without first aligning himself with a mentor experienced in this area, and (2) require him to adopt, use and maintain law office management practices that will aid him in performing work in a timely manner.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Winkel, 542 N.W.2d 252 (Iowa 1996). This is an example of serious neglect of estates and conservatorships. Winkel received seventy-one delinquency notices from the clerk of the district court in fifteen separate probate matters. He also ignored notices of complaint from the ethics board.

The grievance commission recommended a three-month suspension, but the court held that a suspension of at least six months was more appropriate given Winkel's "extensive record of delinquencies."

Board of Professional Ethics and Conduct v. Sather, 534 N.W.2d 428 (Iowa 1995). From 1982 until 1994 Sather was attorney for the estate of his father. The estate was opened by another attorney in 1977, but that attorney withdrew in 1982 because of a conflict of interest. Sather had no probate experience when he undertook representation of the estate. In 1986 he was publicly reprimanded for delinquencies in the estate and for failure to respond to a notice of complaint from the Committee on Professional Ethics and Conduct.

Following 1986 the estate remained open but Sather took no action to close it. He received more delinquency notices from the clerk of court as well as additional notices of complaint from the ethics committee, all of which he ignored. Finally, in April 1994 the court on its own motion closed the estate.

The Court held that regardless of Sather's unfamiliarity with probate, "he held a duty to the courts of this state to

ensure that matters under his responsibility would be completed properly and in a timely fashion." Because of the mitigating factors present, including the absence of prejudice to any party in the family probate matter, the Court imposed a public reprimand.

Committee on Professional Ethics and Conduct v. Humphrey, 529 N.W.2d 255 (Iowa 1995). As the Court noted, "[t]his is a classic example of the special difficulties a sole practitioner faces in stressful times." Humphrey neglected probate matters and a postconviction relief case, and ignored a federal judge's request for information about the status of the latter matter. He also failed to respond to inquiries from the ethics committee.

The Court considered the possibility of probation rather than suspension as a sanction. The Court concluded, however, that the machinery to supervise probation was not available. The Court noted that perhaps the Iowa State Bar Association's mentoring program might be expanded in the future to assist lawyers like Humphrey. The Court determined that a suspension of license for at least 60 days was appropriate, "especially when Humphrey stonewalled two judges, as well as the committee."

IX. Mishandling client funds and property.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Sylvester, ___ N.W.2d ___ (Iowa 5-22-96). Sylvester stole

more than $6,000 in funds belonging to clients and to the law firm in which he was an associate. As described by the court, one of his methods was to "receive a retainer in cash from a client and give the client a receipt for the full amount of the retainer. He would then tear the receipt copies from the receipt book so there would be no record of the receipt that he had given the client. He would then write out a new receipt for the firm in an amount less than the total he received. He would pocket the difference and turn over the lesser amount to the bookeeper."

When these defalcations were discovered, criminal charges were brought, resulting in Sylvester's plea of guilty to one count of theft in the second degree, a class "D" felony.

In the disciplinary proceedings the court imposed the usual sanction for misappropriation of funds, revocation of license.

PRODUCT LIABILITY

STATUS OF RESTATEMENT PROJECT

AND

UPDATE ON PUNITIVE DAMAGES

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PLEASE BRING THIS DRAFT TO THE ANNUAL MEETING

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting

RESTATEMENT OF THE LAW THIRD

The American Law Institute

RESTATEMENT OF THE LAW
TORTS: PRODUCTS LIABILITY

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Tentative Draft No. 2

(March 13, 1995)

SUBJECT COVERED:

Chapter 1 Liability for the Sale or Distribution of Defective Products

Submitted by the Council to the Members of The American Law Institute for Discussion at the Seventy-Second Annual Meeting on May 16, 17, 18, and 19, 1995

The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
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CHAPTER 1
LIABILITY FOR THE SALE OR DISTRIBUTION OF DEFECTIVE PRODUCTS

TOPIC 1
PRODUCT DEFECTIVENESS

§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

(a) One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.

(b) A product is defective if, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.

Comment:

a. History. This Section states a rule of tort liability applicable to commercial sellers and other distributors of products. The types of product defects referred to in § 1(b) are defined in § 2.

The liability established in this Section draws on both warranty law and tort law. Historically, the focus of products liability law was on manufacturing defects. A manufacturing defect is a physical departure from a product's intended design that poses risks of harm to persons or property. Typically manufacturing defects occur in only a small percentage of units in a product line. Courts early began imposing liability without fault on product sellers for harm caused by such defects, holding a seller liable for harm caused by manufacturing defects even though all possible care had been exercised by the seller in the preparation and marketing of the product. In doing so courts relied

§ 2. Categories of Product Defect

For purposes of determining liability under § 1:

(a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

§ 3. Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect, without proof of the specific nature of the defect, when:

(a) the incident resulting in the harm was of a kind that ordinarily would occur only as a result of product defect; and

(b) evidence in the particular case supports the conclusion that more probably than not:

(1) the cause of the harm was a product defect rather than other possible causes, including the conduct of the plaintiff and third persons; and

(2) the product defect existed at the time of sale or distribution.

Comment:

a. History. This Section traces its historical antecedents to the law of negligence, which has long recognized that an inference of negligence may be drawn in cases where the defendant's negligence is the best explanation for the cause of an accident, even if the plaintiff cannot explain the exact nature of the defendant's conduct. See Restatement, Second, Torts § 328D. As products liability law

§ 4. Definition of "Product"

For purposes of this Restatement:

(a) A "product" is something distributed commercially for use or consumption. Most but not necessarily all products are tangible personal property; most have been subjected to processing and fabricating prior to entering the stream of commerce; and most pass through a commercial chain of distribution before ultimate use and consumption.

(b) Services, even when provided commercially, are not products.

(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

Comment:

a. History. The question of whether something distributed in commerce is a "product" for purposes of tort liability is important in this Restatement, but relatively less so than it was in the period from the early 1960s to the early 1980s. Before 1960, American courts had not yet recognized strict liability in tort for harm caused by defective products, particularly where there was no privity of contract between plaintiff and defendant. Thus, prior to that time, plaintiffs claiming in tort against product sellers were required to prove causal negligence; and if they could prove negligence they could usually recover in tort whether or not a product was involved. Once the era of strict products liability in tort arrived in the early 1960s, liability turned primarily on whether what the defendant distributed was, or was not, a product. Most of the focus during this period was on liability for harm caused by manufacturing defects, in connection with which strict liability had a distinctive character. See § 2(a).

By the early 1980s, products liability litigation shifted in emphasis from manufacturing defects to defective designs and defects

§ 5. Definition of "One Who Sells or Otherwise Distributes"

For purposes of this Restatement:

(a) One "sells" a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(b) One "otherwise distributes" a product when, in a commercial context other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

(c) One also "sells or otherwise distributes" a product when, in a commercial context, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

Comment:

a. History. Until the mid-1960s, the only transactions that gave rise to what today is known as "products liability" were commercial product sales, as defined in § 5(a). In large part this limitation reflects the origins of liability without fault in the law of warranty, which has traditionally focussed on sales transactions. During the formative years in the development of strict products liability, courts extended liability to some nonsale transactions, but always by assimilating such

§ 6. Definition of "Harm to Persons or Property": Economic Loss

For purposes of this Restatement the term "harm to persons or property" includes economic loss only when caused by harm to:

(a) the plaintiff's person;

(b) the person of another when harm to the other interferes with a legally protected interest of the plaintiff;

(c) the plaintiff's property other than the defective product itself.

Comment:

a. Rationale. This Section limits the kinds of harm for which recovery can be obtained under this Restatement. Two major constraints on tort recovery give content to this Section. First, products liability law lies at the boundary between tort and contract. Some losses are more appropriately assigned to contract law and the remedies set forth in the Uniform Commercial Code. When the Code governs a claim, its provisions regarding such issues as statutes of limitation, privity, notice of claim, disclaimer, and limitations of remedies ordinarily govern the litigation. Second, some forms of economic loss have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim.

b. Economic loss resulting from harm to plaintiff's person. Loss of earnings are a common form of economic loss resulting from harm to the plaintiff's person and are covered by this Restatement. Other forms of economic loss resulting from personal injury to the plaintiff are recoverable if they are within the general principles of legal cause. See Restatement, Second, Torts, §§ 430-461.

§ 7. Effects of Compliance and Noncompliance with Applicable Product Safety Statutes or Regulations

In connection with a product seller's or distributor's liability for defective design or inadequate instructions or warnings:

(a) a product's noncompliance with an applicable product safety statute or regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and

(b) a product's compliance with an applicable product safety statute or regulation is properly considered in determining whether a product is defective with respect to the risks sought to be reduced by the statute or regulation, but does not necessarily preclude as a matter of law a finding of product defect.

Comment:

a. Product safety statutes or regulations. The safety statutes or regulations referred to in this Section are those, promulgated by federal and state legislatures and governmental agencies, intended to promote greater safety in the design and marketing of products. Statutes or regulations relating to manufacturing defects usually address levels of quality control rather than whether a given product unit is or is not defective. Because liability for manufacturing defects under §§ 1 and 2(a) is liability without fault, quality control levels are not relevant in actions brought under those Sections. In a claim of manufacturing defect brought under common law negligence principles, see § 2, Comment *m*, the relevance of statutory or regulatory violations should be determined according to general negligence principles.

TOPIC 2
RULES OF LIABILITY GOVERNING SPECIAL PRODUCT MARKETS

8. Liability of Commercial Seller or Distributor for Harm Caused by Prescription Drugs and Medical Devices

(a) A manufacturer of a prescription drug or medical device who commercially sells or otherwise distributes a defective product is subject to liability for harm to persons caused by the product defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health care provider's prescription.

(b) For purposes of liability under Subsection (a), a product is defective if at the time of sale or other distribution:

(1) the drug or medical device contains a manufacturing defect as defined in § 2(a); or

(2) the drug or medical device is not reasonably safe due to defective design or because of inadequate instructions or warnings.

(c) A prescription drug or medical device is not reasonably safe due to defective design when the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable

therapeutic benefits so that no reasonable health care provider, knowing of such foreseeable risks and therapeutic benefits, would prescribe the drug or medical device for any class of patients.

(d) A prescription drug or medical device is not reasonably safe because of inadequate instructions or warnings when

(1) reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device are not provided to prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(2) reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device are not provided directly to the patient when the manufacturer knew or had reason to know that no health care provider would be in a position to reduce the risks of harm in accordance with the instructions or warnings.

(e) A retail seller or other distributor of a prescription drug or medical device is subject to liability only if:

(1) at the time of sale or other nonmanufacturing distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or

(2) during the period leading up to the sale or other distribution of the drug or medical device the retail seller or other nonmanufacturing

distributor fails to exercise reasonable care and such failure causes harm to persons.

Comment:

a. History. Subsections (b)(1) and (d)(1) state the traditional rules that drug and medical device manufacturers are liable only when their products contain manufacturing defects or are sold without adequate instructions and warnings to prescribing and treating health care providers. Until recently, courts refused to review the reasonableness of the designs of drugs and medical devices sold only by prescription. However, consistent with recent trends in the case law, two limited exceptions to these traditional rules are generally recognized. Subsection (d)(2) sets forth situations when a drug or medical device manufacturer is required to warn the patient directly of risks associated with consumption or use of its product. And Subsection (c) imposes liability for a drug or medical device whose risks of harm so far outweigh its therapeutic benefits that a reasonable, properly informed health care provider would not prescribe it for any class of patients.

b. Rationale. The obligation of a manufacturer to warn about risks attendant to the use of drugs and medical devices that may be sold only pursuant to a health care provider's prescription traditionally has required warnings directed to the health care provider and not the patient. The rationale supporting this "learned intermediary" rule is that only health care professionals are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy. The duty then devolves on the health care provider to supply to the patient such information as is deemed appropriate under the circumstances so that the patient can make an informed decision as to therapy. Subsection (d)(1) retains the "learned intermediary" rule. However, in some therapeutic relationships the physician or other health care

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RESTATEMENT OF THE LAW THIRD

The American Law Institute

RESTATEMENT OF THE LAW
TORTS: PRODUCTS LIABILITY

Tentative Draft No. 3

(April 5, 1996)

SUBJECTS COVERED:

Chapter 1. Liability for the Sale or Distribution of Defective Products (§§ 9-11, 13, 14)
Chapter 2. Successors; Apparent Manufacturers
Chapter 3. Liability Not Based Upon Product Defect at Time of Sale

Submitted by the Council to the Members of The American Law Institute
for Discussion at the Seventy-Third Annual Meeting
on May 14, 15, 16, and 17, 1996

The Executive Office
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CHAPTER 1
LIABILITY FOR THE SALE OR DISTRIBUTION OF DEFECTIVE PRODUCTS

[**Note:** Sections 1-8 are contained in Tentative Draft No. 2 (1995). They were tentatively approved, subject to the discussion, at the 1995 Annual Meeting and have not been reprinted in this Draft. A revised version of § 9 and an entirely new § 10 are printed below for consideration at the 1996 Annual Meeting. The Council has not yet completed its own review of these Sections.

Sections 10, 12, and 13 of Tentative Draft No. 2 were not reached for discussion in 1995. They have been renumbered, respectively, as §§ 11, 13, and 14 and are reproduced below for consideration in 1996. They are otherwise unchanged. Section 11 of Tentative Draft No. 2 was tentatively approved in 1995. It has been renumbered as § 12 but not reproduced in this Draft.]

TOPIC 2
RULES OF LIABILITY GOVERNING SPECIAL PRODUCT MARKETS

§ 8. Liability of Commercial Seller or Distributor for Harm Caused by Prescription Drugs and Medical Devices

[See Tentative Draft No. 2.]

§ 9. Liability of Commercial Seller or Distributor of Used Products for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing used products who sells a defective used product is subject to liability for harm to persons or property caused by the defect when the defect:

(a) is a manufacturing defect as defined in § 2(a) and, even though the seller exercises all pos-

sible care, a reasonable person in the position of the buyer would expect the used product to present substantially the same risk of defect as if the product were new at the time of sale; or

(b) results from the failure of the seller to exercise reasonable care.

A used product is one that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.

Comment:

a. Rationale. Subsection (a) addresses the liability of a commercial used-product seller for harm caused by departures from a product unit's intended design. Section 2(a) designates such departures as "manufacturing defects," but they need not originate at time of manufacture. See § 2, Comment *b*. If, at the time of sale or other distribution, the used product departs from its intended design, a manufacturing defect as defined in § 2(a) exists even when the defect arises during use of the product after first commercial sale to a buyer not in the commercial chain of distribution. For the used-product seller to be subject to liability without fault for harm caused by a manufacturing defect under Subsection (a), it must be established that a reasonable person in the position of the buyer of the used product would expect the product to present substantially the same risk of defect as if it were in new condition at the time of sale. When a new product is sold or otherwise distributed, a reasonable person expects it to perform without defects, and seller's liability without fault for harm caused

§ 10. Liability of Commercial Seller or Distributor of a Product Component for Harm Caused by a Product Into Which the Component Is Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is not subject to liability for harm to persons or property caused by a product into which the component is integrated unless:

(a) the component is defective in itself, as defined in § 2, and the defect causes the harm; or

(b) (1) the seller or other distributor of the component substantially participates in the design of the product;

(2) the integration of the component causes the product to be defective as defined in § 2; and

(3) the defect in the product causes the harm.

Comment:

a. Rationale. This Section adopts a general rule of nonliability for a component seller when the component itself is not defective as defined in § 2. Product components include raw materials, bulk products, and other constituent products sold for integration into other products. Some components, such as raw materials, valves, or switches, have no functional capabilities unless integrated into other products. Other components, such as a truck chassis or a multi-functional machine, function on their own but still may be utilized in a variety of ways by assemblers of other products.

If the component is not defective as defined in § 2 it would be unjust, impractical, and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the

TOPIC 3
CAUSATION

§ 11. Causal Connection Between Product Defect and Harm

Whether a product defect caused harm is determined by the prevailing rules and principles governing causation in tort.

Comment:

a. Requirement of causal connection between defect and harm. Sections 1(a), 8(a), and 9(a) require that the defect of which plaintiff complains cause harm to person or property. The rules that govern causation in tort law generally are, subject to § 12, also applicable in products liability cases. There are no significant differences in the general concept of causation as applied in products liability cases and causation in cases based on negligence. Thus, when a product has a manufacturing defect as defined in § 2(a) it must also be established that, had there been no defect, the harm to the plaintiff would have been avoided or diminished. Similarly, if a product was defectively designed or was defective because of inadequate instructions or warnings, as

TOPIC 4
DEFENSES

§ 13. Apportionment of Liability Between or Among Plaintiff, Sellers or Distributors of Defective Products, and Other Tortfeasors

When the conduct of the plaintiff or another person combines with a product defect to cause harm to the plaintiff's person or property and the plaintiff's conduct or that of the other person fails to conform to an applicable standard of care, liability for harm to the plaintiff is apportioned between and among the plaintiff, product seller or distributor, or other tortfeasor pursuant to the applicable rules governing apportionment of liability.

Comment:

a. Rationale. The rules governing fault-based apportionment of liability are frequently referred to as the rules governing "comparative responsibility" or "comparative fault." Those rules impose on users and consumers responsibility they bear for safe product use and consumption. It would be inappropriate to impose the costs of substandard plaintiff conduct on manufacturers, who presumably will pass on some or all of those costs to all users and consumers, including those who use and consume products safely and reasonably. See § 2, Comment *a*.

b. Conduct of the plaintiff. The applicable rules of apportionment of liability vary among jurisdictions. Some states have adopted "pure" comparative fault, which allocates liability to each actor purely in proportion to the actor's percentage of total fault. Others follow some variant of "modified" comparative fault,

§ 14. Disclaimers, Limitations, Waivers, and Other Contract-Based Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise

valid products liability claims against sellers or other distributors of new products for harm to persons.

Comment:

a. Effects of contract defenses on products liability tort claims for harm to persons. A commercial seller or other distributor of a new product is not permitted to escape liability for harm to persons through limiting terms in a contract governing the sale of a product. It is presumed that the ordinary product user or consumer lacks sufficient information, bargaining power, or bargaining position necessary to execute a fair contractual limitation of rights to recover. For a limited exception to this general rule, see Comment *d*. The rule in this Section applies only to "sellers or other distributors of new products." For the rule governing commercial sellers of used products and whether they may rely on disclaimers, waivers, and other contractual defenses, see § 9. Nothing in this Section is intended to constrain parties within the commercial chain of distribution from contracting inter se for indemnity agreements or save-harmless clauses.

b. Distinguishing disclaimers from warnings. This Section invalidates disclaimers and contractual exculpations of liability by sellers of new products when they are interjected to bar or limit claims by plaintiffs for personal injury. Disclaimers should be distinguished from warnings. Warnings convey information to the buyer about avoiding risk in using the product. In some cases warnings inform the consumer of risks that cannot be avoided. Both types of warnings provide consumers with valuable information concerning the risks attendant to using the product. A product sold with reasonable instructions or warnings may be nondefective. See § 2, Comments *h, i, j,* and *k*. Disclaimers attempt contractually to avoid liability for defective products. For the reasons set forth in

CHAPTER 2
SUCCESSORS; APPARENT MANUFACTURERS

§ 15. Liability of Successor for Harm Caused by Product Sold Commercially by Predecessor

A successor corporation or other business entity that acquires the assets of a predecessor corporation or other business entity is not subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor, or by the predecessor's breach of a post-sale duty under § 18 or § 19, unless the acquisition:

(a) involves all, or substantially all, of the assets of the predecessor;

(b) is followed by the dissolution, discharge in bankruptcy, or other reorganization of the predecessor so as to prevent the tort claimant from having an effective remedy against the predecessor; and

(c) (1) is accompanied by an agreement for the successor to assume such liability; or

(2) constitutes a consolidation or merger; or

(3) results in the successor becoming a continuation of the predecessor; or

(4) is a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor.

§ 16. Selling or Otherwise Distributing as One's Own a Product Manufactured by Another

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.

Comment:

a. History. The rule stated in this Section derives from § 400 of the Restatement, Second, of Torts, promulgated in 1965. Section 400 incorporates by reference §§ 394-398, setting forth the rules governing the liability of manufacturers of chattels. These rules establish a regime of essentially fault-based manufacturers' liability

CHAPTER 3
LIABILITY NOT BASED UPON PRODUCT DEFECT AT TIME OF SALE

TOPIC 1
TIME OF SALE CONDUCT: MISREPRESENTATION

§ 17. Liability of Commercial Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a misrepresentation is subject to liability for harm to persons or property resulting from such misrepresentation. Whether a product seller or distributor is subject to liability for misrepresentation is governed by § 402B of the Restatement, Second, of Torts.

Comment:

a. Rationale. The rules governing liability for product misrepresentation are well stated in the Restatement, Second, of Torts § 402B. Case law has followed that Section. The two caveats to § 402B deserve attention, however. Section 402B and the caveats concern liability based on misrepresentation as such. The first caveat leaves open the question whether a seller should be liable under that Section for a misrepresentation that is made to an individual and not to the public at large. This question remains open. Case law has dealt exclusively with public misrepresentations. The second caveat leaves open the question whether a seller should be liable for an innocent misrepresentation where harm to persons or property is caused to one who is not a consumer of the chattel. Several decisions indicate that if one intentionally or

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TOPIC 2
POST-SALE CONDUCT: FAILURE TO WARN; FAILURE TO RECALL

§ 18. Liability of Commercial Seller or Distributor for Harm Caused by Failure to Warn After the Time of Sale

One engaged in the business of selling or otherwise distributing products who sells a product is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale when a reasonable person in the seller's position would provide such a warning. A

reasonable person would provide a warning after the time of sale when:

(a) the seller knows or reasonably should know that the product poses a substanial risk of harm to persons or property;

(b) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm;

(c) a warning can be communicated to, and effectively acted on by, those to whom a warning might be provided; and

(d) the risk of harm is sufficiently great to justify the burden of providing a warning.

Comment:

a. Rationale. Judicial recognition of the seller's duty to warn of a product-related risk after the time of sale whether or not the product is defective at the time of original sale within the meaning of §§ 1, 2, 8, and 9 is relatively new. Nonetheless, a growing body of decisional law imposes such a duty. Courts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property. Nevertheless, an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers. The costs of identifying and communicating with product users years after sale are often daunting. Furthermore, as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes. If post-sale improvements in product designs were routinely to give rise to duties to notify users and to warn them of the risks of continuing to use existing designs, the burden on product sellers would be unacceptably great.

§ 19. Liability of Successor for Harm Caused by Successor's Failure to Warn After the Time of Sale by the Predecessor

A successor corporation or other business entity that acquires the assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 15, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a

product sold by the predecessor when a reasonable person in the successor's position would provide a warning. A reasonable person would provide a warning when the factors identified in § 18 are present. In determining if these factors are present, an important consideration is whether the successor maintains contractual relations, including service contracts, with those who purchased products from the predecessor.

Comment:

a. Rationale. Successor corporations are generally not liable for harm caused by products sold by predecessors. Their status as successors, alone, does not expose them to liability. See § 15. This Section subjects a successor to liability for its own failure to warn after acquiring the predecessor's assets when a reasonable person in the successor's position would provide a warning. Liability under this Section is analogous to liability under § 18, in which a seller is liable for harm caused by breach of a post-sale duty to warn even if the product was not defective at the time of original sale.

Whether a reasonable person in the successor's position would provide a warning is governed by the same factors that determine whether a reasonable seller is required to provide a post-sale warning. See Subsections (a) through (d) of § 18. In determining whether a successor owes a duty to provide warnings relating to products sold by the predecessor, courts have focused on the presence or absence of service contracts between the successor and the predecessor's customers. For the most part, this factor serves as a convenient shorthand for determining whether the four requirements set forth in § 18 have been met. When the successor has established no systematic relationships

§ 20. Liability of Commercial Product Seller or Other Distributor for Harm Caused by Failure to Recall Product After Sale or Distribution

A commercial seller or other distributor of a product is subject to liability for harm to persons or property caused by the seller's failure to act as a reasonable person in undertaking to recall the product after sale or distribution when:

(a) the seller or distributor undertakes to recall the product; or

(b) a statute or other governmental regulation specifically requires the seller or distributor to undertake to recall the product.

Comment:

a. Rationale. Duties to recall products impose serious economic burdens on manufacturers. Most product lines constantly are improved so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer. Moreover, even when a product is defective within the meaning of § 2, an involuntary duty to recall should be imposed on the seller only by statute or regulation. Issues relating to product recalls are best evaluated by a governmental or quasi-governmental agency capable of gathering adequate data regarding ramifications of such undertakings. The duty to recall or repair should be distinguished from a post-sale duty to warn about product hazards discovered after sale. See §§ 18 and 19.

b. Distinguishing post-sale failure to recall from the sale or other distribution of defective products in the first instance. When a product is defective within the meaning of § 1, § 2, § 8, or § 9, and

BMW OF NORTH AMERICA, INC., Petitioner,

v.

Ira GORE, Jr.

No. 94–896.

Argued Oct. 11, 1995

Decided May 20, 1996.

Automobile purchaser brought action against foreign automobile manufacturer, American distributor, and dealer based on distributor's failure to disclose that automobile had been repainted after being damaged prior to delivery. The Alabama Circuit Court, Jefferson County, P. Wayne Thorn, J., entered judgment on jury verdict awarding buyer compensatory damages of $4,000 and punitive damages of $4,000,000. Distributor and manufacturer appealed. After determining that court lacked jurisdiction over manufacturer, the Alabama Supreme Court, 646 So.2d 619, conditionally affirmed punitive damage award after reducing award to $2,000,000. Certiorari was granted, and the Supreme Court, Justice Stevens, held that: (1) lawful conduct by distributor outside state of Alabama could not be considered by Alabama court in making award of punitive damages, and (2) award of $2,000,000 punitive damages was grossly excessive in light of low level of reprehensibility of conduct and 500 to 1 ratio between award and actual harm to purchaser.

Reversed and remanded.

Justice Breyer filed a concurring opinion in which Justices O'Connor and Souter joined.

Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

Justice Ginsburg filed a dissenting opinion in which Chief Justice Rehnquist joined.

1. **Constitutional Law ⇐303**
Damages ⇐94

Due process clause of Fourteenth Amendment prohibits state from imposing grossly excessive punishment on tort-feasor. U.S.C.A. Const.Amend. 14.

2. **Damages ⇐87(1)**

Punitive damages may properly be imposed to further state's legitimate interests in punishing unlawful conduct and deterring its repetition.

3. **Constitutional Law ⇐303**
Damages ⇐94

In our federal system, states necessarily have considerable flexibility in determining level of punitive damages that they will allow in different classes of cases and in any particular case, and only when award can fairly be categorized as "grossly excessive" in relation to these interests does it enter zone of arbitrariness that violates due process clause of Fourteenth Amendment; for that reason, federal excessiveness inquiry appropriately begins with identification of state interests that punitive award is designed to serve. U.S.C.A. Const.Amend. 14.

4. **States ⇐5(1)**

State may not impose economic sanctions on violators of its laws with intent of changing tort-feasors' lawful conduct in other states.

5. **States ⇐4.1(1)**

State power may be exercised as much by jury's application of state rule of law in a civil lawsuit as by statute, for purposes of determining whether state has exceeded its authority under Federal Constitution.

6. **Constitutional Law ⇐303**
Fraud ⇐62

Lawful conduct of automobile manufacturer outside of state of Alabama could not be considered by Alabama court in determining appropriate level of punitive damages to be assessed against manufacturer, in fraud action brought by purchaser of automobile based on failure of manufacturer to inform him that automobile had been repainted after prior shipment and prior to its initial sale; any penalties imposed on manufacturer by Alabama could only be supported by Alabama's interest in protecting its own consumers and its own economy.

7. **Constitutional Law** ⇐303
Damages ⇐94

While state court in making award of punitive damages may not consider lawful conduct by defendant outside of state, evidence of defendant's out-of-state actions is relevant to the determination of degree of reprehensibility of defendant's conduct, which is factor in analyzing whether award is grossly excessive and in violation of due process clause U.S.C.A. Const.Amend. 14.

8. **Constitutional Law** ⇐303
Fraud ⇐62

Award of $2 million in punitive damages against automobile manufacturer in purchaser's fraud action, which award was based on manufacturer's policy of repairing automobiles which were damaged prior to delivery, and not advising dealers or purchasers of predelivery repairs costing less than 3% of automobile's suggested retail price, was grossly excessive and violated due process clause; none of the aggravating factors associated with particularly reprehensible conduct was present, 500 to 1 ratio existed between punitive damages award and jury's assessment of actual damages of $4,000, and award was substantially greater than statutory fines available for similar malfeasance under laws of the several states. U.S.C.A. Const.Amend. 14.

9. **Constitutional Law** ⇐303

Elementary notions of fairness dictate that person receive fair notice not only of conduct that will subject him to punishment but also of severity of penalty that state may impose, and while strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, basic protection against judgments without notice afforded by due process clause is implicated by civil penalties. U.S.C.A. Const.Amend. 14.

10. **Constitutional Law** ⇐303
Damages ⇐94

Degree of reprehensibility of defendant's conduct is perhaps most important indicium of reasonableness of punitive damages award under due process clause; damages imposed should reflect enormity of defendant's offense, and may not be grossly out of proportion to severity of offense U.S.C.A. Const. Amend. 14

11. **Courts** ⇐489(2)

Only state courts may authoritatively construe state statutes

12. **Constitutional Law** ⇐303
Damages ⇐94

That conduct is sufficiently reprehensible to give rise to tort liability, and even modest award of exemplary damages, does not establish high degree of culpability that warrants substantial punitive damages award and will justify such an award under due process clause. U.S.C.A. Const.Amend. 14.

13. **Constitutional Law** ⇐303
Damages ⇐94

Constitutional line separating permissible awards of punitive damages from those that are excessive is not marked by simple mathematical formula, not even one that compares actual and potential damages to punitive award; low awards of compensatory damages may properly support higher ratio than high compensatory awards, if, for example, particularly egregious act has resulted in only small amount of economic damages, and higher ratio may also be justified in cases in which the injury is hard to detect or monetary value of noneconomic harm might have been difficult to determine. U.S.C.A. Const. Amend. 14.

14. **Constitutional Law** ⇐303
Damages ⇐94

Comparing punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct provides indicium of excessiveness, in determining whether size of punitive damages award violates due process, and reviewing court engaged in determining whether award is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for conduct at issue. U.S.C.A. Const.Amend. 14

15. **Constitutional Law** ⇐303
Damages ⇐94

Fact that defendant against whom award of punitive damages is imposed is

large corporation rather than impecunious individual does not diminish defendant's entitlement under due process clause to fair notice of demands that the several states impose on conduct of its business. U.S.C.A. Const.Amend. 14

16. **Damages** ⇐87(1)

States ⇐5(1)

While each state has ample power to protect its own consumers, none may use deterrent of punitive damages as means of imposing its regulatory policies on entire nation.

Syllabus *

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366. The Alabama Supreme Court agreed, but reduced the award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.

Held: The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Pp. 1595–1604.

(a) Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. *TXO*, 509 U.S., at 456, 113 S.Ct., at 2719–2720, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. See *e.g.*, *Healy v. Beer Institute*, 491 U.S. 324, 335–336, 109 S.Ct. 2491, 2498–2499, 105 L.Ed.2d 275. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers. Pp. 1595–1599.

(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, lead to the conclusion that the $2 million award is grossly excessive. Pp. 1598–1599.

(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness—the degree of reprehensibility of the defendant's conduct, see

* 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, 26 S.Ct. 282, 287, 50 L.Ed. 499.

large corporation rather than impecunious individual does not diminish defendant's entitlement under due process clause to fair notice of demands that the several states impose on conduct of its business. U.S.C.A. Const.Amend. 14.

16. **Damages** ⇐87(1)

States ⇐5(1)

While each state has ample power to protect its own consumers, none may use deterrent of punitive damages as means of imposing its regulatory policies on entire nation.

Syllabus *

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366. The Alabama Supreme Court agreed, but reduced the award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.

Held. The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Pp. 1595–1604.

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(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness—the degree of reprehensibility of the defendant's conduct, see

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e.g., Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181—is present here. The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. Gore's contention that BMW's nondisclosure was particularly reprehensible because it formed part of a nationwide pattern of tortious conduct is rejected, because a corporate executive could reasonably have interpreted the relevant state statutes as establishing safe harbors for nondisclosure of presumptively minor repairs, and because there is no evidence either that BMW acted in bad faith when it sought to establish the appropriate line between minor damage and damage requiring disclosure to purchasers, or that it persisted in its course of conduct after it had been adjudged unlawful. Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. Pp. 1598–1601.

(d) The second (and perhaps most commonly cited) indicium of excessiveness—the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, see *e.g., TXO*, 509 U.S., at 459, 113 S.Ct., at 2721—also weighs against Gore, because his $2 million award is 500 times the amount of his actual harm as determined by the jury, and there is no suggestion that he or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, see, *e.g., id.*, at 458, 113 S.Ct., at 2720, the ratio here is clearly outside the acceptable range. Pp. 1601–1603.

(e) Gore's punitive damages award is not saved by the third relevant indicium of excessiveness—the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct, see, *e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1—because $2 million is substantially greater than Alabama's applicable $2,000 fine and the penalties imposed in other States for similar malfeasance, and because none of the pertinent statutes or interpretive decisions would have put an out-of-state distributor on notice that it might be subject to a multimillion dollar sanction. Moreover, in the absence of a BMW history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient. Pp. 1602–1604.

(f) Thus, BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate Alabama consumers' economic interests is a matter for that court to address in the first instance. Pp. 1603–1604.

646 So.2d 619 (Ala.1994), reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined.

Andrew L. Frey, Washington, DC, for petitioner.

Michael Gottesman, Washington, DC, for respondent.

Justice STEVENS delivered the opinion of the Court.

[1] The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a " 'grossly excessive' " punishment on a tortfeasor. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366 (1993) (and cases cited). The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of prede-

livery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit.

I

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look " 'snazzier than it normally would appear' " 646 So.2d 619, 621 (Ala.1994). Mr. Slick, the proprietor, detected evidence that the car had been repainted.[1] Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles.[2] Dr. Gore alleged, *inter alia*, that the failure to disclose that the car had been repainted constituted suppression of a material fact.[3] The complaint prayed for $500,000 in compensatory and punitive damages, and costs.

At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired.[4] To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle.[5] Using the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

In defense of its disclosure policy, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that Dr. Gore's car was as good as a car with the original factory finish. It disputed Dr. Gore's assertion that the value of the car was impaired by the repainting and argued that this good-faith belief made a punitive award inappropriate. BMW also maintained that transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim.

The jury returned a verdict finding BMW liable for compensatory damages of $4,000.

1. The top, hood, trunk, and quarter panels of Dr. Gore's car were repainted at BMW's vehicle preparation center in Brunswick, Georgia. The parties presumed that the damage was caused by exposure to acid rain during transit between the manufacturing plant in Germany and the preparation center.

2. Dr. Gore also named the German manufacturer and the Birmingham dealership as defendants.

3. Alabama codified its common-law cause of action for fraud in a 1907 statute that is still in effect. *Hackmeyer v. Hackmeyer*, 268 Ala. 329, 333, 106 So.2d 245, 249 (Ala.1958). The statute provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Ala.Code § 6-5-102 (1993); see Ala.Code § 4299 (1907).

4. The dealer who testified to the reduction in value is the former owner of the Birmingham dealership sued in this action. He sold the dealership approximately one year before the trial.

5. Dr. Gore did not explain the significance of the $300 cut-off.

In addition, the jury assessed $4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud.[6] See Ala. Code §§ 6–11–20, 6–11–21 (1993).

BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs.[7] Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages.

BMW also drew the court's attention to the fact that its nondisclosure policy had never been adjudged unlawful before this action was filed. Just months before Dr. Gore's case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW's failure to disclose paint repair constituted fraud. *Yates v. BMW of North America, Inc.*, 642 So.2d 937 (Ala.1993).[8] Before the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States. When the $4 million verdict was returned in this case, BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.

In response to BMW's arguments, Dr. Gore asserted that the policy change demonstrated the efficacy of the punitive damages award. He noted that while no jury had held the policy unlawful, BMW had received a number of customer complaints relating to undisclosed repairs and had settled some lawsuits.[9] Finally, he maintained that the disclosure statutes of other States were irrelevant because BMW had failed to offer any evidence that the disclosure statutes supplanted, rather than supplemented, existing causes of action for common-law fraud.

The trial judge denied BMW's post-trial motion, holding, *inter alia*, that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. 646 So.2d 619 (1994). The court's excessiveness inquiry applied the factors articulated in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223–224 (Ala.1989), and approved in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21–22, 111 S.Ct. 1032, 1045–1046, 113 L.Ed.2d 1 (1991). 646 So.2d, at 624–625. Based on its analysis, the court concluded that BMW's conduct was "reprehensible"; the nondisclosure was profitable for the company; the judgment "would not have a substantial impact upon [BMW's] financial position"; the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of *no* punitive damages in *Yates* reflected "the inherent uncertainty of the trial process"; and the punitive award bore a "reasonable relationship" to "the harm that

6. The jury also found the Birmingham dealership liable for Dr. Gore's compensatory damages and the German manufacturer liable for both the compensatory and punitive damages. The dealership did not appeal the judgment against it. The Alabama Supreme Court held that the trial court did not have jurisdiction over the German manufacturer and therefore reversed the judgment against that defendant.

7. BMW acknowledged that a Georgia statute enacted *after* Dr. Gore purchased his car would require disclosure of similar repairs to a car before it was sold in Georgia. Ga. Code Ann. §§ 40–1–5(b)–(e) (1994).

8. While awarding a comparable amount of compensatory damages, the *Yates* jury awarded no punitive damages at all. In *Yates*, the plaintiff also relied on the 1983 nondisclosure policy, but instead of offering evidence of 983 repairs costing more than $300 each, he introduced a bulk exhibit containing 5,856 repair bills to show that petitioner had sold over 5,800 new BMW vehicles without disclosing that they had been repaired.

9. Prior to the lawsuits filed by Dr. Yates and Dr. Gore, BMW and various BMW dealers had been sued 14 times concerning presale paint or damage repair. According to the testimony of BMW's in-house counsel at the postjudgment hearing on damages, only one of the suits concerned a car repainted by BMW.

was likely to occur from [BMW's] conduct as well as . . the harm that actually occurred" *Id*, at 625–627

The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. *Id.*, at 627 Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is $2,000,000," *id*, at 629, and therefore ordered a remittitur in that amount.[10] The court's discussion of the amount of its remitted award expressly disclaimed any reliance on "acts that occurred in other jurisdictions"; instead, the court explained that it had used a "comparative analysis" that considered Alabama cases, "along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser."[11] *Id.*, at 628.

Because we believed that a review of this case would help to illuminate "the character of the standard that will identify constitutionally excessive awards" of punitive damages, see *Honda Motor Co. v. Oberg*, 512 U.S. ——, ——, — S.Ct. ——, ——, — L.Ed.2d —— (1994) (slip op., at 4), we granted certiorari, 513 U.S. ——, 115 S.Ct. 932, 130 L.Ed.2d 879 (1995)

II

[2, 3] Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz v. Robert Welch, Inc*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–267, 101 S.Ct. 2748, 2759–2760, 69 L.Ed.2d 616 (1981); *Haslip*, 499 U.S., at 22, 111 S.Ct., at 1045–1046. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See *TXO*, 509 U.S., at 456, 113 S.Ct., at 2719–2720; *Haslip*, 499 U.S., at 21, 22, 111 S.Ct., at 1045, 1045–1046. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Cf *TXO*, 509 U.S., at 456, 113 S.Ct., at 2719–2720. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the

10 The Alabama Supreme Court did not indicate whether the $2 million figure represented the court's independent assessment of the appropriate level of punitive damages, or its determination of the maximum amount that the jury could have awarded consistent with the Due Process Clause

11. Other than *Yates v. BMW of North America, Inc.* 642 So.2d 937 (Ala.1993) in which no punitive damages were awarded, the Alabama Supreme Court cited no such cases. In another portion of its opinion, 646 So.2d, at 629, the court did cite five Alabama cases none of which involved either a dispute arising out of the purchase of an automobile or an award of punitive damages. *G.M. Mosley Contractors, Inc. v. Phillips* 487 So.2d 876, 879 (Ala.1986); *Hollis v. Wyrosdick*, 508 So.2d 704 (Ala.1987); *Campbell v. Burns*, 512 So.2d 1341, 1343 (Ala.1987); *Ashbee v. Brock* 510 So.2d 214 (Ala.1987); and *Jawad v. Granade*, 497 So.2d 471 (Ala.1986). All of these cases support the proposition that appellate courts in Alabama presume that jury verdicts are correct. In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $4,000 by the number of refinished vehicles sold in the United States and (2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama)

value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law.[12] Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers.[13] The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a "safe harbor" for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs.[14]

We may assume, *arguendo*, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation,[15] it

12. See, *e.g.*, *Rivers v. BMW of North America, Inc.*, 214 Ga.App. 880, 449 S.E.2d 337 (1994) (nondisclosure of presale paint repairs that occurred before state disclosure statute enacted); *Wedmore v. Jordan Motors, Inc.*, 589 N.E.2d 1180 (Ind.App.1992) (same).

13. Four States require disclosure of vehicle repairs costing more than 3 percent of suggested retail price. Ariz.Rev.Stat. Ann. § 28–1304.03 (1989); N.C. Gen.Stat. § 20–305.1(d)(5a) (1995); S.C.Code § 56–32–20 (Supp.1995); Va.Code Ann. § 46.2–1571(D) (Supp.1995). An additional three States mandate disclosure when the cost of repairs exceeds 3 percent or $500, whichever is greater. Ala.Code § 8–19–5(22)(c) (1993); Cal. Veh.Code Ann. §§ 9990–9991 (West Supp.1996); Okla.Stat., Tit. 47, § 1112.1 (1991). Indiana imposes a 4 percent disclosure threshold. Ind. Code §§ 9–23–4–4, 9–23–4–5 (1993). Minnesota requires disclosure of repairs costing more than 4 percent of suggested retail price or $500, whichever is greater. Minn.Stat. § 325F.664 (1994). New York requires disclosure when the cost of repairs exceeds 5 percent of suggested retail price. N.Y. Gen. Bus. Law §§ 396–p(5)(a), (d) (McKinney Supp.1996). Vermont imposes a 5 percent disclosure threshold for the first $10,000 in repair costs and 2 percent thereafter. Vt. Stat. Ann., Tit. 9, § 4087(d) (1993). Eleven States mandate disclosure only of damage costing more than 6 percent of retail value to repair. Ark.Code Ann. § 23–112–705 (1992); Idaho Code § 49–1624 (1994); Ill. Comp. Stat., ch. 815, § 710/5 (1994); Ky.Rev.Stat. Ann. § 190.0491(5) (Baldwin 1988); La.Rev.Stat.Ann. § 32:1260 (Supp.1995); Miss. Motor Vehicle Comm'n, Regulation No. 1 (1992); N.H.Rev.Stat.Ann. § 357–C:5(III)(d) (1995); Ohio Rev.Code Ann. § 4517.61 (1994); R.I. Gen. Laws §§ 31–5.1–18(d), (f) (1995); Wis.Stat. § 218.01(2d)(a) (1994); Wyo.Stat. § 31–16–115 (1994). Two States require disclosure of repairs costing $3,000 or more. See Iowa Code Ann. § 321.69 (Supp.1996); N.D.Admin.Code § 37–09–01–01 (1992). Georgia mandates disclosure of paint damage that costs more than $500 to repair. Ga.Code Ann. §§ 40–1–5(b)–(e) (1994) (enacted after respondent purchased his car). Florida requires dealers to disclose paint repair costing more than $100 of which they have actual knowledge. Fla.Stat. § 320.27(9)(n) (1992). Oregon requires manufacturers to disclose all "post-manufacturing" damage and repairs. It is unclear whether this mandate would apply to repairs such as those at issue here. Ore.Rev.Stat. § 650.155 (1991).

Many, but not all, of the statutes exclude from the computation of repair cost the value of certain components—typically items such as glass, tires, wheels and bumpers—when they are replaced with identical manufacturer's original equipment. *E.g.*, Cal. Veh.Code Ann. §§ 9990–9991 (West Supp.1996); Ga.Code Ann. §§ 40–1–5(b)–(e) (1994); Ill.Comp.Stat., ch. 815, § 710/5 (1994); Ky.Rev.Stat.Ann. § 190.0491(5) (Baldwin 1988); Okla.Stat., Tit. 47 § 1112.1 (1991); Va.Code Ann. § 46.2–1571(D) (Supp.1995); Vt.Stat.Ann., Tit. 9, § 4087(d) (1993).

14. Also, a state legislature might plausibly conclude that the administrative costs associated with full disclosure would have the effect of raising car prices to the State's residents.

15. Federal disclosure requirements are, of course, a familiar part of our law. See, *e.g.*, the Federal Food, Drug, and Cosmetic Act, as added by the Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, 21 U.S.C. § 343; the Truth

is clear that no single State could do so, or even impose its own policy choice on neighboring States. See *Bonaparte v. Tax Court*, 104 U.S. 592, 594, 26 L.Ed. 845 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular") [16] Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, *Gibbons v. Ogden*, 9 Wheat. 1, 194–196, 6 L.Ed. 23 (1824), but is also constrained by the need to respect the interests of other States, see, *e.g.*, *Healy v. Beer Institute*, 491 U.S. 324, 335–336, 109 S.Ct. 2491, 2498–2499, 105 L.Ed.2d 275 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres" (footnote omitted)); *Edgar v. MITE Corp.*, 457 U.S. 624, 643, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982).

[4–6] We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.[17] Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983.[18] But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.[19] Nor

In Lending Act, 82 Stat. 148, as amended, 15 U.S.C. § 1604; the Securities and Exchange Act of 1934, 48 Stat. 892, 894, as amended, 15 U.S.C. §§ 78l–78m; Federal Cigarette Labeling and Advertising Act, 79 Stat. 283, as amended, 15 U.S.C. § 1333; Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4519, 27 U.S.C. § 215.

16. See also *Bigelow v. Virginia*, 421 U.S. 809, 824, 95 S.Ct. 2222, 2234, 44 L.Ed.2d 600 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161, 34 S.Ct. 879, 882, 58 L.Ed. 1259 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); *Huntington v. Attrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L.Ed. 1123 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

17. State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief").

18. Brief for Respondent 11–12, 23, 27–28; Tr. of Oral Arg. 50–54. Dr. Gore's interest in altering the nationwide policy stems from his concern that BMW would not (or could not) discontinue the policy in Alabama alone. *Id.*, at 11. "If Alabama were limited to imposing punitive damages based only on BMW's gain from fraudulent sales in Alabama, the resulting award would have no prospect of protecting Alabama consumers from fraud, as it would provide no incentive for BMW to alter the unitary, national policy of nondisclosure which yielded BMW millions of dollars in profits." *Id.*, at 23. The record discloses no basis for Dr. Gore's contention that BMW could not comply with Alabama's law without changing its nationwide policy.

19. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process

may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions

[7] In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages "based in large part on conduct that happened in other jurisdictions." 646 So.2d, at 627. As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful "The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice." *Id.*, at 627, n 6[20] The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct, *id.*, at 628, and based its remitted award solely on conduct that occurred within Alabama.[21] The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent—for reasons that we shall now address—that this award is grossly excessive

III

[8, 9] Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose[22] Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized

violation of the most basic sort") Our cases concerning recidivist statutes are not to the contrary Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions. See *e.g.*, Ala.Code § 13A-5-9 (1994); Cal.Penal Code Ann §§ 667 5(f), 668 (West Supp.1996); Ill Comp Stat., ch. 720, § 5/33B-1 (1994); N.Y. Penal Law §§ 70 04 70.06 70 08 70.10 (McKinney 1987 and Supp.1996); Tex. Penal Code Ann § 12 42 (1994 and Supp 1995-1996) A sentencing judge may even consider past criminal behavior which did not result in a conviction and lawful conduct that bears on the defendant's character and prospects for rehabilitation *Williams v New York* 337 U.S 241, 69 S.Ct 1079, 93 L Ed 1337 (1949). But we have never held that a sentencing court could properly *punish* lawful conduct This distinction is precisely the one we draw here See n 21, *infra*

20 Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasors' *unlawful* conduct in another State

21. Of course the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind To the contrary, as we stated in *TXO Production Corp v. Alliance Resources Corp.*, 509 U.S. 443, 462 n. 28, 113 S.Ct. 2711, 2722, n 28, 125 L.Ed.2d 366 (1993), and discuss more fully *infra*, at 16-19, such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct

22. See *Miller v. Florida*, 482 U.S. 423, 107 S.Ct 2446, 96 L.Ed 2d 351 (1987) (*Ex Post Facto* Clause violated by retroactive imposition of revised sentencing guidelines that provided longer sentence for defendant's crime); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct 1697, 12 L Ed 2d 894 (1964) (retroactive application of new construction of statute violated due process); *id.*, at 350-355, 84 S.Ct at 1701-1703 (citing cases); *Lankford v Idaho*, 500 U.S 110, 111 S.Ct. 1723 114 L.Ed.2d 173 (1991) (due process violated because defendant and his counsel did not have adequate notice that judge might impose death sentence) The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer v Heitner*, 433 U.S. 186 217, 97 S.Ct. 2569, 2587, 53 L Ed.2d 683 (1977) (STEVENS, J., concurring in judgment) is implicated by civil *penalties*

or imposed in comparable cases We discuss these considerations in turn.

Degree of Reprehensibility

[10] Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.[23] As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." *Day v. Woodworth*, 13 How. 363, 371, 14 L Ed. 181 (1852) See also *St. Louis, I M. & S.R. Co. v Williams*, 251 U.S. 63, 66–67, 40 S.Ct. 71, 73, 64 L Ed. 139 (1919) (punitive award may not be "wholly disproportioned to the offense"); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219 (1989) (O'CONNOR, J., concurring in part and dissenting in part) (reviewing court "should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages").[24] This principle reflects the accepted view that some wrongs are more blameworthy than others Thus, we have said that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem v. Helm*, 463 U.S. 277, 292–293, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983) Similarly, "trickery and deceit", *TXO*, 509 U.S., at 462, 113 S.Ct., at 2722, are more reprehensible than negligence In *TXO*, both the West Virginia Supreme Court and the Justices of this Court placed special emphasis on the principle that punitive damages may not be "grossly out of proportion to the severity of the offense."[25] *Id.*, at 453, 482, 113 S.Ct., at 2718, 2733. Indeed, for Justice KENNEDY, the defendant's intentional malice was the decisive element in a "close and difficult" case *Id.*, at 468, 113 S.Ct., at 2725.[26]

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, *id.*, at 453, 113 S.Ct., at 2717–2718, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. See *id.*, at 462, n. 28, 113 S.Ct., at 2722, n. 28 Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more

23. The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages ' Owen A Punitive Damages Overview: Functions, Problems and Reform. 39 Vill. L Rev 363 387 (1994)

24. The principle that punishment should fit the crime is deeply rooted and frequently repeated in common-law jurisprudence ' *Solem v. Helm*, 463 U.S 277 284 103 S.Ct. 3001 3006 77 L Ed 2d 637 (1983). See *Burkett v Lanata* 15 La Ann 337 339 (1860) (punitive damages should be 'commensurate to the nature of the offence'); *Blanchard v Morris*, 15 Ill. 35, 36 (1853) ('[W]e cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats violence and imprisonment were accompanied by mental fear torture and agony of mind''); *Louisville & Northern R. Co. v. Brown*, 127 Ky 732 749 106 S.W 795, 799 (1908) ('We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent')

25. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 22 111 S Ct. 1032 1045 113 L Ed 2d 1 (1991)

26. The dissenters also recognized that 'TXO s conduct was clearly wrongful calculated, and improper. . . ' *TXO* 509 U.S. at 482 113 S Ct at 2733 (O CONNOR J dissenting)

reprehensible than an individual instance of malfeasance. See *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258–1259, 92 L.Ed. 1683 (1948).

In support of his thesis, Dr. Gore advances two arguments. First, he asserts that the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud. Thus, according to Dr. Gore, the statutes may not properly be viewed as immunizing from liability the nondisclosure of repairs costing less than the applicable statutory threshold. Brief for Respondent 18–19. Second, Dr. Gore maintains that BMW should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud. *Id.*, at 4–5.

[11] We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties.[27] A review of the text of the statutes, however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines "material" damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $500, whichever is greater. Cal. Veh. Code Ann. § 9990 (West Supp. 1996). The Illinois statute states that in cases in which disclosure is not required, "nondisclosure does not constitute a misrepresentation or omission of fact." Ill. Comp. Stat., ch. 815, § 710/5 (1994).[28] Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.

Dr. Gore's second argument for treating BMW as a recidivist is that the company should have anticipated that its actions would be considered fraudulent in some, if not all, jurisdictions. This contention overlooks the fact that actionable fraud requires a *material*

27. In *Jeter v. M & M Dodge, Inc.*, 634 So.2d 1383 (La.App.1994), a Louisiana court of appeals suggested that the Louisiana disclosure statute functions as a safe harbor. Finding that the cost of repairing presale damage to the plaintiff's car exceeded the statutory disclosure threshold, the court held that the disclosure statute did not provide a defense to the action. *Id.*, at 1384.

During the pendency of this litigation, Alabama enacted a disclosure statute which defines "material" damage to a new car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $500, whichever is greater. Ala. Code § 8–19–5(22) (1993). After its decision in this case, the Alabama Supreme Court stated in dicta that the remedies available under this section of its Deceptive Trade Practices Act did not displace or alter pre-existing remedies available under either the common law or other statutes. *Hines v. Riverside Chevrolet–Olds, Inc.*, 655 So.2d 909, 917, n. 2 (Ala.1994). It refused, however, to 'recognize or impose on automobile manufacturers, a general duty to disclose every repair of damage, however slight, incurred during the manufacturing process.' *Id.*, at 921. Instead, it held that whether a defendant has a duty to disclose is a question of fact for the jury to determine." *Id.*, at 918. In reaching that conclusion it overruled two earlier decisions that seemed to indicate that as a matter of law there was no disclosure obligation in cases comparable to this one. *Id.*, at 920 (overruling *Century 21–Reeves Realty, Inc. v. McConnell Cadillac, Inc.*, 626 So.2d 1273 (Ala.1993), and *Cobb v. Southeast Toyota Distributors, Inc.*, 569 So.2d 395 (Ala.1990)).

28. See also Ariz. Rev. Stat. Ann. § 28–1304.03 (1989) ("'[I]f disclosure is not required under this section, a purchaser may not revoke or rescind a sales contract due solely to the fact that the new motor vehicle was damaged and repaired prior to completion of the sale'"); Ind. Code § 9–23–4–5 (1993) (providing that "[r]epaired damage to a customer-ordered new motor vehicle not exceeding four percent (4%) of the manufacturer's suggested retail price does not need to be disclosed at the time of sale"); N.C. Gen. Stat. § 20–305.1(e) (1993) (requiring disclosure of repairs costing more than 5 percent of suggested retail price and prohibiting revocation or rescission of sales contract on the basis of less costly repairs); Okla. Stat., Tit. 47, § 1112.1 (1991) (defining "material" damage to a car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $500, whichever is greater).

misrepresentation or omission.[29] This qualifier invites line drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value.[30] There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.[31]

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*. *Haslip*, 499 U.S., at 5, 111 S.Ct., at 1036, *TXO*, 509 U.S., at 453, 113 S.Ct., at 2717–2718. We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.

[12] That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award.

Ratio

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See *TXO*, 509 U.S., at 459, 113 S.Ct., at 2721; *Haslip*, 499 U.S., at 23, 111 S.Ct., at 1046. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree.[32] Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.[33] Our

29. Restatement (Second) of Torts § 538 (1977); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Law of Torts § 108 (5th ed. 1984).

30. The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws. *Wilburn v. Larry Savage Chevrolet, Inc.*, 477 So.2d 384 (Ala.1985). We note also that at trial respondent only introduced evidence of undisclosed paint damage to new cars repaired at a cost of $300 or more. This decision suggests that respondent believed that the jury might consider some repairs too *de minimis* to warrant disclosure.

31. Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.

32. See, *e.g.*, *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the real damage sustained"); *Saunders v. Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery v. Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"); *Houston & Texas Central R. Co. v. Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex.1882) ("Exemplary damages, when allowed, should bear proportion to the actual damages sustained"); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages 'enormously in excess of what may justly be regarded as compensation' for the injury must be set aside "to prevent injustice").

33. Owen, *supra* n. 23, at 368 and n. 23. One English statute, for example, provides that officers arresting persons out of their jurisdiction shall pay double damages. 3 Edw. I., ch. 35. Another directs that in an action for forcible entry or detainer, the plaintiff shall recover treble damages. 8 Hen. VI, ch. 9, § 6.

decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant

In *Haslip* we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages," might be "close to the line," it did not "cross the line into the area of constitutional impropriety." *Haslip*, 499 U.S., at 23–24, 111 S.Ct., at 1046 *TXO*, following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U.S., at 460, 113 S.Ct., at 2721 (emphasis in original), quoting *Haslip*, 499 U.S., at 21, 111 S.Ct., at 1045. Thus, in upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.[34]

The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury.[35] Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*.[36]

[13] Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award *TXO*, 509 U.S., at 458, 113 S.Ct., at 2720.[37] Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . properly enter[s] into the constitutional calculus.'" *TXO*, 509 U.S., at 458, 113 S.Ct., at 2720 (quoting *Haslip*,

Present-day federal law allows or mandates imposition of multiple damages for a wide assortment of offenses including violations of the antitrust laws, see § 4 of the Clayton Act 38 Stat 731, as amended, 15 U.S.C. § 15, and the Racketeer Influenced and Corrupt Organizations Act, see 18 U.S.C. § 1964 and certain breaches of the trademark laws, see § 35 of the Trademark Act of 1946, 60 Stat. 439 as amended, 15 U.S.C. § 1117, and the patent laws, see 66 Stat. 813 35 U.S.C. § 284

34 While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments had petitioner succeeded in its illicit scheme Thus even if the actual value of the 'potential harm to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, jar one's constitutional sensibilities'' *TXO*, 509 U.S., at 462 113 S.Ct. at 2722 quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18 111 S.Ct. at 1043

35. Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's

36 The ratio here is also dramatically greater than any award that would be permissible under the statutes and proposed statutes summarized in the appendix to Justice GINSBURG's dissenting opinion *Post* at 1618–1620.

37. Conceivably the Alabama Supreme Court's selection of a 500 to 1 ratio was an application of Justice SCALIA's identification of one possible reading of the plurality opinion in *TXO*: any future due process challenge to a punitive damages award could be disposed of with the simple observation that 'this is no worse than *TXO*.'' 509 U.S., at 472 113 S.Ct. at 2727 (SCALIA, J., concurring in judgment). As we explain in the text this award is significantly worse than the award in *TXO*

499 U S., at 18, 111 S Ct., at 1043). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow" *TXO*, 509 U S., at 482, 113 S Ct., at 2732 (O'CONNOR, J., dissenting)

Sanctions for Comparable Misconduct

[14] Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As Justice O'CONNOR has correctly observed, a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue" *Browning-Ferris Industries of Vt., Inc. v Kelco Disposal, Inc.*, 492 U S., at 301, 109 S Ct., at 2934 (O'CONNOR, J., concurring in part and dissenting in part) In *Haslip*, 499 U S, at 23, 111 S.Ct., at 1046, the Court noted that although the exemplary award was "much in excess of the fine that could be imposed," imprisonment was also authorized in the criminal context.[38] In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000;[39] other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000.[40] Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case

38. Although the Court did not address the size of the punitive damages award in *Silkwood v. Kerr-McGee Corp* 464 U S. 238, 104 S Ct. 615, 78 L Ed 2d 443 (1984), the dissenters commented on its excessive character noting that the "$10 million [punitive damages award] that the jury imposed is 100 times greater than the maximum fine that may be imposed for a single violation of federal standards' and more than 10 times greater than the largest single fine that the Commission has ever imposed." *Id.*, at 263, 104 S.Ct., at 629 (BLACKMUN, J., dissenting) In *New York Times Co v. Sullivan*, 376 U S. 254, 84 S Ct 710, 11 L Ed 2d 686 (1964), the Court observed that the punitive award for libel was "one thousand times greater than the maximum fine provided by the Alabama criminal statute," and concluded that the "fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute" *Id.* at 277, 84 S Ct. at 724

39. Ala Code § 8-19-11(b) (1993).

40. See, *e g*, Ark.Code Ann. § 23-112-309(b) (1992) (up to $5,000 for violation of state Motor Vehicle Commission Act that would allow suspension of dealer's license; up to $10,000 for violation of Act that would allow revocation of dealer's license); Fla Stat § 320.27(12) (1992) (up to $1 000); Ga Code Ann. §§ 40-1-5(g), 10-1-397(a) (1994 and Supp.1996) (up to $2,000 administratively; up to $5 000 in superior court); Ind.Code Ann § 9-23-6-4 (1993) ($50 to $1,000); N H.Rev Stat Ann §§ 357-C:15, 651:2 (1995 and Supp 1995) (corporate fine of up to $20 000); N Y Gen. Bus. Law § 396-p(6) (McKinney Supp 1995) ($50 for first offense; $250 for subsequent offenses).

IV

We assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMW's affected their actual value Notwithstanding the evidence adduced by BMW in an effort to prove that the repainted cars conformed to the same quality standards as its other cars, we also assume that it knew, or should have known, that as time passed the repainted cars would lose their attractive appearance more rapidly than other BMW's Moreover, we of course accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty

[15, 16] The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation

As in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit [41] Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion

It is so ordered

Justice BREYER, with whom Justice O'CONNOR and Justice SOUTER join, concurring

The Alabama state courts have assessed the defendant $2 million in "punitive damages" for having knowingly failed to tell a BMW automobile buyer that, at a cost of $600, it had repainted portions of his new $40,000 car, thereby lowering its potential resale value by about 10% The Court's opinion, which I join, explains why we have concluded that this award, in this case, was "grossly excessive" in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause See *TXO Production Corp v Alliance Resources Corp*, 509 U S 443, 453, 454, 113 S Ct 2711, 2718, 125 L Ed 2d 366 (1993) (A "grossly excessive" punitive award amounts to an "arbitrary deprivation of property without due process of law") (plurality opinion) Members of this Court have generally thought, however, that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity" *Id*, at 457, 113 S Ct, at 2720 See also *Pacific Mut Life Ins Co v Haslip*, 499 U S 1, 40–42, 111 S Ct 1032, 1054–1056, 113 L Ed 2d 1 (1991) (KENNEDY, J, concurring in judgment) And the Court also has found that punitive damages procedures very similar to those followed here were not, by themselves, fundamentally unfair *Id*, at 15–24, 111 S Ct, at 1041–1047 Thus, I believe it important to explain why this presumption of validity is overcome in this instance

41 Justice GINSBURG expresses concern that we are "the *only* federal court policing this limit *Post* at 1617 The small number of punitive damages questions that we have reviewed in recent years together with the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit indicates that this concern is at best premature In any event this consideration surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one

The reason flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.*, at 20–21, 111 S.Ct., at 1045. See also *id.*, at 18, 111 S.Ct., at 1043 ("[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities").

This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986); *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233–234, 32 L.Ed. 623 (1889). Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112, 69 S.Ct. 463, 466–467, 93 L.Ed. 533 (1949) (JACKSON, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally").

Legal standards need not be precise in order to satisfy this constitutional concern. See *Haslip, supra*, at 20, 111 S.Ct., at 1044 (comparing punitive damages standards to such legal standards as "reasonable care," "due diligence," and "best interests of the child") (internal quotation marks omitted). But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior. The standards the Alabama courts applied here are vague and open-ended to the point where they risk arbitrary results. In my view, although the vagueness of those standards does not, by itself, violate due process, see *Haslip, supra*, it does invite the kind of scrutiny the Court has given the particular verdict before us. See *id.*, at 18, 111 S.Ct., at 1043 ("[C]oncerns of . . . adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus"); *TXO, supra*, at 475, 113 S.Ct., at 2729 ("[I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict") (O'CONNOR, J., dissenting). This is because the standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results.

First, the Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards. That statute permits punitive damages in cases of "oppression, fraud, wantonness, or malice." Ala.Code § 6–11–20(a) (1993). But the statute goes on to define those terms broadly, to encompass far more than the egregious conduct that those terms, at first reading, might seem to imply. An intentional misrepresentation, made through a statement or silence, can easily amount to "fraud" sufficient to warrant punitive damages. See § 6–11–20(b)(1) ("Fraud" includes "intentional . . . concealment of a material fact the concealing party had a duty to disclose, which was gross, *oppressive, or malicious* and committed with the intention . . . of thereby depriving a person or entity of property") (emphasis added); § 6–11–20(b)(2)("Malice" includes *any "wrongful act without* just cause or *excuse* . . . *[w]ith an intent to injure* the . . . *property* of another") (emphasis added); § 6–11–20(b)(5) ("Oppression" includes "[s]ubjecting a person to . . . unjust hardship in conscious disregard of that person's rights"). The statute thereby authorizes punitive damages for the most

serious kinds of misrepresentations, say, tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue here, and for a vast range of conduct in between

Second, the Alabama courts, in this case, have applied the "factors" intended to constrain punitive damages awards, in a way that belies that purpose *Green Oil Co. v. Hornsby*, 539 So 2d 218 (Ala 1989), sets forth seven factors that appellate courts use to determine whether or not a jury award was "grossly excessive" and which, in principle, might make up for the lack of significant constraint in the statute. But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint.

(a) *Green Oil* requires that a punitive damages award "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *Id.*, at 223. But this standard does little to guide a determination of what counts as a "reasonable" relationship, as this case illustrates. The record evidence of past, present, or likely future harm consists of (a) $4,000 of harm to Dr. Gore's BMW; (b) 13 other similar Alabama instances; and (c) references to about 1,000 similar instances in other States The Alabama Supreme Court, disregarding BMW's failure to make relevant objection to the out-of-state instances at trial (as was the court's right), held that the last mentioned, out-of-state instances did *not* count as relevant harm It went on to find "a reasonable relationship" between the harm and the $2 million punitive damages award *without* "*consider[ing] those acts that occurred in other jurisdictions.*" 646 So 2d 619, 628 (1995) (emphasis added). For reasons explored by the majority in greater depth, see *ante*, at 1598–1604, the relationship between this award and the underlying conduct seems well beyond the bounds of the "reasonable." To find a "reasonable relationship" between purely economic harm totaling $56,000, without significant evidence of future repetition, and a punitive award of $2 million is to empty the "reasonable relationship" test of meaningful content As thus construed, it does not set forth a legal standard that could have significantly constrained the discretion of Alabama factfinders.

(b) *Green Oil*'s second factor is the "degree of reprehensibility" of the defendant's conduct *Green Oil*, *supra*, at 223. Like the "reasonable relationship" test, this factor provides little guidance on how to relate culpability to the size of an award. The Alabama court, in considering this factor, found "reprehensible" that BMW followed a conscious policy of not disclosing repairs to new cars when the cost of repairs amounted to less than 3% of the car's value Of course, *any* conscious policy of not disclosing a repair—where one knows the nondisclosure might cost the customer resale value—is "reprehensible" to *some* degree. But, for the reasons discussed by the majority, *ante*, at 1598–1601, I do not see how the Alabama courts could find conduct that (they assumed) caused $56,000 of relevant economic harm *especially* or *unusually* reprehensible enough to warrant $2 million in punitive damages, or a significant portion of that award. To find to the contrary, as the Alabama courts did, is not simply unreasonable; it is to make "reprehensibility" a concept without constraining force, *i.e.*, to deprive the concept of its constraining power to protect against serious and capricious deprivations.

(c) *Green Oil*'s third factor requires "punitive damages" to "remove the profit" of the illegal activity and "be in excess of the profit, so that the defendant recognizes a loss." *Green Oil*, *supra*, at 223. This factor has the ability to limit awards to a fixed, rational amount But as applied, that concept's potential was not realized, for the court did not limit the award to anywhere near the $56,000 in profits evidenced in the record. Given the record's description of the conduct and its prevalence, this factor could not justify much of the $2 million award.

(d) *Green Oil*'s fourth factor is the "financial position" of the defendant. *Ibid.* Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the state's

interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives). See *TXO*, 509 U.S., at 462, and n. 28, 113 S.Ct., at 2722, and n. 28 (plurality opinion); *id.*, at 469, 113 S.Ct., at 2726 (KENNEDY, J., concurring in part and concurring in judgment); *Haslip*, 499 U.S., at 21–22, 111 S.Ct., at 1045; *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300, 109 S.Ct. 2909, 2933, 106 L.Ed.2d 219 (1989) (O'CONNOR, J., concurring in part, dissenting in part). This factor, however, is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy, as this case may illustrate. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct.

(e) *Green Oil*'s fifth factor is the "costs of litigation" and the State's desire "to encourage plaintiffs to bring wrongdoers to trial." 539 So.2d, at 223. This standard provides meaningful constraint to the extent that the enhancement it authorized is linked to a fixed, ascertainable amount approximating actual costs, even when defined generously to reflect the contingent nature of plaintiffs' victories. But as this case shows, the factor cannot operate as a constraint when an award much in excess of costs is approved for other reasons. An additional aspect of the standard—the need to "encourage plaintiffs to bring wrongdoers to trial"—is a factor that does not constrain, but enhances, discretionary power—especially when unsupported by evidence of a *special* need to encourage litigation (which the Alabama courts here did not mention).

(f) *Green Oil*'s sixth factor is whether or not "criminal sanctions have been imposed on the defendant for his conduct." *Ibid.* This factor did not apply here.

(g) *Green Oil*'s seventh factor requires that "other civil actions" filed "against the same defendant, based on the same conduct" be considered in mitigation. *Id.*, at 224. That factor did not apply here.

Thus, the first, second, and third *Green Oil* factors, in principle, might sometimes act as constraints on arbitrary behavior. But *as the Alabama courts interpreted those standards in this case*, even taking those three factors together, they could not have significantly constrained the court system's ability to impose "grossly excessive" awards.

Third, the state courts neither referred to, nor made any effort to find, nor enunciated any other standard, that either directly, or indirectly as background, might have supplied the constraining legal force that the statute and *Green Oil* standards (as interpreted here) lack. Dr. Gore did argue to the jury an economic theory based on the need to offset the totality of the harm that the defendant's conduct caused. Some theory of that general kind might have provided a significant constraint on arbitrary awards (at least where confined to the relevant harm-causing conduct, see *ante*, at 1596–1598). Some economists, for example, have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the harm caused. See, *e.g.*, S. Shavell, Economic Analysis of Accident Law 162 (1987) ("If liability equals losses caused multiplied by . . . the inverse of the probability of suit, injurers will act optimally under liability rules despite the chance that they will escape suit"); Cooter, Punitive Damages for Deterrence: When and How Much, 40 Ala. L.Rev. 1143, 1146–1148 (1989). My understanding of the intuitive essence of some of those theories, which I put in crude form (leaving out various qualifications), is that they could permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and adding generous attorneys fees and other costs. Smaller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would "over-deter" by leading potential defendants

to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself. See Galligan, Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L.Rev. 3, 17–20, 28–30 (1990). Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.

The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied *any* "economic" theory that might explain the $2 million recovery. Cf. *Browning-Ferris, supra*, at 300, 109 S.Ct., at 2933 (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it " 'require the States to subscribe to any particular economic theory' ") (O'CONNOR, J., concurring in part and dissenting in part) (quoting *CTS Corp. v Dynamics Corp. of America*, 481 U.S. 69, 92, 107 S.Ct. 1637, 1651, 95 L.Ed.2d 67 (1987)). And courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, cf. *TXO*, 509 U.S., at 468, 113 S.Ct., at 2725 (KENNEDY, J., concurring in part and concurring in judgment), not those that might have been given on the basis of some conceivable set of facts (unlike the rationality of economic statutes enacted by legislatures subject to the public's control through the ballot box, see, *e.g., FCC v Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993)). Therefore, reference to a constraining "economic" theory, which might have counseled more deferential review by this Court, is lacking in this case.

Fourth, I cannot find any community understanding or historic practice that this award might exemplify and which, therefore, would provide background standards constraining arbitrary behavior and excessive awards. A punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times. *Amici* for Dr. Gore attempt to show that this is not true, pointing to various historical cases which, according to their calculations, represented roughly equivalent punitive awards for similarly culpable conduct. See Brief for James D.A. Boyle et al. as *Amici Curiae* 4–5 (hereinafter Legal Historians' Brief). Among others, they cite *Wilkes v Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763) (£1,000 said to be equivalent of $1.5 million, for warrantless search of papers); *Huckle v Money*, 2 Wills. 205, 95 Eng. Rep. 768 (K.B. 1763) (£300, said to be $450,000, for 6-hour false imprisonment); *Hewlett v. Cruchley*, 5 Taunt. 277, 128 Eng. Rep. 696 (C.P. 1813) (£2,000, said to be $680,000, for malicious prosection); *Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) (£500, said to be $165,000, for poaching). But *amici* apparently base their conversions on a mathematical assumption, namely that inflation has progressed at a constant 3% rate of inflation. See Legal Historians' Brief 4. In fact, consistent, cumulative inflation is a modern phenomenon. See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States, 101 Proceedings of American Antiquarian Society 297, 310, 323–332 (1992). Estimates based on historical rates of valuation, while highly approximate, suggest that the ancient extraordinary awards are small compared to the $2 million here at issue, or other modern punitive damages figures. See Appendix to this opinion, *infra*, at 13–14 (suggesting that the modern equivalent of the awards in the above cases is something like $150,000, $45,000, $100,000, and $25,000 respectively). And, as the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards, rather than arbitrariness or caprice.

Fifth, there are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards. Cf., *e.g.*, Tex. Civ. Prac. & Rem. Code

Ann. § 41.008 (Supp.1996) (punitive damages generally limited to greater of double damages, or $200,000, except cap does not apply to suits arising from certain serious criminal acts enumerated in the statute); Conn. Gen. Stat. § 52–240b (1995) (punitive damages may not exceed double compensatory damages in product liability cases); Fla. Stat. § 768.73(1) (Supp.1993) (punitive damages in certain actions limited to treble compensatory damages); Ga. Code. Ann. § 51–12–5.1(g) (Supp.1995) ($250,000 cap in certain actions).

The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact. That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) was grossly excessive in light of the State's legitimate punitive damages objectives.

The first of these reasons has special importance where courts review a jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.

To the extent that neither clear legal principles, nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection? The standards here, as authoritatively interpreted, in my view, make this threat real and not theoretical. And, in these unusual circumstances, where legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court's detailed examination of the award.

The second reason—the severe disproportionality between the award and the legitimate punitive damages objectives—reflects a judgment about a matter of degree. I recognize that it is often difficult to determine just when a punitive award exceeds an amount reasonably related to a State's legitimate interests, or when that excess is so great as to amount to a matter of constitutional concern. Yet whatever the difficulties of drawing a precise line, once we examine the award in this case, it is not difficult to say that this award lies on the line's far side. The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category of "gross excessiveness" set forth in this Court's prior cases.

These two reasons *taken together* overcome what would otherwise amount to a "strong presumption of validity." *TXO*, 509 U.S., at 457, 113 S.Ct., at 2720. And, for those two reasons, I conclude that the award in this unusual case violates the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides.

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Although I recognize that all estimates of historic rates of inflation are subject to dispute, including, I assume, the sources below, those sources suggest that the value of the eighteenth and nineteenth century judgments cited by *amici* is much less than the figures *amici* arrived at under their presumption of a constant 3% rate of inflation.

In 1763, £1 (Eng.) was worth £1.73 Pennsylvania currency. See U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Series Z—585, p. 1198 (Bicentennial ed.1975). For the period 1766–1772, £1 (Penn.) was worth $45.99 (U.S.1991). See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States, 101 American Antiquarian Society 297, 333

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(1992). Thus, £1 (Eng.1763) is worth about $79.56 (U.S.1991). Accounting for the 12% inflation of the U.S. dollar between 1991 and 1995 (when *amici* filed their brief), see Economic Indicators, 104th Cong., 2d Sess., p. 23 (Feb.1996), £1 (Eng.1763) is worth about $89.11 (U.S.1995).

Calculated another way, £1 (Eng.1763) is worth about £72.84 (Eng.1991). See McCusker, *supra*, at 312, 342, 350. And £1 (Eng.1991) is worth $1.77 (U.S.1991). See 78 Fed. Reserve Bulletin A68 (Feb.1992). Thus, £1 (Eng.1763) amounts to about $128.93 (U.S.1991). Again, accounting for inflation between 1991 and 1995, this amounts to about $144.40 (U.S.1995).

Thus, the above sources suggest that the £1,000 award in *Wilkes* in 1763 roughly amounts to between $89,110 and $144,440 today, not $1.5 million. And the £300 award in *Huckle* that same year would seem to be worth between $26,733 and $43,320 today, not $450,000.

For the period of the *Hewlett* and *Merest* decisions, £1 (Eng.1813) is worth about £25.3 (Eng.1991). See McCusker, *supra*, at 344, 350. Using the 1991 exchange rate, £1 (Eng.1813) is worth about $44.78 (U.S.1991). Accounting for inflation between 1991 and 1995, this amounts to about $50.16 (U.S. 1995).

Thus, the £2,000 and £500 awards in *Hewlett* and *Merest* would seem to be closer to $100,320 and $25,080, respectively, than to *amici*'s estimates of $680,000 and $165,000.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1 (1991). Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for "reasonableness," furnishes a defendant with all the process that is "due." See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470, 113 S.Ct. 2711, 2726, 125 L.Ed.2d 366 (1993) (SCALIA, J., concurring in judgment); *Haslip, supra*, at 25–28, 111 S.Ct., at 1046–1049 (SCALIA, J., concurring in judgment); cf. *Honda Motor Co. v. Oberg*, 512 U.S. ——, ——, 114 S.Ct. 2331, 2342, 129 L.Ed.2d 336 (1994) (SCALIA, J., concurring). I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable. See *TXO, supra*, at 471, 113 S.Ct., at 2727 (SCALIA, J., concurring in judgment).

This view, which adheres to the text of the Due *Process* Clause, has not prevailed in our punitive-damages cases. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S., at 453–462, 113 S.Ct., at 2718–2723 (plurality opinion); *id.*, at 478–481, 113 S.Ct., at 2731–2732 (O'CONNOR, J., dissenting); *Haslip, supra*, at 18, 111 S.Ct., at 1043. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so. See, *e.g.*, *Witte v. United States*, 515 U.S. ——, ——, 115 S.Ct. 2199, 2209, 132 L.Ed.2d 351 (1995) (SCALIA, J., concurring in judgment); *Walton v. Arizona*, 497 U.S. 639, 673, 110 S.Ct. 3047, 3067–3068, 111 L.Ed.2d 511 (1990) (SCALIA, J., concurring in judgment in part and dissenting in part). Our punitive-damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another as-

pect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed

Because today's judgment represents the first instance of this Court's invalidation of a state-court punitive assessment as simply unreasonably large, I think it a proper occasion to discuss these points at some length

I

The most significant aspects of today's decision—the identification of a "substantive due process" right against a "grossly excessive" award, and the concomitant assumption of ultimate authority to decide anew a matter of "reasonableness" resolved in lower court proceedings—are of course not new *Haslip* and *TXO* revived the notion, moribund since its appearance in the first years of this century, that the measure of civil punishment poses a question of constitutional dimension to be answered by this Court. Neither of those cases, however, nor any of the precedents upon which they relied, actually took the step of declaring a punitive award unconstitutional simply because it was "too big."

At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved See, *e.g.*, *Barry v. Edmunds*, 116 U.S. 550, 565, 6 S.Ct. 501, 509, 29 L.Ed. 729 (1886); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521, 6 S.Ct. 110, 113, 29 L.Ed. 463 (1885); *Day v. Woodworth*, 13 How. 363, 371, 14 L.Ed. 181 (1852). See generally *Haslip, supra*, at 25–27, 111 S.Ct., at 1047–1048 (SCALIA, J., concurring in judgment) Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," *ante*, at 1609; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties. These were the decisions upon which the *TXO* plurality relied in pronouncing that the Due Process Clause "imposes substantive limits 'beyond which penalties may not go,'" 509 U.S., at 454, 113 S.Ct., at 2718 (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78, 28 S.Ct. 28, 30, 52 L.Ed. 108 (1907)); see also 509 U.S., at 478–481, 113 S.Ct., at 2731–2732 (O'CONNOR, J., dissenting); *Haslip*, 499 U.S., at 18, 111 S.Ct., at 1043. Although they are our precedents, they are themselves too shallowly rooted to justify the Court's recent undertaking The only case relied upon in which the Court actually invalidated a civil sanction does not even support constitutional review for excessiveness, since it really concerned the validity, as a matter of *procedural* due process, of state legislation that imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed See *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 489–491, 35 S.Ct. 886, 887–888, 59 L.Ed. 1419 (1915). The *amount* of the penalty was not a subject of independent scrutiny. As for the remaining cases, while the opinions do consider arguments that statutory penalties can, by reason of their excessiveness, violate due process, not a single one of these judgments invalidates a damages award. See *Seaboard, supra*, at 78–79, 28 S.Ct., at 30; *Waters–Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111–112, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286, 290, 32 S.Ct. 406, 411, 412, 56 L.Ed. 760 (1912); *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66–67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

More importantly, this latter group of cases—which again are the *sole* precedential foundation put forward for the rule of constitutional law espoused by today's Court—simply fabricated the "substantive due process" right at issue. *Seaboard* assigned no precedent to its bald assertion that the Constitution imposes "limits beyond which penalties may not go," 207 U.S., at 78, 28 S.Ct., at 30. *Waters-Pierce* cited only *Coffey v. County of Harlan*, 204 U.S. 659, 27 S.Ct. 305, 51 L.Ed. 666 (1907), a case which inquired into the constitutionality of state *procedure*, *id.*, at 662–663, 27 S.Ct., at 305–306. *Standard Oil* simply cited *Waters-Pierce*, and *St. Louis, I.M. & S.R. Co.* offered in addition to these cases only *Collins v. Johnston*, 237 U.S. 502, 35 S.Ct. 649, 59 L.Ed. 1071 (1915), which said nothing to support the notion of a "substantive due process" right against excessive civil penalties, but to the contrary asserted that the prescribing and imposing of criminal punishment were "functions peculiarly belonging to the several States," *id.*, at 509–510, 35 S.Ct., at 652–653. Thus, the only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards, see, *e.g.*, *Haslip*, 499 U.S., at 15–18, 111 S.Ct., at 1041–1043; *id.*, at 25–28, 111 S.Ct., at 1047–1048 (SCALIA, J., concurring in judgment).

II

One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be

We are instructed at the outset of Part II of the Court's opinion—the beginning of its substantive analysis—that "the federal excessiveness inquiry . . . begins with an identification of the state interests that a punitive award is designed to serve." *Ante*, at 1595. On first reading this, one is faced with the prospect that federal punitive-damages law (the new field created by today's decision) will be beset by the sort of "interest analysis" that has laid waste the formerly comprehensible field of conflict of laws. The thought that each assessment of punitive damages, as to each offense, must be examined to determine the precise "state interests" pursued, is most unsettling. Moreover, if those "interests" are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them

It appears, however (and I certainly hope), that all this is a false alarm. As Part II of the Court's opinion unfolds, it turns out to be directed, not to the question "How much punishment is too much?" but rather to the question "Which acts can be punished?" "Alabama does not have the power," the Court says, "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Ante*, at 1597. That may be true, though only in the narrow sense that a person cannot be *held liable to be punished* on the basis of a lawful act. But if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of "information concerning every aspect of a defendant's life," *Williams v. New York*, 337 U.S. 241, 250–252, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337 (1949). The Court at one point seems to acknowledge this, observing that, although a sentencing court "[cannot] properly *punish* lawful conduct," it may in assessing the penalty "consider . . . lawful conduct that bears on the defendant's character." *Ante*, at 1598, n. 19. That concession is quite incompatible, however, with the later assertion that, since "neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful," the Alabama Supreme Court "therefore properly eschewed reliance on BMW's out-of-state conduct, . . . and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 1598. Why could the Supreme Court of Alabama not consider lawful (but disreputable) conduct, both inside

and outside Alabama, for the purpose of assessing just how bad an actor BMW was?

The Court follows up its statement that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred" with the statement: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Ante*, at 1597–1598. The Court provides us no citation of authority to support this proposition—other than the barely analogous cases cited earlier in the opinion, see *ante*, at 1596–1597——and I know of none.

These significant issues pronounced upon by the Court are not remotely presented for resolution in the present case. There is no basis for believing that Alabama has sought to control conduct elsewhere. The statutes at issue merely permit civil juries to treat conduct such as petitioner's as fraud, and authorize an award of appropriate punitive damages in the event the fraud is found to be "gross, oppressive, or malicious," Ala. Code § 6–11–20(b)(1) (1993). To be sure, respondent did invite the jury to consider out-of-state conduct in its calculation of damages, but any increase in the jury's initial award based on that consideration is not a component of the remitted judgment before us. As the Court several times recognizes, in computing the amount of the remitted award the Alabama Supreme Court—whether it was constitutionally required to or not—"expressly disclaimed any reliance on acts that occurred in other jurisdictions." *Ante*, at 1595 (internal quotation marks omitted); see also *ante*, at 1598.* Thus, the only question presented by this case is whether that award, limited to petitioner's Alabama conduct and viewed in light of the factors identified as properly informing the inquiry, is excessive. The Court's sweeping (and largely unsupported) statements regarding the relationship of punitive awards to lawful or unlawful out-of-state conduct are the purest dicta.

III

In Part III of its opinion, the Court identifies "[t]hree guideposts" that lead it to the conclusion that the award in this case is excessive: degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative sanctions provided for comparable misconduct. *Ante*, at 1598–1604. The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct," *ante*, at 1603–1604——a loophole that will encourage state reviewing courts to uphold awards as necessary for the "adequat[e] protect[ion]" of state consumers, *ibid.* By effectively requiring state reviewing courts to concoct rationalizations—whether within the "guideposts" or through the loophole—to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that " 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence,' " *ante*, at 1599 (quoting *Solem v. Helm*, 463 U.S. 277, 292–293, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983)), and that " 'trickery and deceit' " are "more reprehensible than negligence," *ante*, at 1599. As to the ratio of punitive to compensatory damages, we are told that a " 'general concer[n] of reasonableness . . . enter[s] into the con-

* The Alabama Supreme Court said:

"[W]e must conclude that the award of punitive damages was based in large part on conduct that happened in other jurisdictions. . . . Although evidence of similar acts in other jurisdictions is admissible as to the issue of 'pattern and practice' of such acts, . . . this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." 646 So.2d 619, 627 (1994)

stitutional calculus,'" *ante,* at 1602 (quoting *TXO, supra,* at 458, 113 S.Ct., at 2720)—though even "a breathtaking 500 to 1" will not necessarily do anything more than "'raise a suspicious judicial eyebrow,'" *ante,* at 1603 (quoting *TXO, supra,* at 481, 113 S.Ct., at 2732 (O'CONNOR, J., dissenting), an opinion which, when confronted with that "breathtaking" ratio, approved it). And as to legislative sanctions provided for comparable misconduct, they should be accorded "'substantial deference,'" *ibid* (quoting *Browning-Ferris Industries of Vt., Inc v. Kelco Disposal, Inc.,* 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219 (O'CONNOR, J., concurring in part and dissenting in part)). One expects the Court to conclude: "To thine own self be true."

These criss-crossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three "guideposts" are the *only* guideposts; indeed, it makes very clear that they are not—explaining away the earlier opinions that do not really follow these "guideposts" on the basis of *additional* factors, thereby "reiterat[ing] our rejection of a categorical approach." *Ante,* at 1599. In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations. The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."

The Court distinguishes today's result from *Haslip* and *TXO* partly on the ground that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." *Ante,* at 1601. This seemingly rejects the findings necessarily made by the jury—that petitioner had committed a fraud that was "gross, oppressive, or malicious," Ala.Code § 6-11-20(b)(1) (1996). Perhaps that rejection is intentional; the Court does not say.

The relationship between judicial application of the new "guideposts" and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to *how* reprehensible petitioner's conduct was (*i.e.*, how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible *at all* (*i.e.*, that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably *imposed* awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of *compensatory* damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. See *TXO, supra,* at 471, 113 S.Ct., at 2727 (SCALIA, J., concurring in judgment). And the same would be true for determinations of liability. By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

For the foregoing reasons, I respectfully dissent.

Justice GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court's prior instructions; and, more recently, Alabama's highest court has installed fur-

ther controls on awards of punitive damages (see *infra*, at 1617, n. 6). I would therefore leave the state court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

I

The respect due the Alabama Supreme Court requires that we strip from this case a false issue: no impermissible "extraterritoriality" infects the judgment before us; the excessiveness of the award is the sole issue genuinely presented. The Court ultimately so recognizes, see *ante*, at 1597–1598, but further clarification is in order.

Dr. Gore's experience was not unprecedented among customers who bought BMW vehicles sold as flawless and brand-new. In addition to his own encounter, Gore showed, through paint repair orders introduced at trial, that on 983 other occasions since 1983, BMW had shipped new vehicles to dealers without disclosing paint repairs costing at least $300, Tr. 585–586; at least 14 of the repainted vehicles, the evidence also showed, were sold as new and undamaged to consumers in Alabama. 646 So.2d 619, 623 (Ala. 1994). Sales nationwide, Alabama's Supreme Court said, were admissible "as to the issue of a 'pattern and practice' of such acts." *Id.*, at 627. There was "no error," the court reiterated, "in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it." *Id.*, at 628. That determination comports with this Court's expositions. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, and n. 28, 113 S.Ct. 2711, 2722, and n. 28, 125 L.Ed.2d 366 (1993) (characterizing as "well-settled" the admissibility of "evidence of [defendant's] alleged wrongdoing in other parts of the country" and of defendant's "wealth"); see also Brief for Petitioner 22 (recognizing that similar acts, out-of-state, traditionally have been considered relevant "for the limited purpose of determining that the conduct before the [c]ourt was reprehensible because it was part of a pattern rather than an isolated incident").

Alabama's highest court next declared that the

> "jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." 646 So.2d, at 627 (emphasis in original) (footnote omitted).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based on out-of-state events not shown to be unlawful. See, *e.g.*, *Independent Life and Accident Ins. Co. v. Harrington*, 658 So.2d 892, 902–903 (Ala. 1994) (under *BMW v. Gore*, trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm caused by defendant's unlawful actions).

No Alabama authority, it bears emphasis—no statute, judicial decision, or trial judge instruction—ever countenanced the jury's multiplication of the $4,000 diminution in value estimated for each refinished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. App. 31, Tr. 812–813. Notably, counsel for BMW failed to object to Gore's multiplication suggestion, even though BMW's counsel interrupted to make unrelated objections four other times during Gore's closing statement. Tr. 810–811, 854–855, 858, 870–871. Nor did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award. See Record 513–529 (listing all charges requested by counsel).

Following the verdict, BMW's counsel challenged the *admission* of the paint repair orders, but not, alternately, the jury's apparent use of the orders in a multiplication exercise. Curiously, during postverdict argument, BMW's counsel urged that if the

repair orders were indeed admissible, then Gore would have a "full right" to suggest a multiplier-based disgorgement. Tr. 932.

In brief, Gore's case is idiosyncratic. The jury's improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does not call for error correction by this Court.

Because the jury apparently (and erroneously) had used acts in other states as a multiplier to arrive at a $4 million sum for punitive damages, the Alabama Supreme Court itself determined "'the maximum amount that a properly functioning jury could have awarded'" 646 So.2d, at 630 (HOUSTON, J., concurring specially) (quoting *Big B, Inc. v. Cottingham*, 634 So.2d 999, 1006 (Ala.1993)). The *per curiam* opinion emphasized that in arriving at $2 million as "the *amount of punitive damages* to be awarded in this case, [the court did] not consider those acts that occurred in other jurisdictions." 646 So.2d, at 628 (emphasis in original). As this Court recognizes, the Alabama high court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 1598 (citation omitted). In sum, the Alabama Supreme Court left standing the jury's decision that the facts warranted *an award* of punitive damages—a determination not contested in this Court—and the state court concluded that, considering only acts in Alabama, $2 million was "a constitutionally reasonable punitive damages award." 646 So.2d, at 629.

II

A

Alabama's Supreme Court reports that it "thoroughly and painstakingly" reviewed the jury's award, *ibid.*, according to principles set out in its own pathmarking decisions and in this Court's opinions in *TXO* and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991). 646 So.2d, at 621. The Alabama court said it gave weight to several factors, including BMW's deliberate ("reprehensible") presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated 10%,[1] the financial position of the defendant, and the costs of litigation. *Id.*, at 625–626. These standards, we previously held, "impos[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Haslip*, 499 U.S., at 22, 111 S.Ct., at 1045; see also *TXO*, 509 U.S., at 462, n. 28, 113 S.Ct., at 2722, n. 28. Alabama's highest court could have displayed its labor pains more visibly,[2] but its judgment is nonetheless entitled to a presumption of legitimacy. See *Rowan v. Runnels*, 5 How. 134, 139, 12 L.Ed. 85 (1847) ("[T]his court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws").

We accept, of course, that Alabama's Supreme Court applied the State's own law correctly. Under that law, the State's objectives—"punishment and deterrence"—guide punitive damages awards. See *Birmingham v. Benson*, 631 So.2d 902, 904 (Ala.1993). Nor should we be quick to find a constitutional infirmity when the highest state court endeavored a corrective for one counsel's slip and the other's oversight—counsel for plaintiff's excess in summation, unobjected to by counsel for defendant, see *supra*, at 1593—and when the state court did so intending to follow the process approved in our *Haslip* and *TXO* decisions.

B

The Court finds Alabama's $2 million award not simply excessive, but grossly so, and therefore unconstitutional. The decision

1. According to trial testimony, in late May 1992, BMW began redirecting refinished cars out of Alabama and two other States. Tr. 964. The jury returned its verdict in favor of Gore on June 12, 1992. Five days later, BMW changed its national policy to one of full disclosure. *Id.*, at 1026.

2. See, *e.g.*, Brief for Law and Economics Scholars et al. as *Amici Curiae* 6–28 (economic analysis demonstrates that Alabama Supreme Court's judgment was not unreasonable); W. Landes & R. Posner, Economic Structure of Tort Law 160–163 (1987) (economic model for assessing propriety of punitive damages in certain tort cases).

leads us further into territory traditionally within the States' domain,[3] and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." But cf. S.Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").[4] The Court is not well equipped for this mission. Tellingly, the Court repeats that it brings to the task no "mathematical formula," *ante*, at 1602, no "categorical approach," *ante*, at 1602, no "bright line," *ante*, at 1604. It has only a vague concept of substantive due process, a "raised eyebrow" test, see *ante*, at 1603, as its ultimate guide.[5]

In contrast to habeas corpus review under 28 U.S.C. § 2254, the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area. The Court's readiness to superintend state court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings. See generally 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820 (2d ed. 1995). And the reexamination prominent in state courts[6] and in legislative arenas, see Appendix, *in-*

3. See *ante*, at 1595 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278, 109 S.Ct. 2909, 2921–2922, 106 L.Ed.2d 219 (1989) (In any "lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 78 L.Ed.2d 443 (1984) ("Punitive damages have long been a part of traditional state tort law.")

4. Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation, and rightly so, in my judgment, for this case does not present the issue. For three reasons, the question of multiple awards is hypothetical, not real, in Gore's case. First, the punitive damages award in favor of Gore is the only such award yet entered against BMW on account of its nondisclosure policy.

Second, BMW did not raise the issue of multiple punitives below. Indeed, in its reply brief before the Alabama Supreme Court, BMW stated: "Gore confuses our point about fairness among plaintiffs. He treats this point as a premature 'multiple punitive damages' argument. But contrary to Gore's assertion, we are not asking this Court to hold, as a matter of law, that a 'constitutional violation occurs when a defendant is subjected to punitive damages in two separate cases.'" Reply Brief for Appellant in Nos. 1920324, 1920325 (Ala. Sup. Ct.), p. 48 (internal citations omitted).

Third, if BMW had already suffered a punitive damages judgment in connection with its nondisclosure policy, Alabama's highest court presumably would have taken that fact into consideration. In reviewing punitive damages awards attacked as excessive, the Alabama Supreme Court considers whether "there have been other civil actions against the same defendant, based on the same conduct." 646 So.2d 619, 624 (1994) (quoting *Green Oil Co. v. Hornsby*, 539 So.2d 218, 224 (Ala. 1989)). If so, "this should be taken into account in mitigation of the punitive damages award." *Ibid.* The Alabama court accordingly observed that Gore's counsel had filed 24 other actions against BMW in Alabama and Georgia, but that no other punitive damages award had so far resulted. *Id.*, at 626.

5. Justice BREYER's concurring opinion offers nothing more solid. Under *Haslip*, he acknowledges, Alabama's standards for punitive damages, standing alone, do not violate due process. *Ante*, at 1605. But they "invit[e] the kind of scrutiny the Court has given the particular verdict before us." *Ibid.* Pursuing that invitation, Justice BREYER concludes that, matching the particular facts of this case to Alabama's "legitimate punitive damages objectives," *ante*, at 1609, the award was "grossly excessive." *Ibid.* The exercise is engaging, but ultimately tells us only this: too big will be judged unfair. What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle.

6. See, *e.g.*, *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N.W.2d 566, 574 (1989) (*per curiam*) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction."); *Santana v. Registrars of Voters of Worcester*, 398 Mass. 862, 502 N.E.2d 132 (1986) (punitive damages are not permitted, unless expressly authorized by statute); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 852, 726 P.2d 8, 23 (1986) (en banc) (same).

In *Life Ins. Co. of Georgia v. Johnson*, No. 1940357 (Nov. 17, 1995), the Alabama Supreme

fra, at 1614, serves to underscore why the Court's enterprise is undue

For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made

APPENDIX TO DISSENTING OPINION OF GINSBURG, J.

STATE LEGISLATIVE ACTIVITY REGARDING PUNITIVE DAMAGES

State legislatures have in the hopper or have enacted a variety of measures to curtail awards of punitive damages. At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute. See N. H. Rev. Stat. Ann. § 507:16 (1994). We set out in this appendix some of the several controls enacted or under consideration in the States. The measures surveyed are: (1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations.

I. CAPS ON PUNITIVE DAMAGES AWARDS

• *Colorado*—Colo. Rev. Stat. §§ 13-21-102(1)(a) and (3) (1987) (as a main rule, caps punitive damages at amount of actual damages)

• *Connecticut*—Conn. Gen. Stat. § 52-240b (1995) (caps punitive damages at twice compensatory damages in products liability cases).

• *Delaware*—H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would cap punitive damages at greater of three times compensatory damages, or $250,000).

• *Florida*—Fla. Stat. §§ 768.73(1)(a) and (b) (Supp. 1992) (in general, caps punitive damages at three times compensatory damages)

• *Georgia*—Ga. Code Ann. § 51-12-5.1 (Supp. 1995) (caps punitive damages at $250,000 in some tort actions; prohibits multiple awards stemming from the same predicate conduct in products liability actions).

• *Illinois*—H. 20, 89th Gen. Ass. 1995-1996 Reg. Sess. (enacted Mar. 9, 1995) (caps punitive damages at three times economic damages).

• *Indiana*—H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (caps punitive damages at greater of three times compensatory damages, or $50,000).

• *Kansas*—Kan. Stat. Ann. §§ 60-3701(e) and (f) (1994) (in general, caps punitive damages at lesser of defendant's annual gross income, or $5 million).

• *Maryland*—S. 187, 1995 Leg. Sess. (introduced Jan. 27, 1995) (in general, would cap punitive damages at four times compensatory damages).

• *Minnesota*—S. 489, 79th Leg. Sess., 1995 Reg. Sess. (introduced Feb. 16, 1995) (would require reasonable relationship between compensatory and punitive damages).

• *Nevada*—Nev. Rev. Stat. § 42.005(1) (1993) (caps punitive damages at three times compensatory damages if compensatory damages equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000)

• *New Jersey*—S. 1496, 206th Leg., 2d Ann. Sess. (1995) (caps punitive damages at greater of five times compensatory damages, or $350,000, in certain tort cases).

• *North Dakota*—N. D. Cent. Code § 32-03.2-11(4) (Supp. 1995) (caps punitive dam-

Court revised the State's regime for assessments of punitive damages. Henceforth, trials will be bifurcated. Initially, juries will be instructed to determine liability and the amount of compensatory damages, if any; also, the jury is to return a special verdict on the question whether a punitive damages award is warranted. If the jury answers yes to the punitive damages question, the trial will be resumed for the presentation of evidence and instructions relevant to the amount appropriate to award as punitive damages.

After postverdict trial court review and subsequent appellate review, the amount of the final punitive damages judgment will be paid into the trial court. The trial court will then order payment of litigation expenses, including the plaintiff's attorney fees, and instruct the clerk to divide the remainder equally between the plaintiff and the State General Fund. The provision for payment to the State General Fund is applicable to all judgments not yet satisfied, and therefore would apply to the judgment in Gore's case.

APPENDIX TO DISSENTING OPINION OF GINSBURG, J.—Continued

ages at greater of two times compensatory damages, or $250,000)

• *Oklahoma*—Okla. Stat., Tit. 23, §§ 9.1(B)-(D) (Supp. 1996) (caps punitive damages at greater of $100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously)

• *Texas*—S. 25, 74th Reg. Sess. (enacted Apr. 20, 1995) (caps punitive damages at twice economic damages, plus up to $750,000 additional noneconomic damages).

• *Virginia*—Va. Code Ann. § 8.01-38.1 (1992) (caps punitive damages at $350,000).

II. ALLOCATION OF PUNITIVE DAMAGES TO STATE AGENCIES

• *Arizona*—H. R. 2279, 42d Leg., 1st Reg. Sess. (introduced Jan. 12, 1995) (would allocate punitive damages to a victims' assistance fund, in specified circumstances).

• *Florida*—Fla. Stat. §§ 768.73(2)(a)-(b) (Supp. 1992) (allocates 35% of punitive damages to General Revenue Fund or Public Medical Assistance Trust Fund); see *Gordon v. State*, 585 So.2d 1033, 1035-1038 (Fla.App. 1991), aff'd, 608 So.2d 800 (Fla. 1992) (upholding provision against due process challenge).

• *Georgia*—Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1995) (allocates 75% of punitive damages, less a proportionate part of litigation costs, including counsel fees, to state treasury); see *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 540-543, 436 S.E.2d 635, 637-639 (Ga. 1993) (upholding provision against constitutional challenge).

• *Illinois*—Ill. Comp. Stat. ch. 735, § 5/2-1207 (1994) (permits court to apportion punitive damages among plaintiff, plaintiff's attorney, and Illinois Department of Rehabilitation Services).

• *Indiana*—H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (subject to statutory exceptions, allocates 75% of punitive damages to a compensation fund for violent crime victims).

APPENDIX TO DISSENTING OPINION OF GINSBURG, J.—Continued

• *Iowa*—Iowa Code § 668A.1(2)(b) (1987) (in described circumstances, allocates 75% of punitive damages, after payment of costs and counsel fees, to a civil reparations trust fund); see *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (upholding provision against constitutional challenge).

• *Kansas*—Kan. Stat. Ann. § 60-3402(e) (1994) (allocates 50% of punitive damages in medical malpractice cases to state treasury).

• *Missouri*—Mo. Rev. Stat. § 537.675 (1994) (allocates 50% of punitive damages, after payment of expenses and counsel fees, to Tort Victims' Compensation Fund).

• *Montana*—H. 71, 54th Leg. Sess. (introduced Jan. 2, 1995) (would allocate 48% of punitive damages to state university system and 12% to school for the deaf and blind).

• *New Jersey*—S. 291, 206th Leg., 1994-1995 1st Reg. Sess. (introduced Jan. 18, 1994); A. 148, 206th Leg., 1994-1995 1st Reg. Sess. (introduced Jan. 11, 1994) (would allocate 75% of punitive damages to New Jersey Health Care Trust Fund).

• *New Mexico*—H. 1017, 42d Leg., 1st Sess. (introduced Feb. 16, 1995) (would allocate punitive damages to Low-Income Attorney Services Fund).

• *Oregon*—S. 482, 68th Leg. Ass. (enacted July 19, 1995) (amending Ore. Rev. Stat. §§ 18.540 and 30.925, and repealing Ore. Rev. Stat. § 41.315) (allocates 60% of punitive damages to Criminal Injuries Compensation Account).

• *Utah*—Utah Code Ann. § 78-18-1(3) (1992) (allocates 50% of punitive damages in excess of $20,000 to state treasury).

III. MANDATORY BIFURCATION OF LIABILITY AND PUNITIVE DAMAGES DETERMINATIONS

• *California*—Cal. Civ. Code Ann. § 3295(d) (West Supp. 1995) (requires bifurcation, on application of defendant, of liability and damages phases of trials in which punitive damages are requested).

• *Delaware*—H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would require, at

APPENDIX TO DISSENTING OPINION OF GINSBURG, J.—Continued

request of any party, a separate proceeding for determination of punitive damages).

• *Georgia*—Ga. Code Ann. § 51–12–5.1(d) (Supp. 1995) (in all cases in which punitive damages are claimed, liability for punitive damages is tried first, then amount of punitive damages).

• *Illinois*—H. 20, 89th Gen. Assembly, 1995–1996 Reg. Sess. (enacted Mar. 9, 1995) (mandates, upon defendant's request, separate proceeding for determination of punitive damages).

• *Kansas*—Kan. Stat. Ann. § 60–3701(a)–(b) (1994) (trier of fact determines defendant's liability for punitive damages, then court determines amount of such damages)

• *Missouri*—Mo. Rev. Stat. §§ 510.263(1) and (3) (1994) (mandates bifurcated proceedings, on request of any party, for jury to determine first whether defendant is liable for punitive damages, then amount of punitive damages).

• *Montana*—Mont. Code Ann. § 27–1–221(7) (1995) (upon finding defendant liable for punitive damages, jury determines the amount in separate proceeding).

• *Nevada*—Nev. Rev. Stat. § 42.005(3) (1993) (if jury determines that punitive damages will be awarded, jury then determines amount in separate proceeding).

• *New Jersey*—N. J. Stat. Ann. §§ 2A:58C–5(b) and (d) (West 1987) (mandates separate proceedings for determination of compensatory and punitive damages)

• *North Dakota*—N. D. Cent. Code § 32-03.2–11(2) (Supp. 1995) (upon request of either party, trier of fact determines whether compensatory damages will be awarded before determining punitive damages liability and amount)

• *Ohio*—Ohio Rev. Code Ann. § 2315.21(C)(2) (1995) (if trier of fact determines that defendant is liable for punitive damages, court determines the amount of those damages)

• *Oklahoma*—Okla. Stat., Tit. 23, §§ 9.1(B)-(D) (Supp. 1995–1996) (requires separate jury proceedings for punitive damages); S. 443, 45th Leg., 1st Reg. Sess. (introduced Jan. 31, 1995) (would require courts to strike requests for punitive damages before trial, unless plaintiff presents *prima facie* evidence at least 30 days before trial to sustain such damages; provide for bifurcated jury trial on request of defendant; and permit punitive damages only if compensatory damages are awarded)

• *Virginia*—H. 1070, 1994–1995 Reg. Sess. (introduced Jan. 25, 1994) (would require separate proceedings in which court determines that punitive damages are appropriate and trier of fact determines amount of punitive damages).

THE ADA & PRIVATE CIVIL SUITS

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THE ADA & PRIVATE CIVIL SUITS

BACKGROUND

By Public Law 101-336, Congress enacted the Americans with Disabilities Act (ADA). The Act is contained in Title 42 U.S.C. §12101 et. seq. Title III of the ADA covers private entities and requires facilities to be accessible to individuals with disabilities. It requires private businesses that serve the public to have removed all architectural, communication and transportation barriers in existing facilities by January 26, 1992, where the removal was "readily achievable" and requires all private businesses to insure that newly constructed buildings are readily accessible to and useful by individuals with disabilities if the building was first occupied after January 26, 1992. All private businesses must insure that any alteration of an existing facility which affects its useability or accessibility must "to the maximum extent feasible" make the altered portion of the facility accessible to and useable by individuals with disabilities.

42 U.S.C. §12181(2) defines a public accommodation as the facility whose operation affects interstate commerce. Both the owner and the operator of a public accommodation are subject to the requirements of the ADA. 28 C.F.R. §36.201(b) permits the parties to allocate the responsibility for complying with the ADA requirements by lease or contract.

Subsequent to the enactment of the ADA, questions have arisen concerning whether the ADA created a private right of action for damages and whether violation of standards imposed by the ADA is negligence per se or evidence of negligence.

THE ADA & PRIVATE CIVIL SUITS

I. Creation of a private right of action for damages.

The ADA does create some private remedies. 42 U.S.C. §12188(a) provides that a person who has reasonable grounds for believing he or she is "about to be" subject to discrimination because of violation of the ADA may bring a private suit for preventative relief. This includes an application for a permanent injunction, temporary injunction or restraining order and if the court determines injunctive relief is appropriate, the injunctive relief "shall include an order to alter facilities to make them readily accessible."

There is no specific provision in the ADA creating a claim or cause of action for damage by an injured party. One district court has held that the ADA does not create an independent private right of action in federal court for damages. See Wagner v. Regent Investment Inc., 903 F.Supp. 966 (at 970)(E.D. Va. 1995)

II. Creation of standards of conduct.

Injured parties have alleged that violation of provisions of the ADA and the rules promulgated pursuant to the ADA is negligence per se or evidence of negligence. While no case has directly addressed the issue of whether or not the ADA creates a safety standard, two cases implicitly dealt with the issue.

The applicability of the ADA to a private claim was considered in Adiutori v. Sky Harbor International Airport et al., 880 F.Supp. 696 (D. Az. 1995). In the Adiutori case plaintiff sued under the ADA and the Air Carriers Access Act for damages arising out of a heart attack suffered while in flight. Neither party appears to have contested the issue of whether the ADA constituted a standard of care analogous to a

safety code, violation of which constitutes negligence pro se. The court granted defendants' motion for summary judgment on the grounds plaintiffs failed to establish that defendants violated any of the provisions of the ADA and plaintiff's causation evidence was "at best only colorable."

The issue was also considered in Schollenberger v. Sears Roebuck & Co., 925 F.Supp. 1239, where the plaintiff claimed that defendant had failed to comply with the ADA accessibility guidelines. In the Schollenberger case the court held that the ADA guidelines were inapplicable because they were enacted after the ramp was constructed and that there was no evidence the ramp constituted "an accessible route" as defined in the guideline. While neither party directly addressed the issue of whether violation of the ADA constitutes negligence per se, this was assumed by the court in its ruling.

It is clear that counsel will continue to raise the issue of the applicability of the ADA in suits for damages and it appears likely that the courts will treat the ADA as equivalent to a safety code, violation of which constitutes negligence per se or evidence of negligence. Cf Koll v Manatl's Transp. Co. 253NW2nd 265 (Iowa 1977) No Iowa case has addressed the applicability of the ADA to a civil suit.

III. Federal questions jurisdiction.

An issue has arisen is concerning whether reference to ADA provisions in a lawsuit for damages confers federal question jurisdiction on the federal courts. This question was address in Wagner v. Regent Investment Inc., supra at 970.

The court held, "Congress's decision not to create such a remedy, particularly in light of private damage remedies available under other sections of the Act, again reveals its intent that reference to ADA provisions in a state court

action for damages is 'insufficiently substantial to confer federal question jurisdiction over the claim." It remanded the pending suit to sate court for disposition. Based on the Wagner case and other analogous case, it is believed that the ADA does not and should not create federal question jurisdiction.

CONCLUSION

The ramifications of the ADA on civil lawsuits will continue to be addressed by the courts and will continue to impact on the civil practice.

ALLOCATION OF FAULT AND MITIGATION OF DAMAGES

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ALLOCATION OF FAULT AND MITIGATION OF DAMAGES

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I. DEFINITION OF FAULT

A. Fault.

Iowa Code §668.1(1) defines "fault" as including:

1. Negligence
2. Recklessness
3. Strict tort liability
4. Breach of warranty
5. Unreasonable assumption of risk not constituting an enforceable express consent
6. Misuse of a product for which the defendant otherwise would be liable
7. Unreasonable failure to avoid an injury or to mitigate damages

B. Causation.

Iowa Code §668.1(2) Provides that the Legal Requirements of Cause in Fact and Proximate Cause Apply Both to Fault as the Basis for Liability and to Contributory Fault.

Iowa Code §668.3 Provides that in allocating fault, consideration shall be given to the extent of the causal relation between the conduct and the damages claimed. Iowa follows the same principles for causation as to both liability and allocation of fault. Iowa Civil Jury Instruction 700.3 defines proximate cause in terms of relationship between conduct and damages. As provided in Iowa Code §668.3(3), Iowa Civil Jury Instruction 400.2 instructs the jury to allocate fault in terms of causal relation between conduct and damages.

II. RAISING AN ISSUE OF CONTRIBUTORY FAULT

A. Contributory Fault Generally

Chapter 668 uses the term "contributory fault" of claimants. It is probably safe to allege contributory

fault generally of a claimant, as defined in Iowa Code §668.3(1) plus an allegation that the contributory fault attributable to claimant was a proximate cause of the claimed damages. "fault" is more inclusive than negligence.

B. Failure to Mitigate

FAILURE TO MITIGATE SHOULD BE SPECIALLY ALLEGED.

Iowa Code §619.7 requires that a defendant must set forth, in a distinct division of the Answer, any facts to mitigate or otherwise reduce damages. See R.E.T. Corporation v. Frank Paxton Company, 329 N.W.2d 416, 422 (Iowa 1983) in which the Supreme Court added "It seems that 'a lack of sufficient funds will excuse an absence of effort to lessen damages.'" Citing authorities. See also Ludden v. Bowen, 888 F.2d 1246, 1249 (8th Cir. 1989) in which a social security claimant explained his failure to lose weight by testifying that he could not afford the expensive foods called for in diets and his pain prevented him from exercising.

C. Seat Belt Defense

Since Iowa Code §321.445 refers to failure to wear a seat belt as admissible "to mitigate damages," it is probably advisable to raise the seat belt defense by specifically referring to the failure to wear a properly adjusted safety belt or safety harness.

III. COURT LIMITATIONS ON WHEN COMPARATIVE FAULT APPLIES

A. Assumption of Risk

Section 668.1(1) seems to say that assumption of risk on the part of a plaintiff could be considered in allocating fault to a plaintiff. However, the Court ruled otherwise in Coker v. Abell-Howe Company, 491 N.W.2d 143 (Iowa 1992). The Court reasoned that the Legislature had constructive knowledge that assumption of risk was not a defense in actions in which contributory negligence was available and that it applied only in strict liability actions. Therefore, the Court assumed that the Legislature only intended assumption of risk to apply in strict liability

actions. See also note to Iowa Civil Jury Instruction 400.9.

B. Situations Where Comparative Fault Was Not Recognized As a Defense Before the Adoption of Chapter 668

The Iowa Supreme Court has held that because the Legislature did not specifically state otherwise, comparative fault cannot be raised in types of cases in which it was not allowed before the adoption of Chapter 668. Therefore, comparative fault is not a defense in dram shop cases or cases in which fraud is alleged. See Tratchel v. Essex Group, 452 N.W.2d 171, 180, 181 (Iowa 1990), and cases cited. However, comparative negligence does apply to strict products liability claims, even though it was inapplicable before the adoption of Chapter 668. Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1993).

C. Employee v. Employer Cases

Since the Legislature did not specifically state otherwise, rule 97, rather than Chapter 668, applies to actions by an employee against an employer. Baumler v. Hemesath, 534 N.W.2d 650, 655 (Iowa 1995).

D. Breach of Warranty

The Committee on Uniform Jury Instructions has a caveat to Iowa Civil Jury Instruction 1100.1 in which it states that breach of warranty is defined as fault in §668.1, but there is insufficient case authority to submit an instruction on that defense. Long v. Jensen, 522 N.W.2d 621, 624 (Iowa 1994), involved an action by a guest for damages in a fall on premises in which suit was brought based on breach of contract. The Court reasoned that the covenant of repair in the contract merely established the duty element of a negligence cause of action and the Court, therefore, correctly submitted comparative fault to the jury.

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IV. DICTIONARY DEFINITIONS OF FAULT

Responsibility for failure or a wrongful act

An error or a mistake

Something done wrongly; specifically, (a) a misdeed, offense, (b) an error, mistake

Responsibility for something wrong

Black's Law Dictionary defines fault as follows:

> "Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act; bad faith or mismanagement; neglect of duty."

V. AMOUNT OF FAULT INHERENT IN VARIOUS CAUSES OF ACTION

A. Strict Products Liability

Recovery under a theory of strict products liability does not require any proof of fault. As a matter of fact, §402A applies even though "the seller has exercised all possible care in the preparation and sale of his product." Restatement Law of Torts Second, §402A(2)(a). Somehow the jury is directed to compare "fault" of a defective product with contributory fault of a plaintiff.

B. Negligence

Most negligence claims include an element of what a layman would consider to be fault under the dictionary definitions. The traditional definition of common law negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. See Marcus v. Young, 538 N.W.2d 285, 288 (Iowa 1995), citing Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 37 (Iowa 1982), relying on Restatement (Second) of Torts §282. "Negligence is conduct, and not a state of mind." Prosser, 5th Ed., page 169. Since a test for common law negligence is an objective standard of a reasonable person, there may be a negligence without any moral blame. Id. page 169. The Iowa Court has repeatedly stated that negligence is behavior that

produces an unreasonable danger of injury to others. Haupt v. Miller, 514 N.W.2d 905, 910 (Iowa 1994). Therefore, a negligence cause of action may involve various degrees of what a layman would describe as "fault" A violation of a statute is negligence per se regardless of whether any danger of injury is apparent. Negligence may be due to stupidity, forgetfulness, an excitable temperament, or even ignorance. Id. page 169.

C. Gross Negligence

Gross negligence signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences. It is merely an extreme departure from the ordinary standard of care. It is a different degree of negligent conduct rather than a different kind. Sechler v. State, 340 N.W.2d 759 (Iowa 1983). Gross negligence does not require conscious indifference to the consequences.

D. Recklessness

Recklessness is described as proceeding with no care coupled with heedless disregard for the consequences. Sechler v. State, 340 N.W.2d 759, 764 (Iowa 1983). I.C.J.I. 600.73.

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E. Willful and Wanton

Intentionally doing an act of an unreasonable character in disregard of a risk known to the person or so obvious that the person must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. Woodruff Const. Co. v. Mains, 406 N.W.2d 787, 790 (Iowa 1987).

Punitive damages are available at this level of fault. I.C.J.I. 210.1.

F. Co-Employee's Gross Negligence amounting to such lack of Care as to amount to wanton neglect for the safety of another

Liability is based upon actual knowledge rather than the reasonable person test and requires knowledge of the peril that injury is probable and a conscious

failure to avoid the peril. Gerace v. 3-D Mfg. Co., 522 N.W.2d 312 (Iowa App. 1994). I.C.J.I. 710.3.

G. Intentional infliction of emotional distress

Requires proof of defendant's intentionally causing, or reckless disregard of the probability of causing emotional distress. I.C.J.I. 2000.1.

H. Battery

An act intended to cause an unpermitted contact. Prosser 5th Ed. page 41.

VI. CONTRIBUTORY NEGLIGENCE

A. Definition

Contributory negligence is conduct which involves an undue risk of harm to the person who sustains it. Adams v. Deur, 173 N.W.2d 100, 113 (Iowa 1969); Restatement (Second) Torts §463. It is possible for a person to be negligent and yet not be contributorily negligence, since a person is not necessarily required to pursue the same course of conduct for his or her own protection as is demanded of him or her for the protection of others. The risk of harm to others may be more apparent, or apparently more serious, than the risk of harm to the actor himself or herself; or the actor may have reasonable confidence in his or her own awareness of the risk, and his or her ability to avoid it, where he or she cannot reasonably have such confidence in the awareness or ability of others. A person may have undertaken a responsibility toward another which requires him to exercise an amount of care for the protection of the other which would not be required for his or her own safety. The relation of the parties, the particular circumstances, and other relevant factors are to be taken into account. However, in the great majority of cases, it is probably true that the same conduct will constitute both negligence and contributory negligence, but it does not necessarily follow in all cases. See Comment f to Restatement (Second) Torts §463. The Court has observed that the real basis of contributory negligence is conduct that creates an unreasonable risk of harm to one's self or one's own interests. Rinkleff v. Knox, 375 N.W.2d 262, 265 (Iowa 1985).

B. Specifications of contributory negligence

One method of increasing the percent of fault of plaintiff is to increase the number of specifications of contributory negligence.

The purpose of requiring the jury to consider specifications of negligence is to limit the determination of the factual questions to only those acts or omissions upon which a particular claim is in fact based and upon which the Court has had an opportunity to make a preliminary determination of the sufficiency of the evidence to generate a jury question. Each specification should identify either (a) a certain thing the allegedly negligent party did which that party should not have done, or (b) a certain thing that party omitted to do which should have been done under the legal theory of negligence which is applicable. Rinkleff v. Knox, 375 N.W.2d 262, 266. In the Rinkleff case, the Court gave the Uniform Jury Instruction on ordinary care and negligence and submitted two specifications of contributory negligence. The first specification was in not knowing or applying safe scaffolding use practices as required under the laws of the State of Iowa. The second was not knowing or applying safe scaffolding use practices as recommended by the American National Standards Institute. The Supreme Court held that these specifications were fatally defective in failing to sufficiently specify those acts or omissions which are claimed to constitute the negligence with which plaintiff was being charged. The Court also concluded that it is sufficiently likely that these added specifications of negligence prejudiced the plaintiff in the allocation of negligence between the parties and that a new trial was warranted. The requirement for instructing on specific acts or omissions is at least partially designed to assure that the jury will give consideration to each of the alleged acts or omissions in determining the overall question of breach of duty. Bigalk v. Bigalk, 540 N.W.2d 247, 249 (Iowa 1995). In the Bigalk case, a premises case, the marshalling instruction required plaintiff to prove that defendant was negligent in failing to make the open stairway safe or in failing to warn. The Court held that it was error to refuse plaintiff's request for instructions on specific acts or omissions including failure to provide adequate lighting, failure to cover

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the openings, or failure to provide a railing. The Court held that plaintiff was entitled to have the jury instructed on each alleged act or omission that found support in the evidence. See also Balboa Insurance Company v. Pixler, 484 N.W.2d 396, 398 (Iowa App. 1992). Failure to warn has been approved as to a separate specification of negligence. Baumler v. Hemesath, 534 N.W.2d 650, 653 (Iowa 1995).

VII. **JURY GUIDELINES FOR ALLOCATING FAULT**

The only guides for the jury in determining percentages of fault are contained in I.C.J.I. 400.2. The jury is told that in determining percentages, they should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the parties, and the extent of the causal relation between their conduct and the damages claimed.

Therefore, the three "C's" in the determination of percentages of fault are:

CIRCUMSTANCES

CONDUCT

CAUSATION

"The real basis of negligence is not carelessness, but behavior which society in general views as involving unreasonable risk of harm to others." Approved by the Supreme Court in Engstrom v. State, 461 N.W.2d 309, 316 (Iowa 1991). See also Prosser, 5th Ed. page 169; Fiala v. Rains, 519 N.W.2d 386, 388 (Iowa 1994); Marcus v. Young, 538 N.W.2d 285, 288 (Iowa 1995); and Rinkleff v. Knox, 375 N.W.2d 262, 265 (Iowa 1985); Restatement §§282, 284.

We should proceed with a step-by-step analysis to explain to the jury why we believe the evidence has shown that fault should be allocated to a plaintiff. We must end up by convincing the jury that they, as representatives of society, find a violation which involves unreasonable risk of harm to persons in the position of defendant.

We probably should start by explaining how the instructions set out either laws or duties applicable to the plaintiff. The instructions do not clearly explain to the jury the differences between statutory and common law duties. I.C.J.I. 700.2 gives a definition of common law negligence in terms of the reasonable person test.

There is no Uniform Jury Instruction explaining the concept of negligence per se from violation of a statute. However, the Uniform Instructions give a basis for explaining those differences to the jury. The instructions on common law duties conclude with a sentence stating "A violation of this duty is negligence." See I.C.J.I. §§600.7, 600.72, as examples. Most of the other instructions in Chapter 600 are based on statutes and conclude by telling the jury "A violation of this law is negligence." It is probably necessary to emphasize the difference. How many drivers give turn signals? It may be that most drivers do not. This is some indication that drivers are not convinced of the necessity of doing so. Therefore, a jury may not consider a violation of that law very important. Likewise, a substantial number of drivers come to rolling stops at controlled intersections and never completely stop as required by law.

It is also advisable to discuss with the jury the policy reasons for adopting laws and the policy reasons behind specifications of fault. In a negligence case, it is necessary to convince the jury that there was a foreseeable and unreasonable risk of harm to others from the conduct complained about. The fact that it happened in the case at trial is some evidence, but greater fault should be assigned if the jury finds that an accident of this kind was foreseeable and that following the law or specification of negligence would have avoided the accident.

The Iowa driver's manual that is used in preparing for the Iowa driver's license test can be very useful in helping convince the jury that there was an unreasonable and foreseeable risk of harm to others from the conduct of the plaintiff. The Iowa driver's manual can be used in cross-examining a plaintiff driver. Most drivers will admit that they read the manual in preparation for taking the test and are very likely to agree with quotations from the manual on cross-examination. It might also be possible to get the manual into evidence by way of judicial notice or as a public record and report under Iowa Rule of Evidence 803(8). For example, the stopping distance chart can be useful. There are statements in the manual explaining why

the rules are important and the need for defensive driving. There is a rule of thumb for safe following distances, etc.

In some situations, it may be advisable to explain to the jury the special relationship between plaintiff and defendant that creates the duty relied upon. The jury might also be told that the Court decides as a matter of law whether a particular duty arises out of the relationship of the parties. Engstrom v. State, 461 N.W.2d 309, 314 (Iowa 1990).

A. Checklist - Contributory Fault Arguments

As explained above, the real basis for negligence is unreasonable risk of harm to others. The following are items that may be argued on the issue of allocating fault. Most of the items deal with attempts to increase the percent assigned to plaintiff, but some of the items could be argued to reduce the percent assigned to a defendant.

1. **Duty**. Defined by relationship between individuals - a legal obligation imposed on one individual for the benefit of another person or particular class of persons. Fiala v. Rains, 51 N.W.2d 386, 388, Iowa 1994); Prosser, pp. 356-359.

2. **Objective Standard Applies**. I.C.J.I. §700.2. An external and objective test, rather than the individual judgment of the actor. As far as possible, the same for all persons - a prudent and careful person who is always up to standard. The community ideal of reasonable behavior, determined by the jury's social judgment. Prosser and Keeton (Fifth Ed.) §32, pp. 173-193 (hereafter "Prosser").

3. **Circumstances**: The surrounding circumstances must be considered. The test is what a reasonable person would do under the same or similar circumstances. I.C.J.I. 700.2, 400.23.

4. **Foreseeability**. "The risk reasonably to be perceived defines the duty to be obeyed. . . ." Fiala v. Rains, 519 N.W.2d 386, 388 (Iowa 1994), quoting from the Palsgraf case.

5. **Likelihood of Harm**. Likelihood or probability of harm resulting from conduct. One of the surrounding circumstances in a motor vehicle accident is the extent of other traffic in the vicinity. Failure to stop at a stop sign for a highway carrying a high volume of traffic would probably be considered greater fault than such an occurrence on a very low traffic count highway. Whether the action took place during the rush hour or very late at night would be another circumstance. As knowledge becomes greater, the conduct takes on more attributes of intent. Prosser, pp. 169, 170.

6. **Amount of Risk Created**. Magnitude of risk created by conduct. Number endangered. Potential seriousness of injury. A jury could probably be convinced that there would be a higher percentage of fault if the negligent act occurred involving high speed traffic as compared with low speed traffic. If there are several occupants in the actor's car, there is more potential risk involved. In Steinkuehler v. Brotherton, 443 N.W.2d 689, 700 (Iowa 1989), the Iowa Court quoted from a 1923 decision which observed that in the days of the ox-drawn vehicle, the presence of a hog upon the highway would not present an imminent danger of a collision with the vehicle. The 1923 opinion also observed that in the later day of swifter moving horse-drawn vehicles, the presence of a hog at large became an increased danger, though more readily avoidable than in the still later day of the motor vehicle. The cases state the proposition variously:

"It is elementary that, the greater the danger, the greater the care and caution necessary for him to exercise to constitute ordinary or reasonable care" Dean v.

Chicago, B. & Q. R. Co., 211 Iowa 1347, 1351, 229 N.W. 223, 225;

> ". . . Increased danger requires increased watchfulness to avoid injury . . ." LaSell v. Tri-States Theater Corporation, 233 Iowa 929, 955, 11 N.W.2d 36, 47; "The standard of care that must be exercised with respect to a given danger is in proportion to the likelihood of injury occurring." Ravreby v. United Airlines, 293 N.W.2d 260, 265 (Iowa 1980).

7. **Knowledge. Judgment. Memory.** An actor is required to recognize that the actor's conduct involves a risk of causing an invasion of another's interest if a reasonable person would do so while exercising:

(a) Such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence and judgment as a reasonable person would have; and

(b) Such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.

Restatement §289; Fiala v. Rains, 519 N.W.2d 386, 388 (Iowa 1994)

In determining whether the actor should recognize that a particular course of conduct involves an appreciable risk of harmful consequences to another, the fact that the actor intends to bring about any one of the chain of evens by which the harm is done is important. The event is to be regarded as though it was certain to happen. Restatement §289, Comment (c).

Lookout and Perception. The actor must have in a reasonable degree the alertness and the concentration necessary to enable the actor to use the actor's senses to perceive the surroundings, and to recognize and

appreciate any danger involved in them. Restatement §289. The actor must exercise the perception of a reasonable person under like circumstances. This means that the actor must to a reasonable degree make use of the actor's senses to become aware of the surroundings, and of any danger involved in them. The actor must see what is visible, hear what is audible, and the like, where a reasonable person would do so. Due allowance must be made for distractions and other influences which would affect a reasonable person under the circumstances. Restatement §289, Illus. 2(e), (c), (f); I.C.J.I. §§600.72 and 700.11 dealing with proper lookout.

Memory. The elements of memory which are of principal importance in enabling the actor to perceive the surrounding circumstances are:

(a) Fixation, by which a sense impression is fixed in the memory for future use. This depends upon the nature of the phenomenon observed, principally its striking character or its recognizable importance as a fact upon which the safety of the actor or others may in the future depend.

(b) Retentiveness, by which a past sense impression is retained for future use. Due allowances must be made for distractions and other influences which would affect a reasonable person under the circumstances. Restatement §289, Illus: (f).

Correlation of Information From Memory and Senses. The actor is required to have not only the attention, perception and memory of a reasonable person, but must also exercise the power of intelligent correlation of the sense impressions with previous knowledge, belief and experience which a reasonable person would exercise, in order to recognize the danger. Restatement §289(g).

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Proceeding in the Dark. A person may be negligent if they should realize that their perception of the surrounding circumstances is so imperfect that the safety or danger of their act depends upon circumstances which at the moment the actor neither does nor can perceive. Restatement §289, Illus: (j). LaSell v. Tri-States Theater Corporation, 233 Iowa 929, 955, 11 N.W.2d 36, 47 (1943); Hunt v. State, 252 N.W.2d 715, 718 (Iowa 1977); Prosser, pp. 184, 5.

Diversions. An actor may allow their attention to be diverted by circumstances which concern their own interests. Restatement §289, Illus: (k).

Superior Qualities. The reasonable person standard requires only a minimum of attention, perception, memory, knowledge, intelligence and judgment in order to recognize the existence of the risk. If the actor has in fact more than the minimum of these qualities, the actor is required to exercise the superior qualities in a manner reasonable under the circumstances. The standard becomes that of a reasonable person with such superior attributes. Restatement §289, Illus: (m).

If the actor is ill or otherwise physically disabled, allowance is made for such disability - otherwise the actor is held to the reasonable person standard. Restatement §289, Illus: (n).

8. **Knowledge Required.** For the purpose of determining whether the actor should recognize that the actor's conduct involves a risk, the actor is required to know:

(a) **Community Knowledge.** The qualities and habits of human beings and animals and the qualities, characteristics and capacities of things and forces insofar as they are matters of common knowledge at the time and in the community; and

(b) **Law.** The common law, legislative enactments, and general customs insofar as they are likely to affect the conduct of the other or third persons.

Restatements §§290, 302; Prosser, pp. 182-185.

Limited Right to Assume. I.C.J.I. 600.71 explains the right of a motor vehicle driver to assume others would obey the law until they knew, or in the exercise of ordinary care, should have known otherwise. Restatement §290, Comment (c), adds that if the known or knowable peculiarities of even a small percentage of human beings, or of a particular individual or class of individuals, are such as to lead the actor to realize the chance of eccentric and improper action, the actor is required to take this chance into account if serious harm to a legally important interest is likely to result from such eccentric action and the actor's own conduct has not such pre-imminent social utility as to justify the serious character of the risk involved therein. In such case, the actor is bound to anticipate and provide against the negligent or intentional misconduct of the other or a third person. An open and obvious condition is just as open and obvious to plaintiff and defendant, and is not conclusive as to precautions reasonably needed. Wieseler v. Sisters of Mercy Health Corp., 540 N.W.2d 445, 451; Konicek v. Loomis, 457 N.W.2d 614, 619 (Iowa 1990).

Scientific Knowledge. The actor is required to possess such scientific knowledge as is common among laymen at the time and in the community. Restatement §290, Comment (e).

Special Knowledge. If the actor has special knowledge, the actor is required to utilize it, but the actor is not required to possess such knowledge, unless the actor holds himself or herself out as possessing it or undertakes a course of conduct which a

reasonable person would recognize as requiring it. Restatement §290, Comment (f); Prosser, pp. 185-193.

Human Qualities. The actor should know the qualities, capacities, and tendencies of human beings, insofar as they are generally recognized at the time and in the community and, therefore, should know how human beings are likely to react to constantly recurring types of situations. Restatement §290, Comment (j).

Habits of Classes. The actor should also know the peculiar habits, traits, and tendencies which are known to be characteristic of certain well-defined classes of human beings, e.g., children. Restatement §290, Comment (k).

Creating Emergency. The actor should also realize that if he puts another person in peril, that person is both likely and privileged to act in its defense, and the actor is required to realize that in so doing, the other person may not act with perfect propriety, particularly where the peril is sudden and creates an emergency in which immediate action is required. Restatement §290, Comment (l).

Law. An actor must know the statutory and common law, insofar as it establishes a standard of obligatory behavior, and must also know such law insofar as obedience to it is likely to determine the conduct of others. Restatement §290, Comment (o).

9. **Unreasonable Risk-Utility Alternatives.** Conduct that produces an unreasonable risk of injury to others can constitute negligence. Fiala v. Rains, 519 N.W.2d 386, 388 (Iowa 1994). Where an act is one which a reasonable person would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular

manner in which it is done. Restatement §291.

The factors relating to utility include:

(a) The social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) The extent of the chance that this interest will be advanced or protected by the particular course of conduct; and

(c) The extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct. Restatement §292; Prosser, pp. 169-173.

10. Acts dangerous intrinsically or because of manner of performance. A negligent act may be one which involves an unreasonable risk of harm to another.

(a) **Intrinsic Danger.** Although it is done with all possible care, competence, preparation, and warning, or

(b) **Danger in Performance.** Only if it is done without reasonable care, competence, preparation or warning.

Restatement §297.

When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable person in that position, with this information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another. Restatement §298.

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Competence - Care. Care is different from competence. Competence is a matter of the ability or capacity of the individual to use care; care is the attention and caution exercised in the use made of that competence. The care which it is reasonable to require of the actor varies with the danger involved in the act, and is proportionate to it. The greater the danger, the greater the care which must be exercised. Restatement §298, Comments (a), (b); Ravreby v. United Airlines, 293 N.W.2d 260, 265 (Iowa 1980).

11. **Competence.** An act may be negligent if it is done without competence which a reasonable person in the position of the actor would recognize as necessary to prevent it from creating an unreasonable risk of harm to another. Restatement §299 - unless the utility is sufficiently great. See Restatement §291. If the actor possesses superior competence, such superior competence must be exercised with reasonable attention and care. Restatement §299, Comments (c), (f).

12. **Preparation.** When an act is negligent, if done without reasonable preparation, the actor, to avoid being negligent, is required to make the preparation which a reasonable person in his position would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another. Restatement §300. Again, a person with superior qualities must exercise them. The word "preparation" includes not only the correction of known defects which should be recognized as likely to create danger, but also such inspection as a reasonable person would recognize as necessary to ascertain whether an instrument is fit for use. Restatement §300. Rinkleff v. Knox, 375 N.W.2d 262, 265-66; Prior v. United States Postal Service, 985 F.2d 440 (8th Cir. 1993).

13. **Risk of Negligence of Others**. An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person. Restatement (Second) Torts, §302A.

14. **Reliance on Others to Take Precautions**. Where the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause. Restatement (Second) Torts, §452.

15. **Failure to Follow Custom**. The customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable person would not follow them. Restatement (Second) Torts, §295A; I.C.J.I. 700.10.

B. **Relating Checklist to Specifications of Negligence**

Many of the items in the above Checklist can be converted into specifications of contributory fault.

If the Court refuses to give the items as specifications of contributory fault, they can still be used as arguments relating to the circumstances, conduct and causation as a basis for allocation of fault under I.C.J.I. 400.2 and the exercise of ordinary care under the reasonable person test of I.C.J.I. 700.2.

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VIII. **CAUSATION**

In determining the percentages of fault, the trier of fact "shall" consider the "extent of the causal relation between the conduct and the damages claimed." Iowa Code §668.3(3) and I.C.J.I. 400.2. This concept is a problem because cause either does or does not exist.

Cause in fact requires that a particular action in fact caused certain consequences to occur. This requirement is met by proof that conduct was a substantial factor in producing the damages and the damages would not have occurred except for defendant's conduct. Legal causation presents a question of whether the policy of the law will extend responsibility to the consequences which have been produced. Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531, 538 (Iowa 1995). The standard of legal causation is an issue of law. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 853 (Iowa 1995).

The following are possible arguments relating to the "extent" of causal relation:

(a) Nearest to the event. Remoteness. [The Court has held that the doctrine of last clear chance is no longer needed, since its function was to avoid the harshness of the contributory negligence rule, and it has no function because contributory negligence is no longer a complete bar. Bokhoven v. Klinker, 474 N.W.2d 553, 556-57 (Iowa 1991); Sonnek v. Warren, 522 N.W.2d 45, 49 (Iowa 1994).

(b) Last human wrongdoer.

(c) Direct cause - without any intervening causes. Re intervening cause, see Weems v. Hy-Vee Food Stores, 526 N.W.2d 57, (Iowa App. 1994).

(d) Foreseeability. It has been said that negligence is based on foresight and proximate cause on hindsight. However, "foreseeability" is considered by the Court in determining the question of law as to whether public policy allows recovery under the circumstances involved. However, it can be argued that there is a correlation between the extent to which the damages were foreseeable and the causal relation between the conduct and the damages. See discussion in Sumpter v. City of Moulton, 519 N.W.2d 427, 434, 435 (Iowa App. 1994), and the Restatement (Second) Torts §§433, 435, and 453, discussed in the opinion.

(e) Active versus passive cause.

(f) Proportional causes.

(g) The number of specifications of contributory fault have been approved against a plaintiff may be an indication of "extent" of causal relation.

(h) Imputed fault or vicarious liability. It can be argued that imputed fault or vicarious liability is more remote and there is less of an "extent" of causal relation between imputed fault or vicarious liability than on the part of the more direct participants.

(i) Fairness. Comparative fault was adopted because of the perceived "unfairness" of the contributory negligence system. The Court considers "fairness" in deciding whether the law provides legal causation if the alleged cause in fact is proved. Sumpter v. City of Moulton, 519 N.W.2d 427 (Iowa App. 1994). Fairness has also been considered by the Court in construing an Indemnity Agreement in the workers' compensation context. Woodruff Construction Company v. Barrick Roofers, Inc., 406 N.W.2d 783, 785, 786 (Iowa 1987). Why shouldn't the jury consider fairness in determining a percentage allocation of fault in relation to the extent of the causal relation?

IX. MITIGATION OF DAMAGES

Iowa Code §668.1 lists both unreasonable failure to avoid an injury and failure to mitigate damages as fault that is to be compared. I.C.J.I. 400.7 provides a jury instruction on mitigation and 400.8 provides an instruction on unreasonable failure to avoid an injury. Coker v. Abell-Howe Company, 491 N.W.2d 143, 150 (Iowa 1992) states that unreasonable failure to avoid an injury may be warranted in those cases in which the plaintiff could have acted to avoid an injury after the defendant's alleged negligence occurred. The comment to I.C.J.I. 400.8 repeats this statement. However, the case of Olson v. Prosoco, 522 N.W.2d 284, 291 (Iowa 1994), states that the doctrine of avoidable consequences would only operate after the occurrence of the plaintiff's "injury." The Court then states that there is no legal wrong, that is, no negligence - without actual injury. Therefore, the Court held that the doctrine could not be used unless the evidence showed that after the injury, plaintiff could have done something to mitigate his damages.

Therefore, these affirmative defenses require the same proof - that after the injury occurred, plaintiff unreasonably failed to exercise ordinary care to mitigate the damages.

As explained in II.C. above, the Iowa Code describes the seat belt defense as a failure to mitigate damages. Under the rationale of the Iowa Court, this would actually be treated as contributory fault because the failure to fasten a seat belt occurs before an injury occurs. Incidentally, the Iowa Court has held that the failure of a motorcyclist to wear a helmet is not allowable as an affirmative defense because the Court defers to the Legislature in that policy decision on the grounds that it is more properly in the domain of the Legislature. Meyer v. City of Des Moines, 475 N.W.2d 181, 191.

In order for the doctrine to apply, there must be evidence that the alleged failure caused an increase in the damages. Miller v. Eichorn, 426 N.W.2d 641 (Iowa App. 1988).

A. Checklist for Failure to Mitigate

_____ unreasonably failed to mitigate the claimed damages as follows:

1. Failure to consult a doctor to obtain reasonable medical treatment. Knauss v. City of Des Moines, 357 N.W.2d 573, 576 (Iowa App. 1984).

2. Failure to follow a doctor's advice to lose weight. McDonnell v. Chally, 529 N.W.2d 611; Tanberg v. Ackerman Investment Co., 473 N.W.2d 193 (Iowa 1991).

3. Failure to take medications that were prescribed.

4. Failure to undergo recommended surgery. Fuches v. S.E.S. Company, 459 N.W.2d 642, 643, 644 (Iowa App. 1990). However, the Court repeated comment from an earlier Supreme Court opinion that lack of funds would be an excuse.

5. Failure to get vocational training. Kirk v. Union Pacific Railroad, 514 N.W.2d 734, 737 (Iowa App. 1994).

6. Failure to perform recommended physical therapy. McDonnell v. Chally, 529 N.W.2d 611 (Iowa App. 1994).

7. Failure to follow doctor's advice to _____. I.C.J.I. 400.7.

8. Failure to (get a job) (get a job that pays enough). See Federal Judicial Center: Reference Manual on Scientific Evidence, pp. 504, 505; U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2464, Displaced Workers, 1991-92; Kirk v. Union Pacific Railroad, 514 N.W.2d 734, 737 (Iowa App. 1994).

9. Failure to keep doctor's appointments to obtain treatment. Miller v. Eichorn, 426 N.W.2d 641 (Iowa App. 1988) - chiropractic treatments.

10. Failure to accept an offer of defendant to mitigate damages. Pogge v. Fullerton Lumber Company, 277 N.W.2d 916, 921 (Iowa 1979) holds that a defendant's offer to mitigate damages is admissible as an exception to the rule that offers of settlement are not admissible.

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PRETRIAL MEDIA STATEMENTS: WHERE ARE THE ETHICAL SAFE HARBORS?

Honorable Robert D. Wilson
Judge, 5th Judicial District

Sharon K. Malheiro
Davis, Hockenberg, Wine, Brown,
Koehn & Shors, P.C.
Des Moines, IA

PRETRIAL MEDIA STATEMENTS: WHERE ARE THE ETHICAL SAFE HARBORS?

HONORABLE ROBERT D. WILSON
SHARON K. MALHEIRO

I. Origins of the Rule

Ethical rules regarding lawyers' statements to the media are relatively recent and stem from abuses that occurred in a series of criminal cases, the most famous of which is Sheppard v. Maxwell, 384 U.S. 333 (1966) The Court described the trial as a circus atmosphere and was very critical of the trial court for not controlling the environment which included issuing gag orders to the attorneys, witnesses and court officials who were communicating prejudicial information to the media at all stages of the proceedings. As a result, ethical rules such as Model Code DR 7-107, Model Rule 3.6 and the ABA Standards for Criminal Justice were drafted. In addition, restrictions were placed on the media, which included banning television cameras from the courtroom.

II. Iowa's Ethical Rules

A. DR 7-107 Trial Publicity

1. DR 7-107(A)-(1)-(4)

Addresses the ethical obligations of a lawyer participating in or associated with the investigation of a criminal matter. In such cases the lawyer shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

a. Information contained in a public record;

b. That the investigation is in progress;

c. The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;

d. A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

2. DR 7-107(B) (1)-(6).

Addresses a lawyer or law firm associated with the defense or prosecution of a criminal matter. In this scenario, the lawyer shall not, from the time the complaint, information, or indictment if filed, or the issuance of an arrest warrant, or arrest, until the commencement or disposition of the trial, make an extra-judicial statement that relates to:

a. The character, reputation, or prior criminal record of the accused;

b. The possibility of a plea of guilty to the offense charged or to a lesser offense;

c. The existence or contents of any confession, admission, or statement given by the accused or the accused's refusal or failure to make a statement;

d. The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests;

e. The identity, testimony, or credibility of a prospective witness;

f. Any opinion as to guilt or innocence of the accused, the evidence or the merits of the case.

3. DR 7-107(C)

Outlines what a lawyer can say during the prosecution or defense of a criminal action:

a. The name, age, residence, occupation, and family status of the accused;

b. If the accused has not been apprehended, any information necessary to aid in the accused's apprehension or to warn the public of any dangers the accused may present;

c. A request for assistance in obtaining evidence;

d. The identity of the victim of the crime;

e. The fact, time, and place of arrest, resistance, pursuit, and use of weapons;

f. The identity of investigating and arresting officers and agencies and the length of the investigation;

g. At the time of seizure, a description of the physical evidence seized, other than a confession, admission statement;

h. The nature, substance, or text of the charge;

i. Quotations from or references to public records of the court in the case;

j. The scheduling or result of any step in the judicial proceedings;

k. That the accused denies the criminal charges

4. DR 7-107(D).

n a criminal trial either during jury selection or the trial, a lawyer shall not make extra-judicial statements about the trial, parties or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except a lawyer may quote from or refer without comment to public records.

5. DR 7-107(E).

After completion of a criminal matter and prior to sentencing, a lawyer shall not make an extra-judicial statement that is reasonably likely to affect the imposition of sentence

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6. DR 7-107(F)

Makes the foregoing provisions applicable to processional disciplinary proceedings and juvenile disciplinary proceedings.

7. DR 7-107(G)

Addresses the ethical obligations of a lawyer participating in or associated with the investigation of a civil matter. In such cases the lawyer shall not make or participate in making an extra-judicial statement, except to quote from or refer to a public record, that a reasonable person would expect to be disseminated by means of public communication, and that relates to:

a. Evidence regarding the occurrence or transaction involved;

b. The character, credibility, or criminal record of a party, witness or prospective witness;

c. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such;

d. An opinion as to the merits of the claims or defenses, except as required by law or administrative rule;

e. Any other matter reasonably likely to interfere with a fair trial of the action.

8. DR 7-107 (H).

Addresses the ethical obligations of a lawyer participating in or associated with the investigation of an administrative matter. In such cases the lawyer shall not make or participate in making an extra-judicial statement, except to quote from or refer to a public record, that a reasonable person would expect to be disseminated by means of public communication, and that relates to:

a. Evidence regarding the occurrence or transaction involved;

b. The character, credibility, or criminal record of a party, witness or prospective witness;

c. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such;

d. An opinion as to the merits of the claims or defenses, except as required by law or administrative rule;

e. Any other matter reasonably likely to interfere with a fair trial of the action.

III. TWO RECENT CASES

Gentile v. State Bar of Nevada, ___ U.S. ___. ___S. Ct. ___, 115 L.Ed.2d 888 (1991).

In this recent case, the Supreme Court recognized that an attorney's duties do not begin inside the courtroom door and condoned the use of a press conference as a lawful strategy used to seek dismissal of a criminal indictment.

Gentile's client had been indicted on charges of stealing drugs and money stored in a locker at a facility owned by his client. The drugs and the money were stored by the Las Vegas police department and were being used in an undercover operation. Prior to the indictment, the Las Vegas police department issued several press releases announcing the theft, possibly blaming the theft on employees of the police department and then shifting the blame for the theft to Gentile's client. Statements to the press included the fact that two officers originally suspected by the police as participants were cleared when they passed lie detector tests and that the owner of the facility was not cooperating with the police investigation.

Gentile held a press conference hours after his client had been indicted on criminal charges. At the conference, he made a prepared statement that accused the

Las Vegas police department of engaging in a cover up for the illegal activity by two police officers. He also stated that his client was being used as a scapegoat. Ultimately, Gentile's client was acquitted of the charges. After the trial, the State Bar brought ethical charges against Gentile. He was given a private reprimand, and appealed to the Supreme Court arguing that the rule unconstitutionally violated his free speech rights.

The Court found the Nevada Rule, modeled after ABA Model Rule of Professional Conduct 3.6 unconstitutionally void for vagueness. Rule 3.6 is similar to DR 7-107. Since Gentile Model Rule 3.6 has been amended to further delineate the "safe harbor" exception for attorneys interaction with the media. The amended rule now states that "**a lawyer may make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.**" In the comment section to the Rule, the Committee noted that "when prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding."

The significance of the Gentile case to the discussion today is the Court's recognition that in certain instances an attorney may have a duty to defend a client by calling a press conference in an effort to neutralize any adverse publicity that occurred by the police or possibly the prosecution. The Court stated "in some circumstances

press comment is necessary to protect the rights of the client and prevent abuses of the courts." Id. at 115 L.Ed.2d at 912.

United States v. Cutler, 58 F.3d 825 (2nd Cir. 1995).

Bruce Cutler was the long-time attorney for noted mobster John Gotti. Gotti was arrested on December 11, 1990 on racketeering charges, including the murder of a rival mobster. Before any court appearances were made both the United States Attorney and Mr. Cutler made several statements about the matter to the local press. Cutler, however, also appeared on national TV on Prime Time Live.

At the initial pre-trial hearing, the district court judge warned both lawyers that he would not tolerate a media trial and admonished them to read the local rule on extra-judicial statements. The New York local rule is similar to DR 7-107. As soon as Mr. Cutler left the courtroom, he held a press conference on the courthouse steps. At the press conference, he called the government witnesses bums and said the government's evidence was erroneous.

At the next hearing, the judge again raised the issue of pretrial publicity and again admonished the lawyers to stay within the local rules. The next day, Mr. Cutler was quoted in Newsday commenting on the evidence. He continued giving interviews to the media for several months. He appeared in local newspapers, magazines and on national television and radio shows. One month before the trial, Mr. Cutler appeared on a one-hour live local television show. During the show he said that:

There is no crime in the neighborhood where Mr. Gotti lives;

-- Mr. Gotti is an honorable man and not ruthless as the government says;

-- Mr Gotti was a good human being and a loyal, family man;

-- Mr. Gotti was being framed;

-- The government witnesses were being paid by the government to testify against Mr. Gotti;

-- The government's evidence was phony.

-- He hoped that the jurors would realize that witnesses lie, even the federal government lies.

Almost immediately after the broadcast, the district court judge issues an order to show cause why Mr. Cutler should not be held in contempt. Cutler lost at the contempt hearing and received a 90-day house arrest, 180-day suspension of his license; 600 hours of non-legal community service and a $5,000 fine. The appellate court vacated the $5,000 fine, but upheld the remaining sanctions. However, the Court did note that today it is difficult for a defense attorney to balance the obligation of zealous representative of a client with the media-related rules.

IV. Increased Media Coverage of Legal Disputes

A. In the past several years, we have seen an increase in news reporting of legal disputes. This involves both criminal matters and civil matters. This increased news coverage was recognized by the Court in Gentile when it acknowledged that a lawyer may be required to make comments to the press to neutralize any adverse publicity. Today, the media coverage often begins well before any legal action is filed.

Media coverage today not only includes a reporting of the basic facts, but also includes the use of legal experts who comment on the facts and offer opinions on what will occur next.

B. The Media.

1. Media coverage of the event, i.e., criminal events.

2. Pre-trial media coverage

3. The media's use of legal experts to evaluate the evidence, the attorneys, the judge, the jurors, and the witnesses.

C. The Attorney's Balancing Act

1. Ethical requirements v. the Client's right to a fair trial.

2. When is "no comment" required and when is a statement necessary?

D. What the Media Wants from Lawyers.

1. Fair reporting of all the facts.

2. Speaking court documents.

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V. Other References

A. Best summary of recent law and periodicals can be found in 1 Am Jur. Trials 303 *Controlling Trial Publicity* along with the 1995 Supplement.

B. As to the duties and obligations of prosecuting attorneys regarding their conduct in trial or prosecution of a case, see 63A Am. Jur. 2nd, *Prosecuting Attorneys*, sections 26-28.

C. *Gentile v. State Bar* and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity, 6 Georgetown Journal of Legal Ethics 583 (1993). Author argues for the "clear and present danger of material prejudice standard."

D. *Attorney Speech on Pending Trials*, 65 Wisconsin Law October, 1992 at p. 14. Author believes Wisconsin's rules (which adopted the ABA model) should be revised so lawyers won't have to guess as to what the rule boundaries are; meantime, suggests "no comment," may be best response. Editor's comment to article suggests "no comment" will erect barrier; reporter will obtain info elsewhere and client's side of story won't be told. Suggests to explain that client confidentiality prevents comment at that time; but promise to discuss it with client and get back to reporter with an answer within the rules.

VI. Judge Wilson's Personal Thoughts on the Media

A. Journalism

A Journalist is a grumbler, a censurer,
a giver of advice, a regent of sovereigns,
a tutor of nations.
Four hostile newspapers are more to be
feared than a thousand bayonets.
Napoleon I

1. Public access. Generally, whether a criminal or civil case, citizens have the right to know how our courts are operating and the nature of justice that is occurring in specific cases.

2. Ignore a reporter at your peril.

3. Try not to take a cold call - promise to call back in five minutes - recall that reports have deadlines.

4. Prepare three talking points - on paper - stick to them and stick to the public record.

5. Take the words: "Off the record" out of your lexicon.

6. Their goal will generally not be the same as yours. They want hard facts and quotes. If the reporter has a personal agenda, it is often telegraphed by the use of leading questions.

7. Treat them as a professional - even if you harbor serious doubts on the issue. This is not the occasion for extending your hand of friendship.

8. Don't say more than 25-30 words without waiting for the next questions. (Trial lawyers - how often have you given that same advise when woodshedding a client prior to a deposition?)

9. Realize to whom they answer: their editor.

10. Post-verdict neither a gloater nor pouter be. In victory or defeat, be gracious. Especially in defeat, with 20 arrows stick in you - which is when reporters really want your reaction - you must be at your most unflappable self. If you forget to prepare for this possibility and you can think of nothing else - then at least remember to thank graciously the jury for their hard work in what was most assuredly a difficult decision.

11. T.V. - Don't go on T.V. unless you look like a movie star, in which case whey are you lawyering for a living?

Exceptions:

a. Lawyers who think they look like move stars;

b. Lawyers who will do anything to get free publicity;

c. Lawyers who think it is in their client's best interest to call a press conference.

For all of these lawyers, I bow to your experience; but I leave you with the well intended advice: *know the DR; know the public record.*

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B. Articles

(SEE ATTACHED)

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Model Code Comparison

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criterion of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 makes clear that only attorneys who are, or have been involved in a proceeding, or their associates, are subject to the Rule. Third, Rule 3.6 omits the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the

I LIKE SAVING THE ENVIRONMENT'

HARRY BAUMERT, Register Photos

16 ear open a wall to get
id office building slated for demolition. They work for EcoYouth Salvage, which keeps teens employed and construction debris out of the landfills.

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TRIAL STARTS THIS WEEK

Who was to blame in Street tragedy?

The basketball star's family wants the millions they says he could have made. The county says the deadly crash was his own fault.

By CHARLES BULLARD
OF THE REGISTER'S IOWA CITY BUREAU

Iowa City, Ia. — Who is responsible for Chris Street's death?

On Monday, lawyers begin picking a jury to decide that question.

Street
Died at 20

The 20-year-old University of Iowa basketball star from Indianola was killed two years ago when a Johnson County snowplow collided with the car he was driving.

If the promising junior forward had played professional basketball he could have earned millions of dollars, his family contends.

The family is suing Johnson County and the snowplow driver, Charles Pence, claiming their negligence caused the Jan. 19, 1993, accident on the north edge of Iowa City. The county says Street was to blame because he pulled out in front of the plow.

Percentages of Blame

But if lawyers for Street's family can prove the county and Pence were more than 50 percent at fault, Johnson County and its insurance company could be forced to pay

r, 16, tear open a wall to get
apids office building slated
for demolition. They work for EcoYouth Salvage, which keeps teens employed and construction debris out of the landfills.

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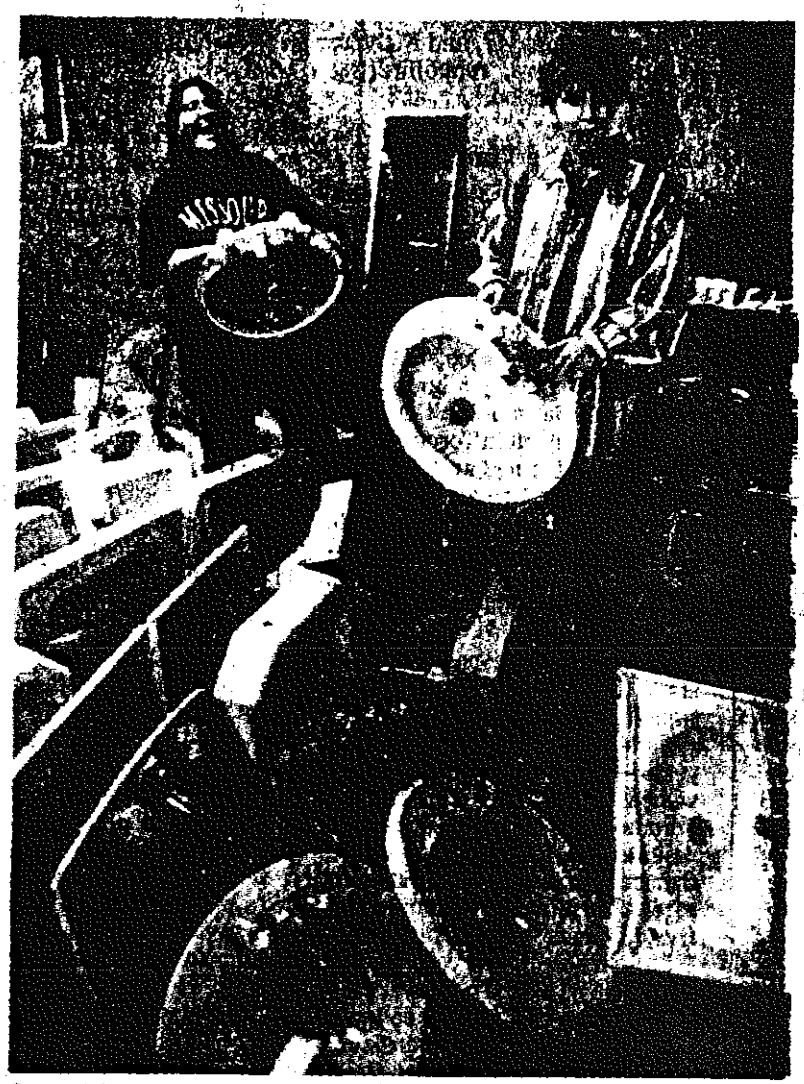
m, paneling, heating and cooling
stems, fixtures and other usable
ms from houses and businesses
ed for the wrecking ball.
'All this stuff would go to the
dfill," Eichelberger said.

lling Salvaged Items

The students established a ware-
use to sell the items they sal-
ged. With only word-of-mouth
vertising, they had sold about
2,000 worth of materials by the
1 of February, Sovern said.
The program started last fall
:h $166,600 in government
nts and donations from compa-
s. Donated materials also have
n accepted.
rganizers hope sales will make
program self-sustaining in a
ır and a half, when the grant
nev runs outs. It takes about
o pay the students, who
t about 20 hours a week.
udents work at the sal-
e sites in the mornings, five in
afternoons, and two are avail-
e to staff the warehouse. They
nd classes at Metro High during
other half of their workday.
e there are no classes at the al-
native school on Fridays, the
dents spend most of that day on
job.

ping In

nthusiasm was evident as the
dents ripped into salvage work
week at a former Ralston
ds office building here.
ob Szabo, 18, of Cedar Rapids
cked tiles around a sink in a
hroom — grunting, pushing,
ing tiles off and wrestling the
te porcelain to the ground.
he sink — and its companion
t being pulled out by Jay Pe-



Crystal Strickel, 18, and program coordinator Michelle Eichelberger look over salvaged plumbing fixtures for sale at EcoYouth's warehouse. Prices run from $10 to $40, depending on the item.

den, 18, of Ely — will join a growing inventory of bathroom and plumbing fixtures offered for sale at EcoYouth's warehouse. Toilets sell for about $15, bathroom vanities for $20 to $40, sinks, $10 to $25.

I like saving the environment," said Peden, who plans to go to college after graduating from Metro High.

Szabo, who had previous construction experience, said he has learned a lot. "It kind of opened my mind to the opportunities that are out there," he said.

The feeling of "ownership" the students have showed when Szabo said, "We're still a fairly young company, but it's going good."

Satisfying Work

The money is not wonderful but the work is enjoyable, said Dan Kramer, 16, of Cedar Rapids. "It's better than working at Hardee's, flipping burgers."

Crystal Strickel, 18, of Cedar Rapids said she enjoys working at the warehouse, though she wants to become a writing teacher.

"I've learned how important it is to be organized," she said. "It's also taught me a lot about responsibili-

TEENS *Please turn to Page* **3B**

...ball, he could have earned millions of dollars, his family contends.

The family is suing Johnson County and the snowplow driver, Charles Pence, claiming their negligence caused the Jan. 19, 1993, accident on the north edge of Iowa City. The county says Street was to blame because he pulled out in front of the plow.

Percentages of Blame

But if lawyers for Street's family can prove the county and Pence were more than 50 percent at fault, Johnson County and its insurance company could be forced to pay millions of dollars to the Street family.

The limit on the county's liability insurance is $5.5 million. Johnson County taxpayers would be responsible for any verdict exceeding that amount.

In an attempt to show Street's potential earning power as a professional basketball player, the Street family's lawyers have indicated that several well-known basketball coaches, such as the University of Iowa's Tom Davis, Mike Krzyzewski of Duke University, Bob Knight of Indiana University, Clem Haskins of the University of Minnesota and Johnny Orr, formerly of Iowa State University, may testify, either in person or by deposition.

Lawyers defending the county and Pence will argue that Street was more than 50 percent at fault because he was not wearing a seat belt and because he drove into the path of the oncoming snowplow. Under Iowa law, if the defense can prove that Street was more at fault than the county and Pence were, his family will collect nothing.

"It is our claim that the cause of the accident was Mr. Street," said Tom Riley, a Cedar Rapids lawyer defending Pence.

Earning Potential

Failing that, lawyers for the county and Pence will attempt to show that Street would not have made it to the NBA or would not have earned as much as lawyers for his family assert.

Court records indicate lawyers representing the county may contend that Street was not NBA material because he had a bad back and a heart problem. But Street never missed a game during more than

STREET *Please turn to Page* **4B**

is true, there's some-
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ious."

ficials said Friday that no
is ending on O'Neel's li-
it mained suspended.

84 to 1992

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21 ord span from 1984 to
ca ng he has twice failed a
driving test and each time
lic se revoked; he was
vi driving while his li-
s re oked; he was charged
ing without a license; and
na his license suspended
ly or failing to pay fines
es hat included speeding
per use of a handicapped
er t in his vehicle.
ow s at least $231 in fines
penalties, said Phyllis
the DOT.
oC rville, a DOT supervi-
the information on
ec d: "This sounds like a
nas low regard for the law.
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s there had been a mis-
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it in my pickup. I don't

whether we're assisting and doing the right thing for veterans."

O'Neel said, "There seems to be a group of individuals, we can't put our finger on what they're dissatisfied about. They're just dissatisfied they're not in control. We have so many letters of support in what Randy has done in hiring me. . . . We have a vocal few that are contacting the senators."

Sen. Jim Lind, R-Waterloo, said the confirmation problem is real.

"This issue is going to be extremely controversial. Why? He hired Mitch O'Neel," he said.

An angry Sen. Tony Bisignano, D-Des Moines, said Brown appears to be challenging the Senate's rejection of O'Neel. "When the Senate doesn't confirm you, the Senate is saying they don't have confidence in you. The new appointee is probably in just as much confirmation trouble as the last nominee."

"Finding Out Things"

Bisignano added, "Because of the intensity raised by veterans since last year, they've made it a high-profile appointment. Now, we're finding things out that we didn't know about before and we should have."

Brown said when he was appointed in June he saw O'Neel as most qualified for the executive officer's job. The post has no specific job description, other than serving as chief administrative officer to the executive director. And the job doesn't require competitive hiring, state personnel officials said.

O'Neel described a job with multiple duties: When lawmakers consider policy changes, he assembles fiscal impact studies. He meets with state officials to coordinate veterans services. He travels to veterans events.

O'Neel's credentials as a disabled veterans representative for Job Service of Iowa and a former member of the veterans commission prepared him for this job, Brown said. "He knows internal works of state government. He knows the benefits and workings of this office. There was nobody else to put in this position that knew the process, knew the job."

Brown asked, "We're under this scrutiny. Have you checked the backgrounds of the people throwing the scrutiny out?"

But Bisignano said O'Neel is the issue and should be removed.

"He doesn't pay his fines; he doesn't have a valid driver's license," Bisignano said. "Is this who we want representing veterans?"

Family, county trade blame for star's death

STREET

Continued from Page 1B

two seasons as a Hawkeye.

John Albright, a University of Iowa doctor, treated Street for a stress fracture, a back problem, and found a heart condition, according to a court document filed by the county's lawyers. Albright declined to comment to a reporter.

Donald Brown, a U of I doctor listed in another document filed by the county as having treated Street's "cardiology problem," said he does not recall ever having seen Street.

Al Lorenzen, a former U of I basketball player, is listed as a defense witness who will testify about the difficulties of going from college to professional basketball.

Trial Moved

The trial will be held at the Iowa County Courthouse in Marengo using jurors from that county because Johnson County jurors would have a conflict of interests. Because of its complexity, the trial is expected to last two to three weeks.

Lawyers for the Street family expect to call an accident reconstruction expert, an engineer, a human-factors scientist and an economist. Lawyers for the county and Pence plan to counter with similar experts, including one who will use computer simulation to recreate the accident.

There is a countersuit by Pence against the Street family. Kimberly Vinton — Street's girlfriend and a passenger in his car — also is suing the county and Pence. Their lawsuits will be tried at the same time as the Street family lawsuit.

Most of the lawyers involved in the cases said they could not comment, citing a voluntary agreement among themselves to limit pretrial statements.

Fault Is Main Issue

Riley, who apparently was not a party to the agreement, said the trial's main issue will be not how much money Street would have made in the NBA, but rather who caused the accident.

"Certainly Chris Street was a fine Iowa basketball player, and had he gotten to the NBA and stayed in the NBA and not squandered his money, he might have had a substantial estate," Riley said.

"But before you even get to that point, you've got to decide who was at fault. We believe that Mr. Street was the cause of the tragedy," he said.

Michael Green, a U of I law professor who is not involved in the trial, agreed with Riley's assessment.

"If I were the Streets' lawyer, I would not want me to be on the jury," Green said. "If I were assessing percentage, I think I would find it hard to conclude that the county and the snowplow driver were more than 50 percent at fault in this."

But Green said Street's popularity and the tragic circumstances of his death could sway jurors.

Weighing against the memory of the popular player is the perception that his family's lawsuit is unseemly, Green said. "When the suit was filed, there was a lot of anger at the family for having done that," he said.

Michael Street, Chris' father, declined to comment.

Both Charge Negligence

According to the family's lawsuit, the county was negligent because the snowplow's headlights were mounted on top of the truck cab in violation of "sound engineering principles." The lawsuit also says the snowplow's yellow flashing light was not operating.

The lawsuit says county snowplow drivers were required to work excessive hours on the day Street was killed. The lawsuit alleges the county failed to properly train its snowplow operators, claims Pence was negligent because he was speeding, and says he failed to maintain a proper lookout and have the snowplow under control.

In June 1993, Pence was convicted by a jury of driving 52 mph in a 45 mph zone. He was ordered to pay a total of $57.50.

According to Pence's counterclaim against Street, the basketball player was negligent because he drove from a driveway into the path of the snowplow. Street failed to maintain a proper lookout and failed to yield the right of way, the counterclaim contends.

If Street had lived, Iowa City police said they would have charged him with failing to yield the right of way and failing to wear a seat belt.

THURSDAY'S FORECAST

Feb. 29, 1996: Sunny; westerly winds 10 to 15 mph. Sunrise: 6:50 a.m. Sunset: 6:05 p.m.
Details: 2M.

HIGH [redacted] LOW 2°

IOWA WINS 20TH; ISU

Hawks upend Wisconsin, 69-54; Cyclones lose to Kansas S

THE NEWSPAPER IOWA DEPENDS UPON

The Des Moines Regi

DES MOINES, IOWA ■ THURSDAY, FEBRUARY 29, 1996 ■ PRICE 35 CENTS

- 16 -

"We'll never know what really went on and why ... I've never seen so much lying in my life."

— **Patricia Hulting,** whose client was acquitted

ury acquits 3 men of murder charges

The fate of two defendants named as gunmen has not been decided.

CAFE DIVANG TRIAL

■ **Two defendants** were acquitted Wednesday of the charge first-degree murder and terrorism. A third was found not guilty c but the jury is still deliberating on the charge of terrorism agains The jury continues to deliberate the fate of two other defendants case.

Charge:	Chieu Quang Le 29	Linh Van Tran 22	Tien Thanh Phan 17	Hoang Xuan Nguyen 23
First-degree murder	*Not guilty*	*Not guilty*	*Not guilty*	Jury deliberating
Terrorism	*Not guilty*	*Not guilty*	Jury deliberating	Jury deliberating

Jury acquits 3 men of murder charges

The fate of two defendants named as gunmen has not been decided.

By DAN EGGEN
REGISTER STAFF WRITER

A Polk County jury cleared three suspects of murder in the Cafe Divang slaying case Wednesday, then continued to ponder the fate of two others behind closed doors.

After deliberating 21 hours over five days, the 12 jurors indicated they were divided on several counts — although they did not identify which defendants or charges they applied to. They were leaning toward conviction on two counts and acquittal on a third.

INSIDE

Biet Nguyen, who owns a struggling grocery store and restaurant, isn't scared.

Page 1M

The two remaining murder defendants were those named as gunmen by prosecutors.

The deadlock raises the specter of a possible mistrial in the case, which is already unprecedented for its scope, length and cost. The state court system spent nearly $100,000 before the trial even began, officials said, most of that for Vietnamese language interpreters.

"This case never should have gone to trial," said Ronald Wheeler, one of eight defense attorneys in the trial. "It was a tremendous waste of taxpayer money."

Tien Phan happily makes signs to relatives at a bond hearing Wedn

Two men, Chien Quang Le and Linh Van Tran, were acquitted of both charges against them, first-degree murder and terrorism. A third, Tien Thanh Phan, was also acquitted of murder, but the jury continues to debate the terrorism charge in his case.

Tran was freed Wednesday, but

DELEGATES

HERE IS the current breakdown of the presidential preferences of delegates to the Republican National Convention, according to The Associated Press.

REPUBLICANS

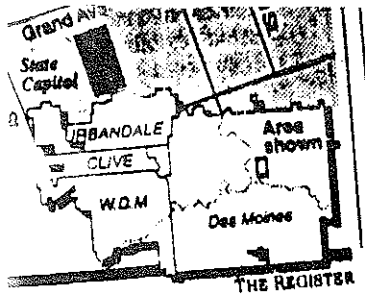
Candidate	Total	Tuesday
Forbes	60	+43
Buchanan	37	+10
Dole	35	+19
Alexander	10	+1
Un		

Candidates on cro

Tuesday's vote didn't clear up the three-way GOP race — it just changed one of the three main contenders.

By JOHN KING

verse electorates all at or
Heading into South Ca
Forbes, Pat Buchanan a
der Bob Dole are cluste
the front.
Following his victory
day in the winner-take-a
zona primary, Forbes is
but it is truly a race wit



devotion to customers on the
it and south sides" of the city.
He said General is "doing better fi-
ncially than at anytime in our his-
ry."

Last year, General officials report-
they had preliminary plans for a
otel on property across the street
om the hospital's main entrance.

Wright on Tuesday said those
lans are on hold, and General offi-
ials now are more interested in leas-
g or selling property on the east
ide of East 14th Street for an elder-
y "assisted living" project.

General officials would like to
ave a facility with about 100 apart-
ment units, he said. The hospital
could provide an on-call physician,
food and other services.

school eyed

viding many potential students for the new high school.

Officials at both Lutheran schools have long wanted a high school, but the expense was considered prohibitive. Kraemer said that donations ady made to the school effort g with the new gift, will provide lid base for fund-raising.

Currently, students wanting to continue a Lutheran education in high school must go to boarding schools in neighboring states.

The new school would not be just for Missouri Synod Lutherans, but would probably have a board representing all Lutheran church types, as is done at most of the Lutheran high schools across the nation, Pierce said.

The meeting will be at 7 p.m. March 7 at the Mount Olive Lutheran Church and School, 5625 Franklin Ave.

The General Accounting Office, a [illegible] dog agency, estimates that the sugar program raises sweetener costs $1.4 billion a year and says the peanut

Jim Ross [illegible] the amendment; Tom Latham and Jim Nussle opposed

Jury acquits three men of slaying at Cafe Divang

DIVANG

Continued from Page 1A

Judge Glenn Pille would not allow it.

His family could not afford the $1,300 for a surety bond. "But I came here to bring him home," his disappointed mother said through an interpreter at the courthouse.

"My family is very happy he has been cleared," Phan's brother, Tam Nguyen, said later. "We want him home again."

The suspects have all been held in the Polk County Jail since August, when they were arrested in the death of Hai Van Nguyen, 30. A recent arrival to Des Moines from the Atlanta area, Nguyen was shot once in the back Aug. 6 at the Cafe Divang, 1926 Cottage Grove Ave.

Wheeler, who represents Le, said the case was a fiasco from the beginning — when a suspect's brother was arrested by mistake.

"Basically, the case was a prosecutor's nightmare," said Wheeler, a former prosecutor himself.

Patricia Hulting, a Des Moines attorney representing Tran, agreed.

"They let people go that they had better evidence against," Hulting said. "We'll never know what really went on and why, because so many of the witnesses put on by the state were lying. I've never seen so much lying in my life."

Polk County Attorney John Sarcone and Daniel Voogt, one of the prosecutors handling the case, declined to comment on the partial verdict. Prosecutor Jamie Bowers could not be reached for comment.

Billed as the largest single murder prosecution in Des Moines history, seven suspects were originally charged with first-degree murder, gang participation and terrorism: Le, Phan, Tran, Hoang Xuan Nguyen, Kiet Thanh Nguyen, Hien Quoc Thai and Toan Song Vo.

None of the suspects are related to each other or the victim.

Authorities portrayed Hai Nguyen's death as a revenge killing, with prosecutors later arguing that it was in retaliation for a July brawl at the Kim Anh Restaurant.

There were several key developments before trial. First, the gang charges were dropped — and all references to gangs were banned at trial. And Thai's case was separated from the others because of statements he made implicating other suspects; his trial is to begin Monday.

But the key change was Vo, a suspect who agreed to plead guilty to the lesser charge of attempted murder in exchange for his testimony.

During the trial, Vo placed all five suspects near or inside the Cafe Divang at the time of the shooting.

But defense attorneys were relentless in their attacks on Vo's credibility, calling him a liar who changed his story to fit his needs. The jury may have agreed: The panel asked to hear a tape-recording of Vo's original statement to police.

"Vo was a witness who was bought and paid for by the state," Wheeler said. "He said whatever they wanted him to say. I think the jury discounted him completely."

Wheeler estimates he's spent 600 hours on the case — meaning an eventual bill of about $33,000 to the state for his services alone. Many have criticized the cost, but attorney Roger Owens does not.

"If that's what it costs, that's what it costs," said Owens, who represents Phan. "Someone di
and you can't put a p ce
that."

The Divang case has bee
by complexity and controve
the beginning.

Just a week after s e
suspects were arrested, d
torneys complained they
able to communicat w
clients because the sta w
providing interpreters,
guaranteed by law. Attor
alleged prosecutorial is
connection with threa t
cooperative witnesses.

The mood was often te
as well. The testimo
witnesses dragged o
during which time fre
mishes erupted among
and three jurors wer lis

CAFE DIVANG CASE

■ **Three defendants wer**
cleared of murder charges Wednesday in the Cafe Divang slaying, but the jury is still debating the fate of two oth s.

T Ri

Short Takes

■ **Ed McMahon** has settled his $5 million libel suit against the *Star* tabloid over a 1993 story that claimed the TV star was rip-roaringly drunk on a flight to London. The case was set [illegible] this week.

...is of communication.

CompuServe has now quit censoring and instead is offering free software that screens out offensive material. This is far preferable. It is better to deal with fears about what someone may offer on the Internet by giving users the power to decide for themselves what they do or do not wish to look at.

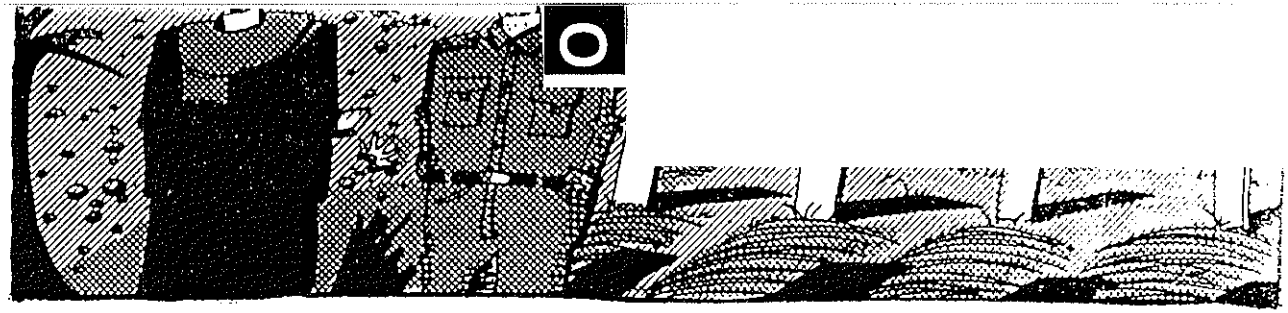
The Internet is composed of some 60,000 computer networks linking more than 2 million computers with 40 million users in 160 countries around the world. By its very nature, the Internet cannot be easily regulated. No single group or institution runs or controls it and information does not flow from central points to far-flung audiences but from point to point, from one computer user to another.

On the Internet, everyone can be a "publisher" by putting up a "home page" on the World Wide Web, by sending out e-mail, by participating in discussion groups. Millions of World Wide Web "publishers" do not publish and disseminate information in the traditional legal sense; rather, they make their web pages available and those who are interested come to look. What interest does the government have in such an exchange? To protect children, perhaps, but will what's available on the Internet for the entire world be governed by what is acceptable to minors in America?

If the Internet is truly the marketplace of ideas that Justice Oliver Wendell Holmes envisioned 75 years ago, where everyone can enter the marketplace on equal footing, that analogy should be carried one step further to answer concerns about the Internet: Just as you would not take children to see a public hanging, parents should be the arbiters of what their children see on the Internet's public square.

...ar conundrum

...geniuses at ISU



TED RALL/CHRONICLE FEATURES

THE REGISTER'S READERS SAY 2/11/96

Race-bias suit a challenge to police, city

A federal trial in Des Moines pits several black police officers against the city of Des Moines, its police chief and his assistant. The main issue is whether the black police officers are being discriminated against by working in a hostile environment.

The legal issues are neither complex nor difficult. However, the allegations from both sides create difficulties that will rage well beyond the boundaries of the courtroom. The police department and our community will be dealing with them for years to come.

Whatever the verdict, it is sheer folly to expect any of these officers to walk back into roll call without some animosity. They have made serious allegations of racism against fellow white officers, who in turn have raised serious allegations against the black officers.

Even officers who are not directly involved in the litigation will be forced to comment and to take sides, which will increase tension. The fact that the police department's dirty laundry has been publicly aired to some extent violates the "blue code of silence."

Police officers have a difficult enough occupation without the added factor of having to deal with charges of racism or being its victim.

The leadership to help the police department and our community out of this morass is absent. Even if there is a verdict, appeals could take years. The police chief's position as a leader on this issue is affected because he is a defendant. The newly elected mayor is unable to speak out due to the fact that litigation is pending and his firm is representing one of the defendants. No council members or other city officials have addressed the issue other than to acknowledge the lawsuit.

This leadership vacuum will play havoc with reconciliation within the police department and community. Unless someone takes the helm, this vacuum will jeopardize effective law enforcement in our community for years to come.

The role of the police department is to protect and serve citizens fairly. A crisis of confidence within the police department or community jeopardizes this mission. The only way the aftermath of a jury verdict can be addressed is by immediate, strong and positive leadership assuring this community and police officers that the department's mission will be preserved.

— Alfredo Parrish,
2910 Grand Ave., Des Moines.

Thankful for flood? Hardly

As a person who worked extensively with the Valley Junction flood victims in July 1993 and for the nearly three years hence, I take great umbrage with Kathy Bolten's article "Thank God f...

hutch, only to see it hauled away with the thousands of tons of debris.

I saw the tears of grandparents and the fears of children, traumatized ...

Mental illness can be treated

A Register editorial on Jan. 27 reminded us that hospitals are places for treatment ...

FEDERAL COURT

Judges sued in reverse bias case

A court official was denied a promotion that he says was given to a less-qualified woman.

By MARK P. COUCH
REGISTER BUSINESS WRITER

Three federal judges in Des Moines have been accused of discriminating against a courthouse veteran who says he was overlooked for a promotion.

David A. Duffy, a court official, contends he didn't get a promotion because the judges hired an outsider with less experience. The allegations are contained in a lawsuit filed Friday in the U.S. District Court in Des Moines.

The judges — Charles R. Wolle, Harold D. Vietor and Ronald E. Longstaff — are the senior jurists on the federal bench and they hire the people who run day-to-day operations at the courthouse.

Duffy, a white man, has worked in the federal court's probation office since 1974, and currently serves as the chief deputy probation clerk. The lawsuit says he served occasionally as acting chief probation officer beginning in 1992.

Two Years Ago

Duffy says he applied for the chief clerk's job and was rejected about two years ago. The job went instead to Jane McPhillips, a white woman who had been a supervisor in charge of pre-sentence investigations in the probation office in the U.S. District Court of Minnesota.

Garold Ray, deputy chief clerk of the federal court in Minnesota, said McPhillips has been employed in the court system for more than 20 years.

Duffy claims that the judge

LAWSUIT *Please turn to Page 7*

U.S. judges are sued for reverse bias

LAWSUIT

Continued from Page 12S

filled the "position of chief probation officer in favor of a substantially less qualified female applicant", and that they "made their promotional decision in substantial part on the basis of gender."

The document doesn't explain how the judges made their decision on the basis of gender.

McPhillips declined to comment.

So-called "reverse-discrimination" cases aren't new. Others have challenged government-sponsored set-aside programs that earmark contracts for minority-owned firms.

But a case like Duffy's is rare. Few lawyers dare to challenge judges they might face in future cases.

In Duffy's case, his primary lawyer, James Baker, practices in Springfield, Ill., and his local counsel, T. James McDonough, is a retired Drake University law professor.

Neither Baker nor McDonough returned calls. Duffy said his lawyers advised him not to comment on the case.

It's a touchy case on the defendants' side as well.

The local U.S. attorney's office has recused itself and will not be representing the judges in the litigation.

The judges will be represented by Lawrence Kudej, assistant U.S. attorney in the U.S. District Court for Northern Iowa in Cedar Rapids. Kudej declined to comment.

VOYEURISM ALLEGED IN URBANDALE

Couple's suit against motel says they were watched via peephole

'This was a very traumatic incident,' their attorney says. 'Their most intimate privacy was invaded.'

By DAN EGGEN
REGISTER STAFF WRITER

A Des Moines couple is suing an Urbandale motel, alleging that an employee spied on them through a peephole.

Angel and Linnette Flores had sex several times during their stay at the Budget Host Inn last June, and Linnette Flores was naked when she discovered the voyeur, according to the lawsuit filed this week in Polk County District Court.

A man who identified himself as the motel's manager said Friday that he needed to consult with an attorney before commenting on the lawsuit.

The Polk County petition is modeled on lawsuits filed against two Coralville Best Western hotels, which gained national attention and netted settlements totaling $1.1 million.

Last June 23, the Floreses checked into the Budget Host Inn, 7625 Hickman Road in Urbandale, with their 17-month-old daughter. The family was in the process of moving and stayed at the motel for about a week, their attorney said.

Linnette Flores, after undressing to take a shower June 27, heard a noise from an adjoining room. She discovered a hole in the door between the rooms and, looking through it herself, saw a man "who had been spying on them," the lawsuit says.

The man, who is not named in the lawsuit, was allegedly a cleaning employee of the motel.

"This was a very traumatic incident for them," said Maggi Moss, the Floreses' attorney. "Their most intimate privacy was invaded."

The couple alleges invasion of privacy, negligence and "intentional infliction of severe and extreme emotional distress." They are seeking compensation, punitive damages and legal fees.

The lawsuit says the couple made love several times during their stay and also discovered that Linnette Flores was pregnant.

The couple "had several very intimate and personal conversations about this discovery while in their hotel room," according to the lawsuit.

As a result of the voyeurism, the lawsuit claims, the Floreses have also suffered a loss of consortium, "deprived of the comfort, society, affection and services of each other."

In 1992, a Johnson County jury awarded a couple $4.3 million in damages because there was a two-way mirror in their Cantebury Inn suite in Coralville; the case was later settled for $1 million. In 1994, a jury awarded an Indiana couple $105,000 in damages because of peepholes in their room at Westfield Inn in Coralville.

The plaintiffs' lawyer in both cases, Tom Riley of Cedar Rapids, has since filed a class-action lawsuit against Younkers, Inc., for allegedly allowing peepholes in fitting rooms at the company's Merle Hay Mall store in Des Moines. Younkers has argued that the case is a hoax set up by a fired employee.

An Omaha woman also sued Kum & Go Food Stores of West Des Moines last year, claiming that an employee at the chain's Urbandale store spied on her while she used a restroom.

Nurse sues doctor, hospital

Muscatine, Ia. (AP) — A nurse at Muscatine General Hospital has sued the hospital and a physician there, charging she suffered damages because the doctor hit her and she had to work in a hostile environment.

An attorney for Leann Holland filed the lawsuit Tuesday in U.S. District Court in Davenport.

Officials at the hospital denied the charges Thursday.

"These allegations are simply not true," said Jonathan Goble, the hospital's chief executive officer. "We have treated Leann with absolute respect."

Dr. Robert Weis, who works at the hospital, was charged with simple assault in October after he reportedly hit a nurse with the back of his hand at Muscatine General. In January, a Muscatine County magistrate fined Weis $50 and ordered him to pay court costs in the case.

In her lawsuit, Holland says Weis hit her when she tried to comfort another nurse he'd yelled at. She says that incident on Oct. 25 came after female employees at the hospital were mistreated because of their gender or their complaints about physicians.

Holland says the hospital allowed that hostile work environment to continue and retaliated against her by reducing her hours on the day shift and criticizing her.

Holland asks for unspecified damages for physical injuries, emotional distress, damage to her career and loss of reputation.

Goble said he was disappointed by the lawsuit.

"Leann Holland is a longtime employee who in my opinion has been treated with respect, as we treat all of our employees," he said.

MAY 7, 1996

Parents sue driver charged in teen's death

By DAN EGGEN
REGISTER STAFF WRITER

The parents of a teen-ager killed by an alleged drunken driver are suing the driver, two taverns and his employer, who owned the vehicle he was driving at the time.

Two young women died after the March 30 crash in Ankeny: Heather Hallengren, 19, and her college roommate, Mercedes Heggen, 20.

Donald Corwin, 45, of Ankeny has been charged with two counts of vehicular manslaughter. Police say he was drunk, and he has a history of drunken driving convictions.

Heggen died instantly, officials said. Hallengren, who had been a member of Students Against Drunk Driving in high school, lived for four days.

On Monday, Hallengren's parents — John and Jamie Hallengren of Adel — filed a lawsuit in Polk County District Court against Corwin, two bars and Bob Brown Chevrolet Inc.

At the time of the crash, according to the lawsuit, Corwin was a salesman at the Bob Brown dealership and was given the use of a Jeep Grand Cherokee as part of his employment.

The dealership "knew or should have known of his alcohol consumption propensities, his past incidents of driving under the influence of alcohol, his driving record and the likelihood that would drive a vehicle provided for his use while under the influence of alcohol," the lawsuit says.

Hallengren's parents also claim that the Dog Leg Lounge in Saylor Township and the Cottontail Lounge in Urbandale were negligent in serving alcohol to Corwin. The family is seeking damages and legal costs.

Ron Brown, president of Bob Brown Chevrolet, declined to comment on the lawsuit. His attorney, Randall Stefani, also declined to comment.

"This was truly a tragic event," Brown said. "Our thoughts and prayers are with the families of the victims."

Owners of the taverns could not be reached for comment.

Corwin declined to comment. He pleaded guilty of drunken driving in 1988, 1989 and 1991, Polk County court records show, and was charged with driving with a suspended license in 1992.

...and his wife, Loretta, can sail their 27-foot sailboat at Saylorville Lake almost every day in the warm months, but when it turns cold, then what?

This is the tricky part of early retirement.

Retired Early

Fingert, just 55 years old, retired from his dentistry practice in late 1992. He quit because of health problems and family history. His dad died at the age of 47. His older brother died when he was 47. When Fingert was 47, he underwent seven heart bypasses in one operation. Four years later, in 1992, he had a heart attack.

He went back to work part time, then while he was struggling with a difficult patient one day, his chest began to hurt and he decided that was enough.

"I was with my dad when he died. I was 12 years old. It left quite an impression on me," Fingert said.

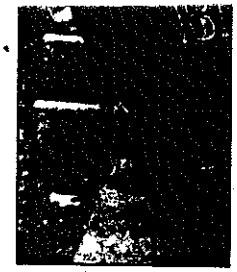
Loretta's salary as a teacher at McKee Elementary is the income for the two of them now. The children are grown and gone. Daughter Jane, 29, is a physical therapist in Kansas City and son John, 27, attends medical school in Iowa City.

John already has a sailboat that his dad restored. Jane's boat is ready for its maiden voyage in Gray's Lake.

"Now I need a project for next winter," Fingert said.

Lots of Experience

If you count scale models, Fingert has plenty of shipbuilding experience. He started while attending dental school at the University of Iowa — "I was halfway through the lib-



The stern of the boat b

eral arts program, flipped dentistry and thought th ing."

After graduation, he sig the leading ship businesse ed States Navy.

"I was on a ship the fi gave me a uniform and salute," Fingert said. Tha shipboard life.

Back on shore at Norf communism and tooth dec tist.

Fingert served two year back to Des Moines, his ho 13.

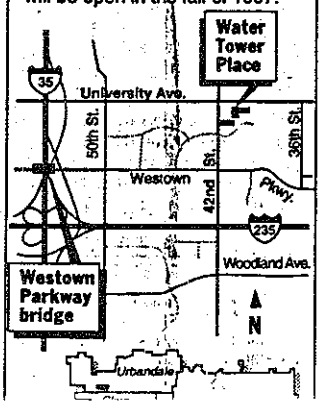
Bigger Ones

He began filling the hou crafted, finely detailed shi scratch and up to 3 feet lo nails made from toothpi made from dimes, copper pennies.

Hot debate in W.D.M.

BRIDGE

■ **Construction of the** Westown Parkway Bridge will begin this summer and the bridge will be open in the fall of 1997.



The dispute among members of the council dampens enthusiasm for the Westown Parkway project.

By KATHY A. BOLTEN
REGISTER STAFF WRITER

West Des Moines, Ia. — City Council members got into a dispute Monday night over whether a pedestrian walkway should be included in the long-awaited Westown Parkway bridge, a project that officials believe will spur development in the area and create more jobs.

Some council members said that the quarter-mile bridge should include the 10-foot walkway to provide pedestrians with a safe route over Interstate Highway 35/80. Others said building the walkway is a

Former employee sues John Deere for his firing

THE REGISTER'S IOWA NEWS SERVICE

Cedar Rapids, Ia. — A former John Deere & Co. employee alleges in a lawsuit that he was fired for a number of wrongful reasons, including reporting to his supervisors violations of environmental laws and regulations at the company's Waterloo foundry.

In a lawsuit filed in federal court in Cedar Rapids, William Montgomery of Waterloo alleges that after 28 years of dedicated service, he was told on Aug. 23, 1994, to turn in his keys and leave the premises. Montgomery, who was engineer of process materials in the environmental foundry's engineering department, says he was given no explanation for his firing.

It also says he has a medical disability called narcolepsy and contends that his termination constituted a violation of the Americans with Disabilities Act and a similar state law. Montgomery, who was 52 when he was fired, also alleges he was discriminated against on the basis of his age.

The lawsuit seeks a judgment for an unspecified amount of money for loss of past and future earnings and benefits, for costs of bringing the lawsuit and for punitive damages.

Deere has a policy of not commenting on pending court matters, a company spokesman said Sunday.

4/22/96

Father, son sue therapist in 'repressed memories' case

LAWSUIT

Continued from Page 1M

psychological treatment of his mother, SAH.

Clinic, Therapist Named

The defendants are Wadle & Associates, a clinic at 2327 70th St., Des Moines, and a therapist there, Anita Jordan, who allegedly misrepresented her credentials and expertise as a counselor and "sexologist."

Janice Klutts, office manager at Wadle & Associates, declined to comment Tuesday on the lawsuit. Jordan did not return phone calls.

"The supposed memories are fairly outrageous," said Janece Valentine, a Fort Dodge attorney representing the man and his son.

"You think that when you go to a doctor or therapist, they are there to heal you, not make you worse."

Valentine said the woman sought treatment for depression after her family's home was deluged by record floods in 1993. She began seeing Jordan in 1994, the lawsuit says.

The therapy — including hypnosis and "participation in survivor groups" — led the woman to have memories of alleged abuse, Valentine said. They included memories of "satanic cult rituals" and a diagnosis of multiple personality disorder, she said.

The lawsuit itself does not say what kind of memories were involved, only that they led the woman to be estranged from her son and stop caring for him. Valentine declined to provide further details.

The woman withdrew from her family and filed for divorce while undergoing therapy, Valentine said. She has since moved from Webster County, where her ex-husband and son still live.

"You think that when you go to a doctor or therapist, they are there to heal you, not make you worse."

— Janece Valentine
Fort Dodge attorney

"This case has all the classic patterns of false-memory syndrome," said Valentine, a partner at Leehey & Valentine. "They're told they have to distance themselves from the outside world to make themselves better."

Across the country and in Iowa, people are suing parents, siblings, neighbors, teachers and clergy they claim abused them as many as 40 years earlier.

One recent example is a 1995 lawsuit against the Roman Catholic Diocese of Des Moines, alleging that two former altar boys — Joseph Duff and Timothy Lynch — were molested by the late Monsignor Francis Zuch from 1970 to 1975. The outcome of that lawsuit is still pending.

Many parents, on the other hand, have begun suing therapists for leading their adult children to falsely accuse them of abuse.

One of the first such cases recently went to trial in California, with mixed results.

The trend has alarmed the psychiatric profession. In 1994, both the American Medical Association and the American Psychiatric Association issued warnings about recovered memories, which they said could not be relied upon as sole evidence of abuse.

The case appears to be the first recovered-memory lawsuit against a therapist in the state, according to Maureen Rank with the Iowa Psychological Association.

There is an added twist in this case: It is a patient's ex-spouse and child — not parents — who are suing the therapist.

The lawsuit not only takes issue with Jordan's therapy, but with her credentials. It alleges that Jordan falsely claimed to have a doctorate degree in behavioral science and "sexology," and says she was not licensed by the state.

"Jordan is not qualified to render hypnosis and memory-recovery therapy," the lawsuit says.

The lawsuit also alleges that Jordan wrongly allowed an unqualified registered nurse to perform those same tasks without supervision.

The man and his son allege professional negligence, fraudulent misrepresentation, public nuisance, intentional infliction of emotional distress, failure to obtain informed consent and negligent hiring.

They are seeking compensation, punitive damages and legal costs.

6/19/96

INTENTIONS AND $4.00 WILL GET YOU A MICROBREW, BUT IT WON'T GET YOU UNDERSTOOD

Mary E. Ryan
Speech Communications Specialists, LTD.
606 South Jersey Street
Denver, Colorado 80224

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Speech Communication Specialists, Ltd.
606 South Jersey Street
Denver, Colorado 80224
303-331-9520

Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood: Perception is the Key to Communication in Litigation

Mary E. Ryan

Nonverbal Communication In Litigation: What Lawyers Need to Know

I.Power & Authority - How We Know Who Has It

A. Space = Power

1. The Human Animal and Territoriality

B. Relaxation = Authority

II. Immediacy & Engagement - How Others Know We Have It

A. Physical Nonverbal Indicators of Engagement

1. Forward Lean
2. Direct Shoulder Orientation
3. Close Proximity
4. Eye Contact

B. Rapport Building

III. Applications of Nonverbal Behavior to Law Practice

A. Power & Authority
1. Court
2. Opposing Counsel
3. Meetings/Depositions

B. Engagement & Immediacy
1. Court
2. Opposing Counsel
3. Meetings/Depositions
4. Staff

Persuasive Language & The Law

I. Humans: The Story Telling Animal

A. The Power of Story & Self Persuasion

B. Persuasion = Facts Filtered Through

1. Reactions to Past Experiences
2. Personality Type
3. Emotional State & Situation

II. Language, Persuasion & Cognitive Processing Modes

A. Types of Cognitive Processing

1. Auditory - "I can hear what your saying," "Sounds good to me"
2. Visual - "I can see that," "That is crystal clear to me"
3. Kinesthetic - "That doesn't feel right to me," "I can get a handle on that"

B. Mirroring Language

III. Applications of Persuasive Language Skills

A. Court
B. Opposing Counsel
C. Meetings/Depositions
D. Staff

Observing Juror's (and other's) Nonverbal Behavior: What Can You Really Know?

Why to Watch

Use nonverbal behavior observation **only** to aid in developing overall communication profiles, **not** as a magic key to "reading the juror's minds."

Observe nonverbal behavior to establish their baseline responses, then watch for variations in those behaviors rather than for some Webster-like dictionary of nonverbal responses.

What to Watch

Their Body

- People control their lower body responses less than their upper body.
- People are almost incapable of controlling their eyes when they are startled or suprised, even when they are trying to mask their responses.

Their Behavior

- People who control space are perceived by others to have power.
- People with higher status tend to touch others more often.
- People with a large signature size frequently are accustomed to having power.

When to Watch

Outside Courtroom

- Outside the courtroom you can observe their interactions with others as well as their behaivor.

While Others Are Answering Questions During Voir Dire

- People react more naturally when they feel they are not the object of observation.

What to Remember When You Watch

Jurors will try to deceive you because they believe it is their job to remain impassive.

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WHAT DOES THE GRIEVANCE COMMISSION DO AND WHAT DO LAWYERS DO SOME SURPRISING CASES

Bruce Haupert, Chair
Supreme Court Grievance Commission
Leff, Haupert, Traw and Willman, L.L.P.
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WHAT DOES THE GRIEVANCE COMMISSION DO AND WHAT DO LAWYERS DO -- SOME SUPRISING CASES

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SECTION I

INTRODUCTION

There are two methods for disciplinary procedure in Iowa. One is under Iowa Supreme Court rule 118, and the other is under Iowa Code §§602.10123-10136.

The procedure under chapter 602 provides for the filing of a complaint in the district court, and pleadings and trial as with ordinary public litigation, before a three-judge court appointed by the chief justice of the Iowa Supreme Court.

THIS PROCEDURE IS NOT USED OFTEN, SO DO NOT SPEND MUCH TIME REVIEWING THIS PART OF THE OUTLINE. ALMOST ALL DISCIPLINARY PROCEDURES ARE HANDLED UNDER SUPREME COURT RULE 118 COVERED BELOW IN SECTION III.

SECTION II

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PROCEDURE UNDER CHAPTER 602, IOWA CODE.

Under chapter 602, disciplinary proceedings may be initiate by the Iowa Supreme Court:

602.10121 Revocation of license.

> The supreme court may revoke or suspend the license of an attorney to practice law in this state.

Under chapter 602, disciplinary proceedings may also be initiated by any individual:

> **602.10123 Proceedings.**
>
> The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on the petition of any individual.

Chapter 602 includes the following grounds for discipline:

> **602.10122 Grounds of revocation.**
>
> The following are sufficient causes for revocation or suspension:
>
> 1. When the attorney has been convicted of a felony. The record of conviction is conclusive evidence.
>
> 2. When the attorney is guilty of a willful disobedience or violation of the order of the court, requiring the attorney to do or forbear an act connected with or in the course of the attorney's profession.
>
> 3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.
>
> 4. Doing any other act to which such a consequence is by law attached.
>
> 5. Soliciting legal business for the attorney or office, either by the attorney or representative. Nothing herein contained shall be construed to prevent or prohibit listing in legal or other directories, law lists and other similar publications, or the publication of professional cards in any such lists, directories, newspapers or other publication.

If the supreme court initiates discipline, the court "must direct some attorney to draw up the accusation...." §602.10123.

In the event a complaint originates under chapter 602 by an individual, the supreme court refers the case to an attorney general who must, within 30 days, issue a report regarding the

appropriateness of bringing an action. §602.10125 The court, then, determines whether or not the complaint should be prosecuted by the attorney general's office or referred to the Iowa Supreme Court Grievance Commission under supreme court rule 118. §602.10125.

Procedure under chapter 602:

1. The accused must appear in court where the accusation was filed and shall be served personally with a copy of the accusation. §602.10125

2. The supreme court shall notify the attorney general. §602.10127

3. The attorney general, through its office or through a special assistant, shall prosecute the charges. §602.10127

4. Three district judges are appointed to hear and decide the case. §602.10128

5. The accused may appeal to the supreme court from a removal or suspension. §602.10135

Helpful case citations are, of course, found in vol. 40 of the Iowa Code Annotated.

SECTION III

DISCIPLINARY PROCEDURE UNDER SUPREME COURT RULE 118.

ALMOST ALL LAWYER DISCIPLINARY PROCEEDINGS ARE HANDLED ACCORDING TO THE PROCEDURE OUTLINED BELOW.

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My favorite research sources are:

1. Iowa Code of Professional Responsibility for Lawyers.

   This source, commonly referred to as the "canons", includes the canons, disciplinary rules and ethical considerations. It is found in the Iowa Rules of Court published by West Publishing Company, page 325, et seq.

2. Supreme Court Rule 118.

   This rule is found in the Iowa Rules of Court, published by West Publishing Company, page 387, et seq.

A complete copy of rule 118 is attached to this outline as EXHIBIT A.

3. Guidelines Concerning Disciplinary Proceedings Under Supreme Court Rule 118.

This is found in Iowa Rules of Court published by West Publishing Company at pages 396 and 397 and is attached to this outline as EXHIBIT B.

4. Rules of the grievance commission of the supreme court of Iowa.

These rules are found in Iowa Rules of Court published by West Publishing Company at pages 398, et seq. and is attached to this outline as EXHIBIT C.

5. Iowa Code Annotated, Volume 40, for annotations to rule 118.

6. Iowa Digest, Attorney & Client.

7. Iowa Code Annotations, volume 40, for annotations to §§602.10112, et seq.

Some county bar associations have their own disciplinary committees and procedures. However, there is no supreme court rule or statute authorizing these local committees. Nevertheless, they have historically served a useful purpose by allowing an informal avenue for complaints to be heard. Typically, local grievance committees receive complaints, conduct formal hearings and either dismiss the complaint, warn or advise the attorney of inappropriate practices, or forward the materials and the evidence collected to the Iowa Supreme Court Board of Professional Ethics and Conduct.

SECTION IV

PROCEDURE UNDER RULE 118.

A. This system operates with the work of four different groups of people:

1. Iowa Supreme Court Board of Professional Ethics and Conduct. This board investigates complaints and determines if a formal complaint should be filed.

2. Iowa Supreme Court Grievance Commission. This group of lawyers and lay persons hears the evidence in complaint hearings, rules on the case and recommends the nature of the sanction, if any.

3. Ethics Counsel. Charles Harrington and David Grace prosecute nearly all of the complaints before the commission. They can be reached at the following phone number: 1-800-457-3729. Occasionally, when the workload becomes too great or a conflict of interest arises, outside counsel will be hired.

4. Clerk of the Board of Professional Ethics and Conduct and Clerk of the supreme court Grievance Committee. Both of these functions are fulfilled, extremely efficiently, by Mr. John Courtney or by his very able assistant, Robin Howe. Their address, phone and fax:

431 East Lucas Street, Suite 201
Des Moines, Iowa 50309
Phone: 515-246-8076
Fax: 515-246-8059

The clerk handles the budget for the disciplinary system, initiates conference calls, receives and disseminates all pleadings, handles all mailings, and helps us to understand the rules.

B. Board of Professional Ethics and Conduct.

1. The board consists of seven lawyers and two lay persons. The lawyers are nominated by the president-elect of the Iowa State Bar Association. All nine are appointed by the supreme court. Rule 118.2.

2. Typical procedure:

A complaint, generally in the form of a hand-written letter from an aggrieved client or party, is typically forwarded to the Iowa State Bar Association which refers the letter to the chair of the board of professional ethics and conduct. The board sends the complaint to the respondent attorney and requests response by a certain time. Once the response is made, the board determines if there is sufficient cause for an investigation. If not, it dismisses the complaint and notifies the complainant. If cause is found, it investigates further by interviewing witnesses, examining

documents and pleadings, etc. If the investigation reveals grounds for discipline, the board may:

(a) admonish or reprimand the attorney; or

(b) file and prosecute the complaint before a division of the grievance commission.

3. It has it own budget.

4. The board has authority to:

(a) Dismiss the complaint.

(b) admonish (a private communication spelling out the violation that has occurred and cautioning against its repetition). Rule 118.2

(c) Reprimand. (This is a written reprimand which becomes filed with the clerk of the supreme court and thus becomes a public record unless excepted to by respondent.) See rules 118.2 and 118.3.

(d) File a formal complaint with the grievance commission. Rule 118.2.

5. In the event the board reprimands an attorney, notice shall be served, and the attorney has 30 days to file exceptions with the clerk of the grievance commission. Failure to do so is a waiver of further proceedings and consent to the public reprimand. Rule 118.3. The supreme court, then, causes "the reprimand to be spread upon the records of the court as a public document." Rule 118.3. If the attorney files an exception, the reprimand is stricken and the board may proceed before the commission with a hearing. Rule 118.3.

6. No member of the board of professional ethics and conduct and no member of the grievance commission may represent any lawyer against whom an ethical complaint has been filed. Rule 118.4.

C. Grievance Commission.

1. The purpose of the commission is to provide a large group of lawyers and lay persons from which "panels" or "divisions" are selected to hear evidence of complaints and to dismiss the case or

recommend a sanction against the respondent attorney.

2. The commission consists of five lawyers from each of the 14 judicial election districts, a total of 70. Between and 5 and 26 lay persons are permitted. Currently, 20 lay persons are appointed. Rule 118.1.

3. After a complaint is received by the chair of the grievance commission, the chair appoints four attorneys and two alternates and one lay person and one alternate to each "panel", commonly called a "division" or "commission".

D. Rules of procedure for the typical case.

(In this discussion, a reference to "rule" will apply to Iowa Supreme Court rule 118 found at page 387 of the Iowa Rules of Court published by West Publishing Company and "GCR" will apply to the grievance commission rules found beginning at page 398 of the Iowa Rules of Court.)

NOTE: The rules of the grievance commission are presently undergoing revision. It is anticipated, however, that the basic procedure will remain substantially unchanged.

1. Appointment of Division.

(a) The chair of the supreme court grievance commission appoints four lawyers, two lawyer alternates, one lay person and one lay alternate. GCR-2. One of the lawyer members shall be designated as the president of the commission. Generally, he or she conducts the "hearing", rules on all motions and objections, and writes the opinion.

(b) With the consent of both sides, hearing may proceed with only four members. GCR-13.

2. Service.

(a) The respondent will be served with a copy of the complaint and also with a copy of rule 11 and a copy of the rules of the grievance commission. GCR-6.

(b) The clerk of the grievance commission will mail pleadings to all appointed commission members. GCR-2.

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3. Venue.

(a) The president of the commission sets the time and place for a hearing. GCR-8.

(b) Hearing shall be held at such other place as the president of the division or chair of the commission may direct. GCR-8. (As a practical matter, after service is obtained, the clerk of the grievance commission, John Courtney, or his assistant, Robin Howe, initiate a conference call involving all five division members, both attorneys and the respondent. The date, time and place is agreed upon, and this system works very well. Subsequently, the clerk enters an order recounting the arrangement.)

4. Challenge of Impartiality.

(a) Respondent may challenge the impartiality of any member of the division but must set forth the grounds. GCR-13.

5. Pleadings.

(a) An introductory statement is appropriate, here. A statement which appears preliminarily to the canons on page 327 of the Iowa Rules of Court provides some helpful definitions:

(1) Canons are a statement of axiomatic norms, expressing general terms of standards of professional conduct.

(2) Ethical considerations, EC's, are aspirational in character and represent objectives.

(3) Disciplinary Rules, DR's, unlike EC's, are mandatory. Disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Thus, the complaint will involve only alleged breaches of disciplinary rules. A breach of an ethical consideration is not unethical conduct.

(b) All pleadings are filed with the clerk of the grievance commission, John Courtney. Rule 118.5.

(c) The complaint is signed, sworn and served. Rules 118.5.

(d) Answer - must be filed 15 days after service of notice of the complaint. GCR-6. However, in the event an answer is not filed at any time, the allegations shall be considered denied and, apparently, no further sanction is justified for such failure to answer. GCR-7.

(e) Motions/applications - preliminary motions or applications are generally filed with the clerk who forwards them to the president of the division who must issue an order fixing the time and place for hearing. GCR-12. As a practical matter, the president generally arranges for a conference call through the clerk's office (John Courtney) and discusses the motions with the two attorneys, hears their arguments, receives briefs if the attorneys request, and issues a written ruling.

6. Discovery.

(a) R.C.P. 121 through 134; 140 and 141; 154 to 158, and 159 to 166 apply except that a respondent is not required to answer interrogatories or requests for admission or submit to oral examination if the answer would be self-incriminatory. Rule 118.6. In other words, discovery is almost identical to any civil case.

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(b) Discovery must be commenced 30 days after service of the complaint. Rule 118.6.

(c) Amendments to the complaint to conform to the proof are acceptable. Rule 118.6.

7. Subpoenas.

(a) Subpoenas are permitted. The president or any member of a division or the respondent may request a subpoena from the clerk of the district court of the county where the disciplinary hearing is held. The clerk of

that court shall issue the subpoena. GCR-10; Rule 118.8.

(b) Refusal to obey a subpoena must be reported to the supreme court by the division. Rule 118.8.

8. Continuance.

(a) Continuances shall not be granted except for good cause. A motion for continuance must be filed within seven days before the hearing, except for emergencies. GCR-9.

(b) An application for continuance must be in writing and supported by affidavit. Rule 118.7.

9. Hearing.

(a) All hearings are private unless the respondent wishes otherwise. GCR-14.

(b) Briefs and arguments are permitted. GCR-14.

(c) The president of the division sets the time and place for hearing. GCR-8.

(1) Hearing must be held within "a reasonable time". GCR-8.

(2) Hearing is held (i) in the county of the respondent's resident, or (ii) at the discretion of the president as shall most nearly serve the convenience of the parties. GCR-8.

(3) Respondent may object to having a hearing in the county of his/her residence. If so, hearing shall be held at such other place as the president of the division directs by order. GCR-8. As a practical matter, hearings are often held at the ISBA office in Des Moines because of its central location.

(d) Must be set after 30 days from the day of service of complaint. Rule 118.7.

(e) If neither party has commenced discovery within 30 days after service of the complaint,

the hearing must be set no later than 45 nor more than 60 days after service. Rule 118.7.

(f) If discovery has been commenced by either party, the hearing must be set no later than 60 nor more than 75 days after service of the complaint. Rule 118.7. Generally, the "prosecuting" attorney attaches a request for admissions to the complaint, so the hearing dates are between 60 and 75 days. In most instances, the date is selected by conference call and the convenience and availability of all involved even though the date may be beyond the 75-day limit.

(g) Evidence of a prior sanction shall be admitted. Rule 118.7.

(h) Issue preclusion is permitted. Rule 118.7.

(i) Witnesses are placed under oath. Rule 118.8.

(j) The proceedings are reported by a court reporter. Rule 118.8.

(i) Briefs and arguments are permitted. Rule 118.9. Usually, it is best to present a closing argument, if that is your preference, and ask for time to submit a brief, if that is your preference.

10. Possible Outcomes/Sanctions.

The division may:

(1) dismiss the complaint;

(2) issue a private admonition (a private communication spelling out the violation that has occurred and cautioning against its repetition);

(3) recommend a reprimand (a written reprimand which becomes filed with the clerk of the supreme court and thus becomes a public record unless excepted to by respondent (see rule 118.3));

(4) recommend the license be suspended for a certain period of time; or

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(5) recommend the license be revoked (disbarrment).

GCR-15; rule 118.9; guidelines concerning disciplinary proceedings under supreme court rule 118.

11. Irregularities/Mistakes in Proceedings.

No defect in the procedure utilized throughout this process shall render void or ineffective any act of the division unless substantial prejudice is shown. GCR-17.

12. Decision.

(a) The decision must consist of written "findings of fact, conclusions of law and recommendations" if any sanction is recommended other than a dismissal or private admonition. Rule 118.9. It is advisable, however, to issue findings, conclusions and recommendations even if a dismissal or a private admonition is recommended.

(b) A tie vote between a request for a sanction and a dismissal results in a dismissal, and the complainant may appeal. GCR-13.

(c) The decision must be filed 30 days after the hearing or 30 days after the last brief is filed. Rule 118.9.

(d) A majority vote controls. Rule 118.9.

(e) Any division member may dissent. Rule 118.9.

(f) No report of the decision is filed with the supreme court if the division dismisses or issues a private admonition. Rule 118.9, but in this event, the complainant must be notified within 10 days. If no appeal is requested by complainant within 10 days, the division's determination is final. Rule 118.9.

(g) The decision is public if it recommends a reprimand or a suspension or a revocation, but it is not public if it recommends a dismissal or private admonition. Rule 118.9.

(h) If the division recommends a dismissal or private admonition, no report is made to the supreme court, but complainant must receive a copy of the ruling in 10 days. Rule 118.9.

13. Appeal.

(a) In the event a dismissal is recommended, complainant may apply for permission to appeal. GCR-13.

(b) If the complainant does not appeal within 10 days after notice of the decision, the division's determination is final. Rule 118.9.

(c) Respondent may appeal to the supreme court. Rule 118.11.

(d) Respondent must file a notice of appeal with the supreme court clerk within 10 days. Rule 118.11.

(e) Complainant must apply to the supreme court for permission to appeal. Rule 118.11.

(f) If the appeal is from a dismissal or from a private admonition, the appeal must be kept confidential. Rule 118.11.

(g) Iowa Rules of Appellate Procedure apply. Rule 118.11.

(h) Expedited time limits apply as per Iowa Rule of Appellate Procedure 17. Rule 118.11.

(i) Requests for additional time are disfavored. Rule 118.11.

(j) Review is *de novo*. Rule 118.11.

(k) If no appeal is taken by either side, the supreme court shall review each case, *de novo*, except in those cases where the division recommended a dismissal or a private admonition and the complainant did not appeal. Rule 118.9 and Rule 118.10.

(l) If, as stated above, the division issues a dismissal or recommends a private admonishment, and the complainant does not

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appeal, the commission's determination is final. Rule 118.9.

14. Miscellaneous.

(a) Length of suspension. This depends upon the findings of the commission and must be approved by the supreme court. Suspensions usually range from one month to three years. The suspension continues until the attorney successfully applies for reinstatement. Rule 118.12. The court may impose reasonable conditions for reinstatement. During the suspension, the attorney must refrain from all facets of the law practice. Rule 118.2.

(b) Reinstatement. Rights to reinstatement are set forth in Rules 118.13 and Rule 118.18(g).

(c) Temporary Suspension. An attorney may be temporarily suspended if convicted of a crime which would be grounds for a suspension or revocation. Rule 118.14.

(d) Consent to Disbarment. An attorney may consent to disbarment. Rule 118.15.

(e) Disability Suspension. If an attorney is adjudicated an alcoholic or drug addict or mentally incapacitated or is committed to a hospital for treatment thereof, the court may enter an order suspending the license and appoint an attorney to act as trustee to inventory the files, sequester client funds and otherwise protect the clients' interests. Payment for the appointed attorney may be secured from the suspended attorney but, if unsuccessful, payment may come from the Clients' Security Trust Fund. The disabled attorney's license to practice may be reinstated by a showing that the disability has been removed. Rule 118.16

(f) Death or Suspension of Practicing Attorney. In the event an attorney dies or has been suspended or disbarred, the chief judge of the judicial district shall appoint a lawyer to serve as trustee to inventory the file, sequester client funds and take other appropriate steps to protect the interests of the clients. The appointed attorney is

entitled to reasonable fees from the deceased attorney's estate or from the Clients' Security Trust Fund. Rule 118.16A.

(g) Reciprocal Discipline. If an attorney was professionally disciplined in another jurisdiction, the state of Iowa has the right to impose an identical discipline in Iowa. Rule 118.17.

(h) What Must a Suspended or Disbarred Attorney Do?

(1) Notify all clients in writing within 15 days.

(2) Deliver all clients' papers within 15 days.

(3) Return all unearned fees within 30 days.

(4) Notify opposing counsel in all pending litigation within 15 days.

(5) File with the supreme court a copy of all notices to opposing counsel within 15 days.

(6) Maintain all records of steps taken to comply with this section.

(7) Within 30 days, file with the Board copies of all notices sent and proof of performance of this rule.

Rule 118.18.

(i) Immunity to Witnesses and Those Filing Complaints. No lawsuit can be based on the testimony of witnesses or upon the complaint having been filed under this section. Also, members of the grievance commission and members of the board of professional ethics and conduct and their staffs are immune from suit for conduct in the course of their official duties. Rule 118.19.

(j) Costs. Court costs shall be assessed against the respondent attorney. Rule 118.22.

RULE 118. COMPLAINT PROCEDURE

Revised November 8, 1974

Including Amendments Received Through
•August 15, 1995

Table of Rules

RULE 118.1 GRIEVANCE COMMISSION

There is hereby created the Grievance Commission of the Supreme Court of Iowa, consisting of five lawyers from each judicial election district, to be appointed by the Supreme Court. The court shall designate one of them, annually, as chair of the commission. The president-elect of the Iowa State Bar Association shall nominate lawyers, including nonmembers of the Association, for appointment to the grievance commission. The grievance commission shall also consist of not less than five nor more than twenty-six lay persons appointed by the court. Members shall serve no more than three three year terms or nine years, whichever is less. The grievance commission shall have an administrative committee consisting of the chair, the clerk, and a nonlawyer commission member appointed by the court. The administrative committee shall at least sixty days prior to the start of each calendar year submit to the court a budget for consideration and approval covering the commission's operations for the upcoming calendar year. The grievance commission, or a duly appointed division thereof, shall hold hearings and receive evidence concerning alleged violations, wherever such violations occur, of the Iowa Code of Professional Responsibility for Lawyers or laws of the United States, and the laws of the state of Iowa or any other state or territory within their respective jurisdictions by lawyers who are members of the bar of this court. The grievance commission shall have such other powers and duties as are provided in these rules.

[Amended July 30, 1981; June 24, 1983; amended effective Jan. 3, 1995; July 26, 1995.]

RULE 118.2 PROCESSING OF COMPLAINTS

There is hereby created the Iowa Supreme Court Board of Professional Ethics and Conduct. The board shall consist of seven lawyers and two lay persons appointed by the supreme court. The supreme court shall designate one of the lawyers, annually, as chair. The president-elect of the Iowa State Bar Association shall nominate lawyers for appointment to the board. The board shall have an executive committee consisting of the chair, the administrator and one nonlawyer member of the board appointed by the court. The executive committee shall at least sixty days prior to the start of each calendar year submit to the court for its consideration and approval a budget covering the operations of the board for the upcoming calendar year. This budget shall include proposed payments to the Iowa State Bar Association for staff, support staff, office space, equipment and supplies necessary to administer the responsibilities of the board as set out in these rules. Approval of the budget by the court shall authorize payment as provided in the budget. The board members are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa. Upon completion of any such investigation the Board of Professional Ethics and Conduct shall either dismiss the complaint made, or admonish or reprimand the attorney, or file

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and prosecute the complaint before the grievance commission or any division thereof.

No member appointed to either the Iowa Supreme Court Board of Professional Ethics and Conduct or the Grievance Commission of the Supreme Court of Iowa shall undertake to represent, in any stage of the investigative or disciplinary proceedings, any lawyer against whom an ethical complaint has been filed. To avoid even the appearance of impropriety, no member of the Iowa Supreme Court Board of Professional Ethics and Conduct should undertake to represent any lawyer in any malpractice, criminal, or other matter where it appears that the filing of an ethical complaint against that lawyer is reasonably likely. A member of the Grievance Commission of the Supreme Court of Iowa may represent a lawyer in a malpractice, criminal, or other matter; however, a member must decline representation of the lawyer in any stage of the investigative or disciplinary proceedings, and not participate in any hearing or other proceeding before the commission.

[Amended July 30, 1981; October 20, 1982; Feb. 9, 1983; amended effective Feb. 3, 1986; Jan. 3, 1995.]

RULE 118.3 REPRIMAND

In event an attorney is reprimanded by the Board of Professional Ethics and Conduct, a copy of the reprimand shall be filed with the clerk of the grievance commission who shall forthwith cause a copy of the reprimand to be served on the attorney by personal service in the manner of an original notice in civil suits or by restricted certified mail, with a notice attached stating that the attorney has thirty days from the date of completed service to file exceptions to the reprimand with the clerk of the grievance commission. Service shall be deemed complete on the date of personal service or the date shown by the postal receipt of delivery of the notice to the attorney. If the attorney fails to file an exception such failure shall constitute a waiver of any further proceedings and a consent that the reprimand be final and public. In that event, the clerk of the grievance commission shall cause a copy of the reprimand to be forwarded to the clerk of this court, together with proof of the aforesaid service thereof and a statement that no exceptions had been filed within the time prescribed. This court shall thereupon cause the reprimand to be spread upon the records of the court as a public document. In event, however, the attorney concerned files timely exception to the reprimand, no report of the reprimand shall be made to the clerk of this court and the reprimand shall be stricken from the records. The Board of Professional Ethics and Conduct may, however, proceed further with any complaint against such attorney before the grievance commission. When a reprimand has been filed but exception is duly taken thereto such reprimand shall not be admissible in evidence in any hearing before the grievance commission.

[Amended June 15, 1983; amended effective Jan. 3, 1995.]

RULE 118.4 RULES

The grievance commission and the Board of Professional Ethics and Conduct shall each adopt reasonable rules prescribing the procedure to be followed in all disciplinary proceedings before each such body, which rules shall be subject to approval by this court.

[Amended effective Jan. 3, 1995.]

RULE 118.5 COMPLAINTS

Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chair of the Board of Professional Ethics and Conduct and served upon the attorney concerned as provided by the rules of the grievance commission. Such complaints shall be sufficiently clear and specific in their charges to reasonably inform the attorney against whom the complaint is made of the misconduct alleged to have been committed. All complaints, motions, pleadings, records, reports, exhibits, evidence and all other documents or things filed under this rule or received in evidence in a hearing before the grievance commission shall be filed with and preserved by the clerk of the grievance commission in Des Moines, Iowa, all of which shall at all times be available to this court or anyone designated by this court.

[Amended effective Jan. 3, 1995.]

RULE 118.6 DISCOVERY

In any disciplinary proceeding or action taken by the Board of Professional Ethics and Conduct, discovery shall be permitted as provided in R.C.P. 121 to 134 inclusive; 140 and 141; and in 154 to 158. The attorney against whom a complaint has been filed, in addition to the restriction stated in R.C.P. 122(a) shall not be required to answer an interrogatory pursuant to R.C.P. 126; a request for admission pursuant to R.C.P. 127; a question upon oral examination pursuant to R.C.P. 140; or a question upon written interrogatories, pursuant to R.C.P. 150; if the answer would be self-incriminatory. In addition thereto, evidence and testimony may be perpetuated as provided in R.C.P. 159 to 166. If either party is to utilize discovery, it must be commenced within thirty days after service of the complaint. The commission may permit amendments to the complaint to conform to the proof or to raise new matters as long as the respondent has notice thereof and a reasonable time to prepare a defense thereto prior to the date set for hearing. The grievance commission, or any division thereof, shall receive an application and may enter an order to enforce discovery or to perpetuate any evidence.

[Corrected March 15, 1983; amended effective Jan. 3, 1995.]

RULE 118.7 HEARING

After a complaint has been filed with the grievance commission and an answer filed thereto pursuant to

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its rules or the time provided for such answer has expired, the grievance commission shall immediately upon the expiration of thirty days from the date of service of the complaint set the matter for hearing and notify all parties thereof at least ten days prior to the date set for such hearing, by restricted certified mail or personal service. If neither party has commenced any discovery within thirty days of the date of service of the complaint, the hearing shall be not less than forty-five days nor more than sixty days after the service of the complaint. If a party has commenced discovery, the hearing shall be not less than sixty days nor more than seventy-five days after the service of the complaint. The commission may grant reasonable continuances but only upon written application supported by affidavit. Proceedings and hearings before the grievance commission or any division thereof shall be confidential unless the attorney involved requests otherwise.

In the event an attorney previously has been publicly reprimanded; or an attorney's license has been suspended, revoked, or the attorney has been disbarred, a certified copy of said action shall be admitted into evidence at any hearing involving disciplinary proceedings without the necessity of a bifurcated hearing. The grievance commission and this court shall consider this evidence along with all other evidence in the case in determining the attorney's fitness or unfitness to practice law in the state of Iowa.

Principles of issue preclusion may be used by either party in a lawyer disciplinary case if:

1. The issue has been resolved in a civil proceeding that resulted in a final judgment, even if the Iowa Supreme Court Board of Professional Ethics and Conduct was not a party to the prior proceeding;

2. The burden of proof in the prior proceeding was greater than a mere preponderance of the evidence; and

3. The party seeking preclusive effect has given written notice to the opposing party, not less than ten days prior to the hearing, of the party's intention to invoke issue preclusion.

[Amended July 30, 1981; Aug 27, 1982, to clarify, not change, the meaning; amended effective Oct. 10, 1984; Jan. 3, 1994; Jan. 3, 1995.]

RULE 118.8 SUBPOENAS

The clerk of the district court of the county in which any disciplinary hearing is to be held shall issue subpoenas of all kinds upon request of the grievance commission, the complainant, or the attorney against whom a complaint has been filed. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses, and shall cause such testimony to be officially reported by a court reporter. The grievance commission shall report to the supreme court of Iowa the failure or refusal of any person to attend or testify in response to any subpoena or any ruling of said commission.

RULE 118.9 DECISION

At the conclusion of a hearing upon any complaint against an attorney, the grievance commission shall dismiss the complaint, issue a private admonition, or recommend to this court that the attorney be reprimanded or the license to practice law of the attorney be suspended or revoked. If the grievance commission recommends reprimand of the attorney or recommends suspension or revocation of the attorney's license, it shall report to this court, in writing, its findings of fact, conclusions of law, and recommendations. A copy of this report shall also be filed with the client security and attorney disciplinary commission. The grievance commission may permit a reasonable time for the parties to file post-hearing briefs and arguments. The disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument. If the commission cannot reasonably make its determination or file its report within such time limit, it shall report that fact and the reasons therefor to the parties and the clerk of this court. Any determination or report of the commission need only be concurred in by a majority of the commissioners sitting. Any commissioner has the right to file with this court a dissent from the majority determination or report. Such matter shall then stand for final disposition in this court. If the grievance commission dismisses the complaint or issues a private admonition, no report shall be made to this court, except as provided in rule 118.20; however, the grievance commission shall, within ten days of its determination, notify the complainant in writing of its report. If no appeal is applied for by the complainant within ten days after such notice, the grievance commission's determination shall be final. Any report of reprimand or recommendations for license suspension or revocation shall be a public document upon the filing thereof with the clerk of this court.

[Amended July 17, 1984; amended effective Oct. 10, 1984; Nov. 1, 1985; April 1, 1994.]

RULE 118.10 DISPOSITION BY THE SUPREME COURT

Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the clerk of the grievance commission shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule

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118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties Upon such review de novo the court may impose a lesser or greater sanction than the discipline recommended by the grievance commission.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules

[Amended Jan. 15, 1975; July 18, 1983; July 1, 1985; amended effective Jan. 3 1995]

RULE 118.11 APPEAL

The respondent may appeal from the report filed by the grievance commission pursuant to rule 118.9 to this court. Respondent's notice of appeal must be filed with the clerk of the grievance commission within ten days after the report is filed with the clerk of this court. The respondent shall serve a copy of the notice of appeal on the complainant or its counsel pursuant to Iowa Rule of Appellate Procedure 30. Promptly after filing notice of appeal with the clerk of the grievance commission respondent shall mail or deliver a copy of the notice of appeal to the clerk of the supreme court.

The complainant, within ten days after filing of final disposition of a case by the grievance commission, may apply to this court for permission to appeal from a ruling, report, or recommendation of the grievance commission. This court may grant such appeal in a manner similar to the granting of interlocutory appeals in civil cases under the Iowa Rules of Appellate Procedure. The filing fee and the docket fee shall be waived upon complainant's written requests. If such appeal is from the grievance commission's dismissal of a complaint, or any charge contained therein, or a decision to issue a private admonition, such appeal shall remain confidential. In making such application the complainant shall refer to the respondent's initials, rather than respondent's name. All references to the respondent in briefs and oral arguments shall be by respondent's initials. In the event this court reverses or modifies the report of the grievance commission, such court order of reversal or modification shall become a public record.

After the filing of a notice of appeal or the granting of permission to appeal, the appeal shall proceed pursuant to the Iowa Rules of Appellate Procedure to the full extent those rules are not inconsistent with this rule Appellant shall cause the appeal to be docketed within ten days after the filing of notice of appeal or the granting of permission to appeal. The matter shall be docketed under the title given to the action before the grievance commission with the appellant identified as such pursuant to Iowa Rule of Appellate Procedure 12 (a). The abbreviated time limits specified in Iowa Rule of Appellate Procedure 17 shall apply. Enlargements of time are not favored and shall not be granted except upon a verified showing of the most unusual and compelling circumstances Review shall be de novo. If a respondent's appeal is dismissed for lack of prosecution pursuant to Iowa Rule of Appellate Procedure 19 or for any other reason, this court shall proceed to review and decide the matter pursuant to court rule 118.10 as if no appeal had been taken

[Amended July 18, 1983; amended effective Sept. 1, 1987; April 1, 1994; Jan. 3, 1995]

RULE 118.12 SUSPENSION

In event an order of this court provides for the suspension of the license of an attorney to practice law, such suspension shall continue for the minimum time specified in such order and until this court has approved the attorney's written application for reinstatement. In the order of suspension or by order at any time before reinstatement, this court may require the suspended attorney to meet reasonable conditions for reinstatement including, but not limited to, passing the Multistate Professional Responsibility Examination.

Any attorney suspended shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills, and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

Nothing in this rule shall preclude an attorney, law firm, or professional association from employing a suspended attorney to perform such services only as may be ethically performed by lay persons employed in attorneys' offices, under the following conditions:

a. The place of performance of such services shall be not less than one hundred miles from the suspended attorney's former law practice; and

b. Notice of employment, together with a full job description, shall be provided to the Iowa Supreme Court Board of Professional Ethics and Conduct before employment commences; and

c. Informational reports, verified by the employer and employee, shall be submitted quarterly to the Iowa Supreme Court Board of Professional Ethics and Conduct Such reports shall contain a certification that no aspect of the employee's work has involved the unauthorized practice of law; and

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d. No suspended attorney shall have direct or personal association with any client, or shall disburse or otherwise handle funds or property of a client.

[Amended Nov. 21, 1977; April 25, 1985; amended effective Nov. 1, 1985; Jan. 3, 1995.]

RULE 118.13 APPLICATION FOR REINSTATEMENT

An application for reinstatement from any suspension shall be filed with the clerk of this court not more than sixty days prior to expiration of such suspension or time fixed for making application therefor in accordance with the provisions of court rule 117. In addition thereto the applicant shall state, in said application, that the applicant has complied in all respects with the orders and judgments of this court relating to the suspension. The applicant shall also submit to this court satisfactory proof that the applicant, at time of the application, is of good moral character and in all respects worthy of the right to practice law.

[Amended effective Jan. 3, 1995.]

RULE 118.14 CONVICTION OF A CRIME

Upon receipt by this court of satisfactory evidence that an attorney had pled guilty to, or nolo contendere to, or has been convicted of a crime which would be grounds for license suspension or revocation, such attorney may be temporarily suspended from the practice of law by this court regardless of the pendency of an appeal. Not less than twenty days prior to the effective date of such suspension, the attorney concerned shall be notified, in writing directed by restricted certified mail to the last address as shown by the records accessible to this court, that the attorney has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

For good cause shown, this court may set aside an order temporarily suspending an attorney from the practice of law as hereinabove provided, upon application by such attorney and hearing thereon in accordance with court rule 117, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

An attorney temporarily suspended under the aforesaid provisions of this rule shall be promptly reinstated upon the filing of a good and sufficient certificate disclosing the underlying conviction of a crime has been finally reversed or set aside, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

The clerk of any court in this state in which an attorney has pled guilty or nolo contendere to, or been convicted of a crime as aforesaid shall, within ten days thereafter transmit a certificate thereof to the clerk of this court.

[Amended Nov. 21, 1977; April 25, 1985; amended effective Jan. 3, 1995.]

RULE 118.15 DISBARMENT ON CONSENT

An attorney subject to investigation or a pending proceeding involving allegations of misconduct subject to disciplinary action may acquiesce to disbarment, but only by delivering to the grievance commission an affidavit stating the attorney consents to disbarment and that

(1) The consent is freely and voluntarily given absent any coercion or duress, with full recognition of all implications attendant upon such consent;

(2) The attorney is aware of a presently pending investigation into, or proceeding involving allegations that there exist grounds for discipline the nature of which shall be specifically set forth;

(3) The attorney acknowledges the material facts so alleged are true; and

(4) In event proceedings were instituted upon the matters under investigation, or if existent proceedings were pursued, the attorney could not successfully defend against same.

Upon receipt of such affidavit the grievance commission shall cause same to be filed with the clerk of this court whereupon this court shall enter an order disbarring such attorney on consent.

Any order disbarring an attorney on consent shall be a matter of public record. However, the affidavit required as aforesaid shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

[Amended effective Jan. 3, 1995.]

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RULE 118.16 DISABILITY SUSPENSION

In event an attorney shall at any time in any jurisdiction be duly adjudicated a mentally incapacitated person, or an alcoholic, or a drug addict, or shall be committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which any such adjudication or commitment is entered shall, within ten days thereafter, certify same to the clerk of this court.

Upon the filing of any such certificate or a like certificate from another jurisdiction or upon determination by this court pursuant to a sworn application on behalf of a county bar association or the Iowa Supreme Court Board of Professional Ethics and Conduct, that an attorney is not discharging professional responsibilities due to disability, incapacity, abandonment of practice, or disappearance, this court may enter an order suspending the license of such attorney to practice law in this state until further order of this court. Not less than twenty days prior to the effective date of such suspension, the attorney concerned or the attorney's guardian and the director of the institution or hospital to which such attorney has been committed, if any, shall be notified, in writing directed by restricted certified mail to the last address as shown by the records accessible to this court, that the attorney has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place; provided, however, that, upon a showing of exigent circumstances, emergency or other compelling cause, the court may reduce or waive the twenty-day period and the effective date of action above referred to. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time. A copy of such suspension order shall be given the suspended attorney, or to the attorney's guardian and the director of the institution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as this court may direct.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

No attorney suspended due to disability under the aforesaid provisions of this rule may engage in the practice of law in this state until reinstated by order of this court.

Upon being notified of the suspension of the attorney, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Iowa Supreme Court Board of Professional Ethics and Conduct and as a commissioner of the supreme court for the purposes of the appointment. While acting as a trustee, the trustee shall not serve as a lawyer for the clients of the disabled lawyer and other affected persons. Neither shall the trustee examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall, as to such matters, protect the privacy interests of the disabled lawyer's clients by prompt recusal or refusal of employment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the suspended attorney. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When the suspended attorney is reinstated to practice law in this state, or all pending representation of clients has been completed, or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

Any attorney so suspended shall be entitled to apply for reinstatement to active status once each year or at such shorter intervals as this court may, in the suspension order, provide or specify. An attorney suspended due to any aforesaid disability may be reinstated by this court upon a showing, by clear and convincing evidence, that the attorney's disability has been removed and the attorney is fully qualified to resume the practice of law. Upon the filing of an application for reinstatement this court may take or direct any action deemed necessary or proper to determine whether such suspended attorney's disability has been removed, including a direction for an examination of the applicant by such qualified medical experts as this court shall designate. In its discretion this court may direct that the expenses of such an examination be paid by the petitioning attorney.

The filing of an application for reinstatement to active status by an attorney suspended due to disability shall constitute a waiver of any doctor-patient privilege with regard to any treatment of the petitioning attorney during the period of the disability. Such

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attorney shall also set forth in the application for reinstatement the name of every psychiatrist, psychologist, physician and hospital or any other institution by whom or in which the petitioning attorney has been examined or treated since the suspension due to disability, and shall also furnish to this court written consent that any such psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated as aforesaid may divulge any and all information and records requested by this court or any court-appointed medical experts.

Where an attorney has been suspended due to any aforesaid disability and thereafter, in proceedings duly had, the attorney shall be judicially held to be competent or cured, this court may dispense with further evidence regarding removal of the disability and may order reinstatement to active status upon such terms as are deemed reasonably proper and advisable.

[Amended Nov. 21, 1977; March 30 1982; amended effective Nov. 26, 1984; amended April 25, 1985; amended effective Sept. 4, 1990; Jan. 3, 1995.]

RULE 118.16A DEATH OR SUSPENSION OF PRACTICING ATTORNEY

Upon a sworn application on behalf of a county bar association or the Iowa Supreme Court Board of Professional Ethics and Conduct showing that a practicing attorney has died or been suspended or disbarred from the practice of law, and a reasonable necessity exists, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Iowa Supreme Court Board of Professional Ethics and Conduct as a commissioner of the supreme court for the purposes of the appointment. While acting as a trustee, the trustee shall not serve as a lawyer for the clients of the disabled lawyer and other affected persons. Neither shall the trustee examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall, as to such matters, protect the privacy interests of the disabled lawyer's clients by prompt recusal or refusal of employment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the deceased attorney's estate or the attorney whose license to practice law has been suspended or revoked. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When all pending representation of clients has been completed or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

[Amended March 30, 1982; May 19, 1982; amended effective Sept. 4, 1990; Jan. 3, 1995.]

RULE 118.17 RECIPROCAL DISCIPLINE

Any attorney admitted to practice in this state, upon being subjected to professional disciplinary action in another jurisdiction or in any federal court, shall promptly advise the Iowa Supreme Court Board of Professional Ethics and Conduct (board), in writing, of such action. Upon being informed that an attorney admitted to practice in this state has been subjected to discipline in another jurisdiction or any federal court, the board shall obtain a certified copy of such disciplinary order and file it in the office of the clerk of this court.

Upon receipt of a certified copy of an order disclosing an attorney admitted to practice in this state has been disciplined in another jurisdiction or any federal court, this court shall promptly give notice thereof by restricted certified mail or personal service directed to such attorney containing: (1) A copy of said disciplinary order from the other jurisdiction or federal court, and (2) an order directing that such disciplined attorney file in this court, within thirty days after receipt of said notice, any objection by such attorney that imposition of identical discipline in this state would be too severe or otherwise unwarranted, giving the specific reasons therefor. A like notice shall be sent, by ordinary mail, to the board, which shall have the right to object in like manner on the ground that the imposition of identical discipline in this state would be too lenient or otherwise unwarranted. If either party so objects, the matter shall be set for hearing before three or more justices of this court and the parties notified thereof by restricted certified mail at least ten days prior to the date set. At such hearing a certified copy of the testimony, transcripts, exhibits, affidavits and other matters introduced into evidence in such jurisdiction or federal court shall be admitted into evidence as well as any findings of fact, conclusions of law, decision and orders decided or issued. Any such findings of fact shall be conclusive and not subject to readjudication. Thereafter, the court shall enter such findings, conclusions and orders that it deems appropriate.

If neither party so objects within thirty days from service of notice issued pursuant to the foregoing provisions, this court may impose the identical discipline, unless it finds that on the face of the record upon which the discipline is predicated it clearly appears: (1) The disciplinary procedure was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process; or (2) there was such infirmity of proof establishing misconduct as to give

rise to the clear conviction that this court could not, conscientiously, accept as final the conclusion on that subject; or (3) the misconduct established warrants substantially different discipline in this state.

If this court determines that any such factors exist, it may enter an appropriate order. Rule 117 shall apply to any subsequent reinstatement or reduction or stay of discipline.

[Amended effective Feb. 15, 1990; Jan. 3, 1995.]

RULE 118.18 NOTIFICATION OF CLIENTS AND COUNSEL

In every case in which a respondent is ordered to be disbarred or suspended, the respondent shall:

a. Within fifteen days notify the respondent's clients in writing, in all pending matters to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another lawyer;

b. Within fifteen days deliver to all clients being represented in pending matters any papers or other property to which they are entitled or notify them and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

c. Within thirty days refund any part of any fees paid in advance that have not been earned;

d. Within fifteen days notify opposing counsel in pending litigation or, in the absence of such counsel, the adverse parties, of the respondent's disbarment or suspension and consequent disqualification to act as a lawyer after the effective date of such discipline or transfer to disability inactive status;

e. Within fifteen days file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties;

f. Keep and maintain records of the steps taken to accomplish the foregoing; and

g. Within thirty days file with the Board of Professional Ethics and Conduct copies of the notices sent pursuant to the preceding subsections of this rule and proof of complete performance of the foregoing subsections, and this shall be a condition for application for readmission to practice.

[Amended Jan. 15, 1979; amended effective May 15, 1989; Jan. 3, 1995.]

RULE 118.19 IMMUNITY

Complaints submitted to the grievance commission, or to the Board of Professional Ethics and Conduct, or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.

Members of the grievance commission, members of the Board of Professional Ethics and Conduct, and their respective staffs shall be immune from suit for any conduct in the course of their official duties.

A true copy of any complaint against a member of the grievance commission or the Board of Professional Ethics and Conduct involving alleged violations of an attorney's oath of office or of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or state of Iowa shall be promptly forwarded to the chief justice of this court.

[Amended effective Sept. 1, 1987; Jan. 3, 1995.]

RULE 118.20 REPORTS

The chair of the grievance commission and the chair of the Board of Professional Ethics and Conduct shall, on July 1 of each year, submit to this court a report of the number of complaints received and processed during the prior period, a synopsis of each such complaint, and the disposition thereof. The name of the attorney charged and the name of the complainant shall be omitted, but a synopsis of the charges made and a report of disposition shall be included.

[Amended effective Dec. 1, 1987; Jan. 3, 1995.]

RULE 118.21 EFFECTIVE DATES

These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

RULE 118.22 COSTS

In the event that an order of revocation, suspension, or public reprimand results from formal charges of misconduct, the court shall assess against the respondent attorney the costs of the proceeding. For the purposes of this rule costs shall include those expenses normally taxed as costs in state civil actions pursuant to the provisions of Iowa Code chapter 625.

Within thirty days of the filing of the commission report, the complainant shall serve the respondent with a bill of costs and file the bill with the clerk of the supreme court. An appeal does not obviate this requirement. The respondent shall have ten days from the date of service to file written objections with the court. Any objections filed shall be considered by the court upon disposition of the matter under Rule 118.10 or 118.11. Additional costs associated with an appeal shall be taxed by the clerk as in other civil actions.

Concurrently with the filing of the final decision of the supreme court, the court shall order restitution paid by the respondent to the complainant of such costs as the court may approve. No suspended or disbarred attorney may file application for reinstatement or readmission until the amount of such restitu-

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tion for costs assessed under this rule has been fully paid, or waived by the supreme court.

[Amended Oct. 8, 1970; Nov. 8, 1974; amended effective Oct. 1, 1986; May 1, 1990.]

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GUIDELINES CONCERNING DISCIPLINARY PROCEEDINGS UNDER SUPREME COURT RULE 118

Adopted June 23, 1975

Including Amendments Received Through August 15, 1995

There are two methods for disciplinary procedure in Iowa. One is under Iowa supreme court rule 118, and the other is under Iowa Code sections 602.10123–10136.

The procedure under chapter 602 provides for the filing of a complaint in the district court, and pleadings and trial as with ordinary public litigation, before a three-judge court appointed by the chief justice of the Iowa supreme court. This statement of chapter 602 proceedings is abbreviated because it is not used very much, since rule 118 has become so effective. These guidelines concern themselves with the rule 118 procedure.

Complaints may be filed either with the county or district bar association or directly with the state. There is enclosed herewith a copy of the complaint form used by the state.

Nowhere, either by statute or supreme court rule is there a provision defining the authority of a local committee. Traditionally local committees have:

1. Investigated complaints.

2. By personal admonition or in writing warned members of their bar concerning activities considered improper.

3. Forwarded the material to the Iowa Supreme Court Board of Professional Ethics and Conduct for attention. Local committees can, and for many years past have played a very important role in discipline, by meeting with the complainants, hearing "their side" and explaining the whole problem. Often this is all the complainants want and all that is needed. There also is great value in these committees meeting with the lawyer, hearing the lawyer's side and, where indicated, influencing the lawyer to adjust the lawyer's fee, correct a minor error, or caution the lawyer against certain practices.

If discipline more serious than an admonition is indicated, it is suggested that under existing rules the matter be forwarded to the Iowa Supreme Court Board of Professional Ethics and Conduct. It is entirely possible that that board will request additional investigation or action from the local committee thereafter.

The lawyer members and the lay members of the Board of Professional Ethics and Conduct are appointed by the supreme court and all are then confirmed as commissioners of the supreme court. The president-elect of the Iowa State Bar Association shall nominate lawyers for appointment to the board. Upon receipt of complaints by that board, they are investigated to the extent deemed necessary and then acted upon by the board.

The board has the authority to:

1. Dismiss the complaint.

2. Admonish (a private communication spelling out the violation that has occurred and cautioning against its repetition).

3. Reprimand. (This is a written reprimand which becomes filed with the clerk of the supreme court and thus becomes a public record unless excepted to by respondent.) See rule 118.3.

4. File a formal complaint with the grievance commission.

The lawyer members and lay members of the grievance commission are appointed by the supreme court and all are then confirmed as commissioners of the supreme court. The president-elect of the Iowa State Bar Association shall nominate lawyers for appointment to the grievance commission. The grievance commission receives formal complaints filed by the Board of Professional Ethics and Conduct and may:

1. Dismiss the complaint.

2. Admonish the respondent.

3. Recommend reprimand.

4. Recommend suspension for a certain period of time.

5. Recommend disbarment.

The findings and recommendations of the grievance commission are filed with the clerk of the supreme court. Under rule 118 procedure, this is the first time they become a public record.

The respondent may take exception, and if this is done, the court considers the matter de novo, on the record. Whether or not exception is taken, final action on the recommendation of the grievance commission is by the supreme court, on its order.

There are attached hereto a copy of supreme court rule 118, a copy of the rules of the Board of Professional Ethics and Conduct, and a copy of the rules of the grievance commission.

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(Page 1 of 2 pages)

Local committees are encouraged to confer with the Iowa Supreme Court Board of Professional Ethics and Conduct whenever in their opinion it seems desirable.
[Amended effective Feb 15, 1990; Jan. 3, 1995.]

THE IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT COMPLAINT FORM

Re _____ (Name of Attorney) of _____, Iowa, Zip Code _____

I, _____ (Complainant), residing at _____, in the City of _____, State of _____, Zip Code _____, Telephone Number, ( ) _____ hereby complain that _____, whose address is _____, has violated the Rules of Ethics and Conduct of the Legal Profession in that:

(Here explain the basis for the complaint.)

(Additional pages may be attached if necessary.)

IN FILING THIS COMPLAINT, THE UNDERSIGNED HEREBY WAIVES THE ATTORNEY-CLIENT PRIVILEGE BETWEEN COMPLAINANT AND THE ABOVE-NAMED ATTORNEY.

Date _____

_____
Signature of Complainant

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

_____
Notary Public in and for the State of _____

[Amended effective May 1, 1987; Jan. 3, 1995.]

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RULES OF THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

Adopted June 23, 1975

Including Amendments Received Through August 15, 1995

RULE 1

The grievance commission of the supreme court of Iowa is hereafter referred to as the commission, and the members thereof are referred to as the commissioners. The Assistant Court Administrator for the Disciplinary System shall serve as clerk for the grievance commission and shall designate an assistant clerk for the grievance commission. At least sixty days prior to the start of each calendar year, the clerk shall submit to the court an annual budget of operations which may be amended as necessary. In the chair's absence or inability to act, the vice chair shall perform all duties of the chair. See Iowa Court Rule 118.1.

[Amended effective Feb. 15, 1990; Jan. 3, 1995.]

RULE 2

The commissioners may act as a body or in such divisions as the chair may direct. Until otherwise directed the commission shall consist of four divisions designated first, second, third, and fourth, and each division shall consist of five members. The personnel of each division shall be selected and designated by the chair for each complaint as required. The chair shall appoint one of said members to serve as president of said division. One additional member shall be selected as an alternate.

[Amended effective Feb. 15, 1990.]

RULE 3

Any complaint filed by the Iowa Supreme Court Board of Professional Ethics and Conduct shall be filed in the name of the board as complainant and against the attorney named in said charges as respondent. Thereafter such complaint and charges referred to therein shall be prosecuted by said board before the commission until final disposition thereof.

[Former Rule 4 renumbered effective Feb. 15, 1990; amended effective Jan. 3, 1995.]

RULE 4

The clerk shall cause each such complaint to be separately numbered and filed and all subsequent motions, pleadings, orders or other documents relating thereto shall be made part of such file. The clerk shall also provide for a permanent docket to be kept as required by court rule 118.5. All complaints filed by or on behalf of the board shall be docketed therein and such file and docket shall be kept in substantially the same manner as the records relating to civil actions in district court.

[Former Rule 5 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995.]

RULE 5

The clerk shall report the filing of each such complaint to the chair of the commission, who shall thereupon by written order filed in the cause direct that the same be heard by the commission as a whole or a specified division thereof.

[Former Rule 6 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995.]

RULE 6

Upon the filing of such complaint, the clerk shall also cause a written notice thereof with a copy of said complaint, a copy of court rule 118, and a copy of these rules attached to be served upon the respondent by personal service in the manner of an original notice in civil suits or by restricted certified mail. The notice shall also notify said respondent to file a written answer to the complaint within fifteen days after completed service of the notice. Written return of service shall be made by the person making the service if by personal service, or by the clerk with postal receipts attached if by restricted certified mail, and such return of service shall be filed in the cause. Service shall be deemed complete on the date of personal service or date shown by the postal receipt of delivery of said notice to the respondent or refusal of the respondent to accept delivery. The notice shall be deemed sufficient if substantially in the form set out in Appendix "A", made a part hereof.

[Amended Nov. 20, 1981; former Rule 7 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995.]

RULE 7

The respondent shall file a written answer to the complaint within fifteen days from the completed service of notice. If the respondent fails or refuses to file such answer within the time specified, the allegations of the complaint shall be considered denied and the

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(Page 1 of 4 pages)

commission or a division thereof may proceed as if a formal denial were filed.

[Former Rule 8 renumbered and amended effective Feb 15, 1990.]

RULE 8

The chair of the commission or the president of any division thereof to which a complaint has been referred, shall direct a hearing to be held upon such complaint within a reasonable time, in the county of respondent's residence or at the discretion of the chair within any other judicial district as shall most nearly serve the convenience of the parties, and shall designate by written order the time and place for such hearing and the personnel of the commission or division. The clerk shall mail a copy of said order to all parties and attorneys at least ten days before the date set for said hearing. If the respondent files written objections to the hearing of said complaint in the county of the respondent's residence, the hearing shall be held at such other place as the chair or division president shall direct by written order in which case a new notice shall be given as above prescribed.

[Former Rule 9 renumbered and amended effective Feb 15, 1990; amended effective Jan 3, 1995.]

RULE 9

No hearing shall be continued except for good cause. Except in case of emergency, any motion for continuance shall be filed at least seven days before the day of hearing. Any objections to continuance shall be filed promptly thereafter.

[Former Rule 10 renumbered effective Feb. 15, 1990.]

RULE 10

The chair of the commission or president or any member of a division to which a complaint has been referred, or any attorney against whom a complaint has been filed, may request the clerk of the district court of the county in which any disciplinary hearing is held to issue subpoenas of every kind in all matters pending before the commission or division thereof and the clerk shall issue same. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses and shall cause such testimony to be officially reported by a court reporter.

[Former Rule 11 renumbered and amended effective Feb 15, 1990.]

RULE 11

All answers, motions, applications, petitions, and pleadings in connection with a complaint shall be filed in duplicate with the grievance commission clerk's office in Des Moines, Iowa. The clerk shall prepare and mail copies thereof to the respondent, the chair of the board, attorneys of record, and to the chair of the commission if sitting as a whole, or to the president of a division thereof to whom such complaint has been referred; provided, however, that on and after the day fixed for hearing any such papers may be filed in duplicate with the chair of the commission or the president of the division, as the case may be, who shall notify all parties and attorneys of the filing thereof and a copy shall be filed with the clerk.

[Former Rule 12 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995.]

RULE 12

If prompt written request is filed by or on behalf of any party for a hearing upon any preliminary motion or application filed in connection with a complaint, the chair of the commission sitting as a whole or the president of the division to whom such complaint has been referred shall by written order fix a time and place of hearing upon such motion or application and shall notify all parties and attorneys. After such hearing or if none is requested, such chair or president of a division as the case may be, or any member of the commission or division designated by such chair or president, shall file a written ruling upon such motion or application and thereafter all parties shall promptly comply with the terms and conditions thereof.

[Former Rule 13 renumbered and amended effective Feb 15 1990.]

RULE 13

The respondent may challenge the impartiality of any member of the commission or division by motion setting forth the grounds therefor and filed within the time allowed for filing answer to the complaint. Said motion shall be disposed of as provided in rule 12 and if the challenge is sustained the vacancy thus created shall be filed as provided in rule 16.

With the consent of the complainant and the respondent, a division of the grievance commission may consist of four members. In the event the four-member division is evenly divided between a recommendation of sanction and dismissal, the division shall enter a dismissal of the complaint pursuant to the provisions of court rule 118.9. Upon such dismissal the complainant may apply for permission to appeal pursuant to court rule 118.11.

[Former Rule 14 renumbered effective Feb. 15, 1990.]

RULE 14

At the time and place fixed for the hearing upon any complaint, the commission or division thereof shall proceed to hear the evidence, briefs of authorities, and arguments in connection therewith. The hearing shall be private unless a written request for a public hearing is filed by the respondent. All witnesses shall be sworn by a person authorized by law to administer

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(Page 2 of 4 pages)

oaths or any member of the grievance commission and their testimony shall be taken in writing by a duly qualified reporter. The rules governing procedures and the order and admissibility of evidence in causes tried in district court without a jury shall be adhered to as nearly as practicable. All questions of procedure, including objections to evidence, shall be determined by the chair of the commission or president of the division, as the case may be.

[Former Rule 15 renumbered and amended effective Feb 15, 1990]

RULE 15

At the conclusion of a hearing upon any complaint against an attorney before such commissioners, the commissioners are empowered to dismiss such complaint, issue a private admonition, or reprimand the respondent, and in the event of such reprimand, the commissioners shall promptly file their report of such action with the clerk of the supreme court, or if action by the supreme court of suspension or revocation of the license of such attorney to practice in the courts of this state is recommended, the commissioners shall make a report to the supreme court of their recommendations and conclusions of fact and law concerning the complaint, answer, and proof within a reasonable time of the date of the last responsive brief and argument and thereupon such matters shall stand for consideration and disposition in the supreme court. Any member of the commission has the right to file with the supreme court a dissent from the majority determination or report.

The clerk shall promptly cause a copy of any such report to be served on the respondent in the manner prescribed by Iowa Rule of Appellate Procedure 30. Such report of the commissioners shall be filed with the supreme court, together with proof of service of a copy thereof upon the respondent, as provided by Iowa Rule of Appellate Procedure 30.

If the charges are dismissed by the commissioners, no publicity shall be given to any of the proceedings except at the request of the respondent. All reports and recommendations of the commissioners shall be concurred in by at least three members of the division or at least twelve members of the commission as the case may be, all of whom shall have been present throughout the proceedings.

[Amended Dec. 10, 1982; July 18, 1983; former Rule 16 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995]

RULE 16

In case of the absence or inability of the chair and vice chair of the commission sitting as a whole to perform any of the duties provided for herein, said commission may designate some other member to perform such duties as acting chair. In case of the absence or inability of the president of a division to perform any of the duties provided for herein, said division may designate some other member thereof as acting president to perform such duties. If a vacancy occurs in any division from any cause, the same shall be filled by the chair, vice chair or acting chair of the commission.

[Former Rule 17 renumbered and amended effective Feb. 15, 1990; amended effective Jan. 3, 1995]

RULE 17

No omission, irregularity, or other defect in procedure shall render void or ineffective any act of the commission or a division or any member thereof unless substantial prejudice is shown to have resulted therefrom.

[Former Rule 18 renumbered and amended effective Feb 15, 1990]

APPENDIX "A"—NOTICE OF COMPLAINT

BEFORE THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

Iowa Supreme Court Board of Professional Ethics and Conduct	)	
Complainant,	)	
vs.	)	NOTICE OF COMPLAINT
Name Attorney at Law, of _____ Iowa,	)	
Respondent.	)	

To Name,

Respondent above named:

You are hereby notified that there is now on file with the Clerk of the Grievance Commission of the Supreme Court of Iowa at 431 East Locust Street, Suite 201, Des Moines, Iowa, a complaint alleging that you have committed unethical practices as an attorney and counselor at law as described therein.

A copy of said complaint, a copy of Court Rule 118, and a copy of the rules of said commission relating to hearing said complaint are attached hereto and made a part of this notice.

You are further notified to file your written answer to said complaint within fifteen days from the completed service of this notice and to abide by the further orders of said commission made in accordance with these rules.

You are further notified that the commission will hear said complaint in accordance with the rules and will take the action thereon as may be warranted by the facts and circumstances disclosed at the hearing thereon.

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Dated this ___ day of _____, 19__.

_____
Clerk of the Grievance Commission
431 East Locust Street, Suite 201
Des Moines, Iowa 50309

[Amended Nov. 20, 1981; amended effective Aug. 3, 1987; Feb. 15, 1990; Jan. 3, 1995.]

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Iowa Defense Counsel Association

1965 through 1995 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

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